



# CIVIL PROCEDURE



## CIVIL PROCEDURE—FEDERAL

### TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	1
A.	PERSONAL JURISDICTION . . . . .	1
B.	SUBJECT MATTER JURISDICTION . . . . .	1
1.	Diversity of Citizenship Jurisdiction . . . . .	1
2.	Federal Question Jurisdiction . . . . .	1
3.	Removal Jurisdiction . . . . .	1
4.	Supplemental Jurisdiction . . . . .	1
C.	VENUE . . . . .	2
D.	DISCOVERY . . . . .	2
E.	MULTIPLE PARTIES . . . . .	2
II.	PERSONAL JURISDICTION . . . . .	2
A.	OVERVIEW . . . . .	2
1.	Limitations on Personal Jurisdiction . . . . .	2
a.	Statutory Limitations . . . . .	2
b.	Constitutional Limitations . . . . .	3
c.	Personal Jurisdiction in Federal Courts . . . . .	3
2.	Three Types of Personal Jurisdiction . . . . .	3
a.	In Personam Jurisdiction . . . . .	3
b.	In Rem Jurisdiction . . . . .	3
c.	Quasi In Rem Jurisdiction . . . . .	4
1)	Defendant Is Not Bound Personally . . . . .	4
B.	STATUTORY LIMITATIONS ON IN PERSONAM JURISDICTION . . . . .	4
1.	Physical Presence at Time of Personal Service . . . . .	4
2.	State Law Exceptions to Traditional Rule . . . . .	5
a.	Service by Fraud or Force Invalid . . . . .	5
b.	Immunity of Parties and Witnesses . . . . .	5
3.	Domicile . . . . .	5
a.	Defined . . . . .	5
b.	Citizenship . . . . .	5
4.	Consent . . . . .	6
a.	Express Consent . . . . .	6

1) By Contract . . . . .	6
2) By Appointment of Agent to Accept Service of Process . . . . .	6
a) Appointment Required by State . . . . .	6
b. Implied Consent . . . . .	6
c. Voluntary Appearance . . . . .	6
5. Long Arm Statutes . . . . .	7
a. Unlimited Long Arm Statutes . . . . .	7
b. Limited (or Specific) Long Arm Statutes . . . . .	7
1) Limitations in Tort Cases . . . . .	7
2) Limitations in Contract Cases . . . . .	7
3) Limitations in Property Actions . . . . .	7
4) Limitations in Marital Dissolution Cases . . . . .	8
C. CONSTITUTIONAL LIMITATIONS ON IN PERSONAM JURISDICTION . . . . .	8
1. Sufficient Contacts with the Forum . . . . .	8
a. Traditional Rule: Physical Power . . . . .	8
b. Modern Due Process Standard: Contact, Relatedness, and Fairness . . . . .	8
1) Contact . . . . .	8
a) Purposeful Availment . . . . .	9
(1) "Stream of Commerce" Cases . . . . .	10
(2) Internet Cases . . . . .	10
b) Foreseeability . . . . .	11
2) Relatedness of Claim to Contact . . . . .	11
a) Claim Arising from Activity in the State (Specific Jurisdiction) . . . . .	12
b) "At Home" in the State (General Jurisdiction) . . . . .	13
3) Fairness . . . . .	13
a) Convenience . . . . .	13
b) Forum State's Interest . . . . .	14
c) Other Factors . . . . .	14
2. Notice . . . . .	14
a. Traditional Methods of Personal Service Satisfy Due Process Notice Requirements . . . . .	15
b. Requirement that Agent Notify Defendant . . . . .	15
c. Requirements for Cases Involving Multiple Parties or Unknown Parties . . . . .	15
d. Knowledge that Notice by Mail Was Not Received . . . . .	15
D. IN REM JURISDICTION . . . . .	16
1. Statutory Limitations . . . . .	16
2. Constitutional Limitations . . . . .	16

a.	Nexus .....	16
1)	No Jurisdiction If Property Not Located in State .....	16
2)	No Jurisdiction If Property Brought in by Fraud or Force .....	16
b.	Notice .....	16
E.	QUASI IN REM JURISDICTION .....	16
1.	Statutory Limitations .....	17
2.	Constitutional Limitations .....	17
a.	Nexus .....	17
1)	Quasi In Rem Type I .....	17
2)	Quasi In Rem Type II .....	17
3)	Procedural Requirements .....	18
b.	Notice .....	18
III.	DIVERSITY OF CITIZENSHIP JURISDICTION .....	18
A.	INTRODUCTION .....	18
B.	DIVERSITY AMONG THE PARTIES .....	18
1.	Complete Diversity When Action Is Commenced .....	18
a.	Multiple Parties—Complete Diversity .....	19
1)	But Note .....	19
b.	“Alienage” Jurisdiction .....	19
1)	Aliens as Additional Parties .....	20
c.	Diversity When Action Is Commenced .....	20
2.	Questions of Citizenship .....	21
a.	State Citizenship of an Individual—Domicile .....	21
b.	Citizenship of a Corporation—Possible Multiple Citizenships .....	21
1)	Special Rule for Direct Actions .....	21
2)	Incorporation or Principal Place of Business in Foreign Country .....	21
c.	Unincorporated Associations .....	22
1)	Capacity .....	22
2)	Citizenship .....	22
3)	Class Action .....	22
4)	Partnerships .....	22
5)	Limited Liability Companies .....	22
d.	Legal Representatives .....	22
e.	Class Actions .....	23
f.	Nonresident United States Citizens .....	23
3.	Collusion and Devices to Create or Defeat Diversity .....	23
a.	Assignment of Claims .....	23
b.	Class Actions .....	24

