

A Student's Guide to the

FEDERAL RULES OF CIVIL PROCEDURE

Tenth Edition

By

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PREFACE TO THE 10TH EDITION OF THE STUDENT'S HANDBOOK

Thank you for selecting the new Tenth Edition of *A Student's Guide to the Federal Rules of Civil Procedure* for your introduction to civil procedure. If you are replacing an earlier edition of the *Student's Guide*, thanks for your continued patronage. We're delighted to have you back again this year. If you are a new purchaser of the *Student's Guide*, welcome. As in years past, our goal is to provide readers with an affordable, one-volume, user-friendly roadmap to the Federal Rules of Civil Procedure—and not just the Rules' text, but their practical and case law applications as well. In this softback form, we intend the *Student's Guide* to bridge the gulf between the cost and benefits of larger treatises and the mere text of the Rules themselves.

Changes in the Tenth Edition: The Tenth Edition tracks the continuing development of the Civil Rules with nearly **1100 new citations** to interpretative decisions from the nation's federal courts. In addition, this edition traces the continued development and application of the significant new amendments, **particularly including crucial changes to accommodate discovery of electronic data and inadvertently produced privileged matter**. These changes took effect at the end of 2006, and have an impact on most of the important discovery rules. Here are the highpoints of those changes:

Discovery of Electronic Data – Our discussion addresses the Amendments' sweeping revisions necessary for the discovery of electronic data. These provisions touch the discovery of electronic data at nearly every stage of the discovery process, including the pretrial conference (**Rule 16**), the initial disclosures (**Rule 26**), interrogatories (**Rule 33**), document requests (**Rule 34**), subpoenas (**Rule 45**), and sanctions (**Rule 37**). The Amendments control the form in which electronic data is produced (in hard copy or in various electronic forms), with attendant procedures for objections and motion practice regarding electronic data from particularly burdensome sources or in particularly onerous forms. The Amendments also create a safe harbor for electronic data destroyed during routine computer operations.

Inadvertently Produced Privileged Matter – This Edition analyzes the new provisions designed to protect parties in the event of the inadvertent production of privileged matter. As amended, the Rules now establish a procedure under which a party who inadvertently produces privileged matter may provide a notice to the opposing party, who must either return the privileged matter or provide the matter to the court for a determination of the validity of the privilege.

Introduction of new Rules or amendments to other existing Rules are also addressed comprehensively. For this Edition those discussions focus on one new Rule and important amendments to two existing Rules:

PREFACE

Rule 5 (*Service and Filing*) – This Edition discusses the Amendment governing circumstances in which litigators may file papers electronically in the district court.

Rule 5.1 (*Procedures for Constitutional Challenges to Statutes*) – This Edition discusses new Rule 5.1, which governs the process for notifying the United States Attorney General or the relevant State attorney general when a civil suit challenges the constitutionality of a federal or State statute. It replaces an older provision, previously found in Rule 24(c).

Rule 50 (*Judgments as a Matter of Law and New Trials*) – This Edition reviews the newly refined procedures under Rule 50 for asserting a motion for new trial which now eliminate the language requiring a party to renew a motion for judgment as a matter of law at the close of evidence as a prerequisite to filing a post trial motion under Rule 50(b). The Amendments also specify the deadline for filing a post-trial motion under Rule 50(b) if the motion for judgment as a matter of law addressed an issue that was not decided by the verdict.

Readers will also find an entirely new section of “General Concepts in Federal Practice” that addresses the special requirements for removal of cases that are or may be certified as class actions. Additionally, we have also expanded our treatment of diversity jurisdiction to address new opportunities for diversity jurisdiction in most class actions in which the case arises under State law. These changes are, of course, separate from the normal, rapid evolution of case law addressing various features of Rule 23 that we continue to follow and explain.

The final important change we made this year was in response to thoughtful comments from you, the readers. This year we have added an entirely new part to the *Student’s Guide*, describing proposed amendments to the Rules that are likely to become effective in December, 2007, but which have not yet traveled successfully through the entire amendment process. This new feature, we hope, will help professors and students prepare for upcoming changes to the Rules before they occur, without disrupting analysis of the Rules as they are. In introducing this new feature, we have made one exception, which is effective only for the Tenth Edition. Due to limitations on space we have not included the text of the proposed “re-styling” changes that, if adopted, will probably have some effect on virtually every Rule. Future editions, of course, will conform to the “re-styling” if it actually becomes effective.

