Lect 35

Inadeq discl.

* D . . .
	+ did not turn over disclosure materials
	+ made frivolous discovery requests
	+ and illegitimately refused to turn over materials that were within the scope of your discovery requests
* What do you do?

Can get sanctions for violation of certification in 26(g)

*26(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

    (1) Signature Required; Effect of Signature.  Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney’s own name — or by the party personally, if unrepresented — and must state the signer’s address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry:
        (A) with respect to a disclosure, it is complete and correct as of the time it is made; and
        (B) with respect to a discovery request, response, or objection, it is:
            (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
            (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
            (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.
...
    (3) Sanction for Improper Certification.  If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney’s fees, caused by the violation.*

But how do you get stuff that D won’t turn over?

* motion to compel

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
(a) Motion for an Order Compelling Disclosure or Discovery.
(1) In General.

On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

If, the motion is granted and D does not turn over, then sanctions

*37(b)(2) Sanctions in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent ...fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.

They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or*

- but notice that asking for sanctions without a motion to compel first is possible concerning disclosure

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37(c) Failure to Disclose; to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement.

If a party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

WHY immediate sanctions for failing to satisfy disclosure?

- otherwise disclosure obligations would be like discovery obligations

Terminating Litigation before trial

1) 12(b)(6) (ONLY USED BY DEFENDANT)

- take facts as true, if they fail to add up to a violation of the law, then dismissal

2) motion for judgment on the pleadings (USED BY EITHER SIDE)

- when brought by a D it is like a 12(b)(6) motion, except brought after answer is submitted

- and P can use if D introduces only one defense that fails as a matter of law

- about legal insufficiency given the facts – not about evidentiary insufficiency

what about avoiding trial due to evidentiary insufficiency

summary judgment
directed verdict
judgment notwithstanding the verdict

best to start with standards at trial

Burden of pleading (or of allegation), burden of production and burden of persuasion

* You already know burden of pleading/allegation
	+ P has burden for all elements of cause of action
	+ D has burden for affirmative defenses
* burden of production is burden of providing sufficient evidence to get the matter to a jury
	+ usually is on party with the burden of pleading
	+ burden of providing evidence such that a reasonable jury could find in your favor
* if you have not satisfied burden then D can get the action dismissed
	+ D will not even have to introduce any contrary evidence
* burden of persuasion – who bears the burden of non-persuasion?

if the standard of proof is not satisfied, then must find against the party who had the burden

* in particular, if the finder is on the fence about whether the standard of proof is satisfied, then must find against the party with the burden
	+ P satisfied his burden of production at trial concerning every element of the cause of action
	D offers no evidence
	directed verdict for P?
		- NO
		- To say P has satisfied the burden of production means that he has offered evidence such that a reasonable jury *could* find in his favor
		- Doesn’t mean that it must
		- Assume for example that P is a witness to every element of the cause of action and provides testimony for all the elements
			* Has satisfied the burden of production, but does not mean that a jury has to believe him
		- NOTE: some jurisdictions hold that if there is uncontradicted and unimpeached testimony by a disinterested witness then a reasonable jury must take it to be true

- directed verdict at trial is called in federal court a Rule 50 Judgment as a Matter of Law- “no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue”

 Motion for summary judgment under Rule 56 is the same reasonable jury standard, but this motion occurs before trial

rarely brought until after discovery

- standard?

- pleadings and discovery materials show

- “no genuine issue of material fact and that moving party is entitled to j as a matter of law”

- does this mean no contested issue of material fact?

* NO – if P and D agreed about the facts the parties could bring a motion for a judgment on the pleadings

- the idea is that there is no genuine issue of material fact, because no reasonable jury could find for the non-movant on the basis of the evidence that would be presented at trial

* - P sues D for negligence
- P offers evidence that at trial would satisfy the burden of production concerning negligence and damages but nothing concerning causation
- D offers no evidence and moves for summary judgment
* Granted

summary judgment for defendant concerning a cause of action:
no reasonable jury could find for the plaintiff with respect to at least *one* element of the cause of action

- P sues D for negligence
- P offers sufficient evidence concerning negligence, causation and damages such that a reasonable jury *would have* to find in his favor
- D offers no evidence

Summary judgment for P

summary judgment for plaintiff concerning a cause of action: no reasonable jury could find for the defendant with respect to *each* element of the cause of action

- P sues D for negligence
- P offers sufficient evidence concerning negligence, causation and damages such that a reasonable jury would have to find in his favor
- D offers rebutting evidence concerning causation

- result: partial summary judgment on negligence and damages – but causation will be a jury issue

partial summary judgment

R 56(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

materials that may be submitted in support or opposition to summary judgment

56(c) Procedures.
(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
(A) ***citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials***; or
(B) ***showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact***.
(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.
(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.
(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, ***set out facts that would be admissible in evidence***, and show that the affiant or declarant is competent to testify on the matters stated.

