Venue in removed actions

There is always venue in the district to which the action was removed

Transfer of venue 28 USC 1404(a)

- a party (usually a defendant) can request a transfer from one district with venue to another district with venue if the other district is more convenient

- notice that this is not the same as getting an action dismissed if there is no venue

Pleadings –

Formal documents demanding relief or justifying why relief should not be given

FRCP 7(a) identifies the possible pleadings

*FRCP 7. Pleadings Allowed; Form of Motions and Other Papers  
  
(a) Pleadings. Only these 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.*

In addition to a complaint, the other pleadings requesting relief are a counterclaim (e.g. the D joins a request for relief against the P), a crossclaim (e.g. a defendant joins a request for relief against a co-defendant), and a third party complaint (e.g. a defendant joins an action against his insurance company)

We will discuss all of these later

They all have responsive pleadings (answers) in which the party from whom relief is demanded justifies his refusal

NOTE, the party upon whom an answer is served may, if the court grants his request, submit a *reply* to an answer – they are not common, but they can arise when, e.g., the plaintiff wishes to respond to factual allegations in the defendant’s answer

Answers

Types of defense in an answer  
1) “procedural defenses”: PJ, SMJ, venue, service, process  
2) failure to state a claim (even if everything the P says is true, it does not add up to a violation of the law)  
3) negative defenses (D denies a factual allegation that the P makes that is necessary to state a claim)  
4) affirmative defenses (even if everything the P says is true and it states a claim, P cannot recover because the D alleges facts that constitute a defense)

Rules 8(c) lists some possible affirmative defenses

* Remember that whether an affirmative defense (e.g. contributory negligence) is available is not a matter of looking to Rule 8(c) but looking to the substantive law

FRCP 8(c) Affirmative Defenses.  
    (1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:  
        • accord and satisfaction;  
        • arbitration and award;  
        • assumption of risk;  
        • contributory negligence;  
        • discharge in bankruptcy;  
        • duress;  
        • estoppel;  
        • failure of consideration;  
        • fraud;  
        • illegality;  
        • injury by fellow servant;  
        • laches;  
        • license;  
        • payment;  
        • release;  
        • res judicata;  
        • statute of frauds;  
        • statute of limitations; and  
        • waiver.

4) answer (also replies to CCs and answers to Crossclaims and 3rd party answers to 3rd party complaints)

Answers must admit, deny or deny knowledge or information sufficient to form a belief about the truth of an allegation (which counts as a denial)

Factual allegations in a complaint not responded to in an answer are admitted

What is the pleading standard for answers:

*FRCP 8(b) Defenses; Admissions and Denials.  
    (1) In General. In responding to a pleading, a party must:  
        (A) state in short and plain terms its defenses to each claim asserted against it; and  
        (B) admit or deny the allegations asserted against it by an opposing party.  
    (2) Denials — Responding to the Substance. A denial must fairly respond to the substance of the allegation.  
    (3) General and Specific Denials. A party that intends in good faith to deny all the allegations of a pleading — including the jurisdictional grounds — may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.  
    (4) Denying Part of an Allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.  
    (5) Lacking Knowledge or Information. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.  
    (6) Effect of Failing to Deny. An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.*

short plain statement of defenses

- does Twiqbal apply? Not clear – there is current a disagreement among federal courts

- after all, in Iqbal, the plausibility standard was read into the word “showing” in Rule 8(a) – Rule 8(b) doesn’t have the word “showing” in it

- on the other hand, it is odd if the P is subject to Twiqbal and the D is not

*(2) Mistaken Designation. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.*

What is the about?

