Civil Procedure

10

What Is This Chapter About?

This chapter examines the rules of civil procedure and topics related to the process of pursuing a civil claim in the courts. Using the Federal Rules of Civil Procedure as a guide, we begin by considering the positions of plaintiffs and defendants as litigation is contemplated, who may be a party to a civil suit, and who may join the litigation.

In this chapter, we also discuss the forms and purposes of pleading. The chapter focuses on the contents of complaints, answers, and replies, as well as various motions that "test" the plaintiff's claims or the defendant's counterclaims.

The process of discovery is examined in some detail. This includes the use of interrogatories and requests for production of documents, as well as the use of requests for admissions. In addition, the purpose of depositions and the manner in which they are conducted are explored. The resolution of discovery disputes is also examined.

Rules governing the trial process are also a central focus of this chapter. The process of requesting and selecting a jury and creating a trial theme is discussed. The presentation of evidence and the use of subpoenas are considered, objections and trial motions examined, and jury instructions discussed. Posttrial matters, judgments, and appeals are also explored.

Learning Objectives

After reading this chapter, you should be able to

1. Understand how civil procedure relates to the substantive civil law.
2. Understand the purpose of pleading.
3. Explain the function and contents of a complaint and an answer.
4. Describe the types and purposes of pretrial motions.
5. Explain the methods and purposes of discovery.
6. Describe the functions of pretrial conferences.
7. Understand the types and purposes of trial motions.
8. Explain the relative roles of judge and jury.
9. Understand the basis for an appeal and the final judgment rule.

A large proportion of the caseload of the courts, state and federal, involves the resolution of civil disputes. The process through which such claims are resolved is governed by distinct rules that specify the way in which all aspects of the case are to proceed. *Civil procedure* refers to this process and the specific ways in which litigants must present their cases for resolution by a court. The methods available to litigants and their attorneys in accomplishing their goals by obtaining the relief they desire are therefore the subject of civil procedure.

Although the procedural civil law is distinct from the substantive civil law, it shares both statutory and case law sources. In addition, courts at each level develop rules that govern the flow of cases through the courts. Moreover, in some cases, the procedures themselves overshadow the original dispute and become the focus of the litigation or the subject of a subsequent appeal. As a result, the topic of civil procedure is not stagnant; rather, its application in a great variety of civil lawsuits results in the continuing development of the law of civil procedure and the effect of this form of law on court processes and the outcome of cases.

The goal of civil procedural rules is to provide a fair and just means of resolving disputes, while also creating an efficient method for processing cases. That is, when all parties to a dispute have a shared understanding of how the litigation will proceed and what the court will require in order to resolve it, the court proceeding will be fair to all parties in the sense that it does not create an advantage for one party over another. As stated in Rule 1 of the Federal Rules of Civil Procedure (FRCP), which have been adopted by the U.S. Supreme Court to govern civil procedure in the federal courts, the rules of civil procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." This does not mean, however, that attorneys or their clients do not or should not use the procedural rules to their advantage. The American system of justice is an adversarial one. This means that the law, both substantive and procedural, may be used as both a sword and a shield because it governs the manner in which both sides of a case will proceed. The courts, the parties, and society itself therefore benefit from procedural rules by balancing fairness to the parties with the efficiencies that rules may create.

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Generally, a civil lawsuit involves three categories of procedures: pleading, discovery, and trial processes. Each of these processes is necessary to resolve disputes that are brought before a court in a civil trial. The rules of civil procedures specify the requirements of each category as they develop in a civil lawsuit.

Pleading

The term "pleading" refers to documents that are filed with a court, but not just any document may be filed. Only those that comply with the local, state, or federal rules of civil procedure and that serve a particular purpose in accordance with those rules will be considered and acted on by the court. Thus, the form a pleading takes will have an effect on the progress of the litigation. Specifically, pleadings help to "frame" a lawsuit. That is, they specify what gave rise to the case and what the litigation will be about, the law that will help to resolve it, and the terms on which the parties believe it should be resolved.

A pleading may take one of many forms depending upon its purpose. The most basic and necessary pleadings are the civil Complaint and the Answer. These are prepared and filed by the plaintiff and the defendant, respectively, and allow each party to set forth initial positions with respect to the claims being made. This includes, to a limited extent in these initial pleadings, the facts and the law that comprise the case. Motions (and briefs in support of the motions) are pleadings that may be filed by either party in order to accomplish a specific goal. Because judges in civil lawsuits largely play a passive role in determining the legal claims presented, motions are used to ask the judge to take some action, based on the facts or the law or both.

The Complaint

A civil Complaint is a pleading that initiates a civil lawsuit. It states the legal basis for claims being made by the plaintiff and the facts to support those claims. FRCP Rule 8 states that a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In order to be legally sufficient under FRCP Rule 8(a), the Complaint must accomplish three things: invoke the jurisdiction of the court by stating the basis for the court's jurisdiction, state the cause(s) of action or legal claims and how the elements of those claims are met on the basis of the facts, and request a remedy from the court. The Complaint usually sets forth its legal and factual allegations in separately numbered paragraphs; however, the federal courts and most state courts take a liberal approach to the manner in which a claim may be presented in a civil complaint, in accordance with the FRCP, or its parallel state rules. This means that a plaintiff need only indicate in some way the nature of claim and why that claim entitles him or her to some relief from the court. Tracing the history of this approach to pleading, Justice Stevens has explained the purpose of "notice" pleading:

> Rule 8 (a)(2) of the Federal Rules requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The rule did not come about by happenstance and its language is not inadvertent. The English experience with Byzantine special pleading rules—illustrated by the hypertechnical Hilary rules of 1834—made obvious the appeal of a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought. Stateside, David Dudley Field developed the highly influential New York Code of 1848, which required "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, § 120(2), 1848 N.Y. Laws pp. 497, 521. Substantially similar language appeared in the Federal Equity Rules adopted in 1912. See Fed. Equity Rule 25 (requiring "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence").
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> A difficulty arose, however, in that the Field Code and its progeny required a plaintiff to plead "facts" rather than "conclusions," a distinction that proved far easier to say than to apply. As commentators have noted, it is virtually impossible logically to distinguish among 'ultimate facts,' 'evidence,' and 'conclusions.' Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described. Weinstein & Distler, Comments on Procedural Reform: Drafting Pleading Rules, 57 Colum. L.Rev. 518, 520–521 (1957).
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> Rule 8 was directly responsive to this difficulty. Its drafters intentionally avoided any reference to "facts" or "evidence" or "conclusions."
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> Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. Charles E. Clark, the "principal draftsman" of the Federal Rules, put it thus:
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> Experience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result. The New Federal Rules of Civil Procedure: The Last Phase-Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A.B.A.J. 976, 977 (1937).
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> *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) (Stevens, J., dissenting).

The pleading requirements found in the federal rules were also discussed by the U.S. Supreme Court in *Swierkiewicz v. Sorema*, 534 U.S. 506, 122 S. Ct. 992, 152 L.Ed.2d 1 (2002). *Swierkiewicz* involved an employment discrimination claim made after a 53-year-old Polish worker was fired and his responsibilities were given to a 32-year-old Frenchman. The complaint was dismissed

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because the plaintiff had not "adequately alleged circumstances that support an inference of discrimination." The trial court and the court of appeals found that the complaint did not allege discrimination with enough specificity; that is, there were insufficient alleged facts in the complaint to show that the elements of a discrimination claim could be met. The Supreme Court, interpreting the liberal pleading requirements found in FRCP Rule 8, reversed the court of appeals, reinstating the complaint. The opinion is found in **Case Decision 10.1**.

As discussed in the *Swierkiewicz* case, the FRCP take a liberal approach to pleading referred to as *notice pleading*; the purpose of the Complaint is to place the defendant on notice of the claim against him, and the plaintiff need only provide some indication of the basis for the claim.

Jurisdiction and Venue

The importance and types of jurisdiction and the concept of venue were discussed in Chapter 2. Jurisdiction refers to the power of a court to hear and act on a matter, and venue refers to the place in which it should be heard. Thus, the complaint must state the basis for the court's authority in order for the court to proceed with the case. In addition, the Complaint will indicate why the case should be heard in the court in which the case was filed. For example, in a case involving injuries from a car accident, the plaintiff would state that the accident occurred in the state or county in which the court sits. Any actions taken by the court in a case in which it had no jurisdiction would not be valid, and thus, the Complaint at the outset shows why the case should be heard in that court.

