Review

* 1391(b)(3)- fall back provision
  + Used when everything happened abroad and the defendants are not residents of the same state
  + Be sure to still check on PJ over each defendant
* For every cause of action in federal court there must be SMJ, PJ, and venue
* SMJ, PJ, and venue for cross claims, counter-claims, etc… (we’ll talk about this later)

Defenses

1. Forum is wrong (PJ, SMJ, Venue) or other procedural defect (Service, Process) 12(b)(1)-(5)
2. Failure to state a claim 12(b)(6)
3. Negative defenses (denying an allegation that makes up an element of the cause of action)
4. Affirmative defenses (Δ alleges facts that make him not liable even if π states a claim and proves all elements of claim)

* (3) and (4) must be brought in answer – not in pre-answer motion

Pre-answer motions (includes all 12(b) defenses and 12(e), sometimes 12(f))

* Gets rid case without having to draft unnecessary answer
* Saves money and time
* Allows you to delay having to answer the π’s complaint
  + If successful there is no need to answer at all
* 12(e) – motion for a more definite statement
  + Used when the complaint is too vague (think Twiqbal standards)
  + Helps with notice; allowing Δ to prepare his defense
  + Must point out exactly where more detail is desired
  + You only have 14 days from when the more definite statement is issued to answer
* 12(f) – motion to strike
  + Can be used by defendant in pre-answer motion to get rid of gibberish in complaint so defendant does not have to answer those parts
  + Can be used by a plaintiff to get rid of legally insufficient affirmative defenses in an answer
* If the court denies your pre-answer motion then you have 14 days to answer the complaint
  + Since you have already been dealing with the case in some manner for an extended period of time, there is no need for the normal 21 days to prepare an answer.

Answers

* FRCP 7 – which pleadings are allowed.

1. a complaint
2. an answer to a complaint
3. an answer to a counterclaim designated as a counterclaim
4. an answer to a crossclaim
5. a third-party complaint
6. an answer to a third-party complaint; and
7. if the court orders one, a reply to an answer.

* 8(b) - format of answers
  + Looks a lot like 8(a) (short plain statements)
    - No need for Twiqbal?
  + admit or deny factual allegations
    - Some answers do this by admitting or denying the allegations paragraph by paragraph
    - Other answers will list which allegations they admit or deny as a group
* Firms can manipulate answers by saying “denied, except…” or “admitted, except…” and then putting the part that is the exception into their own words (essentially giving an alternate account to the plaintiff’s allegations)
* 8(c)- lists some examples of affirmative defenses that may be brought
  + the law that supplies the cause of action (e.g. state law in a diversity case) is what will govern which affirmative defenses (like contributory negligence v. comparative fault) can be brought
    - * Note: this is not so for certain procedural defenses like res judicata (we will get to this)
  + Examples of affirmative defenses
    - * Accord and satisfaction – there was already a pre-litigation settlement
      * Arbitration and award - already been adjudicated by an arbitrator
* 8(c)(2) – mistaken identity
  + If Δ mistakes a counterclaim for an affirmative defense or vice-versa, the court will this treat the pleading as if it was stated correctly.
    - * This is generous to the Δ, probably because court doesn’t want to waste its time with litigation that should not actually go through.
    - Counterclaim means π actually owes Δ
    - Affirmative defense means Δ is not liable to π
    - Sometimes an action can work as both an affirmative defense and as the grounds for counterclaim
      * Termite example. P sues D because D bought house and won’t pay. D might bring a defense of fraud (P lied about termites). This is an affirmative defense, but it’s also grounds for a counterclaim. “I don’t have to pay you, and furthermore you actually have to pay me – I should get my deposit back” This is both an affirmative defense and a counterclaim and it can often be unclear whether D is trying to do one, the other, or both. The courts are just very generous.
* Counterclaims and/or crossclaims are put in with the answer or in a separate pleading
  + Each of the extra-pleadings (counterclaim, crossclaim, etc…) will look like complaints and they will have an answer
* Motions are incredibly brief

Waiver of defenses - 12(g) and 12(h)