* why might the two be confused?
  + Certain facts can be the basis of a defense (why the D is not liable to a P) and a counterclaim (why the P is liable to the D) – e.g. the P’s negligence

certain defenses can be brought by preanswer motions rather than in answers

*FRCP 12(b) How to Present Defenses.  Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a  
party may assert the following defenses by motion:  
    (1) lack of subject-matter jurisdiction;  
    (2) lack of personal jurisdiction;  
    (3) improper venue;  
    (4) insufficient process;  
    (5) insufficient service of process;  
    (6) failure to state a claim upon which relief can be granted; and  
    (7) failure to join a party under Rule 19.*

NOTE: *12b No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.*

what does this mean? – can mention both the defense of lack of PJ and defenses that get to the merits together without waiving the PJ defense (this is different from a special appearance approach)

- why preanswer motions?

- reason is that you may be able to get rid of case without effort of the answer

Other pre-answer motions

- motion for more definite statement – this is how the D will initially bring up a defense that the P’s complaint fails to satisfy Twiqbal

*12(e) Motion for a More Definite Statement.  A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.*

*(f) Motion to Strike.  The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:  
    (1) on its own; or  
    (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.*

* Here is an example of a motion to strike being used against an answer
* P sues D for breach of contract
* D answers
* D’s answer includes the affirmative defense of laches, which is an equitable doctrine barring stale claims, similar to a statute of limitations for actions at law
* Laches applies only to equitable actions
* P’s action is an action at law and is inside the statute of limitation
* P wants to remove this silly affirmative defense from consideration – can use a motion to strike

Timing (12(a))

answer to complaint/counterclaim/crossclaim/third-party complaint must be within 21 days of service

(unless waiver of service for complaint was accepted – then 60 days)

*FRCP 12(a) Time to Serve a Responsive Pleading.  
    (1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:  
        (A) A defendant must serve an answer:  
            (i) within 21 days after being served with the summons and complaint; or  
            (ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent . . .  
        (B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.  
        (C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.*pre-answer motions change things however

* If you make a motion, you won’t be drafting an answer because you may get rid of action entirely (or if you made a motion for a more definite statement, you will have a different complaint to answer if the motion is granted)
* if motion to dismiss is denied, then you have fourteen days to answer

if motion for a more definite statement is granted, you have 14 days after service of more definite statement to answer

*(4) Effect of a Motion.  Unless the court sets a different time, serving a motion under this rule alters these periods as follows:  
        (A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court’s action; or  
        (B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.*

Waiver of defenses

NOTE – I did not assign FRCP 12(g) and 12(h) -

I will just give you the upshot

Upshot

SMJ – can bring up any time

* in 1st preanswer motion, subsequent preanswer motion, answer, later at trial, even on appeal

failure to state claim, failure to join a necessary party

* If you bring it in a preanswer motion, in must be in the 1st – unless it was not available to you at the time
* But if barred from bringing it up in a 2nd preanswer motion, it is not a big deal because you can bring it up in your answer or later
* A motion for failure to state a claim outside of the pleading period will be called a Motion for Judgment on the Pleadings.   
    
  FRCP 12(c) Motion for Judgment on the Pleadings.   
    
  After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings

pj venue process service – these are the waivable defenses

If you submit a pre-answer motion under R 12, it must be in it – it cannot be brought up in a second pre-answer motion (unless it was not available to you at the time, which is rare)  
  
If your first response is instead an answer it must be in it (unless you can add it through an amendment “as a matter of course”)

