

Common Law Civil Procedure



Univ.- Prof. Dr. Walter Buchegger
walter.buchegger@jku.at

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. Structure

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**

Rules of Evidence (FRE) apply

I. Structure

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 **direct evidence** are examined and cross-examined
- ▶ **defendant's witnesses** and other **direct evidence** are examined and cross-examined
- ▶ plaintiff's and defendant's presentation of rebuttal evidence

I. Structure

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 or just generally asks for a verdict in favor of one party
 - jury returns a verdict after deliberation in seclusion
 - judge renders a judgment upon the verdict

I. Structure

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

II. Jury Trial

Amendment VII to the U.S. Constitution (1791) (part of the Bill of Rights 1791, Amendments I thru X)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

- waivable right to a jury
- factfinding of the jury is not to be reexamined than according to the rules of common law.

II. Jury Trial

Right to Jury Trial

- ▶ in cases as jury trial existed under English common law, when the amendment was adopted (USSC)
 - courts in equity had no juries
 - today one of the most difficult constitutional questions, as the provision does **not create** but **preserve** a right existing at that point in time (1791)
- ▶ today, dynamic interpretation of historically twofold adjudication: balance between reliefs in law and equity has shifted

II. Jury Trial

Right to Jury Trial

- ▶ all cases heard before federal courts and the courts of the District of Columbia, not in state court systems, unless state constitution provides for juries
- ▶ cases of statutorily created cause of action which expressly or impliedly provide for a jury trial
- ▶ discretion of the court in equity proceedings to empanel an advisory jury

II. Jury Trial

Right to Jury Trial

- ▶ state law, which is to be enforced by federal courts, is subjected to the FRCP und to jury trial
- ▶ if a state court enforces a federally created right, of which the right to jury trial is a substantial part, court may not eliminate jury trial
- ▶ parties may waive their right to a jury

Note: Most of the trials in the U.S. are without juries, the judge is hearing the evidence, doing factfinding as well as lawfinding

II. Jury Trial

Jury – Judge

- ▶ **jury consists** of 6 to 12 persons, selected by way of **vois dire**
- ▶ verdict has to be passed **unanimously, unless the parties stipulate otherwise**
- ▶ **jurors have three tasks:**
 - determining what the facts are
 - evaluating the facts in terms of legal consequences the judge has instructed the jury (i.e. „reasonable time“ ?)
 - presenting a verdict after deliberation
- ▶ **judge has to determine issues of law**

II. Jury Trial

Exceptions

- ▶ statutory exceptions (vocational categories of service, health or incompetence)

Vois Dire

- ▶ selection process by way of submitting questions to the person, to find out whether he/she is biased or prejudiced in the case
- ▶ vois dire questions are usually asked by the court, the parties submit questions in advance, and in other jurisdictions vois dire is executed by the attorneys

II. Jury Trial

Vois Dire

- ▶ party may challenge a potential juror
 - by **challenge for cause**, if the juror is contended to be biased or prejudiced; person will be removed from the jury panel upon the court's consent
 - by **peremptory challenge**, a limited device, allowing to strike a juror without reason
 - no peremptory challenge on the basis of race or gender!

II. Jury Trial

Types of Verdicts

- ▶ **general verdict**
 - jury will find the facts and apply the law, the verdict will be in favor of a party, judgment is entered upon the verdict
- ▶ **special verdict**
 - judge requests the jury to make specific findings of fact, judge will apply the law on the facts found by the jury
- ▶ **general verdict with answers to written questions**
 - judge asks for general verdict plus submits written questions on one or more issues of fact

II. Jury Trial

Types of Verdicts

- ▶ **general verdict with answers to written questions**
 - if verdict and questions of fact answered are consistent, the judge must enter a judgment on the verdict
 - if verdict and questions of fact answered are inconsistent, the court may
 - enter a judgment upon the answers given notwithstanding the jury's general verdict
 - direct the jury to further consider its answers and verdict
 - order a new trial

II. Jury Trial

Impeachment of Verdict

- ▶ **based on misconduct of jurors**
 - evidence used not presented by the court
 - relationship to a party was not disclosed during voir dire
 - one juror testifying to the factual questions to the others
- ▶ **verdict will be set aside**
 - problem of evidence, as jury's deliberations are privileged
 - juror's ability to testify in this context is governed by Rule 606 FRE

II. Jury Trial

Motion for Directed Verdict

Motion for Judgment as a Matter of Law (Rule 50 FRCP)