Case Decision 10.1 *Swierkiewicz v. Sorema*, 534 U.S. 506, 122 S. Ct. 992, 152 L.Ed.2d 1 (2002)

Opinion of the Court by Justice Thomas:

This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). We hold that an employment discrimination complaint need not include such facts and instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

I

Petitioner Akos Swierkiewicz is a native of Hungary, who at the time of his complaint was 53 years old. In April 1989, petitioner began working for respondent Sorema N. A., a reinsurance company headquartered in New York and principally owned and controlled by a French parent corporation. Petitioner was initially employed in the position of senior vice president and chief underwriting officer (CUO). Nearly six years later, François M. Chavel, respondent's Chief Executive Officer, demoted petitioner to a marketing and services position and transferred the bulk of his underwriting responsibilities to Nicholas Papadopoulo, a 32-year-old who, like Mr. Chavel, is a French national. About a year later, Mr. Chavel stated that he wanted to "energize" the underwriting department and appointed Mr. Papadopoulo as CUO. Petitioner claims that Mr. Papadopoulo had only one year of underwriting experience at the time he was promoted, and therefore was less experienced and less qualified to be CUO than he, since at that point he had 26 years of experience in the insurance industry.

Following his demotion, petitioner contends that he "was isolated by Mr. Chavel . . . excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA." Petitioner unsuccessfully attempted to meet with Mr. Chavel to discuss his discontent. Finally, in April 1997, petitioner sent a memo to Mr. Chavel outlining his grievances and requesting a severance package. Two weeks later, respondent's general counsel presented petitioner with two options: He could either resign without a severance package or be dismissed. Mr. Chavel fired petitioner after he refused to resign.

Petitioner filed a lawsuit alleging that he had been terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, and on account of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA). The United States District Court for the Southern District of New York dismissed petitioner's complaint because it found that he "ha[d] not adequately alleged a prima facie case, in that he ha[d] not adequately alleged circumstances that support an inference of discrimination." The United States Court of Appeals for the Second Circuit affirmed the dismissal, relying on its settled precedent, which requires a plaintiff in an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the

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framework set forth by this Court in *McDonnell Douglas*. The Court of Appeals held that petitioner had failed to meet his burden because his allegations were "insufficient as a matter of law to raise an inference of discrimination." We granted certiorari to resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases. The majority of Courts of Appeals have held that a plaintiff need not plead a prima facie case of discrimination under *McDonnell Douglas* in order to survive a motion to dismiss. Others, however, maintain that a complaint must contain factual allegations that support each element of a prima facie case. [We] now reverse.

II

Applying Circuit precedent, the Court of Appeals required petitioner to plead a prima facie case of discrimination in order to survive respondent's motion to dismiss. In the Court of Appeals' view, petitioner was thus required to allege in his complaint: (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination.

The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement. In *McDonnell Douglas*, this Court made clear that "[t]he critical issue before us concern[ed] the order and allocation *of proof* in a private, non-class action challenging employment discrimination" (emphasis added). In subsequent cases, this Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination.

This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. For instance, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constric[t] the role of the pleadings." Consequently, the ordinary rules for assessing the sufficiency of a complaint apply. "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Moreover, the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202, p. 76 (2d ed. 1990).

Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a). These requirements are

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exemplified by the Federal Rules of Civil Procedure Forms, which "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Fed. Rule Civ. Proc. 84. For example, Form 9 sets forth a complaint for negligence in which plaintiff simply states in relevant part: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."

Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. "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."

Applying the relevant standard, petitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. In addition, they state claims upon which relief could be granted under Title VII and the ADEA.

Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." Furthermore, Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."

For the foregoing reasons, we hold that an employment discrimination plaintiff need not plead a prima facie case of discrimination and that petitioner's complaint is sufficient to survive respondent's motion to dismiss. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Cause of Action

The purpose of the complaint is to allege a *cause of action* and give the defendant notice of it. A cause of action is the factual and legal basis for a plaintiff's claim. Nothing has been proven at the time the Complaint is filed; it merely makes allegations as to what the plaintiff believes to be true and will later set out to prove at trial. Thus, the cause of action states a legal claim based on a statute or the common law, summarizes the elements required to prove the claim, and alleges facts that, if proven, would support each claim. For example, in a Complaint for personal injury resulting from a driver's negligence, a plaintiff's cause of action might state that the driver had a duty to maintain control of his vehicle at all times, that he breached that duty by losing control of his vehicle and hitting the plaintiff's vehicle from behind, and that this breach of duty caused injuries and property damage to the plaintiff. Although there is no specific language necessary under the liberal pleading rules as mentioned previously, the Complaint must prove a sufficiently clear statement of the cause of action for the defendant (and the court) to understand the basis for the Complaint.

Request for Relief

The Complaint must also make a *request for relief*. That is, what is the plaintiff asking the court to do? Historically, the remedy that a court could grant was dependent on whether it was a *court of law* or a *court of equity*. Cases in courts of law were heard by judges or juries and could award money damages. Cases in courts of equity were heard only by judges, who could fashion remedies as justice required, including injunctive relief, restitution, and

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the issuance of other orders that the judge deemed to be just. In America, the distinction between courts of law and courts of equity no longer exists, and judges may grant both legal and equitable remedies.

Most often, civil Complaints request monetary damages—either a specific amount or an "amount to be proven at trial." The judge is not bound to grant (or not grant) the relief requested, but may make whatever award is consistent with the evidence. As a result, the plaintiff also often includes a request for "such relief as the court deems just and proper."

The Answer

An *Answer* in a civil case refers to a pleading filed by the defendant. In it, the defendant responds to the allegations made by the plaintiff, in effect refuting the claims made in the Complaint. The defendant may respond in several ways to the allegations of the Complaint. The defendant may make a general denial of all allegations, may specifically deny each allegation, may claim an *affirmative defense*, or may admit an allegation. If a defendant has insufficient basis to either admit or deny an allegation, it may be denied on the basis of that insufficient knowledge. An affirmative defense is one that raises additional facts or legal arguments to refute allegations found in the Complaint. A common example of an affirmative defense is reliance on a *statute of limitations* by the defendant. A statute of limitations is a statutory provision that requires that a particular type of legal claim be raised within a certain amount of time in order to proceed in court. The defendant may raise as an affirmative defense the time limits shown in the statutory provision and facts showing that the plaintiff failed to file the Complaint within the allotted time. Affirmative defenses are important for at least two practical reasons (and many strategic reasons): They may result in dismissal of all or part of the claims made by the plaintiff, and if an affirmative defense is not raised in the Answer, it is usually waived, which means that it may not be raised at a later time.

The Answer is an important pleading for a number of reasons. First, if no Answer to a Complaint is filed, the allegations of the Complaint are taken by the court as true and a default judgment is entered. A default judgment is an order from the court in favor of the plaintiff, granting the relief requested by the plaintiff or whatever relief the judge believes to be just. Second, admissions and denials in the Answer help to limit and define the issues for trial. Only those facts denied by the defendant need be proven by the plaintiff at trial, and only the affirmative defenses will be issues to be proven by the defendant at trial. Third, the Answer provides a defendant with the opportunity to assert a *counterclaim*. A counterclaim is a defendant's request for relief from the court that is independent of that requested by the plaintiff, though related to the factual allegations of the Complaint. That is, a counterclaim is a response to the plaintiff's Complaint that it is the defendant who has been harmed by the plaintiff, not the other way around, and the court should award damages to the defendant. For example, if a plaintiff's Complaint asserts that a defendant has breached a contract by not making a scheduled payment for a piece of equipment, the defendant may make a counterclaim alleging that the equipment was defective and inoperable.