Note that the depositions and affidavits are generally inadmissible at trial - hearsay

But they are allowed for summ j, because they are showing what would be presented at trial

BUT – content of them must be admissible

* must be on personal knowledge, and be in form that is admissible (no hearsay content)

reasonable jury standard for summary judgment/directed verdict

* P is suing D for age discrimination
* P alleges in his complaint that
* D promoted X rather than P
* D did so because X was younger than P, not because X had performed better on the job than P
* D makes a motion for summary judgment
* In opposition to motion, P introduces an affidavit by P stating that D said to P at a meeting that D “did not want to promote old people”
* D introduces 10 affidavits from the other 10 people at that meeting stating that D said no such thing
* If P’s affidavit is the only evidence that he has that D’s motive for not promoting P was age, should D win on his summary judgment motion?
* NO – cannot use summ j to resolve dueling affidavits

P sues Ds for violation of the federal antitrust law (Sherman Act)
P offers as evidence of an agreement in restraint of trade the Ds’ parallel conduct
 - for example, that they do not cut in on each other’s territory

This is an example where summary judgment would be appropriate – no reasonable jury could find an agreement just on the basis of parallel conduct - too many alternative explanations of the parallel conduct

Other examples where summ j would be appropriate?

- Iqbal – summ j for D on intent to discriminate when only evidence is disparate impact on Muslims
- Sierocinki – summ j for D on negligence of manufacturing when only evidence is that it blew up in his face

- Two cars enter an intersection at right angles and strike one another killing both drivers and all passengers.
- There are no eyewitnesses to the accident.
- The only evidence available is that there was a working traffic light; thus one of the drivers, but only one, had to go through the red light.
- The family of driver of one car sues the estate of the driver of the other for negligence
- The estate moves from summary judgment

- should be granted – no reasonable jury could find by a preponderance of the evidence that any of the two drivers was negligent

- X must take a certain pill once a day to remain alive. The pill is highly toxic. To take two within 24 hours is fatal.
- X is found dead in his bedroom and the evidence is clear that he took two pills that day.
- The uncontradicted evidence shows that several hours before his death, X made out a new will, substantially different from the one previously in force. It also shows that at about the same time, X made plans to accompany several friends on a fishing trip on the following day.
- X’s family sues Insurance Co. for insurance proceeds on the ground that X’s death was an accident
- Insurance Co. moves for summary judgment

Should be denied?

here a reasonable jury could find one or the other piece of evidence more persuasive

The movant has the burden of showing that summary judgment is appropriate.

Does that mean that a defendant being sued for negligence cannot successfully move for summary judgment unless she offers some evidence against the plaintiff’s allegations?

NO – need not offer evidence – can simply argue that P’s evidence is insufficient. BUT D must offer the argument. Otherwise D has not satisfied burden.

# Trial

pretrial disclosure of evidence (except for impeachment evid)

Right to jury (7th Amendment question)

- must have been considered an action at law at time of enactment of 7th A

Even if there is a right, you need to request a jury trial or you will have waived your right

- empanel jury

- voir dire

 - peremptory challenges, for cause challenges

Ps lawyer’s opening statement

- presentation of evidence by P’s lawyer

- examination & cross exam

- Motion for a directed verdict by D at end of P’s evidence

If denied then

- D’s opening statement (sometimes this is right after P’s opening statement instead), presentation of D’s evidence

Then both will make motion for directed verdict

If denied

- instructions to the jury

- verdict

- special or general (general can be with interrogatories)

- after verdict the loser will likely move for a judgment notwithstanding the verdict

- a.k.a. motion for a judgment NOV

Why bother if judge already rejected the motion for a directed verdict?

Consider…

At the end of the evidence, D moves for a directed verdict.
It is granted.
What happens if the trial court’s decision is reversed on appeal?

Must have a new trial, because jury will probably not be able to be brought together again

At the end of the evidence, D moves for a directed verdict.
It is denied.
The jury finds for the plaintiff.
D moves for a judgment n.o.v.
It is granted.
What happens if the trial court’s decision is reversed on appeal?
- can give effect to the verdict for P

Also possible - motion for new trial due to

•Improper jury instructions

•Jury failed to follow instructions

•Newly discovered evidence

•Verdict “against the weight of the evidence”

–Especially excessive damages

The court then takes the verdict and turns it into a JUDGMENT

If judgment for P, there will be relief

* If an injunction, then the court will retain jurisdiction to sanction the D if he does not abide by the injunction
* If damages, then that creates a debt
* P must bring action to collect debt

suit on the judgment will be under state law

even if the debt was created by a judgment in federal court

the federal court can also retain the case to enforce the judgment if the D has assets in the state

supplementary proceedings under R 69

Rule 69. Execution

(a) In General.
(1) Money Judgment; Applicable Procedure.

A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

Also loser can request:

motion for relief from a judgment

R. 60

and can, of course, appeal

NOW Erie

Really about problem of one sovereign’s law in another sovereign’s courts

a federal court entertains a state law action, or action under the law of a foreign nation

a state court entertains a federal action, or sister state action, or action under the law of a foreign nation

two problems

1. - how do you interpret the “foreign” law?
	1. Eg how does a federal court interpret state law?
2. - how much of the foreign procedure follows the foreign cause of action into federal court?