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# JURISDICTION OVER THE PARTIES

## General

* 1. Legal provisions
     1. Constitution – the exercise of jurisdiction must meet the minimum requirements for notice of the due process clause of the 14th Amendment, as it is interpreted by SCOTUS. (For federal courts it is 5th Amendment.)
     2. Long-arm statutes – even when the due process requirements (minimum contacts, etc.) are satisfied, the defendant may not be served outside of the forum state unless the forum state has enacted a statute authorizing out-of-state service under certain circumstances. Long-arm statutes allow jurisdiction on the basis of certain links between the defendant and the forum state, such as domicile there ownership of property in the state, commission of a tortious act inside the state, etc.
        1. Federal courts long-arm statute (FRCP 4(k)(1)(A)) – federal court can exercise IPJ whenever state court can. Note: Federal courts could have exercised more power but chose not to.
  2. Three types:
     1. In personam – gives court power to issue a judgment against defendant personally. This judgment can then be sued upon in other states and all of his assets may be seized to satisfy the judgment.
        1. What if you win lawsuit and D refuses to pay? P induces court to attach something D owns and proves entitlement to it (previous court judgment) (new quasi in rem lawsuit to collect on what you won). Sometimes it is second lawsuit, in some states it is administrative proceeding. (Think of it as second lawsuit).
        2. Easy cases – P sues D in D’s home state
        3. P does not sue D in D’s home state
           1. D can

Show up in State A – D has consented to litigating in State A or

File special appearance in State A and say State A has no personal jurisdiction over D. State A will decide if it has personal jurisdiction over D.

If D wins, P can appeal in Alaska court system all the way to SCOTUS if federal constitutional issue.

If D loses, D can then defend on merits of lawsuit (some states allow D to appeal personal jurisdiction immediately while others don’t because they prefer to hear whole case). If P wins entire court, D can appeal on merits of case and personal jurisdiction

Not show up in State A. D will never be able to contest merits of lawsuit but when P tries to seize/sell D’s property to collect on judgment that State A issued (quasi in rem LS 2), D is entitled to litigate whether State A had jurisdiction over D in state where property is. (Article IV Sec. 1)

* + - * 1. D is entitled to one opportunity to litigate IPJ. If D lost personal jurisdiction case in State A, refuses to pay, P files L2 in D’s homestate where property is, D cannot litigate IPJ again in home state.
    1. In rem – gives court power to adjudicate a claim made about a piece of property or about a status.
       1. When someone sues a piece of property you are seeking a declaratory judgment from a court that you either own property or have rights of ownership to it to force sale of piece of property to get proceeds from sale.
       2. E.g. action to quiet title to real estate; dissolve a marriage
       3. John Locke – when you mix labor with something it is yours, you made it.
    2. Quasi in rem – action begun by seizing property owned by (attachment), or a debt owed to (garnishment) the defendant, within the forum state. Different from in rem because action is not about the thing seized. The thing seized is a pretext for the court to decide the case without having jurisdiction over the defendant’s person. Any judgment affects only the property seized, and the judgment cannot be sued upon in any other court. What if property is intangible? Where is it located?

## Individual Personal Jurisdiction

* 1. Consent – IPJ can be exercised by consent, even if party has no contacts with the forum state.
     1. Consent by filing action – a plaintiff is considered to have submitted to the court’s jurisdiction by filing an action.
     2. Consent before claim arises – a party may agree to submit to the jurisdiction of a certain court even before any cause of action has arisen. E.g. Forum selection Clause.
        1. Forum selection clauses – some contracts obligate each party to litigate in one particular court.
     3. General appearance/no dispute – appearance in court to contest the case on the merits constitutes consent to IPJ.
     4. Failure to timely object
     5. Implied consent – certain states recognize the doctrine of implied consent, by which a defendant is said to have impliedly consented to IPJ over him by virtue of acts which he committed within the state. See non-resident motorist statutes and jurisdiction over corporations.
  2. Truly At Home – general jurisdiction may be exercised over an individual who is domiciled within the forum state, even if he is temporarily absent from the state. Don’t need statute.
     1. Formula for individual domicile
        1. Domicile = current dwelling place + intent to remain indefinitely
        2. Go back as far as possible (when you were born). Domicile changes if person moves states with intention to remain indefinitely.
        3. ***Mas v. Perry (5th Cir. 1974)*** Tool: Citizenship determined by domicile. If not U.S. citizen, then citizen of foreign state. Synopsis: Mas’s sue Perry (LA). Mas’s in school in La. but determined to not be La. citizens.
        4. Note: Same test used for diversity in SMJ.
     2. Corporations – corporation is citizen of state where it is incorporated or has its principal place of business.
     3. Unincorporated – probably principle place of business (different from SMJ analysis)
  3. Objecting Out of State
     1. Long arm statute
        1. FRCP 4k1a – piggy-back on state long-arm statutes
        2. Many states say go to the limits of the constitution so just do constitutional analysis.
     2. Constitutional
        1. General Jurisdiction
           1. In-State Tag – general jurisdiction may be exercised over an individual by virtue of his presence within the forum state.

Originally chief, if not sole, basis for jurisdiction.

***Pennoyer v. Neff* (SCOTUS 1877)** Tool: A court may enter a judgment against a non-resident only if the party (1) Is personally served with process while within the state, or (2) has property within the state, and that property is attached before litigation begins (as in quasi in rem jurisdiction) Synopsis: Mitchell sued Neff in Oregon. Neff (non-OR resident) was not personally served but default judgment rendered against him. Pennoyer purchased land seized from Neff.

***Pennoyer*** did not fare well with nationalization of economy – cars, contracts and corporations

In limbo

***Burnham v. Superior Court* (SCOTUS 1990)** Tool: IPJ established when defendant voluntarily travels to the forum state and is served while there. Note: No majority. Plurality reasoning (Scalia) – continuing tradition of our legal system so it cannot be said to violate “traditional notions of fairness,” the standard for determining whether a practice violates due process. Other – presence almost always suffices but there may be instances where it would lead to unfairness and might thus be unconstitutional Synopsis: Dennis (NJ) served in CA when visiting CA on business and to see children.

Presence of corporate agent – has to be high up corporate agent and unclear if they need to be there on business.

***Grace v. MacArthur* (AK 1959)** Tool: Under IPJ of state you are flying over. Synopsis: Smith served while flying over AK.

* + - * 1. Essentially “At Home” – court left open the possibility that a firm might have sufficient contacts with the forum state to subject it to jurisdiction even on a cause of action independent of any in state activities.

***Daimler AG v. Bauman* (SCOTUS 2014)** Tool: For general jurisdiction, test no longer really minimum contacts, the test is whether the corporation is essentially “at home,” not just in state. No general jurisdiction over multinational company when contacts few compared to international contacts. Simply because a company is licensed to do business or operates a branch in a state **does not mean the company may be sued in that state** on claims that have nothing to do with the company’s actual activities in that state (AKA general jurisdiction). Synopsis: Argentina plant workers sue Germany in CA for violation of Torture Victims Protection Act.

Court not very interested in exercising general jurisdiction so most activity in specific jurisdiction.

Loophole – do business everywhere so not “at home” in any specific state.

* + - 1. Specific Jurisdiction (specific to claim) – Minimum Contacts Analysis
         1. Minimal contacts” – irreducible minimum contacts required.

Test – modern view of jurisdiction derives mainly from ***International Shoe Co. v. Washington* (SCOTUS 1945)** Tool: In order to have IPJ over someone outside the state, the person must have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice. Factors: purposefully availed itself; benefited from market; enjoyed protection of laws Synopsis: Washington sues International, which does not “do business” in WA. Jurisdiction established by minimum contacts.

Inconvenience – test of “fair play” may include an estimate of the inconveniences which would result to the corporation from a trial away from its home or principal place of business.

Limits of Minimum Contacts Test – purposefully avail test in two contract cases

***McGee v. International Life Insurance Co.* (SCOTUS 1957)** Tool: IPJ established by a contract with substantial connection to the forum state. State has a strong interest in providing effective means of redress for its citizens when their insurers refuse to pay claims. Synopsis: CA resident seeking to enforce judgment rendered in CA in TX on TX insurance company that refused to pay benefits claiming deceased death was suicide.

***McGee*** represents the least contact with the forum state that has been approved by SCOTUS as the basis for IPJ. Note that cause of action involved in-state activities. When cause of action does not involve in-state activities, significantly greater contacts with the forum state have been required.

***Mc Gee*** goes beyond ***International Shoe factors*** in considering state interests and where efficiently litigated.

***Hanson v. Denckla* (SCOTUS 1958)** Tool: Minimum contacts requires that there be some act by which D "purposely avails" itself of the privilege of conducting activities in the state, thus invoking the benefits and protections of its laws. Synopsis: Beneficiaries brought action in FL against DE trustee. Trust created in DE and then settlor moved to FL.

***Hanson*** distinguished from ***McGee****:* In ***Hanson***, contacts with the forum state initiated by settlor and not the defendant. “The unilateral activities of those who claim some relationship with the non-resident defendant cannot satisfy requirements of contact with the forum state.”

Center of gravity ignored – court noted that a state court does not acquire jurisdiction by being the center of gravity of the controversy, or the most convenient location for litigation.

Domestic Relations

***Kulko v. Superior Court* (SCOTUS 1978)** Tool: Minimum contacts should be applied to commercial activities and wrongful activity outside the state affecting a resident but not to family relations. Synopsis: Children lived with father (NY). Father permitted them to move in with mother (CA).

Court conceded that state had strong interest in assuring financial support of children but this was adequately protected by federal act that would have allowed wife to obtain a NY adjudication on the support issue without requiring her to leave CA (distinguished from ***McGee*** because citizens would not have been severely disadvantaged).

Tried to do “purposefully availed” analysis with different language saying father didn’t voluntarily reach into CA.

* + - * 1. Fairness and Reasonable Factors

Long Arm Statute Factors sometimes specify type of litigation that will occur.

Non-resident motorist statutes – many states have statutes allowing their courts to exercise jurisdiction over non-resident motorists who have been involved in accidents in the state.

Implied consent – formerly, this jurisdiction over non-resident motorists was based on the implied consent.

States passed statutes saying anyone who drives car into our state must appoint an agent for service of process in state so that agent can be tagged and thereby establish IPJ. At first, people had to appoint agents themselves but nobody did it so states made it automatic. This went to SCOTUS in ***Pawloski***.

***Hess v. Pawloski*** **(SCOTUS 1927)** Tools: MA statute held that MA had jurisdiction over anyone who drove within the state on the grounds that they impliedly consented the appointment of the registrar as one who may be served all lawful processes (and thus IPJ), so it does not violate the due process clause of the 14th amendment. Synopsis: Hess (MA) sues Pawloski (PA) in MA for car accident. Pawloski mailed notice but not served personally with notice per state statute.

Rejection of implied consent theory – modern trend in non-resident motorist statutes is to reject the theory of implied consent, in favor of a theory that states have the right to use their police power and their court system to protect their own citizens who are injured.

Service on state official – most of the non-resident motorist statutes provide for in-state service of process on the designated state official and for registered mail service on the defendant himself.

Purposeful Availment

See ***McGee***

Unilateral Action of Third Parties – no minimum contacts

See ***Hanson***

Foreseeability

***Gray v. American Radiator Corp.* (IL 1961)** Tool: Tortious act is committed where the resultant damage occurs. Synopsis: Titan makes boiler valves in OH. Explodes and injures in IL.

Stream of commerce - This principle was held in ***Asahi***. Based on this test, the NJ Supreme Court decided that the British manufacturer was subject to the state’s jurisdiction, even though it had not purposefully availed itself of the state’s benefits or protection for its business. The intent of the corporation or individual to submit to and avail themselves of the state’s laws, protection and benefits is sufficiently shown by their placing their goods into the stream of commerce, expecting these products to be purchased by consumers from this state as well.

Awareness of Sales ***– World-Wide Volkswagen Corp. v. Woodson* (SCOTUS 1980)** Tool: IPJ not established by mere fact that product found its way into forum state. IPJ over corporation established over corporation that “delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.” Synopsis: Robinsons bought car in NY and got into accident in OK. Sued WWV in OK.

If D had made an effort to serve the market for its products in OK, IPJ could be established. However, use of D’s products in OK was due to unilateral activity of P (***Hanson***).

Single-out-of-state-tort – ***Volkswagen*** supported by the potential paralyzing effect on commerce that might result if IPJ were based on a single out-of-state tortious act with in-state consequences.

When talking about unintentional torts, should it matter if D “purposefully availed” themselves?

***Gray*** may be invalid because of ***Volkswagen***. If the defendant in ***Gray*** had reason to expect that IL customers would buy its product, Gray may survive ***Volkswagen*** decision.

***J. McIntyre Machinery v. Nicastro* (SCOTUS 2011)** Tool: Stream-of-commerce doctrine only applies if business activities amount to a purposeful intention to be under the state’s sovereignty. Synopsis: Case in NJ state court between an injured worker and the British company which manufactured the machinery that injured him. Company disputed state’s right to exercise IPJ over it. Court found that McIntyre had a marketing sales strategy directed at the US in general without being directly intended for NJ. This means that a federal US court might have jurisdiction over the manufacturer, but not so for the NJ state court.

Four person plurality opinion does not state the law because two person concurring opinion is narrower. When you comply with 4k2, still have to do minimum contacts (federal rules of procedure cannot change constitution) but minimum contacts for entire country which McIntyre met.

Single sale is not sufficient. Federal court restricted by FRCP 4(k)(1)(A) and bating Congress to change it.

Similar to ***International Shoe*** but different outcome. Concerned about national sovereignty (sounds like ***Pennoyer***).

Only Connection is Plaintiff

Libel ***– Calder v. Jones* (SCOTUS 1984)** Tool: A state has personal jurisdiction over any party whose actions intentionally reach another party in the state and are the basis for the cause of action. Synopsis: Shirley Jones (CA) brought suit in CA against Calder for libel in National Inquirer which was distributed nationwide.

Courts did not know what to do with this. ***Walden*** clamped down on it.

Maybe easier to think of in terms of where her reputation was? Not really relevant today.

Acts Committed on the Internet – ***Griffis v. Luban* (Supreme Court of MN 2002)** Tool: Jurisdiction established if: (1) D committed intentional tort; (2) P felt brunt of harm in forum such that forum state was the focal point of P’s injury; and (3) D expressly aimed the tortious conduct at the forum such that the forum state was the focal point of the tortious activity. 🡪 not sufficient that P in forum state and therefore felt effects there. Synopsis: Griffis sued Luban in AL for defamation on the internet. Griffis lost because tortious conduct not aimed at forum state.

How do you reconcile with Calder? Egyptology not centered in AL while Jones’ reputation was centered in CA.

***Walden v. Fiore* (SCOTUS 2014)** Tool: To establish minimum contacts - look at defendant’s contacts with the forum state itself, not with the persons who reside there. (Plaintiff cannot be only link.) The connections between defendant and forum have to be more than D and the P, they have to be the D and the state. Synopsis: Fiore and Gipson (professional gambler) sued Walden in NV for confiscating their winnings in GA.

How does ***Walden*** compare with ***McGee*** (company reached out) and ***Hanson*** (unilateral action)? Is it different because not contract but a tort?

***Walden*** overruled ***Calder*** (so not assigned).

Other factors: Where best adjudicated (witnesses, evidence, etc.); Choice of law – prefer to adjudicate own law; a tag; interest of the forum state in providing redress to its citizens; interest of P in obtaining relief in a convenient forum; interest of the states in enforcing their substantive law or policy; the extent of the inconvenience to the D if she is forced to defend away from home.

Cessation of in-state contacts – once an act or systemic doing of in-state business has rendered a corporation subject to the state’s jurisdiction, the fact that the corporation has ceased to do business within the state will not undo IPJ.

* + - * 1. International Jurisdiction

Long-arm statutes – some long-arm statutes exercise jurisdiction over non-resident individuals located in foreign countries.

FRCP 4(k)(1)(A) – service of process may be made only (1) within the territorial limits of the state in which the District Court sits or (2) anywhere else that the long-arm of the state where the District Court sits permits.

FRCP 4(k)(1)(C) – service establishes IPJ when Congress authorizes by statute. If authorized by Congress, service can be made anywhere in the world. First try to get minimum contacts within a state.

***Go-Video v. Akai Electric* (9th Circuit, 1989)** Tool: IPJ can be established over foreigners because Clayton Act Sec. 12 authorizes world-wide service given the existence of sufficient “national contacts.” Synopsis: Go-Video sued foreigners. They filed motion to dismiss for lack of IPJ.

If Foreign defendant not servable in any state – FRCP 4(k)(2) allows a federal question suit to be brought against a person or organization who cannot be sued in any state court (usually foreigner) and when minimum contacts met nationwide.

***Pyrenee v Wocom Commodities* (E.D. 1997)** Tool: For foreign defendant just need “national contacts but must also consider what is more “convenient forum.” Synopsis: Pyrenee sues Wocom. Both have connections with Hong Kong so dismissed for more convenient forum.

## Jurisdiction Over Things

* 1. In rem jurisdiction
     1. Declaratory judgment of ownership rights of property itself.
     2. Court begins by exercising dominion over piece of property which must be located within jurisdictional confines of court’s jurisdiction
     3. Requires us to locate geographically incorporeal pieces of property e.g. financial instruments which leads to problems
     4. Either take property from initiating party or take property and sell it and give money to initiating party.
     5. Under ***Shaffer***, now need to do second analysis of IPJ. E.g. (1) Is ship in geographic limits of court? (2) Is it legitimate in ***Int’l Shoe*** sense for court to exercise jurisdiction of individuals’ INTEREST in this property? Fact that property is in jurisdictional boundaries is big factor in determining jurisdiction over interest in property. (Same reasoning behind in person tag creating jurisdiction (although airplanes messed this up)).
     6. Need to do procedural due process analysis but not big of an issue as in quasi in rem.
  2. Quasi in rem jurisdiction
     1. Courts only have jurisdiction over property within jurisdiction boundaries (analogous to writ of replevin).
     2. Seize property to satisfy judgment you intend to win.
     3. ***Harris v. Balk* (SCOTUS 1905)** Tool: Debt clings to and accompanies debtor. Synopsis: Harris (NC) owed Balk (NC) who owed Epstein (MD). While Harris in MD, Epstein attached debt Harris owed to Balk.
        1. Note: not current law because it would not work in today’s economy. Paper does not need to switch hands.
     4. ***Shaffer v. Heitner* (SCOTUS 1977)** Tool: Quasi in rem jurisdiction over D cannot be exercised unless D has minimum contacts with forum state. All actions adjudicate the interests of people in things and are therefore really against people. Synopsis: Heitner brought shareholder’s derivative suit in DE against Greyhound’s officers. DE statute allowed court to sequester stock to provide quasi in rem jurisdiction. SCOTUS ruled in favor of D because no minimum contacts (stocks not enough).
        1. ***Shaffer*** ended the utility of quasi in rem jurisdiction. Must do double IPJ analysis (see in rem).
     5. Must consider Procedural Due Process.

