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Topic 2: Preliminary or Summary Proceedings, Scope and Importance

United States of America

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We are last-minute substitutes, so our report must regrettably be skimpy and partial. In particular, we focus largely on the federal-court system rather than on practice in the 50 states and other American jurisdictions, and the report does not attempt to provide empirical data about instances of various kinds of dispositions.

Mechanisms for disposition on the merits without normal trial

1. Motion to dismiss (also known in some systems as “demurrer”). Rule 12(b) of the Federal Rules of Civil Procedure permits early motions to dismiss on several grounds, most of them procedural but including in Rule 12(b)(6) the failure to state a claim upon which relief can be granted. That ground may also be presented in a defendant’s answer to a plaintiff’s complaint and at later stages of a federal civil case. A motion under Rule 12(b)(6) challenges the legal sufficiency of the allegations in a plaintiff’s complaint, in effect saying “so what?”--the motion raises for decision by the court the question whether, even assuming that everything the plaintiff alleges is true, the plaintiff is on any legal theory entitled to relief. If the court grants such a motion, the ruling will obviously not be a “final result involving the granting of relief,” which is what the questionnaire to which we are responding asks about at one point, because it will be a judgment for the defendant granting the defendant no relief (except from having to defend further) and having the effect that the plaintiff takes nothing.

2. Motion for judgment on the pleadings. After the pleadings (complaint, answer, etc.) are closed, Federal Rule 12(c) permits either side to move for judgment on the pleadings. Such a motion could rest on procedural rather than substantive grounds, but defendant may assert in a Rule 12(c) motion the substantive ground that the plaintiff has failed to state a claim upon which relief can be granted. A plaintiff might also in some--probably uncommon--circumstances be able to use the Rule 12(c) motion for judgment on the pleadings to seek a judgment and relief in plaintiff’s favor, as when the plaintiff’s complaint did state a claim on which relief could be granted but the only defense(s) asserted by a defendant were legally insufficient.

3. Default judgment. Federal Rule 55(a) provides, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk [of court] shall enter the party's default." A court may enter a default judgment not just for failure to appear or defend, but also under Rule 37(b)(2)(C) as a sanction for litigation misconduct such as failure to obey discovery orders. Usually, plaintiffs gaining judgment by default must make some proof to the court of the amounts of damages or other relief to which they may be entitled. Although Rule 54(c) generally authorizes the granting of whatever relief a plaintiff may be entitled to, even if not demanded in the plaintiff's pleadings, to prevent unfair surprise (and to encourage defendants with no defense not to bother appearing) the rule makes an exception for default judgments and limits them to the relief demanded in the complaint. Under Rule 55(c), courts may for good cause set aside default judgments; such motions are, depending on circumstances, fairly often granted.

4. Dismissal for failure to prosecute. The counterpart to default judgment against a defendant, for a plaintiff who files an action but effectively abandons it, is involuntary dismissal for failure to prosecute or to comply with procedural rules or court orders. Federal Rule 41(b) provides, "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." Rule 37(b)(2)(C), mentioned above in connection with defaults against defendants, also authorizes "dismiss[al of] the action or proceeding or any part thereof" as a sanction for discovery misconduct. Default judgments and involuntary dismissals for failure to prosecute or as a sanction are probably fairly common.

5. Summary judgment. A form of disposition without trial that either side may seek, but that is probably considerably more often sought and obtained by defendants, is full or partial summary judgment under Federal Rule 56. The standard for granting summary judgment is, in the words of Rule 56(c), "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment differs from motions to dismiss for failure to state a claim, or motions for judgment on the pleadings, in the key respect that it is said to pierce the pleadings--not to assume the truth of parties' allegations and to test their legal sufficiency, but to determine whether there is sufficient proof on material issues for the case to go to trial, or if it should be disposed of without trial. The standard for grant of summary judgment is still demanding, in that if a trier of fact (jury or judge) might go either way on the admissible evidence as it appears in connection with the motion, the court is not to grant the motion; it is not to resolve genuine and material issues of fact or witness credibility (even if one side's case appears quite weak), but rather to decide whether there are such issues at all--and if so to deny summary judgment and let the case proceed to trial if the parties do not settle it. Still, summary-judgment motions are granted with some frequency; and the former belief that they were reversed on appeal considerably more often than other trial-court rulings has not been borne out by such empirical research as has been conducted.

Summary-judgment motions draw on facts as presented in affidavits and documents that the parties may present, and on facts as developed in discovery. Each side may present such materials in support of or opposition to the motion, and to argue that they show the presence or absence of

genuine issues of material fact. A key feature of summary-judgment practice is that the standard for granting summary judgment is formally, and to a considerable extent in practice, the same as for pre-verdict and post-verdict judgments as a matter of law (previously, and often still, referred to respectively as motions for a directed verdict and for judgment notwithstanding the verdict). For cases tried by juries, Federal Rule 50(a)(1) provides, "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." The function of the pretrial motion for summary judgment and of trial motions for judgment as a matter of law is the same--to determine whether there is any material issue for a trier of fact, or whether the moving party should be granted judgment by the court as a matter of law; and Supreme Court precedent makes it explicit that the standard for the motions, however they are labeled, is the same.

