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6 Pleading Under the Federal Rules of Civil Procedure

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I. INTRODUCTION

A. [6.1] Scope of Chapter

This chapter identifies and analyzes federal rules and doctrines relating to the pleading of claims, defenses, counterclaims, and other matters. However, the Federal Rules of Civil Procedure are continuously amended. Thus, to keep current, practitioners should review both proposed and current changes to the rules. They can be found at www.uscourts.gov/rules.

B. [6.2] What Constitutes "Pleading" Under Federal Rules of Civil Procedure

Under the Federal Rules of Civil Procedure, the concept of "pleading" has a technical and narrow focus. Fed.R.Civ.P. 7(a) delineates what constitutes a pleading:

(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.

Under the rules, it is a misnomer to refer to any document as a pleading except those expressly set forth in Rule 7(a). A motion for summary judgment is not a pleading. *In re Zweibon,* 565 F.2d 742 (D.C.Cir. 1977). A motion to dismiss is not a pleading. *Kopff v. Battaglia,* 425 F.Supp.2d 76, 86 n.13 (D.D.C. 2006). A letter by a party denying that it was properly served is not a pleading. *Haven v. Polska,* 215 F.3d 727, 732 (7th Cir. 2000). This distinction is particularly relevant when seeking relief through a motion to strike under Fed.R.Civ.P. 12(f) or contesting affirmative defenses under Rule 12(b). See §§6.28 and 6.30 below.

C. [6.3] Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law, in equity, or in admiralty with the exceptions stated in Fed.R.Civ.P. 81. See Fed.R.Civ.P. 1. Rule 81 states that the Federal Rules of Civil Procedure apply to bankruptcy to the extent provided by the rules. It exempts prize proceedings in admiralty which are governed by 10 U.S.C. §§7651 – 7681. Rule 81 allows different mechanisms to bring proceedings to review administrative and arbitral judgments before

the court. The rule also honors statutory provisions pertaining to pleading and service in proceedings to revoke naturalization. Under the rules, the old common-law forms of action have been abolished and law and equity have been merged. Fed.R.Civ.P. 2 declares: "There is one form of action — the civil action."

D. [6.4] General Pleading Objectives

The objective of the rules governing pleadings is to provide a flexible mechanism for the achievement of substantial justice in litigation. The classic description of the pleading requirements of the Federal Rules of Civil Procedure remains that in *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99, 103 (1957), in which the Supreme Court stated:

> **[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.**

The Supreme Court overruled *Conley* regarding the standard a court should apply when ruling on a motion to dismiss for failure to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 173 L.Ed.2d 868, 129 S.Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 167 L.Ed.2d 929, 127 S.Ct. 1955, 1969 (2007). Still, the *Conley* Court's aspirational language on the subject of pleadings remains relevant because the Seventh Circuit has interpreted *Twombly* more narrowly than other circuits have. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1082 – 1083 (7th Cir. 2008); *Vincent v. City Colleges of Chicago*, 485 F.3d 919, 924 (7th Cir. 2007). *See Twombly, supra*, 127 S.Ct. at 1969 (acknowledging decision interprets Fed.R.Civ.P. 12 and not Fed.R.Civ.P. 8).

The federal pleading rules are meant to eliminate needless delays and minimize pleading requirements. Unlike outworn common-law notions that placed exaggerated importance of form, often at the expense of substance, the Federal Rules of Civil Procedure do not require tremendous specificity. Cases are to be decided on the merits, not on arid and desultory disputes between counsel over the pleadings. See generally Charles Alan Wright, THE LAW OF FEDERAL COURTS §66, *et seq.* (4th ed. 1983).

The pleading rules are implemented by, and largely dependent on, pretrial procedures for the identification of issues. The pleadings rules rely on pretrial examination and summary judgment to disclose the factual basis of the action, to confine the trial to those issues that are truly controverted, and to permit an award of judgment in a relatively short time when there is no bona fide claim or defense. See 2 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE §8.02 (3d ed. 2013) (multivolume set, year varies by volume).

II. COMPARISON BETWEEN STATE AND FEDERAL PLEADING REQUIREMENTS

A. [6.5] Rules of Pleading in Federal Practice

Under federal practice, unlike under Illinois state court practice, a party is required to plead only the general contours of a claim or defense. Thus, Fed.R.Civ.P. 8(d)(1) commands that "[e]ach allegation must be simple, concise, and direct," while Rule 8(a) requires that all pleadings however denominated contain "a short and plain statement" of: (1) the court's jurisdictional basis; (2) the claim showing that the pleader is entitled to relief; and (3) the relief sought.

In the federal courts, almost all pretrial fact-finding is accomplished through discovery, while the identification of trial issues is accomplished principally through the burdensome pretrial order, which is jointly submitted by the parties following the close of discovery. The pleadings merely express the basic positions of the parties without identifying or articulating evidentiary or factual positions. Indeed, a complaint that pleads too much factual detail may be self-defeating if, for example, it includes all the elements of an affirmative defense to its allegations. *United States v. Lewis,* 411 F.3d 838, 842 (7th Cir. 2005).

Fed.R.Civ.P. 16 governs pretrial procedure and provides a deadline for setting an initial scheduling order. Further, this rule calls attention to opportunities for the structuring of the trial under Fed.R.Civ.P. 42, 50, and 52. Finally, Rule 16 allows courts to set ground rules for discovery of electronically stored information.

B. [6.6] General Inapplicability of State Rules in Federal Litigation

In district courts, the federal procedural rules generally govern without regard to their state counterparts. This principle applies in diversity cases as well as in cases in which jurisdiction is based on the existence of a federal question. Hence, pleadings in diversity cases do not have to comply with the fact-pleading requirements imposed in Illinois courts but need satisfy only the "short and plain statement" requirement of Fed.R.Civ.P. 8. See 2 MOORE'S FEDERAL PRACTICE §8.04[1][a].

Federal procedural rules are sometimes employed in diversity cases in preference to their state counterparts even though the procedural differences may be determinative of the outcome of the litigation. *Compare Hanna v. Plumer,* 380 U.S. 460, 14 L.Ed.2d 8, 85 S.Ct. 1136 (1965) (effective filing dates prevailed over contrary state rules that would have required dismissal of action under state's statute of limitations), *with Walker v. Armco Steel Corp.,* 446 U.S. 740, 64 L.Ed.2d 659, 100 S.Ct. 1978, 1983 (1980) (in diversity actions, statute of limitations is tolled by effective filing date determined by state law rather than by Fed.R.Civ.P. 3).

C. [6.7] Reference Sources

The rules and principles governing federal pleadings are found in:

1. Fed.R.Civ.P. 7 – 16 and 24;

2. Forms 1 – 21, 30, and 31 in the Appendix of Forms enacted as a part of the Federal Rules of Civil Procedure, which "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate" (Fed.R.Civ.P. 84) and can therefore serve as useful templates in drafting pleadings in the district courts; and

3. local district court rules, the importance of which cannot be overlooked, for while local rules do not alter the substantive requirements of the Federal Rules of Civil Procedure, they often prescribe time limits for filing pleadings and related motions, the number of copies that must be filed, the format that must be followed, and other special provisions of concern to the local district judges.

D. Basic Differences Between Federal and State Pleading Rules

1. [6.8] "Notice" Pleading

Fed.R.Civ.P. 8(a), governing claims for relief, and Rule 8(b), governing pleading defenses, require that all pleadings be stated in "short and plain" terms. Thus, Rule 8 is the basis for what has come to be known as "notice pleading," under which a federal pleading is deemed sufficient if it informs the adversary, without details, of the pleader's position with respect to the controversy.

While 735 ILCS 5/2-603 employs the "plain and concise statement" language of Rule 8, and while §2-603(c) mandates that "[p]leadings shall be liberally construed with a view to doing substantial justice between the parties," Illinois courts continue to insist that Illinois practice requires fact and not notice pleading. *See, e.g., Gray v. City of Plano,* 141 Ill.App.3d 575, 490 N.E.2d 1020, 1022, 95 Ill.Dec. 928 (2d Dist. 1986); *Wait v. First Midwest Bank/Danville,* 142 Ill.App.3d 703, 491 N.E.2d 795, 800, 96 Ill.Dec. 516 (4th Dist. 1986). *See also Estate of Johnson v. Condell Memorial Hospital,* 119 Ill.2d 496, 520 N.E.2d 37, 42 – 43, 117 Ill.Dec. 47 (1988).

A federal plaintiff must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus,* 551 U.S. 89, 167 L.Ed.2d 1081, 127 S.Ct. 2197, 2200 (2007), quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 167 L.Ed.2d 929, 127 S.Ct. 1955, 1964 – 1965 (2007). If a plaintiff provides enough facts to call the defendant's attention to an incident but fails to show the court how the incident was the result of wrongdoing, the defendant may obtain judgment on the pleadings. *Ashcroft v. Iqbal,* 556 U.S. 662, 173 L.Ed.2d 868, 129 S.Ct. 1937, 1949 (2009); *Twombly, supra.* The so-called plausibility standard of *Twombly* and *Iqbal* has nothing to do with the odds of a plaintiff proving alleged facts, but depends on whether the allegations, if true, plausibly constitute a cause of action. *Iqbal, supra.*

Plaintiffs can no longer avoid dismissal by insisting there is a hypothetical set of facts that would allow recovery. *Twombly, supra,* 127 S.Ct. at 1969 (overruling *Conley v. Gibson,* 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99, 103 (1957)). The *Twombly* Court's decision to overrule *Conley* has caused a great deal of consternation in other circuits. David G. Savage, *Narrowing the Courthouse Door: High Court Makes It Tougher to Get Past the Pleading Stage,* 95 A.B.A.J. 22 (July 2009). But the Seventh Circuit has consistently limited *Twombly*'s application. *Tamayo v. Blagojevich,* 526 F.3d 1074, 1082 – 1083 (7th Cir. 2008); *Vincent v. City Colleges of Chicago,* 485 F.3d 919, 924 (7th Cir. 2007).

