

Nebraska Federal Litigation Civil I



Topics

- ▶ Development of current practices
- ▶ Scheduling order
- ▶ Rule 26(f) Report
 - Method of resolution
 - Settlement
 - Claims and defenses
 - Consent to Magistrate Judge
 - Case Progression deadlines and agreements
 - Court conferences
 - Trial and pretrial conference scheduling and practices
- ▶ Motions to Continue
- ▶ Jurisdiction, venue, and immunity

Developing Uniform Civil Case Management Practices



Scheduling Order

- 1) Entered after the Defendant(s)' answers are filed.
- 2) Motions addressing related cases, bifurcation, or consolidation should be raised now (or earlier) if at all possible.
- 3) Sets the deadline for filing a Rule 26(f) Report.
- 4) May also set the mandatory disclosure deadline.
- 5) Entered in nearly all civil cases. See NECivR 16.1(b) for exceptions.

Rule 26(f) Report

Jointly prepared by counsel
and filed.

A conference call with the
court is held to resolve any
disputes.

Used to prepare the case
progression order.

For suggested dates, check the
Rule 26(f) Report Calculator at:

<https://www.ned.uscourts.gov/attorney/rule-26f-report-calculator>

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District of Nebraska
Chief Judge Robert F. Rossiter, Jr.

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Civil Case Management

- [Magistrate Judge Civil Case Management Practices](#)
- [Rule 26\(f\) Report Calculator](#)

III. **METHOD OF RESOLUTION:** Please indicate below how the parties anticipate that this case will be resolved.

- Administrative record review:
 - A party will request discovery.
 - A party will not request discovery.
Note: If no party is requesting discovery, the parties need not complete the **Section VI: Case Progression** portion of this report. Instead, contact the assigned magistrate judge to schedule a conference for entering an administrative review scheduling order.
 - A dispute exists as to whether and to what extent discovery is needed. The parties need not complete the **Section VI: Case Progression** portion of this report at this time. Instead, contact the assigned magistrate judge to set a case progression conference.
- Cross-motions for summary judgment and/or resolution on stipulated facts:
 - A party will request discovery.
 - A party will not request discovery. The parties' cross-motions for summary judgment will be filed on or before [Click here to enter a date.](#)
Note: If no party is requesting discovery, the parties need not complete the **Section VI: Case Progression** portion of this report.
 - A dispute exists as to whether and to what extent discovery is needed. The parties need not complete the **Section VI: Case Progression** portion of this report at this time. Instead, contact the assigned magistrate judge to set a case progression conference.

Trial:

- No party has timely demanded a jury trial.
- A party has timely demanded a jury trial and does not anticipate waiving that demand, and the parties agree that all or part of the claims in this case must be tried to a jury.
- A party has demanded a jury trial, and the parties disagree on whether trial by jury is available for all or part of this case.
A motion to strike the jury demand will be filed no later than: [Click here to enter a date..](#)
- The party who previously demanded a jury trial now wishes to waive that right. Any other party who will now demand a jury trial will file that demand within 14 days of the filing of this report, in the absence of which jury trial will be deemed to have been waived.

IV. SETTLEMENT:

Counsel state (mark all boxes that may apply):

- To date, there have been no efforts taken to resolve this dispute.
- Efforts have been taken to resolve this dispute
 - prior to filing this lawsuit. Explain: _____.
 - after filing this lawsuit, but before the filing of this report. Explain: _____.
- Counsel have discussed the court's Mediation Plan and its possible application in this case with their clients and opposing counsel, and:
 - It is agreed:
 - Mediation is appropriate at this time, and pending the outcome of those efforts,
 - case progression should be stayed.
 - case progression should not be stayed.
 - Mediation may be appropriate in the future. Please explain when you believe mediation may be useful: _____.
 - Mediation will not be appropriate. Explain: _____.
 - Counsel believe that with further efforts in the future, the case can be settled, and they will be prepared to discuss settlement, or again discuss settlement, by [Click here to enter a date.](#)
 - At least one party is not interested in exploring options for settling this case.

