

USA

CIVIL PROCEDURE IN THE USA ¹

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This paper focuses on the civil litigation rules of the Federal Court system set out in the Federal Rules of Civil Procedure (hereinafter FRCP) and the pertinent judiciary statutes for the Federal Courts set out in 28 United States Code. The separate state court system of the 50 states is not covered herein. Nevertheless, the fundamental principles and systemic concepts of civil litigation in the state courts resemble the model of the FRCP. It should be noted that issues of civil law are allocated by the Constitution of the United States primarily with the states. The legislative power of Congress is limited in this area.

The FRCP have been amended extensively in the last few years, the latest changes came into effect December 1, 2007.

The Federal Courts are courts of limited jurisdiction by origin and design. They derive their personal jurisdiction from the personal jurisdiction rules of the state where the Federal Court is located. Personal jurisdiction answers the question whether the defendant has sufficient contacts with the forum to justify the court exercising jurisdiction over the defendant or its property. The issue of personal jurisdiction is especially relevant for foreigners as defendants in American courts, as the lack of personal jurisdiction is an effective defense to obtain a dismissal of the suit.

The subject matter jurisdiction – i.e. what kind of civil disputes the Federal Courts may hear and decide – is limited to three categories: (i) exclusive jurisdiction, (ii) federal question jurisdiction and (iii) diversity jurisdiction. The two latter categories do not make it mandatory for plaintiffs to file suit in a Federal Court; a defendant only has the option to remove the suit to a Federal Court. State courts are courts of general jurisdiction, giving them the competence for any cause of action, if not exclusively in the domain of the Federal Courts.

Ad (i): this category encompasses certain subject matters, which – by nature and constitutional allocation – are vested in the federal system, e.g. admiralty and maritime matters, bankruptcy, patent and copyright, civil forfeiture, cases where the U.S. is a party or cases under Securities Exchange Act of 1934.

Ad (ii): when a lawsuit raises a federal law question to be answered in order to solve the legal dispute, then the plaintiff can file the lawsuit in Federal Court or the defendant has the option to move the suit to Federal Court by filing a motion in the state court where the case is pending. The cause of action may still be based on state substantive law, but may contain a substantial federal question. For the majority of cases brought under federal question jurisdiction, the suit arises under the federal law which creates also the cause of action. The federal question has to be presented in the claim for the court to be cognizant. A defense

¹ Literature: Reinhard, Klageerhebung und Beklagenschutz im US-amerikanischen und deutschen Zivilprozess.

that raises a federal question does not create the federal question jurisdiction, even if the plaintiff anticipates and sets out such a defense in his complaint.

Ad (iii): here, the Federal Court has jurisdiction if the lawsuit involves a controversy between citizens of different states, a citizen of a state and an alien, or between a foreign state and a citizen of a state. The concept of diversity jurisdiction attempts to prevent bias against out-of-state parties in state courts by giving the out-of-state defendant the option to transfer the case from state court to Federal Court, but only if the amount in dispute is above a certain sum (presently USD 25,000). Obviously, the cause of action has to be based on state law and neither of the above mentioned categories applies. The protective effect is based on the juror pool of the Federal Courts, as the jury is the ultimate fact finder group in an eventual trial, if the parties do not waive the constitutional right to a jury trial. To reduce the above mentioned presumed bias against out of state defendants, the Federal Courts draw from a much larger geographical pool of potential jurors, making the Federal Courts the preferred forum in these instances.

However, Federal Courts abstain from exercising their jurisdiction, albeit the diversity jurisdiction applies here, in cases concerning domestic relations (e.g. custody of a child, alimony and support obligations) and core probate matters.

With the jurisdiction of the Federal Courts being limited to the above mentioned three categories, consequently, small claims courts exist – if at all – only in the state court system. To what extent states provide small claims courts is in the discretion of the legislature of the respective state.

Despite having personal and subject matter jurisdiction, a Federal Court may abstain from hearing the case in extraordinary or narrow circumstances. As Federal Courts apply state law in diversity cases, a lawsuit might force the Federal Court to solve an unclear or unresolved question of state law, thereby potentially interfering with the competence of state legislation or state courts.

The forum non conveniens concept is a defense motion, asking the court to dismiss the case because the lawsuit can be heard in another, more appropriate foreign forum. This defense is a useful defense tool if foreign plaintiffs try to avail themselves of the American court system, thereby hoping to benefit from the advantages of the American legal system for the plaintiff, procedural as well as substantive.

As a rule, judges at the Federal Courts are of a higher caliber and the jury for a potential jury trial is drawn from a larger geographical area, making Federal Courts the forum of choice for more sophisticated defendants.

The FRCP state explicitly that there is only one form of action – the civil action. Consequently, the FRCP do not provide for any separate modes or forms of civil procedure depending on subject matter or amount of dispute. It should be noted, though, that for bankruptcy cases a special court exists. However, in case of class actions, due to the inherent difficulties of such mass litigation, certain special rules apply to handle these categories of plaintiffs and provide additional protection against abuse, e.g. certifying of a class before the case can proceed as class action under Rule 23 (c). Also, if several lawsuits are filed in different courts and these lawsuits have a common federal question, such lawsuits can be joined by application to a Multi-District Litigation Panel and transferred to one district court.