A federal defendant should state defenses in "short and plain" terms. Fed.R.Civ.P. 8(b). Certain affirmative defenses, among the most commonly pleaded, are forfeit if a defendant does not raise them in the first responsive pleading. Fed.R.Civ.P. 8(c). Unlike pleading practice in Illinois, under federal pleading rules, negligence and comparable failures of duty, as well as malice, intent, knowledge, and most other conditions of mind, may be alleged generally without any pleading of supporting facts and circumstances. See Fed.R.Civ.P. 9(b). However, Rule 9(b) does require that fraud or mistake be pleaded with particularity.

2. [6.9] Last Permitted Pleading

In state practice, when an affirmative defense is pleaded in an answer, the plaintiff must either: (a) file a reply denying the factual allegations; or (b) file a motion challenging the sufficiency of the answer. If neither of these things is done, the allegations of the affirmative defense will be deemed admitted. 735 ILCS 5/2-602, 5/2-609, 5/2-610. The Federal Rules of Civil Procedure, however, do not provide for the filing of a responsive pleading to the affirmative allegations made in an answer. Fed.R.Civ.P. 7(a). Of course, when a counterclaim is filed, the plaintiff must file a response thereto.

Under Illinois practice, if a reply to an answer contains previously unpleaded allegations, no surreply is necessary and the allegations "shall be taken as denied." Illinois Supreme Court Rule 136(b). If a defendant desires to respond with more than a simple denial, the defendant may seek leave to file a further pleading pursuant to 735 ILCS 5/2-609. In this way, a defendant can protect against a claim that evidence supporting its position should be excluded on grounds of surprise or prejudice.

Fed.R.Civ.P. 8(b)(6) renders such anticipatory pleading unnecessary by providing that allegations within the last required pleading (normally the answer) are "considered denied or avoided." Hence, there is generally no need for a plaintiff to obtain leave to file a reply. While Rule 7(a) empowers a court to order the filing of a reply, such orders are seldom entered. See Charles Alan Wright, THE LAW OF FEDERAL COURTS §66 (4th ed. 1983).

3. [6.10] Prayer for Damages

Under Illinois practice, personal injury plaintiffs are forbidden from pleading specific dollar amounts of claimed damages. See 735 ILCS 5/2-604.1. No comparable restriction exists under the Federal Rules of Civil Procedure. In fact, Fed.R.Civ.P. 8(a)(3) mandates that a plaintiff specify the relief sought. Because Fed.R.Civ.P. 54(c) states that in cases of default the judgment

"must not differ in kind from, or exceed in amount, what is demanded in the pleadings," it is important for plaintiffs to properly plead damages in federal cases.

4. [6.11] Claims or Defenses Based on Written Documents

In Illinois state courts, a party whose claim or defense is based on a written instrument must either attach a copy of that instrument to the pleading or recite it therein. 735 ILCS 5/2-606. Fed.R.Civ.P. 10(c) governs attachments to federal court filings and does not impose a universal requirement to attach written contracts. *See Arnold v. Janssen Pharmaceutica, Inc.*, 215 F.Supp.2d 951, 962 (N.D.Ill. 2002). But when an Illinois state law contract claim is brought in federal court, the five-year statute of limitations for oral contracts will apply unless the plaintiff attaches a copy of the contract. *Ramirez v. Palisades Collection LLC*, 250 F.R.D. 366, 369 – 370 (N.D.Ill. 2008).

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✓ In general, accuracy and completeness demand that litigants in federal cases append relevant written instruments to their pleadings as exhibits.

5. [6.12] Abolition of Verification Rule

Unlike practice under the Illinois Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, which specifically allows any pleading to be verified (see 735 ILCS 5/2-605(a)), the filing of a verified pleading in federal court has no legal significance. Nor is verification required for specific categories of allegations and denials as under §§2-605(b), 2-607(c), and 2-610(b) of Illinois' Code of Civil Procedure. But see Fed.R.Civ.P. 65(b) (applications for temporary injunctive relief must be supported by affidavit or verified complaint); 28 U.S.C. §1924 (bill of costs must be supported by affidavit); Federal Rule of Appellate Procedure 39 (bill of costs on appeal must be itemized and verified). Fed.R.Civ.P. 11 abolished the requirement that pleadings be verified in federal court.

6. [6.13] Motions To Strike

Under the Illinois Code of Civil Procedure, a motion to strike reaches any defect, whether formal or substantive, in any pleading or motion. The motion may challenge either a part or the whole of a pleading. See 735 ILCS 5/2-615(a). A successful motion generally results in the pleader being required to amend the stricken pleading. 735 ILCS 5/2-612(a), 5/2-615(d).

Under federal practice, the motion has been given a much narrower application. In general, its use is not favored. *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 892 – 893 (2d Cir. 1976); *Abdulrahim v. Gene B. Glick Co.*, 612 F.Supp. 256, 260 n.1 (N.D.Ind. 1985); *Lirtzman v. Spiegel, Inc.*, 493 F.Supp. 1029 (N.D.Ill. 1980).

Presently, four provisions of the Federal Rules of Civil Procedure expressly authorize a motion to strike. Fed.R.Civ.P. 11(a) requires that any unsigned paper shall be stricken unless the

defect is cured promptly. Fed.R.Civ.P. 12(e) authorizes the striking of a pleading in the absence of compliance with an order directing the filing of a more definite statement. Fed.R.Civ.P. 37(b)(2)(A)(iii) authorizes the striking of pleadings or parts thereof for a party's failure to comply with a discovery order. Finally, Fed.R.Civ.P. 12(f) permits the striking of "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

The motion also may be appropriate when a document has been filed in disregard of page limits for briefs or has been filed in an untimely manner without leave of court. However, even in these contexts, the motion is not favored. Lawyers who do not practice with regularity in the federal courts should be aware that the kinds of attacks on pleadings that are commonplace in the state courts are often treated with disdain by federal courts.

III. COMPLAINT UNDER FEDERAL RULES OF CIVIL PROCEDURE

A. [6.14] Form of Complaint

A civil suit in the federal courts is commenced by the filing of a complaint. Fed.R.Civ.P. 3. There is no rigid stylistic format that must be followed in drafting a federal complaint. See Fed.R.Civ.P. 8(d)(1) ("No technical form is required."). While there is ample room for creativity in drafting the complaint, the Federal Rules of Civil Procedure require the inclusion of a caption setting forth the name of the court, the title of the action, the case number, and a designation of the nature of the pleading. Form 1, in the Appendix of Forms in the Federal Rules of Civil Procedure, is the model for case captions. A complaint also must include the names of the parties to the suit, a jurisdictional statement, a plain and concise statement of the claim, and a prayer for relief. See Fed.R.Civ.P. 8(a), 10(a).

A typical caption is set forth below:

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.

In addition to a caption, the pleading must set forth the averments in numbered paragraphs, each of which is limited "as far as practicable" to the statement of a single set of circumstances.

Fed.R.Civ.P. 10(b). Claims that are founded on separate transactions or occurrences and defenses other than denials are to be stated in separate counts or defenses if such a separation will facilitate the clear presentation of the matters set forth.

Statements in one part of a pleading may be adopted by reference in other parts. The requirement of numbered paragraphs that are limited to a single set of circumstances applies only "as far as practicable." *Id.* Also, claims arising out of separate transactions or occurrences need to be set forth in separate counts only when such a separation will facilitate the clear presentation of the matters set forth. See Charles Alan Wright, THE LAW OF FEDERAL COURTS §66 (4th ed. 1983).

The emphasis is on clarity and on practicality rather than on any mechanical rule as to form. The Supreme Court has observed: "We no longer insist upon technical rules of pleading, but it will ever be difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation or thinking." *O'Donnell v. Elgin, J. & E. Ry.*, 338 U.S. 384, 94 L.Ed. 187, 70 S.Ct. 200, 205 (1949).

B. [6.15] Pleading Subject-Matter Jurisdiction

Fed.R.Civ.P. 8(a) expressly provides that a pleading that sets forth a claim of relief "*must* contain . . . a short and plain statement of the grounds for the court's jurisdiction." [Emphasis added.] This requirement flows from the fact that federal courts, under Article III of the Constitution, are courts of limited jurisdiction. As such, there is no presumption in favor of their jurisdiction, and a party must affirmatively demonstrate the jurisdictional basis of the claim. *Manway Construction Co. v. Housing Authority of City of Hartford*, 711 F.2d 501, 503 (2d Cir. 1983); Fed.R.Civ.P. 12(h)(3). See 2 MOORE'S FEDERAL PRACTICE §8.03[1].

Perhaps as a reflex to spiraling court dockets, there has been a heightened sensitivity to jurisdictional requirements in recent years. With increasing frequency, courts at all levels of the federal system are carefully examining the jurisdictional bases of cases brought before them. See Fed.R.Civ.P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

This preoccupation with jurisdiction is prevalent in the Seventh Circuit Court of Appeals. In a series of cases, the court has sua sponte examined the bases of its and the district court's jurisdiction, often to the dismay of the parties. Moreover, Seventh Circuit Rule 28(a) requires that each brief contain a jurisdictional statement setting forth in carefully prescribed detail the bases of jurisdiction not only of the court of appeals but of the district court as well. See also Seventh Circuit Rule 3(c)(1):

> **(c)(1) *Docketing Statement.* The appellant must serve on all parties a docketing statement and file it with the clerk of the district court at the time of the filing of the notice of appeal or with the clerk of this court within seven days of filing the notice of appeal. The docketing statement must comply with the requirements of Circuit Rule 28(a). . . . If the docketing statement is not complete and correct, the appellee must provide a complete one to the court of appeals clerk within 14 days after the date of the filing of the appellant's docketing statement.**

In sum, special care must be taken when pleading jurisdiction. When jurisdiction is based on diversity of citizenship, the pleader must affirmatively demonstrate complete diversity among the parties, except that minimal diversity has been allowed in some class action suits since 2005. *City of Indianapolis v. Chase Nat. Bank of City of New York,* 314 U.S. 63, 86 L.Ed. 47, 62 S.Ct. 15, 16 – 17 (1941) (explaining complete diversity); *Preston v. Tenet Healthsystem Memorial Medical Center, Inc.,* 485 F.3d 804, 810 – 811 (5th Cir. 2007) (analyzing class actions). Compare 28 U.S.C. §§1332(a), 1332(d). If a corporation is a party and diversity is the jurisdictional basis, the complaint should make clear not only the state of incorporation but also the state in which the corporation has its principal place of business. *See District of Columbia ex rel. American Combustion, Inc. v. Transamerica Insurance Co.,* 797 F.2d 1041 (D.C.Cir. 1986) (not enough to plead state in which party maintains its principal place of business; must also plead state of incorporation). *Accord Randazzo v. Eagle-Picher Industries, Inc.,* 117 F.R.D. 557 (E.D.Pa. 1987).

