Responding to a complaint…

* Entry of default – clerical, but it is the equivalent of the def. submitting an answer and not contesting any of the facts
* Motion for a default judgment – you need more than just all of the admissions to get the judgment. Judge has to make sure judgment is appropriate. Judge has to determine if plaintiff has stated a claim. Judge can do this sua sponte anyway, but normally the def.’s lawyer would take care of that. When you default, the judge has to do it for you. Remember, court has to look to if they have SMJ. Sometimes, they’ll even look to if there is PJ. Then, after these administrative determinations, determining if/what type of relief is appropriate.

Virgin Records America, Inc. v. Lacey

* 21 days to answer or submit preanswer motion
* D didn’t
* Motion for Entry of Default was supposed to be mailed to the D, but was not done in this case. But ct concluded this was not a problem because the entry of default was mailed to her and she still did not respond
* Entry of default – clerical, legal consequence: D admits to all facts in complaint. But that does not mean that you get your relief.
* P must first bring motion for Default judgment – in the default judgment the court orders relief. Ct first needs to figure out whether a claim is stated. Then decide whether relief is appropriate.
* Collateral Attacks:
* - P sues D in federal court in New York  
  - D appears and argues lack of PJ and SMJ  
  - D loses and appeals are not pursued  
  - P then sues on the judgment in state court in CA, where D has assets  
  - can D challenge the federal judgment for want of SMJ and PJ?
* No – the D is issue precluded – if he didn’t like the fed ct’s decision he should have appealed

- P sues D in federal court in New York  
- D defaults  
- P brings a motion for a default judgment  
- the court determines whether it has SMJ and PJ before entering the default judgment  
- P then sues on the default judgment in state court in CA, where D has assets  
- can D challenge the default judgment for want of SMJ and PJ?

- modern view is that because fed court has obligation to determine SMJ, collateral attack is not possible (this bothers Green)

- this has generally not been accepted with respect to PJ though

- P sues D in federal court in New York  
- D appears and does not mention PJ or SMJ (the court doesn’t mention SMJ either)  
- D loses and appeals are not pursued  
- P then sues on the judgment in state court in CA, where D has assets  
- can D challenge the federal judgment for want of SMJ and PJ?

- cannot attack concerning PJ, because he consented to it by failing to bring it up

- modern view is that he cannot collaterally attack concerning SMJ either

Pleadings – only a certain number of pleadings are allowed.

**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.

Pre-answer motions – you have to admit or deny each element of a claim, and there is no reason to do that if you can get rid of it quickly and easily. Getting rid of the actions before you have to go through the process of an answer.

* A motion is very bare bones – it is a request of the court to do something (the arguments for/against the motion will be in the briefing)
* Possible Pre-answer motions: 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.
* FRCP 12(b): “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 is this about? Remember that in special appearances, by answering that you failed to state a claim, you submit to PJ.
  + But this provision makes is clear that the federal approach is even more generous to the D than a special appearance
    - Can challenge PJ and bring up defenses on the merits together
* “If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”
  + What is this about?
  + First of all - FRCP 12(c) Motion for Judgment on the Pleadings. A motion usually brought after pleading period stating that on the basis of the pleadings, without looking at the evidence, one can see that a judgment should be given to the P or to the D.
    - After the preanswer motion period, a motion to dismiss for failure to state a claim will be in the form of a motion for a judgment on the pleadings
    - But a P can also get a judgment on the pleadins
      * Eg the defendant accepts all of the plaintiff’s allegations but introduces a legally insufficient affirmative defense –
    - If there are any disagreements about the facts, a motion for a judgment on the pleadings won’t work, you’ll have to consider the evidence and dispose the case through summary judgment or trial.
  + Now someone who is making a motion to dismiss for failure to state a claim or a motion for a judgment on the pleadings (both of which do not consider evidence at all, but simply look at what is said in the pleadings) might introduce evidence
  + If that is the case, then it must be treated as a motion for summary judgment and both sides must be given a reasonable opportunity to present all the evidence that is pertinent to the motion.
* 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 14 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.
* 12(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.

Timing

* 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.
  + What happens if the court denies your pre-answer motion? You have 14 days to answer.
* 12(a)(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.
  + Motion for a more definite statement, granted, you get the new claim, now you have 14 days to answer.