Motions Attacking the Pleadings (Rule 12 Motions)

A *motion* is a request by a party for a ruling by the judge on a particular issue. In most jurisdictions, the motion must be accompanied by a brief explaining the basis for the motion and legal argument to support it. Motions may be made prior to trial, during trial, or after trial, but most are pretrial motions. Motions that attack the pleadings do just that: seek to obtain a ruling from the court that either the Complaint or the Answer are insufficient and that the pleading deficiency must be remedied. In the FRCP and its state counterparts, Rule 12 governs a variety of defensive motions on the pleadings. These include motions relating to improper jurisdiction and venue, the sufficiency of the form or manner in which a pleading is served, and a number of motions relating to specific substance of the allegations of a Complaint or defenses raised in an Answer. Most common among the Rule 12 motions are a Motion to Dismiss (Rule 12b), a Motion for a More Definite Statement (Rule 12e), and a Motion to Strike (Rule 12f).

A Motion to Dismiss, often referred to as a Rule 12b(6) motion, challenges the allegations made in the plaintiff's Complaint by arguing that, even if those allegations are true, the plaintiff is not entitled to relief. When considering a Motion to Dismiss, a court will accept all of the factual allegations of the complaint as true, and if the complaint's allegations do not allow recovery under the law, it must be dismissed. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L.Ed.2d 517 (1993). That is, the law does not allow recovery to the plaintiff based on the facts alleged. In other words, the defendant argues that the plaintiff has failed to state a cause of action in the Complaint. A Motion to Dismiss may be directed at all of the allegations of the Complaint or may attempt to dismiss only certain claims.

A Motion for a More Definite Statement and a Motion to Strike are both addressed toward specific allegations of the Complaint or defenses raised in the Answer. The former asks the court to order the opposing party to clarify a portion of the pleading that is ambiguous or uncertain as to the claim or defense being raised. The latter seeks to have a portion of the questioned pleading removed because it is redundant, unnecessary, inflammatory, or otherwise inappropriate. Given that the purpose of the pleadings is to provide notice to the opposing party and to narrow the issues for trial, these motions allow the party raising them to more clearly understand the legal and factual issues being raised.

Discovery

Discovery is intended as a process of investigation and development of the evidence to be presented at trial. It allows the parties to "discover" in more detail the legal arguments and positions of the opposing party and the

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evidence that may be relevant to support those positions. In addition to revealing potential evidence to support the facts for trial, discovery allows the parties to preserve evidence that may no longer be available at the time of trial. Discovery also allows the parties to "capture" the testimony of witnesses so that it does not change at trial, either due to loss of memory or intentional fabrication or perjury.

In order to streamline the discovery process by saving time, cost, and reducing the potential for disputes about discovery, the federal courts and some state courts require mandatory disclosure of certain types of information in civil cases (Moskowitz, 2007). Except in certain types of cases specified by the rules, Rule 26 of the FRCP requires each party initially to provide the other with information that the disclosing party may use at trial, including (1) the names of individuals who "likely have discoverable information," (2) a copy or description of documents or tangible things in the party's possession, (3) a computation of the damages claimed by the disclosing party and documents relating to them, and (4) any insurance agreement that may apply to the payment of damages. In addition to these initial mandatory disclosures, each party must also subsequently provide the other with the names of expert witnesses and a report summarizing their opinions, as well as a list of witnesses and exhibits that will be introduced at trial. Although these mandatory disclosures should provide each party with considerable evidence that may be relevant at trial, there are many limitations on what constitutes "discoverable information," including *privileged* documents and materials such as notes from meetings with a party's attorney or documents prepared by an attorney in the case.

In addition to mandatory disclosures (or in jurisdictions that do not require disclosures), several discovery tools may be used to request and obtain information from an opposing party. Three such tools are most commonly used: interrogatories, requests for productions of documents, and depositions.

Interrogatories

Interrogatories are written questions that are formally served on a party who must respond within a time period specified in procedural rules, usually 30 days. Answers to the interrogatories must be given under oath. The questions may ask about any matter relevant to the case, but may not be served in order to burden or harass a party. Nonetheless, a party must respond to interrogatories that pertain to information it possesses, even if it requires review of documents, materials, or other sources of information. Many states place a restriction on the number of interrogatories that may be asked, and the federal rules limit the number to 25.

The purpose of interrogatories is to help educate the serving party about the facts in the case, at least facts in the possession of or from the perspective of the opposing party. For example, a hospital in a medical malpractice case might ask the plaintiff: "State the full and complete basis for your allegations in paragraph 12 of the Complaint that Dr. Smith's actions fell below the standard of care of other physicians within the community." The interrogatories thus serve the purpose of obtaining initial information from a party about his or her position in the case. They are discovery devices that allow a party to place the opposing party on record (as the answers are given under oath), and they provide an outline from which follow up information can later be obtained.

Requests for Production of Documents

Like interrogatories, *Requests for Production of Documents* are a discovery tool that seeks to obtain information in the possession of an opposing party, but a particular type of information: documents. These requests require the opposing party to provide to the requesting party relevant documents within the opposing party's possession. The "documents" requested may also include tangible things that may be relevant to determining the facts in a case. For example, in a car accident case, a request may be made to view the wrecked vehicle in order to determine how the accident occurred. The types of documents requested may be broad, but a party has no obligation to produce documents that are outside of its control.

The review of documents in civil cases can be very valuable. Although interrogatories may require a party to review its own documents in order to craft an answer, an opposing party's own review of those same documents may lead to different conclusions, or it may lead to other discoverable information. In complex litigation, document review may involve millions of documents, including electronically stored information and e-mails, and take considerable time and resources.

Depositions

A *deposition* is a proceeding in which a party or a witness is questioned in person under oath. A court reporter records and prepares a transcript of the testimony, which preserves in writing (and sometimes by video) the questions asked and the deponent's answers. A deposition is an important tool for ascertaining before trial the testimony that a witness will give at trial. A party may also be required to be deposed, although not required to testify at trial. As in a trial, a witness may be examined and cross-examined at a deposition, and the witnesses' testimony from the deposition transcript may later be used at trial for purposes of impeachment. Because deposition testimony is taken live under oath and is subject to cross-examination, it may also be introduced at trial when a witness is unavailable because of death or distance from the venue in which the trial is held.

Despite their usefulness in trial preparation, depositions may elicit more information before trial than may be useful. Specifically, when a witness has had opportunity to "rehearse" testimony at a deposition and review it before trial, the opportunity to later explain inconsistencies or inaccuracies at trial exists. In addition, the cost of depositions makes them the most expensive discovery tool. The costs stem from the fees for the time of all attorneys in the case, the cost of travel to and from depositions, and the cost of stenographic and transcription services.

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Requests for Admissions

One way in which to limit issues for trial involves the use of *Requests for Admission*. This discovery method requests that the opposing party admit the truth of certain facts in a case. In addition to facts, Requests for Admission may relate to the applicability of the law or relate to the genuineness of documents or other evidence. Facts that are admitted need not be tried, which saves time and usually cost because evidence need not be presented at trial relating to those facts. Requests for Admission are governed by FRCP Rule 36 and its state counterparts.

A procedural and strategic reason for the use of Requests for Admissions involves sanctions provided by the rules for a party's failure to admit facts that are true. In particular, FRCP Rule 37(c)(2) states, "If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof." Although a party need not pay such expenses if the party has a reasonable belief that the matter may not be proven at trial, a party nonetheless has an incentive to admit facts it thinks might be true.

Discovery Disputes

Despite the liberal approach to the discovery of information taken by the federal and most state courts, given the adversarial nature of the justice system, parties do not always agree on the disclosure of information. Parties frequently object to all or part of a discovery request and may engage in informal negotiations regarding the objectionable nature of an interrogatory or document request. If the parties are unable to agree, they will request that the judge intervene and settle the dispute. This most often occurs when a *motion to compel discovery* is filed by one of the parties. This is a motion that explains why the information is discoverable and should not be withheld and asks the judge to compel the nonmoving party to provide the information requested. The judge may then order the nonresponsive party to provide the information requested or may enter a *protective order*, which prevents disclosure of certain information or inquiry into certain topics during the course of discovery.