- ▶ Choose a mediator
- ▶ Contact the court if you are requesting a stay of deadlines
- ▶ Advise the court if the case is settled, and if it was settled through mediation

- ▶ Request a settlement conference
- ▶ Which MJ will preside?
- ▶ Scope of the conference
- ▶ What to expect

Mediation



Settlement
Conference

II. CLAIMS AND DEFENSES:

- A. Claims:² Provide a brief statement of the alleged facts and a succinct summary of the alleged federal or state theories of recovery, citing any relevant statutes which provide the basis for any statutory claims. You do not need to list the elements of each claim.

- B. Defenses:³ List each alleged affirmative defense to the claims, and for any defenses based on a statute, cite the relevant statute.

Consent cases

V. CONSENT TO FINAL RESOLUTION BY A MAGISTRATE JUDGE:

As explained more fully in the Civil Case Management Practices, in accordance with the provisions of 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, the parties in this case may voluntarily consent to have a United States Magistrate Judge conduct all further proceedings in the case, including the trial, and order the entry of final judgment. The consent must be unanimous, and any appeal must be taken to the United States Court of Appeals. If the parties do not presently consent, they may do so later. Absent consent, the case will remain with the assigned United States District Judge or, if not previously assigned to a District Judge, it will be randomly assigned to a District Judge.

- All parties hereby voluntarily consent to have the United States Magistrate Judge conduct all further proceedings in this case including the trial and entry of final judgment.
- At least one party does not currently consent.



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Consent to Random Assignment to Magistrate Judge	WordPerfect	Word
Consent to Reassignment to Magistrate Judge	WordPerfect	Word

Consent to Random Assignment: Used when the case was assigned to the magistrate judge at the outset.

Consent to Reassignment: Used when the case was assigned to a district judge at the outset.

VI. CASE PROGRESSION:

A. Initial mandatory disclosures required by Rule 26(a)(1).

- Have been completed.
- Will be completed by [Click here to enter a date..](#)

B. Motions to amend the pleadings or to add parties.

- A plaintiff [Choose an item.](#) anticipate a need to amend pleadings or add parties. Motions to amend pleadings or add parties will be filed by Plaintiff(s) on or before [Click here to enter a date..](#)
- A defendant [Choose an item.](#) anticipate a need to amend pleadings or add parties. Motions to amend pleadings or add parties will be filed by Defendant (s) on or before [Click here to enter a date..](#)

If more than 90 days are needed, explain why: _____.

C. Discovery.

1) As to written discovery under Rules 33, 34, 36, and 45:

a. The parties have discussed currently anticipated number of interrogatories, document production requests, and requests for admissions. Based on those discussions:

The parties do not anticipate any disputes over the number of discovery requests served.

The parties believe a dispute may arise over the number of (mark all boxes that may apply):

Interrogatories.

Requests for Production.

Requests for Admission.

If the parties anticipate a possible dispute over the number of written discovery requests, when completing **Section VII** below, indicate when a conference with the court may be useful to avert or resolve that dispute.

b. Written discovery will be completed⁴ by [Click here to enter a date.](#)

- 2) As to expert disclosures as required under Rule 26(a)(2):
- The parties do not anticipate calling experts to testify at trial.
 - The parties anticipate calling experts to testify at trial, and
 - a. Counsel agree to at least **identify** such experts, by name, address, and profession (i.e., without the full reports required by Rule 26(a)(2)), by **Click here to enter a date.**⁵
 - b. Expert **reports** shall be served by **Click here to enter a date.**⁶
 - c. Motions to exclude expert testimony on *Daubert* and related grounds will be filed by **Click here to enter a date.**

- 3) As to deposition testimony under Rules 30 and 45:
- a. The maximum number of depositions that may be taken by the plaintiffs as a group and the defendants as a group is _____.
 - b. All depositions
 - will be limited by Rule 30(d)(1).
 - will be limited by Rule 30(d)(1), except as follows:
_____.
 - c. All depositions, regardless of whether they are intended to be used at trial, will be completed by [Click here to enter a date..](#)

4) Protective Order:

- All parties anticipate that a protective order will be needed to complete the exchange of discovery, and
 - the parties hereby move the court to enter the court's standard protective order (see, [Civil Case Management](#) website page,
 - with the court's standard Attorneys' Eyes Only provisions.
 - with the court's standard HIPAA language permitting release of Protected Health Information.
 - the parties hereby move the court to enter the proposed protective order attached to this report.
 - the parties will jointly move, or a party will move for entry of a protective order, emailing a copy of the proposed protective order in Word format to the chambers of the magistrate judge assigned to the case.⁷
- At least one party believes a protective order will not be necessary in this case.