When jurisdiction is based on a federal question, it is preferable to set forth with specificity the statutory or constitutional basis on which jurisdiction rests. Similarly, when jurisdiction is based on principles of ancillary or pendent jurisdiction, the pleadings should set forth with clarity this jurisdictional basis.

C. [6.16] Pleading the Claim Itself

The pleading of claims in federal court is governed by the concepts of notice pleading discussed in §6.8 above. Thus, a complaint must contain a short and plain statement of the claim showing that the plaintiff is entitled to relief and a demand for the relief to which the plaintiff is entitled. Despite this requirement, a pleader should set forth more than a bare-bones outline of the claim or defense.

This is particularly true in complex cases, such as those involving antitrust, securities, or the Racketeer Influenced and Corrupt Organizations Act (RICO), Pub.L. No. 91-452, Title IX, §901(a), 84 Stat. 941. A good test for how factually complete a complaint should be is found in a famous Lincoln anecdote. When asked how long a man's legs should be, Mr. Lincoln is said to have responded, "Just long enough to touch the ground — but not an inch longer."

D. [6.17] Pleading Fraud Under Fed.R.Civ.P. 9(b)

It is fundamental that in fraud cases with one or more defendants "[e]ach defendant is entitled to notice in the pleadings as to the factual basis for the charge against him." *Minpeco, S.A. v. ContiCommodity Services, Inc.,* 552 F.Supp. 332, 339 (S.D.N.Y. 1982). "At a minimum, Rule 9(b) requires allegations of the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Benchmark Electronics, Inc. v. J.M. Huber Corp.,* 343 F.3d 719, 724 (5th Cir. 2003), quoting *Tel-Phonic Services, Inc. v. TBS International, Inc.,* 975 F.2d 1134, 1139 (5th Cir. 1992). *See also Bruss Co. v. Allnet Communication Services, Inc.,* 606 F.Supp. 401, 405 (N.D.Ill. 1985) (complaint "must inform each defendant of the specific fraudulent acts which constitute the basis of the action against each particular defendant"). See also 5A Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE §1297 (3d ed. 2004).

The requirement for particularization and specificity in pleadings is dictated by Fed.R.Civ.P. 9(b), which requires that "[i]n alleging fraud . . . a party must state with particularity the circumstances constituting fraud." It has been consistently held that Rule 9 applies to civil Racketeer Influenced and Corrupt Organizations Act complaints based on alleged predicate acts of fraud. *Murr Plumbing, Inc. v. Scherer Brothers Financial Services Co.,* 48 F.3d 1066, 1069 (8th Cir. 1995); *Reynolds v. East Dyer Development Co.,* 882 F.2d 1249, 1251 (7th Cir. 1989); *Bennett v. Berg,* 685 F.2d 1053, 1062 (8th Cir. 1982). *See also Beck v. Cantor, Fitzgerald & Co.,* 621 F.Supp. 1547, 1551 (N.D.Ill. 1985) (highlighting pitfalls for unwary).

The purposes underlying Rule 9(b) were cogently expressed in *D & G Enterprises v. Continental Illinois National Bank & Trust Company of Chicago,* 574 F.Supp. 263, 266 – 267 (N.D.Ill. 1983):

> **The demand for greater specificity in pleadings codified in Rule 9(b) serves a number of purposes. Complaints alleging fraud should seek redress for a wrong rather than attempting to discover unknown wrongs. . . . Moreover, defendants must be protected from the harm that results from charges of serious wrongdoing . . . as well as the harm that comes to their reputations. . . . Finally, allegations of fraud must be concrete and particularized enough to give notice to the defendants of the conduct complained of, to enable the defendants to prepare a defense. [**Citations omitted.**]**

In *Skycom Corp. v. Telstar Corp.,* 813 F.2d 810 (7th Cir. 1987), the plaintiff brought an action alleging fraud, misrepresentation, and violations of RICO. The fraud count merely alleged that the fraudulent representations were made to the plaintiff on a specified date. On appeal, the court held that the count charging fraud violated Rule 9(b) because the claims of fraud were not pleaded with the requisite particularity. Without an indication as to what the fraudulent statements were and the circumstances in which they were made, the count could not withstand a Rule 9(b) motion. *See also Jepson, Inc. v. Makita Corp.,* 34 F.3d 1321 (7th Cir. 1994) (complaint made general allegations of fraud but failed to allege particulars); *Baldi v. Carey (In re Estate of Royal),* 289 B.R. 913, 918 (N.D.Ill. 2003) ("The plaintiff must identify particular statements and actions and specify why they are fraudulent."); *Unimobil 84, Inc. v. Spurney,* 797 F.2d 214 (5th Cir. 1986) (general allegations that fail to state with particularity what representations were made to plaintiff by each defendant fail to comply with Rule 9(b)).

Rule 9 must be read in conjunction with the requirement of Fed.R.Civ.P. 8 that the complaint contain a short and plain statement of the claim for relief. This principle underlies a number of decisions that seem unwilling to enforce Rule 9 rigorously. *See, e.g., Renovitch v. Stewardship Concepts, Inc.,* 654 F.Supp. 353, 360 (N.D.Ill. 1987) (interplay between Rules 8 and 9 precludes need for pleading "detailed evidentiary matters" even in fraud cases); *Sweeney Company of Maryland v. Engineers-Constructors, Inc.,* 109 F.R.D. 358 (E.D.Va. 1986) (Rule 9(b) must be balanced against Rule 8; this balancing requires relaxation of Rule 9(b) when plaintiffs are unlikely to have access to more specific information than appears in complaint after discovery). When read together, Rule 9(b) and the liberal notice pleading standard of Rule 8 indicate that a complaint is sufficient if the allegations contain a brief sketch indicating how the fraudulent scheme operated, when and where it occurred, and the participants involved. *Tomera v. Galt,* 511

F.2d 504 (7th Cir. 1975). *See also Frank E. Basil, Inc. v. Leidesdorf,* 713 F.Supp. 1194, 1198 (N.D.Ill. 1989) (time, place, and contents of fraud needed but not evidentiary details).

E. [6.18] Demand for Relief

Each count in a complaint or counterclaim must contain a separate demand for relief, which must be reasonably specific. Nevertheless, relief may be requested in the alternative or of several different types. Fed.R.Civ.P. 8(a)(3).

Federal law contains no prohibition against the pleading of a specific dollar ad damnum in personal injury cases such as exists under Illinois law. See 735 ILCS 5/2-604. Under Fed.R.Civ.P. 54(c), and with the exception of a judgment entered by default, "[e]very other final judgment should grant the relief to which each party is entitled, *even if* the party has not demanded that relief in its pleadings." [Emphasis added.] Federal courts are not restricted by the theory adopted by the pleader, be it erroneous or not, but may take any action appropriate under the facts of the case.

When a pleading alleges damages in a specific dollar amount, however, the court will assume that a plaintiff seeks that specified amount. *See Palomo v. United States,* 188 F.Supp. 633 (D. Guam 1960). No relief may be awarded beyond that sought in the pleading against a defaulting party. Fed.R.Civ.P. 54(c).

IV. THE ANSWER

A. [6.19] Answering Allegations in Complaint

Fed.R.Civ.P. 7(a) provides for the filing of an answer. Fed.R.Civ.P. 8(b) sets forth the form that an answer must take:

> **(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.

In plain, straightforward terms, Rule 8(b) requires a defending party to admit or deny the averments on which the adverse party relies. Any allegations that are not denied are deemed admitted. Fed.R.Civ.P. 8(b)(6). Rule 8(b)(5) gives guidance to a party that lacks sufficient information to admit or deny an allegation.

Answering that a party "neither admits nor denies the allegation, but demands strict proof thereof" invites a federal court to deem the allegation admitted under the terms of Rule 8(b)(6). Such an answer is an impermissible hedge. *Mahanor v. United States*, 192 F.2d 873 (1st Cir. 1951). In *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1030 (C.C.P.A. 1982), the court held: "An answer which attempts to evade the pleading requirements of Rule 8 by the tactic of an equivocal admission or denial is an admission."

Rule 8(b) does not prescribe any exclusive method for setting forth a denial. Rather, it accords the pleader freedom to present denials in any form that is sufficiently clear and that is not evasive. If a pleader is without knowledge or information to form a belief as to the truth of an averment, the pleader shall so state, and this statement has the effect of a denial. *Id.*

The following example illustrates the operation of Rule 8. Assume that paragraph four of a complaint alleges the following:

On January 1, 20__, Plaintiff and Defendant met at the Chicago Public Library. While there, Plaintiff transferred $5,000 in cash to Defendant in the presence of John Smith. Of this amount, one half was obtained from Plaintiff's account at the Northern Trust Company. At the time of the transfer, Defendant falsely stated she would return the money in ten days.

Assume that the defendant is able to admit the allegations in the first sentence completely, is able to admit those in the second sentence partially, lacks sufficient knowledge regarding those in the third sentence, and is able to deny completely the allegations of the last sentence. An appropriate response would be as follows:

Defendant admits the allegations in the first two sentences of paragraph 4, except that she denies the allegation that Smith was present at the time of the transfer of the cash. Further

answering, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the third sentence of paragraph 4. Further answering, Defendant denies the allegations in the last sentence of paragraph 4.

B. [6.20] Affirmative Defenses

Fed.R.Civ.P. 8(c) requires a pleader who desires to raise "any avoidance or affirmative defense" to raise that matter in the next responsive pleading. Those matters include:

- **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.** Fed.R.Civ.P. 8(c)(1).