Navigating our readers through these monumental changes to the Federal Rules of Civil Procedure, our *Student’s Guide’s* familiar format is unchanged. We reprint the text of each Federal Rule (as amended), followed immediately by our *Authors’ Commentary* to the Rule and its subparts. Our Commentary first distills the Rule’s “Purpose and Scope”, summarizes the “Core Concept” of each Rule’s subsections, and then follows with an extended textual discussion of the Rule in application, including citations to case authorities from the Supreme Court, the national Courts of Appeals, and District Courts.

Thank you, again, for your patronage. As you can see from our discussion (above) of the new part on proposed amendments, we warmly encourage sugges-

PREFACE

tions, observations, and criticisms from our readers. Please continue to send them to us by email, fax, regular mail, or telephone call. Each year we endeavor to incorporate your many helpful recommendations in our annual revisions to the *Student's Guide*, and more often than not we are able to do so. Your annual comments help us keep the book a current and useful resource. Thanks again!

THE AUTHORS

May 2007

*

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Mr. Janssen thanks his family and friends for teaching him that you have not truly lived until you've answered, for the thousandth time: "No, we're still not done with that book yet." Mr. Janssen dedicates this effort to his parents, Bill and Catherine, and to TMcP.

The authors welcome any comments, suggestions, or constructive criticisms of this book. Their telephone and telefax numbers and email addresses are provided below.

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PART I
GENERAL CONCEPTS IN
FEDERAL PRACTICE—
Personal Jurisdiction, Notice Requirements,
Federal Subject Matter Jurisdiction, Venue,
Forum Non Conveniens, Removal, *Erie*,
Res Judicata and Collateral Estoppel

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A. FEDERAL JURISDICTION, VENUE AND *ERIE*

§ 1.1 Introduction

Although the Federal Rules of Civil Procedure control many aspects of a civil suit in a district court, the Rules do not contain all the elements that must be satisfied before the suit can be prosecuted successfully. Of particular importance at the onset of litigation are the concepts of jurisdiction and venue. For the most part, these elements are not discussed in the Rules. In fact, Rule 82 provides that the Rules neither increase nor limit a district court's power and obligations in the areas of jurisdiction and venue. A claimant's failure to satisfy requirements of subject matter jurisdiction and venue, however, will usually assure failure in the suit.

Before a federal district court may hear a plaintiff's claim, it must satisfy three prerequisites. These are: (1) jurisdiction over persons or things (*i.e.*, the court's ability to drag an individual into its district); (2) subject matter jurisdiction (*i.e.*, the court's ability to hear a particular kind of claim);¹ and (3) venue.

Every cause of action sued upon in a case, irrespective of whether it is a count brought by the plaintiff, a counterclaim, crossclaim, or impleader, must satisfy one of the kinds of jurisdiction over persons or things, *as well as* some kind of subject matter jurisdiction.² However, requirements of venue, discussed below, apply only to the claims brought by a plaintiff. If, upon appropriate notice to the court, it is found that any of these requirements are lacking, the court will not hear the case.

§ 1.2 Jurisdiction Over Persons or Things—Introduction

There are three kinds of jurisdiction over persons or things: personal jurisdiction (the normal form of action against an individual, company, or other entity, also known as *in personam* jurisdiction); quasi in rem jurisdiction (actions in the nature of attachment); and in rem jurisdiction (where an object or piece of land is the subject of the lawsuit). Every count in a case must satisfy one or another of these jurisdictional standards.¹ There is no requirement that a count satisfy more than one. However, in cases where one kind of jurisdiction over persons or things is uncertain, it would be a wise tactic to try to satisfy another kind as well. In certain factual settings there may also be advantages if one particular kind or other is achieved.

Important: In the area of jurisdiction over persons or things, it should be kept in mind that in many circumstances the power of a federal court to hear cases is closely analogous to the power of a state court in the state where the federal court sits. Thus, jurisdiction over persons or things should not pose

1. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (while jurisdictional issues should generally be resolved before court addresses merits of a case, there is no rigid rule directing court to decide questions of subject matter jurisdiction before deciding questions of personal jurisdiction).