At times, parties or their attorneys delay responding to discovery requests, provide limited or incomplete information, or refuse to provide discoverable information at all. When this occurs, attorneys may be subjected to sanctions, usually fines or the costs of proceedings, for obstructing the discovery process. One such case, *Cunningham v. Hamilton County*, *Ohio*, 527 U.S. 198, 119 S. Ct. 1915, 144 L.Ed.2d 184 (1999), involved the failure of an attorney to participate in discovery despite a judge's order to do so. Moreover, she filed notices of deposition for witnesses she was ordered not to depose until she had fully complied with other discovery requests. She scheduled them on days other than those ordered by the court, and she filed a motion to compel the witnesses' attendance at the depositions. The opposing attorneys filed motions for sanctions for these discovery violations and refusal to obey a court order, which the judge granted, ordering the sanctioned attorney to pay $1,494 in costs and fees. The attorney was later removed from the case but filed an appeal of the order of sanctions. Although the issue in that case was whether an order for discovery sanctions is a final order that may be immediately appealed (the U.S. Supreme Court held that it was not), the case is also important because the Court found the determination of discovery sanctions to be "inextricably intertwined with the merits." Given the importance of discovery in addressing the merits of a case, the Court found that the sanctions order was not a "final order" entitled to an immediate appeal. Questions relating to appellate procedures discussed in this case are examined further later (**Case Decision 10.2**).

Case Decision 10.2 *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 119 S. Ct. 1915, 144 L.Ed.2d 184 (1999)

Opinion of the Court by Justice Thomas:

Federal courts of appeals ordinarily have jurisdiction over appeals from "final decisions of the district courts." 28 U.S.C. § 1291. This case presents the question whether an order imposing sanctions on an attorney pursuant to Federal Rule of Civil Procedure 37(a)(4) is a final decision. We hold that it is not, even where, as here, the attorney no longer represents a party in the case.

I

Petitioner, an attorney, represented Darwin Lee Starcher in a federal civil rights suit filed against respondent and other defendants. Starcher brought the suit after his son, Casey, committed suicide while an inmate at the Hamilton County Justice Center. The theory of the original complaint was that the defendants willfully ignored their duty to care for Casey despite his known history of suicide attempts.

A Magistrate Judge oversaw discovery. On May 29, 1996, petitioner was served with a request for interrogatories and documents; responses were due within 30 days after service. See Fed. Rules Civ.

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Proc. 33(b)(3), 34(b). This deadline, however, passed without compliance. The Magistrate Judge ordered the plaintiff "by 4:00 p.m. on July 12, 1996 to make full and complete responses" to defendants' requests for interrogatories and documents and further ordered that four witnesses—Rex Smith, Roxanne Dieffenbach, and two individual defendants—be deposed on July 25, 1996.

Petitioner failed to heed the Magistrate Judge's commands. She did not produce the requested documents, gave incomplete responses to several of the interrogatories, and objected to several others. Flouting the Magistrate Judge's order, she noticed the deposition of Rex Smith on July 22, 1996, not July 25, and then refused to withdraw this notice despite reminders from defendants' counsel. And even though the Magistrate Judge had specified that the individual defendants were to be deposed only if plaintiff had complied with his order to produce "full and complete" responses, she filed a motion to compel their appearance. Respondent and other defendants then filed motions for sanctions against petitioner.

At a July 19 hearing, the Magistrate Judge granted the defendants' motions for sanctions. In a subsequent order, he found that petitioner had violated the discovery order and described her conduct as "egregious." Relying on Federal Rule of Civil Procedure 37(a)(4), the Magistrate Judge ordered petitioner to pay the Hamilton County treasurer $1,494, representing costs and fees incurred by the Hamilton County prosecuting attorney as counsel for respondent and one individual defendant. He took care to specify, however, that he had not held a contempt hearing and that petitioner was never found to be in contempt of court.

The District Court affirmed the Magistrate Judge's sanctions order. The court noted that the matter "ha[d] already consumed an inordinate amount of the Court's time" and described the Magistrate's job of overseeing discovery as a "task assum[ing] the qualities of a full time occupation." It found that "[t]he Magistrate Judge did not err in concluding that sanctions were appropriate" and that "the amount of the Magistrate Judge's award was not contrary to law." The District Court also granted several defendants' motions to disqualify petitioner as counsel for plaintiff due to the fact that she was a material witness in the case.

Although proceedings in the District Court were ongoing, petitioner immediately appealed the District Court's order affirming the Magistrate Judge's sanctions award to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals, over a dissent, dismissed the appeal for lack of jurisdiction. It considered whether the sanctions order was immediately appealable under the collateral order doctrine, which provides that certain orders may be appealed, notwithstanding the absence of final judgment, but only when they "are conclusive, . . . resolve important questions separate from the merits, and . . . are effectively unreviewable on appeal from the final judgment in the underlying action." In the Sixth Circuit's view, these conditions were not satisfied because the issues involved in petitioner's appeal were not "completely separate" from the merits. As for the fact that petitioner had been disqualified as counsel, the court held that "a non-participating attorney, like a participating attorney, ordinarily must wait until final disposition of the underlying case before filing an appeal." It avoided deciding whether the order was effectively unreviewable absent an immediate appeal but saw "no reason why, after final resolution of the underlying case . . . a sanctioned attorney should be unable to appeal the order imposing sanctions."

The Federal Courts of Appeals disagree over whether an order of Rule 37(a) sanctions against an attorney is immediately appealable under § 1291. We granted a writ of certiorari, limited to this question, and now affirm.

II

Section 1291 of the Judicial Code generally vests courts of appeals with jurisdiction over appeals from "final decisions" of the district courts. It descends from the Judiciary Act of 1789, where "the First Congress established the principle that only 'final judgments and decrees' of the federal district courts may be reviewed on appeal." In accord with this historical understanding, we have repeatedly interpreted § 1291 to mean that an appeal ordinarily will not lie until after final judgment has been entered in a case. As we explained in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S. Ct. 669, 66 L.Ed.2d 571 (1981), the final judgment rule serves several salutary purposes:

> It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual

(*Continues*)

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(*Continued*)

> plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration.

Consistent with these purposes, we have held that a decision is not final, ordinarily, unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

The Rule 37 sanction imposed on petitioner neither ended the litigation nor left the court only to execute its judgment. Thus, it ordinarily would not be considered a final decision under § 1291. However, we have interpreted the term "final decision" in § 1291 to permit jurisdiction over appeals from a small category of orders that do not terminate the litigation. "That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action."

Respondent conceded that the sanctions order was conclusive, so at least one of the collateral order doctrine's conditions is presumed to have been satisfied. We do not think, however, that appellate review of a sanctions order can remain completely separate from the merits. [A] Rule 37(a) sanctions order often will be inextricably intertwined with the merits of the action. An evaluation of the appropriateness of sanctions may require the reviewing court to inquire into the importance of the information sought or the adequacy or truthfulness of a response. Some of the sanctions in this case were based on the fact that petitioner provided partial responses and objections to some of the defendants' discovery requests. To evaluate whether those sanctions were appropriate, an appellate court would have to assess the completeness of petitioner's responses. See Fed. Rule Civ. Proc. 37(a)(3) ("For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond"). Such an inquiry would differ only marginally from an inquiry into the merits and counsels against application of the collateral order doctrine. Perhaps not every discovery sanction will be inextricably intertwined with the merits, but we have consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral.

Even if the merits were completely divorced from the sanctions issue, the collateral order doctrine requires that the order be effectively unreviewable on appeal from a final judgment. Petitioner claims that this is the case. In support, she relies on a line of decisions holding that one who is not a party to a judgment generally may not appeal from it. She also posits that contempt orders imposed on witnesses who disobey discovery orders are immediately appealable and argues that the sanctions order in this case should be treated no differently.

Petitioner's argument suffers from at least two flaws. It ignores the identity of interests between the attorney and client. Unlike witnesses, whose interests may differ substantially from the parties', attorneys assume an ethical obligation to serve their clients' interests. This obligation remains even where the attorney might have a personal interest in seeking vindication from the sanctions order. The effective congruence of interests between clients and attorneys counsels against treating attorneys like other nonparties for purposes of appeal.

Petitioner's argument also overlooks the significant differences between a finding of contempt and a Rule 37(a) sanctions order. "Civil contempt is designed to force the contemnor to comply with an order of the court." In contrast, a Rule 37(a) sanctions order lacks any prospective effect and is not designed to compel compliance. Judge Adams captured the essential distinction between the two types of orders when he noted that an order such as civil contempt

> is not simply to deter harassment and delay, but to effect some discovery conduct. A non-party's interest in resisting a discovery order is immediate and usually separate from the parties' interests in delay. Before final judgment is reached, the non-party either will have surrendered the materials sought or will have suffered incarceration or steadily mounting fines imposed to compel the discovery. If the discovery is held unwarranted on appeal only after the case is resolved, the non-party's injury may not be possible to repair. Under Rule 37(a), no similar situation exists. The objective of the Rule is the prevention of delay and costs to other litigants caused by the filing of groundless motions. An attorney sanctioned for such conduct by and large suffers no inordinate injury from a deferral of appellate consideration of the sanction. He need not in the meantime surrender any rights or suffer undue coercion.

