

Civil Procedure Outline Nofar Fall 1998

FED; limited smj jurisd

FED Jurisdictional bases;

Arising under fed law;

Created by fed law; Fed issue m/be stated on the face of the complaint.
Subst’l Const’l Q

Diversity;

Amt in controversy

Must EXCEED 75K. (\$75,001);

Single P can aggregate.

Multiple P can’t aggregate. 7/86

Or equity relief sought must exceed 75K;

Amt alleged governs-not the amount that was rec’d at trial.

Citizenship

No P can cross the v. D’s can be from same side.

Individuals; look at domicile + where they intend to remain or return.

Corp; (1) citizen of state of incorp OR (2) citizen of where primary business-bulk of physical activities takes place

Unincorporated Assoc; every single member / ptr counts as a separate party for diversity.

Aliens;

Not admitted as permanent residents; alien may sue non-alien & have diversity.

Admitted as permanent resident aliens (PRA); PRA is not an alien so look at domicile.

American citizen domiciled outside US; may NEVER sue based on diversity

Suppl Jur;

Pendant Juris; 1 fed claim and the other is state claim (cnoof)

2 claims and there is a primary jurisdictional basis for one claim but not the other claim, the fed ct will have discretion to assert suppl jur over both claims if they derive from a cmn nucleus of operative fact.

Doesn’t apply to diversity cases only fed Q cases. B/c need 1 fed claim & there is no fed claim in Divsty.

ESSAY;

Fed cts are cts of limited jurisdiction. There are two primary jurisdictional bases (1) arising under and (2) diversity. In this case, the first claim ……In this case, the second claim… Under suppl jur the ct has discretion to hear both claims b/c they arise out of the cmn nucleus of operative fact. Therefore, fed has suppl jusid over both claims.

Removal jurisdiction; Venue & convenience are related.

Defined; an act of D (only by the D) in removing an action from state ct to fed ct. Must have SMJ (either arising or diversity i.e. one of the dist cts have original jurisdiction). Procedure: Removal notice m/be filed w/in 30 days after receipt of initial pleading.

Exception; if the only jurisdictional basis is diversity; there can be no removal if any single D is a citizen of the state where the action is filed. Ex MI D in MI ct , b/c of convenience.

ERIE;

Must be in Fed ct

Fed cts resolve a claim that does not arise under fed law (either by diversity or fed Q-suppl jurisd)

TEST;

If there is a conflict btw FRCP and state law or FRE and state law; fed law governs; e.g time to certify a class action is determined by Fed law.

If Fed Rule: Rather than looking at "substantive or procedural" law look at whether Fed rule considered is embedded in FRCP. If embedded then go w/ fed rule & ignore state rule. Example: time limit to certify is only required under state and not federal.

FRCP must be consistent with eth Rules Enabling Act.

If Case Law is at issue use fed law unless (1) w/lead to forum shopping; (2) causes a party to be subject to conflicting rules.

EX; (State law must be substantive rather than procedural). Fed procedural laws will be applied over state procedural laws when in fed ct.

Statute of limitations
Burdens of proof laws

FF&C doesn't encompass Fed judgments; only bwtm states so say "Fed Supremacy" & deference.

PJ

Definition; PJ is pwr of ct over the person or prop of person.

If no PJ m/be asserted in 1st responsive pleading or its waived

MI cts have PJ if 2 things are true;

MI law grants PJ

MI law must be const's

In MI, there are 3 basis for pj;

Consent;
Presence;

Physical presence; one foot in MI is enough.

Domicile; true home is in MI.

Doing business;

Regular & systematic continuous business in MI. One product in the stream of commerce is not enough. Must purposefully avail…

Mere solicitation is not enough. Lone advertisement or mailing one brochure is not enough; look for specific mktg plan or target MI.

Long arm statute (L.A.S.);

Must be a (1) specific connection btwn CONDUCT and lawsuit & (2) must be CONSTITUTIONAL

Conduct; “LIMIT”

Land

Injury

Matrimony

Insurance k for a risk located in MI ex, homeowners policy

Transaction in business; can be a single act.