Notice and Opportunity to be Heard **(Procedural Due Process)**

* 1. General
     1. Notice – Once it has been established that the court has the authority to adjudicate a dispute between the parties or over the property before it, it must still be established that D received adequate notice of the case against him.
     2. Opportunity to defend – D must be given adequate time to prepare a defense, and an opportunity to present that defense.
     3. Constitutional Due Process Clause – the adequacy of notice and hearing are measured by a Constitutional due process standard – ***Mullane*** balancing test is minimum standard
     4. FRCP 4 – provide for service of process requirements that are stricter than constitutional minimum notice requirements.
     5. See handout/chart on Constitutional v. Statutory requirement
     6. A due process violation can occur only where the state actively participates in the interference of D’s property rights.
  2. Notice requirements
     1. Until 20th century, personal “in-hand” service within the forum state was generally required.
     2. Attachment – In in rem and quasi in rem cases, if the suit is begun by attachment of tangible property, need additional means of informing D, such as publication or mailing notice to D.
     3. Substitute service
        1. Papers left at dwelling – most common substitute service
        2. Some statutes require court order showing that personal service was unsuccessfully attempted.
        3. Some statutes require that paper be left with someone of suitable age and discretion.
        4. Left at unattended dwelling – some states permit papers in certain types of actions to be left even at an unattended dwelling; usually such statutes require that the papers be affixed to the door. However, in some fact situations, this may violate the constitutional due process right to adequate notice.
           1. ***Greene v. Linsdey* (SCOTUS 1982)** Tool: Posting summonses on public housing apartment doors does not meet due process requirements of adequate notice because children can tear them down. Use of mail is better. Synopsis: Notice of evictions proceedings was given by posting summonses on the door of apartment tenants. Tenants claimed they did not see them and did not learn of proceedings until after default judgment.
        5. Service by ordinary first class mail allowed be some states and federal courts if D returns an acknowledgment or waiver form to P’s lawyer.
     4. Constructive notice of out-of-staters
        1. Mail notice – generally provide for notice by registered or certified mail
        2. Reasonableness test – Was procedure used reasonably likely to give D actual notice?
        3. Service on state official – non-resident motorist statutes provide for constructive service on a state official plus notice by mail to D.
        4. Publication – service by newspaper publication announcing the suit has been upheld in certain cases. E.g. where D’s identity in unknown. See ***Mullane v. Central Hanover Bank***.
           1. Publication insufficient of D’s name and address are known. See ***Walker v. City of Hutchinson* (SCOTUS 1956)**.
     5. Service on corporations
        1. Many states require that corporation designate a corporate official to receive process for suits against the company.
        2. Many other states merely provide for notice to be given to any corporation official or manager.
        3. FRCP 4(h)(1)(B) – service on a corporation may be made by giving papers to “an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process.”
     6. ***Mullane*** balancing test - ***Mullane v. Central Hanover Bank & Trust Co.* (SCOTUS 1950)**
        1. Holding
           1. Reasonableness standard – “The means [of notice] employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” But this may be limited by reasonable considerations of economy.
           2. Names and addresses known – Publication insufficient when names and addresses of D known.
           3. Names and addresses unknown – Publication sufficient.
           4. Declined to determine whether case was in rem or in personam but relied on state’s interests in “providing means to close trusts that exist by the grace of its laws…” balance with individual interests. This indicates distinction between both of notice required dying out.
        2. Synopsis: To discharge its obligations to notify the beneficiaries (known and unknown addresses) of the pendency of the petition for settlement, bank complied with NY law and published notice by newspaper.
        3. ***Jones v. Flowers*** **(SCOTUS 2006)**Tool: If certified mail doesn’t work, use regular mail (change in society) 🡪 if you find out that first attempt at service failed, you are not relieved of burden to give notice if there are other reasonable steps you can take. Synopsis: Government used certified mail to notify the taxpayer of an impending sale of his property, but made no further effort to contact the taxpayer when the notice was returned unclaimed.
        4. ***Dusenbery v. United States* (SCOTUS 2012)** Tool: Don’t need to take extreme efforts to notify D. Synopsis: FBI notified prisoner prior to forfeiting property seized by publishing notice in newspaper and sending notice by mail to his address before being arrested. The prison received the letter but disputed whether prisoner actually received it. Applying Mullane, Court held that government’s use of certified mail satisfied due process clause and that additional steps would require “heroic efforts” and were not required.
  3. Opportunity to Be Heard
     1. General Rule – D must not only be notified of the suit against him, but must also be given an opportunity to be heard. In order for the state to take D’s property from him (even just temporarily), D must be given a chance to appear in court. This hearing requirement is imposed by Due Process Clause of 14th Amendment.
     2. Temporary prejudgment relief – unclear how opportunity to be heard applies in these cases.
        1. Many states allow P under certain circumstances to attach D’s property after litigation begins. Once litigation is finished, if P wins, the attached assets can be used to satisfy the judgment. If D wins, the attachment is released.
        2. D has a right to notice and a hearing before there is a state-sponsored deprivation of any **significant** **property** interest.
        3. What is considered property?
           1. Old Property – land and employment wages

P should post bond to show P is serious and can pay damages in case D suffers loss and P loses case.

Wage garnishment – ***Sniadach v. Family Finance Corp. et al.* (SCOTUS 1969)** Tool: Procedural Due Process applies in temporary deprivations! Taking of wages requires notice and a prior hearing to satisfy due process. Invalidated garnishment process in almost every state because prior hearing often not required. Is quasi in rem constitutional anymore? Synopsis: D owes debt to P. P requested writ of garnishment which clerk (not judge) granted. Garnishee (D’s employer) withheld wages in case P wins. State law does not require prior hearing, just notice within 10 days after garnishee receives notice. Note: Employer has incentive to fire D in these situations because they can be sued if they don’t withhold enough and P wins.

Bank account attachment – ***North Georgia Finishing, Inc. v. Di-Chem* (SCOTUS 1975)** Tool: D’s bank account may not be attached unless he is given the right to argue against the attachment either before it occurs or immediately thereafter.

Installment Sales Contract – ***Fuentes v. Shevin* (SCOTUS 1972)** Tool: A statue allowing a creditor to obtain repossession of goods before a hearing violates due process where it (1) allows repossession merely on the creditor’s conclusory statement that he owns the property; (2) provides for a writ of possession issued by a clerk rather than a judge; and (3) does not provide for an immediate post-repossession hearing. Should require posting of bond by creditor and allow a counterbound that allows D to get property back. Extraordinary situations might exist that justify postponing notice and opportunity to be heard when (1) seizure necessary to secure an important governmental or general public interest; (2) special need for prompt action; (3) state has kept strict control over its monopoly of legitimate force – the person initiating the seizure has been a governmental official responsible for determining under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Installment Sales Contract – ***Mitchell v. W.T. Grant* (SCOTUS 1895)** Tool: Prejudgment-seizure is proper when a judge reviews the complaint that has specific facts alleging possession, a bond is posted, an immediate post-seizure hearing is afforded to the party, and vendor has interest in preventing waste of property. Synopsis: P sold items (fridge, stereo, washing machine) to D, which D would pay for in installments. P had reason to believe D would alienate property so judge signed an order of sequestration and directed a constable to take possession after P posted a bond for twice that amount that was due. Court upheld sequestration statute.

* + - * 1. New Property – government benefits, ID

Doesn’t make sense for P to post bond because government is usually P in new property. This is bad idea because poor use of government resources and should assume that government can make good on financial obligations.

***Goldberg*** Tool: When terminating someone’s welfare benefits, you should provide live evidentiary hearing before termination.

* + - 1. Three Part Test in determining when a state-sponsored deprivation of any significant interest made before a full trial on the merits violates D’s due process rights.
         1. ***Matthews, Secretary of Health Education, and Welfare v. Eldridge* (SCOTUS 1976)** Tool: Due Process does not require a hearing prior to termination of SSD benefits because it is not based on financial need, the decision is mostly based on questionnaire, and it would be a significant administrative burden. Three factor test: (1) private interest; (2) risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Synopsis: Eldrige was notified his SS Disability benefits would terminate without an opportunity for a prior hearing. Private interest not that great because people don’t necessarily live off of SSD benefits because you only get them after working (e.g. trust fund babies). Risk of error not big because got feedback from doctors. Also, he can go to administrative hearing to appeal after benefits stopped. Government interest huge (it would be really costly to provide pre-hearing beforehand).
         2. ***Lassiter v. Department of Social Services of Durham County, NC* (SCOTUS 1981)** Tool: Due Process Clause presumes assistance of counsel when there is a danger that one’s personal liberty will be denied. Due Process also requires that the three factors in Mathews v. Eldridge are weighed, specifically that the private interests, government interests and the risk that the procedures in place may provide erroneous outcomes be weighed against presumption. Synopsis: P challenged the NC’s decision not to provide her counsel in a custody hearing. SCOTUS found P would have received little help from counsel and there was no damage done in lack of counsel.
         3. ***Connect*i*cut v. Doehr* (SCOTUS 1991)** Tool: Use Matthews 3 factor test. However, when prejudgment remedy statutes deal with disputes between private parties, instead of considering the government’s interests, principal attention must be given to the interest of the party seeking the remedy. Synopsis: D challenged constitutionality of CT statute authorizing the attachment of real estate without prior notice or the opportunity for a prior hearing if P verifies by oath that there is probable cause to sustain the validity of his claim. D’s private interest is strong because the attachment clouds title to the property, preventing D from selling it, affecting his credit rating, and prevents him from getting a home equity loan or new mortgage. Risk of error is great because only basing decision on one sided account (of a bar fight which doesn’t come with documentary evidence) and state doesn’t require P to post bond (4 justices). P’s interest not valid because P doesn’t show that D about to transfer or encumber his real estate.
         4. ***Vitek, Correctional Director v. Jones* (SCOTUS 1980)** Tool: Statute allowing transfer from prison to mental hospital is unconstitutional per due process if done without (1) written notice; (2) opportunity to be heard (after a reasonable amount of time has passed since notice given and allowing for witnesses); (3) independent decision maker; (4) written statement of evidence and reasons for decision; (5) appointed counsel (not required because concurrence doesn’t agree); and (6) effective and timely notice, because prisoner should not be transferred without finding that he was mentally ill and transfer is major change in conditions of confinement (stigma). Synopsis: P transferred from prison to mental hospital under state statute which allows prison director to do so if prisoner is found mentally ill by physician.
         5. Confer R2d §83(2) in Full Faith and Credit Section.
  1. Assessing constitutionality on procedural due process
     1. How much do you have to show?
        1. Preliminary injunction – Likelihood of success on the merits, Irreparable Harm (money not sufficient), Balance of Equities (harm to both sides balanced), Public Interest (***Thane Coat***)
        2. Three factor test – Private interest, risk of error, interest of the party seeking the remedy (***Matthews*** and ***Doehr***)
        3. Get bond (Installment cases/Four justices in ***Doehr***)
        4. Counsel would have made difference (***Lassiter***)
     2. How do you show it?
        1. One sided presentation is insufficient (***Doehr***)
        2. Affidavit insufficient because conclusory and no specific facts (***Doehr***)
     3. Who issues?
        1. Clerk (***Sniadach***)
        2. Should it have to be judge?
     4. What kind of dispute/What is nature of evidence?
        1. Bar fight so no documentary evidence, just witness testimony insufficient (***Doehr***)
        2. Medical testimony sufficient(***Matthews***)
     5. Timeline
        1. How quickly do you have to pursue lawsuit after obtaining writ of garnishment?

## Venue

* 1. General
     1. No constitutional aspect.
     2. Plaintiff lays venue, venue properly lain.
     3. Venue in State Actions – will not be covered by this class. Assume venue and SMJ in state court.
  2. Federal Statute – 28 U.S.C. §1391
     1. Federal judicial district can consist of either a whole state or a portion of a state.
     2. Still need personal jurisdiction
     3. Three ways to establish venue:
        1. Any D resides in that district (If alien, where alien is domiciled) AND all D’s reside in the state containing that district.
        2. 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 in the district.
        3. (Only applies if first two don’t.) All D’s are in some sense “reachable” in the district and there is no district in which the action may otherwise be brought. (in cases based solely on diversity, the test is satisfied if any D is subject to IPJ in the district; in cases raising a federal question, the test is met if any D may be found in the district).
     4. Corporations and unincorporated associations is a resident of any district as to which it would have the minimum contacts necessary to support IPJ.
     5. Resident = domicile
  3. Waiver: An objection to improper venue must be raised at the same time as one to lack of IPJ. Rule 12(h)(1). If not, it is waived.
  4. Federal removal cases – A case removed from state to federal court passes to the district court of the U.S. for the district and division embracing the place where such action is pending. 28 U.S.C. §1441(a) even if it ends up where it could not have had venue originally. (No venue objections on removed cases but may IPJ.)
  5. Transfer
     1. Transfer Statutes – 1404a, 1406a, 1631 (reference to jurisdiction is both SMJ and IPJ)
        1. Can only transfer within the federal court system; not federal 🡪 international, federal 🡪 state, or state🡪state (therefore SMJ not an issue within federal court system)
     2. Burden on defendant
        1. Plaintiff’s choice should be honored unless a couple of factors which should be considered – public interest factors, private interest factors, convenience, etc.
        2. ***Gulf Oil Corp. v. Gilbert* (SCOTUS 1947)** Tool: Factors to be considered for forum non conveniens: Private interest of litigant; ease of access to evidence; ease and cost of getting witnesses to court; possibility of view of premises; enforceability of a judgment; relative obstacles/advantages to fair trial; unless the balance is strongly in favor of the defendant, plaintiff’s choice of forum should rarely be disturbed; public interest factors; docket congestion; local interest in litigation Synopsis: N/A
     3. Statutory standard - 28 U.S.C. §1404(a) provides that “for the convenience of parties and witnesses…a district court may transfer any civil action to any other district or division where it might have been brought.” Can be invoked by either party. Transfer request should be granted when more convenient for parties and interest of parties to do so. In reality, courts use this to get rid of cases they don’t want.
     4. Interpretation of “where it might have been brought” – where P could lay venue and IPJ
        1. Plaintiff’s motion – transfer on the motion of the plaintiff may be made only to a district where the defendant could have been served with process (pursuant to long-arm statute) and where venue would originally have been proper.
        2. Defendant can waive IPJ – 1404a altered since Hoffman 🡪 only need venue AND IPJ over objecting defendant.
           1. ***Hoffman v. Blaski* (SCOTUS 1960)** Tool: Consent by the defendant will not permit transfer to a forum where the action could not originally have been commenced. Synopsis: P (IL) sues D (TX). D removes to IL. P could not have originally brought suit in IL.
           2. ***Goldlawr v. Heiman* (SCOTUS 1962)** Tool: 28 USC 1406 authorizes the transfer of an action even if the transferor court lacks personal jurisdiction if defendant consents to IPJ. Transferee court always has to be happy even though transferor court in unhappy. Synopsis: N/A
        3. Change of venue does not need to be favorable to plaintiff
     5. Greiner Happy Court Rule – when §1404(a) is invoked, the state law of the transferor court is to be applied by the transferee court if transferor court happy (venue and IPJ and obviously need/have SMJ). If transferor court unhappy, use choice of law rules of transferee court. Van Dusen, Ferens, and Klaxon, and Erie combine to give you Happy Court Rule.
        1. Only relevant in federal court cases based solely on diversity.
        2. ***Van Dusen v. Barrack* (SCOTUS 1964)** Tool: “A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms.” Synopsis: N/A
        3. ***Ferens v. John Deere* (SCOTUS 1990)** Tool: Van Dusen rule applies to a plaintiff initiated transfer. Synopsis: Two lawsuits – P driving John Deere tractor and gets injured. Lawsuit – breached contract because sold me something that was not safe. Lawsuit 2 – product liability claim (tort claim) Limitations periods for contracts are typically long (MS and PA had long limitation periods but PA had 2 year tort limitation period and MS had 6 year limitation). P wanted to bring contract and tort lawsuit in year 2.5. Didn’t want to lose tort claim (damages). Injury/accident happened in PA. Breach of contract lawsuit is filed in PA. Tort lawsuit originally filed in MS. P moved to transfer case to PA hoping that MS law followed transfer. PA court ruled that MS choice of law rules needed to be applied. Choice of law rules (use forum law for procedural laws – statute of limitations) gave MS limitations period. MS jurisdiction and venue was proper. NOTE: Original state remains the “forum.”
     6. When should transfer happen? Convenience of parties, location of witnesses, physical evidence and documents, congestion of the courts
     7. Transfer where original venue improper: Transfer may also be made under 28 U.S.C. §1406(a), which provides that when a suit is brought in a district where venue is improper, the action may be transferred to a district where it could have been brought.
        1. Where jurisdiction also lacking – If the court decides that it lacks venue and IPJ, the court may probably nonetheless order the transfer.
     8. Exception to all rules: Forum selection clause
        1. Should almost always transfer
        2. Happy court rule doesn’t apply
        3. Don’t consider private interests (already taken into account)
        4. Use choice of law rules of location parties put into contract
        5. ***Atlantic Marine Construction Co. v. United States District Court* (SCOTUS 2013)** Tool: When parties have agreed to a forum-selection clause, a court should transfer the case to that forum per 1404a unless there are exceptional factors at work. The presence of a valid forum selection clause requires district court to adjust their usual 1404a analysis in three ways: (1) The party requesting the change of forum should bear the burden of proving that such a change is necessary; (2) Should not consider parties’ private interests since they waived that when they agreed to clause but should only consider public interest factors; (3) a 1404a transfer will not carry with it the original venue’s choice of law rules. Synopsis: Atlantic’s subcontract agreement with J-Crew contained a forum selection clause. J-Crew violated the clause brining suit in TX rather than VA federal court.
           1. Overruled ***Stewart Organization v. Ricoh Corp.*** on factors to consider in forum-selection clauses but not on Erie question.
  6. Forum Non Conveniens
     1. Common law because not covered by federal statutes. Therefore, applicable when location is abroad or state court.
     2. Dismiss because of forum non conveniens.
     3. What to consider?
        1. Private interest factors – convenience of parties, location of evidence, witnesses
        2. Public interest factors – state has interest in not burdening its courts with litigation not connected with the state; burden on jury pool; kitchen sink, etc.
        3. Give P’s choice of forum a lot of deference unless P is from abroad (See ***Piper***).
        4. Is P state resident/taxpayer?
        5. Which forum will be familiar with state law that must govern the case?
        6. If you dismiss on grounds of forum non conveniens, D will often say that he will waive objections to IPJ/venue in other country and make witnesses/evidence available. If D does not follow on this promise, P will ask to revive motion under FRCP 60(b) and it will likely be granted (few occasions when it is granted).
        7. Unfavorable change in law insufficient UNLESS the remedy provided by the alternative forum was so clearly inadequate or unsatisfactory that it is no remedy at all.
           1. ***Piper Aircraft Co. v. Reyno* (SCOTUS 1981)** Tool: Forum non conveniens should not be dismissed because the law applied in alternate forum would be less favorable to P. The possibility of change in substantive law should not be given conclusive or even substantial weight in the forum non conveniens inquiry. Synopsis: Following an airplane crash in Scotland, a legal secretary sued the airplane’s manufacturer in CA. The manufacturer moved to dismiss the suit on grounds of forum non conveniens.

No longer contemplating federal to federal, contemplating federal court to abroad

Subtext - If plaintiff is from abroad, we assume they are forum shopping in a way we don’t like. We don’t give abroad plaintiff presumption that forum they chose is good forum.

Choice of law under first restatement likely Scottish law. US says that would be hard for us to apply. But Scotland would have to use US law.

* + 1. No HCOL because it is dismissed so no transfer and brand new lawsuit.

