

# Mastering Civil Procedure Checklist

For cases originally filed in federal court, is there an anchor claim, over which the court has personal jurisdiction, venue, and subject matter jurisdiction? If not, then the defendant should move to dismiss the case.

- Personal jurisdiction over the anchor claim:
  - Does a federal long-arm statute apply to the claim? If not, does a state long arm statute authorize service of process?
  - Does assertion of personal jurisdiction over the claim against the defendant comport with Due Process requirements?
    - Is the defendant a resident of the state? Has it voluntarily appeared, waived, or consented to personal jurisdiction? Is it a plaintiff, and so consented to assertion of counterclaims? Is jurisdiction in rem sufficient?
  - Is there general jurisdiction over the plaintiff because it has systematic and continuous contacts with the forum state?
    - Is there specific jurisdiction over the claim because the defendant has minimum contacts with the forum and assertion of personal jurisdiction would not offend traditional notions of fair play and substantial justice?
- Subject matter jurisdiction over the anchor claim:
  - Does the claim “arise under” federal law?
  - Is there complete diversity between the parties and does the amount in controversy, exclusive of costs and interest, exceed \$75,000? If there is more than one claim, can the amounts be aggregated to reach \$75,000?
  - Is there a “substantial federal question” raised by a state law claim that does not satisfy diversity requirements?

- Venue over the anchor claim:
  - Is venue over the claim proper under a specific statute?
  - Is venue over the claim proper under the general federal venue statute, in that either it is filed (a) in a judicial district where any defendant resides and all the defendants reside in that state; (b) it is filed in a district in which a substantial part of the events or omissions occurred; or (c) it is in a district where any defendant can be found if venue is not proper elsewhere?

**For cases removed to federal court from state court:**

- Did the removing parties seek to remove within 30 days of receipt of the pleading or other paper showing the case was removable?
- For diversity-type removal:
  - Is there complete diversity over one claim? If not, is the non-diverse defendant fraudulently joined?
  - Is there a forum defendant? If so, has it been fraudulently joined?
  - Is the amount in controversy established?
  - Did the defendants comply with the one-year deadline? If not, is there an equitable exception to the one-year deadline?
- Has the right to seek removal been waived by conduct?
- Did all properly joined defendant join in the removal? If not, were they fraudulently joined?
- Is the case subject to remand by the plaintiff?
  - Is any state law claim “separate and independent” and so subject to remand?

**For each additional claim:**

- Is there authority in Rules 13, 14, 18, 19, 20, 21, 22, 23, or 24 to join the claim? Does a federal statute, such as those governing intervention or interpleader authorize joinder?
- Is there personal jurisdiction, pendent personal jurisdiction, or has personal jurisdiction been waived or provided by consent?
- Is there original subject matter jurisdiction or supplemental jurisdiction over the claim?
- Is there venue, pendent venue, or is venue over the claim unnecessary?

### Complaints

- Does the complaint allege subject matter and personal jurisdiction?
- Does it allege facts which, if true, state a claim upon which relief can be granted?
- Are allegations of fraud or mistake pled with particularity?
- Are damages prayed for, and special damages specifically pled?

### Defendant's Choices

- Make a pre-answer motion.
  - Is a pre-answer motion required because the complaint contains scandalous material or is indefinite?
  - Is a pre-answer motion permitted because subject matter jurisdiction, personal jurisdiction, or venue are lacking, or the complaint fails to state a claim upon which relief can be granted, was improperly served, or fails to join an indispensable party?
  - If a pre-answer motion is permitted or required, all available defenses except lack of subject matter jurisdiction, failure to join an indispensable party, and failure to state a claim must be consolidated or they are waived.
- File and serve an Answer
  - Which averments must the defendant deny? Admit? Plead insufficient information?
  - Which affirmative defenses must be pled?
  - Which claims are "compulsory counterclaims" that must be pled?
- Do nothing.
  - This generally allows the plaintiff to obtain a default judgment.

### Does the Case Present Special Venue Issues?

- Even if a claim is properly filed a court, if the convenience of parties and witnesses indicates another forum is clearly more convenient, is there basis for any party to move to transfer venue under 28 U.S.C. 1404(a)?
- Is there a forum selection clause which supports transfer of venue?
- Does forum non Conveniens necessitate dismissal?

