

# Common Law Civil Procedure



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# Chapter 6 Section 4

## **Discovery**

# I. Discovery

## **Discovery is the pretrial factfinding device in Civil Procedure**

- ▶ it is carried out by the attorneys of either party
- ▶ in the presence of the attorney of the opponent
- ▶ in cases of lack of cooperation the courts may render an order  
i.e. for a witness to appear, to present documents etc.  
if the person or party will not comply with the court order she is in  
contempt of court
- ▶ **principle of mandatory disclosure (with exemptions)**

# I. Discovery

## Mandatory Disclosure in the Federal System (Rule 26)

### Three steps of Discovery

- ▶ **Initial disclosure** - naming persons likely to have information, provide the other party with copies of documents to be used, electronically stored information, tangibles, computation of damages sought, any insurance agreements
- ▶ **Expert Testimony** - identify experts to be used at trial to the other party
- ▶ **Pretrial Disclosure** - identity of witnesses to be presented at trial, depositions, documents and exhibits to be used

# I. Discovery

## The „Work-Product“ Doctrine, Rule 26(b)(3)

- ▶ Hickman v. Taylor, 329 U.S. 495 (1947) USSC
- ▶ today in Rule 26(b)(3)
- ▶ a tool to prevent „parasitism“: letting one attorney do all the inquiry and then have all the documents presented by way of
- ▶ Work-Product Rule will give way to exceptions from discovery of such documents and property, if the party demanding disclosure cannot show a need for this information to prepare for the case, especially if obtaining this information is not possible otherwise or would impose a hardship upon the party

# I. Discovery

## Discovery Devices

- ▶ **oral depositions**
- ▶ **depositions upon written questions**
- ▶ **interrogatories**
- ▶ **discovery and production of property** (documents and things)
- ▶ **physical and mental examination**
- ▶ **requests for admission**

# I. Discovery

## Oral Deposition

- ▶ in the presence of a court officer and both attorneys
- ▶ party or witness (deponent) has to answer all questions, unless they would touch privileged information; cross examination; the scope of evidence is not limited by the rules of evidence; oath is taken
- ▶ costly way of discovery, a small trial
- ▶ used for witnesses outside the court's power of subpoena, in federal procedure for witnesses more than 100 miles away from the court
- ▶ allows the attorneys to get a good impression of the individual

# I. Discovery

## Written Deposition

- ▶ attorney develops a list of questions to the deponent
- ▶ list is sent to opposing attorney, who will insert questions for cross examination (redirect and recross questions may also be inserted)
- ▶ court summons the deponent before a court officer, the written questions are answered under oath and transcribed



# I. Discovery

## **Interrogatory**

# I. Discovery

## Interrogatory

- ▶ written questions to a party which are answered in writing under oath
- ▶ interrogatories will usually not be allowed as a means of evidence at trial
- ▶ interrogatories rather give attorneys first information about the case, they are often used as a first step
- ▶ burdensome use of interrogatories especially in business context is restricted under the FRCP and many state systems

# I. Discovery

## **Discovery and Production of Property (documents and things)**

- ▶ requesting parties may inspect files, make copies, inspect premises, take photographs or use any other form of record
- ▶ exchange of document copies almost immediately after the commencement of the proceeding
- ▶ problem of „control“ over property: *Societe Internationale v. Rogers*, 357 U.S. 197 (1958) USSC (documents ruled to be produced; this constituted a criminal offense in Switzerland; court had knowledge that party might be able to influence Swiss government – which changed the law!)

# I. Discovery

## Physical and Mental Examination

- ▶ necessary request as opposing party will on himself not produce medical reports as this is privileged information
- ▶ examination of: other party, injured child the parents sue for, an employee, whose condition is in controversy
- ▶ discovery device under complete court control!
- ▶ only issued, when necessity to the case is shown
- ▶ examinee is handed out any report the examining person has put together

# I. Discovery

## Requests for Admission

- ▶ party serves upon the other the request, that facts essential to the case be admitted
- ▶ request is filed without the court intervention
- ▶ responding party either has to admit, to deny or to give a statement, why he/she cannot truthfully admit or deny the facts questioned
- ▶ response is under oath
- ▶ device is used to make clear upon which facts there is no dispute

Chapter 6 section 5

**Pretrial Conference**

# I. Pretrial Conference

## Reasons for the Need of a Pretrial Conference

- ▶ nature of civil procedure has developed a need of judicial intervention to prepare for trial; reasons are i.e.
  - joinder of parties and claims
  - almost unlimited discovery
  - less informative pleadings
  - complex cases