6. Cognovit notes. Consumer-credit contracts often used to include a clause under which the debtor acknowledged "debt or liability in the form of a confessed judgment" and "relinquished, in advance, any right to be notified of court hearings in any suit for nonpayment." BLACK'S LAW DICTIONARY (7th ed. 1999; online Westlaw version, definition of "cognovit"). They are not unconstitutional: Supreme Court decisions in *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), and *Swarb v. Lennox*, 405 U.S. 191 (1972),

have made clear that cognovit notes are not per se violative of due process principles. The decisions do indicate, however, that the Supreme Court and the lower federal courts might look with some disfavor upon these procedures and might examine the relative bargaining positions of the parties, the comparative knowledge factor, and other elements that relate to due process in determining whether such contractual clauses are legitimate and should be enforced.

4A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1074, at 374 (3d ed. 1998). However, they are invalid under the law of many states and have been largely replaced by mandatory arbitration clauses (*see generally infra* discussion of alternative dispute resolution) putting the debtor at a disadvantage in the proceeding.

Interim and provisional relief

1. Judgment as to part of a case. Although the question about the circumstances under which interim or provisional relief may be granted perhaps does not focus mainly on partial adjudication, it may be worth pointing out that the various motions discussed above can often result not in a final judgment for any party but in partial resolution as to claims or issues, with remaining matters left for trial. In both Federal Rule 56(a) and 56(b), on summary judgments for claimants and for defending parties, there appears authorization for entry of summary judgment "in the party's favor upon all or any part" of a claim. And Rule 56(c) specifically provides, "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine

issue as to the amount of damages.” Similarly, other motions such as failure to state a claim may yield dispositions as to part but not all of a case.

2. Interlocutory injunctions. The leading form of provisional relief available in American courts is the interlocutory injunction--temporary restraining orders (TROs) and preliminary as opposed to final injunctions. TROs are for urgent situations involving possibly highly imminent action, may be granted without notice or hearing to the other side (as when, for example, contested funds in a defendant’s control may be sent beyond reach if the defendant gets notice before an order freezing them), and are supposed to be of very short duration--ten days, renewable once for another ten days, under Federal Rule 65(b). Preliminary injunctions are still provisional and interlocutory but issued after more deliberation, after adversary hearing and on the basis of a balancing of four well-established factors (which also apply to the grant or denial of TROs): 1) plaintiff’s likelihood of success on the merits; 2) the chance of irreparable harm to the plaintiff before a decision on final relief if interlocutory relief is not granted; 3) the relative balance of harms to the plaintiff and defendant resulting from the grant or denial of interim injunctive relief; and 4) if relevant, the effect of grant or denial of interlocutory relief on the public interest. Interlocutory injunctions are supposed to be granted only if the plaintiff posts a bond sufficient, in the view of the court, to compensate “any party who is found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). The grant or denial of an interlocutory injunction often, but not always, has the effect in fast-moving situations such as corporate takeover bids of effectively resolving a controversy without final adjudication.

3. *Mareva* injunctions. Injunctions to keep a defendant from disposing of assets during litigation, when the plaintiff fears that there will be no reachable assets by the time judgment is entered, are not available in United States federal courts. But the Supreme Court decision that so held, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), rested on the scope of traditional equity powers and strongly indicated that the courts would defer to a statute authorizing such orders if Congress were to pass one. “[O]ur traditionally cautious approach to equity powers . . . leaves any substantial expansion of past practice to Congress.” *Id.* at 329. “The debate concerning this formidable power over debtors should be conducted and resolved where such issues belong in our democracy: in the Congress.” *Id.* at 333. A leading state-court decision speaks in very similar terms:

[W]hen asked to exercise inherent judicial powers to impose significant innovations in the field of provisional remedies, we have previously determined that the balancing of important competing interests and crafting of appropriate safeguards and standards to ensure that the balance is fairly administered in the individual case, are “task[s] best left to statutes and rules rather than ad hoc judicial decision-making.” The same self-restraint and deference to a legislative solution applies here, where judicial innovation may have far-reaching impact on the existing balance between debtors’ and creditors’ rights.

Credit Agricole Indosuez v. Rossiyskiy Credit Bank, 94 N.Y.2d 541, 551, 729 N.E.2d 683, 689, 708 N.Y.S.2d 26, 32 (2000) (citations omitted)..

Settlement and alternative dispute resolution (ADR)

American courts tend strongly to favor settlement of civil litigation, and it is sometimes said that a large majority of cases are settled. That is probably a misleading statement, confusing settlement with disposition without trial--which can take place in any of several ways, as foregoing discussion has illustrated. Still, it is probably safe to say that a large number of American civil cases are settled, either with or without judicial encouragement--and that the percentage of filed cases that go all the way to trial is small and has declined in recent decades.