# SUBJECT MATTER JURISDICTION

## Federal Question

* 1. General
     1. Legal Provisions
        1. Article III, §2 cl. 1
        2. 28 U.S.C. §1331 – original jurisdiction extends to all civil actions “arising under the Constitution, laws, or treaties of the U.S.
           1. Constitutional grant of federal power is not self-executing. SCOTUS interprets statute more narrowly than constitution even though language is virtually the same 🡪 preserving state power.
     2. Burden: Party seeking to invoke the jurisdiction of the federal court must affirmatively show that the case is within the competency of the court.
     3. Dismissal: Federal Rules provide that the parties or the court on its own initiative can always object to the court’s lack of FQJ. If the court finds lack of FQJ, it must dismiss the action.
     4. Either party can change position on FQJ.
     5. Cannot be waived
     6. Concurrent Jurisdiction – can always be heard in state court unless federal exclusive jurisdiction, e.g. federal antitrust, patent, copyright, etc.
     7. Federal v. State Court – where you litigate can have serious consequences (judge, jury pool, rules of procedure, etc.). E.g. Cooper v. Aaron (The Governor and the Legislature of Arkansas openly resisted the Supreme Court's decision in Brown v. Board of Education. They refused to obey court orders designed to implement school desegregation. Local officials delayed plans to do away with segregated public facilities.)
     8. Federal courts will not probate will or do divorces.
  2. Arising Under Jurisdiction
     1. Federal Claim: federal law is the source of the cause of action conversely or the plaintiff’s right of relief necessarily depends on resolution of a substantial question of federal law.
        1. ***Osborn v. Bank of the United States* (SCOTUS 1824)** Tool: FQJ satisfied in any case which calls for application of federal law to prove claim or defense – broad “federal ingredient” approach. However, Article III does not confer FQJ to lower federal courts. Synopsis: Bank of U.S. sued Ohio for collecting tax alleged to be unconstitutional. Court granted temporary injunction. State appealed on grounds of lack of FQJ.
     2. Well-Pleaded Complaint – federal question must be part of complaint, not anticipated defense. Article III power is broad but 28 U.S.C. §1331 interpreted more narrowly than Article III although similar language.
        1. ***Louisville & Nashville R. Co. v. Mottley* (SCOTUS, 1908)**Tool: “Well-pleaded complaint” rule – No FQJ because federal statute was not essential to P’s cause of action. Synopsis: Mottley’s injured in RR accident. Given free passes. Federal statute created to prohibit free passes. RR stops giving free passes. Mottley’s complaint included breach of contract (state cause of action) and federal law as expected defense.
     3. State Law Claims that Implicate Significant Federal Issues – Interprets 28 U.S.C. §1331 more broadly.
        1. ***Smith v. Kansas City Title & Trust Co.* (SCOTUS 1921)** Tool: Claim satisfies FQJ if controversy directly concerns constitutional validity of federal law. Synopsis: Smith sued Kansas for investing in federal bonds (State cause of action). Smith argued bonds invalid because federal statute authorizing them was unconstitutional.
        2. ***Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing* (SCOTUS, 2005)**Tools:State claims have FQJ if (1) “Turns on substantial elements of federal law in such a way that you need federal courts’ experience; (2) need for nationwide uniformity; (3) will not lead to significant increase in non-federal claims heard by federal courts (“will not disturb congressionally approved balance of federal and state judicial responsibilities”). Synopsis: Grable claimed conveyance of its property to Darue was invalid because federal tax statute requires personal (he received certified mail) service before federal tax seizure by IRS.
           1. Creation Test: If federal law creates cause of action 🡪 FQJ under §1331.
           2. Federal issue embedded in state law is necessary but not sufficient.
           3. Why? Don’t trust state courts.
        3. Federal government as interested party: Exception will most likely apply when federal government itself is a participant of underlying activities. E.g. ***Grable*** issue involved the correctness of the IRS’ own procedures.
        4. ***Empire Healthchoice Assurance, Inc. v. McVeigh* (SCOTUS 2006)** Tool: Claim based on federal contract does not necessarily arise under federal jurisdiction, because fact bound and does not raise substantial federal issue. Synopsis: Empire sued McVeigh to recoup third-party medical expenses as required by federal contract.
           1. Why? Fact bound cases have specific impact while issue of law has broader impact. And don’t trust state courts.
     4. “Imaginary Lawsuit” Greiner Rule
        1. For a declaratory judgment, imagine what lawsuit would be.
        2. ***First Federal Savings and Loan Association of Bowling Green, Kentucky v. H. Earl McReynolds (1969)*** Tool: Can’t use declaratory judgment to create FQJ if original suit would have federal issue as defense. Synopsis: Bank requests declaratory judgment that federal regulation makes McReynold’s contract void.
  3. Insufficient
     1. State claim needs interpretation of federal law.
        1. ***Merrell Dow Pharmaceuticals Inc. v. Thompson* (SCOTUS, 1986)** Tool: If Congress does not create a private right of action for violation of federal statute, a state law claim that alleges a violation of the federal statute (and meaning of federal statute is not in dispute) does not have FQJ (even though similar to Smith). Worried about influx of cases. Synopsis: Thompson alleged state cause of action (negligence) that could be proved by showing violation of federal statute (FDCA labeling requirements).
     2. Anticipation of Defense: anticipated defense based on federal statute not sufficient for FQJ (See “Well-pleaded complaint”)
     3. Suit authorized by federal law
        1. ***Shoshone Mining Co. Rutter* (SCOTUS 1900)** Tool: The mere fact that a suit is authorized by the federal law, is not, in and of itself, sufficient to vest jurisdiction in the federal courts. Synopsis: Mining companies filed claims to determine possession of land. Federal law provided that right to possession could be determined by local customs or rules of miners.

## Diversity

* 1. General
     1. Legal Provisions
        1. Article III, §2 cl. 1
        2. 28 U.S.C. §1332
     2. Rationale: Local bias
     3. Date of determination: Commencement of the action/time of filing
  2. Amount in Controversy
     + 1. General Rule: In all diversity cases, the amount in controversy must exceed $75,000
       2. 28 U.S.C. §1332(a)
       3. Proof not required: sum claimed by plaintiff controls if the claim is made in good faith.
       4. Aggregation of claims – requires same plaintiffs and same defendants
          1. Single plaintiff

If one claim is greater than $75,000 plaintiff can add on other claims that do not meet amount in controversy (See Supplemental Jurisdiction)

If not a single claim is greater than $75,000, plaintiff can add together all claims.

* + - * 1. Multiple plaintiffs

At least one plaintiff meets amount – other plaintiffs can join (See Supplemental Jurisdiction)

No single claim meets the amount – aggregation is normally not allowed unless plaintiffs unite to enforce a single title or right in which they have a common and undivided interest.

* 1. Complete Diversity
     1. Definition: No plaintiff is a citizen of the same state as any defendant.
     2. Not a constitutional requirement.
     3. Judge-made interpretation of 28 U.S.C. §1332(a) – Justice Marshall in ***Strawbridge v. Curtiss* (SCOTUS, 1806)** Tool: 1332(a) grants diversity jurisdiction if there is “complete diversity” between all parties. Synopsis: Strawbridge (MA) sued Curtiss (VT) and others from MA.
  2. Citizenship
     1. Definition: Domicile (not residence)
        1. Formula for domicile
           1. Domicile = current dwelling place + intent to remain indefinitely
           2. Go back as far as possible (when you were born). Domicile changes if person moves states with intention to remain indefinitely.
           3. ***Mas v. Perry (5th Cir. 1974)*** Tool: Citizenship determined by domicile. If not U.S. citizen, then citizen of foreign state. Synopsis: Mas’s sue Perry (LA). Mas’s in school in La. but determined to not be La. citizens.
           4. Note: Same test used for diversity in IPJ
     2. D.C. resident is from 51st state
     3. Alienage jurisdiction
        1. Foreign citizen is from 52nd state
        2. Suit between just foreign citizens does not count
     4. Representatives and administrators will generally be treated as having the same citizenship of the party they represent.
     5. Corporation – 28 U.S.C. §1332(c)
        1. Incorporated
        2. Principal Place of Business
           1. “Nerve center” test (***Hertz***) – principal place of business is headquarters, not where the bulk of business activities occur.
        3. Exception: Insurance companies citizens of state of insured when litigating on their behalf and not the company’s behalf (don’t need to know for class).
     6. Unincorporated Associations/Partnerships: citizen of each member counts (e.g. labor unions, non-profits)
        1. ***United Steelworkers of America, AFL-CIO v. Bouligny (1965)*** Tool: Unincorporated association’s citizenship is that of each member but think this is silly rule and trending toward principle place of business. Synopsis: Bouligny (NC) brought action against United (principal place of business in PA but members also in NC). United removed case.
  3. Refusal to exercise jurisdiction
     1. Divorce
     2. Probate matters
     3. Abstention Doctrine
        1. Congestion of federal courts docket
        2. Difficulty of state law presented
        3. Existence of related litigation in state court
  4. Devices to Create or Destroy Diversity
     1. Assignment of Claims: assigning claims for the sole purpose of creating or destroying diversity is invalid.
     2. Failure to name indispensable parties
     3. Joinder of non-diverse defendant: Removal may not be defeated by the plaintiff’s joinder as defendant of a party against whom no bona fide claim exists.

## Supplemental Jurisdiction

* 1. General
     1. Legal Provisions
        1. Article III §2, cl. 1
        2. 28 U.S.C. §1367 (enacted in 1990 in response to Finley)
     2. Does not eliminate requirement of jurisdiction over the parties.
     3. Venue does not have to be satisfied for each party.
     4. Claim definition (for Supp. Jurisdiction) – unique defendant, plaintiff and theory of relief
     5. Steps
        1. Find anchoring claim
        2. Find one that has FQJ
        3. In none, check diversity.
        4. If supplemental ruins diversity, don’t allow.
        5. Then go to 1367(c) to use discretion
  2. Federal Question Core Claim
     1. Similar Claims
        1. General Rule: State and federal claims must “derive from a common nucleus of operative fact.”
        2. ***United Mine Workers of America v. Gibbs* (SCOTUS, 1966)**Tool: Federal court has discretionary power to hear state claims arising out of the same “nucleus of operative facts” as federal claims within the same case. (Authority under Article III) If state law claim > federal claim, court can dismiss state law claim. Synopsis: Gibbs sued United asserting federal law claim (Labor Mngt. Relations Act) and state law claim for interference with contractual relations.
     2. “Pendant Party” Jurisdiction
        1. 28 U.S.C. §1367 provides that supplemental jurisdiction can include claims that involve the joinder or intervention of additional parties.
        2. Previously restricted by case law: SCOTUS, in a series of decisions, held that Congress needed to affirmatively indicate that it wanted to allow new parties to be brought in on supplemental state claims even if the federal claim was of a type that could only be brought in federal court.
           1. ***Aldinger v. Howard* (SCOTUS 1976)** Tool: Supplementary jurisdiction is limited when claims against different defendants. Synopsis: Aldinger brought federal civil rights claims against state officials and sought to join Spokane County as additional defendant under state law, which was inconsistent with apparent intent of Congress to bar claims under §1983 against counties.
           2. ***Finley v. United States*** **(1989)** Tool: Congress has granted supplementary claim, not supplementary party jurisdiction. Synopsis: Finley sued FAA under proper federal claim (Federal Tort Claims Act and §1346(b)) and city/company under state claims.
        3. Reversed by statute: 28 U.S.C. §1367 enacted in 1990 in response to ***Finley***.
           1. New parties may be brought in to defend against the state-law claims even though they don’t independently satisfy FQJ.
  3. Diversity Core Claim
     1. Supplementary claim does not need to meet amount in controversy requirement (***Exxon***)
     2. Diversity Exclusions: Plaintiff not allowed to assert a claim against third-party defendant if it defeats complete diversity. 28 U.S.C. §1367 (b)
        1. ***Owen Equipment & Erection Co. v. Kroger* (SCOTUS, 1978)**Tool: There is no supplementary jurisdiction when plaintiffs claim is based on diversity and new claim eliminates diversity (even if third party brought on by defendant), because worried about gamesmanship. Synopsis: Kroger (IA) brought diversity actions against OPPD (NE) for death of husband. OPPD filed third-party claim against owner-operator of crane, Owen (IA and NE) and Kroger tried to make claim against Owen.
        2. ***Guaranteed Systems, Plaintiff and Third-Party Plaintiff, v. American National Can Company, Defendant, R.K. Elite-Hydrovac Services, Inc., Third-Party Defendant* (NC U.S. District Court 1994)** Tool: Federal courts may exercise supplemental jurisdiction unless action is within their jurisdiction solely on the basis of diversity, and so doing would be inconsistent with diversity requirement even if third party defendant. Court recognized that there was no gamesmanship here but said they were bound by §1367 (b). Synopsis: Guaranteed (NC) filed state court action against National (DE) in NC. National removed to federal court under diversity jurisdiction. National filed counterclaim. Guaranteed filed third-party action against Hydrovac (NC).
     3. Claims Allowed
        1. Compulsory counterclaims
        2. Additional parties to compulsory counterclaims
        3. Cross-Claims
        4. Impleader of third party defendants (not by original plaintiff).
  4. Discretionary Rejection of Supplemental Jurisdiction
     1. 28 U.S.C. §1367 (c) provides four reasons (mostly follows ***Gibbs***):
        1. Claim raises a novel or complex issue of State law
        2. [State law] claim substantially predominates over the claim(s) over which district court has original jurisdiction
        3. District court has dismissed all claims over which it has original jurisdiction
        4. Exceptional circumstances
     2. Must fall into 1-4 for court to dismiss
        1. ***Executive Software North America v. United States District Court* (1994)**Tool: Supplemental jurisdiction must be asserted unless court properly invokes a §1367(c) category. (Different from *Gibbs)* Synopsis: Page filed suit against Executive for federal and state causes of action. District court remanded state causes of action without invoking §1367(c) category.

## Removal

* 1. General
     1. Legal Provision: Not in Constitution; 28 U.S.C. §1441
     2. Pleadings not pierced: Right of removal decided from the face of the pleadings. Plaintiff’s complaint controls.
     3. As when evaluated:
        1. Federal Question: Allegations are viewed as of the time the notice of removal is filed unless plaintiff amended complaint so as to make it a federal question.
        2. Diversity: Diversity must exist at the time of filing of original action and at the time of removal unless plaintiff has dropped a party that prevented diversity. Rationale is to prevent defendants from moving to create diversity.
     4. You cannot remove from federal to state court. If improper SMJ, federal court dismisses.
  2. Only cases which could originally have been brought in the federal courts.
     1. Federal Question
     2. Diversity
        1. Exception – Cases cannot be removed under diversity if at least one defendant is a citizen of state in which the action was brought. §1441(b)(2)
  3. Multiple claims: Whenever a claim arising under FQJ is joined with other related but otherwise non-removable claims, the entire case may be removed. 28 U.S.C. §1441 (c)
  4. Only a defendant may remove (technically it is removed but would automatically be remanded).
     1. Even plaintiff removing counterclaim cannot remove
        1. ***Shamrock Oil & Gas Corp. v. Sheets*** **(SCOTUS, 1941)** Tool: Plaintiff cannot remove action to federal court, even when confronted with counterclaim. Synopsis: Sheets made federal counterclaim. Shamrock requested removal due to counterclaim.
  5. Remand
     1. Federal judge must remand if removal did not satisfy SMJ.
     2. The doctrine of abstention – abstention from the exercise of federal jurisdiction is the exception, not the rule. Four exceptions:
        1. Cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.
        2. Cases with difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case in question or when the exercise of federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial concern.
        3. Absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings.
        4. Parallel proceedings – A fourth reason to abstain is when there are parallel proceedings in state and federal court and other factors are met.
           1. ***Colorado River Water Conservation District v. United States* (SCOTUS 1976)** Tool: In determining whether federal court should abstain in favor of parallel proceedings, weigh “unflagging obligation” to exercise jurisdiction if it has it against four factors (“wise judicial administration”): 1) whether state has jurisdiction over property, 2) inconvenience of fed. forum, 3) desirability of avoiding piecemeal litigation, and 4) order in which jurisdiction was obtained. Synopsis: McCarren amendment was federal statute allowing U.S. to be joined in certain suits concerning the adjudication or administration of rights to use of waters in state court.
           2. ***Marilyn Clark, on behalf of Sears, Plaintiff-Appellant, v. Alan Lacy, et al., Defendants-Appellees* (8th Cir. 2004)**Tool: Parallel state proceedings does not mean identical state proceedings. Added six more factors: (5) the source of governing law, state or federal; (6) the adequacy of state court action to protect the federal plaintiff's rights; (7) the relative progress of state and federal proceedings; (8) the presence or absence of concur-rent jurisdiction; (9) the availability of removal; and (10) the vexatious or contrived nature of the federal claim. Synopsis: Simultaneous proceedings against Sears in state and federal courts regarding its issuance of Master Cards.

***Clark*** is not faithful interpretation of ***Colorado***. It does not take its own 10-factor test seriously. It drives a semi through the hole that ***Colorado*** created giving federal court more discretion to remand/stay. Note: that ***Colorado*** was 7th Circuit and ***Clark*** was 8th Circuit.

* + 1. Federal question claim and supplemental claim removed and the federal claim is dismissed before trial. 28 U.S.C. §1367 (c)(3)
    2. Mechanics 28 U.S.C. §1446-50
       1. Removable event: Defendant must file for removal within 30 days of the time he receives service of the complaint or the removable event occurs.
       2. Where filed: Defendant files by submitting to the district court a “notice of removal.”
       3. Stay: Once notice has been filed, the state court may take no further proceedings until and unless district court remands.
       4. All defendants generally must join notice of removal.
       5. Remand: Plaintiff has 30 days after notice has been filed to request remand.
       6. Note: Claims can be remanded/dismissed at any time it is found SMJ is lacking.
    3. Defects in removal procedure – remand automatically granted
       1. Defendant did not remove within 30 days
       2. Not all defendants signed removal petition
       3. Defendant removes for diversity in his own state court.
       4. Cased removed solely for diversity more than one year after removable event.

# ASCERTAINING APPLICABLE LAW

## Vertical Choice of Law

* 1. History – Federal Substantive Law
     1. Rules of Decision Act, 28 U.S.C. §1652, states that in civil actions, the federal courts must apply the “law of the several states, except where the Constitution or treaties of the United States or Acts of Congress require or provide.” This act has been in effect since 1789 but its interpretation was changed drastically with the decision in ***Erie***.
        1. This has always been taken to mean that the federal Constitution, treaties, and acts of Congress always take precedence over state provisions. This applies to proceedings in federal and state courts alike.
        2. The act has always been taken to mean that in the absence of controlling federal provisions, the federal courts will be bound by state constitutions and statutes.
        3. The dispute is about what law the federal courts should apply where there is no controlling constitutional or statutory provision, federal or state; that is, where the “law” in question is the so-called “common,” or judge-made, law.
     2. ***Swift v. Tyson* (SCOTUS 1842)** Tool: Federal courts were bound by state court opinions which construed state’s constitution, statutes, or essentially local matters but, in all other questions, the federal courts were free to evolve their own common law irrespective of what state court were doing. In other words, “laws of the several states” in the Rules and Decision Act did not encompass “general” common law (judge-made law). Synopsis: P sued D in NY federal district court on general commercial law matter.
        1. Common law was an “ideal entity” – judges don’t make law, they try to find the law.
        2. No such thing as FRCP at the time so used state civil rules of procedure.
     3. ***Swift*** in disfavor
        1. Legal writers began to express the view that judges “make” common law in much the same way that legislatures make statutory law. Common law came to be seen as a “law of the state” so ***Swift’s*** distinction between statutory and common law had less meaning.
        2. Forum Shopping – forum shopping became notorious as parties tried to maneuver into a federal court in order to evade a state body of law that he found unfavorable or into a state court to avoid the application of unfavorable federal common law principles.
           1. Discrimination against citizens – forum-shopping allowed non-citizens to gain an advantage against citizens of the state where the federal court sat – D can’t remove for diversity if lives in state court. And you can’t remove from federal to state cour.
     4. ***Erie R. Co. v. Tompkins* (SCOTUS 1938)**
        1. Tool: Overruled ***Swift*** doctrine. When the Rules and Decision Act required federal courts in diversity to apply “laws of the several states,” this includes a state’s common law; not just its constitutional and statutory provisions. A federal court sitting in diversity would normally have to apply state common law principles and was not free to apply “federal common law.” Federal courts will apply state substantive law in diversity cases.
        2. Synopsis: P (PA) sued RR for damages as a result of being struck in PA by something projecting from train as he walked alongside the railroad. RR incorporated in NY, so P sued in NY federal court. PA common law favored RR holding that it had no duty or liability toward people walking along the right of way (these being deemed “trespassers”) unless its negligence was “wanton or willful.” Federal district court decided to interpret general common law on its own, and found against RR.
        3. Factors
           1. Nature of law/Metaphysical – federal judges don’t have power to make law, and no such thing as discovering general common law (not something you find in the sky – no transcendental body of law)
           2. Constitutionality

Violates federalism – “There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state, whether they be local in their nature or general, be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.”

This cannot be taken seriously anymore with federal regulatory state.

Separation of Powers – Under separation of powers, we might not want courts to do things, but if Congress tells us, that is different story. But here, Congress has not said anything. So we will do what courts say.

Equal protection principle – ***Swift*** doctrine gave non-citizen the ability to forum-shop for the forum most favorable to him. Allowed discrimination of out-of-staters.

* + - * 1. Statutory Sec. 1652 – Common law is also “law of the states” along with state statutes.
        2. Common Law: Rule of prudence – Catch all. Even if above factors aren’t true, it just makes sense.
      1. Twin aims – no forum shopping and no discrimination against citizens. Old way wasn’t working. So this is matter of prudence. E.g. ***Black & White Taxicab*** taxicab company reincorporated in different state in order to have diversity and bring suit in federal court.
      2. Certain federal common law matters remain – Under ***Erie*** there remains a federal common law in matters related to clear federal questions. E.g. interstate commerce. It is only general federal common law that was held not to exist by ***Erie***.
  1. History – Federal Procedural Law
     1. Conformity Act: Before 1934, a federal court had to apply the procedures of the courts of the state in which it was sitting, if no federal statute governed. Typically, there was no federal statute for procedural matters.
     2. Rules Enabling Act, 28 U.S.C. §2072 – allowed the Supreme Court to “prescribe, by general rules…the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law” for the federal courts.
        1. Substantive rights not affected – Enabling Act provided that the rules so enacted must not “abridge, enlarge, nor modify the substantive rights of any litigant.”
        2. Federal Rules – Pursuant to Enabling Act, the Court promulgated the FRCP in the same 1938 term in which it handed down the ***Erie*** decision.
        3. See ***Hanna v. Plumer***, the main SCOTUS decision on how to determine whether a FRCP is valid under Enabling Act.
  2. Four Tests (go through all four tests in exam) for Vertical Choice of Law: Procedure v. Substance
     1. Outcome determinative test – Law is substantive if the result in federal court would be different than in state court (i.e. would mean end of lawsuit. See Exam 2010 model answer question 2(d))
        1. ***Guaranty Trust Co. v. York* (SCOTUS 1945)** Tool: Outcome determinative test – Federal court must apply the state statute of limitations when following the Erie doctrine because refusing to apply it would allow a party to bring suit that it would be barred from bringing in state court. Synopsis: York sued Guaranty under diversity alleging breach of fiduciary duty (equitable remedy).
        2. This is practically dead on arrival because almost any procedural rule will affect outcome of litigation. But, holding in York is still good law.
        3. Statute of limitations periods are substantive for vertical choice of law purposes so federal courts must use state court statute of limitations periods.
        4. Reliance on Erie Principles – Federalism and Equal Protection Principle but not Separation of Powers
     2. Federal law hierarchy – ***Hanna v. Plumer* (SCOTUS 1965)** Tool: In diversity, FRCP should be used instead of state laws for service process because it is not substantive. Federal courts should apply state law with regard to any issue that is not governed by an applicable and valid federal rule. Synopsis: Service of process complied with federal rules but not state rules. (NOTE: Erie Principle – Sec. 1652 – common law is law of the states (don’t distinguish between substantive and procedural) but Hanna distinguishes among federal laws.)
        1. If constitutional provision, it must be:
           1. Valid – assume this
           2. Applicable – if yes, use constitutional provision
        2. If federal statute, it must be:
           1. Valid – Did Congress have the constitutional authority to enact the federal statute?