- ▶ **possible after evidence of opposing party has been heard**
 - in cases of insufficient evidence to go to the jury
 - if evidence is so compelling, that trial time can be saved and judgment is entered for the movant without the jury

II. Jury Trial

Motion for Judgment Notwithstanding the Verdict (JNOV) Motion for Judgment as a Matter of Law (Rule 50 FRCP)

- ▶ **possible after the verdict is rendered**
 - if verdict is erroneous in the light of overriding issues of law
 - if the verdict is not supported by the evidence taken

II. Jury Trial

Motion for New Trial

- ▶ **possible after the verdict is rendered**
 - if verdict is concludable from the evidence, but not convincing
 - any error of law, which has prejudiced the movant can be considered
 - discretion of the court
 - no case for a motion for JNOV
- ▶ in some jurisdictions a **combined motion** for JNOV or New Trial is allowed

Chapter 8

Judgment

I. Relief from Judgments

Relief from Judgment

- ▶ **Motion to set aside Judgment and obtain New Trial**
 - after time for moving for new trial has passed
 - after time for appeal has passed
 - six months – one year after entry of judgment
 - discretion of court
- ▶ **Action to set aside**
- ▶ **Cases**
 - esp. default judgments, but also final judgments
- ▶ **Grounds:** in federal system Rule 60(b) FRCP

I. Relief from Judgments

Rule 60(b) FRCP *Grounds for Relief from a Final Judgment, Order, or Proceeding.*

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

II. Enforcement

Enforcement of U.S. judgments

- ▶ **is purely administrative**, carried out by the sheriff to whom a copy of the judgment is presented by the winner
 - writ of execution is issued on the debtor's property or
 - writ garnishing the debtor's wages
 - writ garnishing automobile
 - discretion of court

II. Enforcement

Enforcement of foreign judgments

- ▶ judgment creditor brings in an action on the judgment in the local court to obtain a local judgment
 - defendant and debtor has possibility to respond
 - in almost all the cases a judgment will be entered upon the basis of the foreign judgment
 - enforcement commences as usual

III. Securing a Judgment

Securing a judgment

- ▶ to prevent tangibles, money or any other movable assets from being transferred outside the jurisdiction; state provisions apply
 - postjudgment attachment
 - prejudgment attachment:
 - opposing party has to have opportunity to be heard (Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) USSC)
 - balancing test to assess constitutional validity of attachment!
 - goods have to be related to the procedure (Connecticut v. Doebr, 501 U.S. 1 (1991) USSC)

IV. Judgment – Effects

Effects of the Judgment

▶ **Res Judicata – Claim Preclusion**

- prevents relitigation of the same cause of action
- regardless of issues brought into trial
- merger: will prevent a second action of winner from going forward
- bar: prevents the second action of the loser from proceeding

▶ **Collateral Estoppel – Issue Preclusion**

- a separate cause of action is subject to the second proceeding
- any issue actually and necessarily litigated in the first proceeding cannot be relitigated

IV. Judgment – Effects

Effects of the Judgment

▶ **Claim and Issue Preclusion**

- establish binding effect for all courts, regardless if state or federal
- binding effect for enforcement proceeding
- full faith and credit clause!

▶ **Stare Decisis**

- principle of precedence

IV. Judgment – Effects

Asserting res judicata

▶ party has to show

- that the same cause of action or same claim is subject to the second lawsuit
- that there was a valid and final judgment on that claim
 - completion of all steps of adjudication short of enforcement
 - appeal will not affect on finality (!), unless appellate court vacates the judgment and orders for a new trial
- that the judgment was on the merits
 - dismissal for lack of subject-matter jurisdiction will not bar a second lawsuit

IV. Judgment – Effects

Asserting Res Judicata

▶ persons bound

- parties to the first lawsuit
- persons in privity with one party
 - persons whose interests are tied to those of the existing parties, that to allow a second lawsuit would be a waste of time and effort
 - no persons with similar or even identical interest if there is no special relationship to a party

IV. Judgment – Effects

Asserting Collateral Estoppel

- ▶ **party has to show**
 - that the same or identical issue is presented in the second lawsuit
 - that the issue was actually and necessarily decided in the first lawsuit
- ▶ **persons bound**
 - parties and persons in privity
 - several exceptions for the nonparty to obtain collateral estoppel (i.e. if person could have easily joined the first lawsuit, in cases of unfairness etc.)