Failure to raise these affirmative matters seasonably may be deemed a waiver of the defense, preventing the party from introducing evidence in support of the affirmative defense unless the opponent offers no objection or the court grants a belated motion to amend the pleading. However, failure to plead the affirmative matter will not preclude a party from taking advantage at trial of the opponent's evidence. See 2 MOORE'S FEDERAL PRACTICE §8.07[3]. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court must, if justice requires, treat the pleading as if there had been a proper designation. See Fed.R.Civ.P. 8(c)(2).

When a plaintiff has notice of an affirmative defense, the defense and evidence supporting it may be considered by a court even if the defendant failed to plead the defense as required by Rule 8(c). In *Hassan v. United States Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988), a plaintiff was questioned extensively during her deposition about social security and insurance payments she received. The payments were also the subject of an earlier interrogatory. The plaintiff was therefore held to have been on notice that the payments would be raised as an affirmative defense at trial although the defense was not formally pleaded.

V. MOTIONS DIRECTED TO PLEADINGS

A. [6.21] General Observations

In federal district courts, a judge is assigned to a case from its inception through its conclusion. This differs markedly from the practice in the Cook County Circuit Court. There, motions are often presented to special "motion judges" and cases are sent out for trial to a different judge.

Motions are also handled differently in federal courts. They are briefed and frequently decided without oral argument. In state court, most motions are resolved after an oral presentation of the issues. In federal court, oral argument may be allowed in the court's discretion. See, *e.g.*, N.D.Ill. Local Rule 78.3; C.D.Ill. Local Civ. Rule 7.1(A); S.D.Ill. Local Rule 7.1(h).

B. [6.22] General Mechanics of Motion Practice in the Northern District

The discussion in §§6.23 – 6.27 below focuses on the Local Rules for the Northern District of Illinois, which are available on the court's website, www.ilnd.uscourts.gov. Local rules for the Central District and Southern District are available on the courts' respective websites: www.ilcd.uscourts.gov and www.ilsd.uscourts.gov.

1. [6.23] Notice of Motions and Objections (Nonemergency Matters)

Motions may be presented to the court upon proof of written notice by mail seven days prior to the date of presentment or personal delivery by 4:00 p.m. of the second business day preceding the date of presentment. N.D.Ill. Local Rule 5.3(a).

2. [6.24] Filing Pursuant to Local Rule

Except when a judge fixes a different time, copies of all motions must be presented to the judge's minute clerk by 4:30 p.m. two business days before the hearing. N.D.Ill. Local Rule 78.1.

3. [6.25] Time

Each judge in the Northern District of Illinois has his or her own motion schedule. Most judges do not hear motions every day of the week.

4. [6.26] Form of Documents To Be Filed

The Federal Rules of Civil Procedure allow courts to make local rules permitting papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, established by the Judicial Conference of the United States. Fed.R.Civ.P. 5(d)(3). The Northern, Central, and Southern Districts of Illinois all currently allow electronic filing. Electronic filing is required of attorneys in the Central and Southern Districts. Electronic filing is optional in the Northern District and for pro se litigants in the Central District. See N.D.Ill. Local Rule 5.2(a); C.D.Ill. Local Civ. Rules 5.1 – 5.5. Instructions for electronic filing are found on each court's website.

Each hard copy of a document to be filed must "be flat and unfolded on opaque, unglazed, white paper 8½ × 11 inches in size." N.D.Ill. Local Rule 5.2(c). It shall be "plainly written, typed, printed, or prepared by means of a duplicating process, without erasures or interlineations which materially deface it." *Id.* The paper must be "bound or secured on the top edge of the document by a staple or a removable metal paper fastener inserted through two holes." N.D.Ill. Local Rule 5.2(d).

If the document is typed, the line spacing must be at least two lines. N.D.Ill. Local Rule 5.2(c). When the document is typed or printed, the type size must be 12 points and footnotes no less than 11 points. N.D.Ill. Local Rule 5.2(c)(1). All margins must be at least one inch. N.D.Ill. Local Rule 5.2(c)(2). "Any document that does not comply with this rule shall be filed subject to being stricken by the court." N.D.Ill. Local Rule 5.2(e). In addition to the original, one copy must be filed for use by the court. N.D.Ill. Local Rule 5.2(f).

All documents, affidavits, and other papers relied on are to be attached to the motion. N.D.Ill. Local Rule 78.4. Motions shall state with particularity the grounds therefor and the relief or order sought. Fed.R.Civ.P. 7(b)(1). Fed.R.Civ.P. 11 requires that all motions must be signed personally by counsel (a signature on behalf of a firm will not suffice).

5. [6.27] Briefs

Pursuant to N.D.Ill. Local Rule 7.1, briefs in support of or in opposition to any motion are limited to 15 pages without prior approval of the court. Judges in the Northern District of Illinois have varying degrees of tolerance for oversized briefs.

C. [6.28] Motion To Dismiss Complaint

Fed.R.Civ.P. 12 governs the presentation of defenses, objections, and certain motions. It is meant to afford an easy method for the presentation of defenses while at the same time preventing their use for purposes of delay. All defenses or objections are presented by motion or pleading. The historic distinctions between demurrers, motions, exceptions for insufficiency, and pleas have been eliminated. Special appearances to challenge in personam jurisdiction or improper venue are outdated and unnecessary.

Under Rule 12(b), every defense to any claim for relief shall be presented in the next required responsive pleading. Rule 12(b) enumerates certain non-affirmative defenses that might be raised to a complaint, cross-claim, or counterclaim. All defenses to the complaint (or other claim for relief) must be raised in the answer, except that the following defenses may be raised by motion before the filing of an answer: (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 on which relief can be granted; and (7) failure to join an indispensable party. Fed.R.Civ.P. 12(b).

Under Rule 12(h), the following four defenses are waived unless appropriately and timely presented: (1) lack of personal jurisdiction; (2) improper venue; (3) insufficient process; and (4) insufficient service of process. Thus, if counsel does not file a Rule 12(b) motion to dismiss based on one or more of the four preceding grounds and does not raise these defenses in the answer (or other responsive pleading), they are waived. Fed.R.Civ.P. 12(h)(1).

If counsel files a Rule 12(b) motion but does not raise all of these four defenses, the omitted defenses are waived and may not thereafter be raised in a subsequent Rule 12(b) motion or in the answer. Defenses of lack of subject-matter jurisdiction, failure to state a claim on which relief can be granted, and failure to join an indispensable party are not waived, and courts can take notice of these defenses at any time either sua sponte or by motion of the parties. Fed.R.Civ.P. 12(h)(2).

D. [6.29] Motion for More Definite Statement

Motions for more definite statements under Fed.R.Civ.P. 12(e) are generally disfavored because they tend to needlessly delay the proceedings. Such a motion is properly brought only if "a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." *Id.* This is the determining test and the propriety of the motion is to be determined without regard to whether the moving party has knowledge of additional facts and circumstances.

A Rule 12(e) motion is not a proper substitute for discovery and, thus, should not be granted to require evidentiary detail exceeding what is required by Fed.R.Civ.P. 8. *Wishnick v. One Stop Food & Liquor Store, Inc.*, 60 F.R.D. 496, 498 (N.D.Ill. 1973); *Garza v. Chicago Health Clubs, Inc.*, 329 F.Supp. 936 (N.D.Ill. 1971). Such a motion is proper only when the moving party is required or permitted to file a responsive pleading, and it is waived unless made before the responsive pleading is filed.

A motion for more definite statement must be made within the time required for serving a responsive pleading unless otherwise extended by the district court. *See United States ex rel. Argyle Cut Stone Co. v. Paschen Contractors, Inc.*, 664 F.Supp. 298, 303 (N.D.Ill. 1987) ("While we do not want to make it impossible for the defendant to respond to the complaint, we also do not want to conduct discovery via the pleading stage.").

E. [6.30] Motion To Strike

A motion to strike under Fed.R.Civ.P. 12(f) applies only to pleadings and typically is used to strike defenses that are insufficient as a matter of law. It is the plaintiff's equivalent of a Rule 12(b)(6) motion. *See Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Local Union No. 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 281 F.Supp. 971, 975 – 976 (E.D.N.Y. 1968).

Motions and exhibits or memoranda of law attached to motions are not pleadings and, consequently, are outside the scope of Rule 12(f). *City of Kalamazoo v. Michigan Disposal Service Corp.*, 125 F.Supp.2d 219, 221 – 222 (W.D.Mich. 2000). Although courts generally are reluctant to grant motions to strike, when a defense is truly insufficient, the motion should be granted in order to save the parties unnecessary expenditure of money and effort in preparing for trial. See §6.13 above.

F. Motions for Judgment Before Trial

1. [6.31] Motion for Judgment on Pleadings

After the pleadings have been closed, Fed.R.Civ.P. 12(c) allows any party to move for judgment on the pleadings. This motion is available when no issue of material fact is raised on the face of the pleadings and only issues of law are to be resolved. The chief difference between a motion to dismiss and a motion for judgment on the pleadings is that the motion for judgment on the pleadings examines all the pleadings together, instead of focusing on specific defects in the complaint. *Aponte-Torres v. University of Puerto Rico*, 445 F.3d 50, 54 – 55 (1st Cir. 2006). *See Collins v. Bolton*, 287 F.Supp. 393, 396 (N.D.Ill. 1968).

Matters extrinsic to the pleadings may not be offered by the movant in support of the motion for judgment on the pleadings. In the event such matters are presented, Rule 12(d) requires that the motion be treated as a motion for summary judgment and be disposed of pursuant to Fed.R.Civ.P. 56. *See Wagner v. Higgins*, 754 F.2d 186, 187 – 188 (6th Cir. 1985); §6.32 below.

2. [6.32] Motion for Summary Judgment

A motion for summary judgment under Fed.R.Civ.P. 56 is used when there is no genuine issue as to any material fact, and the movant is entitled, as a matter of law, to judgment. In *Mintz v. Mathers Fund, Inc.*, 463 F.2d 495, 498 (7th Cir. 1972), the court succinctly set forth the purposes of a motion for summary judgment:

> **The primary purpose of a motion for summary judgment is to avoid a useless trial, and summary judgment is a procedural device for promptly disposing of actions in**

> **which there is no genuine issue of any material fact even though such issue might have been raised by formal pleadings. The very purpose of Rule 56 is to eliminate a trial in such cases where a trial is unnecessary and results in delay and expense.**

Proper application of Rule 56 by a court requires a discerning examination of the pleadings, depositions, answers to interrogatories, and the affidavits submitted in support of and in opposition to the motion for summary judgment. *See Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 7 L.Ed.2d 458, 82 S.Ct. 486 (1962); *Mintz, supra;* Fed.R.Civ.P. 56(c). All inferences of fact are to be drawn against the movant and in favor of the opposing party. *Teal v. Potter*, 559 F.3d 687, 691 (7th Cir. 2009); *First State Bank of Monticello v. Ohio Casualty Insurance Co.*, 555 F.3d 564, 568 (7th Cir. 2009).