To permit an immediate appeal from such a sanctions order would undermine the very purposes of Rule 37(a), which was designed to protect courts and opposing parties from delaying or harassing tac-

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tics during the discovery process. Immediate appeals of such orders would undermine trial judges' discretion to structure a sanction in the most effective manner. They might choose not to sanction an attorney, despite abusive conduct, in order to avoid further delays in their proceedings. Not only would such an approach ignore the deference owed by appellate courts to trial judges charged with managing the discovery process, it also could forestall resolution of the case as each new sanction would give rise to a new appeal. The result might well be the very sorts of piecemeal appeals and concomitant delays that the final judgment rule was designed to prevent.

Petitioner finally argues that, even if an attorney ordinarily may not immediately appeal a sanction order, special considerations apply when the attorney no longer represents a party in the case. Like the Sixth Circuit, we do not think that the appealability of a Rule 37 sanction imposed on an attorney should turn on the attorney's continued participation. Such a rule could not be easily administered. For example, it may be unclear precisely when representation terminates, and questions likely would arise over when the 30-day period for appeal would begin to run. The rule also could be subject to abuse if attorneys and clients strategically terminated their representation in order to trigger a right to appeal with a view to delaying the proceedings in the underlying case. While we recognize that our application of the final judgment rule in this setting may require nonparticipating attorneys to monitor the progress of the litigation after their work has ended, the efficiency interests served by limiting immediate appeals far outweigh any nominal monitoring costs borne by attorneys. For these reasons, an attorney's continued participation in a case does not affect whether a sanctions order is "final" for purposes of § 1291.

We candidly recognize the hardship that a sanctions order may sometimes impose on an attorney. Should these hardships be deemed to outweigh the desirability of restricting appeals to "final decisions," solutions other than an expansive interpretation of § 1291's "final decision" requirement remain available. Congress may amend the Judicial Code to provide explicitly for immediate appellate review of such orders. Recent amendments to the Judicial Code also have authorized this Court to prescribe rules providing for the immediate appeal of certain orders, and "Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect." Finally, in a particular case, a district court can reduce any hardship by reserving until the end of the trial decisions such as whether to impose the sanction, how great a sanction to impose, or when to order collection.

For the foregoing reasons, we conclude that a sanctions order imposed on an attorney is not a "final decision" under § 1291 and, therefore, affirm the judgment of the Court of Appeals.

Trial Processes

Summary Judgment

Although *summary judgment* is not technically part of the trial process, it is a pretrial procedure that is often used to resolve a case in favor of one party without trial. Summary judgment occurs, usually after discovery, when a party asks the court to rule in his or her favor because, applying the law to the facts disclosed and the evidence likely to be presented if a trial were to occur, the only conclusion is a ruling in that party's favor.

The standard for determining when summary judgment should be granted is found in FRCP Rule 56(c): "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Thus, if there is evidence that contradicts the factual showing on some determinative issue in a case made by the moving party, an issue of fact exists, and summary judgment would not be proper. To be "entitled to judgment as a matter of law," the moving party must demonstrate that, given the undisputed facts, the law provides that judgment for the moving party is required.

Pretrial Conferences

The parties and their counsel, not the judge, are responsible for the progress of a civil lawsuit through the court system. The civil rules provide for orderliness and efficiency as this occurs. In this context, it is nonetheless necessary for counsel to work together with the judge so that the case can properly proceed. The judge can have considerable influence on the conduct of parties and the resolution of case before trial by encouraging settlement discussions, limiting the time for and nature of discovery, and encouraging agreement between the parties regarding issues in the case. Therefore, it is not unusual for attorneys in a case to meet with the judge several times before trial.

The judge has discretion to schedule any conferences with attorneys deemed necessary and, especially in complex litigation, may meet frequently with counsel for the parties, but there are specific times during the course of a

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civil case that the judge and counsel nearly always meet to set the course of the case. At the outset of a lawsuit, shortly after the complaint and answer have been filed, a *scheduling conference* is conducted. This is used to set deadlines for discovery, for filing motions, and for submitting lists of witnesses for trial and exchanging other information. Some jurisdictions also mandate one or more *settlement conferences* in order to resolve a case without trial. Even if not required by local procedural rules, a settlement conference may be particularly useful after discovery is complete and the positions of the parties are clear, as well as the evidence available to support their positions. A *status conference* is typically conducted at or near the close of the time for discovery, in which counsel for the parties meet with the judge to determine what factual issues remain in dispute for trial and evidentiary matters are resolved.

Jury Trials

After a trial date is established at a pretrial conference, the parties work toward preparing for trial on that date, unless the judge grants a continuance. The trial process in civil and criminal cases was discussed in Chapter 3. The focus of this discussion is the procedural rules governing jury trials in civil cases. In particular, the role of the jury as decision makers and the presentation of evidence to the jury in civil cases are examined.

Role of the Jury

A jury's role is to decide facts—indeed, the purpose of a trial is to resolve disputes about facts and how the law applies to those facts; therefore, the jury considers the evidence presented at trial and determines which facts are most likely to be true. It is the job of the judge to decide questions of law. Once instructed on the law by the judge, the jury can reach a conclusion about the proper outcome of the case based on the facts it determines to be true. For example, in a case involving personal injuries caused by alleged medical malpractice by a doctor, the judge instructs the jury on the elements of negligence—duty, breach of duty, causation, and harm—and the jury must decide what actions the doctor took and whether those actions constituted a breach of his or her duty to the patient that resulted in harm to the patient. Thus, the judge and jury must together consider and decide the two aspects of a legal proceeding, facts and law, to reach a just result.

When a civil case is presented to the jury for deliberation, the judge supplies a set of jury instructions that provide guidelines on the applicability of legal principles to the case and a verdict form on which the jury can indicate which party is entitled to a judgment and how damages should be assessed. Generally, there are two types of verdicts that the jury in a civil case may be asked to return. A *general verdict*, most commonly used, is one in which the jury indicates the "winning" party and the amount of damages. A general verdict form gives no indication of the basis for the jury's conclusions. A *special verdict* requires the jury to answer specific questions about the facts in the case. After the special verdict is returned, the judge applies the law to the facts found by the jury to reach a conclusion. Some jurisdictions allow variations on the special verdict, which grants the jury the power to decide the party entitled to judgment, but also answer specific questions about the factual basis for its conclusion.

Presentation of Evidence

Trials are built around the presentation of evidence. Attorneys for the parties assemble physical, testimonial, documentary, and demonstrative evidence in order to "tell a story" about what happened in the case. The jury considers the evidence presented and, on the basis of the evidence that it believes to be credible, determines what occurred.

Although the rules of evidence for a jurisdiction govern the specific manner in which evidence may be admitted, generally, evidence must be relevant and trustworthy. Evidence is relevant if it is useful in making some fact more or less likely to be true. Thus, relevant evidence must have some bearing on one or more factual issues in a case. Evidence is trustworthy if it is presented in accordance with the rules of evidence and procedure. Thus, witnesses must be sworn and subjected to cross-examination and may not testify as to hearsay. Hearsay is an out-of-court statement offered for the truth of the matter asserted in the statement. Although there are exceptions to the hearsay rule, it is generally inadmissible because the person who made the statement is unavailable at trial to be examined about the statement. In addition, the trustworthiness of other types of evidence is supported by adherence to the rules. For example, a proper foundation must be laid before exhibits may be introduced. A foundation for physical or documentary evidence exists when its source may be established. The use of objections to the introduction of testimony or other evidence also assists the jury in determining which evidence may be relied on in deciding the facts.

Trial Motions

Several types of motions may be made at trial to narrow the issues in a case or resolve it altogether. Most common among these are a motion for a directed verdict, a motion for a new trial, and a motion for judgment notwithstanding the verdict.

