Monday September 9

**Rule 11**: We like Rule 11 because it is directed at what the problem actually is, that being, plaintiffs bringing lawsuits when they don’t have evidentiary support justifying filing a suit and putting the defendant through discovery.

* Problem:
  + Because we are worried that evidence will only be discovered in discovery, the standard in Rule 11 is interpreted broadly ( and so it is easy to satisfy). Lawyers are inclined to think they have satisfied it, and so when issue of sanctions come up, we have already gone through discovery and courts are reluctant to issue sanctions.
* It is better to screen the action out before we have gone through discovery which is what Twombly tries to do.

**One possibility is the approach Congress enacted for Securities Actions**:

* The standard for screening would not be a bogus plausibility standard – at beginning of lawsuit, court asks plaintiff for what evidence he has and an explanation why it justifies going into discovery.
  + This way, sanctions would not be necessary and we could weed out cases that do not have merit before discovery.
  + Twombly tries to do this based on specificity of allegations in complaint
    - Twombly has you look at the complaint to see if the person who wrote the complaint would likely have evidence
    - Two general ways that you might satisfy Twombly
      * specificity of allegations with facts (dates, times, etc) in enough detail to convince court that you have evidence that merits going into discovery.
      * Actually mentioning the evidence that you have
    - If not satisfied, no sanctions issued.

\*Screening should not be Twiqbal plausibility standard; screening should be asking directly what evidence plaintiff has and the likelihood of getting evidence in discovery (Congressional idea)

**R8(d)(2) Alternative Pleading of a Claim or Defense**

Alternative Pleading:

* Can have a number of causes of action, inconsistent with one another
* Defendant can have inconsistent defenses -- > change in standard of pleading from common law

**BUT***, these claims and defenses still have to satisfy Rule 11*, even though the evidence does NOT have to be evidence in admissible form.

* Does not have to be evidence that would overcome directed verdict or convince a jury. But Rule 11 is a continuing obligation to make reasonable inquiry into the claims.
* Rule 11 Sanctions it not a method for disposing of the case; the case can still have merit
* At the time complaint was signed, if attorney had no reason to believe evidence would arise, and evidence DID arise, Rule 11 sanctions can begin while the case continues to proceed.
* Safe harbor rule provides that the plaintiff has 21 days to take back the contested claim

Vase Hypo:

P sues D, alleging that D borrowed P’s vase, the vase was uncracked when D borrowed it, and D returned it cracked.  
D denies all three allegations – that is, he never borrowed vase, that vase was cracked when he borrowed it, and that he returned vase uncracked.  
OK?

* Inconsistent negative defenses, but all must satisfy Rule 11
* **Is it ever possible to have evidentiary support in order to support inconsistent claims or defenses that satisfy Rule 11?**
* How could Defendant have evidentiary support for all of these denials?
  + Maybe he has forgotten event himself but has witness for all three inconsistent defenses

*EACH* one of the alternative defenses on its own has to have evidentiary support.

* If he found three witnesses that each gave testimony, he could satisfy Rule 11 because there would be evidentiary support sufficient for each of those three defenses. Therefore, he can allege all three of those defenses.

**Rule 3. Commencement of Action**

* A civil action is commenced by filing a complaint with the court.
* Federal Courts are always open (can file up to a minute before midnight)

**Filing commences the action:**

**A few things intersect with the time of filing the action**

1. **Diversity jurisdiction** 
   1. On a state-law cause of action, can you sue in Federal court if you are citizens of different states at the time of the adjudicated incident?
   2. Citizens of different states at the commencement of the suit!
      1. That is what satisfies the diversity standard for jurisdiction.
2. **Statute of limitations**

* Statute of Limitations may stop running at this point.

Ex) If we get into a fight, I may only need to file a complaint within the limitations period in order to satisfy the statute.

* Or, service within the period may be necessary to satisfy the statute.

**Another way of putting this is: At what point does the statute of limitations toll?**

* Toll at the filing of complaint
* Toll at the service completed.

**If statute of limitations purpose for protecting defendants🡪 an argument for tolling the statute of limitations at service.**

* Federal rule: toll at filing (but sometimes the state rule will be used in federal court – we will deal with this later)
* Some states have the rule of tolling at service.

1. **Race to the Courthouse**

How do we tell who is first to sue? 🡪 look at date of filing

* One court will defer to the court where suit was brought earlier.