Examples

* P serves D in suit for battery
* Within 21 days D makes a motion to dismiss for lack of PJ
* D’s motion is rejected by the court
* May D make *another* pre-answer motion to dismiss for improper venue?
  + No, waived
* May D introduce venue as a defense in his answer?
  + No, waived
* May D introduce failure to state a claim in a second pre-answer motion?
  + NO (only one preanswer motion for all defenses then available)
* In his answer?
  + Yes
* After the pleading period? In motion for j on the pleadings
  + Yes
* May D introduce lack of SMJ in a second pre-answer motion?
  + Yes
* In his answer?
  + Yes
* After the pleading period?
  + Yes
* P serves D in suit for battery
* Within 21 days D answers
* May D include with that answer the defense of lack of PJ?
  + Yes
* After the answer may D make a motion to dismiss for lack of SMJ?
  + Yes any time
* After the answer, may D ask for a judgment on the pleadings on the ground that P fails to state a claim?
  + Yes
* After the answer, may D make a motion to dismiss for insufficient service?
  + No
* May D save the defense of insufficient service by including it the answer by an amendment under R. 15 “as a matter of course”?
  + Yes
* P serves D in suit for battery
* Within 21 days D makes a motion for a more definite statement and a motion to dismiss for lack of PJ
* The court grants the motion for a more definite statement but denies the motion to dismiss
* P responds to the motion for a more definite statement, serving D with an amended complaint
* D makes a motion to dismiss for failure to state a claim and a motion to dismiss for insufficient service
* What result?
  + motion to dismiss for failure to state claim? probably OK because not available at the time of the first preanswer motion
  + insufficient service? – waived

Amendment

15(a) Amendments Before Trial.  
(1) Amending as a Matter of Course.   
  
A party may amend its pleading once as a matter of course within:   
  
(A) 21 days after serving it, or   
  
(B) if the pleading is one to which a responsive pleading is required [that is, a complaint, counterclaim, crossclaim, third-party complaint], 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

Notice 15(a)(1)(B) means that anyone making a claim for relief (e.g. a complaint, counterclaim) has a right to one amendment after the defendant submits a response

* That allows the P a chance to fix his complaint if the D claims it does not satisfy Twiqbal or it fails to state a claim
* P files a complaint and serves D in accordance with R. 4
* D answers, introducing the affirmative defense of statute of limitations
* 25 days later, D makes a motion to amend his answer “as a matter of course” to include the defense of insufficiency of process
* May he amend as a matter of course?
  + no
* May he amend at all?
  + yes
* Is the insufficiency of service defense saved if an amendment is allowed
  + No, because not an amendment as a matter of course

Amendments Before Trial.  
(1) Amending as a Matter of Course.   
  
A party may amend its pleading once as a matter of course within:   
  
(A) 21 days after serving it, or   
  
(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

Standard for amending when not as a matter of course

15(a)(2) Other Amendments.  
   
In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

- through consent of opposing party

- or: “freely when justice so requires”

very liberal

What are factors?

- prejudice

- cost to the would-be amender of being unable to amend

- cost to the party responding to the amendment if amendment is allowed

- e.g. it is too difficult to assemble the evidence to counter the amended pleading

- undue delay

- it is relevant that the party requesting amendment could have made the request earlier

- but it is not dispositive

- bad faith

- e.g. put off amending to harm other side

- liberality of amendment follows from the notice pleading system

- it should be possible to amend when new facts come out of discovery

NOTE: There will be a scheduling order at the beginning of the discovery period which will often set limits to amending - if you break that limit you will have to show that it could not be avoided

Beeck v Aquaslide

* Beeck injured at pool party by what appeared to be an aquaslide slide
* Aquaslide sends insurance adjuster who says it is aquaslide’s
  + Also home association adjuster and Beeck’s employer, who threw the party, looked at it and concluded it was an Aquaslide slide
* D admits that D was the manufacturer
* statute of limitations had passed so P cannot bring suit against another party
* Then the D’s president visits pool and discovers not aquaslide side
  + Asks to amend answer to change admission that it was the manufacturer to a denial
  + Should it be granted?
  + Why not as matter of course? - not 21 days after serving answer on Beeck

Dist Ct allowed amendment

* On appeal to Ct App used abuse of discretion standard
  + - Not de novo
    - Most appellate cases we have read have been de novo review
      * in de novo Ct App does not defer to the trial court
  + Why abuse of discretion in this case?
    - fact intensive question and district court is closer to the relevant facts
      * hard to get relevant facts into materials the Ct App will look at
    - relevant factors include burden on trial court, so trial court should have discretion about the matter