**11 November 2013**

**Rules:**

13(a) – compulsory counterclaim

13(b) – permissive counterclaim

13(g) – cross claim

13(h) – joinder of parties to cross claims and counterclaims

14(a)(1) – impleader

14(a)(2)(D) & 14(a)(3) – “triangular” actions

18(a) – joinder of causes of actions

19 – necessary parties

20 – permissive joinder of plaintiffs/defendants

24 – intervention

**Supplemental Jurisdiction**

* A cause of action that, although not having its own source of federal SMJ, can make it into federal court along with an action that does have its own source of federal SMJ (the core action)
  + Case or controversy requirement stipulates which causes of actions may, as a constitutional matter, be brought into federal court along with the core action:
    - 2 Types:
      * (1) causes of action that share a common core or operative fact with the core action or
      * (2) Causes of action created as a possibility due to success of the core action

BUT the Constitution is not the only concern

Worry that P will manipulate supplemental jurisdiction to get out of requirements of diversity

1367(b) is meant to exclude such cases – but it is over and under inclusive

* Example where supplemental jurisdiction would be barred even though there is no worry about manipulation by plaintiffs:
* A (Cal.) sues E (Nev.) (B’s employer) under state law for a battery committed by B (Cal.)   
  - E impleads B   
  - B then brings a suit against A on the harm done to B in their fight   
  - A impleads his insurer (Cal.)

A (CA)  I (CA)

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E (NV)  B(CA)

* + Falls under exception in 1367(b) - In any civil action of which the district courts have original jurisdiction founded **solely on section 1332 of this title**, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by **plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure**, or over **claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules**, when exercising supplemental jurisdiction over such claims would be **inconsistent with the jurisdictional requirements of section 1332**.

**Remember that these two things are different:**

* P (NY) sues D1 (NJ) for state law battery asking $100k and D2 (of NJ) asking $25K.
  + No sup jur for P’s action against D2
* P1 (NY) sues D (NJ) under state law battery for $100k and joins with P2 (NY) who sues D for $25K.
  + Sup jur exists for P2’s action against D

1367(d) – protects you from statute of limitation if you have brought an action in federal court that had supplemental jurisdiction but was dismissed on 1367(c) grounds

* Statute of limitations is frozen while a suit is in federal court, and remains so for 30 days once the suit is dismissed from federal court, so the individuals involved have time to bring it in state court if they so chooses
* Federal regulation of state procedure – this is arguably unconstitutional
  + SCt upheld it though
  + We will hardly ever see Congress telling state courts how they should entertain their own causes of action

**Hypo:**

* P (CA) sues D (CA) in state court in CA under 42 U.S.C. § 1983 for violations of his civil rights. Joined to the action is an unrelated state law breach of contract action against D. May D successfully remove?
  + P (CA) sues for two causes of action:

Federal civil State contract (Separate, unrelated)

rights question

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D (CA)

* Notice the state law action does not have sup jur - need a common core of operative fact
* Cannot defeat removal of federal question action by joining an unrelated non-removable state law n
* Under 1441(c) the case can be removed and the state law action severed and remanded
* **28 U.S.C. § 1441. - Actions removable generally**(c) Joinder of Federal law claims and State law claims.--(1) If a civil action includes—  
  (A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and  
  (B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).  
  (2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed….
* **Change of facts**: Assuming the parties are diverse, to get above jurisdictional minimum, you may aggregate a federal question action with a diversity action

**Distinction between disclosure and discovery:**

* **Disclosure**: must give to opposing party without being asked
  + Other side may move for sanctions if fail to do so
* **Discovery**
  + Only have to give over if asked
  + If other side does not abide by discovery request, must bring motion to compel – only if that motion is granted and the other side still does not turn over the materials are sanctions appropriate

**3 Types of Disclosure:**

* (1) **Beginning of discovery period**: the party just turns over materials without being asked
  + Olden days: must turn over documents if relevant to “disputed facts alleged with particularity”
    - Made uncomfortable situations with lawyers/clients
    - Half of federal courts opted out of it
  + Now: R26(a)(1)(A)(i): only have to turn over discoverable material that supports your claims or defense unless it if for impeachment
    - Hypo: Perry Mason brings a surprise witness on the stand during trial. OK?
      * No. This falls under second type of disclosure
* (2) **Pretrial Disclosure** (30 days before trial)
  + Must disclose what will be brought forward in trial
  + If you present this evidence at trial, it must have been in the disclosure
    - Idea is we don’t want surprises because it doesn’t give the other side its due process right to challenge the evidence
      * If this is true, why make an exception for impeachment? We do allow surprises for impeachment (impeachment is offered to show the evidence or witness is unreliable) because if the lying witness was given the impeachment evidence in advance, he’d just accommodate his testimony to account for the impeachment evidence; whereas if it’s a surprise, the unreliable witness will be caught in the lie in front of the jury. We want to prevent surprises, but we also want to prevent liars.
        + Only bad thing about impeachment not being subject to disclosure: can’t impeach the impeachment

(Solution to this problem in a couple of days)

* (3) **Expert witness disclosure** so that the other side can research the witness’ credibility