PJ; L.A.S. must be Constitutional (DUE PROCESS; (1) PURPOSE AVAIL; (2) ARISE FROM ACTIV IN STATE;(3) SUBSTANT’L CONNECTION.): If D has engaged in minimum contacts that w/not be unfair to make him defend in MI (suit against D doesn’t offend tradition notions of fair play and substantial justice). Look to see if D purposefully availed himself (single advertisement in a national newspaper is not enough) (minimum contacts, stream of commerce) –D c/reasonably anticipate being hailed into MI ct.

2 forms of consent;

Express;

Authorize an agent to accept process

D expressly consents tp PJ

SMJ can never be accepted to

Implied;

Failure to object to pj in a timely manner.

MI; 21 days to object if served w/ process in MI. @8 days to object if served o/s MI or by registered mail.

Full Faith & Credit (FF&C); if Ohio never had PJ over MI D then no need to give FF&C to Ohio P.

ESSAY;

PJ is the pwr of the ct over the person or property of the D. MI cts have PJ if (1) MI law grants PJ and (2) MI L.A.S is constit’l. Under MI law there are 3 bases for PJ: (1) consent, (2) presence (3) L.A.S. There are 2 forms of consent, (1) express and (2) implied. In this case there is no consent…The next issue is presence…. Under MI LAS no “L”;, no “l” …MI law must be constit’l. In this case, …Therefore...

SERVICE OF PROCESS; This is how you get PJ.

Process is proper if 2 things (1) method is proper & (2) method is constit’l (reasonably calculated to apprise interested parties).

Proper method; FED abode, waiver, agent, state, personal (AWASP)

Abode service;

Leave at home w/someone of suitable age and discretion.

Waiver;

Mail complaint at the request of D. FED: D had 20 days to respond to complaint but if waive then get 60 days.

Agent service;

Personal service on authorized agent

State method;

Use any method allowed by state.

MI; "R.I.P";

Registered mail with a return receipt plus affidavit

In hand

Publication

D must own prop in MI + must get an affidavit that D is outside MI or cant be found + registered mail to D's last known address.

Corp; personal service on a director/officer

Ptnr; personal service on person in charge plus registered mail.

Personal Service;

In person in hand. Or in vicinity of a reluctant D aka Wing span

Method is constit'l (reasonably calculated to apprise interested parties).

Attacking service of process:

Direct attack; by motion or pleading

Collateral attack; allows a default judgment to be entered against him or his prop then claims jurisdiction was improper.

Advantage is that you can avoid the cst of traveling to distant states. Disadvantage is that you give up the rts to challenge/fight the case on the merits. If you lose the jurisdiction argument, the default judgment stands.

VENUE

Fed rule; venue is proper where;

Any D resides if all D's reside in same state. Any substantial part if the cause of action arose.

MI; RULE + any D resides, tort exception, cause of action

RULE; venue is proper where any D resides or conducts business.

Exceptions;

Tort action; Priority of venue

Check 1st where both cause of action arose and D resides.

Check 2nd where both cause of action arose and the P resides.

Check 3rd both P & D reside.

Check 4th where any D resides or conducts business.

Objection to venue; motion to transfer m/be done in the first responsive pleading to the complaint and the ct has discretion.

Improper venue;

D claims hardship Transfer to proper venue;

Forum non-conveniences; State ct with proper jurisdiction & venue may require that P to re-institute the case in a ct in another state where the trail w/be substantially more appropriate.

Where did injury take place? Nexus btwn ct and accident.

Forum m/be minimally convenient.

Weigh adv & dis (nexus btwn D & the act).

Decision to decline is discretion of the ct.
Inconvenience is no defense; even if law is harder in the other state – the court will still give discretion.

Talk about removal;

PLEADINGS

General requ;

All pleadings m/be well grounded in fact & warranted by law.