# I. Pretrial Conference

## Nature and Aim

- ▶ a pretrial conference is a meeting of the attorneys and a trial judge
  - instead of a judge a magistrate with certain judicial powers may chair the pretrial conference
  - sometimes the parties also may have to appear at the conference
- ▶ the conference shall help to structure the trial, sort out facts not disputed and clarify procedural aspects in preparation for trial thus the conference shall also prevent unnecessarily protracted trials



# I. Pretrial Conference

## Parties' Duties

- ▶ parties have to
  - appear at the pretrial conference
  - reveal all facts found,
  - disclose all evidence to be used in the case
  - stipulate upon issues agreed upon
  - comply with court orders or constructively deal with suggestions
  - consider a settlement if suggested

# I. Pretrial Conference

## Conference Judge and Trial Judge

- ▶ in most jurisdictions conference judge and trial judge are not identical; courts differ;
- ▶ arguments for identity
  - less incentive for judge to become totally familiar with the case
  - less effective trial
  - expertise and familiarity to the case is otherwise lost
- ▶ arguments against identity
  - lessening of coerciveness of conference judge's suggestions
  - no fear that failure to concede or admit will be treated as prejudicial at trial

# I. Pretrial Conference

## Conference Judge's Role

- ▶ forcing settlement?
  - judge usually suggests a settlement once the facts are revealed and he/she assumes the case apt for settlement
  - judge shall not urge parties into settlement
- ▶ forcing the parties to stipulate on the issues?
  - pretrial conference is designed to sort out all facts which are agreed upon – these are no issues in trial
  - most courts negate the judge's power to force the parties to stipulate

# I. Pretrial Conference

## Conference Judge's Role

- ▶ sanctions against parties upon failure to comply with court requests:
  - failure to appear, reveal information, disclose evidence
    - reducing the party's ability to use information and evidence at trial just to the extent the failing party actually has complied with the court's requests
    - reimbursement of costs to the other party for failure to comply
    - default judgment against defendant
    - involuntary dismissal of the action upon failure of plaintiff
  - default judgment and involuntary dismissal only in severe cases

## II. Pretrial Order

### Contents

- stipulation of facts agreed upon
- list of evidence (including witnesses) agreed upon
- any other issue decided in the conference
  - i.e. procedural questions, such as proper joinder of parties and claims

### Effect

- order supersedes the pleadings, controls the following proceeding

## II. Pretrial Order

### **Motion to amend**

- ▶ introduction of new issue lies within descretion of the court;
- ▶ party will have to file a motion for amendment to the pretrial order
  - court will take into account whether movant was dilatory in following court requests during the pretrial conference

Chapter 6 section 6

**Adjudication Without Trial**

# I. Forms of Adjudication without Trial

## Overview

- ▶ Summary Judgment
- ▶ Default Judgment
- ▶ Voluntary and Involuntary Dismissal



## II. Summary Judgment

### Scope of Summary Judgment

- ▶ demurrer or motions to dismiss for failure to state a claim will not allow the movant to bring in outside information
- ▶ if such additional information is brought into the case, the motion is regarded as one for summary judgment
- ▶ summary judgment is rendered, if the case or parts of the case are no issues of fact
  - because of admission or
  - if the underlying facts can be established outside trial

## II. Summary Judgment

### Grounds and Prerequisites

- ▶ motion by a party, usually supported by written material, rarely by oral evidence; often depositions are used in support of the motion
- ▶ no genuine dispute as to any material fact within the scope of the motion:
  - a part of the issues at stake may remain for trial if facts are contested,
  - in these cases the motion leads to a summary judgment on a part of the merits and simplifies the trial
  - minor facts or feigned facts will not prohibit summary judgment

## II. Summary Judgment

### Grounds and Prerequisites

- ▶ movant has to be entitled to a judgment as a matter of law
- ▶ movant bears the burden of proof in showing that prerequisites for summary judgment are met
  - mere disagreement of the opposing party to the statements of movant will in itself not suffice to successfully prevent the entry of summary judgment

### Time

- ▶ at any time after the pleadings have been completed (in some jurisdictions even before the answer)

## II. Summary Judgment

### **Credibility Issue**

- ▶ the allegation that material facts may only be proven by evidence brought before a jury is a problematic issue
  - this could block any motion for summary judgment
- ▶ credibility issue leads to
  - motion v. jury trial right
  - differing solutions among the jurisdictions, even among courts

## II. Summary Judgment

### Procedure

- ▶ motion usually only after completion of pleadings
- ▶ court has to make sure that opponent has fair opportunity to show that there is a dispute on material fact
- ▶ usually a hearing before decision, though not mandatory