**Rule 4. Summons**

* Clerk of court will sign a summons, which is then served with the complaint upon the defendant.
  + Why not serve just the complaint?
    - The **summons** tells the defendant that they MUST answer or else there will be a default judgment against them (within 21 days).
      * “You must do something, or you will lose.”
    - The summons also shows that this complaint is REAL. It is signed and sealed by the court, assuring the defendant that this suit is legitimate.

**Service**: a Constitutional requirement for due process.

**Questions to consider:**

Q 1) *What is the minimal amount that the Plaintiff must do to satisfy due process and remain within the bounds of the Constitution?* Broadest scope of attempts at service.

* It is wrong for money to make taken away from you, or be required to do something by the court in accordance with an injunction if there was not a sufficient attempt to notify you about the suit and give you the opportunity to appear before the court to mount a defense.

Q 2) *What have federal courts decided is the means for service?*

What, within those Constitutional bounds, the federal courts have determined to satisfy service 🡪 Rule 4 tells you specifically what needs to be done to satisfy service.

**What can you do if service was not proper and you default:**

**Option A)** Go to rendering court that issued the default judgment where plaintiff filed, and make a **motion to set aside the judgment.**

**Option B) Collateral Attack**

* When plaintiff wins default judgment for $, it is not an order to defendant to pay the $. If defendant does not pay, the court will not order defendant to pay. It is instead a debt.
* The plaintiff must sue to collect the debt.
* And the defendant can bring up defenses to collection of the judgment debt e.g. : bankruptcy
* The judgment may be worthless because of some type of defense that is brought up during suit to collect judgment.
* Sometimes the suit to collect the judgment is brought as a continuation of the first lawsuit; or the plaintiff can bring an entirely new suit to collect the debt that was created by the first judgment.

Assume P wins a judgment in federal court in Virginia. If defendant does not have any assets in Virginia, the plaintiff can go to California with judgment in hand, and can sue in State Court in California.

* Defendant can then collaterally attack the judgment on the basis of improper service.
* But can collaterally attack the judgment on the ground of service only if the defendant defaulted
* If Defendant had shown up but FAILED to mention that service was improper, then that defense is waived.

\*Subject-matter and personal jurisdiction can also be defended through collateral attack after default has been issued.

* If you appear in court and do not bring up PJ defense, then you cannot bring up personal jurisdiction in a collateral attack.
  + Indeed must mention PJ almost immediately in first proceedings (we will discuss this later) or it will be waived.
* The situation for subject matter jurisdiction is more complicated – if you appear in the first proceedings, you can bring up SMJ at any time - even on appeal (and courts must bring it up sua sponte) – but if you appeared in the first action, a collateral attack on the ground of lack of SMJ will not be allowed.

***What if you find out about the suit despite the inadequate service and appear to challenge service?***

* **Usually result due to minor technicalities (rather than finding summons in the sewer)**

Could file a **pre-answer motion** to dismiss for insufficient service of process FRCP 12(b)(5)

**OR**

Bring up **insufficient service as a defense in Answer**.

* The action should be dismissed due to insufficient service, even if the defendant, by chance, happens to find out about the lawsuit because the complaint and summons was “floating past on the street”.
* NOTE: must mention this defense almost immediately or it will be waived (will discuss this later)

**Waiver of Service of Summons:**

You mail two copies of waiver, summons, and complaint to defendant, and then defendant has to mail it back, accepting the litigation without proper service; if defendant accepts waiver of service then he has 60 days to Answer rather than 21. If he does not accept the waiver, then the defendant must pay for proper service unless he can show why he could not accept the waiver. (is not often offered by big firms because they process server fees are small and they do not want the defendant to have 6o days to answer)

Moment of service can be very important for statute of limitation purposes.

* If you mail a waiver of service form to the defendant, the defendant sends the waiver of service back, and THEN I file the waiver of service with the court, THAT is the moment of service in the court
  + (this could take a long time, and runs the risk of exhausting the statute of limitations).

**Service: specific rules**

-in Federal court

-concerning defendants that are individuals, corporations, and unincorporated associations

-when service is effectuated in the United States

**Insufficiency of process:** there is something wrong with the papers served, eg there is no summons

**Insufficiency of service of process**: there is something wrong with the way the papers were served - eg because the plaintiff served and a party cannot serve

Service in federal court against an **individual**:

**HYPOS**

1. **P files an action against D in the E.D. Va. For violation of federal law.**

**D resides in Boston, MA**

**P drives to D’s home in MA and delivers the complaint to D personally at his home.**

**D appears in the E.D. Va. And makes a motion to dismiss for insufficiency of service of process and insufficiency of process. What result?**

* Service is NOT sufficient because plaintiff is a party and not able to serve.
* Process is insufficient because summons was not included.