Rules Enabling Act

Full Faith and Credit

Commerce clause

Necessary and proper clause – allows to perpetuate any other power (Art. I, Sec. 8, Cl. 18)

Article III, Sect. 2: Power to create and regulate the lower federal courts

* + - * 1. Applicable – yes, if it conflicts with state law
        2. Application – ***Stewart Organization v. Ricoh Corp.* (SCOTUS 1988)** Tool: The state and federal statutes conflict because the AL law does not require consideration of additional factors. Therefore, federal law prevails even though this may promote forum shopping. Synopsis: The AL law articulated a clear policy against forum selection clauses. The federal statute, by contrast, required consideration of various factors such as bargaining power and convenience when evaluating the validity of the forum selection clause.

Synopsis: P sued D in AL federal court on diversity for breach of contract. Contract contained forum selection clause specifying venue in NY. D requested transfer or dismissal under federal transfer statutes. P argued that AL law disfavored forum selection clauses.

Tool: Application of Hanna analysis:

Applicable – transfer statutes are sufficiently broad to be applicable to issue at hand. Application of the state rule pertaining to forum selection clauses would be incompatible with the judicial flexibility authorized by the federal statute. Since two statutes conflict, federal statute controls if valid.

Valid – Transfer statutes are valid under Rules Enabling Act because it does not alter the substantive law regarding venue. Also, Congress has power to create federal courts other than SCOTUS and transfer statutes involve transferring between lower courts.

* + - 1. If regulation, then don’t know. Likely exam question. Reason from structure and Erie values.
      2. If FRCP (part statute and part common law), it must be:
         1. Valid – Rules Enabling Act – can’t expand, modify, or alter substantive rights; presumptive validity given process for approving FRCP. No FRCP has been held invalid. However, we care about it because issues with validity often get transferred to applicability since court doesn’t want to hold its own rules invalid. In determining validity, have to look at statute that created it:

Title VII and Section 1983

Sherman Anti-Trust – Sec. 1982

* + - * 1. Applicable – In order to be applicable, it must conflict with state law. FRCP have been interpreted narrowly to so that it is “inapplicable” but in reality to avoid invalidity with Rules Enabling Act.

Example of not applicable – ***Walker v. Armco Steel Corp.* (SCOTUS 1980)** Tool: Under Hanna, a federal procedural rule must directly conflict with the state law dealing with the same issue in order for the federal rule to apply. In this situation, FRCP 3, “when is the action commenced,” was interpreted not to address when a statute of limitations is tolled, and thus did not fall into “direct conflict” with the state tolling provisions. Synopsis: P’s claim had run under OK’s statute of limitations tolling provision but not federal provision.

***Walker*** gives narrow interpretation of FRCP 3 because it’s trying not to overrule ***Ragan v. Merchants Transfer* (SCOTUS 1949)**, which held state rule that statute of limitations is only satisfied by filing complaint with the court AND requiring service on the defendant with the period as opposed to FRCP 3 which says that civil action is commenced by filing a complaint with the court.

* + - 1. If common law (no constitutional provision, statute, regulation or FRCP), use existing or make up federal common law if ***Erie’s*** twin aims are met (almost always results in state law which is point of ***Erie***):
         1. No forum-shopping
         2. No inequitable administration of the laws
    1. Harlan’s Concurrence in ***Hanna***
       1. Does it significantly change party’s pre-litigation conduct?
          1. Yes 🡪 Substantive, use state law so that there is uniformity

Erie factor – federalism, said federal law was stepping over state powers

* + - * 1. No 🡪 procedural, use federal

E.g. Harlan though ***Ragan*** was wrongly decided because it wouldn’t significantly change pre-litigation behavior.

* + - * 1. Note: argument regarding affecting a party’s primary conduct is stronger for large entities that have a lot of litigation, such as insurance companies.E.g. ***Black & White Taxicab*** taxicab company reincorporated in different state in order to have diversity and bring suit in federal court.
    1. Ginsberg in Shady Grove – say they can narrowly interpret FRCP (contrast to ***Walker*** where they footnote saying they are not narrowly interpreting FRCP even though they are). Says she is using Hanna majority, but isn’t. Won’t say federal law is invalid but will see if it’s applicable to accommodate state law. Willing to bend a lot to make not applicable.
       1. Scalia – FRCP 23 is valid and applicable because conflicted with state law. (embed in Hanna Majority analysis)
          1. Look at federal law first. FRCP 23 answers question in this case so no need to worry about state law or narrowly construing it.
          2. If federal law applies, don’t even need to look at state law. Federal law should be same everywhere.
          3. If ambiguous whether it applies, then interpret it so that it doesn’t conflict with state interests (federal-state separation important).
       2. Ginsburg – “applies” Hanna Majority analysis – Rule 23 is valid but not applicable, don’t want to create federal common law, so use state law. (This is Ginsburg analysis we want to use)
          1. Look at state law
          2. Identify state’s interest

In Shady Grove, what was purpose of state law? Worried that class actions are going to make civil penalty lawsuits would get too large and will impose crushing liability on job creators. This will make class actions unattractive to attorneys.

This feels substantive

* + - * 1. Accommodate federal law to effectuate state interest
      1. Stevens (controlling opinion)
         1. Agrees with Ginsburg that we should bend federal law but can’t break it so agrees with Scalia with the result but agrees with Ginsburg on process.
         2. Just because state rule is procedural, it may be bound up in system of rights that state defines than it is really substantive. BUT, this is not the case in Shady Grove.
         3. Doesn’t care that federal law may be applied differently in different states.
  1. Four Tests Have Strange Result – consider policy issues behind Erie
  2. Federal Common Law
     1. Federal common law exists
        1. Federal question cases
        2. Specific issues
     2. Federal Common law in diversity cases
        1. Balancing test (See ***Byrd***)
        2. Specific cases
     3. Federal Common Law in State Courts
        1. Most federal question claims
        2. Some procedural questions
  3. If you end up applying state law, than probably need to do HCOL analysis.

## Horizontal Choice of Law

* 1. ***Klaxon Co. v. Stentor Electric MFG Co.* (SCOTUS 1941)** Tool: In order to promote the uniform application of substantive law within a state, federal courts must apply the choice of law rules of the state in which they sit (AKA choice of law rules are substantive). Synopsis: N/A
  2. Steps
     1. Procedural 🡪 Forum law (Very broad for HCOL, almost anything that is arguably procedural is considered so. E.g. Statute of Limitations)
     2. Substantive 🡪 Forum’s choice of law analysis (note state choice of law rules are a subset of state laws)
        1. 1st Restatement
           1. Lex loc delictis
           2. Don’t cut cake up as much
           3. ***Alabama Great Southern RR v. Carroll* (Supreme Court of AL 1893)** Tool: “Vested rights doctrine” – State law in which injury occurred should be used. Synopsis: Carroll and RR citizens of AL. Carroll injured by weak link in MS. MS law has fellow servants doctrine while AL law has respondeat superior.

Vested interest doctrine – where last event necessary for tort to blossom (injury) occurs is where plaintiff becomes vested in right to sue.

* + - 1. 2nd Restatement
         1. Cut cake into issues, look at individual issues – damages, liability, whether affirmative defense available
         2. Factors:

State interests (governing conduct in state, protecting its citizens, helping its citizens win, furthering state policies)

Center of gravity/most of the facts (often lines up with lex loc delictis but exception in ***Babcock***)

Convenience

* + - * 1. ***Babcock v. Jackson, as Executrix of William H. Jackson, Deceased, Respondent* (Court of Appeals NY 1963)** Tool: “Center of gravity rule” – Law of the state which has the most significant relationship with the occurrence and parties determines their rights and liabilities. Synopsis: Jackson (NY) driving Babcock (NY) in Canada when car crashed and Babcock injured. Ontario law – car drivers not liable for injuries to passengers.
        2. ***Neumeier, as Administratrix of the Estate of Amie Neumeier, Deceased, v. Kuehner, as Administratrix of the Estate of Arthur Kuehner, Deceased* (NY 1972)** Tool: State law in which incident occurred should be used when driver and passenger from different states – created three principles. Synopsis: Kuehner (U.S.) driving Neumeier (Canada) in Canada when hit train and both died.
  1. Procedural v. Substantive
     1. Unclear distinction
     2. Statute of limitations is procedural in horizontal law but substantive in vertical law.
  2. First Restatement v. Second Restatement Choice of Law
     1. First Restatement
        1. Pros
           1. Clear
           2. Don’t have to do many choice of law analyses because you apply it to all issues.
        2. Cons
           1. Circular – you can’t figure out where last event occurred for tort to happen without deciding which state law to use in determining what “last event” means.
           2. Does not take into account location where tort occurred to cause the injury.
           3. Allows unjust/bad laws to be used from other states.
     2. Second Restatement
        1. Pros
        2. Cons
           1. Opaque
           2. Won’t use a whole system of laws 🡪 incoherent system 🡪 unjust overall regime

E.g. ***Babcock*** – NY law to decide who can recover (NY has interest in protecting NY insurance company from fraud) and Ontario law to decide whether negligent (Ontario wants to people to be safe on the roads). But doesn’t liability influence conduct?

# PLEADING

## General

* 1. Two approaches
     1. Code Pleading – purpose is to (1) state the facts underlying the case; (2) formulating the issues for trial; (3) weeding out sham claims; and (4) notifying the parties so that they could prepare for trial. (Use FRCP 12(b)(d) motion to dismiss to screen after complaint.)
        1. ***Gillispie v. Goodyear Service Stores* (NC 1963)** Tool: Pleading requires specific facts, not just mere legal conclusions. Need enough facts to determine if D would be liable assuming facts true. Synopsis: P alleged D took her by force from her own yard. (Turns out they were cops.)
     2. Notice Pleading – Only the fourth function is performed primarily by the pleadings under the Federal Rules. Give notice to all parties of the nature of the lawsuit sufficient to allow the other parties to make pre-trial and trial preparation. (Use FRCP 56 motion for summary judgment to screen after discovery.)
        1. ***Dioguardi v. Durning* (US Circuit Court of Appeals, Second Circuit 1944)** Tool: Simplified notice pleading – does not require facts sufficient to establish cause of action, just “a short and plain statement of the claim showing that the pleader is entitled to relief” and to put D on notice. Synopsis: P sued D on vague allegations that D stole sold P’s tonics seized at border but not to the highest bidder.
        2. ***Swierkiewicz v. Sorema* (SCOTUS 2002)** Tool: Prima facie standard is too high. Conflicts with Rule 8(a)(2) which only requires a short and plain statement of the claim showing that Petitioner is entitled to relief – notice pleading system. Synopsis: Employment discrimination Prima Facie Case: (1) P member of protected class; (2) P was minimally qualified for position; (3) P suffered adverse employment action; and (4) P replaced by someone outside protected class; and maybe something else. If P proves prima facie case, burden shifts to D proving non-discriminatory reason for adverse action. Burden shifts back to P to show that pretext for adverse action was really discrimination. P’s claim of employment discrimination for nationality and age was dismissed because it did not establish #3. How do you show that without discovery? SCOTUS reversed.
        3. Current rule but legal fiction with ***Twombly*** and ***Iqbal***.
  2. General Principles
     1. No “theory of pleadings” – Federal Rules do not require, as many Codes do, that the P confine himself to one particular “theory of pleadings.” If P is entitled to relief, he is not to be thrown out of court because his lawyers chose an incorrect legal theory when drafting the pleadings. The ease with which pleadings may be amended, even during trial, is one indication of the abandonment of the “theory of pleadings” requirement.
     2. Substantial justice – the pleadings are to be “construed so as to do justice.” FRCP 8(e). This replaces the common law principle that the pleadings are to be construed “most strongly against the pleader.”
     3. Dismissal – The complaint can be dismissed for “failure to state a claim on which relief may be granted.” FRCP 12(b)(6). But it’s relatively difficult for D to satisfy this standard (though not as hard as it was before ***Twombly*** and ***Iqbal***). If the court, after assuming that all factual allegations in the complaint are true, cannot “plausibly infer” that D is liable, the court will dismiss the complaint for failure to state a claim.
  3. Mechanics
     1. Kind of Pleadings – complaint, answer, reply
     2. Rule 65(b), permitting temporary restraining orders on a verified complaint showing that the petitioner will suffer “immediate and irreparable injury, loss, or damage” if the restraining order is not granted.
  4. Relief Pending Litigation
     1. Preliminary injunction
        1. Four things to consider
           1. Likelihood of success on the merits
           2. Irreparable Harm (money not sufficient)
           3. Balance of Equities (harm to both sides balanced)
           4. Public Interest
        2. ***ALK Corp. v. Columbia Pictures* (3d Cir. 1971)** Tool: Preliminary injunction test – For an injunction, the moving party must show (1) a reasonable probability of eventual success in the litigation and (2) that it will be irreparably injured pending the litigation if relief is not granted to prevent a change in the status quo. (2) requires that (a) subject matter is special in nature or peculiar in value and (b) damages cannot be calculated. Synopsis: Columbia and theater had license agreement for theater to be able to show movie early. Columbia backed out of agreement and wanted to rebid early showing.
        3. ***Abney v. Amgen* (6th Cir. 2006)** Tool: Preliminary injunction test (adds factors): (3) Will substantial harm to other occur if injunction is granted? And (4) Will public interest be served in granting motion for a preliminary injunction? Synopsis: Drug trial patients seek to enjoin trial sponsor to keep administering drugs to them.
        4. ***Thane Coat***
     2. Pleading in the alternative – the pleader, whether he is a P or D, may plead “in the alternative” by FRCP 8(d) – “A party may set out 2 or more statements of a claim or defense alternately or hypothetically.” This rule also provides that “a party may state as many separate claims or defenses as it has, regardless of consistency.”

## The Complaint

* 1. Definition of complaint – the complaint is the initial pleading in a lawsuit, and is filed by the plaintiff.
     1. Commencement of action – the action is deemed to have been “commenced” by the filing of the complaint with the court. FRCP 3.
        1. Effect of statute of limitations – In diversity cases, this filing, although “commencing” the action, does not satisfy or toll a state statute of limitations requiring actual service of process. Federal courts in diversity cases are required to follow the statute of limitations in the state where they sit. See ***Guaranty Trust v. York*** and ***Ragan v. Merchants Transfer***.
  2. Elements of complaint: FRCP 8(a) sets out three essential elements which a complaint (and D’s counterclaim, any party’s third-party claim, and any party’s cross-claim) must contain:
     1. Jurisdiction – “a short and plain statement of the grounds for the court’s jurisdiction”;
     2. Statement of a claim – “a short and plain statement of the claim showing that the pleader is entitled to relief”;
     3. Relief – “a demand for the relief sought”
  3. Degree of specificity requires: FRCP 8(a)’s requirement of a “short and plain statement of the claim showing that the pleader is entitled to relief” has generally been construed so as to place relatively few technical requirements on the pleader. The level of factual detail required has not been high; gaps in facts are usually remedied through discovery or other pre-trial procedures.
     1. Rationale – One of the reasons for not insisting on extreme specificity in pleadings is that when a complaint is dismissed for failure to plead a valid cause of action, P normally has the right to amend the pleading. Therefore, the dismissal plus repleading often will not eliminate any lawsuits.
     2. Complaint must support a “plausible” inference of liability – But as the result of ***Bell Atlantic v. Twombly* (SCOTUS 2007)** and ***Ashcroft v. Iqbal* (SCOTUS 2009)**, the federal district courts do have the right to dismiss a claim for failing to satisfy FRCP 8(a) if, taking all the complaint’s factual allegations as true, the court cannot “plausibly” infer that D is liable.
     3. Conclusory statement not enough – the pleader must state at least the basic facts of his claim, and may not simply recite his legal conclusion that he is entitled to relief.
        1. E.g. employment discrimination
  4. Demand for judgment – Under FRCP 8(a), each complaint (as well as each counterclaim and cross-claim) must contain “a demand for the relief sought.”
     1. Contents – generally, this demand for relief (a “prayer”) will be for one or more of the following:
        1. Money damages
        2. Injunctive or other equitable relief
        3. Declaratory judgments as to the parties’ rights and liabilities

## Motions Against the Complaint

* 1. General
     1. Defenses which may be raised in motion – certain defenses may be raised either in the answer or by motion. D can move to dismiss complaint on various grounds listed in FRCP 12(b):
        1. Lack of jurisdiction over the subject matter
        2. Lack of jurisdiction over the person
        3. Improper venue
        4. Insufficiency of process (actual document)
        5. Insufficiency of service of process
        6. Failure to state a claim upon which relief may be granted, See *infra* 12(b)(6) motion
        7. Failure to join a necessary party under Rule 12(h)(1)
     2. Based solely on pleadings – Motions referred to in FRCP 12(b) are directed solely at the pleadings, and must be decided solely by reference to them. If either party raises contentions or introduces evidence not contained in the pleadings, the motion is treated as a motion for summary judgment under FRCP 56 and not as FRCP 12 motion.
  2. 12(b)(6) motion to dismiss for failure to state claim – if D believes that P’s complaint does not state a legally sufficient claim, he can make a FRCP 12(b)(6) motion to dismiss for “failure to state a claim upon which relief can be granted.” Under recent SCOTUS decisions, the motion can succeed by demonstrating that even if every fact asserted in the complaint is taken as true, no recovery is “plausible” under any legal theory.
     1. Standard for granting – “Plausibility” standard
        1. ***Bell Atlantic v. Twombly* (SCOTUS 2007)**
           1. Tool:

To survive FRCP 12(b)(6) motion, complaint must have “more than labels and conclusions” and “a formulaic recitation of the elements of a cause of action will not do.”

Facts must nudge complaint across line from possibility to plausibility.

Majority says does not impose a probability requirement at the pleading stage but calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreements. Trial judges cannot limit discovery.

Mere allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Conscious parallelism does not conclusively prove an illegal agreement because the conduct could be explained by the fact that it is in Ds own economic interest.

Seems to go against notice pleading but maybe only applies when cost of discovery is great (this would be consistent with ***Iqbal***).

* + - * 1. Synopsis: Subscribers sue Bell Atlantic and local telephone companies alleging violations of anti-trust laws by (1) inhibiting the growth of local phone companies and (2) have each local phone company refrain from entering another company’s market. P had no direct evidence that Ds had made any forbidden agreement to restrain trade. P relief on indirect evidence alleging that Ds had engaged in particular instances of parallel business behavior that suggest an agreement.
      1. ***Ashcroft v. Iqbal* (SCOTUS 2009)**.
         1. Tool:

Made clear that requirement of “plausible” inference of liability now applies to motions to dismiss in all federal-court civil suits, not just antitrust matters. (Cost of discovery great.)

In deciding on a FRCP 12(b)(6) motion, court must accept as true all the allegations contained in the complaint with two limitations: (1) Any pure legal conclusion not supported by factual allegations could be ignored and (2) complaint must state a “plausible claim” for relief. Making this determination is “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”

Given “more likely” explanations (aka national security), allegations did not plausibly establish purpose (seems to introduce probability component).

Rejected argument that pleadings should be less strictly scrutinized where the trial court is willing to restrict discovery.

Dissent – Souter wrote dissent (he had written majority opinion in Twombly). Souter agreed with “plausible” standard but argued that Twombly does not require the factual allegations to be “probably true.” Court must accept the factual allegations “no matter how skeptical the court may be” with the exception of allegations that are “sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.” Souter also disagreed that allegations in the complaint were legal conclusions.