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Protective Orders

- ▶ Standard Protective Orders
- ▶ Case-specific protective orders
- ▶ Litigated protective orders
 - ▶ Pre-motion discovery conference
 - ▶ Is it really confidential?
 - ▶ AEO and due process
 - ▶ *In camera* review

Protective Orders

Rule 26(c) :

Upon a finding of good cause, the court may enter:

- “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden,” including, e.g.,
- “confidential research, development or commercial information not be revealed or be revealed only in a designated way.”

Protective Orders

Attorney Eyes Only (AEO) clause:

- Permits certain discovery to be seen by only counsel, thereby preventing a party from viewing the opposing party's sensitive business information.
- Allowed sparingly--due process concerns.

Bussing v. COR Clearing, LLC, No. 8:12CV238, 2015 WL 4077993, at *2 (D. Neb. July 6, 2015).

5) Work Product and Privileged Information: The parties have reviewed the **Civil Case Management Practices**, including those provisions discussing discovery of **Privileged Information**, and they have discussed whether certain categories of documents, are presumptively privileged.

- The parties agree that the following categories of documents are presumptively privileged and need not be listed on a privilege log:
 - Documents between legal counsel and clients created on or after **Click here to enter a date**.
 - Documents maintained by consulting or testifying experts created on or after **Click here to enter a date**.
 - The following documents: _____.
- Counsel have discussed the discovery of privileged information, but they have not agreed on what documents are presumptively privileged.

If the parties anticipate a possible dispute over Work Product and Privileged Information discovery, when completing **Section VII** below, indicate when a conference with the court may be useful to avert or resolve that dispute.

Privileged
Information



Sealed and Restricted Access Filings

- ▶ Access
- ▶ Visible text
- ▶ How to file

ESI

- 6) Electronically Stored Information (ESI): The parties have reviewed the Civil Case Management Practices, including those provisions discussing discovery of ESI and,
- the parties do not anticipate a dispute over preservation, scope, and production of ESI.
 - the parties anticipate a dispute regarding the preservation, scope, and production of ESI.

If the parties anticipate a possible dispute over ESI, when completing **Section VII** below, indicate when a conference with the court may be useful to avert or resolve that dispute.

ESI

➤ Initial discussion:

- Topics
- Time frame
- Types of data
- Custodians—identity and number
- Preservation
- Anticipated cost
- Production format

➤ ESI Preparation:

- Alternatives?
- Is there a less expensive discovery option?
- Search terms
 - Candid discussion re: search terms
 - Use a sample set to find search terms
 - Ask the right people for help
 - ✓ Clients
 - ✓ Experts

D. Dispositive Motions.

- The parties do not anticipate filing motions to dismiss, for judgment on the pleadings, or for summary judgment as to any claims and/or defenses.
- A party anticipates filing a motion to dismiss, and/or for judgment on the pleadings, and/or or for summary judgment
 - a. as to the following claims and/or defenses:⁷ _____;
 - b. such motions to be filed on or before **Click here to enter a date.**

E. Other matters to which the parties stipulate and/or which the court should know or consider: _____.

F. This case will be ready for trial before the court by: (month, year).

G. The estimated length of trial is _____ days.

Dispositive Motion Practice



Follow the local rules



Be mindful of briefing deadlines; they can impact the trial date



Expect at least 60 days following full submission before a ruling

CONFERENCING WITH THE COURT:

A. Initial Case Conference:

- At least one party requests a conference with the court before the court enters a final case progression order for this lawsuit.
- All parties agree that the court may enter a final case progression order for this lawsuit without first conferring with the parties.

B. Interim Status Conference:

- At least one party believes a court conference with the parties may be helpful (e.g., to assist with averting or resolving a dispute over written discovery, ESI, or privilege/work product discovery; following service of mandatory disclosures; after completing written discovery, etc.), and requests a conference be set in: (month/year).
- The parties do not currently anticipate that a court conference will assist with case progression, and they will contact the assigned magistrate judge to schedule a conference if a problem arises.

Court Conferences



Communicating with the Court

- ▶ Request a conference
- ▶ Check the calendar
- ▶ Email a proposal
- ▶ Order entered
- ▶ Use the court's calling instructions

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MARK A. MEHNER,

Plaintiff,

vs.