FED CT; Notice

Pleading must contain sufficient info to place the adversary on notice of the claim against him

MI CT; Fact Pleading; sameness + knowledge + 120 days

NO NOTICE pleading. MI has FACT pleading. The pleading must contain specific allegations of fact constituting a cause of action or defense.

Amendments; must cure fatal defects in the original pleading otherwise SJ.

General rule; in FED & MI cts amendments to the pleadings are liberally granted in the interest of justice.

No bad faith. If amendment is futile then wont cure defect & ct will deny amendment.

No undue delay.

Statute of limitations continues to run.

FED; have rt to amend pleading b4 response to pleading is serviced

MI; can amend pleading w/in 14days after process is served.

Special Problems with Amendments;

Relation Back of amendments to conform to the S of L; Med Mal 6 months B4 end of S of L. No additions or subtractions after the S of L.

FED;

New claims; if the new claim arises from the same transaction or occurrence as the timely filed claim then OK.

New parties; m/be from the same transaction or occurrence as to original timely filing AND the new party must have had knowledge (w/in 120 days of filing the complaint) that but for the mistake in name he w/have been named in the pleading.

MI; discretionary regarding new claims or new parties

MI statute of limitations in relation back;

MI int'l torts 2yrs to file

All other torts 3 yrs

Challenging the pleadings; FED & MI; must be raised in the answer.

Pleading in the Alternative; P may allege 2 or more stmts of fact in the after when doubt about which of stmt is true or state as many separate claims or defenses. Ex. Widow sues bar – not sure what happened sues one count of negligence and one count of intoxication.

JOINDER

Joinder of Claims; THINK JUDICIAL ECONOMY

Compulsory if it arises out of. Think RES JUDICATA.

May join as many claims as you have against D regardless of whether there is any connection btwn the claims.

Counterclaims;

Permissive; in MI all "cc" are permissive.

CC doesn't derive from the same trans or occurrences P's claim & can be filed as a separate claim. D can bring a separate suit.

Cross-claims are not compulsory they are permissive.

Compulsory;

CC derives from same trans or occurrence. May not file this claim as a separate action. You waive the right to bring a latter action. FED; no CC in fed cts but res judicata forces joinder.

Joinder of Parties;

Compulsory joinder of parties if presence is essential to render complete relief.

Claims involving the parties must derive from the same transaction or occurrence or at least the same SERIES of transactions or occurrences.

Ct may substitute parties if there is a death or transfer of interest.

Impleader; (2ndry; derivative liability) OPTIONAL

3rd P claim, P sues D, D wants to bring in new 3rd P. D may implead so long as 3rd P may be liable to the D for all or part of the D's same liability to P reduces duplicate litigation and allows for contribution / indemnification.

Impleader cant be used to "shift" liability only to share liability

Interpleader & Intervention;

Inter-pleader;

Insurance co as a holder of cmn fund may come ct to bring in RIVAL CLAIMANTS/FOR CMN FUND.

Statutory inter-pleader;

Minimal diversity is required and amt in controversy is \$500 or more. Minimal diversity if any 2 rival claimants are from different states.

Intervention;

Rt of non-party to become a party in a lawsuit.

Intervention as a RT;

You have a rt to intervene if you can show you have an interest that will be adversely affected by the lawsuit and not protected by the parties.

Permissive intervention;

Discretion of the judge. Look for commonality of the issues

Indispensable parties;

Cant be joined as a party b/c no smj or pj over persons or claim and whose absence from lawsuit is so prejudicial to the

existing parties that the entire lawsuit m/be dismissed for failure to join the indispensable parties.

Judicial Consolidation;

Ct by its own order (discretion/wants judicial economy) consolidates cases on its docket when “substantial and controlling common Q of law or fact are pending b4 the ct” & there is a cmn D.

D can motion sever; b/c of prejudice or juror confusion (different %’s of comparative negligence). Must show abuse of discretion.

Class action;

Defined; an action in which a named P represents a class of commonly situated absent P’s

Certification for all class actions; (“CANT”)

Commonality; of issue of fact or law pertaining to the class.

Adequacy; P and named counsel will adequately protect the class.