2. *Insurance Corp. of Ireland, Ltd. v. Com-pagnie des Bauxites de Guinee*, 456 U.S. 694, 701, 102 S.Ct. 2099, 2103, 72 L.Ed.2d 492 (1982)

("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties.").

1. See, e.g., *Youn v. Track, Inc.*, 324 F.3d 409, 417 (6th Cir.2003) ("The party seeking to assert personal jurisdiction bears the burden of demonstrating that such jurisdiction exists;" standard of proof is preponderance of evidence).

many new problems for practicing attorneys already familiar with similar jurisdictional concepts in state courts.

Important: If jurisdiction over persons or things is absent, and the court also has no quasi in rem jurisdiction or in rem jurisdiction, the typical remedy is to dismiss the claim.²

ADDITIONAL RESEARCH REFERENCES

C.J.S. Federal Courts §§ 4(1)–6.

West's Key No. Digests, Federal Courts ☞3–5.

§ 1.3 Jurisdiction Over Persons or Things—Requirements for Personal Jurisdiction

Two elements play important roles in determining the requirements for personal jurisdiction. These are notions of fair play, as developed under Due Process provisions of the Constitution, and state limitations on the authority of the state courts to exercise personal jurisdiction. Fair play, or due process, divides into two components: an evaluation of the contacts that exist between the defendant and the state where the court sits; and an evaluation of the quality of notice of the suit that the defendant received.

§ 1.4 Jurisdiction Over Persons or Things—Requirements for Personal Jurisdiction—Due Process: Consent, In-State Service, or Minimum Contacts

CORE CONCEPT

Before a federal trial court may exert personal jurisdiction over a defendant, it must satisfy the due process standard of the 5th and 14th Amendments of the Constitution. This requirement must be met for each defendant.¹

This requirement has meant primarily that the exercise of personal jurisdiction must not be fundamentally unfair to the defendant. The most common means of satisfying this fairness requirement are: (1) the defendant's consent to jurisdiction; (2) service of process on the defendant within the territorial confines of a state in which the district court sits; or (3) service of process on a non-consenting defendant not within a state, when such service is fair because the defendant has sufficient "contacts" with the state.

2. See Rule 12(b)(2) (authorizing dismissal for lack of personal jurisdiction); See, e.g., *Swaim v. Moltan Co.*, 73 F.3d 711, 718 (7th Cir.1996) ("If the district court finds itself without [personal] jurisdiction . . . then it is obligated to dismiss the case because it has no authority over the defendant.").

1. Cf., *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S.Ct. 571, 572, 62 L.Ed.2d 516 (1980) ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a . . . court

exercises jurisdiction." Acknowledging, however, that parties' relationships among themselves may be relevant to their relationships to the forum). See also *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 653 (5th Cir.2002) (*Rush* "does not preclude us from imputing the jurisdictional contacts of a predecessor corporation to its successor corporation or individual alter ego.").

APPLICATIONS

Consent to Jurisdiction

If a party consents to jurisdiction, the Due Process requirement of fairness is satisfied. Consent may occur in a variety of ways. The following examples are typical of circumstances where persons may have consented to personal jurisdiction:

(1) *By Contract*: If the parties, through a contract or agreement prior to the initiation of litigation, consent to the jurisdiction of a court, such agreements will generally be enforced even if the chosen court might not otherwise have been able to sustain its jurisdiction.² Exceptions arise when there was substantially unequal bargaining power between the parties that gave one side an unfair advantage in choosing the jurisdiction, or there was the absence of *any* rational link between the court chosen and the parties or cause of action.³

A related question that arises about forum selection clauses in contracts is whether such clauses may properly *exclude* the use of judicial fora not chosen in the clause (even if such courts could, in the absence of the clause, have exercised personal jurisdiction under, e.g., principles of minimum contacts, discussed elsewhere in this text), or whether forum selection clauses may only provide the potential to *expand* the available fora to include courts that might otherwise have not enjoyed jurisdiction over the parties. It is now settled that such clauses are to be construed according to standard principles of contract law, which may result—depending on the wording of specific clauses in individual cases—in either restriction or expansion of the available fora.⁴

(2) *Waiver*: A party who does not object to personal jurisdiction in a timely manner waives objections, and thereby consents.⁵ In the federal courts, timely objections to personal jurisdiction are controlled by Rule 12(b)(2), (g), and (h)(1), and must be raised in the answer or before the answer is filed.