FURNITURE DESIGN STUDIOS, INC., a
New York Corporation; PANERA, LLC, a
Foreign Limited Liability Company; JOHN
DOE, individuals; and JANE DOE,
individuals;

Defendants.

8:22CV168

FINAL PROGRESSION ORDER

IT IS ORDERED that the final progression order is as follows:

- 1) The trial and pretrial conference will not be set at this time. A status conference to discuss case progression, the parties' interest in settlement, and the trial and pretrial conference settings will be held with the undersigned magistrate judge on **January 10, 2023 at 11:00 a.m.** by telephone. Counsel shall use the conferencing instructions assigned to this case to participate in the conference.
- 2) The deadline for serving initial mandatory disclosures under Rule

Final Pretrial Conferences

- ▶ Parties jointly complete the forms posted online.
- ▶ Requirements governed by NECivR 16.2(a).
- ▶ Educate yourself regarding the trial judge's preferences: number of jurors; how exhibits should be submitted; length of voir dire permitted; how objections to deposition testimony should be submitted; etc.
- ▶ Consider consenting to a trial before the magistrate judge, particularly if expert witnesses will testify live.

Trial

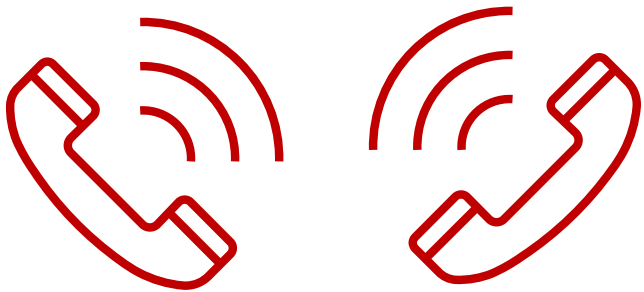


Motions to Continue

A case management order setting progression deadlines “may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4).

- The moving party must first show diligence in attempting to meet the case management order’s requirements.
- If diligence is shown, the moving party must then show the existence or degree of prejudice.

Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 716-17 (8th Cir. 2008);
Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748, 759 (8th Cir. 2006).



Discovery Conferences

- 1) nonprivileged matter,
- 2) relevant to any party's claim or defense, and
- 3) proportional to the needs of the case.

▶ Proportionality

➤ Factors:

- Importance of the issues at stake
- Amount in controversy
- Parties' relative access to relevant information
- Parties' resources
- Importance of the discovery
- Whether the burden of getting it outweighs its likely benefit.

Scope of Discovery

“Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.”

Hofer v. Mack Trucks, Inc., 981 F.2d 377, 380 (8th Cir. 1992).

Scope of Discovery

Discovery Conferences



Court expectations

- Civility
- Candor
- Preparation

Methods for resolution

- Telephone conference
- Web meeting
- Courtroom hearing
and if not resolved,
- Motion and expedited
briefing

Before requesting a pre-motion discovery conference:

The moving party must discuss with opposing counsel and know:

- ▶ The elements of the claims or defenses, and
- ▶ Precisely
 - What was requested;
 - What objection was raised;
 - What was received;
 - What is still needed;
 - Why it's important;
 - Any compromise offered; and
 - Why that compromise is insufficient.

and if not resolved, then

Email a summary of that information to the court.

Before attending a pre-motion discovery conference:

The responding party must discuss with opposing counsel and know:

- ▶ The elements of the claims or defenses, and
- ▶ Precisely
 - What was requested;
 - What objection was raised;
 - What was provided (if anything);
 - What was withheld (if anything) and why;
 - The burden of responding or further responding;
 - Any compromise offered; and
 - Why that compromise is sufficient.

and if not resolved, then

Email a summary of that information to the court.

Do Not expect the court to always suggest or encourage a compromise.

Sometimes a compromise is appropriate, but

- sometimes the court will fully disagree with one side; or
- suggest structured discovery;

OR

Examples:

- Staggered discovery
- Phased/staged discovery

- order formal motion practice.

Jurisdiction, Venue, and Immunity



I. **INITIAL MATTERS:**

A. Jurisdiction and Venue: As to the defendant(s) (mark all boxes that may apply).

Jurisdiction is contested because _____.

Venue is contested because _____.

Neither jurisdiction nor venue are contested.