Numerosity; class is so large that joinder w/be impossible

Typicality; claims of P are typical of the class.

Additional MI requirements;

Notice; class must rec notice of the lawsuit (reasonably calculated to apprise-interested parties.

RT to OPT out;

Superiority; class action device is superior method of adjudicating multiple claims.

DISCOVERY; material is discoverable if 2 things are true METHOD + SCOPE = DISCOVERY.

Discovery devices;

Production of documents

Interrogatories

Depositions

Physical/blood examination.

Admission of fact

Methods; (mention 1st)

Federal automatic prompt disclosure; MI has traditional discovery devises.

Disclose 4 kinds of info:

All potential witnesses

All relevant doc’s

Computation of damages

Relevant insurance coverage.

Duty to Supplement & Amend; both Fed & MI each side has a duty to supplement its disclosure w/in a reasonable time of new info. Ex. If previous infor was incorrect or is no longer true.

Scope limitations; (mention 2nd)

M/be relevant and not privileged.

Only Relevant matter is discoverable; liberal, broad relevance to any part of the lawsuit. Discovery only needs “to lead to admissible material relevant info”.

Protective order limits discovery; issued where it is necessary to avoid embarrassment or undue burden or expense. Ex bank stmt will be admitted but not public (divorce cases). Work product of attorney is privil.

No expectation of privacy rights if its in is subpoenaed.

Not privileged; (work product-material prepared for litigation)

Confidential info is not privileged. Need an evidentiary privilege to keep it out.
2 types of work product;

Mental impressions of attny; never discoverable; absolutely immune.
Everything else; not discoverable unless you make a showing of substantial need of the material & you suffer an undue hardship.
Privilege doesn't apply to the work product of an atty for a NON-PARTY.

Avoiding discovery; if D list an expert then w/drawl him b/c u think he will be adverse to your case, P must show
“exceptional circumstances” in order to depose D w/drawn expert b/c its trial strategy.

Motion in Limine; must renew the motion if its denied to preserve it for appeal.

Relevancy test.

Motion to compel discovery; w/in the cts discretion; must lead to relevant material even if the material is inadmissible at trial. P27.

Sanctions imposed for failure to supplement; actual csts & reasonable attny fees against P & L for failing to comply with duty to investigate. More severe sanctions for gross negl or FRAUD.
Dismissal b/c of int’l failure of discovery (1) prejudice (2) int’l delay.

TRIAL & MOTIONS

Adjudication w/o trial. Judgment on the pleadings.

Motion for Voluntary Dismissal;

Fed & MI; P has file a lawsuit and wants to dismiss it without prejudice so she can refill at a later date. Fed & MI the P has absolute rt to take 1 voluntary dismissal b4 response is served.
Dismissal with prejudice; its an adjudication on the merits, final disposition, barring rt to bring action on same claim Res Judicata.
W/O prejudice; can bring claim again.

Motion to dismiss;

No PJ; or failure to abide w/ct rule/discovery

Improper process;

Motion objecting to venue;

Affirmative defense; statute of limitations.

FED (20/60) waiver; these motions m/be filed w/ 1st responsive pleading to the complaint w/in 20 days of service of process except if you waive formal process then have 60 days.

MI (21/28) waiver; motion m/be filed w/1st response to complaint. Get 21 days if served in MI & 28 days if served outside state or by certified mail.

If find fraud w/in 21 days then get motion to dismiss

If find fraud after 21 days then get motion to set aside case. Motion for new trial.

Summary Judgment;

Aka Summary disposition; requested by D. Judge needs to determine if there is any genuine issue of material fact. Burden then transfers to the non-moving party to demonstrate a genuine issue for trial. Ct looks beyond the pleadings and looks to affidavits, depositions (b/c subject to cross) & discovery product b/c they are more reliable.

No SJ if:

Conclusory allegations are insufficient

To avoid SJ must show disputed facts; need specific evidentiary facts that indicate probable cause.

Breach, causation or damages are at issue b/c they are Q's of fact for the jury to decide. Duty is a Q of law.