(3) *Counterclaims*: A plaintiff sued on a counterclaim may consent to personal jurisdiction on the counterclaim by filing the original

2. *National Equipment Rental v. Szukhent*, 375 U.S. 311, 315-16, 84 S.Ct. 411, 414, 11 L.Ed.2d 354 (1964). (“[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court.”). See also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n. 14, 105 S.Ct. 2174, 2182 n. 14, 85 L.Ed.2d 528 (1985) (“[P]articularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction.”).

3. See, e.g., *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir.1995) (holding that forum selection clause is presumptively enforceable in the absence of fraud, overreaching, grave inconvenience, or violation of forum’s public policy).

4. See, e.g., *Dunne v. Libbra*, 330 F.3d 1062, 1063 (8th Cir.2003) (applying general principles of contract construction). But cf., *M.B. Restau-*

rants, Inc. v. CKE Restaurants, Inc., 183 F.3d 750, 752 n. 4 (8th Cir.1999) (noting split among circuits as to whether forum selection clauses in diversity cases should be construed pursuant to federal or state law; not reaching a conclusion in instant case); *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 320-21 (10th Cir.1997) (also not deciding issue).

5. See, e.g., *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535 (6th Cir. 1995) (defendants objected to personal jurisdiction in their original answer; but when plaintiff filed amended complaint containing new count, defendants answered but did not challenge jurisdiction as to new count; held, as to new count, defendants waived defense of lack of personal jurisdiction).

complaint.⁶ It is unclear if this consent to jurisdiction over the counterclaim is limited to countersuits closely related to plaintiff's original claims, or whether consent extends to unrelated counterclaims.⁷

On the other hand, most courts agree that if a defendant files *both* an objection to jurisdiction and a claim that is either a counterclaim, cross-claim, or third party impleader, the objection to jurisdiction is not waived⁸—provided that the new claim does not involve the joinder of new parties.⁹ The conclusion is that an objection to jurisdiction may be preserved if it is filed with a claim asserted against someone who is already a party.

It is unsettled whether filing an in rem action constitutes consent to personal jurisdiction to a counterclaim.¹⁰

(4) *Consent to Determine Jurisdiction*: Perhaps the most subtle form of consent occurs when a defendant objects to personal jurisdiction, claiming that sufficient links between the defendant and the court do not exist. In that circumstance, the defendant, though preserving the objection to jurisdiction, has consented for the limited purpose of allowing the court to determine whether personal jurisdiction exists.¹¹

Transient Jurisdiction (“Tag” Jurisdiction)

A defendant served with process while physically present within a state is normally subject to the personal jurisdiction of the trial courts within that state. It is irrelevant whether the defendant lives within the state or was just passing through; personal jurisdiction is present in such cases simply because the defendant was properly served within the

6. *Adam v. Saenger*, 303 U.S. 59, 58 S.Ct. 454, 82 L.Ed. 649 (1938). (By suing, a plaintiff submits to the court's jurisdiction over counterclaims). Cf., *General Contracting & Trading Co. v. Interpole, Inc.*, 940 F.2d 20, 22 (1st Cir.1991) (third-party defendant in first suit filed second, related suit against original defendant in same court; held, by filing second suit, third-party defendant submitted to personal jurisdiction in first suit).

7. *But see, Threlkeld v. Tucker*, 496 F.2d 1101, 1103 (9th Cir.1974) (action to enforce state court judgment; held, state court had jurisdiction to hear counterclaim because filing complaint meant plaintiff had submitted to jurisdiction as to any counterclaim). See also *Frank's Casing Crew & Rental Tools, Inc. v. PMR Technologies, Ltd.*, 292 F.3d 1363, 1372 (Fed.Cir.2002) (“Where . . . a defendant seeks to bring into the same action new claims against new parties, not arising out of the same transaction or occurrence, such action is not authorized by the joinder rules, and we think that such an attempted joinder constitutes a waiver as to the claims then pending in the action against the party seeking to add the additional claims.”).

8. *Bayou Steel Corp. v. M/V Amstelvoorn*, 809 F.2d 1147, 1149 (5th Cir.1987) (not distinguish-

ing between compulsory and permissive counterclaims; holding that view is majority position).