B. Immunity: As to the defendant(s) (mark all boxes that may apply).

An immunity defense has been raised by a defendant.

An immunity defense will be raised, such defense to be raised on or before [Click here to enter a date..](#)

No immunity defense has or will be raised in this case.

C. Either jurisdiction or venue is being challenged, or a defense of immunity has or will be raised, and:

- Not applicable.
- The parties agree that discovery and case progression can begin before the jurisdiction, venue, and/or immunity issues are decided.
- Any or all parties believe that case progression and discovery should be stayed pending a ruling on those issues, and
 - before any motion(s) to resolve jurisdiction, venue, and/or immunity issues can be filed, initial discovery limited to those issues will be necessary, and such discovery can be completed by: **Click here to enter a date.**
Explain: _____.
 - a dispute exists as to whether and to what extent discovery is needed to resolve jurisdiction, venue, and/or immunity issues. A conference with the court is requested.
 - motion(s) to resolve jurisdiction, venue, and/or immunity issues can be filed on or before **Click here to enter a date.**



- Diversity
- Federal Question
- Federal Officers and Agencies
- Removal and Remand

Subject Matter Jurisdiction

Diversity

Diversity jurisdiction requires:

- Complete diversity: No defendant holds citizenship in the same state as any plaintiff; and
- the amount in controversy exceeds \$75,000.

Cascades Development of Minnesota, LLC v. National Specialty Ins., 675 F.3d 1095, 1098 (8th Cir. 2012); see also 28 U.S.C. § 1332(a).



Diversity of Citizenship

- The fundamental inquiry is citizenship, not residence.
- A state is not a citizen of any state.
- A corporation is a citizen of its state of incorporation and of its principal place of business.
- For the purposes of diversity, a partnership or limited liability company is a citizen of every state in which its members are citizens.

Amount in Controversy

- The party seeking to invoke diversity federal jurisdiction “must prove the requisite amount by a preponderance of the evidence.”
- Allegations within the complaint are not presumed to be true.
- The party asserting jurisdiction may offer evidence and argument, and the court may weigh that evidence and resolve factual issues.

UNLESS determining the amount in controversy is substantially intertwined with deciding the underlying merits of the case.

- The question is not whether damages are greater than the requisite amount, but whether a fact finder might legally conclude they are.

28 U.S. Code § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Federal
Question

28 U.S.C. § 1442(a)(1):

Provides independent federal jurisdiction over cases involving federal agencies and officers.

Jacks v. Meridian Res. Co., LLC, 701 F.3d 1224, 1229 (8th Cir. 2012).

Federal
Officers and
Agencies

If the court has federal question subject matter jurisdiction, it also has supplemental jurisdiction over state law claims which are “part of the same case or controversy.”

Supplemental Jurisdiction

See *McLaurin v. Prater*, 30 F.3d 982, 984-85 (8th Cir. 1994) (quoting 28 U.S.C. § 1367).



Removal and Remand

Removal

A defendant may remove a case filed in state court to federal court if the case could have been filed in federal court from the outset.

The party seeking removal and opposing remand bears the burden of proving federal subject-matter jurisdiction by a preponderance of the evidence.

Any doubts as to the propriety of removal are decided in favor of remand.

City of Chicago v. International College of Surgeons, 522 U.S. 156, 163 (1997); *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 620 (8th Cir. 2010); *Phipps v. F.D.I.C.*, 417 F.3d 1006, 1010 (8th Cir. 2005)(citing 28 U.S.C. § 1441(b)). *In re Bus. Men's Assurance Co. of Am.*, 992 F.2d 181, 183 (8th Cir. 1993) (per curiam).

Removal Deadline

A notice of removal must be filed:

- within 30 days after Plaintiff's initial complaint was formally served on the defendant if that complaint alleges a basis for federal subject matter jurisdiction, OR
- if the initial complaint did not provide a basis for federal subject matter jurisdiction, within 30 days after Defendant receives "a copy of an amended pleading, motion, order or other paper" indicating subject matter jurisdiction exists.
 - Other paper is broadly construed to include any document, e.g., settlement agreements, demand letter, written discovery responses, and/or deposition transcripts.
 - If the basis for removal is diversity, the removal notice must be filed within a year after the case commenced in the state court; interpreted to mean when it was filed and not when it was first served.