## III. Default Judgment

### Types of Default

- ▶ defendant fails to answer or to appear
- ▶ defendant makes an appearance but fails to file a formal answer or to appear at trial
- ▶ defendant fails to comply with court order in pretrial stage and court uses default judgment as a penalty for the severity of the defendant's conduct

## III. Default Judgment

### Entry of Default and Default Judgment (Rule 55 FRCP)

- ▶ **entry of default**

is a notation by the court clerk, if default is shown by affidavit or otherwise; it precludes the defendant from any new defenses regarding liability

- ▶ **entry of a default judgment**

judgment on the merits entered against the defendant in default

## III. Default Judgment

### **Sum of Payment Due – i.e. Liquidated Damages**

#### **▶ entry of default**

when it is clear that the claimant has the right to recover a certain sum (and only this sum, i.e. in case of liquidated damages)

the court clerk may enter the default judgment

- special and exceptional case!



## III. Default Judgment

### **Defendant made an Appearance, then defaults**

- ▶ **default judgment only by court**
  - hearing before decision
  - notice to the defendant prior to the hearing
  - all subsequent papers are to be served with the defendant, lack of such service will give rise to a motion to set aside the default judgment under Rule 60(b) FRCP
    - rationale: benefit for defendant for prior cooperation

## III. Default Judgment

### **Defendant filed notice but no technical answer**

- ▶ treated as an „appeared and defaulted“ case

### **Defendant responded, then failed to appear**

- ▶ no uniform answer to this case
  - defendant has raised issue, has not conceded liability
    - plaintiff to prove liability?
  - but defendant is not present
    - handle the case as a default with liability conceded?

## III. Default Judgment

**Defendant making an Appearance, defending, participating in pretrial, defaulting at trial**

- ▶ **untrue default situation**
  - issues for procedure have been framed
  - adversarial situation
  - entry of a judgment without prior notice
  - no technical situation for a default judgment

## III. Default Judgment

### Prior Notice

- ▶ the right for prior notice arises, if the defendant has made „an appearance“, thus shown interest to contest the complaint  
any written statement will be treated equal to an appearance
  - defending party or representative has to be served with written notice of the motion filed 7 days prior to the application of a default judgment

## IV. Dismissal

### **Voluntary Dismissal (Rule 41(a) FRCP)**

- ▶ plaintiff has right to voluntarily dismiss the action by mere notice to the court
  - if the defendant has not yet answered to the action
- ▶ plaintiff may dismiss the case after the defendant's answer only with defendant's consent or court approval
- ▶ first dismissal will not prejudice a second action based on the same claim; a second dismissal of an action based on the same claim will prejudice a third

## IV. Dismissal

### **Involuntary Dismissal (Rule 41(b) FRCP)**

- ▶ plaintiff has failed to prosecute
- ▶ typical cases:
  - plaintiff has not taken steps toward trial after filing the complaint
  - plaintiff has failed to appear at hearing or at the pretrial conference
  - plaintiff has delayed procedure, has lengthened time periods
- ▶ defendant moves for dismissal
  - dismissal operates on the merits with further claim prejudice

# Chapter 7

## **Trial**

# I. Trial

## Preparation

- ▶ after Pretrial Stage, if the case has to be tried, time and place will be fixed, a trial judge will be assigned the case
- ▶ both parties have to be present for trial
- ▶ preparatory court orders are issued (i.e. summons of witnesses, of a jury pool etc.)
  - **US Civil Procedure provides for juries (upon motion of a party)**

**Rules of Evidence (FRE) apply**



# I. Trial

## Structure

- ▶ **opening statements** of plaintiff's counsel and of defendant's counsel
  - presenting their fact allegations, what they intend to prove, which relief is sought
  - giving an overview of the evidence they want to present
- ▶ **plaintiff's witnesses and other evidence** are examined and cross-examined
- ▶ **defendant's witnesses** and other evidence are examined and cross-examined
- ▶ **closing statements of the parties**

# I. Trial

## Structure

- ▶ **closing statements**
  - plaintiff's, then defendant's
  - plaintiff's right of rebuttal
- ▶ **in non-jury cases: judge renders a judgment**
- ▶ **in jury cases:**
  - judge instructs the jury as to the law to be applied
  - judge asks the jury questions substantial to the decision of the case,
  - jury returns a verdict after deliberation in seclusion
  - judge renders a judgment upon the verdict

# I. Trial

## Structure

- ▶ **in jury cases:**
  - verdict is not given reasons
  - if the jury is deadlocked, judge may send the jury back to deliberations
  - if the jury remains deadlocked, the case has to be retried („hung jury“); the presence of a „shadow jury“ during the entire trial will give way to a new verdict without retrying the case