Can't be based on Hearsay; burden to establish a prima facie case.

SJ if: "grounds";

Must be raised in 1st motion or in responsive pleading whichever is 1st or Waived.

Lack of juris (circuit ct amt in controversy m/be 25K or more

Insuff service of process

In responsive pleading or amended pleading;

Lack of legal capacity to sue

Another action re same parties and claims has already been filed

Claim is barred by

Release,

Pmt,

Prior judgment,

Immunity, S of L, SF, agreement to arbitrate, infancy, and disability.

Raised anytime;

Ct lacks SMJ

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No genuine issue of material fact.

Willful failure to comply with discovery

Adjudications with trial; DONT WANT JURY TO DECIDE

These 3 take away case from the jury:

Judgment as a matter of law (MI is Directed verdict) DV

After adversary has rested his case, ct will grant the motion if there is insufficient evidentiary basis from which a reasonable jury could find for the other side.

Judge s/not resolve disputed issues of fact (ex. Conflicting testimony)

Judges role is to rule on the sufficiency of the opposing parties evidence to support a verdict.

Can't ask for DV at end of trial based on lack of PJ. Lack of PJ s/be raised along w/ venue at beginning or the defense is WAIVED.

Renewed motion for judgment as a matter of law. (MI -- JNOV)

At end of jury case. Standard used is was there insufficient evidentiary basis from which a reasonable jury c/have found for they way they did.

Judge may grant new trial of juries verdict was against the great weight of evid. This is discretionary & opposing party m/show abuse of discretionary. Trial judge can't assume role of fact finder.

Ct cant assume the role fact finder;

Sufficiency of evidence; did P fail to make burden of production? If so then jury can decide/weigh evidence.

New trial; permits modification of the verdict in whole or part.

Fed & MI same; maybe granted on the discretion of the judge. (1) Look at errors at trial that materially affected the rts of the parties (2) verdict was against the manifest of the weight of the evidence.

Harmless error; had no effect on verdict b/c substantial other evid to support verdict.

Plain error; judge allowed Atty to "inflame the passions of the jury"; "prejudiced stmts". If not

harmless must preserve claim for appellate review.

Rt to a jury trial;

Must file a written demand; FED w/in 10 days (MI 28 days after complaint) of the filing of the pleading, which contains, or responds (in the answer) to the jury triable claim.

Constitutional rt; jury demand + \$ = jury

JUDGMENTS;

Default judgments;

Define; a D will have default judgment against him if it fails to respond to the complaint in a timely manner.

FED 20/60 days; MI 21/28 days

Motion to vacate judgment;

Fed; m/be filed in a reasonable time of the default judgment (dismissal w/ prejudice). Liberally granted.

MI; time limit w/in 21 days of judgment & must show that you have a defense on the merits & good cause for the default.

Motion for relief from a judgment; motion to set aside default judgment.

Time limit; w/in a reasonable time no longer than 1 yr from judgment.

Requirements; all are necessary (“MEND”) in both FED & MI

Merits; to your claim or defense

Equity; equity demands relief from judgment. Fraud or perjury taint judgment

New facts; have surfaced

Do Diligence; despite your do diligence unable to discover the new facts until after the judgment

FINALITY AND APPELLATE REVIEW

Finality; effects of judgments on future cases.

Res Judicata;

Same parties same claims which has been litigated to a final judgment on its merits cant be re-litigated by the parties

Bars subsequent action; ex father cant claim he’s not the father after the court already awarded paternity to the mother. Father s/have brought the claim then. Father can look to exceptions to the finality rule. Ex. Ct dismissed claim b/c of failure to obey ct order pretrial conference=prior jdgmt.

Not an add’l claim but the same claim based on a new theory; negl vs strict liability.

“Conserve judicial resources; promote finality.”

Full faith & Credit; if 1st claim in ST1 ct and 2nd claim in ST2 ct FF&C. If 1st claim is in FED ct and 2nd claim is in MI then honor b/c of fed supremacy and deference; not b/c FF&C.