Bad Faith Exception to the 1-year Limit

The one-year deadline for removing a case based on diversity is not applicable if the Plaintiff acted in bad faith to avoid removal.

Examples of bad faith include deliberately preventing removal by:

- fraudulently joining a nondiverse defendant when Plaintiff knows there is no factual basis for the pursuing a claim against that defendant; and
- waiting a year to:
 - disclose that the amount in controversy exceeds 75K;
 - finalize a settlement with a nondiverse defendant;
 - dismiss a nondiverse defendant when there was never any intent to actually obtain a judgment against that defendant.

Removal deadline and jurisdiction

The 30-day deadline is not jurisdictional.

- failure to timely remove a case is a procedural error only; and
- if a timely motion to remand alleging untimely removal is not filed or granted, the federal court still has subject matter jurisdiction.

The one-year deadline for removing diversity cases set forth in 28 U.S.C. 1446(c), may be jurisdictional.

See *Vasseur v. Sowell*, 930 F.3d 994 (8th Cir. 2019).

Removal Procedure

1) A defendant must file a notice of removal in federal court with:

- A concise statement of the grounds for removal jurisdiction; and
- A copy of all process, pleadings, and orders served on the defendant.

2) Request place of trial (Omaha, Lincoln, or North Platte). NECivR 40.1(b).

3) File a copy of the notice of removal in the state court.

4) Serve all adverse parties with a written notice stating the case was removed.

Removal Procedure

If removed on the basis of federal question, all defendants subject to a claim based on federal law must, at the time of removal, consent to removal.

If removal is based on diversity jurisdiction:

- all defendants must consent to removal at the time the notice is filed, and
- the citizenship of defendants sued under fictitious names is disregarded.

NOTE: A diversity case cannot be removed if any defendant is a citizen of the state where the case was filed.

Diversity of Citizenship

Challenging or Changing the Pleadings

Fraudulent Joinder

Substitution of a Party

Failure to Join: Rule 12(b)(7) and Rule 19

Realigning Parties

Intervention: Rule 24

Fraudulent Joinder

The right of an out-of-state defendant to remove a diversity suit to federal court cannot be defeated by a fraudulent joinder of a resident defendant.

Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921).

“[I]f it is clear under governing state law that the complaint does not state a cause of action against the non-diverse defendant, the joinder is fraudulent and federal jurisdiction of the case should be retained.”

Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 810 (8th Cir. 2003).

Rule 12(b)(6) Motion to Dismiss

Under Rule 12(b)(6), the court must determine whether the complaint fails to state a claim upon which relief may be granted.

Fraudulent Joinder Standard

- ▶ Whether there is a reasonable basis for predicting that the state's law might impose liability against the non-diverse defendant,
Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 811 (8th Cir. 2003).

or (perhaps)

- ▶ Whether the plaintiff actually intends to pursue recovery from the non-diverse defendant.
Scientific Computers, Inc. v. Edudata Corp., 596 F.Supp. 1290 (D.Minn.1984)(finding fraudulent joinder exists if the plaintiff does not intend to actually prosecute the action against the non-diverse defendant).

Substitution of Party

Jurisdiction is tested by facts which existed when the action was brought.

If jurisdiction existed at the outset, but upon the death of a party, a non-diverse representative is substituted for that party, diversity still exists.

Smith v. Sperling, 354 U.S. 91, n. 1 (1957).

Joinder of a Party

Rule 19(a)(1): Joinder is required only when the missing party's absence prevents complete relief among the current parties.

Rule 19(a)(2), a party is necessary if:

- it claims an interest relating to the subject of the action, and
- failure to join the nonparty will:
 - i) as a practical matter impair or impede its ability to protect that interest, or
 - ii) leave any of the current parties subject to a substantial risk of incurring multiple or inconsistent obligations.

If a party is not necessary under Rule 19(a), a Rule 19(b) inquiry is not required.

Gwartz v. Jefferson Memorial Hosp. Ass'n, 23 F.3d 1426, 1430 (8th Cir. 1994).

Joinder of a Party

Rule 19(b):

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

- (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
- (2) the extent to which any prejudice could be lessened or avoided by:
 - (A) protective provisions in the judgment;
 - (B) shaping the relief; or
 - (C) other measures;
- (3) whether a judgment rendered in the person's absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder..