A directed verdict (sometimes called judgment as a matter of law) is a decision in favor of one party based on the insufficiency of the evidence presented by the other party. The verdict is entered by the judge because the evidence presented cannot support a verdict for the party against whom the verdict is entered, and it is therefore unnecessary for the jury to deliberate about the facts. In deciding a motion for a directed verdict, the judge does not weigh the evidence of the opposing parties to decide which has more, or more credible, evidence. That is the province of the jury. Rather, the judge considers the evidence in a light favorable to the nonmoving party and resolving all questions about the weight of the evidence in favor of that party. Having done so, if the judge still concludes that no reasonable jury could decide in favor of the nonmoving party, the directed verdict will be entered.

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A motion for a new trial may be made by a party for a variety of reasons. All of these involve some form of prejudice to one of the parties. That is, the reason for granting a new trial must stem from something occurring at the trial that was fundamentally unfair to the party requesting a new trial. Common grounds for a new trial include juror misconduct, errors of law, or extreme prejudice to a party, but a judge has discretion to consider whether a new trial is warranted. Juror misconduct can occur in various ways, such as failing to obey the judge's order to not discuss the case with other jurors before deliberation begins or reading newspapers or reference works on the law, despite a directive by the judge not to do so. An error of law can occur when, for example, the judge allows admission of prejudicial evidence that the moving party establishes was in violation of law, such as reference at trial to existence of an insurance policy covering a plaintiff's injuries. Other ways in which prejudice to a party requiring a new trial may occur involve inflammatory statements made by counsel during opening statements or closing arguments or objectionable derogatory statements about a party made by a witness during examination.

A judgment notwithstanding the verdict ("JNOV") is similar to a directed verdict but is granted after the jury has returned a verdict rather than at the close of the opposing party's evidence. The basis for a JNOV is that the jury's verdict was erroneous; that is, the jury erred in applying the law to facts in reaching its conclusion. In determining whether a motion for JNOV should be granted, the judge will not re-examine the facts but will consider whether the jury found sufficient facts to support the verdict given the applicable law in the case (**Sidebar 10.1**).

Sidebar 10.1 *Civil Court: Justice for the Wealthy?*

The criminal justice system, as is well known from the famous Miranda warnings, provides an attorney to criminal defendants who cannot afford one. The civil court system in the United States is different. There is no right to an attorney, and people who are sued or suing need to hire their own. Civil courts were intended as a means of allowing citizens seeking justice, including businesses, to have an independent decision maker resolve a private matter—one that did not affect the broader interests of society. Over time, the caseload of civil courts has increased dramatically, and cases usually take a long time from start to completion of a single case. Although small claims (less than $5,000 in many jurisdictions) may be handled more expeditiously, the civil justice system for cases involving higher amounts of money or equitable relief may take from 6 months to several years before a case can be resolved. Thus, although the civil justice system is designed to allow any person a forum in which he or she can receive a fair hearing to resolve disputes, who can afford it? Is the design consistent with reality? Can anyone, including those of modest means, really afford to access the courts? Or are they just places for the wealthy to sort things out?

Without question, the cost of bringing or defending a lawsuit and going to trial is high. Indeed, many groups seeking court reform cite the cost to businesses and individuals as a primary reason why the justice system doesn't work (see Sidebar 13.1). In large cities, hourly fees for attorneys typically range from $200 to $400, but may be as high as $1,000 for highly experienced lawyers in well-established law firms. Even with contingent fees, where attorneys collect a portion of any judgment or settlement amount, the percentage can exceed 50%. In addition, the costs associated with lawsuits, including the deposition, document review, economic or statistical analysis, expert witnesses, and even copying fees, can increase the cost of a lawsuit dramatically. Given the rising costs of litigation, many individuals and businesses seek protection against what could be devastating cost of defending a lawsuit. A significant component of many liability insurance policies is not the limits of liability that the company will pay but the terms and extent to which a policy will pay litigation costs in the event the policyholder is sued.

The question raised is this: Is a person or a business with a great deal of wealth better able to pursue cases in court that a person or company of lesser means cannot? Those who are able to afford a lengthy litigation process are often able to outlast those who are not; indeed, such wealth may be used as a litigation strategy by prolonging the proceedings using legitimate court processes. Is this justice? Has the civil justice system grown so costly that only the wealthy can afford to use it?

Generally, even large corporations involved in civil suits do not wish for lengthy legal proceedings, especially if the benefits do not outweigh the costs and risks to the company. Therefore, both small and large businesses alike advocate litigation reform; however, efforts at reform have brought about little in the way of suggested solutions for the problem, other than calls for limiting punitive or compensatory damages, exempting certain types of organizations (such as nonprofit corporations) from suit, or providing immunity from suit for certain products (such as some experimental drugs). Suggestions such as these may reduce the amount of litigation but would do nothing to reduce the costs or the potential advantage that those with wealth may hold.

Because the purpose of any court is to seek justice, bias experienced by one side in the form of financial effects of protracted litigation or the quality of representation is arguably in contrast to the goal of the courts. The cost of legal fees coupled with an overburdened legal system may prove to be the Achilles heel of the justice system. Perceptions of justice are important to the meaning of justice, and if the public perceives that the court system favors the wealthy or if a person believes he or she cannot afford justice, support for our justice system will erode. Above the steps of the U.S. Supreme Court is the inscription "Equal Justice Under Law." To the extent that the process of civil justice is affected by its cost, the quality of justice for those of lesser means may not be equal.

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Appeals

A right to appeal civil judgments exists in every jurisdiction. The basis for the appeal and likelihood of prevailing on appeal varies considerably. Rules of appellate procedure govern the manner and deadlines within which an appeal may be brought, but two fundamental requirements are shared by appellate practice in all jurisdictions: the existence of a final judgment and one or more legal issues for appeal.

Final Judgment Rule

The final judgment rule states that the right to appeal exists only when a final judgment has been issued in a civil case. The question, of course, is this: What constitutes a "final judgment"? The U.S. Supreme Court has said that "a decision is not final, ordinarily, unless it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 119 S. Ct. 1915, 144 L.Ed.2d 184 (1999). The *Cunningham* case held that an order for discovery sanction against an attorney was not a final appealable order because it was not an order that ended the litigation on the merits of the case. Thus, a final judgment is an order from the court that resolves all legal and factual issues in the case; nothing more is left to be decided.

The final judgment rule is intended to prevent multiple appeals from decisions that may be made by a court as litigation progresses. In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S. Ct. 669, 66 L.Ed.2d 571 (1981), the Court found that the final judgment rule has several purposes:

> It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration.

Thus, if appeals of each and every decision by the trial judge were allowed, the trial would likely be interrupted to obtain appellate court rulings and further extend an already time-consuming trial process. Furthermore, appellate courts would be forced to make decisions in piecemeal fashion that may or may not ultimately have a bearing on the outcome of a case. As the Court in *Firestone* indicated, the goal of the final judgment rule is efficiency in the operation of both the trial and appellate courts. By allowing the appellate court, in a single case, to decide the legality of all objections raised at trial, the trial and appellate courts can maintain independence in their functioning and the processes of justice can move forward orderly and efficiently for the courts and the parties that look to them for decisions.

Legal Issues for Appeal

Two general principles govern whether an appeal may be brought. First, only questions of law, not questions of fact, may form the basis for an appeal. It is the responsibility of the trial judge to decide issues of law. An issue of law requires interpretation of the law that applies in a case. When that interpretation is erroneous, it may be raised in the appellate court by the party against whom it was made. The appellate court will review the law, consider its proper interpretation in light of the facts found by the jury, and either sustain or reverse the decision regarding that issue made by the trial judge. Although the appellate court may overturn a verdict that is wholly without factual support, it must generally defer to the trial court in determinations of fact. *Metropolitan Stevedore Company v. Rambo*, 521 U.S. 121, 117 S. Ct. 1953, 138 L.Ed.2d 327 (1997). An appellate court will not disturb factual conclusions made at trial unless they are clearly erroneous. *Peterkin v. Jeffes*, 855 F.2d 1021 (1988).