1. Offer of judgment. Federal Rule 68, with counterparts in many state systems, provides that a party defending against a claim may make a formal offer to have a specified judgment entered against it. If the offer is accepted, that ordinarily ends the case; but the offer rule creates incentives beyond those regularly involved with settlement offers by providing that if a claimant does not accept a defense offer and wins a verdict but does not do better than the offer in the final judgment, the claimant is not entitled to post-offer "costs" and is liable to pay the defendant's post-offer costs. This rule corresponds to practices elsewhere such as the English provision for "payment into court" of an amount for which the defendant is willing to be held liable, again with cost consequences for a plaintiff who does not accept and does not ultimately do better than the offer. A key difference is that under the American attorney-fee default rule that each party is liable for its own lawyer's fees win or lose, "costs" do not usually include attorney fees and are thus small enough to make the offer rule ineffective and relatively little used. In some situations, as when a federal statute makes an exception to the American rule holding defendants liable for a prevailing plaintiff's attorney fees as part of "costs," formal offer rules can have more teeth when they at least let a defendant cut off its fee liability as of the date of an offer that the plaintiff does not accept and does not better.

2. Alternative dispute resolution. ADR is very widespread in United States federal and state courts, and also as a voluntary mechanism used by parties who prefer the informality and possibly lower cost of one or another ADR procedure. Two general observations are probably worth making at the outset about this multifarious field: First, ADR approaches are of many varieties, both binding and nonbinding and taking different forms such as mediation to try to facilitate settlement and arbitration to produce what may be a binding or nonbinding award. Second, ADR may be either a party-chosen alternative to court adjudication (often culminating in a binding ruling by an arbitrator or arbitration panel after trial-like procedures) or court-annexed and rarely binding because of constitutional rights to trial by jury in state and federal courts. Court-annexed mediation or arbitration, even when it results in an "award" in favor of one side, is nearly always advisory with the parties retaining the right to go to regular civil trial if they do not settle the case--which, of course, mediation or nonbinding arbitration may help them do.

Federal statute (the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658) now requires each federal district (trial) court to have its own program for alternative dispute resolution of civil cases. Furthermore, Federal Rule 16 on pretrial conferences authorizes, in Rule 16(c)(9), the consideration at pretrial conferences and court action upon "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."

An integrated view on American litigiousness, discovery, and pretrial disposition

Contrary to popular belief, Americans are not especially litigious. Nine times out of ten, individuals with viable claims against others do not consult a lawyer or even consider litigation. Most, with the celebrated Learned Hand, would prefer anything but sickness or death to litigation.

For those individuals who do consult a lawyer about a dispute, the chances that they will go to trial are slight. While there are vast differences in the proportion depending on the substantive nature of the disputes, few matters reaching court are resolved in a courtroom. For example, millions of claims are filed annually for the purpose of collecting debts that the debtor does not contest. Such claims are reduced to judgment in order to set in motion the machinery for collection, i.e., to secure a court order directing a sheriff or marshal to seize the debtor's assets, sell them, and remit the proceeds to the creditor. But the debt collection cases filed in court are a minor fraction of the total number of unpaid debts. Many creditors do not pursue legal remedies because they perceive that the debtor has no assets that are available for seizure or sale. And many others will calculate that debt collection is not worth the trouble. Or they will settle for payment of part of the debt.

In contrast, commercial disputes between business firms are likely to be turned over to lawyers. If commercial claims are pursued, they are likely to be contested by defendants, but even within this category, there are substantial differences depending on the substantive nature of the dispute. Antitrust claims, for example, are unlikely to be resolved privately by the parties either through forbearance or prompt settlement. There is a tendency of lawyers representing defendants in all kinds of civil cases to exploit every decent opportunity (and some not so decent) to delay the resolution of a claim. Many defendants calculate that the opportunity to keep their money for as long as possible is more valuable than the peace and amiability they might achieve by an early settlement. This may be especially true of liability insurance companies.

Thus, when there is a dispute between business firms, it is very likely that a claim will be filed with a court. This is not merely because of the propensity of defendants to delay settlement as long as possible, but also because one must file a claim in order to have access to discovery. All American courts, in varying form, allow the parties to conduct discovery. Lawyers for all parties are endowed with the authority to compel parties and even non-parties to provide all needed assistance in establishing proof or disproof of a claim or a defense. Thus, a lawyer in a filed case can compel any person whether or not a party to submit to examination and cross-examination about any events in dispute. They may also be compelled to produce documents that might be helpful in proving the adversary's case, or to submit to an inspection of things or premises in their possession. A plaintiff claiming personal injury may be required to undergo a physical examination by a doctor nominated by the defendant.

While discovery is preparation for trial, it is also designed to eliminate the need for trial in many cases. A premise of discovery practice is that parties who can foresee the evidence that would be presented at trial are more likely to settle their cases, and this appears to be the result. Of course, discovery does not always enable parties to forecast the results of trials, but it makes it more likely