**Amendments to Pleadings.**

- If no scheduling order is in effect:
  - A party may amend its pleading as a matter of right if a responsive pleading is permitted but not yet filed, or if one is not permitted, then if 20 days have not passed.
  - A party may amend its pleading with consent of the opposing parties;
  - A party may amend its pleading upon motion which shall be freely given.
- If a scheduling order is in effect and the deadline passed, then the party must show good cause to modify the date in the scheduling order and also meet one of the three alternatives above.
- If a final pretrial order is in effect and the deadline passed, then the party must show “manifest injustice” will result and also meet one of the alternatives above.
- If the amendment adds a claim, and if limitations has run on that claim, then the amendment would be futile if the claim does not “relate back” under Rule 15(c).

**Rule 26(f) Conference, Initial Disclosures, Scheduling Conference, and Discovery**

- Each party must confer and, within 14 days thereafter, disclose to each other party certain information under Rule 26 that it may use to support a claim or defense.
- The court must issue a Rule 16 scheduling order, which sets deadlines for discovery, motions for summary judgment, expert witnesses and other deadlines.
- The parties may begin discovery only after the Rule 16 order is in place:
  - Interrogatories may be served only on parties
  - Requests for admissions may be served only on parties;
  - Document requests may be served on parties and, by way of subpoena, on non-parties;
  - Oral depositions may be taken of parties and, by way of subpoena, on non-parties;
  - Other forms of discovery such as physical examination and deposition on written questions are also available.
- All discovery is limited, absent court order, to that which is relevant to a claim or defense in the lawsuit.

### Which Law Applies?

- Federal Claims: Federal substantive and procedural law applies.
- State Claims: Federal procedural law, but state substantive law, applies.
  - Which state's law applies turns on which state has the most significant contacts with the claim.
  - Whether state law is characterized as “substantive” – and so controls over a contrary federal procedural rule – turns on the Erie doctrine.

### Adjudication Prior to Trial

- Default can be taken if the defending party fails to answer or otherwise appear.
- The party asserting the claim can voluntarily dismiss under Rule 41.
- A party defending a claim can obtain dismissal for failure to state a claim upon which relief can be granted or for judgment on the pleadings under Rule 12.
- Either party may seek summary judgment on a claim or defense asserted by or raised against it
  - If the party moving for summary judgment does not have the burden of proof on the issue at trial, then it need only show that there is no genuine issue of disputed fact and the summary judgment evidence shows there is insufficient evidence for a reasonable jury to find for the non-movant on one or more elements of the claim or defense.
  - If the party moving for summary judgment also has the burden of proof on the issue at trial, then it must show there is no genuine issue of disputed fact and the summary judgment evidence is so compelling that no reasonable jury could find for the non-movant.

### Adjudication by Trial

- The parties must submit the final pretrial order including exhibits, witnesses, and other disclosures.
- Whether the court, or jury, will decide a claim turns on whether there is a right to trial by jury and whether a party properly invoked that right under Rule 38.
- Once the party with the burden of proof on an issue has had an opportunity to be fully heard, then the opposing party may move for judgment as a matter of law under Rule 50.

**Post-trial**

- After verdict, the losing party must promptly seek to poll the jury or argue that the jury's verdict is inconsistent.
- After verdict, the clerk or court must enter judgment in a separate piece of paper.
- Post-trial motions for new trial and for judgment as a matter of law must be made within 10 days of entry of the judgment.
  - A post-judgment Rule 50(b) motion can be granted only to the extent the issues it raises were raised prior to submission of the case to the jury.
  - New trial motions under Rule 59 may be based upon either errors at trial or the fact that the verdict was against the great weight of the evidence.
- The judgment winner can "execute" on the judgment unless execution is stayed pending appeal.
- Absent an exception to the final judgment rule, only after judgment is entered can anyone appeal.
  - The exceptions to the final judgment rule are narrow and include the collateral order doctrine, orders granting or denying injunctive relief, and certified appeals under Rule 54(b).
- Collateral attacks by way of Rule 60(b) are extremely limited in order to avoid the final judgment rule.