Case Decision 10.3 *Salve Regina College v. Russell*, 499 U.S. 225, 111 S. Ct. 1217, 113 L.Ed.2d 190 (1991)

Opinion of the Court by Justice Blackmun:

The concept of a federal general common law, lurking (to use Justice Holmes' phrase) as a "brooding omnipresence in the sky," was questioned for some time before being firmly rejected in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938). *Erie* mandates that a federal court sitting in diversity apply the substantive law of the forum State, absent a federal statutory or constitutional directive to the contrary. In decisions after *Erie*, this Court made clear that state law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law. In this case, we must decide specifically whether a federal court of appeals may review a district court's determination of state law under a standard less probing than that applied to a determination of federal law."

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I

The issue presented arises out of a contract dispute between a college and one of its students. Petitioner Salve Regina College is an institution of higher education located in Newport, R.I. Respondent Sharon L. Russell was admitted to the college and began her studies as a freshman in 1982. The following year, respondent sought admission to the college's nursing department in order to pursue a bachelor of science degree in nursing. She was accepted by the department and began her nursing studies in the fall of 1983.

Respondent, who was 5′6″ tall, weighed in excess of 300 pounds when she was accepted in the nursing program. Immediately after the 1983 school year began, respondent's weight became a topic of commentary and concern by officials of the nursing program. Respondent's first year in the program was marked by a series of confrontations and negotiations concerning her obesity and its effect upon her ability to complete the clinical requirements safely and satisfactorily. During her junior year, respondent signed a document that was designated as a "contract" and conditioned her further participation in the nursing program upon weekly attendance at a weight-loss seminar and a realized average loss of two pounds per week. When respondent failed to meet these commitments, she was asked to withdraw from the program and did so. She transferred to a nursing program at another college, but had to repeat her junior year in order to satisfy the transferee institution's 2-year residency requirement. As a consequence, respondent's nursing education took five years rather than four. She also underwent surgery for her obesity. In 1987, respondent successfully completed her nursing education, and she is now a registered nurse.

Soon after leaving Salve Regina College, respondent filed this civil action in the United States District Court for the District of Rhode Island. She asserted, among others, claims based on (1) intentional infliction of emotional distress, (2) invasion of privacy, and (3) nonperformance by the college of its implied agreement to educate respondent. The amended complaint named the college and five faculty members as defendants and alleged discrimination in violation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701, *et seq.*; denial of due process and unconstitutional interference with her liberty and property interests; negligent and intentional infliction of emotional distress; invasion of privacy; wrongful dismissal; violation of express and implied covenants of good faith and fair dealing; and breach of contract. The District Court entered summary judgment for the defendants except as to the three state-law claims for intentional infliction of emotional distress, invasion of privacy, and breach of contract. The parties agree that the law of Rhode Island applies to all substantive aspects of the action.

At the close of plaintiff-respondent's case in chief, the District Court directed a verdict for the individual defendants on all three of the remaining claims, and for the college on the claims for intentional infliction of emotional distress and invasion of privacy. The court, however, denied the college's motion for a directed verdict on the breach-of-contract claim, reasoning that "a legitimate factual issue" remained concerning whether "there was substantial performance by the plaintiff in her overall contractual relationship at Salve Regina."

At the close of all the evidence, the college renewed its motion for a directed verdict. It argued that under Rhode Island law the strict commercial doctrine of substantial performance did not apply in the general academic context. Therefore, according to petitioner, because respondent admitted she had not fulfilled the terms of the contract, the college was entitled to judgment as a matter of law.

The District Court denied petitioner's motion. Acknowledging that the Supreme Court of Rhode Island, to that point, had limited the application of the substantial-performance doctrine to construction contracts, the District Court nonetheless concluded, as a matter of law, that the Supreme Court of Rhode Island would apply that doctrine to the facts of respondent's case. The Federal District Judge based this conclusion, in part, on his observation that "I was a state trial judge for 18 and 1/2 years, and I have a feel for what the Rhode Island Supreme Court will do or won't do." Accordingly, the District Court submitted the breach-of-contract claim to the jury. The court instructed the jury:

> The law provides that substantial and not exact performance accompanied by good faith is what is required in a case of a contract of this type. It is not necessary that the plaintiff have fully and completely performed every item specified in the contract between the parties. It is sufficient if there has been substantial performance, not necessarily full performance, so long as the substantial performance was in good faith and in compliance with the contract, except for some minor and relatively unimportant deviation or omission.

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The jury returned a verdict for respondent, and determined that the damages were $30,513.40. Judgment was entered. Both respondent and petitioner appealed.

The United States Court of Appeals for the First Circuit affirmed. It first upheld the District Court's directed verdict dismissing respondent's claims for intentional infliction of emotional distress and invasion of privacy. It then turned to petitioner's argument that the District Court erred in submitting the breach-of-contract claim to the jury. Rejecting petitioner's argument that, under Rhode Island law, the doctrine of substantial performance does not apply in the college-student context, the court stated:

> In this case of first impression, the district court held that the Rhode Island Supreme Court would apply the substantial performance standard to the contract in question. In view of the customary appellate deference accorded to interpretations of state law made by federal judges of that state, we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error.

Petitioner college sought a writ of certiorari from this Court. It alleged that the Court of Appeals erred in deferring to the District Court's determination of state law. A majority of the Courts of Appeals, although varying in their phraseology, embrace a rule of deference similar to that articulated by the Court of Appeals in this case. Two Courts of Appeals, however, have broken ranks recently with their sister Circuits. They have concluded that a district-court determination of state law is subject to plenary review by the appellate court. We granted certiorari to resolve the conflict.

II

We conclude that a court of appeals should review *de novo* a district court's determination of state law. As a general matter, of course, the courts of appeals are vested with plenary appellate authority over final decisions of district courts. The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations.

Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. District judges preside alone over fast-paced trials: Of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence. Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs. Thus, trial judges often must resolve complicated legal questions without benefit of "extended reflection [or] extensive information."

Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multi-judge panels that permit reflective dialogue and collective judgment. Over 30 years ago, Justice Frankfurter accurately observed:

> Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions.

Independent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review. Petitioner readily acknowledges the importance of a district court's reasoning to the appellate court's review. Any expertise possessed by the district court will inform the structure and content of its conclusions of law and thereby become evident to the reviewing court. If the court of appeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion. Independent review, however, does not admit of unreflective reliance on a lower court's inarticulable intuitions. Thus, an appropriately respectful application of *de novo* review should encourage a district court to explicate with care the basis for its legal conclusions.

Although some might say that this Court has not spoken with a uniformly clear voice on the issue of deference to a district judge's determination of state law, a careful consideration of our cases makes apparent the duty of appellate courts to provide meaningful review of such a determination. In a series of cases decided soon after *Erie* the Court noted that the appellate courts had applied general federal

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law instead of the law of the respective States, and remanded to the Courts of Appeals for consideration of the applicable principles of state law.

III

In urging this Court to adopt the deferential standard embraced by the majority of the Courts of Appeals, respondent offers two arguments. First, respondent suggests that the appellate courts professing adherence to the rule of deference actually are reviewing *de novo* the district-court determinations of state law. Second, respondent presses the familiar contention that district judges are better arbiters of unsettled state law because they have exposure to the judicial system of the State in which they sit. We reject each of these arguments.

A

Respondent primarily contends that the Courts of Appeals that claim to accord special consideration to the District Court's state-law expertise actually undertake plenary review of a determination of state law. According to respondent, this is simply *de novo* review "cloth[ed] in 'deferential' robes." In support of this contention, respondent refers to several decisions in which the appellate court has announced that it is bound to review deferentially a district court's determination of state law, yet nonetheless has found that determination to constitute reversible error. Respondent also relies on cases in which the Courts of Appeals, while articulating a rule of deference, acknowledge their obligation to scrutinize closely the District Court's legal conclusions.

We decline the invitation to assume that courts of appeals craft their opinions disingenuously. The fact that an appellate court overturns an erroneous determination of state law in no way indicates that the appellate court is not applying the rule of deference articulated in the opinion. Respondent would have us interpret this caveat as an acknowledgment of the appellate court's obligation to review the state-law question *de novo*.

In a case where the controlling question of state law remains unsettled, it is not unreasonable to assume that the considered judgment of the court of appeals frequently will coincide with the reasoned determination of the district court. Where the state-law determinations of the two courts diverge, the choice between these standards of review is of no significance if the appellate court concludes that the district court was clearly wrong.