A complaint has to be filed in writing. This follows from the wording of Rule 4 (c) (1), which requires the summons to be served with a copy of the complaint. In addition, Rule 10 - Form of Pleadings – requires the complaint to be designated as such and state in the caption the court's name, a title and name all the parties. The substantive requirements for the drafting the complaint as such are set out in Rule 8. Pursuant to this rule, only short and plain statements of jurisdiction, of the claim stating that pleader is entitled to relief and a demand for the relief sought are required. As Rule 8 (d) (1) emphasizes, no technical form is required, a simple, concise and direct allegation is sufficient. Rule 9 – Pleading Special Matters – creates only a slightly higher standard for fraud and conditions of mind. With these rules for guidance, a plaintiff has to overcome only a rather low threshold for filing a complaint. Such unsophisticated standards serve as reminder of the fundamental decision to provide easy access to the courts due to the importance of courts in the common law system to create law and thereby supplement the legislation. The case law of the Supreme Court has consistently upheld the idea that Rule 8 embodies the concept of notice pleading and has refuted higher standards of pleading, with rare exceptions for special areas of law, e.g. securities and anti-trust. The purpose of weeding out frivolous or meritless claims is left to the rules of pleadings and motions, especially motions for summary judgment, as well as discovery. Only a fair notice for the defendant is required of what the plaintiff's claim is and the grounds upon which it rests.

Nevertheless, the FRCP attach some significance to the signature under any pleading pursuant to Rule 11. The signature is the certification of the attorney or unrepresented party that, inter alia, the pleading, written motion or other paper is not filed for improper purpose, any claim, defense or other legal contention is not frivolous and any factual contentions have evidentiary support. If the opposing party should determine that a pleading or motion is frivolous, the party may move for sanctions pursuant to Rule 11.

The filing of the claim and service of process on the defendant initiates the phase of pleadings and motions. This phase has potentially hearings concerning the motions of the parties over the briefs filed. The reaction of defendant is twofold: a reply and, if the complaint is deficient, certain motions to attack the complaint. It is possible to include the attacks on the complaint in the reply or file separate motions.

The defendant now has to use his reply and the legal instruments set out in Rule 12 to force the plaintiff to substantiate the claim or suffer a dismissal. Already in the reply, the defendant has to set out according to Rule 8 (c) certain affirmative defenses such as statute of limitation, laches, estoppel, accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, failure of consideration, payment and res judicata.

The defendant has a variety of motions which are used to attack the complaint and obtain an early dismissal of the lawsuit. Rule 12 is – after the defenses set out in Rule 8 (c) – the earliest line of defense for a defendant to obtain a dismissal without entering the costly and time consuming phase of discovery. As the legal instruments of Rule 12 (b) do not involve any analysis of evidence beyond the facts set out in the respective briefs of the parties or only a very limited analysis of documentary evidence readily available and rely on questions of law to decide the case, a hearing without a jury as a fact finder is

sufficient for a judgment. For the purpose of such early judgments (the so-called summary judgments), the facts provided by the plaintiff are assumed as true and any question of doubt is solved in favor of the plaintiff. Now should all the facts as set out by the plaintiff, assuming they are true, fail to state a claim upon which relief can be granted, the claim is dismissed. The defendant is obliged to raise all possible defenses under Rule 12, if applicable, in the first motion, Rule 12 (g) (2). These defenses include lack of personal or subject matter jurisdiction, improper venue, insufficient process, insufficient service of process, failure to state a claim upon which relief can be granted or failure to join a party under Rule 19. The latter refers to cases where another party has to be joined in order for the court to accord complete relief or to protect the interests of the party to be joined or of the existing party. Pursuant to Rule 12 (i), the court must hear and decide any motion made pursuant to Rule 12 (b)(1)-(7). In the alternative, the court can decide to defer the decision until trial. Such a deferral, however, is practically never made in the case of lack of subject matter jurisdiction.

Electronic filing of briefs and documents: The FRCP do not explicitly prohibit such an approach. Electronic filing is based on local rules of the respective Federal District Court. Each Federal District Court has a certain limited competence to create local rules for the civil (and criminal) proceedings, which govern inter alia such issues as size and color of paper for briefs, number of copies to be filed and also the option of electronic filing. Whether electronic filing is possible in State Courts, should most likely depend on the state rules of civil procedure and the technical equipment of the relevant court.