IV. Judgment – Effects

Asserting Collateral Estoppel

▶ limitations of issue preclusion

- first court had limited jurisdiction
- first action was in a state court, second is in a federal court, and claims in the second lawsuit are to be exclusively brought before the federal court
- changes in the law between first and second lawsuit
 - usually operative facts to obtain a favorable judgment will also alter

Chapter 9

Appeal

I. Final Judgment Rule

Final Judgment Rule

- ▶ **final judgment is a prerequisite for appeal**
 - every step has been taken on trial level
so that enforcement is left as the sole step yet open
 - rule wants to foster efficiency
 - rule is not undisputed: New York courts are permissive in allowing immediate appeal of court orders

I. Final Judgment Rule

Statutory Exceptions to the Final Judgment Rule

▶ Interlocutory Appeal

- according to 28 U.S.C.A, § 1292(b); discretionary appeal, if
 - issue involves a controlling question of law,.
 - if there is substantial ground for difference of opinion on this issue subjected to interlocutory appeal
 - appeal may materially advance the termination of litigation

I. Final Judgment Rule

Statutory Exceptions to the Final Judgment Rule

- ▶ **Interlocutory Appeal for special categories of orders or types of proceedings**
 - **according to 28 U.S.C.A, § 1292(a)**
 - orders granting, continuing, modifying, refusing or dissolving injunctions
 - orders refusing to modify or dissolve injunctions
 - interlocutory decrees in admiralty cases
 - **upon rules prescribed by the USSC: 28 U.S.C.A. § 1292(e)**
 - in context with class actions (Rule 23 FRCP), appeal from orders, granting or denying class certification: Rule 23(f).

I. Final Judgment Rule

Judicial Exceptions to the Final Judgment Rule

▶ Collateral Order Doctrine

- appeal from an order, final and unrelated to the merits (collateral order), if not appealed immediately, may result in irreparable harm to the appellant
- Death Knell Doctrine: special case of Collateral Order Doctrine
 - order denying class certification is collateral to the merits as in class actions the plaintiffs usually have little claims, thus denial of class certification would „kill“ the litigation and harm the plaintiffs
 - after a case, where the Inverse Death Knell Doctrine was developed, Rule 23(f) was adopted (see supra).

I. Final Judgment Rule

Judicial Exceptions to the Final Judgment Rule

- ▶ **Appeal from a decision with irremediable consequences**
 - case: partial adjudication of claim with order to the losing party to deliver property immediately
 - court thus treated its partial decision as final,
 - immediate appeal was heard.

II. Writ of Mandamus and Contempt Cases

Extraordinary Routes of Appeal

- ▶ **application to the appellate court for a writ of mandamus**
 - appellate court orders trial court to change its judgment
rationale: means to immediately fight severe cases of trial court discretion abuse
- ▶ **contempt of court**
 - often in discovery stage, when a party will not obey court orders
 - in cases, where disobedience amounts to criminal (not mere civil) contempt – risky type of immediate appeal, in case of affirmation contempt will stand

III. Scope of Appeal

- ▶ **rulings promptly objected to in trial court are appealable**
 - any error in trial has to be objected to immediately to avoid unnecessary appeals
- ▶ **findings deemed erroneous but not necessary to the decision**
 - are not subject to an appeal of the winner
 - unnecessary findings are no basis for collateral estoppel
- ▶ **appellee's response to the appeal of the appellant**
 - response may only address any issues sustaining the judgment
 - additional issues are subject to a cross-appeal
 - often used in multiple party or multiple claim situations
- ▶ **appellate court will not hear witnesses or take evidence**

IV. Standard of Review

▶ **nonjury trial**

- findings of fact are overturned if clearly erroneous
- if trial judge's findings are based on misunderstanding of law or are not supported by evidence, they will be reversed
- mixed questions (of fact and law) are treated as questions of law – subject to full review!

▶ **jury trial**

- great deference given to the jury's findings as a matter of constitutional law (see Amendment VII)

Reading Material

Mary Kay Kane, Civil Procedure in A Nutshell

7th edition (2013)

West Nutshell Series

Databases

- ▶ <http://han.ubl.jku.at/han/WESTLAW-2> **WestLaw Database**
 - available on JKU campus alone, not on off-campus PCs
 - information on law in common law countries, esp. U.S. Law
 - U.S. court decisions are available in full text
 - any USSC decision mentioned in class or book can be found!

Cornell University free databases

- ▶ <http://www.law.cornell.edu/rules/frcp> **Federal Rules of Civil Procedure**
- ▶ <http://www.law.cornell.edu/rules/fre> **Federal Rules of Evidence**
- ▶ <http://www.law.cornell.edu/uscode/text/28> **U.S. Code, Title 28**
- ▶ <http://www.law.cornell.edu/constitution/overview> **U.S. Constitution**