Joinder of a Party

Rule 20: Joinder is permissive if the person or entity to be joined is:

- (A) asserting a claim or defending an action which arises out of the same transaction, occurrence, or series of transactions or occurrences; and
- (B) any question of law or fact common to all [plaintiffs] [defendants] will arise in the action.

Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1332 (8th Cir. 1974).

Intervention: Rule 24

As a matter of right (Rule 24(a))--the proposed intervenor:

- timely filed the motion,
- has a recognized interest in the litigation,
- that interest may be impaired by the resolution of the case, and
- no other party can adequately protect its interest.

Permissive (Rule 24(b)) --the proposed intervenor:

- has a claim or defense that shares with the main action a common question of law or fact; and
- the proposed intervention would not unduly delay or prejudice the adjudication of the parties' rights."

Re-aligning Parties

Federal courts look beyond the pleading to arrange the parties according to their sides in the dispute.

The court must consider:

- The principal purpose and the primary and controlling matter in dispute; and
- Whether the controversy is actual and substantial.

City of Indianapolis v. Chase Nat. Bank of City of New York, 314 U.S. 63 (1941).

Re-aligning Parties

Parties may need to be realigned before deciding whether federal diversity actually exists.

The question of realignment must be tested at the time of filing of the complaint.

Universal Underwriters Ins. Co. v. Wagner, 367 F.2d 866, 871 (8th Cir. 1966).

The court has jurisdiction to realign the parties before deciding if diversity jurisdiction exists.

See e.g., *Chi., R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 578 (1954).

Remand

A motion to remand the case based on any defect other than lack of subject matter jurisdiction must be filed within 30 days after the notice of removal was filed. 28 U.S.C.A. § 1447.

If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case must be remanded.

If a complaint was removed based on federal question jurisdiction, and the federal law claim(s) is dismissed,

- state law claims over which the court has exercised supplemental jurisdiction may, in the court's discretion, be remanded, and
- even if diversity jurisdiction exists over the state claims, the court may remand those claims to state court if Defendant's notice of removal identified federal question, but not diversity, as the basis for removal.



Remand

Appeal of Remand Order

An order of remand cannot be appealed if the basis for remand was lack of subject matter jurisdiction.

But the appellate court can review whether the district court's actual reason for remand was lack of subject matter jurisdiction.

An order of remand can be appealed where the basis for remand was not lack of subject matter jurisdiction; e.g., untimely notice of removal, failure to file the state court records, lack of defendants' unanimous consent to removal, etc.

After removal. . . .

Pending motions: Any motions pending and undecided by the state court must be re-filed in federal court. NECivR 81.1

Discovery deadlines: Unless the federal court orders otherwise, the deadline for responding to any discovery served in the state action but unanswered as of the date of removal is stayed pending entry of the case progression order.

Deadline to Answer or Respond: Defendant(s)' answer or response to the removed complaint must be filed within 21 days after being served with the complaint (or the summons for a filed complaint), or 7 days after removal, whichever is later. Fed. R. Civ. P. 81(c).

Jury Demand: If a party wants a jury trial, that party must file a jury demand within 14 days after filing a notice of removal or receiving notice that the case was removed, unless a written jury demand:

- is within the state court records filed with the removal notice, or
- was not required in the state court to secure a trial by jury.

Venue

A civil action may be brought in--

- (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
- (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
- (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

Venue Transfer—*Forum non conveniens*

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

28 U.S.C.A. § 1404(a)

Parties and witnesses

the convenience of the parties

the convenience of the witnesses –including the willingness of witnesses to appear, the ability to subpoena witnesses, and the adequacy of deposition testimony

the accessibility to records and documents

the location where the conduct at issue occurred

Interests of justice

judicial economy

plaintiff's choice of forum

the comparative costs of litigating in each forum

each party's ability to enforce a judgment

obstacles to a fair trial

conflict of law issues

whether a local court should determine questions of local law

Terra Int'l., Inc. v. Mississippi Chemical Corp., 119 F.3d 688, 696 (8th Cir. 1997).

Qualified Immunity

“[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . .

“If the law at that time was not clearly established, . . . discovery should not be allowed.”

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

But limited discovery on the qualified immunity issue is allowed if the plaintiff's allegations state a violation of clearly established law.

Mitchell v. Forsyth, 472 U.S. 511 (1985).

Questions?

Thank You!