* + - * 1. Synopsis: Iqbal was Pakistani Muslim arrested and detained by federal officials following the terrorist attack on 9/11. He sued US Attorney General and Director of the FBI for violating his constitutional rights for their policy of singling out Muslim men for extra-harsh conditions of imprisonment, including physical mistreating, based solely on their race and religion and that D’s knew and approved of this impermissible purpose. Ds conceded that anyone who treated P worse on account of his race, religion or national origin would be civilly liable for violating P’s constitutional rights. The issue was whether the complaint made allegations about Ds own behavior and motive that were sufficient to tie them to the claimed unconstitutional conduct. Majority granted D’s motion to dismiss because allegations against Ds did not tie them to the claimed unconstitutional behavior with enough specificity to show that Ds themselves had an intent to discriminate to satisfy “plausibility” test.
        2. Criticism

In cases where D has access to critical information, P in a Catch-22, being required to plead detailed factual information without discovery to find that information.

Telling federal judges to evaluate complaint’s plausibility by drawing on their “judicial experience and common sense” gives judges unbridled discretion.

Confusing and hard to apply. By requiring P to show that liability is plausible, the case has imposed a probability standard. This use of probabilities for deciding FRCP 12(b)(6) motions is essentially the same standard as that for deciding motions of summary judgment under FRCP 56. This standard is unwise at the complaint stage because judge is weighing likelihood without any evidential basis and with scant procedural protections.

* + - 1. FRCP 12(b)(6) motions after ***Twombly*** and ***Iqbal***:
         1. Two Step Analysis for making determination on FRCP 12(6)(b) under “plausibility” standard:

**Strike out conclusory statements and ultimate** **facts** – Court must assume that factual allegations are true, but only if they have some degree of detail and not those that court finds to be “legal conclusions” or “formulaic recitation” of the elements of the claim.

**Are there sufficient facts left that nudge complaint across line from possibility to plausibility?** – FRCP 8(a) by requiring a “short and plain statement of the claim showing that the pleader is entitled to relief,” means that the complaint must contain factual allegations that lead to a “plausible” inference that D is liable to P. If D can show that there is no plausible inference of liability to be drawn from the facts alleged in the complaint, D is entitled to FRCP 12(b)(6) dismissal at beginning of case.

Draw on judicial experience and common sense. (***Iqbal***)

Are there more likely explanations that make allegations improbable? (***Iqbal***)

* + - * 1. Where P lacks personal knowledge – “Plausibility” standard will make the most difference where P alleges facts as to which he doesn’t have personal knowledge and as to which D is in sole control of the relevant records or testimony. E.g. violations of civil rights laws or employment discrimination laws.

***Branham v. Dolgencorp Memo Opinion*** Tool: Have to allege sufficient facts to state claim for relief. Need to show that employees saw spill and took no action or didn’t regularly inspect floor. How do you prove these things without discovery? Synopsis: Slip and fall at dollar store. P did not include how accident happened, how liquid got on the floor, or if D should have known.

* + - * 1. D relieved from discovery – Pre-***Iqbal***, Ds faced by factually weak but logically coherent complaints generally had to undergo discovery and then make a motion for summary judgment. This reduces pressure to settle.
        2. “Smoking gun” never uncovered – in cases where there exist documents or witnesses under D’s control that would show liability but P can’t learn of or get access to them without discovery, ***Iqbal*** may be very outcome determinative.
        3. FRCP 84 Form 11 – not sufficient ***Twombly*** and ***Iqbal***. Movement to get rid of forms because lawyers don’t use them.
        4. What if state court does not follow ***Twombly*** and ***Iqbal***? If diversity, Erie analysis.
  1. Motion for judgment on the pleadings – FRCP 12(b)(6) motion to dismiss is generally made before D files his answer. After D files his answer and the pleadings are complete, D can challenge the sufficiency of the complaint by FRCP 12(c) motion for judgment on the pleadings.

## The Answer

* 1. General – D’s response to P’s complaint.
     1. D must “state in short and plaint terms [his] defenses to each claim asserted against [him] and admit or deny the allegations asserted against [him].” FRCP 8(b)
        1. Applies to answer counterclaim, answer of a third party defendant to a third-party claim and other such pleadings.
        2. Must be “so construed as to do substantial justice.”
     2. Alternative pleading – Defenses, like claims, may be pleaded in the alternative. D may even make defenses which are contradictory.
  2. Denials – D permitted to make various kinds of denials.
  3. Answer must be signed by defendant’s attorney.
  4. Affirmative defenses – FRCP 8(c) lists 18 specific defenses which must be explicitly pleaded in the answer if D is to raise them at trial. Among the more important of these affirmative defenses are contributory negligence, fraud, res judicata, statute of limitations and illegality.
     1. Rationale – Notice-giving function of pleadings in federal practice.

## Time for Various Pleadings

* 1. Timetable for various pleadings steps is given by FRCP 12(a).
  2. Complaint – filing of a complaint will normally occur before it is served. Service must then normally occur within 120 days. FRCP 4(m).
     1. Different state rule – If P has served D out of state, by using the long arm statute of the state where the district court sits (as allowed by FRCP 4(k)(1)(A)), the time to answer allowed under that state rule governs (typically a longer period).
     2. FRCP 12 motion – If D makes a FRCP 12 motion against the complaint and loses, he has 14 days after the court denies the motion to answer. (If he wins, P usually repleads.)

# TRIAL PROCEDURE

## Burden of Proof

* 1. Two meanings
     1. Burden of Production – Unless party produces some evidence that A exists, the judge must direct the jury to find that A does not exist. Burden of production is met if party gives enough evidence to send issue to jury.
     2. Burden of Persuasion – Unless party persuades jury that A exists, jury must find that A does not exist (risk of non-persuasion). Burden of persuasion is met if he has produced enough evidence to lead the jury to believe that the existence of A is more likely that not (preponderance of evidence).

## Adjudication without Trial

* 1. See *supra* FRCP 12(b)(6) motion to dismiss complaint
  2. Voluntary dismissal by P – P in federal court may voluntarily dismiss his complaint without prejudice any time before D serves an answer or moves for summary judgment.
     1. ***McCants v. Ford Motor Co.* (11 Cir. 1986)** Tool: Voluntary dismissal should be granted unless D will suffer clear legal prejudice, other than the mere prospect of a subsequent lawsuit. When D has considerable expenses, then dismissal is not warranted unless P reimburses D for a portion of expenses, including attorney’s fees. Synopsis: P moved for dismissal after one year to commence suit in another state where controlling statute of limitations had not expired.
     2. ***Wojtas v. Capital Guardian Trust Co.* (7th Cir. 2007)** Tool: Voluntary dismissal should not be granted to P allowing P to commence suit in another state because D would suffer plain and legal prejudice as a result. Synopsis: P moved for dismissal to commence suit in another state where controlling statute of limitations had not expired.
  3. Involuntary dismissal
  4. Summary Judgment – Granted after sufficient amount of discovery if one party can show that there is no “genuine dispute as to any material fact” in the lawsuit, and that he is “entitled to judgment as a matter of law.”
     1. Burden of Production under FRCP 56(c) – ***Celotex Corp. v. Catrett* (SCOTUS 1986)** Synopsis: P sued D claiming death of husband due to his exposure to D’s products containing asbestos. D moved for summary judgment claiming that P produced no evidence. Note: Moving party always has burden of production. SCOTUS held that summary judgment could properly be granted for D.
        1. If the moving party will bear the burden of persuasion at trial that party must support its motion with credible evidence that if unrebutted, would demonstrate that there is no genuine issue of material fact, which would entitle it to a summary judgment.
           1. Such an affirmative showing would shift burden of production to the non-moving party. Non-moving party must show that there is genuine issue of material fact.
           2. If non-moving party succeeds, it probably goes to trial.
        2. If the moving party does not bear the burden of persuasion at trial, that party may satisfy its burden of production in two ways:
           1. Moving party may submit affirmative evidence that negates an essential element of the nonmoving party’s claim.

If successful, burden of production shifts to non-moving party.

* + - * 1. Moving party may demonstrate to the Court that nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. Conclusory assertion is not sufficient. Need affirmative evidence.

If successful, burden of production shifts to non-moving party.

* + - 1. Judge must construe facts in light most favorable to non-moving party. No credibility determinations.
         1. Exception - ***Scott v. Harris* (SCOTUS 1769)** Tool: When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. Synopsis: Officer Scott bumped Harris off the road during chase. Harris gave testimony in direct conflict with video.
    1. Burden of Production for Discrimination Cases – different procedure because very factual
       1. Burden Shifting
          1. P establishes Prima Facie case: (1) applied; (2) minimally qualified; (3) denied position; (4) member of protective class; (5) someone outside protected class promoted or position was not filled; and (6) plus factor?
          2. If P makes prima facie case, burden shifts to D to offer non-discriminatory explanation (does not need to persuade)
          3. If D meets burden, shift to P to show that non-discriminatory reason is pre-text for discrimination.
       2. ***Texas Department of Community Affairs v. Burdine* (SCOTUS 1981)** Tool: P has the burden of establishing a prima facie case of discrimination, and if D can articulate a legitimate nondiscriminatory reason for the conduct (does not need to persuade court just raise genuine issue of fact) then the burden falls back to P to prove by a preponderance of the evidence that the reasons put forth by D were just a pretext for discrimination. Synopsis: D challenged the evidentiary burden ordered by the court that D must prove by the preponderance of the evidence that there was a nondiscriminatory reason for the firing of P.
       3. ***Roger Reeves v. Sanderson Plumbing Products, Inc.* (SCOTUS 2000)** Tool: Employment discrimination P may survive summary judgment by establishing a "prima facie case," and evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. Synopsis: P sued D alleging that he had been fired because of his age. P established prima facie case. D gave other explanation. P gave evidence that D’s explanation not true.
    2. If Summary judgment motion denied, go to trial.

## Judge and Jury

* 1. Seventh Amendment Right to a Jury Trial (doesn’t apply to states)
  2. When tried in court – a case will be tried without a jury if one of the two following conditions exist:
     1. No right to a jury trial exists or
     2. All parties have waived their right to jury trial.
  3. Jury Trial demand – either party needs to demand jury trial in complaint.
  4. Law and Equity
     1. History
        1. Court of Chancery – no jury
        2. King’s Bench – jury, rich people’s court, rigid rules
     2. 7th Amendment preserves right to jury trial – “sword in the bed that prevents union of law and equity
     3. Some states still have separate courts for law and equity. E.g. Delaware
     4. Remedies
        1. Law
           1. Compensatory damages
           2. Punitive damages
           3. Ejectment – get off property
           4. Mandamus – order to government official or lower court judge to do something
        2. Equity
           1. Injunction/Specific Performance
           2. Contract Decision (requesting specific performance)
           3. Contract Reformation
           4. Restitution – money changing hands
           5. Disgorgement (of ill gotten gains)
     5. Cases with both law and equity causes of action
        1. Clean Up Rule – when a legal set of issues is embedded in equity case, you don’t have to split case. You try everything on the equity side.
           1. ***Beacon Theatres, Inc. v. Westover* (SCOTUS 1959)** Tool: If you can try issues in a particular order, and on order allows you right to jury trial (law) and the other kills right to jury trial (equity), use order that allows you right to jury trial. Otherwise, issue preclusion will not allow you to re-litigate with jury. Synopsis: Fox West Coast Theatres had a contract with movie distributors, which granted it the exclusive right to show first-run movies. Beacon Theaters, a nearby theatre, threatened to bring an antitrust lawsuit against Fox. Fox then brought a claim for declaratory relief against Beacon, which in turn, counterclaimed for treble damages and demanded a jury trial.
           2. Compare ***Parklane*** - it is not deprivation of right to jury trial to issue preclude in case with right to jury trial when previous trial did not have jury.
        2. When we merged law and equity, appellate judges started thinking we could try mixed cases with juries (trial judges hate juries but appellate judges love juries)
     6. Newly created causes of action (after 7th Amendment)
        1. Two Part Test – ***Chauffers, Teamsters and Helpers Local 391 v. Terry* (SCOTUS 1990)** Tool: Two Part Test (Tull) – To determine whether a statutory action will go before a jury: (1) look for analogous action that existed in the 18th in the courts of England prior to the merger of the courts of law and equity to determine whether it is legal or equitable. (2) Examine the type of remedy sought to determine whether it would be categorized as an action at law or in equity. The second step is more important. Synopsis: Union members sued union (unions didn’t exist before 7th amendment because they were illegal) requesting jury trial for breach of duty of fair representation claim. Union sought compensatory damages. Ct. held cause of action is like trust action which goes back to courts of equity while remedy is legal remedy (not equity because workers want backpay, not suing company for money they should have received). Ct. held P had right to jury because second step more important.
        2. Why is Clean Up Rule not used here? Appellate judges love juries (trial courts don’t because they don’t have to deal with them).
        3. Cause of action based on federal statute does not necessary get jury because many statutes didn’t exist at time of 7th Amendment.
        4. Two Part Test Exception – Administrative hearings
           1. ***Atlas Roofing Co. v. Occupations Safety & Health Review Commission* (SCOTUS 1977)** Tool: In public rights cases, 7th Amendment does not prohibit Congress from assigning initial adjudication and fact finding to administrative forum without jury. Synopsis: P issued stop work order (injunction – equity) and fined (remedy – legal) for violations after hearings before administrative law judge. P argues enforcement scheme violates 7th amendment.
           2. Requiring jury would bring down entire administrative state.
           3. Administrative law judges are not Article III judges.
           4. When does exception apply?

Government involved (as a party)

Government has to be acting as regulator (sovereign) and not as economic actor

* + - 1. ***Granfinanciera, SA v. Nordberg* (SCOTUS 1989)** Tool: Congress lacks power to deprive parties of a trial by jury in private matters. Synopsis: Bankruptcy trustee (P) sues D to recover a fraudulent conveyance in bankruptcy court. D’s request for jury trial was denied. SCOTUS reversed.
  1. Fact v. Law
     1. Divide
        1. Judge – Law
           1. Analyze written documents

***Markman v. Westview Instruments, Inc*. (SCOTUS 1996)** Tool: While the 7th Amendment guarantees the right to a jury’s resolution of the ultimate dispute, analysis of construction of scope of patent is a matter of law and therefore reserved for the courts. Synopsis: P brought patent infringement suit against D. Jury interpreted expert witness testimony about term and held for P. Judge directed verdict for D stating that the jury interpreted term incorrectly.

No good historical analogue for patents.

Judges better at construing written instruments, which is matter of law.

Decision spawned “Markman” hearings in patent litigation where judge hears testimony to tell the judge what the patent means. Patent is so complex and so embedded in the industry that judge can’t understand the patent just from reading it. Aren’t there credibility determinations in this context? Don’t juries make credibility determinations?

If you are suing for damages in patent claims, you get jury. But when deciding what patent means, you hear testimony on it and there is still no right to jury trial. Isn’t testimony about facts? Just because there is testimony doesn’t ALWAYS mean the issue is factual.

“Pure” law – case law, statutes, administrative regulations

* + - 1. Jury – Facts
         1. Common perspective – what is objectively reasonable, expectations in terms of due care, issues that require community consensus
         2. Credibility determinations
  1. Jury Instructions – judge must instruct jury as to the law relevant to their finding of fact.
     1. Objections – in order to raise the inadequacy of the instructions on appeal, a party must make an objection to them before the jury retires.
     2. Harmless Error Review ***– Kennedy v. Southern California Edison Co. (*9th Cir. 2000)** Tool: Court has obligation to correct jury instructions, especially when new rule that has yet to be interpreted or applied in court. Appellate court performs harmless error review – an error by a judge that is not sufficient for it to reverse or modify the lower court’s judgment at trial. Synopsis: P’s wife and mother died from cancer allegedly caused by exposure to nuclear radiation from nuclear rods manufactured by D. Trial court did not give proper instructions to jury. Not harmless error so reversed and remanded.
  2. Findings of fact – In an action tried without a jury, FRCP 52 requires the trial court to state findings of fact (clear error) and findings of law (de novo) separately either in writing or orally.
     1. ***Roberts v. Ross* (3rd Cir. 1965)** Tool: Per FRCP 52(a), a judge should state and file the facts and legal conclusions that led to his decision. Synopsis: Trial judge concluded as matter of law for D without stating how he got to decision.
     2. Parties can submit findings of fact and law, but if judge just signs off on them, appellate court will not look kindly on this.
     3. Rationale
        1. Facilitates appellate review - Helps appellate court know what basic decision was.
        2. Defines issues for Preclusion – need to know what was decided and what basis of decision was when another suit is brought on related action
        3. Better quality decision if we require statement of reasons
     4. Why does this not apply to juries?
        1. Difficult to get 12 people to agree of findings of fact and conclusion of law. Happy when they can agree on verdict alone.
        2. Don’t think lay people would do credible job in doing this.
        3. Specific verdict forms do this to an extent

## Judgment as a Matter of Law

* 1. FRCP 50
  2. Directed Verdict (DV) (FRCP 50(a)) – takes case away from jury and determines the outcome as a matter of law.
     1. Granted when party has been fully heard on the issue and reasonable trier of fact could only decide in favor of moving party while taking evidence in light most favorable to non-moving party and making all credibility determinations in favor of non-moving party unless evidence is clear to the contrary. See ***Scott v. Harris***.
     2. Similar to summary judgment (FRCP 56) except summary judgment makes decision on discovery record and directed verdict makes decision on trial record.
     3. Most judges reserve decision on DV motion until after jury has reached a verdict (JNOV) because if appeals court finds that judge erred, a whole new trial will be necessary. But if he denies motion, he may be sending a case to the jury that should be decided as a matter of law, and he risks being overturned on appeal.
  3. Judgment Notwithstanding Verdict (JNOV) (FRCP 50(b) – entry of judgment for the party who lost the verdict; it is a finding that the verdict had no sufficient legal basis. If appellate court disagrees with JNOV, appellate court can just rule for other party and not to have whole new trial.
     1. Granted when reasonable trier of fact could only decide in favor of moving party while taking evidence in light most favorable to non-moving party and making all credibility determinations in favor of non-moving party unless evidence is clear to the contrary. See ***Scott v. Harris***.
     2. Party must have made directed verdict motion or JNOV motion will be denied or will only get plain error review.
        1. Rationale
           1. Functional – Puts everyone on notice and gives trial judge discretion to reopen evidence and have another trial day.
           2. Metaphysical– when you are granting matter post judgment, you are basically saying that jury should have never had decision in the first place so you should have granted pre-verdict (this is how you get around 7th amendment).
        2. What if party made pre-verdict motion and denied, then made motion for JNOV and denied, then party appealed, it is reviewed de novo because deciding on whether rationale jury could have found as such).
     3. JNOV/JML may be combined with new trial motion.
     4. ***Unitherm Food Systems, Inc. v. Swift-Eckrich. Inc.* (SCOTUS 2006)** Tool: Party must renew FRCP 50(a) DV under FRCP 50(b) JML/JNOV to form basis of appeal on FRCP 50. Synopsis: P sued D alleging that D attempted to enforce a patent obtained by fraud. D moved for FRCP 50(a) DV based on insufficiency of evidence and did not renew motion as FRCP 50(b) JML/JNOV or move for a new trial (FRCP 59).

## New Trial

* 1. FRCP 59
  2. Judge’s discretion – court has wide discretion to grant a motion for a new trial, since such a motion runs less of a risk of abridging the 7th Amendment than DV or JNOV.
  3. Grounds for new trial
     1. No harmless error – new trial may not be granted for harmless error, that is, an error that does not affect the substantial rights of the party seeking the new trial AKA doesn’t affect the outcome of the case.
     2. Objection required – Party injured by error must make a timely objection, in order to preserve the right to cite that error on appeal as a ground for a new trial.
     3. Judicial error
     4. Prejudicial conduct by party, witness or counsel
     5. Jury misconduct
     6. Verdict against the weight of the evidence
        1. ***Aetna Casualty & Surety Co. v. Yeats* (4th Cir. 1941)** Tool: The granting or refusing of a new trial is a matter within the discretion of the trial judge and his decision is not reviewable on appeal except for the most exceptional circumstances. Judge must on motion order a new trial “if he is of the opinion that the verdict is against the clear weight of the evidence or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.” Synopsis: Pre Roe v. Wade. Doctor sued for malpractice. Insurance company has sued for declaratory judgment that it doesn’t have to pay because doctor performing criminal activity (abortion). Doctor testified and said he didn’t do abortion (no Scott v. Harris evidence here). Jury found for doctor. Insurance company appealed stating that the trial judge abused his discretion by not granting a judgment notwithstanding the verdict and motion for a new trial.
        2. New trial motion can be granted even if there is substantial evidence to support the verdict, which is not allowed for DV or JNOV.
     7. Verdict is excessive or inadequate
        1. Additur/Remittitur – judge may find jury’s verdict excessive or inadequate but wish to avoid ordering a new trial because he agrees with jury’s decision on liability.
           1. Remittitur – Judge conditionally orders a new trial at request of D to occur unless P agrees to a reduction of the damages to a specified amount describes an order denying the defendant’s application for new trial on condition that plaintiff consent to a specified reduction in the jury’s award.