Thus, the mandate of independent review will alter the appellate outcome only in those few cases where the appellate court would resolve an unsettled issue of state law differently from the district court's resolution, but cannot conclude that the district court's determination constitutes clear error. These few instances, however, make firm our conviction that the difference between a rule of deference and the duty to exercise independent review is "much more than a mere matter of degree." When *de novo* review is compelled, no form of appellate deference is acceptable.

B

Respondent and her *amicus* also argue that *de novo* review is inappropriate because, as a general matter, a district judge is better positioned to determine an issue of state law than are the judges on the court of appeals. This superior capacity derives, it is said, from the regularity with which a district judge tries a diversity case governed by the law of the forum State, and from the extensive experience that the district judge generally has had as practitioner or judge in the forum State.

We are unpersuaded. As an initial matter, this argument seems to us to be founded fatally on overbroad generalizations. Moreover, and more important, the proposition that a district judge is better able to "intuit" the answer to an unsettled question of state law is foreclosed by our holding in *Erie*. The very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge. Similarly, the bases of state law are as equally communicable to the appellate judges as they are to the district judge. To the extent that the available state law on a controlling issue is so unsettled as to admit of no reasoned divination, we can see no sense in which a district judge's prior exposure or nonexposure to the state judiciary can be said to facilitate the rule of reason.

IV

The obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie* require that courts of appeals review the state-law determinations of district courts *de*

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novo. The Court of Appeals in this case therefore erred in deferring to the local expertise of the District Court. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Dissent by Chief Justice Rehnquist, joined by Justices White and Stevens:

I do not believe we need to delve into such abstractions as "deferential" review, on the one hand, as opposed to what the Court's opinion calls, at various places, "plenary," "independent," and "*de novo*" review, on the other, in order to decide this case. The critical language used by the Court of Appeals, and quoted in this Court's opinion, is this: "In view of the customary appellate deference accorded to interpretations of state law made by federal judges of that state, we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error."

In order to determine the Court of Appeals' views as to "customary appellate deference," it seems only fair to refer to the page in *Dennis v. Rhode Island Hospital Trust Nat. Bank*, 744 F.2d 893 (1984), to which the court cites. There we find this language: "[I]n a diversity case such as this one, involving a technical subject matter primarily of state concern, we are 'reluctant to interfere with a reasonable construction of state law made by a district judge, sitting in the state, who is familiar with that state's law and practices.'"

The court does not say that it *always* defers to a district court's conclusions of law. Rather, it states that it is reluctant to substitute its own view of state law for that of a judge "who is familiar with that state's law and practices." In this case, the court concluded that the opinion of a District Judge with 18½ years of experience as a trial judge was entitled to some appellate deference.

This seems to me a rather sensible observation. A district court's insights are particularly valuable to an appellate court in a case such as this where the state law is unsettled. In such cases, the courts' task is to try to *predict* how the highest court of that State would decide the question. A judge attempting to predict how a state court would rule must use not only his legal reasoning skills, but also his experiences and perceptions of judicial behavior in that State. It therefore makes perfect sense for an appellate court judge with no local experience to accord special weight to a local judge's assessment of state court trends.

If we must choose among Justice Holmes' aphorisms to help decide this case, I would opt for his observation that "[t]he life of the law has not been logic: it has been experience." O. Holmes, The Common Law 1 (1881). And it does no harm to recall that the Members of this Court have no monopoly on experience; judges of the courts of appeals and of the district courts surely possess it just as we do. That the experience of appellate judges should lead them to rely, in appropriate situations, on the experience of district judges who have practiced law in the State in which they sit before taking the bench seems quite natural.

For this very reason, this Court has traditionally given special consideration or "weight" to the district judge's perspective on local law. But the Court today decides that this intuitively sensible deference is available only to this Court, and not to the courts of appeals. It then proceeds to instruct the courts of appeals and the district courts on their respective functions in the federal judicial system, and how they should go about exercising them. Questions of law are questions of law, they are told, whether they be of state law or federal law, and must all be processed through an identical decisional mold.

I believe this analysis unduly compartmentalizes things which have up to now been left to common sense and good judgment. Federal courts of appeals perform a different role when they decide questions of state law than they do when they decide questions of federal law. In the former case, these courts are not sources of law but only reflections of the jurisprudence of the courts of a State. While in deciding novel federal questions, courts of appeals are likely to ponder the policy implications as well as the decisional law, only the latter need be considered in deciding questions of state law. To my mind, therefore, it not only violates no positive law but also is a sensible allocation of resources to recognize these differences by deferring to the views of the district court where such deference is felt warranted.

I think we run a serious risk that our reach will exceed our grasp when we attempt to impose a rigid logical framework on the courts of appeals in place of a less precise but tolerably well-functioning approach adopted by those courts. I agree with the Court that a court of appeals should not "abdicate" its obligation to decide questions of state law presented in a diversity case. But by according weight to the conclusion of a particular district judge on the basis of his experience and special knowledge of state law, an appellate court does not "suspend [its] own thought processes." I think the Court of Appeals did no more than that here, and I therefore dissent from the reversal of its judgment.

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The question of deference to conclusions of law made by the trial judge was a central issue in *Salve Regina College v. Russell*, 499 U.S. 225, 111 S. Ct. 1217, 113 L.Ed.2d 190 (1991), found in **Case Decision 10.3**. That case involved an unusual contract between a student and the college she had attended, in which the student was required to attend weekly weight loss sessions and lose 2 pounds each week in order to stay enrolled in a nursing program. She sued the college on a variety of tort theories, as well as a state law breach of contract claim. The trial court granted motions for summary judgment or directed verdicts in favor of the college on all of the tort claims, but not on the breach of contract claim, which was submitted to the jury. The trial judge instructed the jury on the Rhode Island law of contracts in evaluating the facts of the case, in particular whether the student made a good faith effort and had "substantially performed" the contract. He interpreted the applicable requirements of contract law in Rhode Island based on what he believed the Rhode Island Supreme Court's interpretation of contract law would be, based on his many years of experience as a state and federal court judge in Rhode Island. On that claim, the jury awarded damages of about $30,000 to the student. On appeal, the Court of Appeals for the First Circuit upheld the award, giving deference to the interpretation of law made by the trial judge. The U.S. Supreme Court reversed the Court of Appeals, finding that it is the job of the appellate court to draw its own conclusions about questions of state law, not defer to the interpretations of law made by the trial judge. In dissent, three members of the Court believed that requiring appellate courts to decide for themselves what state law requires, independent of the trial judge who lives, works, and has considerable experience in the state, to be mistaken. It viewed the majority's decision to reflect a "rigid logical framework" that would make interpreting the meaning of state law less certain, not more. The holding of the case and the debate between the majority and dissenting views is instructive because it shows the difficulties that sometimes exist in deciding what the law is and how it should apply in a given case.

The second principle governing whether an appeal may be brought is that only those legal issues to which objections were made at trial ("preserved" for appeal) may be raised. Furthermore, the objection must have been made by the losing party who brings the appeal, and the objectionable issue of law must arguably have been related to the outcome of the case. The reason for requiring that objections have been made at trial is one of fairness. The appealing party may not wait until the time of appeal to object to a decision made by the trial when, if it were made at trial, the trial judge would have had the opportunity to "correct" the error. In other words, the appellant cannot wait to see whether the judge's evidentiary and other decisions during trial are beneficial or detrimental and, if ultimately the latter, raise it on appeal. The appeals court need only consider the matter properly brought before it, and in this context, "properly" means first raised at trial.

Key Terms

Civil Procedure
Pleading
Cause of Action
Affirmative Defense
Motions
Discovery
Summary Judgment
Pretrial Conference
Final Judgment Rule

Discussion Questions

1. What is the relationship between civil procedure and substantive civil law?
2. What are the Federal Rules of Civil Procedure?
3. What is the purpose of pleading in a civil case? Why are pleadings necessary?
4. What is the function of a civil complaint and an answer? What information must they contain?
5. What are three types of pretrial motions? What is their purpose?
6. What does the use of discovery accomplish? What are four commonly used discovery tools?
7. Why is the use of pretrial conferences a necessary part of civil court procedures? What types of pretrial conferences are held?
8. What are the respective roles of the judge and jury in a civil case?
9. What is the final judgment rule? How does it apply to appeals?

Cases

Bell Atlantic v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007).
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