**Discovery**

* Material you must give over because you were asked
* Scope 26(b)(1):
  + “Nonprivileged matter that is relevant to any party’s claim or defense”
  + Covers material that is inadmissible at trial if reasonably calculated to lead to admissible evidence
* 26(b)(2)(C)
  + Spells out limits on discovery that take into account the burdens and benefits of discovery
  + (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;  
                (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or  
                (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.
  + Both sides are burdened with enormous cost of discovery

**Privilege against self-incrimination**

* You can refuse to testify on the grounds that it will tend to incriminate you
* Primarily arises in criminal cases, but it can arise in civil cases
  + Ex: wrongful death; what I testify to could incriminate me for murder
  + Ex: witnesses could refuse to testify to protect themselves from incrimination
* How do we solve the problem?
  + (1) Bring criminal action first
  + (2) Once criminal trial is over, the privilege against self-incrimination cannot be invoked
  + There is no privilege against self “inliabilization”-- people can’t refuse to take the stand because they fear having to pay lots of money
    - Ex: OJ Simpson trial

**FRCP 501 – attorney-client privilege, spousal privileges, priest penitent privilege, etc**

* These are governed by common law
* If you are bringing a federal cause of action, federal common law privilege applies; if you are bringing a state law cause of action in federal court, state common law privileges apply

**Hypos**

* During discovery it has become clear that D was looking the other way while driving. P’s lawyer thinks that D would have admitted this allegation if it had been put in P’s complaint. What does P’s lawyer do?
  + Could depose D
  + Request for admission (R 36) much better than getting a statement in a deposition
    - An admission binds the party
    - A request for an admission is really a continuation of pleading period; it is like adding an allegation in complaint, submitting it to the D, and having the D admit it in his answer
    - On other hand, if D simply says he was looking the other way in a deposition, D could say in trial that he didn’t look the other way
      * Matter is still before the jury to decide, even if you try to impeach D based on deposition
    - Someone who is not a party cannot make a request for an admission
    - But a party can make the request for an admission from another party, even though that other party is not an adversary (e.g. A plaintiff requesting an admission of a coplaintiff)
* P Corp. is suing D Corp. for violations of antitrust law. Counsel for P Corp wants any documents that the X Corp. might have concerning agreements with the D Corp. to fix the price of widgets. What should the counsel for the P Corp. do? X is bad, but you’re suing P
  + Document request would be inappropriate because this applies only to parties
  + Can only get documents from non parties in a subpoena duces tecum
  + Subpoenas are also used to compel non parties to appear at trial or at depositions

**Rule 45 Subpoena**

* A way the court gets power over third parties
  + Cannot get this power without subpoena
* If X is already a party, you don’t need a subpoena to request documents from X

**Document requests**

* Typically begin with “horrible” definitions of every possible thing under every definition
  + So that the other side cannot misconstrue the request and withhold documents/information
    - This is typically firm specific; it’ll have its own language that every lawyer sends out
* Need to be reasonably narrow
  + Other side can offer objections
    - Outside scope of discovery
    - Irrelevant
    - Privilege
      * May go before a court or magistrate to decide (everyone hates dealing with discovery disputes so encourage parties to resolve it out outside of court)

**Hypos**:

* P is suing the D Corp. for securities fraud for misrepresenting its loan loss reserves as adequate. P’s lawyer wants to find out who at the D Corp. knows how the loan loss reserves were determined. What does P’s lawyers do?
  + Document request problem: lack background knowledge for meaningful document request
    - So start out interrogatory request on the D Corp to find out whom to ask for the documents and what kind of questions to ask
  + chronological order: interrogatories, document requests, and then dispositions if you need it
* X was a witness to the car accident that P is suing D for. P’s lawyer wants X to answer questions about what he saw, X refuses. What do you do?
  + Subpoena him for a deposition
* During a deposition, opposing counsel asks your client for irrelevant material; what do you do?
  + Object and answer the question anyway
  + Primary worry is that this will be presented at trial: so you reserve your objection for trial
  + Allows the deposition to proceed without breaking down
* What if she asked for relevant hearsay material that you think will be inadmissible?
  + You don’t even have an objection
  + This is within scope of discovery – as long as it is reasonably calculated to lead to admissible evidence
* What if she asked for confidential communications between you and your client?
  + You do not answer because the whole point of privileges is that the client does not under law have to give information protected by the attorney client privilege
    - In this case you do dig in your heels and not answer
* \*\***Don’t always need a deposition**
  + Sometimes have friendly witnesses or people who are not on either side
  + You can get information from them just by asking
  + Deposition will replicate what trial will look like
    - When there is a motion for summary judgment, use depositions in support or opposition to the motion. You’ll have a documentary representation of what evidence will be presented at trial
    - It then possible to determine whether a reasonable jury could find in favor of the non movant

**Privileges:**

**Attorney-Client Privilege:**

* Restatement (Third) of The Law governing Lawyers (useful in this case even though not binding because it’s just a restatement – it is basically what the federal common law on the atty client privilege looks like)
  + §68 Attorney-Client Privilege
    - The attorney-client privilege may be invoked as provided in §86 with respect to:
      * (1) a communication
      * (2) made between privileged persons
      * (3) in confidence
      * (4) for the purpose of obtaining or providing legal assistance for the client
        + Client may waive in malpractice situations