Constitutional because if jury awarded $50K then it awarded $20K

Usual test for determining the amount is that it should reduce the verdict only to the highest amount that the jury could properly have awarded.

***Powers v. Allstate Insurance Co.* (Wis. 1960)** Tool: In determining how much to decrease damages in case of remittitur, judge should determine reasonable amount (standard rule). Synopsis: P received jury award that was thought to be excessive.

* + - * 1. Additur – Judge conditionally orders a new trial at request of P to occur unless D consents to a raising of the damages.

Unconstitutional under 7th amendment in federal scheme.

But 7th amendment does not apply to the states. Fisch allowed additur

***Fisch v. Manger* (Sup. Ct. NJ 1957)** Tool: Trial judges may grant additurs and remittiturs when substantial justice in the original trial may be achieved instead of having to grant a new trial. However, these decisions can be appealed if proposed change in damages is inadequate. Synopsis: The trial judge submitted that unless D agreed to an increase in damages, he would grant a new trial on the damages question alone. D agreed, but P appealed arguing the amount was too small.

* + - 1. Partial new trial on damages – instead of using remittitur/additur, may grant new trial on the issue of damages only.
    1. Newly discovered evidence – 4 criteria must generally be met before judge will grant motion for a new trial because of newly discovered evidence:
       1. New discovery since the end of trial
       2. Movant must demonstrate he was reasonably diligent in his search for evidence prior to and during trial and that he could not reasonably have found the evidence in question before the trial’s end.
       3. Evidence must be material in that on a new trial it may produce a difference outcome
       4. It is clear that injustice has clearly resulted
  1. New trial motion usually not granted. Can be granted if party makes case that verdict will probably be reversed.
  2. Judge cannot continually grant new trial until he gets verdict he wants.
  3. Rationale – Judge can’t make credibility determinations in summary judgment, DV, or JNOV
  4. Appealability – not normally appealable because it is not final judgment.
  5. Timing
     1. ***Hulson v. Atchison, Topeka & Santa Fe Railway* (SCOTUS 1961)** Tool: Under FRCP 6(b), trial court may not extend the time for motion for new trial (50(b)); a motion to alter/amend judgment (59(e)); or motion for ground for relief from a final judgment, order or proceeding (60(b)). Synopsis: P moved to extend time in which to file motion for a new trial. Court granted 10-day extension. P filed motion within extension period. D moved to strike motion. Motion to strike was granted because time cannot be extended for filing motion for a new trial.

## Appeals

* 1. Standards of Review – under what posture will appellate court review issue you are trying to bring to ct.
     + 1. De Novo – look at it new. Use it on issues of law that trial court decided. No reason to give deference to trial court. E.g. summary judgment (no trial, just reading briefs)
       2. Clear Error/Abuse of Discretion
          1. Both involve fair amount of deference to trial court.
          2. Clear Error (Rule 52) When judge acts as fact-finder, you review for clear error (belief that being there and seeing witness counts for something/has some truth sense)
          3. Abuse of Discretion – when there is element of discretion that judge has. E.g. Discovery rulings, Motion for a new trial
       3. Plain error – enormous level of deference. This standard usually taken if party did not object to ruling, party didn’t give jury instructions, etc. because we want to penalize parties for not bringing all issues to trial court’s attention. Unlikely that appellate court will reverse.
  2. The Final Judgment Rule
     1. Issue – when a losing party will be permitted to file an appeal depends on (1) whether final judgment rule applies and (2) if the rule does apply, whether it has been satisfied.
     2. Final Judgment Rule in general – appeal is allowed only after all the issues involved in the suit have been finally determined by the trial court.
        1. Suit, not just issue must be finally determined – loser on one or more issues cannot take an appeal until the entire case has been finished at the trial court level and a judgment in the case has been entered.
     3. Interlocutory appeal – appeal that is taken when no final judgment has yet been entered.
        1. Rationale
           1. Cost benefit analysis of:

If we allow interlocutory appeals – unnecessary extra appeal if the trial judge turns out to have been correct and

If we don’t allow interlocutory appeals – unnecessarily long trial if the trial judge turns out to have been wrong.

* + - * 1. Underlying facts

Trial judges are reversed far less frequently than they are affirmed

Final judgments in many cases are not even appealed.

* + - * 1. Therefore, risks posed by unnecessary interlocutory appeals are probably greater than the risks presented by allowing trials to go forward that would have been properly eliminated by allowing such appeals.
    1. Federal Statute (28 U.S.C. §1291) – except in a few special situations covered by other statutory provisions, the U.S. Courts of Appeals shall only have jurisdiction over “final decisions of the district courts.” Congress drafted provision so that Courts of Appeals don’t have jurisdiction to hear an appeal in which no final judgment has been rendered, so they don’t generally have power to relax the rule.
       1. Appellate Jurisdiction – Appellate court is responsible for bringing up SMJ and Appellate Jurisdiction issues sua sponte. If no SMJ, dismiss. If no App. Jurisdiction, remand to trial court. If trial judge has more discretion (issue of law), less likely to have appellate jurisdiction.
       2. Partial summary judgment is not enough – partial summary judgment does not constitute final judgment and cannot yet be appealed.
          1. ***Liberty Mutual Insurance Co. v. Wetzel* (SCOTUS 1976)** Tool: Partial summary judgment on liability alone does not constitute a final judgment under 28 U.S.C. § 1291. Exceptions that did not apply: Multi-claims (FRCP 54(b)); collateral order doctrine; grant or denial of injunction by losing party (28 U.S.C. § 1292(a)); and request to certify a question for interlocutory appeal when the issue is very important (28 U.S.C. § 1292(b)). Synopsis: P sues D requesting injunction, damages and attorneys’ fees. District Court finds D liable, denies injunction and does not decide on other forms of relief. D appeals on liability issue (both parties wanted review). SCOTUS found no appellate jurisdiction because not final judgment.
    2. State court exceptions – states do not have to impose final judgment rule. E.g. NY allows a broad range of interlocutory appeals.
  1. Exceptions to Final Judgment Rule
     1. Multi-claim and multi-party federal litigations – FRCP 54(b) may allow for an appeal when there is a final judgment on one claim but other claims in the same suit remain.
        1. Requirements – 54(b) says that if the suit involves multiple claims or multiple parties, the trial court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court (1) expressly determines (written/oral on the record so that parties aware of timeline for appeal) that there is (2) no just reason for delay.” This allows an immediate appeal of the final judgment on just one claim.
        2. Basis for appeal under appeal under 54(b) – (1) court was wrong on law or facts that led it to judgment issued or (2) judge erroneously held that the claims as to which judge entered final judgment were sufficiently separable from the rest of the case.
        3. Rationale – efficiency in reviewing similar set of facts at once.
        4. Claim Definition
           1. (1) Single legal theory, (2) Single set of facts and (3) Married to single party. See ***Liberty Mutual***.
           2. Narrower interpretation than in Supplementary Jurisdiction.
           3. ***Sears, Roebuck & Co. v. Mackey* (SCOTUS 1956)** Tool: FRCP 54(b) allows for court to direct entry of final judgment as to fewer than all claims (or parties) if there is no reason for delay. Interrelationship of claims important – they should be separate in nature. Tool: P sued D on multiple claims. District court dismissed some claims. P appealed dismissal of these claims.
           4. ***Curtiss-Wright Corp.v. General Electric Co.* (SCOTUS 1980)** Tool: Mere presence of counterclaim does not prevent use of FRCP 54(b). In reviewing FRCP 54(b) cases, Court of Appeals should (1) evaluate interrelationship of claims (are they severable factually and legally?) to prevent piecemeal appeals in cases which should be reviewed as single unit and (2) if #1 is met so that claims are separate, district court should be given substantial deference. It is difficult to prescribe guidelines for determining when there is “no just reason for delay” but factors considered by district court in this scenario were good (P’s claim large and liquidated, hardship to P, pending claims would not be decided for a long time). Synopsis: P sues D. D counterclaimed. District Court granted summary judgment to P and directed entry of final judgment under Rule 54(b) after determining there was no just reason for delay. Third Circuit reversed because counterclaim existed.
     2. 28 U.S.C. § 1292(b)/Double Discretion – allows an interlocutory appeal of an other-wise unappealable district court order if the judge who rendered the order certifies that order for an immediate appeal. Both the trial court and the court of appeals must approve the interlocutory appeal. Trial judge has to (1) state in writing in his order (2) that the order involved a controlling question of law as to which there is (3) substantial ground for difference of opinion and that (4) an immediate appeal may materially advance the ultimate termination. (5) Must appeal within 10 days after the district court’s order is entered. (6) Court of appeals has discretion to permit the appeal.
        1. ***Atlantic City Electric Co. v. General Electric Co. (2d Cir. 1964)*** Tool: Pre-trial appeal leaves should only be granted when adverse final trial judgments would not be appealable. Synopsis: The Court certified pursuant to 28 U.S.C. § 1292(b) an order that sustained objections to the D’s interrogatories designed to discover whether damages were actually sustained by P, who may have shifted the damages to their customers of electricity.
     3. “Collateral Issue” Doctrine – judge made exception to the final judgment rule in federal litigation.
        1. ***Cohen v. Beneficial Industrial Loan Corp.* (SCOTUS 1949)** Synopsis: D made motion to require P to post bond for costs. District court denied motion. Court of Appeals reversed. SCOTUS affirmed reversal. Tool: Collateral order doctrine allows for an immediate appeal if the order satisfies three requirements:
           1. Conclusively determine the disputed question
           2. Important issue complete separate from the merits of the action.
           3. Effectively unreviewable on appeal from a final judgment – Judge based on entire category, not impact to specific litigant. Delaying review must imperil interest to a significant extent so that it justifies hampering the efficiency of judicial administration.

Categories that qualify

Orders denying or granting class action (FRCP 23(f)) (***Coopers & Lybrand v. Livesay*** – Factors for decision: (1) subject to revision in District Court; (2) Class determination generally involves considerations that are enmeshed in cause of actions; and (3) subject to effective review after final judgment at request of P or intervening class members). NOTE: only at discretion of the Court of Appeals. Not a right of the party who lost the certification decision.

Party refuses to obey court order, party held in criminal contempt, issue distinct from underlying case, and issue important. (***United State v. Nixon*** except Nixon not held in contempt because that would be “unseemly.”)

Categories that don’t qualify

Orders compelling disclosure of materials that one party claims are attorney-client privileged. (will be too many reviews and can make motion for new trial where evidence not tainted so reviewable)

Orders granting or denying a party’s attempt to have the other party’s lawyer disqualified on account of a conflict.

Argument that D is immune from civil process because extradited to U.S.

Orders denying a party’s attempt to have the case tried somewhere else on the basis of a forum-selection clause in a contract (separable from the merits and issue of law but it is reviewable)

Orders rejecting a party’s claim to immunity from suit under a private settlement agreement.

Order imposing sanctions for discovery violations on attorney who no longer represented client.

* + 1. Orders involving the grant or denial of an injunction – 28 U.S.C. § 1292(a)(1) allows for an immediate appeal of a federal district court order granting, denying or refusal to modify an injunction (not refusal to make decision on injunction). Appeal must be made by losing party in decision on injunction.
  1. Writ of mandamus (28 U.S.C. §1651) – New lawsuit filed in appellate court where you in essence sue the trial judge. Two Types:
     1. Standard Mandamus - Something bad is going to happen to me. I’m going to be harmed (sounds like irreparable harm in preliminary injunction) in some way that will be really hard for me to fix later (feels like collateral order in ***Cohen*** but does not have to be separate from merits of the action.).
     2. Supervisory Writ – Appellate Court worries about gross error by trial courts.
        1. ***La Buy v. Howes Leather Co.* (SCOTUS 1957)** Tool: Given “unusual and compelling circumstances,” the courts of appeal may properly use a writ of mandamus to oversee the proper administration of justice without committing error – the principal of finality was never intended to allow obvious commission of gross error to go unappealed until late in proceedings. Judge LaBuy arguing against issuing writ says this essentially abolishes final judgment rule. Synopsis: Judge gives antitrust case to Master but parties want judge to try it because very complicated and already explained it to him. Probably doesn’t fall under Collateral Order doctrine because not effectively unreviewable. No injunction. No class certification. No double discretion because trial judge would have to approve and this judge wouldn’t.
        2. ***Cheney v. United States District Court* (SCOTUS 2004)** Tool: Three part test for issuance of a writ of mandamus: (1) there must be no other adequate means to attain the relief sought; (2) the movant bears the burden of showing that the right to relief is clear and indisputable; and (3) the issuing court in its discretion must be satisfied that the writ is appropriate under the circumstances. Synopsis: VP sought writ of mandamus. Ct. of App. denied because it regarded possible assertion of executive privilege as available avenue of relief.

## Set Aside Judgment

* 1. Mistake and Excusable Neglect
     1. ***Briones v. Riviera Hotel & Casino* (9th Cir. 1997)** Tool: “Excusable neglect” under Rule 6(b) is flexible and for purposes of Rule 60(b), it can include failure to comply with a filing deadline attributable to negligence. Four factors to consider in deciding if neglect is excusable: (1) danger of prejudice to opposing party; (2) length of the delay and its potential impact on the judicial proceedings; (3) reason for the delay; (4) whether the moving party acted in good faith. Synopsis: D filed motion to dismiss. P failed to respond so motion granted. P, not proficient in English, moved for relief under FRCP 60(b)(1).
  2. Newly Discovered Evidence/Fraud
     1. ***Patrick v. Sedwick* (Alaska 1966)** Tool: Motion for new trial on the grounds of newly discovered evidence must meet the following requirements: (1) must be such as would probably change the result on a new trial; (2) must have been discovered since the trial; (3) must be of such a nature that it could not have been discovered before trial by due diligence; (4) must be material; (5) must not be merely cumulative or impeaching. Synopsis: Court found for P and awarded damages. D moved for new trial because a new treatment would ameliorate P’s injuries and thus reduce damages. Trial court denied motion. Appellate court affirmed.
     2. ***Title v. United States* (SCOTUS 1959)** Tool:Relief of Judgment underFRCP 60(b) is not for providing relief for error on the part of the court or to afford a substitute for appeal. A change in judicial view of applicable law after a final judgment is not sufficient basis for vacating such judgment. Synopsis: Title lost denaturalization proceeding in 9th Cir. Statute interpreted differently later in different circuit. SCOTUS denied motion under FRCP 60(b) because judgment was final.
     3. ***Hazel-Atlas Glass Co. v. Hartford-Empire Co.* (SCOTUS 1944)** Tool: Court has power and duty to vacate previous judgment when it was based on fraud. Synopsis: P brought action to set aside previous judgment because D perpetrated fraud to obtain patent.

# MULTI-PARTY AND MULTI-CLAIM LITIGATION

## Background

* 1. Common Law – At common law, the prevailing policy was to prohibit any sort of action other than one involving a single P and a single D. Also, a lawsuit was generally limited to a single legal theory or cause of action.
  2. Equity – The courts of equity, however, were willing to entertain more complex sorts of actions, since they used no juries and all their proceedings were in writing.
     1. Merger – the merger of law and equity resulted in the incorporation of multi-party, multi-claim suits into the unitary civil action.
  3. See Multi-Party Slides

## Counterclaims

* 1. General
     1. Common Law – at common law, there were two devices by which D could bring a claim against P.
        1. Recoupment – Had to be for same transaction and no affirmative recovery
        2. Set-Off – Could be for different transaction and no affirmative recovery
     2. Codes – Codes combine these remedies in the counterclaim. Counterclaim allowed to any claim out of the same transaction. There is the possibility of an affirmative recovery.
        1. Some states follow the code rule but most states follow the more liberal federal procedure.
  2. Federal Rules – FRCP 13 allows for both permissive and compulsory counterclaims.
     1. Permissive counterclaim – FRCP 13(b) allows assertion as a counterclaim at D’s discretion of “any claim that is not compulsory.” No claim is too far removed from the subject P’s claim to be allowed as a counterclaim.
        1. Needs to independently satisfy SMJ (includes independently meet AIC requiretment)
     2. Compulsory counterclaim – a claim is compulsory under FRCP 13(a) if it meets two requirements: (1) It arises out of a transaction or occurrence that is the subject matter of the opposing party’s claim and (2) It does not require adding another party over whom the court cannot acquire jurisdiction.
        1. Jurisdiction – probably won’t worry about it if it is not claim by P. Falls under Supplemental Jurisdiction (28 U.S.C. § 1367(a) – a district court may exercise supplemental jurisdiction whenever there exists a logical relationship between the counterclaim and the main claim. )
        2. Species of Claim Preclusion – the penalty for failing to state a compulsory counterclaim is loss of the claim in future litigation. If a compulsory counterclaim is not asserted, a later suit on that claim by the present D will be precluded by principle of *res judicata*, waiver or estoppel (disputed). (FRCP 13 is silent on this).
        3. Exception – Certain claims are not compulsory even though they are within the same transaction or occurrence as P’s claim:
           1. A claim which “was the subject of another pending action” at the time the present action was commences (FRCP 13(a)(2)(A)) and
           2. A claim in which the suit against D is in rem or quasi in rem (assuming that D is not making any other counterclaim in the action) (FRCP 13(a)(2)(B)).

Rationale – In rem and quasi in rem suits don’t subject D to personal liability. If compulsory, D has to choose between losing his claim forever through failure to assert it or make his claim and subject himself to unlimited personal liability.

* + - 1. Must be asserted in D’s pleading – If D’s counterclaim is compulsory, it must be brought in D’s pleading. FRCP 13(a). If action is dismissed before D must file answer, then no compulsory counterclaim ever comes to existence.
      2. Rationale – Judicial economy
  1. Transaction or occurrence – A counterclaim is compulsory under FRCP 13(a) if it arose out of the same transaction or occurrence as P’s claim. The courts have not agreed on the precise formula for determining what constitutes a transaction or occurrence.
     1. Logical relation – most accepted verbal formula is that a claim arises out of the same transaction or occurrence that is the subject matter of P’s claim if it is logically related. ***United States v. Heyward-Robinson Co.* (2nd Cir. 1970)** Tool: Counterclaims need only have similar circumstances to the subject matter of the litigation in order to be compulsory. There need not be identical facts but a logical relationship between the claims. Synopsis: P sued D for breach of a contract performed for the Navy. D counterclaimed against P for overpayments on both the Navy contract and a private contract. P filed a reply counterclaim on the private contract. Judgment was rendered against D on the reply counterclaim and D appealed arguing lack of SMJ. Court finds related transaction/occurrence (same kind of work, same time, same insurance policy, contracts themselves were intertwined (cross-termination provision in contract, and lump sum payments)). It makes sense to try cases together because same kind of evidence. Efficiency analysis. This is prior to 28 U.S.C. § 1367(a) so needed to do jurisdiction analysis but now don’t need to.
     2. Classic definition – It is the one circumstance without which neither party would have found it necessary to seek relief (but for cause). Essential facts should be shared but don’t need to be identical and counterclaim can embrace additional allegations. ***Moore v. New York Cotton Exchange* (SCOTUS 1926)**.
     3. Four tests courts use today:
        1. Are issues of fact and law largely the same?
        2. Would res judicata bar a subsequent suit on D’s claim absent the compulsory counterclaim rule?
        3. Will substantially the same evidence support or refute P’s claim as well as D’s counterclaim?
        4. Is there any logical relation between the claim and counterclaim such that separate trials would involve a substantial duplication of time and effort?
  2. Counterclaims by third parties – A counterclaim can be made by any party against any opposing party. FRCP 13(a), 13(b). Test for distinguishing compulsory and permissive counterclaims is the same.
     1. Third Party D May Counterclaim (See Third Party Practice)
     2. P may have counterclaim to counterclaim.
     3. New parties – new parties to a counterclaim can be brought into a suit, as long as the joinder test of either FRCP 19 or FRCP 20 is satisfied.
     4. Cross-claim – claim by a party against a co-party is not a counterclaim (see Cross Claims).

## Joinder of Claims

* 1. FRCP 18(a) provides that a party asserting a claim, counterclaim, cross-claim, or third party claim, may join, as independent or alternative claims, as many claims as it has against an opposing party.
  2. Never required – Joinder of claims is never required by FRCP 18(a) but is left up to the claimant. However rules of *res judicata*, particularly the rule against splitting a cause of action, will often induce the claimant to join claims.
  3. SMJ must still be independently satisfied
  4. Permissive joinder – common issue of law or fact not hard to find.