* SMJ
  + can be brought up at any time
  + the court actually has an obligation to bring this up *sua sponte*
* Failure to state a claim/join a necessary party
  + Must be in first pre-answer motion if you make one.
    - Can’t be in a second pre-answer motion unless defense was previously unavailable.
    - E.g. after a motion for a more definite statement
    - But you can always bring this up later, in an answer or after pleading period in a motion for a judgment on the pleadings
    - This defense is essentially impossible to waive because our legal system believes it is important to spend money on lawsuits only when what the plaintiff is claiming is a violation of the law.
* PJ, venue, process, and service (actually waivable)
  + must be brought in first response (can’t bring up in 2nd unless not previously available)
  + slight exception: If you forget them and your first response was an answer then you can amend within 21 days as a matter of course to put them in
  + It’s a little bit better to screw up in a first response answer than a first response pre-answer motion, so why wouldn’t you always use answer?
  + The cost is a lot greater, the best way is just to examine all possible defenses and use a pre-answer motion
* These defenses should be obvious so it isn’t really prejudicial for them to have a timeline
* Often a source of malpractice when lawyers waive these defenses
* Why is venue waivable? Related to question of why venue can’t be brought up by court sua sponte. Won’t this be inconvenient for the court and witnesses?
  + Odd that it is treated as a waivable defense, but it is (although occasionally courts will bring up venue sua sponte – unclear whether this is OK or not)
  + If you waive venue could you still ask for transfer (need for transfer could become clear later)
  + If there are two or more districts with venue and one is better, you can request for transfer under 28 USC 1404 to that district

Amendment

* As a matter of course - 15(a)
  + You can just file on your own without requesting it of the court or the other side
  + It is allowed within 21 days of serving the pleading you are amending (if it is a pleading to which no responsive pleading is required – i.e. an answer); or
  + (if the pleading is one to which a responsive pleading is required – i.e. a complaint, counterclaim, crossclaim, 3rd party complaint) 21 days after service of a responsive pleading or 21 days after service of a 12(b), (e), or (f) motion, whichever is earlier
    - Used because you should at least once be able to redo complaint to satisfy what Δ is pointing out.
* You can always amend with consent of other side or through motion of leave by court
  + “The court should freely give leave when justice so requires.”
* Because the reliance in federal courts is on discovery, amendment has to be liberally given (you’re not going to know every detail of why the Δ is liable until after discovery)
* What is considered when determining if leave should be granted to amend?
  + Fault
    - Oversight – due diligence, I should’ve known that I needed to amend but did not.
    - The other party may have concealed some things
    - Bad faith
  + Prejudice
    - If a case has gone on long enough prejudice against the party opposing amendment will be too great to allow amendment because they have already spent their time and resources building a particular case or defense and will not have adequate time to respond to the amendment
* Scheduling order – Court will come up with a schedule for discovery. This usually sets a termination point for amendments. Anything outside of this date would have to have a very good reason behind it

Beeck v Aquaslide

* Π gets hurt on waterslide and sues manufacturer, Δ, for his injuries
* Originally Δ admitted it was their slide but they later found out the slide was a counterfeit
* Δ tries to amend claim after figuring out the slide was a counterfeit
* Trial court grants amendment
* Π appealed
  + abuse of discretion standard
* Was there evidence of bad faith on part of Δ? No, there was an issue with the statute of limitations, but really the people who benefited were the counterfeiters.
* Not allowing an amendment would be highly prejudicial against Δ, because they would have to defend for something they didn’t make. The case had not gone on long enough for the prejudice to be too great for the π.
* On appeal, court of appeals found that allowing amendment was not an abuse of discretion

Types of Appeals

* “Abuse of discretion” appeals regard decision where trial court had discretion and will be reversed only if it abused its discretion.
  + Rule 11 sanctions are one other type of decision subject to the “abuse of discretion” standard on appeal.
  + The other is issues dealing with amendment
* “De novo” appeals regard the topic freshly and the appeals court either affirms or reverses trial court’s decision based on their own interpretation of the matter. No deference to trial court.

Relation back R 15(c)

* Assume a plaintiff brings their complaint within the statute of limitations and then amends their complaint to add another cause of action *after the statute of limitations clock has run*
* Is the new cause of action barred?
* If the new action is preserved—despite being outside the statute of limitations—due to its closeness to the original cause of action, then it is said to “relate back” to the original complaint.
* The purpose of relation back policy is to preserve the purpose of statutes of limitations and to protect against the frustration of those purposes.
  + If relation back is allowed, it must be because the purposes of statute of limitations are not frustrated
  + If there is no relation back, it must be because allowing the new action to proceed would frustrate the purposes of statute of limitations.
* Why conduct, transaction, or occurrence test for relation back?
  + Issues with notice, the evidence and witnesses for the new action overlap with those for the original one.