Summary judgment can be granted on various grounds. For instance, the movant may produce evidence which, if unrebutted, conclusively negates the nonmovant's claim. *Jackson v. Widnall*, 99 F.3d 710, 714 (5th Cir. 1996). Or a motion may contend that the other party has failed to produce admissible evidence to support an essential element of the claim on which the other party bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548, 2552 (1986). It is also possible that the parties may agree on the facts but disagree on the proper application of the law to the facts. *Bell Lumber & Pole Co. v. United States Fire Insurance Co.*, 60 F.3d 437, 441 (8th Cir. 1995).

To withstand a motion for summary judgment, the nonmoving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505, 2511 (1986). Rule 56 makes clear that a party opposing a motion for summary judgment cannot rely on factual allegations in its pleading. Rule 56 requires the opponent to respond with affirmative proof. *See Tarpley v. Greene*, 684 F.2d 1, 6 (D.C.Cir. 1982). Fed.R.Civ.P. 56(c)(1) provides:

> **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 [**by the adverse party**] do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.**

Special care must be taken to ensure that the evidentiary materials submitted either in support of or in opposition to a motion for summary judgment satisfy the requirements of Rule 56. By its terms, Fed.R.Civ.P. 56(c)(2) precludes the use of affidavits or other materials that contain evidence that would not be admissible at a trial under the Federal Rules of 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.

By its terms, Rule 56 is applicable in any kind of case brought in the federal courts. However, the federal courts have "repeatedly emphasized that cases in which the underlying issue is one of motive or intent are particularly inappropriate for summary judgment." *Egger v. Phillips,* 669 F.2d 497, 502 (7th Cir. 1982) (and cases cited therein). *See also Poller, supra,* 82 S.Ct. at 491 ("summary procedures should be used sparingly . . . where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot"). *But see Briscoe v. County of St. Louis, Missouri,* 690 F.3d.1004, 1016 n. 2 (8th Cir. 2012) (stating "[i]n *Torgerson,* this court en banc made clear that 'summary judgment is not disfavored and is designed for "every action" ' "), citing *Torgerson v. City of Rochester,* 643 F.3d 1031, 1043 (8th Cir. 2011); 11 MOORE'S FEDERAL PRACTICE §56App.200[4].

Caution should be exercised in bringing summary judgment motions in contract actions (*see, e.g., Peoples Outfitting Co. v. General Electric Credit Corp.,* 549 F.2d 42 (7th Cir. 1977); *Fitzsimmons v. Best,* 528 F.2d 692, 694 (7th Cir. 1976); *Welt v. Koehring Co.,* 482 F.Supp. 437, 440 (N.D.Ill. 1979)) and "actions based on a complex scheme of fraud" (11 MOORE'S FEDERAL PRACTICE §56App.200[34], p. 56App.-132.9). This is not to say that summary judgment is unavailable in such cases. The point is that when there are unresolved disputes about the parties' intent and the surrounding circumstances, summary judgment procedures cannot be used to deprive the opponent of the right to a jury trial.

This does not mean that summary adjudication cannot ever be granted when a complaint charges fraud. There is no "firm rule precluding use of the summary judgment procedure in cases involving questions of fraud. . . . '[I]n whatever guise the issue of fraud may appear in an action, the general basic principles underlying summary judgment apply and, if these are met, the issue of fraud may be summarily adjudicated.' " *Federal Deposit Insurance Corp. v. Lauterbach,* 626 F.2d 1327, 1336 – 1335 (7th Cir. 1980), quoting 6 MOORE'S FEDERAL PRACTICE ¶56.17[27] (2d ed. 1948); *Schaefer v. First National Bank of Lincolnwood,* 509 F.2d 1287 (7th Cir. 1975) (summary judgment for some defendants affirmed in action alleging violations of federal securities laws).

The form of the motion does not control whether it is to be considered under Rule 56 or Fed.R.Civ.P. 12. If the motion is styled as a motion for judgment on the pleadings under Rule 12(c) or a motion to dismiss under Rule 12(b)(6) but matters extrinsic to the complaint are submitted and not stricken, the motion will be treated as a motion for summary judgment under Rule 56. Unless a local rule or court order provides otherwise, a motion for summary judgment may not be filed more than 30 days after the close of discovery. Fed.R.Civ.P. 56(b).

3. [6.33] Local Rules Governing Summary Judgment Motions

N.D.Ill. Local Rule 56.1(a) requires that the moving party file, in addition to the motion, affidavits, and other materials referred to in Fed.R.Civ.P. 56(c), a supporting memorandum of law and a statement of the material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to judgment as a matter of law. The statement must consist

of short, numbered paragraphs with specific references to the affidavit, record, and other supporting materials and must include a description of the parties and all facts supporting venue and jurisdiction. *"Failure to submit such a statement constitutes grounds for denial of the motion."* [Emphasis added.] N.D.Ill. Local Rule 56.1(a).

N.D.Ill. Local Rule 56.1(b) requires a party opposing a motion for summary judgment to file, in addition to any opposing affidavits and other materials referred to in Fed.R.Civ.P. 56(c) and a supporting memorandum of law, a concise response to the movant's statement. That response must contain: (a) numbered paragraphs, each identifying the paragraph of the movant's filing to which it is addressed; (b) a response to each numbered paragraph in the movant's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied on; and (c) a statement, consisting of short numbered paragraphs, of any additional facts that the opposing party maintains warrant the denial of summary judgment, including other supporting materials relied on. *"All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party."* [Emphasis added.] N.D.Ill. Local Rule 56.1(b).

N.D.Ill. Local Rule 56.2 requires a party moving for summary judgment against a pro se litigant to furnish a standardized notice describing what a motion for summary judgment is and how to contend with it. C.D.Ill. Local Civ. Rule 7.1(D) governs summary judgment in the Central District. It imposes special constraints on the fact sections of summary judgment motions and replies, and it also exempts all but the argument section of each from the standard page limit.

G. [6.34] Assignment to Magistrate Judge

A district judge may assign any motion, including pretrial matters, to a magistrate judge for decision except motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or permit maintenance of a class action, to dismiss for failure to state a claim on which relief can be granted, and to involuntarily dismiss an action. 28 U.S.C. §636(b)(1)(A). Some judges routinely assign these matters to a magistrate judge; others do not. In the Northern District of Illinois, magistrate judges commonly handle such matters.

The magistrate judge's rulings on non-dispositive motions may be reconsidered by the district judge only if "clearly erroneous or contrary to law." *Id.* The magistrate judge's rulings on dispositive motions are to be reviewed de novo by the district judge upon notice served by either party within 14 days of the magistrate judge's decision. See 28 U.S.C. §636(b)(1); *United States v. Raddatz*, 447 U.S. 667, 65 L.Ed.2d 424, 100 S.Ct. 2406 (1980); *Hernandez v. Estelle*, 711 F.2d 619, 620 (5th Cir. 1983). This notice should list the particular portion(s) of the magistrate judge's decision to which the party objects.

Magistrate judges can recommend sanctions for discovery and other abuses. 28 U.S.C. §636(e)(4). See also Chapter 10 of this handbook on practice before magistrate judges.

H. [6.35] Motions for Attorneys' Fees Under Fed.R.Civ.P. 11 and 28 U.S.C. §1927

Fed.R.Civ.P. 11(b) provides that by presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that

> **to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:**
>
> > **(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;**
> >
> > **(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;**
> >
> > **(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and**
> >
> > **(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.**

If, after notice and a reasonable opportunity to respond, the court determines that a pleading, motion, or other paper has been signed in violation of Rule 11(b), the court may, subject to certain restrictions, impose an appropriate sanction on the attorneys, law firms, or parties that have violated subsection (b) or are responsible for its violation. Fed.R.Civ.P. 11(c).

Sanctions imposed for violation of Rule 11(b) are limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. Fed.R.Civ.P. 11(c)(4). The sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation. *Id.*

Monetary sanctions are subject to two limitations:

1. They may not be awarded against a represented party for a violation of Rule 11(b)(2).

2. They may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned. Fed.R.Civ.P. 11(c)(5).

Any fine assessed must be based on court costs and may not be some arbitrary penalty fixed by the court. *See Magnus Electronics, Inc. v. Masco Corporation of Indiana,* 871 F.2d 626, 634

(7th Cir. 1989). When the sanction is one of attorneys' fees, the attorney sanctioned has no due-process right to take discovery on the issue of the reasonableness of the opponent's fees. *See Borowski v. DePuy, Incorporated, Division of Boehringer Mannheim Co.,* 876 F.2d 1339, 1341 (7th Cir. 1989). The Seventh Circuit has established that district court Rule 11 decisions are to be reviewed under the abuse of discretion standard. The court's en banc decision in *Mars Steel Corp. v. Continental Bank N.A.,* 880 F.2d 928 (7th Cir. 1989), resolved conflicts between the various panels within the circuit concerning the appropriate standard of review.

In *Szabo Food Service, Inc. v. Canteen Corp.,* 823 F.2d 1073, 1080 (7th Cir. 1987), it was held that Rule 11

> **contains several strands. There must be "reasonable inquiry" into both fact and law; there must be good faith (that is, the paper may not be interposed "to harass"); the legal theory must be objectively "warranted by existing law or a good faith argument" for the modification of existing law; and the lawyer must believe that the complaint is "well grounded in fact." The attorney filing the complaint or other paper must satisfy all four requirements.**

While the thrust of the 1983 amendment to Rule 11 was to impose an objective standard, the good-faith "strand" of the rule is clearly subjective. Thus, an objectively colorable suit filed for an improper subjective purpose warrants sanctions. *Hill v. Norfolk & Western Ry.,* 814 F.2d 1192, 1202 (7th Cir. 1987).

