I. FED-STATE CHOICE OF LAW

A. ERIE V. TOMPKINS
   2. Apparent Basis: Constitutional
   3. History: Rules of Decis. Act; Swift v. Tyson--Confined to State & "Local" Laws
   4. Basic Rule: In Diversity or Other State-Claim Cases, the Substantive Law is to be Determined Not by Reference to "General" Law but Rather by the Substantive Law of the State Where the Dist. Ct. Sits

B. FREQUENT PROBLEMS
   1. The Substance-Procedure Problem: For Erie Purposes, Labels as to What is Usually "Substantive" or "Procedural" May have Some Limited Utility, But Don't Really Apply
      b. Second: If No Controlling Fed. Rule:
         (1) Outcome Determinative Test (Guaranty Trust v. York)
         (2) "Absolute" or "Definitive" Outcome Determination (Byrd v. Blue Ridge)
         (3) Fed.-State Interest Balancing (Byrd)
(4) Basic Test: Policies of Erie

2. The Ventriloquists Dummy Analogy


5. Difficulty in Determining State Law--The "Erie Educated Guess" & Other Phenomena--Ct Infers What Highest State Court Wd Do

II. PLEADING

A. BASIC TYPES OF APPROACHES

1. Historical: Forms of Action; Rise of Equity; Common-Law Pleadings; Field Codes

2. Restrictive Practice--Facts, Not Conclusions. Disadvantages: Difficulty; Expense; Injustice Thru Noncompliance or Variance (Restrictive State Approaches)


4. Modern Liberalized State "Cause of Action" Pleading--Cal., N.Y., Tex. (Cause of Action just means you have to make a statement about each element of the claim)

5. Which Is Better: (1) "Notice" Pleading of Claim or (2) Liberalized "Cause of Action" Pleading?

B. PLAINTIFF'S COMPLAINT

1. Must State a Claim, Show Juris., & Claim Relief, But

2. Sufficiency as to Specificity; Will be Read Liberally ("Notice" Pleading). Forms. Particularity Req'mts: R.9 (e.g., Fraud); Official Immunity

Complaint in Light Most Favorable to P.; Then Only if it Cannot Be Said that P. Could Recover on Any Proof Under Complaint Will Mot. Be Granted."

Or: Assume all allegations are true; dismiss only if, as a matter of law, P still couldn't recover.

4. Defensive Attacks on Pleadings:
M./Dism./Fail State Claim;
M./More Def. Stmt.; M./Strike

5. Alternative & Inconsistent--OK

6. Particularity: Certain Things Must be Alleged w/Particularity--E.g., Fraud, Mistake, Special Damages.
(Special damages are those that cannot be inferred from the fact of injury alone--i.e., most damages.)

C. ANSWER


2. Denials
   a. General Denial (State)
   b. Federal: Must Admit & Deny in Good Faith, Fairly Meeting the Substance of Each Allegation

3. Aff. Defenses Must be Pled--Notice Pleading

4. Summarizing Defendants' Pleadings
   --3 Basic Types: Dilatory (Abatement) Matters; Challenges to Plf.'s Pleadings; Answer on Merits (Called Pleas in Bar)
   --In Fed. Ct., Generally These Matters can be Part of the Answer. Some Can Be Raised by 12(b) Motion. Others are Governed by 12(e) and (f) (Mot./More Definite Stmt., Mot./Strike).
   --Texas Uses More Specific Pleading Types.
<table>
<thead>
<tr>
<th>SUBJECT</th>
<th>FED. PLEADING</th>
<th>TEXAS STATE PLEADING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abatement:</td>
<td>(Ans.; 12(b) Mot.)</td>
<td>(Plea to Juris.)</td>
</tr>
<tr>
<td>Subj. Juris.</td>
<td>Ans.; 12(b) Mot.</td>
<td>Mot./Dism. (Special Appearance)</td>
</tr>
<tr>
<td>Service</td>
<td>Ans.; 12(b) Mot.</td>
<td>Mot. to Transfer</td>
</tr>
<tr>
<td>Venue</td>
<td>Ans.; 12(b) Mot.</td>
<td>Plea in Abatement</td>
</tr>
<tr>
<td>Parties Defect</td>
<td>Ans.; 12(b) Mot.</td>
<td></td>
</tr>
<tr>
<td>Pleadings:</td>
<td>Ans.; 12(b) Mot./Dism.</td>
<td>Special Exception</td>
</tr>
<tr>
<td>Substantive Ins.</td>
<td>Fail State Claim</td>
<td></td>
</tr>
<tr>
<td>Vagueness</td>
<td>12(e) M. More Def.</td>
<td></td>
</tr>
<tr>
<td>Inapprop. Matter</td>
<td>Stmt.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>12(f) Mot./Strike</td>
<td></td>
</tr>
<tr>
<td>Merits:</td>
<td>Rule 8(b) Denials &amp; Admissions (Gen.</td>
<td>Gen. Denial</td>
</tr>
<tr>
<td>Denial</td>
<td>Denial Only if Denying Entirety)</td>
<td>Special Denial</td>
</tr>
<tr>
<td>Aff. Defense</td>
<td>&quot;Notice&quot; Pleading</td>
<td>Pled Like Plf.'s Petition</td>
</tr>
<tr>
<td></td>
<td>(Like Plf.'s Complaint)</td>
<td></td>
</tr>
</tbody>
</table>