9. See, e.g., *Frank's Casing Crew & Rental Tools, Inc. v. PMR Technologies, Ltd.*, 292 F.3d 1363, 1372 (Fed.Cir.2002) (counterclaims, cross-claims and impleader actions against persons already parties do not, by themselves, constitute a waiver of properly raised objections to jurisdiction; different result if claims do not arise from original transaction or occurrence and are brought against new parties).

10. Compare, *United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1576–77 (11th Cir.1988) (en banc) (filing an in rem action does not usually equal consent to personal jurisdiction), with *United States v. 51 Pieces of Real Property, Roswell, New Mexico*, 17 F.3d 1306, 1313 (10th Cir.1994) (rejecting *One Lear Jet Aircraft*; concluding that government submits to personal jurisdiction upon filing forfeiture action).

11. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). See also *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir.1998) (“[W]hen a defendant appears and challenges jurisdiction, it agrees to be bound by the court's determination on the jurisdictional issue.”).

state.¹² One important exception to exercise of “tag” jurisdiction occurs when a defendant was either forced into a jurisdiction, or induced there by fraud. Enticing a defendant to come to a state for bogus reasons will vitiate personal jurisdiction.¹³

Minimum Contacts

A defendant served with process outside the territorial confines of the state where a court sits may nonetheless be subject to the personal jurisdiction of courts within that state. Personal jurisdiction may be sustained even if the defendant does not consent to jurisdiction. For such jurisdiction to be constitutional, the defendant has to have “contacts” with the state in which the court sits of such a quality and nature that exercise of personal jurisdiction would not offend “traditional notions of fair play and substantial justice.”¹⁴ It should be noted, however, that the “contacts” necessary to sustain personal jurisdiction need not always be physical contacts. In appropriate circumstances an intentional relationship with residents of a state can be a basis for sustaining personal jurisdiction.¹⁵

Once such minimum contacts have been identified, the court will then typically evaluate the reasonableness of an assertion of personal jurisdiction over the defendant. The following factors are often consid-

12. *Burnham v. Superior Court*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (plurality opinion). See generally Fed. R. Civ. P. 4(e)(2). See also, *Edelman v. Taittinger*, 295 F.3d 171 (2d Cir.2002) (tag jurisdiction that is constitutional under *Burnham*, supra, is a fortiori applicable to personal service of a discovery subpoena on a non-party); *First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d Cir. 1998) (subpoena served on non-party witness; “We are satisfied that in light of *Burnham* . . . the assertion of personal jurisdiction . . . based upon service [within a state] satisfies due process.”); *Kadic v. Karadzic*, 70 F.3d 232, 247 (2d Cir.1995) (“Fed. R. Civ. P. 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction.” Citing *Burnham*, supra).

13. See, e.g., *Wyman v. Newhouse*, 93 F.2d 313 (2d Cir.1937). See also, *Amusement Equipment, Inc. v. Mordelt*, 779 F.2d 264, 271 (5th Cir.1985)(where defendant’s presence is obtained by fraud, service can be quashed).

14. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Cf., *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 711 (4th Cir.2002) (“However minimal the burden of defending in a foreign tribunal, a defendant may not be called

upon to do so unless he has had the ‘minimal contacts’ with that State that are a prerequisite to its exercise of power over him.”); *IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir.1998) (where plaintiff has not met burden of demonstrating defendant’s minimum contacts with forum, court need not reach question of whether exercise of jurisdiction would satisfy fair play and substantial justice). See also *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977) (“[T]he relationship among the defendant, the forum, and the litigation . . . [is] the central concern of the inquiry into personal jurisdiction.”).

15. *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985) (“So long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.”). See also, e.g., *Oriental Trading Co. v. Firetti*, 236 F.3d 938, 943 (8th Cir.2001) (in fraud case, “numerous” telephone calls, faxes and invoices sent to forum state should have caused defendants to understand that injury from fraud would be felt in forum—held, absence of physical contacts with forum may not necessarily defeat personal jurisdiction). But see *Truserv Corp. v. Flegles, Inc.*, 419 F.3d 584, 589 (7th Cir.2005) (“[S]imply contracting with a party based in [a state] is not enough to establish the required minimum contacts.”).