The two most pivotal elements are the requirements that pleadings: (1) be well grounded in fact; and (2) be warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. Both of these elements must be examined prefiling. The factual investigation element has been described by the Seventh Circuit in *Szabo, supra,* as follows:

> **It is not permissible to file suit and use discovery as the sole means of finding out whether you have a case. Discovery fills in the details, but you must have the outline of a claim at the beginning. Rule 11 requires independent inquiry. See *Brown* [***v.*** *National Board of Medical Examiners,* 800 F.2d 168 (7th Cir. 1986),**] and e.g., *Rogers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985). The amount of investigation required by Rule 11 depends on both the time available to investigate and on the probability that more investigation will turn up important evidence; the Rule does not require steps that are not cost-justified. Only a "reasonable" inquiry is necessary. See also *Pantry Queen* [***F****oods, Inc. v. Lifschultz Fast Freight, Inc.,* 809 F.2d 451, 454 (7th Cir. 1987)**]. Inquiry that is unlikely to produce results is also unnecessary. *FDIC v. Elefant,* 790 F.2d 661, 667 (7th Cir. 1986). How much inquiry would have been "reasonable" before filing this complaint is something we cannot determine. Neither could the district court, on the information available to it.** 823 F.2d at 1083.

It is equally imperative that the pleader "study the law before representing its contents to a federal court," for "[c]ounsel who puts the burden of study and illumination on the [other side] or the court must expect to pay attorneys' fees under the Rule." *Thornton v. Wahl,* 787 F.2d 1151, 1154 (7th Cir. 1986). *But see Mortell v. Mortell Co.*, 887 F.2d 1322, 1328 (7th Cir. 1989) (Rule 11 per se does not apply in circuit courts of appeal).

Since 1993, sanctions for discovery violations have been governed by Fed.R.Civ.P. 37 instead of Rule 11. Fed.R.Civ.P. 11(d). According to the Rules' Advisory Committee Notes, the purpose of the revision was to remedy problems that arose in the interpretation and application of the 1983 amendment to the rule. Advisory Committee Notes, 1993 Amendments, Fed.R.Civ.P. 11. The rule continues to embody the conviction that attorneys and pro se litigants have an obligation to the court to refrain from conduct that would frustrate the goals of Rule 11. The revision enlarged the scope of this obligation but, at the same time, placed greater constraints on the imposition of sanctions with the aim of lessening the number of motions for sanctions presented to the court. *Id.*

"Moreover, the advisory committee note to the amended rule states that the signer's conduct is to be judged as of the time the pleading or other paper is signed. Fed.R.Civ.P. 11 advisory committee note. It is difficult to imagine why this comment would be made if the rule were meant to impose a continuing obligation on the attorney." *Oliveri v. Thompson,* 803 F.2d 1265, 1274 (2d Cir. 1986). Failure to reevaluate one's claims in light of intervening legal developments is, however, justification for sanctions pursuant to the court's inherent authority and 28 U.S.C. §1927.

Beyond its use in civil litigation in the district courts, Rule 11 and its caselaw inform practice on motions for sanctions in criminal cases and appeals. *See In re Kelly,* 808 F.2d 549, 551 (7th Cir. 1986); *Hill, supra,* 814 F.2d at 1200. In *Mays v. Chicago Sun-Times,* 865 F.2d 134, 139 (7th Cir. 1989), the Seventh Circuit clarified that Fed.R.App.P. 38 is the substantive rule against improper appellate filings, Fed.R.App.P. 46(c) is the basis for imposing sanctions, and Fed.R.Civ.P. 11 guides the interpretation of Fed.R.App.P. 38 and 46. *See also Fred A. Smith Lumber Co. v. Edidin,* 845 F.2d 750, 754 (7th Cir. 1988).

In *State of Wisconsin v. Glick,* 782 F.2d 670, 673 (7th Cir. 1986), the Seventh Circuit announced that Rule 11 "appl[ies] only to civil litigation" but then stated that criminal defendants and their attorneys must still adhere to the standards governing other litigants, including those embodied in Rule 11, and ultimately imposed the sanction of damages on each criminal defendant in the case pursuant to Fed.R.App.P. 38, guided by Rule 11's strictures.

What emerges from these cases is that no pleading, motion, or other paper will escape Rule 11 scrutiny. Moreover, the voluntary dismissal provisions of Fed.R.Civ.P. 41 will not afford refuge to an attorney seeking to outrun a Rule 11 violation since the violation is "complete when the paper is filed." *Szabo, supra,* 823 F.2d at 1077.

Further examples of the Seventh Circuit's aggressive posture on Rule 11 are found in cases such as *Shrock v. Altru Nurses Registry,* 810 F.2d 658 (7th Cir. 1987) (pro se nurse sanctioned), and *Kelly, supra,* 808 F.2d at 549 (single statement in affidavit that misrepresented inference as

fact deemed violation of Rule 11). *Accord Skycom Corp. v. Telstar Corp.,* 813 F.2d 810, 819 (7th Cir. 1987) (although fees not sought, Seventh Circuit remanded with suggestion that they be considered in light of statements misrepresenting inferences as facts). *See Walter v. Fiorenzo,* 840 F.2d 427, 433 (7th Cir. 1988) (both Rule 11 and 28 U.S.C. §1927 violated by needless multiplication of summary judgment proceedings).

Any lingering doubts that Rule 11 will be tenaciously applied were silenced in *Szabo, supra,* 823 F.2d at 1077: "Otherwise *splendid* conduct of the litigation does not excuse an established violation." [Emphasis added.] Particular caution should be observed by would-be tax protestors (*Coleman v. Commissioner,* 791 F.2d 68 (7th Cir. 1986) (collecting cases)), by those who seek to challenge arbitration awards on the applicability of mandatory arbitration clauses (*Bailey v. Bicknell Minerals, Inc.,* 819 F.2d 690 (7th Cir. 1987) (collecting cases)), and by those who would risk litigating in the face of potential limitations and res judicata bars to suit (*Cannon v. Loyola University of Chicago,* 784 F.2d 777, 782 (7th Cir. 1986) (claim barred by res judicata was "egregious and blatant violation of Rule 11"); *Dreis & Krump Manufacturing Co. v. International Association of Machinists & Aerospace Workers, District No. 8,* 802 F.2d 247, 255 (7th Cir. 1986) (abuse of discretion to deny sanctions when suit was time barred)). The Seventh Circuit has proclaimed that the ultimate Rule 11 violation is to falsely attribute a position to the court. *See Mays, supra,* 865 F.2d at 140.

There are, however, circumstances that may accord attorneys slight leeway. The widest latitude is afforded to litigants who make good-faith arguments in support of a change in existing law because "a court must take care not to penalize arguments for legal evolution." *Szabo, supra,* 823 F.2d at 1082. The appropriate format for such an argument, which must be scrupulously adhered to, is to "*accurately* describe the law and then call for change." [Emphasis added.] *Thornton, supra,* 787 F.2d at 1154. The caution with which such arguments will be examined has been phrased thusly:

> **To find out whether it was the opening shot in a campaign for some new legal principle, a court must examine what the lawyers later say about their work. Rule 11 creates difficulties by simultaneously requiring courts to penalize frivolous suits and protecting complaints that, although not supported by existing law, are bona fide efforts to change the law. The only way to find out whether a complaint is an effort to change the law is to examine with care the arguments counsel later adduce. When counsel represent that something cleanly rejected by the Supreme Court is governing law, then it is appropriate to conclude that counsel are not engaged in trying to change the law; counsel either are trying to buffalo the court or have not done their homework. Either way, Rule 11 requires the court to impose a sanction.** *Szabo, supra,* 823 F.2d at 1082.

Since 1993, the district courts have had the power to sanction law firms and represented parties, in addition to individual attorneys who sign papers. Fed.R.Civ.P. 11(c)(1). The Advisory Committee Notes to the 1993 amendments describe when these broader sanctions are appropriate. Advisory Committee Notes, 1993 Amendments, Fed.R.Civ.P. 11.

VI. [6.36] COUNTERCLAIMS

Among the pleadings allowed by Fed.R.Civ.P. 7 is the counterclaim, which is governed by Fed.R.Civ.P. 13 and filed with the answer. The counterclaim, which may name not only the original plaintiff, but also third parties, is generally susceptible to the same pleading attacks as a complaint. An exception is that a counterclaim may not be attacked on the basis that venue would have been improper if it had been brought by itself. See Charles Alan Wright, THE LAW OF FEDERAL COURTS §79 (4th ed. 1983).

A further exception is that matters that otherwise would be barred by the statute of limitations if brought in an independent complaint may survive if brought as a counterclaim in the nature of a setoff used only to defeat the plaintiff's claim. For this exception to apply, however, the matters pled as a setoff must arise from the same transactions as the plaintiff's claim. *See Stone v. White*, 301 U.S. 532, 81 L.Ed. 1265, 57 S.Ct. 851 (1937); *Wells v. Rockefeller*, 728 F.2d 209, 213 – 214 (3d Cir. 1984). *See also Venturi, Inc. v. Austin Co.*, 681 F.Supp. 584, 588 (S.D.Ill. 1988) (under what is now 735 ILCS 5/13-207, one may bring counterclaim otherwise barred by statute of limitations only if claim it counters was owned by plaintiff prior to expiration of limitations period, so when statute of limitations on defendant's counterclaim had run before plaintiff's claim accrued, §13-207 would not revive time-barred counterclaim).

Counterclaims are either "compulsory" or "permissive." Compulsory counterclaims are those that arise out of the transaction or occurrence that is the subject matter of the opposing party's claim, occur by the time the answer to the complaint is served, are not the subject of a prior pending action, and do not require for their adjudication the presence of third parties beyond the court's in personam jurisdiction. Fed.R.Civ.P. 13(a). All counterclaims that are not compulsory are permissive. *See Republic Health Corp. v. Lifemark Hospitals of Florida, Inc.*, 755 F.2d 1453 (11th Cir. 1985) (antitrust action not compulsory counterclaim in bankruptcy action); *USM Corp. v. SPS Technologies, Inc.*, 102 F.R.D. 167 (N.D.Ill. 1984) (antitrust claim as compulsory counterclaim in patent litigation).