D. AMENDMENT
1. Of Right--Before Responsive Pleading, Once
2. Permissive (With Leave)--"Freely Given, When Justice so Requires."

E. TEXAS PLEADING DIFFERENCES
1. Plf.'s: "Petition; Cause of Action Pleading (but liberal)
2. Def.'s: See Above.

F. CURRENT RULE 11
1. Implied Certifications: Best of Knowledge, Based on a "Reasonable Investigation"--
   a. No Improper Purpose;
   b. Warranted by Existing Law (or Nonfrivolous Argument);
   c.-d. Evidentiary Support (or Likely After Discovery, if Specifically Identified)
2. Sanctions: Discretionary; Deterrence Purpose; on Attorneys, Law Firms, Parties "Responsible"

3. Safe Harbor Procedure: Service on Opponent of Unfiled Motion; Filed only if Not Withdrawn Within 21 Days (Separate Procedure if Judge Initiates)

4. Recall methods of avoiding violation--demand ltr, cross-X client, document the investigation, expert wtn, legal expert, legal research, prompt discovery, specifically ID allegations depending on discov., etc.

G. OTHER SANCTION POWERS OF COURT: Statutes (e.g., Sanctions for "Vexatiously" Multiplying Litigation--Willfulness Req'mt); Discovery Sanctions; General Equity Powers (Not Confined to Pleadings)

III. PARTIES & CLAIMS: JOINDER

A. COUNTERCLAIM
   1. Permissive & Compulsory
   2. Distinguished From Cross-Claim

B. THIRD PARTY CLAIMS (IMPLEADER)--When May Be Liable to D.

C. JOINDER OF PLFS. & DEFS.
   1. Permissive
      a. Joint, Serv. or Alt. Relief
      b. Same Trans.
      c. Common Q.'s
   2. Persons Needed for Just Adjudication
      a. Basic Notion: Sometimes There are Persons, Not Parties, Who Will so Be Affected by the Action That They Ought to Be Joined if Feasible and Thus Made Parties.
      b. Simple Statemt. of Test: If an Absent Person Could Assert an Interest in the Subject of the Action, so That the Absent Person (or any Existing Party) Could Be Harmed by the
Proceedings, then the Absent Person or Entity is "Needed".
--E.g., Cotenants in a Suit to Cancel Deed; All Heirs in a Will Contest; Dutcher, in Provident Tradesmens Case.

c. If Not Feasible to Join:
   (1) Reasons Why Not Feasible: Destruction of Jurisdiction; Judgmt. Already Rendered or Case Underway
   (2) Test for Proceeding: (a) Harm to Absent Person, or Parties; (b) Shaping of Relief; (c) Adequacy of J. to Defs.; (d) Plf.'s Adequacy of Remedy (Equity & Good Consc.) Example: Trial Ct. Might Have Reasonably Dism'd in Prov. Tradesmens, if Raised Immediately; After J., No.

D. COMPLEX & MULTI-PARTY ACTIONS

1. Class Actions--R. 23
   a. Four 23(a) Prerequisites (Numerosity, Commonality, Typicality & Adequate Rep.)
   b. Three 23(b) Models ((b)(1), (b)(2) & (b)(3); (b)(3) is Most Frequent, Involving "Predominance" and "Superiority")
   c. 23(c) Certification & Notice


Simple Example:

Decedent Life A (Claims
Ins. $100,000
R.I.P. Co.-- B (Also
$100,000 Claims
Suicide? Policy $100,000)

3. Intervention
a. Of Right: When (1) Statutory
   Right or (2) Interest in Subj. of
   Act'n Would be Impeded as
   Practical Matter and Not
   Represented by Parties
b. Permissive: When (1) Statutory
   Right or (2) Common Q. of Law
   or Fact

   Litigation: Consolidated Pre-Trial
   Proceedings. Note Multidistrict Rules
   and Manual for Complex &
   Multidistrict Litigation.