Talk about whether Fed ct had pendant jurisdiction over state claim; “cmn nucleus of operative facts”.
P25. In fed ct sue then sue 2nd time in state ct. if c/have brought state claim in fed ct its pendant jurisdiction & bars later suit in fed ct.

Cmn nucleus of operative facts btwn fed & state claim.

Collater Estoppel;

An ISSUE which has been litigated to a final judgment cant be re-litigated

Finality Rule;

A claim or an issue, which has been litigated to a final judgment on the merits cant, be re-litigated. BONUS PTS: Parties are bound by claims or issues, which have been litigated against them to a final judgment on the merits.

Offensive Collateral Estoppel;

SEC files an action against G. SEC wins. Is G bound by adverse judgment if private claimants sue G? YES in the cts discretion. Parties are bound by claims or issues, which have been litigated against them to a final judgment on the merits.

EXCEPTIONS to finality; Restatmnts of Judgments;

Revival of old lawsuit; ex. S of L ran.

Clear & convincing need for a new trial b/c;

Not foreseeable in the initial trial; ex. DNA test - paternity
Didn’t have an opportunity to obtain full & fair adjudication in 1st trial.

Request relief from judgment/ aka set aside judgment
B/c of mistake
Newly discovered info; ex. Anonymous letter sent six months after dismissal is valid.

Must be material;
C/not have been produced with reasonable diligence in previous suit.

Fraud;
May prejudice the other party.

Relation back; if court grants motion then it will relate back to complaint and not barred by S of L.

Appellate Jurisdiction; only final judgments may be appealed as a matter of rt if: p35.

App cts have jurisdiction over appeals.
Rules of App jurisdiction;

App cts have pwr to review FINAL ORDERS; which is an order, which leaves nothing left to be done in the lower cts. Ex dismissal are adjudication on the merits & if try to re-litigate then Res Judicata.

Ex. Dismissals are adjudications on the merits & if try to re-litigate then Res Judicata.

Exceptions;

Partial final orders; BOTH FED & MI

Order which resolves some claims against some parties but not all claims form all parties. Maybe appealed if lower ct finds that there is no just reason to delay this appeal.

Discretionary Certification of Interlocutory Appeals; this is an appeal of a non-final order (instant appeal)

Doubt on a
Controllable legal issue such that
Appellate review would materially advance the litigation.

Appeal as a matter of right;

Only if there has been a final judgment.
Can be a final judgment on one or more but fewer than all claims.

EQUITY; 2/01 preliminary injunctions/protest in front of store.

Injunctions

Need PJ over D
4 factor analysis:

Is a legal remedy avail?

\$ make P whole?
Inadequate if:

Damages are speculative
D is insolvent
Injury is irreparable

Is a property rt evolved?

Must show any legitimate property int; rt to privacy; easement;

Is enforcement feasible?

No injunction if; Negative injunction requires less supervision;

Great skill / judgment of D
Series of acts over a period of time
Out of state act; D must be in same state.

Are the hardships balanced? Benefits & burdens

Balance benefit to P vs burden/hardship to D. Is there great outweighing?

Defenses?

Unclean hands; acting improperly;
Latches; P knows & waits an unreasonably long time & D is prejudiced. Give \$ damages then
Impossibility; hardship; freedom of speech

Give \$ damages then

Dates

Respond to pleadings

Fed 20/60; if no response then default judgment. Motion to vacate default judgment w/in reasonable time. Discretion.
MI 21/28 if no response then default judgment. 21 days after judgment and must show merit & good cause for default.

Amendments

Fed; b4 response to pleading is served
MI; 14 days after process is served.

Motion to dismiss;

Fed; 20/60 otherwise its waiver
MI; 21/28 otherwise its waiver

Rt to jury Trial;

Fed; w/in 10 days
MI; 28 days after complaint

Removal to fed ct w/in 30 days after receipt of initial pleadings.

Review

SMJ—use FED law

PJ

Service

Venue

Pleadings

Joinder

Discovery

Trial / Motions

Judgments

Finality & Appellate review.

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