Failure to assert a compulsory counterclaim results in a waiver of the claim. Fed.R.Civ.P. 13(a). There are, however, certain limited exceptions to this bar. For example, a would-be counterclaimant will not be precluded when it has successfully obtained a dismissal of the complaint under Fed.R.Civ.P. 12(a). *See United States v. Snider*, 779 F.2d 1151 (6th Cir. 1985). A further exception is that a federal court may not restrain a state court from hearing the claim not presented as a counterclaim. *Id. See also St. Paul Fire & Marine Insurance Co. v. Seafare Corp.*, 831 F.2d 57 (4th Cir. 1987) (counterclaim not required under Rule 13(a) when answer referred to pending state action encompassing claim); *Robbins v. Lynch*, 836 F.2d 330 (7th Cir. 1988) (erroneous dismissal of compulsory counterclaim for lack of subject-matter jurisdiction held harmless because counterclaim failed on merits).

A party who has failed to include a counterclaim may amend its pleading in accordance with Fed.R.Civ.P. 15(a). Fed.R.Civ.P. 13(f) formerly governed amendment of pleadings to add counterclaims, but this rule was phased out. Finally, a counterclaim that accrues or was acquired by the pleader after serving the pleading may, with leave of court, be filed by supplemental pleading. Fed.R.Civ.P. 13(e). *See Peter Fabrics, Inc. v. S.S. "Hermes,"* 765 F.2d 306 (2d Cir. 1985) (counterclaim properly added during trial when supporting evidence was already in record and plaintiff suffered no prejudice).

Beyond the waiver rule, the second crucial distinction between compulsory and permissive counterclaims is jurisdiction. Contrary to compulsory counterclaims, which can rely on the opponent's claim for jurisdiction, permissive claims require an independent basis unless pled as a setoff. 3 MOORE'S FEDERAL PRACTICE §13.110[2]. *See Oak Park Trust & Savings Bank v. Therkildsen*, 209 F.3d 648 (7th Cir. 2000) (dismissal of counterclaim was proper due to lack of subject-matter jurisdiction since counterclaim was permissive, not compulsive, and did not have independent basis for federal jurisdiction).

Counterclaims must be designated as such; otherwise, they require no reply unless the court orders one to be filed. 2 MOORE'S FEDERAL PRACTICE §7.02[5]. Matters of affirmative defense, however, that are erroneously labeled as counterclaims do not require a reply. *Id.*

PRACTICE POINTER

✓ To avoid any risk of making admissions by improperly failing to respond, doubts should be resolved in favor of filing a reply even if one suspects that the "counterclaim" designation is inaccurate.

VII. [6.37] CROSS-CLAIMS

Cross-claims are defined and governed by Fed.R.Civ.P. 13(g), which provides:

> **A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.**

Cross-claims resemble permissive counterclaims to the extent that they need not be pled.

Cross-claims are to be liberally construed. A properly asserted cross-claim is analyzed under the "logical relationship test," which seeks to determine whether the cross-claim involves many of the same factual and legal issues present in the main action. *Progressive Casualty Insurance Co. v. Belmont Bancorp.*, 199 F.R.D. 219, 223 (S.D. Ohio 2001). The factual predicate for the cross-claim must bear some relationship to the original action. As a consequence of this nexus, cross-claims generally do not present questions of jurisdiction or venue. See 3 MOORE'S FEDERAL PRACTICE §13.110[1][c].

Rule 13(g) also limits cross-claims to those filed against "copart[ies]," *i.e.*, defendant versus codefendant or plaintiff versus coplaintiff. Rule 13(g) does not create jurisdiction by itself. A court will not allow a cross-claim unless independent or ancillary federal jurisdiction exists. *Cam-Ful Industries, Inc. v. Fidelity & Deposit Company of Maryland*, 922 F.2d 156, 161 (2d Cir. 1991). *See also Georgia Ports Authority v. Construzioni Meccaniche Industriali Genovesi, S.P.A.*,

119 F.R.D. 693, 695 (S.D.Ga. 1988) (allowing original defendant to bring cross-claim under Rule 13(g) against third-party defendant as "coparty"); *Ryan v. Schneider National Carriers, Inc.*, 263 F.3d 816 (8th Cir. 2001) (plaintiff's claim against coplaintiff properly added as cross-claim, rather than by amending complaint to add coplaintiff as defendant, since claims against coplaintiff arose out of auto accident that was subject of original action).

VIII. [6.38] THIRD-PARTY PRACTICE (IMPLEADER)

When a defendant or plaintiff claims that a person or entity that is not a party to the action is liable for all or part of the recovery sought by the complaint, counterclaim, or cross-claim, Fed.R.Civ.P. 14 authorizes, but does not require, the filing of a third-party complaint. The claimant, referred to as the "third-party plaintiff," need not seek leave of court to serve the complaint if it is filed within 14 days of serving the original responsive pleading. See Fed.R.Civ.P. 14(a). The third-party defendant may then file motions, cross-claims, or counterclaims pursuant to Fed.R.Civ.P. 12 and 13 and even bring in outside parties pursuant to Rule 14.

A federal court has subject-matter jurisdiction to hear the third-party claim when it may exercise either independent or ancillary jurisdiction over it. *Revere Copper & Brass, Inc. v. Aetna Casualty & Surety Co.,* 426 F.2d 709, 718 (5th Cir. 1970). Seventh Circuit precedent establishes that ancillary jurisdiction exists over third-party claims that are analogous to compulsory counterclaims, but not over analogues to permissive counterclaims. *Hartford Accident & Indemnity Co. v. Sullivan,* 846 F.2d 377, 380 – 381 (7th Cir. 1988). Despite its use as a conceit to analyze jurisdiction, no such thing as a compulsory third-party claim exists. 846 F.2d at 382. When subject-matter jurisdiction exists over a third-party claim at its beginning and the underlying lawsuit is resolved, jurisdiction over the third-party claim does not automatically cease to exist, but must be reevaluated. *First Golden Bancorporation v. Weiszmann,* 942 F.2d 726, 731 (10th Cir. 1991).

When impleader is considered together with the seemingly endless possibilities for counterclaims and cross-claims, it is apparent that a once-simple lawsuit can easily become labyrinthine. For a good illustration of the possible permutations that arise in connection with counterclaims and cross-claims in the context of impleader, see 3 MOORE'S FEDERAL PRACTICE §14.27. Fed.R.Civ.P. 14(a)(4) addresses this problem by allowing "[a]ny party [to] move to strike the third-party claim, to sever it, or to try it separately." However, "a third-party defendant, facing a binding judgment, and permitted to raise defenses on the underlying claim, should be able to participate meaningfully in the litigation of the claim." 3 MOORE'S FEDERAL PRACTICE §14.25, p. 14-65.

IX. AMENDMENTS TO PLEADINGS

A. [6.39] General Observations

Fed.R.Civ.P. 15, which governs amended and supplemental pleadings, is generally accorded a liberal interpretation. Substantial latitude is allowed in order to assert matters that occurred

before the filing of the original pleading but were overlooked by the pleader or were unknown to the pleader at the time. Thus, Rule 15(a) provides that a party may amend a pleading once as a matter of course within 21 days after serving it. Or, if the pleading is one to which a responsive pleading is required, within 21 days after service of a responsive pleading or service of a motion under Fed.R.Civ.P. 12(b), 12(e), or 12(f).

After the filing of a responsive pleading, or after the time for amending as of right has otherwise expired, amendment may be made only by leave of court or with the written consent of the adverse party. Fed.R.Civ.P. 15(a)(2) provides, however, that "[t]he court should freely give leave when justice so requires," and refusal to permit amendment is an abuse of discretion in the absence of justification for the refusal. *Foster v. DeLuca*, 545 F.3d 582, 584 – 585 (7th Cir. 2008). Leave to amend may be accompanied with conditions that the pleader must satisfy if there is some reason that such conditions are necessary. The test to determine whether amendment is proper is a functional rather than conceptual one.

It is entirely irrelevant that a proposed amendment changes the cause of action or the theory of the case, that it states a claim arising out of a transaction different from that originally sued on, or that it causes a change in parties. Normally, leave to amend should be denied only if it would cause actual prejudice to an adverse party. However, a busy court does not abuse its discretion if it protects itself from being imposed on by the presentation of theories ad seriatim and, thus, may deny a belated application to amend that makes a drastic change in the case in the absence of some good reason why the amendment is offered at a late stage. Charles Alan Wright, THE LAW OF FEDERAL COURTS §66 (4th ed. 1983). *See Tamari v. Bache & Company (Lebanon) S.A.L.*, 838 F.2d 904, 909 (7th Cir. 1988) ("the burden to the judicial system from allowing parties to change theories in midstream is a pertinent factor and may in appropriate cases justify a refusal to allow an amendment even if the amendment would cause no hardship at all to the opposing party"); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 809 – 810 (9th Cir. 1988) (undue delay, prejudice, and prior repeated failures to cure deficiencies are all valid reasons to deny leave to amend); *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329 (10th Cir. 1988) (claim preclusive effect of denial of consolidation with related lawsuit).

A motion is not a "responsive pleading" within the meaning of Rule 15(a), so a plaintiff may cure defects identified in a motion to dismiss by amending the complaint as of right before the motion is ruled on. *Hill v. City of Indianapolis*, 17 F.3d 1016, 1018 (7th Cir. 1994).

B. [6.40] Relation Back

Fed.R.Civ.P. 15(c)(1) allows the amendment of a pleading to relate back to the original pleading when:

> **(A) the law that provides the applicable statute of limitations allows relation back;**
>
> **(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or**

> **(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:**
>
> > **(i) received such notice of the action that it will not be prejudiced in defending on the merits; and**
> >
> > **(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.**

Rule 15(c) is based on the concept that a party that is notified of litigation concerning a given transaction or occurrence has been given all the notice that statutes of limitation are intended to afford.

> **An amendment is permitted to relate back when a pleader attempted, but failed, to set forth a claim or defense in the original pleading. Thus, if the amendment corrects technical deficiencies in order to more adequately plead the claim or defense that was attempted in the original pleading, the amendment will relate back.** 3 MOORE'S FEDERAL PRACTICE §15.19[2], pp. 15-100 through 15-101.