## Joinder of Parties

* 1. FRCP 19 (compulsory joinder) and 20 (permissive joinder) provide for the bringing in of multiple P’s or D’s in certain circumstances, in federal actions. Most states have similar joinder provisions.
  2. Both joinders apply to either multiple plaintiffs or multiple defendants.
  3. Permissive Joinder – FRCP 20 allows P in certain circumstances to join other P’s or make several parties co-D’s to his claim.
     1. Optional
     2. Requirements
        1. Single transaction or occurrence – claim for relief must arise from a single transaction, occurrence, or series of transactions or occurrences (consider underlying policy of FRCP 20 – are these claims we would want to litigate together for efficiency?)and
        2. Common questions – must be substantial
           1. P’s joining – there must be a question of law or fact common to all Ps which will arise in the action. FRCP 20(a)(1).
           2. D’s joining – there must be a question of law or fact common to all D’s which will arise in the action. FRCP 20(a)(2).
     3. Test – same transaction or occurrence test as for compulsory counterclaims. Broader than same T/O for preclusion purposes. (See 2011 final exam)
     4. Plaintiffs must be voluntary but not defendants
     5. Jurisdiction – must independently meet IPJ, SMJ and Venue requirements
  4. Compulsory Joinder – FRCP 19
     1. Jurisdiction – must independently meet IPJ, SMJ and Venue requirements

## Third Party Practice

* 1. Third Party Defendant – D alleging that a third person is liable to him for all or part of P’s claim against D may implead such a person as a third-party D. Generally falls under supplemental jurisdiction. Venue generally remains valid unless it would result in very great inconvenience to TPD in which court may refuse to allow the impleader at all.
  2. P against whom a counterclaim is filed, may implead a third person who is liable to him for the counterclaim under same rules applying to D (does NOT fall under supplemental jurisdiction – Remember ***Guaranty System***).
  3. Not governed by transaction or occurrence issue because usually involved insurance companies. See ***Guaranty Systems***.
     1. Permissive if shifts liability
     2. FRCP 14(a) – 14 day rule
     3. Counterclaim by Third Party against D is compulsory if same transaction or occurrence unless no IPJ (FRCP 14(a)(2)(B)).
  4. Claim by Third Party against P must be same transaction or occurrence but permissive. FRCP 14(a)(2)(D). P can counterclaim this (either permissive or compulsory if same T or O). Careful with SMJ.
  5. P may assert claim against TPD but needs to independently satisfy SMJ (Sec. 1367(b)).
  6. TPD may bring in another TPD who would be liable for all or party of any claim against it. FRCP 14(a)(5).

## Cross Claims

* 1. FRCP 13(g)
  2. Requirements
     1. Same transaction or occurrence
     2. Actual relief – cross claim must ask for actual relief
  3. Always permissive
  4. P cross claims – careful with SMJ § 1367(b)
  5. D cross claims under supplemental jurisdiction.

## Intervention

* 1. Generally – FRCP 24 allows certain persons who are not initially part of a lawsuit to enter the suit on their own initiative. Two forms of intervention
     1. Intervention as of right – no leave of court required. FRCP 24(a)
     2. Permissive intervention – left to court’s discretion whether to allow intervention. FRCP 24(b)
  2. Intervention as of right
     1. ***Smuck v. Hobson* (DC Cir. 1969)** Synopsis: In a class action lawsuit (school desegregation case), the Court found for P and issued a detailed order that restrained Board of Education from making certain educational policy decisions. The Board decided not to appeal. The superintendent, a Board member and parents of white school children moved to intervene in the case as of right under Rule 24(a). Tool:a stranger to an existing action has an automatic right of intervention under FRCP 24(a) if he meets all the following criteria:
        1. Interest in the subject matter – he must claim an interest relating to the property or transaction that is the subject of the action;
        2. Impaired interest – he must be so situated that disposing of the action may as a practical matter impair the movant’s ability to protect its interest (not concerned that non-party will be legally bound by judgment entered in absence because the principles of res adjudicate prevent this); and
        3. Inadequate representation – he must show that his interest is not adequately represented by existing parties.
           1. ***Natural Resources Defense Council v. New York State Department of Environmental Conservation* (2d Cir. 1987)** – a potential intervenor is not inadequately represented by a party because it has a different motive as long as the party has demonstrated sufficient motivation to litigate vigorously and to present all colorable contentions.
     2. United States has unconditional right to intervene in actions challenging the constitutionality of an act of Congress or seeking relief under Civil Rights Act.
     3. Requires independent ground for SMJ. Intervention does not fall within the court’s supplemental jurisdiction.
     4. Not compulsory
  3. Permissive Intervention

## Class Actions

* 1. General
     1. FRCP 23
     2. Federal – focus on federal class actions
  2. Certification Decisions
     1. Class established via court certification. Sometimes discovery required for judge to make decision.
     2. ***Wal-Mart*** essentially holds that there are two trial on the merits: (1) class certification motion and (2) if/when case goes to trial.
     3. Requirement of a Class (23(c)(1)(B)) – Court that orders certification must “define the class and the class claims, issues, or defenses.”
     4. 23(c)(1)(A),(C) – scope of class may change as discovery goes forward and court retains authority to amend the order before final judgment.
     5. Court may certify partial class action – it may consider on a class basis only a limited number of factual issues relevant to a larger cause of action.
  3. Four Prerequisites before there is a possibility of a class action (FRCP 23(a)):
     1. Numerosity – class must be so large that joinder of all the members is not feasible. No consensus has emerged with respect to how large the class must be.
        1. 20-40 range is usually grey area.
        2. Will ask for geography of P’s to see if it would be hard to get them all in one court room.
     2. Commonality – there must be “questions of law or fact common to the class.” Critical question is if whether “differences in the factual background of each claim will affect the outcome of the legal issue.”
        1. ***Wal-Mart Stores, Inc. v. Dukes* (SCOTUS 2011)** Tool: “Common contention” must be “capable of class-wide resolution.” Proving “commonality” requires examination on the merits of P’s claims. Must have common answers on top of common set of facts/questions. 23(b)(2) does not apply where money damages are the sole or primary relief sought. Injunctive or declaratory relief must be the chief goal of the suit. Synopsis: A small group of women who alleged discrimination on the basis of gender filed suit against Wal-Mart. The action was sought to be changed to a class action to represent female Wal-Mart employees nationwide (~1.5M)
           1. Prior to ***Wal-Mart***, courts tended to interpret “commonality” requirement broadly (like in joinders) and SCOTUS had stated it was not appropriate to conduct a hearing on the merits to determine whether class certification was warranted.
           2. Two views: (1) Harder for P because have to prove twice and (2) burdensome for D because has to reveal more information.
     3. Typical claims – The claims or defenses of the representatives must be “typical” of those of the class. Looks to whether each class member’s claim arises from the same course of events, and each class member makes similar arguments to provide D’s liability. Goal is to ensure that the named P’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Tends to bleed together with commonality and representative.
     4. Class Representative (Named Plaintiff) – The representatives must “fairly and adequately protect the interests of the class.” Class representative must be a member of the class.
        1. Representatives must not have a conflict of interest with the absent class members and they must furnish competent legal counsel.
        2. Rationale
           1. Due Process concern that a judgment ought not to bind parties who have not literally had their day in court unless as members of a defined group with similar claims and proper representation have had a figurative day in court.
           2. Not leave judgment vulnerable to collateral attack – individual can later argue that they are not bound by result because the adequacy requirement was not met.
        3. Example – See ***Anchem***.
  4. Three categories – Once the prerequisites are met, a class action will not be allowed unless the action fits into one of the following categories:
     1. Prejudice Class Actions (23(b)(1))
        1. Requirements – Individual actions by or against members of the class would create a risk of either (Greiner can’t distinguish between the two):
           1. Inconsistent decisions that would establish incompatible standards of conduct for the party opposing the class (23(b)(1)(A)) OR
           2. The impairment of the interests of members of the class who are not actually a party to the individual actions. (23(b)(1)(B))
        2. Opt-Out Options – Members of the class may NOT opt out
        3. Effect on Future Actions by Same P – Since members of the class may NOT opt out, all class members are necessarily bound by the disposition.
        4. Notice – not required
        5. Examples
           1. Voting rights – In a voting rights dispute involving a question of eligibility for registration, individual applicants may win and lose. The election board would then be in the position of not knowing whether to register all individuals similarly situated who have not brought suit. (23(b)(1)(A))
           2. Mass tort claims – If individual suits are brought, Ps with early suits may bankrupt D, leaving nothing for later P’s. (23(b)(1)(B))
     2. Injunctive and Declaratory Relief (23(b)(2))
        1. Requirement – The party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory judgment relief is appropriate respecting the class as a whole. Single injunction/declaratory judgment would provide relief to all class members. Secondary monetary damages cannot be individualized but must go to the class as a whole.
        2. Opt-Out Options – Members of the class may NOT opt out
        3. Effect on Future Actions by Same P – Since members of the class may NOT opt out, all class members are necessarily bound by the disposition.
        4. Notice – no notice requirement
        5. Examples
           1. Civil rights cases – where discrimination against the whole class is alleged, and an injunction prohibiting further discrimination is sought.

Commonality and typicality requirements – A proposed class action claiming that D employer has discriminated against employees, and seeking an injunction against continuation of such conduct, might always seem to satisfy the requirement that D have “acted…on grounds that apply generally to the class.” Yet there may not be sufficient issues of law or fact common to the members of the class, and the names P’s claim may not be sufficiently typical of those of the class. See ***Wal-Mart Stores, Inc. v. Dukes* (SCOTUS 2011)**.

* + - * 1. Not for money damages – 23(b)(2) generally does not apply where money damages are sought. Although trial court may construe ***Wal-Mart Stores, Inc. v. Dukes* (SCOTUS 2011)** so that it does when they are minor.
    1. Damage Class Actions (23(b)(3)) (most popular)
       1. Requirements
          1. Predominance – common questions of law or fact predominate over any questions affecting only individual members (after Wal-Mart, not clear what you have to show in predominance that adds to commonality. Dissent in Wal-Mart said that what court said about commonality should be in predominance. So we should not worry too much about predominance as long as you prove commonality) AND

See ***Anchem***.

* + - * 1. Superior method – The class action is superior to other available methods for fair and efficient adjudication of the controversy (consider that you will deprive class members of control).

On the merits examination may be warranted for “immature torts” that may have more success as individual adjudication. See ***Castano v. American Tobacco Co.*** (CB p. 768)

Factors to consider

Interest in individual control – the class members’ interests in individually controlling the prosecution or defense of separate actions

Existing litigation – the extent and nature of any litigation concerning the controversy already begun by or against class members.

Concentration in one forum – the desirability or undesirability of concentrating the litigation of the claims in the particular forum

Difficulties of management (IMPORTANT) – the likely difficulties in managing a class action

Size of class

Number of class members that want to intervene and participate in action

Practicability of providing mandatory notice

* + - 1. Opt-Out Options – Members have the right to opt out.
      2. Effect on Future Actions by Same P – Effects each class member unless the member opted out.
      3. Notice - mandatory
      4. Examples
         1. Mass tort claims – some courts allow under (b)(3) but courts tend to prefer (b)(1).
  1. Jurisdiction – only the representatives must satisfy the requirements of IPJ, SMJ, and Venue.
     1. IPJ
        1. 23(b)(1) and (2) –Individuals cannot opt out so judgment is binding on everyone. No notice requirement.
           1. Rationale – b1 and b2 are inherently cohesive. E.g. injunction is common remedy indivisible for entire class; discrimination, structural reform (Matthews v. Eldridge); bankruptcy rationale under b1B depends on no opt out option.
           2. Where a P does not have minimum contacts with the forum state and is not permitted to opt out, the absent member could plausibly argue that his due process rights have been infringed.
        2. 23(b)(3) – Individuals can opt out so they will not be bound by decision (can’t assert collateral estoppel). Notice is therefore mandatory.
           1. ***Phillips Petroleum Co. v. Shutts* (SCOTUS 1985)** Synopsis: P composed of class of all persons owning royalty interest in certain oil and gas leases being exploited by D. Claim was for interest alleged to be owed by D to P’s on account of late royalty payments. Small % of P and leases involved in KS where suit brought. D asserted that P’s who did not opt out but were absent and did not live in KS were not properly class members since they did not have minimum contacts with KS and thus could not be constitutionally bound by decision. SCOTUS found that minimum contacts not required and KS had appropriate safeguards – notice, and option to opt out. Those who did not get notice were excluded.

An absent P who does not “opt out” (in other words remains silent) will be bound by the decision, even if he lacked minimum contacts with the forum state (and thus could not have been bound had he been a defendant).

Rationale – Minimum contacts required for D as opposed to P in class actions there could be no monetary recovery against absent P nor is absent P required to do anything (Retain counsel and appear as D does). Further, opt-out procedure gives P ability to escape.

Safeguards that must be observed before absent members who remain silent can be deemed part of a class and thus bound – the forum state must provide minimal procedural due process protection, which consists of: (all of these are inherent in class action prerequisites and as part of 23(b)(3). NOTE: SCOTUS has not ruled on applicability to (b)(1) and (b)(2) which is important since directly conflicts with them); state law

Notice and opportunity to be heard

Opt-Out Provision (no opt-in requirement) – ***Shutts*** implies this applies to claims “wholly or predominately for monetary judgments.” (b)(1) is likely exception when bankruptcy problem. This has caused confusion about what to do for hybrid class action for both equitable and monetary relief. See ***Wal-Mart***.

Adequate representation

HCOL – KS law should not be applied because KS must have contacts or a significant aggregation of contacts that creates KS’s interest in the litigation so applying KS law would not be arbitrary or unfair. This prevents application of the law from violating the full faith and credit clause and the due process clause of the United States Constitution. Court is permitted to apply the law of various states and must exercise that authority when applying the law of the forum state would be arbitrary and unfair.

* + 1. SMJ
       1. Federal Question Cases – A class action based on a federal question does not raise SMJ jurisdiction issues.
       2. Diversity Cases
          1. Need anchoring claim – named person that meets complete diversity and amount in controversy.
          2. Diversity – In determining complete diversity, only the citizenship of the named P, not the citizenship of the unnamed class members, counts. As long as none of the named representatives is a citizen of the same state as any D, there is complete diversity. ***Sup. Ct. of Ben Hur***.
          3. Amount in controversy

At least one named member meets amount (has to be same person that is diverse) – if at least one named class member satisfies the jurisdictional amount, other class members can be part of the action even though their claim is for less than this amount due to supplemental jurisdiction (if one P has a valid diversity or federal question claim against D, other P’s with closely-related claims may be brought into the action even if they don’t separately satisfy SMJ requirements). “The jurisdictional requirements of section 1332” refer only to complete diversity, not the AIC ***Exxon Mobil Corp. v. Allapattah Services Inc.***

***Zahn*** said that each class member, including unnamed, had to meet amount in controversy. However, Sec. 1367 came about and ***Exxon*** interpreted it otherwise. Note – 1367 seems to be drafting error due to lack of congressional intent to overrule ***Zahn***.

Named members can’t aggregate

* 1. Settlements – any settlement of a class action must be approved by the court. FRCP 23(e). The purpose of the approval requirement is principally to ensure that the interests of the absent class members are adequately protected.
     1. Notice requirement –if a class has already been certified, notice in a reasonable manner of a proposed settlement must also be given to all class members who would be bound by the proposal.
     2. Fairness hearing – have to find that settlement was fair, adequate and reasonable
     3. Financial condition – some courts have held that the financial condition of D may be taken into account in determining whether the settlement is fair.
     4. Objectors – unnamed class members that object to settlement; if you object, can’t withdraw objection without court’s approval; will probably allow objectors discovery to determine how settlement reached.
     5. Settlement-only class actions – sometimes a class is certified for settlement purposes only. This is a way of giving the parties – especially D – a method of disposing of all claims on a particular subject, even claims that have not yet ripened, held by persons who may not yet even have been injured.
        1. Danger of collusion – Settlement-only class actions are controversial because they may be motivated by collusion between the lawyers for both parties, and because they may short-change the future P’s.
           1. ***Anchem Products, Inc. v. Windsor* (SCOTUS 1997)** Tool: For settlement class actions, court required to consider provisions of 23(a) and 23(b) but not 23(b)(3)(d) – consider management difficulties. Class certification struck down because: (1) no predominance of common questions over questions affecting only individual members (23(b)(3)). The fact that all class members were exposed to asbestos products supplied by D’s and that all P’s had interest in getting fair and prompt compensation is insufficient. There are many more issues peculiar to the several categories of class members and individuals within each category, such as the nature and extent of exposure, the type of symptoms of disease suffered, etc. (2) Rule 23(a)(4)’s requirement of adequate representation is not satisfied. The named parties who have already manifested medical problems are interested in generous immediate payments. Class members who were merely exposed are more interested in having an ample, inflation-protected fund for the future, when symptoms develop. This disparity between the P categories makes it unlikely that the named P’s could adequately represent the other class members. Synopsis: The District Court certified a class of those who were or might be affected by asbestos manufactured by Defendants. The certification was for settlement purposes only. Objectors to the settlement appealed, arguing that absent class members were not adequately notified of the settlement nor were their interests adequately represented.

# FORMER ADJUDICATION

## General

* 1. *Res Judicata* Doctrine – set of rules that prevent re-litigation of claims and issues arising out of the same incident and against the same party even if it is erroneous and subject to reversal.
     1. **Procedural Due Process – if you are a potential litigant and you have never been to court to be heard on a particular issue, you CANNOT be precluded. That is a violation of procedural due process.**
  2. Claim Preclusion
  3. Issue Preclusion (Collateral Estoppel)
  4. Full Faith and Credit
  5. Applicable only to new actions – don’t care about further proceedings, new trial or appeal.
  6. Rationale – fairness to the victor and judicial economy

## Claim Preclusion

* 1. Definition
     1. Merger – If P wins the first action, his claim is merged into his judgment. He cannot later sue the same D on the same cause of action.
     2. Bar – If P loses the first action, his claim is extinguished, and he is barred from suing again on that cause of action.
  2. Scope of Claim
     1. Definition – claim includes all rights of P to remedies against D with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
        1. Transaction
           1. Natural grouping/common nucleus of facts considering their relationship in time, space, origin, or motivation and whether together they form a convenient unit for trial purposes and whether their treatment as a unit conforms to the parties’ expectations or business under-standing or usage. R2d.
           2. Strike balance between interest of D and the courts in bringing litigation to a close and interest of P in the vindication of a just claim.
           3. Trial convenience – overlap in witnesses and proofs
     2. Complaint – P’s lawyers must include all matters in the complaint that might be considered part of the same claim against that D, or risk preclusion of omitted matters in future litigation.
     3. Rules against splitting – a claim can include much more than P actually chose to state in his complaint. P cannot split his claim – if he sues upon any portion of a claim, the other aspects of that claim are merged in his judgment if he wins, and barred if he loses.
        1. Strict application – rule against splitting a claim applies even where P did not split claim intentionally.
        2. Installment contracts – P must sue for all payments due at the time the suit is filed in the lease or installment contract.
           1. Acceleration clauses – courts have disagreed as to whether P must sue for the whole balance at once, or whether he may sue for just those months which have actually elapsed. A strict application of the splitting rule would require that P sue for the entire amount, but such a result would likely drive D into bankruptcy.

***Jones v. Morris Plan Bank of Portsmouth* (Sup. Ct. of App. VA 1937)** Tool: Contract with acceleration clause constitutes single transaction so it gives rise to only claim. Suing on portion of such a contract will constitute a waiver or merge of the right to sue on the remainder. Synopsis: P defaulted on car note payments. D went to court to collect on two months. P missed another payment. D sued. D precluded. D repossessed/sold car to collect amount due. P sued for conversion of car alleging that second action merged with first because acceleration clause said all payments due at once. P won because bank split claim.

* + - * 1. Running account – same rule requiring suit for all payments due at the time of suit applies
        2. Promissory notes – Where a debt is represented by promissory notes or a bond includes a number of interest coupons, a separate suit may be brought upon each note or coupon.
  1. Elements of Claim Preclusion
     1. Same claim (same D)
        1. Series of related transactions or occurrences
        2. Related facts; same kind of evidence involved
        3. Legal theories can be completely different
        4. We manipulate this E.g. bond and attached coupons considered separate claims; installment contract payments that have not been paid v. those that are yet to be paid on are separate claims. Policy reason – need a market
     2. Judgment that is
        1. Final
           1. Need rendering court to issue final judgment (not just jury verdict)
           2. Assume trial court judges are right and won’t be reversed on appeal; settlements usually sufficient.
        2. On the merits – states differ on what is on the merits. E.g. Statute of Limitations (Similar arguments as to substantive v. procedural divide.)
           1. Following are grounds for dismissal which never lead to bar. R2d §20.