Waiver of defenses (“HIGHLY TESTABLE”)

* About particular defenses in things like PJ, venue, service of process, etc… If you don’t bring it up in a timely manner, they are waived.
* 12(g) says in your motion, you have to list everything that is available to you at the time
* 12(h) consequences of not bringing them in

SMJ, can be brought up at ANY time, NOT waivable

Failure to state a claim, if you bring up in a pre-answer motion under R 12, you can’t bring it up in a second pre-answer motion (unless it was not available to you at the time of the first preanwer motion), but you can bring it up in your answer or later, so really not a big deal

These are the ones that are waivable: pj, venue, process, service

* 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)
* 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” or it was not available to you at the time)
* 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,
    - - unless it wasn’t available to you the first time, like: if your first motion was for a more definite statement and couldn’t have known there was no venue from the allegations without the more definite statement.
      * Transactional venue is all about what the plaintiff alleges happened. Facts of the merits overlap sometimes with facts of venue.
  + - May D introduce venue as a defense in his answer? No (again, unless not available first time)
  + May D introduce failure to state a claim in a second pre-answer motion?
    - No (unless not available at first time), not in a second pre-answer motion, but can do it later in his answer or after the pleading period.  
      - In his answer? Yes!  
      - After the pleading period? Yes!
  + - May D introduce lack of SMJ in a second pre-answer motion? Yes!  
    - In his answer? Yes!  
    - After the pleading period? Yes!
  + (In fed. Court)P serves D in suit for battery  
    Within 21 days D answers  
    May D include with that answer (not pre-answer motion) the defense of lack of PJ? Yes!  
    After the answer may D make a motion to dismiss for lack of SMJ? Yes!  
    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, it is waived unless it wasn’t available at first time.  
    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, the weird thing where if your first response is an answer, there is a narrow time where you can amend as a matter of course. We will discuss later
  + (In fed. Court) 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.
    - Are they available or waived? Service is waived because PJ has already been mentioned and you could’ve mentioned service then.
      * Nature of amendment matters for failure to state a claim – it was probably amended b/c of having something to do with this, so probably not waived.

Hunter v. Serv-Tech Inc. (E.D. La. 2009)

* Def. didn’t bring up PJ in his first response, but tried to say “I reserve the right to bring it up later,” but that doesn’t work in this area.

1. Now – answers
2. Answers justify why the relief requested by the plaintiff is refused
3. There are four types of defenses in an answer
   1. PJ, SMJ, venue, service, process
      1. these are the procedural defenses, which could also have been in a pre-answer motion
      2. But they can also be in an answer (to the extent that they are not waived)
   2. failure to state a claim
      1. also could be put in a preanswer motion
      2. claims that even if everything the P alleges is true it does not add up to a legal ground for relief
   3. negative defenses
      1. the answer denies one of the factual allegations in the plaintiff’s complaint that is essential for the plaintiff stating a claim
         1. eg D denies he was negligent
   4. affirmative defenses
      1. defenses where the D must plead and prove his own factual allegations
      2. affirmative defenses defeat liability even if the P’s factual allegations states a claim and the P proves all his factual allegations
      3. Examples of this would be claim preclusion or statute of limitations. There are also affirmative defenses tied to particular causes of actions.
      4. **Rule 8(c)** lists some:  
                 • accord and satisfaction;  
                 • arbitration and award;  
                 • assumption of risk;  
                 • contributory negligence;  
                 • 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.
      5. Green: notice that this is just a procedural rule that lists some possible affirmative defenses. Whether they are actually available depends upon the relevant substantive law
         1. P (NY) sues D (Ill) in federal court in Illinois under Illinois negligence law  
              
            under Illinois negligence law, the plaintiff must plead and prove his own lack of contributory negligence in order to state a claim  
              
            does FRCP 8(c) make a difference to that?
         2. Green: No - at least with respect to who has the burden of proof, Illinois law must be followed in federal court – P must prove his own lack contributory negligence –
4. Counterclaims are not defenses, they are claims for relief by the defendant against the plaintiff. – they can also be added to answer, but are not grounds for why the D is not liable to the P. They are claims by the D that the P is liable to the D
5. Affirmative defenses allege new facts. The pleading standard for them is in FRCP 8(b)(1)(A)
   1. (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;
   2. some courts think that Twiqbal doesn’t apply to affirmative defenses because the word “showing” is not in 8(b)(1)(A)
6. 8(c)(2) if a counterclaim is mistakenly presented as a defense, or a defense is mistakenly treated as a counterclaim, the court should treat is as if it were done correctly.
   1. Why might the two be confused?
   2. The same fact can be the ground of an affirmative defense and a counterclaim
   3. E.g. P sues D for negligence. D denies negligence and alleges that P was negligent
      1. The allegation that P was negligent is the ground for an affirmative defense (contributory negligence) and the ground for a counterclaim against P for the damages P’s negligence caused D.