In *United States v. Davis*, 614 F.Supp. 957, 959 (N.D.Ill. 1985), the court held that amendments that correct technical deficiencies or restate the original claim with greater particularity or detail will relate back to the date of the original pleading:

> ***Staren v. American National Bank & Trust Co. of Chicago*, 529 F.2d 1257, 1263 (7th Cir. 1976) teaches amendments under Rule 15(c) should be allowed freely when a complaint has put the defendant on notice of the claim. *Solo Cup Co. v. Paper Machinery Corp.*, 359 F.2d 754, 758 (7th Cir.1966) and 3 Moore, *Moore's Federal Practice* ¶15.15[2], at 15-190 to -191 stress the defendant need be put on "fair notice" of only the "general fact situation" out of which the claim arises. 6 Wright & Miller, *Federal Practice and Procedure: Civil* §1497, at 489-92 makes out the dividing line for limitations purposes:**
>
> > **When plaintiff attempts to allege an entirely different transaction by amendment, as, for example, the separate publication of a libelous statement or the breach of an independent contract, the new claim will be subject to the defense of statute of limitations.**
> >
> > **On the other hand, amendments that merely correct technical deficiencies or expand or modify the facts alleged in the earlier pleading meet the Rule 15(c) test and will relate back. Thus, amendments that do no more than restate the original claim with greater particularity or amplify the details of the transaction alleged in the preceding pleading fall within Rule 15(c).**

In *Staren v. American National Bank & Trust Company of Chicago,* 529 F.2d 1257 (7th Cir. 1976), a group of individual plaintiffs sued several defendants for alleged violations of federal and state securities laws. After the statute of limitations would have expired, the plaintiffs filed an amended complaint that substituted a corporation as the party plaintiff in lieu of the individual plaintiffs. The Seventh Circuit held that the amendment related back pursuant to Rule 15(c):

> **It is well settled that the Federal Rules of Civil Procedure are to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits and to dispense with technical procedural problems. To this end, amendments pursuant to Rule 15(c) should be freely allowed. Further, the cases clearly state that *notice* is the critical element involved in Rule 15(c) determinations. . . .**
>
> **The emphasis is to be placed on the determination of whether the amended complaint arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. [**Emphasis added.**] [**Citations omitted.**] [**Footnote omitted.**]** 529 F.2d at 1263.

See also In re Olympia Brewing Company Securities Litigation, 612 F.Supp. 1370 (N.D.Ill. 1985) (newly added Racketeer Influenced and Corrupt Organizations Act allegations held to relate back to filing of complaint alleging securities fraud even though amended complaint not only added new legal theory but also added factual allegations that could be characterized as falling within general "transaction" alleged in original complaint); *Dandrea v. Malsbary Manufacturing Co.,* 839 F.2d 163 (3d Cir. 1988) (amendment to add corporation's new name held to relate back to original filing date for statute of limitations purposes since amendment would not change party).

In *Wilson v. Westinghouse Electric Corp.,* 838 F.2d 286, 289 – 290 (8th Cir. 1988), the plaintiff initially filed an age discrimination complaint within the 60-day waiting period prescribed by federal law. The court held that the defect was properly cured by a supplemental pleading under Rule 15(d) after expiration of the waiting period. Relation back under such circumstances would be "precisely the kind of procedural mousetrap that the Federal Rules were designed to dismantle." 838 F.2d at 289.

In a diversity action, a federal court may apply the federal rule to allow relation back and is not bound by a more restrictive state rule on the subject. The cases were once in conflict on this point but the decision in *Hanna v. Plumer,* 380 U.S. 460, 14 L.Ed.2d 8, 85 S.Ct. 1136 (1965), should remove any doubt as to this. See also articles cited in Charles Alan Wright, THE LAW OF FEDERAL COURTS §66, p. 430 n.28 (4th ed. 1983).

C. [6.41] Supplemental Pleadings

Fed.R.Civ.P. 15(d) gives the court discretionary power to permit supplemental pleadings. A supplemental pleading deals with events that have occurred since the original pleading was filed. *See Owens-Illinois, Inc. v. Lake Shore Land Co.,* 610 F.2d 1185, 1188 – 1189 (3d Cir. 1979). Thus, it differs from an amended pleading, which covers matters occurring before the filing of the

original pleading but overlooked at that time. A supplemental pleading that is mislabeled as an amended pleading will be considered under the rules for supplemental pleadings and vice versa. *Cabrera v. City of Huntington Park*, 159 F.3d 374, 382 (9th Cir. 1998).

A district court can deny leave to file supplemental pleadings when the addition of new matter would result in prejudice to the other party (*Weeks v. New York State (Division of Parole)*, 273 F.3d 76, 88 (2d Cir. 2001)) or if the movant has the option of filing a separate suit instead of filing supplemental pleadings (*Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1229 (11th Cir. 2008)).

D. [6.42] Amendments To Conform to Evidence

Fed.R.Civ.P. 15(b) allows the pleadings to be amended to conform to the evidence admitted at trial:

> **(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.**
>
> **(2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.**

See Galindo v. Stoody Co., 793 F.2d 1502, 1512 – 1513 (9th Cir. 1986) (court properly amended pleadings to include plaintiff's claim for breach of fair representation duty when defendant union introduced evidence and argued issue); *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 288 (plaintiff's oral amendment of pleadings during trial allowed when plaintiff had included issue in its trial brief), *op. amended on denial of reh'g*, 853 F.2d 292 (5th Cir. 1988).

X. TIME REQUIREMENTS

A. [6.43] Distinctive Federal Provisions

The method of computing pleading time in federal practice is significantly different from that employed in state practice. The most meaningful distinctions are:

1. The effective date of an answer, counterclaim, cross-claim, or reply is the date of its service on opposing parties rather than the date on which it is filed. Filing may be completed "within a reasonable time" after service of the pleading. Fed.R.Civ.P. 5(d).

2. Any paper other than a summons and complaint, including a request to waive service of summons, may be made by first-class mail. Fed.R.Civ.P. 4(d), 5(b)(2)(C). Service by mail, when appropriate, is complete at the time of mailing. Fed.R.Civ.P. 5(b)(2)(C). If the plaintiff does not file a waiver of service, service may be accomplished in the traditional ways. Fed.R.Civ.P. 4(c). If the defendant refuses to waive service without good cause, the court "must" make the defendant pay for the cost of service. Fed.R.Civ.P. 4(d)(2).

3. Service of summons and complaint must be made within 120 days after filing. Fed.R.Civ.P. 4(m).

4. When the time for a responsive pleading is determined by the service of the adversary's pleading, that time for response is extended by three days if service was made by mail or on the clerk of the court because no mailing address was known. Fed.R.Civ.P. 6(d).

5. All time periods measured in days include intervening Saturdays, Sundays, and holidays. Fed.R.Civ.P. 6(a)(1)(B). But filing deadlines exclude the partial day on which the event creating the deadline occurred and begin on the next full day. Fed.R.Civ.P. 6(a)(1)(A). If the last day of a filing window would be a Saturday, Sunday, or court holiday, the deadline is extended to the court's next business day. Fed.R.Civ.P. 6(a)(1)(C), 6(a)(2)(C).

B. [6.44] Federal Pleading Schedule

If no motion is made attacking the pleadings, the times for serving responsive pleadings are:

1. The answer must be served within 21 days after service of the summons and complaint unless service of summons has been timely waived on request under Fed.R.Civ.P. 4(d). Fed.R.Civ.P. 12(a)(1)(A). If service is waived, the answer must be served within 60 days after the date when the request for waiver was sent or within 90 days after that date if the defendant was addressed outside any judicial district of the United States. *Id.*

2. A counterclaim or cross-claim must be served with the answer. Fed.R.Civ.P. 13.

3. A third-party complaint must be served within 14 days after service of the original answer. Fed.R.Civ.P. 14(a).

4. A reply to a counterclaim and an answer to a cross-claim must be filed within 21 days after service of the claim. Fed.R.Civ.P. 12(a)(1)(B).

5. The answer and other responsive pleadings by a third-party defendant must be filed within 21 days after service of the summons and third-party complaint. Fed.R.Civ.P. 14(a), 12(a).

6. A reply to the answer, if allowed by the court, must be filed within 21 days after service of the order allowing the reply. Fed.R.Civ.P. 12(a)(1)(C).

The United States and its agencies are granted 60 days within which to respond to any claim. Fed.R.Civ.P. 12(a)(2), 12(a)(3).

Any of the foregoing deadlines may be extended by the court. Fed.R.Civ.P. 6(b)(1). If a motion seeking an extension is not made before the applicable due date passes, the movant will need to show excusable neglect. *Id.* However, a court must not extend the time to act under Fed.R.Civ.P. 50(b), 50(d), 52(b), 59(b), 59(d), 59(e), and 60(b). Fed.R.Civ.P. 6(b)(2).

If a defendant to any claim moves for dismissal, to strike, or for a more definite statement, the time for service of the answer is extended until 14 days following denial of the motion. Of course, if the motion is granted, the time for response ordinarily will be determined by the plaintiff's election to amend or to stand on its pleading and by the further pleading schedule as established by the order granting the defendant's motion. However, if a more definite statement is granted, the answer must be served within 14 days after service of the expanded pleading. Fed.R.Civ.P. 12(a)(4).

If a pleading is amended, the adversary must respond within the same time period as if responding to the original pleading or within 14 days after service of the amendment, whichever is longer. Fed.R.Civ.P. 15(a)(3).

XI. [6.45] FORMS

Sample forms for use under the Federal Rules of Civil Procedure are included in an appendix to the rules. According to Fed.R.Civ.P. 84: "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."

Specific forms in local use, some of which can be completed and filed online, are available at the websites for the various federal courts. See, for example:

Central District of Illinois	www.ilcd.uscourts.gov
Northern District of Illinois	www.ilnd.uscourts.gov
Southern District of Illinois	www.ilsd.uscourts.gov
Seventh Circuit Court of Appeals	www.ca7.uscourts.gov

For links to the websites for other federal courts, see the federal judiciary homepage, www.uscourts.gov.