4(c)(2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint.

NOTE: 4(c)(2) is on *who* may serve, but there is also 4(e) on *how* to serve

4(e) Serving an Individual Within a Judicial District of the United States.   
Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by:  
(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or  
(2) doing any of the following:  
(A) delivering a copy of the summons and of the complaint to the individual personally;  
(B) leaving a copy of each at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there; or  
(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Notice that 4(e)(1) references state law methods

Does that mean service by a party in example 1 is OK if it is OK under the law of the state where service was effected or where the action was filed…?

As it turns out, service by a plaintiff is not OK under relevant state law

* In MA, service must be delivered by sheriff or officer.
* In VA, cannot be served by party to claim or party interested.

BUT even if it *were* OK under VA or MA law, Green argues that plaintiff could not rely upon state law in example 1

Why? Rule 4(e)(1) references state law only concerning how to serve. The question of who may serve is answered, without reference to state law, in 4(c)(2)

1. **P files an action against D in the E.D. of VA for violation of federal law.**

**-D resides in Boston, MA and has a summer home in Martha’s Vineyard**

**-P waits 3 months after filing to have a process server deliver a copy of the summons and complaint to D at his summer home**

**-D appears in ED of VA and and makes motion to dismiss for insufficiency of service of process. What is the result?**

Plaintiff has 120 days to provide service and a copy of the summons and complaint was delivered to the individual personally. Service is complete.

1. **The P Corp files an action against D in the E.D. of Va for violation of federal law. Provision for WHO can serve 4(c ) (2).**

**-D resides in Boston, MA and has a summer home in MV**

**-The P Corp has an employee deliver a copy of the summons and complaint**

**-D appears in court and makes a motion to dismiss for insufficiency of service of process. What is the result?**

Need to decide if an employee of a plaintiff corporation is a “party” for the purposes of 4(c)(2).

One possibility is to claim that any employee from CEO on down is NOT the intangible corporation, so no one is precluded from serving when the plaintiff is a corporation

But that seems implausible

Argument that employee is a “party”

* The purpose of precluding parties from serving is that plaintiff would have an incentive in making sure there was improper service and so a default – this is true of an employee of the plaintiff too, who might want a default judgment

Alternative to saying employee is a “party”

* Could use same requirements that are in 4(h) concerning who MAY accept service on behalf of the corporation (“an officer, a managing or general agent”) in order to answer question of who may NOT serve for corporation
* Courts tend to allow employees (though not high-ups) to serve on behalf of a corporation.

\*\*Lawyers MAY serve. Law Firm could serve for the Plaintiff\*\*

1. **P files an action against D in the E.D. Va. for violation of federal law. P has his brother leave a copy of the summons and complaint with D’s 16 year-old daughter who is staying at D's summer home on Martha's Vineyard.**

**-**Federal Rule has said someone who is not a party and not 18 can serve. Just because the VA would have a problem with this, FRCP Rule 4(c) has already answered this question.

**-**16 year old could be of “suitable age and discretion” under 4(e)(2)(B)

- BUT she does not reside in the summer home.

**-**AND is not his dwelling or usual place of abode.

- so service is inadequate under 4(e)(2)

This just means that the federal standard was not satisfied.

Could be satisfied under 4(e)(1) is OK under state law

* VA or MA law
  + But it is not satisfied under either state law, which also requires that papers be left at usual place of abode if there is not personal service

What if P’s brother had knocked at the door of D’s home in Boston and finding no one there had left a copy of the summons and complaint attached to D’s front door?

Could be okay under 4(e)(1) - because MA law says you can leave the papers under the door if this is his last and usual abode

NOTE: Glannon would say that if you rely on generous state method of service pursuant to 4(e)(1) then you also must abide by on state law on WHO may serve 🡪 MA requires a sheriff

Thus Glannon would say service is inadequate in Example 4

Green disagrees: 4(c)(2) is the standard governing who may serve even when the plaintiff is relying on 4(e)(1) concerning how to serve.

**To repeat…the way Green reads it**

**Method of Service**: Under 4(e)(1) can rely on state law (state where court sits or where service happens) even if standards in 4(e)(2) are not satisfied

**WHO can serve**: The only thing that applies is 4(c)(2).

* In this case, it does not matter if state law is more restrictive

This issue has never been litigated