Lack of jurisdiction

Improper venue

Nonjoinder or misjoinder of parties

P agrees to voluntary dismissal without prejudice or the courts directs dismissal without prejudice

Statute, rule or court specifies that judgment does not bar claim

* + - * 1. Sufficient but not necessary that the court litigated the factual merits of the claim
        2. Is this the kind of lawsuit we want to be relitigated?
        3. Motion to dismiss for failure to state a claim (FRCP 12(b)(6)) is usually on the merits but court will usually allow P to amend.
    1. Same party (plaintiff) or in privity (someone representing your legal interests completely)
       1. Typically involves contractual relationship (grey area – paying for someone’s lawyer)
       2. ***Gonzalez v. Banco Central Corp.* (1st Cir. 1994)** Tool: Although #1 and #2 met, if #3 is not met, than claim is not barred. Synopsis: Rodriguez P’s sued real estate developers for selling swampland. P tried to form class action with Gonzalez’s but were not allowed. Rodriguez P lost. Gonzalez P sued same D on similar complaint. #3 not met because Gonzalez P’s were neither party to the initial action nor in privy to the Rodriguez P’s.
  1. Law of the case – issue of law, once determined, cannot generally be relitigated in subsequent stages of the same lawsuit.
     1. Although some claims cannot be barred from relitigation, decision on issue of law may preclude that claim from being relitigated in same court. E.g. decision on improper venue or SMJ.
  2. Continuing or Renewed Conduct
     1. If conduct that is subject of the first action continues after judgment, claim preclusion would not prevent second suit. Issue preclusion may apply to matters of status or issues of fact resolved in first action.
     2. Nuisance suits – “temporary” nuisances are not considered to preclude later litigation involving the same behavior.

## Issue Preclusion

* 1. General Rule – If a particular issue of fact or law has been determined in a proceeding, then in a subsequent proceeding between the same parties (Even on a different cause of action), each party is collaterally estopped from claiming that that issue should be decided differently than it was in the first action.
  2. Distinguished from claim preclusion – issue preclusion applies as long as any issue is the same, even though the causes of action are different. Issue preclusion does not prevent second suit altogether, but merely compels the court to make the same finding of fact on the identical issue that the first court made. Issue is specific to state laws (e.g. SoL MA is different form SoL NH) but not so narrow as based on specific witnesses and set of facts. Issue of whether issue or claim preclusion applies can be issue precluded.
  3. Issues to which issue preclusion applies
     1. (Need final ruling – See exam 2011 p. 7 of model response)
     2. Same issue
        1. Similar factual elements
        2. Same applicable laws
        3. Manipulate to further policies **– *Cromwell v. County of Sac* (SCOTUS 1876)** Tool: Where two actions involve generally the same subject matter, but the causes of action litigated are different or the parties involved are different, the first action is conclusive as against the second only on issues actually and necessarily litigated in the course of the first trial. Define issue narrowly. County today would/should have made declaratory judgment counterclaim on issue so that precluded later. Synopsis: L1 – P (essentially P but someone in his place) sued county (D) on bonds/coupons for county courthouse. P never argued that he actually owned bonds in L2. L2 – P sued on different bonds/coupons (therefore no claim preclusion). D tries issue preclusion. Court finds no because issue of whether he is actual owner of bonds is issue different from L1.
     3. Actually litigated and decided – the issue must have actually litigated and been decided by the first court.
        1. Needs “finality” see 2010 Assignment #3
        2. Needs actual fight – otherwise parties will want to fight everything first time in fear that it will be precluded but this would lead to inefficiency.
        3. “Full and fair” litigation
        4. Split on whether issues under default judgment are actually litigated. In re Bush held that default judgment entered as sanction for deliberate refusal to participate in discovery carried issue preclusive effect.
        5. Guilty plea – courts splits on whether guilty pleas should be given preclusive effect
     4. Necessary to Judgment – the first court’s decision on this issue must have been necessary to the outcome in the first suit; only preclude people from things they lost, not won.
        1. Multiple independent holdings – ***Russell v. Place* (SCOTUS 1876)** Tool: If there is any uncertainty in the record of the first trial as to whether a distinct issue was raised and litigated, or if it appears that several issues have all been litigated as a “group” rather than singly, as here, the whole subject matter will be at large and subject to relitigation. Synopsis: In earlier suit, P sued D for patent infringement upon two counts. P won but court did not specify as to which counts. D did not change behavior on one count. In this action, P sued again, D set up same defenses, P moved to dismiss on issue preclusion. Court found not issue preclusion because unclear how each single issue decided.
           1. R2d compares a judgment on multiple independent grounds to that of a nonessential determination because determinations in the alternative may not have been carefully considered as a judgment based on one holding and the losing party, who is entitled to appeal, might be dissuaded from appealing because there is a likelihood that at least one of the determinations would be upheld.
        2. Nonessential holdings – ***Rios v. Davis* (Ct. of Civil App. TX 1963)** Tool: It is the judgment and not the conclusions of fact filed by a trial court that constitutes estoppel. A finding of fact by a jury or court, which does not become the basis or one of the grounds of the final judgment, is not conclusive against either party to the suit. Synopsis: P sued D for negligence in car accident. P’s employer had previously sued D and court found contributory negligence so denied recovery. D claimed res judicata precluded P from bringing suit. L1 – P’s employer 🡪 D 🡪 P all contributorily negligent so cancel out all damages (Note: Rios could not appeal because he won). L2 – P 🡪 D. Court finds D can’t estop P.
        3. Summary Judgments followed by settlements followed by dismissals – unclear whether dismissal based on summary judgment (suggests we issue preclude) or settlement (suggests we don’t issue preclude).
        4. Why do we need this element?
           1. Can’s appeal finding unless they affect the judgment
           2. If people had to contest every single finding, it would increase litigation
           3. Dictum can be less vigorous than holding
     5. Same Party
        1. Three Regimes
           1. Other states – require strict mutuality doctrine (same P and D)
           2. NY – No mutuality doctrine
           3. Federal Courts – allow defensive non-mutual collateral estoppel and offensive only when P can’t join first action
        2. Mutuality Doctrine at Common Law – party not bound by an earlier judgment (because not a party to it) could not use that judgment to bind adversary who had been a party to the former action.
           1. Many courts still refuse in particular situations to allow the use of issue preclusion by one not a party to the first action, but it is no longer a general rule.
        3. Decline of Mutuality Doctrine – ***Blonder-Tongue Laboratories v. University of IL Foundation* (SCOTUS 1971)** Tool: When (1) identical issue identified, (2) mutuality doctrine should be disregarded to avoid misallocation of resources (3) as long as the party against whom an estoppel is asserted had a full and fair opportunity to litigate. Default judgments cannot be basis for issue preclusion. Synopsis:Patent holder wants to sue on his patent after it as once been held invalid following opportunity for full and fair trial.
        4. Non-mutual Collateral Estoppel
           1. Two Types

Offensive – Where new P in the second action seeks to assert estoppel against same D (L1 – P1 🡪 D, P1 wins; L2 – P2 🡪 D ?)

P2 has to have opportunity to litigate and we are okay with this. Notice and Opportunity to be Heard – you get one shot

Defensive – Where D in the second action seeks to assert estoppel against P who lost case against another D (L1 – P 🡪 D1, P loses; L2 – P 🡪 D2 ?)

Promotes judicial economy because it incentivizes P to join all D’s (possible issue with SMJ, IPJ. See ***Marresse***.

* + - * 1. Although many courts have rejected the mutuality doctrine, some courts allow the defensive use of issue preclusion but not the offensive use of issue preclusion.
        2. Offensive estoppel approved by SCOTUS in federal system on a case-by-case approach

***Parklane Hosiery Co v. Shore* (SCOTUS 1979)** Tool: Non-mutual offensive estoppel allowed in this case because P could not have joined first action, D had every incentive to litigate the first case vigorously (especially since it new about second action) and different procedural opportunities won’t make a difference. Synopsis: P brought stockholders’ class action against D for damages caused by a false and misleading proxy statement. Prior to trial, SEC brought separate action on same issue and won. P moved for partial summary judgment as to the falsity of the statement in the SEC action. SCOTUS found for P.

Downside – SCOTUS acknowledged in non-mutual offensive estoppel could have some negative consequences.

May create incentive on the part of each P to wait and see in the hope that the first action by another P will result in favorable judgment.

May be unfair to D when D has little incentive to contest first action vigorously (e.g. small amount in damages on the line).

Second action may afford D procedural opportunities unavailable in first action that could cause different result.

Factors in case-by-case analysis

Alignment in first suit – If D in second action was D in first action, less likely to allow non-mutual offensive estoppel. (See ***Rios***)

Incentive to litigate – whether the person to be estopped had a reasonable incentive to litigate the issue fully in the first action. (e.g. amount of money, foreseeability of second suit)

Discouraging breakaway suits – whether P in the second action could have joined the first action but didn’t.

Prior judgments – less likely to allow if prior judgments are inconsistent.

Multiple P anomaly – court less likely to permit if multiple potential P’s waiting in the wings.

Procedural opportunities – whether procedural opportunities in the second action that are not available in the first could make a difference in the outcome.

Issue of law – if issue of law, than stare decisis, rather than collateral estoppel, should normally be applied.

Government is party – non-mutual offensive use of collateral estoppel against the federal government will virtually never be allowed. ***United States v. Mendoza.***

Rationale – would thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. This would mean that SCOTUS would not get the chance to follow its current practice of frequently waiting for a conflict to develop between circuits before granting certiorari. Also, the federal government would come under pressure to appeal virtually every adverse trial court decision in order to avoid losing the opportunity for reconsideration in a different case presenting the same issue.

## Full Faith and Credit

* 1. Effect
     1. U.S. Const. art. IV §1 – Full Faith and Credit constitutional requirement requires each state to apply the same rules of claim and issue preclusion as the state which rendered the earlier judgment would apply.
     2. 28 U.S.C. §1738 – compels the federal and state courts to give Full Faith and Credit to the judgment of state courts.
     3. Note: Still need to establish jurisdiction
  2. General Rule
     1. A rendering court can decrease the preclusive effect of its judgment (say not on the merits/without prejudice) but cannot increase it.
     2. No duty of decisions to other countries.
     3. Misinterpretation of another state’s law: State A must give Full Faith and Credit to an adjudication of State B, even if judgment was based on a misinterpretation of the laws of State A.
  3. Two step – analysis: (1) what law applies? And (2) What does the law say?

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  |  | **Subsequent Court** | | | |
|  |  | *State* | | *Federal* | |
| **Rendering Court** | *State* | Article IV Full Faith and Credit Clause  §1738 | | §1738 | |
| *Federal* | Diversity  Federal Common Law 🡪 borrow state law (Semtek) | Arising Under  Federal Common Law | Diversity  Federal Common Law 🡪 ? | Arising Under  Federal Common Law 🡪 ? |

* 1. Federal suit follows state suit
     1. §1738 – federal courts must give state court judgment Full Faith and Credit
        1. Partial repeal by Congress – Since §1738 is a statute, it is subject to repeal by Congress. Any statute may be partially repealed, either implicitly or expressly. Therefore, whenever Congress creates a new federal statutory right, it could be argued that this new federal statute implicitly repeals §1738 with respect to any state court determination relevant to the federal right; if this were accepted, the result would be that a federal court need not grant a prior state court judgment the res judicata effect of that judgment if doing so would affect a federal right.
        2. SCOTUS rejected this view unless Congress has made it quite clear that it wishes to deny the state court judgment res judicata effect in the federal court proceeding.
     2. Applies to claim and issue preclusion – ***Migra v. Warren City School District Bd. Of Education et. Al.* (SCOTUS 1984)** Tool: State claim preclusion rules (along with issue preclusion) must be applied in subsequent federal actions unless Congress has affirmatively indicated in creating the federal right that state preclusion rules are to be ignored. Synopsis: P sues D for breach of contract and tort under state law in state court. Wins on breach of contract but court dismissed tort claim without prejudice. Problem is that it only dismissed tort claim without prejudice but did not speak to any other claims. Judgment in favor of P. P sues D under Sec. 1983 in federal court. SCOTUS finds that claim preclusion applies because court assumes that all other claims decided on with prejudice unless court specifies otherwise. Also Sec. 1983 is a parallel jurisdiction statute so state courts can hear such claims.
        + 1. Lesson for Lawyers – ask court to dismiss ‘all other claims without prejudice.’
     3. Can’t claim preclude in federal court if state court had no SMJ – ***Marrese v. American Academy of Orthopaedic* Surgeons (SCOTUS 1985)** Tool: If L1 litigated in court that lacks SMJ over theories of relief, than judgment issued by court 1 will not claim preclude you from bringing theories of relief in L2. Synopsis: P’s brought state law anti-trust claims in state court. They lost. P’s brought set of claims based on federal anti-trust laws in federal system. D’s alleged claim preclusion. Court said no, because federal anti-trust claims can ONLY be litigated in federal court, so states lack SMJ because Congress has said state can’t hear claims. What if they had started in federal court with federal claims? They probably would have been precluded in state court because could have exercised supplemental jurisdiction over state law claims. P’s do not assert action under IL Antitrust Act in state court. P’s try to bring action based on Sherman Antitrust Act in federal court. Remanded case for a determination of how IL would have treated later action under Sherman Antitrust Act) – applying §1738, federal court must determine whether state claim preclusion law would preclude the federal suit.
        1. If not, there is no preclusion.
        2. If state would bar federal action, the federal court must determine whether the relevant federal law contains an implied or explicit exception to §1738.
  2. **S**tate suit follows federal suit
     1. Diversity – as a matter of federal common law, state court in second suit must give to the earlier federal judgment the same preclusive effect as such a judgment would have been given by the courts of the state where the first federal court sat.
        1. ***Semtek International Inc. v. Lockheed Martin Corp.* (SCOTUS 2001)** Synopsis: L1 – P sued D in CA state court for breach of contract and other business torts. D removed to CA federal district court based on diversity. Dismissed because barred by 2-year statute of limitations. L2 – P sued in MD state court where not time barred. D filed motion to dismiss on ground of res judicata and MD granted motion. MD appeals court affirmed on theory that even though CA might not have given claim preclusive effect to a decision by its own courts on statute of limitation grounds, the res judicata effects of a federal diversity judgment is a matter of federal law (FRCP 41(b)) under which dismissals that are on the merits are claim preclusive. Tool: SCOTUS disagreed with MD appeals court holding that (1) claim-preclusive effects of a federal diversity judgment are a matter of federal common law and (2) court was hereby deciding that federal common law should apply the preclusion law of the forum state i.e., the state where the federal court that issued the judgment (CA) sat (rendering court). Steps court took to get to this outcome:
           1. FRCP 41(b) doesn’t control

41(b) says that unless the dismissing court states otherwise, any dismissal (other than for lack of jurisdiction, for improper venue, or failure to join) operates as adjudication on the merits.

Since court had not otherwise specified, it was on the merits. Rule 41(a) makes clear that adjudication on the merits is the opposite of dismissal without prejudice.

However, just because it is on the merits, does not necessarily mean judgment is entitled to claim preclusion effect in other jurisdictions. 41(b) is a way of determining whether P could refile in the same federal court and not a rule that was intended to govern what claim preclusive effect the dismissal would have in some other court, such as a state court (that would violate Rules Enabling Act). Holding otherwise would induce forum-shopping (violates federalism principle of Erie).by engendering different outcomes in state and federal litigation (Hanna).

Have never applied 41(b) in federal question cases.

* + - * 1. Federal Common Law Applies
        2. Apply law of forum state

Pros/Cons – fail to yield uniform nationwide rule; discourage forum shopping; can decline to apply state rule where state law is incompatible with the federal interests.

* + - 1. ***Hart v. American Airlines, Inc* (Sup. Ct. NY 1969)** Tool: For collateral estoppel to be applied in this situation, there must be (i) an identity of issue that has necessarily been decided in the prior action and is decisive of the present action and (ii) there must have been a full and fair opportunity to contest the decision now said to be controlling. Synopsis: Airline (D) plane crashed in KY killing 58 passengers. L1 – P1 sued D in TX federal court (diversity). P1 on issue of D’s liability for crash. L2 – P2 sued D in NY state court. P2 moved for summary judgment based on L1. P2 won.
    1. Federal Question – federal courts apply federal common law to determine the preclusive effect that their judgment should have. But there is no forum state court so federal courts will develop their own case-by-case policies about when their judgment should have preclusive effects (and later state courts will be required to give the same preclusive effect if a case relating to that federal-question claim is brought in state court).
  1. Intersystem Preclusion
     1. P may wish to enforce a judgment in a state other than the one that rendered judgment. Procedures for enforcing an out-of-state judgment vary from state to state.
     2. A subsequent court can give greater effect to rendering court’s judgment than it would have in that other state. (See Hart).
  2. Administrative Agency (for class, no difference between state and federal)
     1. §1738 does not require that the federal court give administrative findings the same preclusive effect they would have in the state courts.
     2. SCOTUS held as a matter of federal common law, the same result should normally occur where a state administrative agency has made a judicial-type decision. ***University of Tennessee v. Elliott* (SCOTUS 1986)** Tool: “when a state agency acting in a judicial capacity…resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency’s fact finding the same preclusive effect to which it would be entitled in the State’s courts.” Synopsis: P fired black employee (D). D had administrative hearing. ALJ found for P but did not rule on Title VII and Sec. 1983 because no SMJ. D filed suit in federal court under Civil Rights Act. District Court found for P due to res judicata. App. Ct. reversed. SCOTUS affirmed in part that in this case, administrative judgment has no preclusive effect on Title VII because no SMJ (See ***Marrese***) give Congressional intent (Title VII is structured so that Congress did not intend for unreviewed state administrative proceedings to give judgments preclusive effect on Title VII claims) but created federal common law rule that administrative agency judgments have preclusive effect when properly litigated.
     3. R2d §83(2) – an adjudication determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:
        1. Adequate notice
        2. Opportunity to present and rebut evidence
        3. Formulations of issues of law and fact
        4. A rule of finality
        5. Other procedural elements necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question.
     4. R2d §83(2) – an adjudication determination of a claim by an administrative tribunal does not preclude litigation in another tribunal if it would be incompatible with legislative policy.
     5. Compare with Vitek – written notice, live hearing/trial like proceeding, requirement of representative but not lawyer.
  3. Limits on Full Faith and Credit (notes p. 1303-1304?)

# ACCESS TO JUSTICE

## Right to Representation

* 1. Presumption that there isn’t counsel if incarceration is not at issue but doesn’t mean that there is presumption that there is counsel if incarceration is at issue.
  2. ***Turner v. Rogers* (SCOTUS 2011)** Synopsis: Turner stopped paying child support. After being held in contempt 5 times, sentenced to one year in prison. Judge did not explain ruling or Turner’s ability to pay arrearage (A court may not impose punishment in civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.). While serving sentence, Turner received pro bono counsel. Turner claimed he had right to counsel at contempt hearing. After Turner completed sentence, court rejected his right to counsel because civil different from criminal contempt because it doesn’t require all the constitutional safeguards, including right to counsel. SCOTUS held that 14th Amendment’s Due Process Clause does not automatically require the state to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration. In this case, however, the petitioner's incarceration violated due process because he received neither counsel nor the benefit of alternative procedural safeguards that would reduce the risk of an erroneous deprivation of liberty.
     1. Will not require counsel but will rule unconstitutional because there were other things that court system could have done that didn’t as safeguards.
     2. Alternative safeguards that should be used:
        1. Notice to D that ability to pay is important;
        2. Use of form to elicit relevant financial information;
        3. Opportunity to answer questions of financial status at hearing; and
        4. Express finding by court on whether D has ability to pay.
  3. Gagnon did not require representation for a criminal offender facing revocation of probation and imprisonment.
  4. Distinguishing Cases from Gagnon
     1. Gault required representation in civil juvenile delinquency proceeding – comparable to criminal prosecution
     2. Vitek required representation in transfer from prison to mental hospital. – controlling opinion did not require lawyer just some form of representation
     3. Lassiter required representation when D may lose physical liberty. Court drew from these precedents the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. – Court had previously found a right to counsel only in cases involving incarceration, not that a right to counsel exists in all such cases.
  5. Matthews v. Eldrige factors:
     1. The nature of the private interest that will be affected
        1. Big private interest for Turner – physical liberty
     2. Comparative risk of an erroneous deprivation of that interest with and without additional or substitute procedural safeguards.
        1. When right procedures in place, ability to pay is straightforward analysis
        2. Opposing party can provide information on D’s ability to pay
     3. Nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements
        1. Cost to government
        2. Opposing party is often indigent also so providing counsel to D would lead to asymmetry
        3. Delay in opposing party getting child support