IV. DISCOVERY
A. PURPOSES & TECHNIQUES: The
   Practicalities
B. SCOPE: THE FOLLOWING IS
   DISCOVERABLE--
   1. Relevant Info (Need Not Be
      Admissible, if "Reas Calculated to
      Lead to Admissible Evid.")
   2. Not Privileged (Can't Discover Even
      Tho. Relevant, if Privileged)
   3. Limits--Not Cumulative/Unduly
      Inconvenient; Ample Opportunity;
      Benefit/Burden
   4. Work Product
      a. Trial Prep. Mat'l's Usually Not
         Discoverable (Note Escape
         Valve)
      b. Experts--(1) Testifying Experts
         Fully Discoverable; (2)
         "Retained" Consultants,
         Extraordinary Circumstances
         Only; [(3) One Court Says
         Informally Consulted, Not at
         All;] (4) If Not Consulted for
         Trial, No Restriction. Note
         Difference in Treatment of
         Reports of Phys. or Mental
Exam. Expenses Usually to be Pd. by Discoverer.


C. DISCLOSURE; MEETING
1. Initial: a. Identification of Witnesses; b. Documents; c. Damage Calculations; d. Insurance
2. Experts
3. Pretrial
4. Discovery Meeting between Counsel (Required under Rule) (Note "Discovery Plan" Form)

D. METHODS
1. Depositions--Ct. Rptr.; Use under 32(a) (Impeach, Party, Unavailable, Completeness; contrast Tx, Other States); Notice; Subp.; Presumptive Limit (10; 7 hrs.)
2. Depositions on Written Q.'s
3. Depositions to Preserve Testimony
4. Interrogatories (Presumptive Limit 25)
5. Requests to Admit
6. Requests to Produce or Inspect
7. Motions for Phys. or Mental Exam (Good Cause; In Controversy; Relevance Not Enough)

E. DUTY TO SUPPLEMENT

F. SANCTIONS
1. Range: From Ordering Discov., to Establishment, Preclusion, Striking of Claims or Defenses, Dismissal, Default, Contempt, Other "Just" Orders.
G. IMPLIED CERTIFICATION, DISCOVERY CONF.

V. PRETRIAL CONFERENCE
A. CONCEPT AND PURPOSES; SANCTIONS
B. REQUIREMENTS PLACED ON PARTIES BEFORE
C. PRETRIAL ORDER--Controls Action Unless Manifest Injustice
D. SERIES OF PRETRIALS; VARIES W/JURIS.
E. THE "NEW" MANAGEMENT
   1. Civil Justice Reform Act Plans
   2. Tracking; Differential Case Mgmt; Staging; Fast Track; Enforcement; Adjudication by Deadline

VI. PRETRIAL DISPOSITION OF CASE
A. SUMMARY J.
   1. Based on Pleadings, Discov., Affidavits
   2. If These Show no Genuine Issue of Material Fact & Movant Entitled to J. as Matter of Law
      a. Movant Shows There's No Reasonable Way Opponent Can Prevail
      b. Burden on Movant (But Note Celotex Case: A Def. Can Carry Burden Without Affidavits or Proof, by Definitive Inference that P. Can't Produce Legally Sufficient Evidence)
      c. Affidavits of Inability; Required Response by Opponent
      d. Court Can't Resolve Credibility or make Fact Inferences
   3. Partial Sum. J.; Affidavit Req'mts
B. DISMISSAL
   1. Voluntary & Involuntary
   2. With & Without Prejudice (i.e., With or Without Adjudication of Merits)
C. DEFAULT
   1. On D.'s Failure to Plead or Defend as Req'd by Rules
   2. Judgmt. by Clerk--If Liquidated
3. **By Court if Not Liquidated. Ct. May Require Proof of Default.**

4. **Setting Aside--Under Certain Conditions.** Basically, (1) Existence of Arguable Defense on Merits (or Damages) and (2) Excusable Neglect.