Rule 16 is the pivotal regulation for active case management by the judge. This rule empowers the judge to schedule one or more pretrial conferences. The central purpose of these conferences is to expedite disposition of the action, establishing and continuing control so that the case will not protracted because of lack of management, discourage wasteful pretrial activities, improve the quality of the trial through more thorough preparation and facilitate settlement of the lawsuit. These conferences are compulsory and are scheduled either after consulting the parties and the attorneys or after receiving the parties' report pursuant to Rule 26 (f). This report under Rule 26(f) relates to a compulsory meeting of the parties to discuss the nature and basis of their claims and defenses and the possibilities of a prompt settlement or resolution of the case, make arrangement for the different aspects of discovery, including a discovery plan pursuant to Rule 26 (f) (3). Fourteen days after the said inter-party conference, a report has to be submitted to the court outlining the plan.

Such a pretrial conference has to take place as soon as practicable, but no later than 120 days after any defendant has been served with a complaint or 90 days after any defendant has appeared, Rule 16 (b)(2).

During the discovery phase, the parties are in control. They conduct the gathering of evidence, review the documents, hearings of witnesses and experts. The judge is insofar involved as the parties can file motions during the discovery, typically to limit the access of opposing party to evidence or to access documents the opposing party refuses to provide etc. However, the judge still maintains an important role. For the discovery phase, case management by conferences is an important method for the judge to maintain control of the case and set out a schedule for the parties to further a speedy and comprehensive solution. It is possible for the judge to discuss stipulations of facts in such conferences pursuant

to Rule 16 to avoid unnecessary discovery and narrow down the factual disputes of the case. Such stipulations of facts might be considered as contracts between the parties. In addition, hearings may be necessary to decide on motions filed by the parties, especially if one party is not compliant with the production of evidence. As mentioned before, a discovery plan is drafted by the parties pursuant to Rule 26 (f) to set out issues of privileges concerning information, changes in timing, form or requirements for disclosure under Rule 26(a), the subjects on which discovery may be needed, when discovery should be completed and whether discovery should be conducted in phases or be limited or focused on particular issues, the topic of electronically stored information, what changes should be made in the limitation on discovery imposed under the FRCP.

If the lawsuit is not settled or otherwise terminated during the pleadings and motions phase or discovery phase, a final pretrial conference is scheduled to organize an efficient trial, especially with regard to the admission of evidence. This is intended to improve efficient allocation of resources of the court and parties to obtain the best effect for a swift solution of the dispute. Additionally, the judge is supposed to prevent abuse of litigation instruments, as parties can tend to wage a war of attrition by taking too much time and requesting excessive amounts of information. Due to the American Rule of Costs, time is a valuable commodity and extensive litigation can put a strain on financial resources of a party. Especially the discovery phase is often abused to pressure a party into settlement (the so called “nuisance value of litigation”).

The FRCP do not contain any provisions, which directly create obligations of the parties before a complaint is filed. However, the rules relating to discovery have certain elements, which have anticipatory effects for parties which have certain indications that a lawsuit may be filed or filing is intended concerning the preservation of evidence. Presently, this affects with heightened impact for the parties electronically stored data and documents. As companies create a huge amount of electronically stored data and documents, document retention and preservation of this type of documents is often enough essential for a lawsuit. Therefore, companies should implement a policy which prohibits document destruction, if a lawsuit is threatening or imminent – the so-called litigation hold, if a lawsuit is reasonably anticipated. The FRCP do not specify the exact moment when any routine document deletion policy has to be put on hold. The exact requirements of the issues related to the discovery and preservation of electronically stored information is presently hotly debated and already decisions were handed down to interpret the relevant FRCP regulations. Failure to comply which these demands regularly creates negative legal consequences for the culpable party, e.g. shifting the burden of evidence, negative presumption etc. Naturally, the intentional destruction of relevant documents, in what form whatsoever, when litigation is imminent is fatal for the position of a party, as proof of such behavior is sanctioned heavily by the court. In addition, Rule 26 (f) provides that parties are to confer no later than 100 days into litigation the electronic document discovery issues, including, but not limited to, the format in which electronic documents will be produced, the manner in which electronic documents will be preserved by the parties, and the assertion of privilege to protect electronically stored information.

The FRCP provide by their structure a detailed concept of pre-trial interaction of the parties. The phase of pleadings and motions as well as the

discovery-phase are intended to disclose the respective strengths and weaknesses of the parties as well as clarify the points of dispute. At the same time, these proceedings contain various elements which further settlements of lawsuits. This is evidenced by the fact that only a tiny fraction of all cases filed (3-5%) actually reach the “real” trial, i.e. hearing of the cases in front of a jury (or, if the parties waive the right to trial by jury, only a judge).

The above-mentioned waiver of jury trial by the parties is probably the most important aspect where a stipulation of the parties can influence the conduct of a trial.

Concerning the oral and written elements under the FRCP, there is at present no relevant discussion going on. However, the question of pleading standards, especially of heightened pleading standards for certain causes of action is a constant subject of legal debate. In some areas, the substantive law and case law have created – outside of the standards of the FRCP – specific heightened standards, e.g. securities fraud or anti-trust conspiracy. Outside these narrow areas, the Supreme Court has consistently refused to increase the standard for pleadings.