c. Voluntary Change of State Citizenship .....	24
4. Realignment According to Interest .....	24
a. May Create or Destroy Diversity .....	24
b. Shareholder Derivative Actions .....	24
5. Supplemental Jurisdiction over Additional Claims .....	24
6. Joinder or Subsequent Addition of Parties .....	25
a. Restriction on the Use of Supplemental Jurisdiction in Diversity Cases .....	25
b. Intervention of Right .....	25
c. Permissive Intervention .....	26
d. Substitution of Parties .....	26
e. Third-Party Practice—Impleader .....	27
1) Subject Matter Jurisdiction Required .....	27
f. Cross-Claims .....	28
1) Subject Matter Jurisdiction Required .....	28
C. JURISDICTIONAL AMOUNT: IN EXCESS OF \$75,000 .....	28
1. What Is “In Controversy”? .....	29
a. Collateral Consequences of the Judgment .....	29
b. Interest and Costs .....	29
c. Equitable Relief .....	30
d. Punitive Damages .....	30
2. Aggregation of Separate Claims .....	30
a. One Plaintiff Against One Defendant .....	30
b. One Plaintiff Against Several Defendants .....	30
c. Several Plaintiffs Against One Defendant .....	31
d. Significance in Class Actions .....	31
3. Supplemental Jurisdiction over Claims Not Exceeding \$75,000 in Diversity Cases .....	31
4. Counterclaims .....	32
a. Compulsory Counterclaim Need Not Meet Jurisdictional Amount .....	32
b. Permissive Counterclaim Must Meet Jurisdictional Amount .....	33
c. No Removal to Federal Court Based on Counterclaim .....	33
D. <i>ERIE</i> DOCTRINE AND THE LAW APPLIED UNDER DIVERSITY JURISDICTION .....	34
1. Federal Statutes or Federal Rules of Civil Procedure .....	34
a. Caution .....	34
2. If There Is No Federal Statute or Rule on Point, Is the Issue Substantive or Procedural? .....	35

a. Some Situations Are Clearly Established . . . . .	35
b. Law Is Unclear in Other Situations . . . . .	36
3. Statutes Involving Both Substance and Procedure . . . . .	36
4. Interpreting State Law . . . . .	36
a. De Novo Review of District Court's Decision . . . . .	36
b. Subsequent State Court Decisions . . . . .	37
<b>E. FEDERAL COMMON LAW . . . . .</b>	<b>37</b>
1. When Federal Courts Create Federal Common Law Rules . . . . .	37
a. Interpretation of Federal Statute or Constitution . . . . .	37
b. Creating Rules to Fill Gaps in Federal Regulatory Schemes . . . . .	37
1) Formulating Uniform Federal Standard . . . . .	37
2) Borrowing State Standard . . . . .	37
2. When Federal Courts Create Federal Implied Rights of Action . . . . .	38
a. Implied Right of Action Based on Federal Statute . . . . .	38
1) Need for Affirmative Congressional Intent . . . . .	38
b. Implied Right of Action Based on Constitution . . . . .	38
<b>F. EXCEPTIONS TO DIVERSITY OF CITIZENSHIP JURISDICTION . . . . .</b>	<b>39</b>
1. Domestic Relations . . . . .	39
2. Probate Proceedings . . . . .	39
<b>G. MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT . . . . .</b>	<b>39</b>
1. Requirements . . . . .	39
a. The Action . . . . .	39
b. Minimal Diversity . . . . .	39
c. One Additional Condition . . . . .	40
d. Limitation on Jurisdiction . . . . .	40
2. Intervention . . . . .	40
3. Service of Process . . . . .	40
<b>IV. FEDERAL QUESTION JURISDICTION . . . . .</b>	<b>40</b>
<b>A. INTRODUCTION . . . . .</b>	<b>40</b>
<b>B. FEDERAL QUESTION MUST APPEAR IN THE COMPLAINT . . . . .</b>	<b>41</b>
1. Defendant's Answer or Defense Is Irrelevant . . . . .	41
2. Anticipation of a Defense . . . . .	41
<b>C. IMPLIED FEDERAL RIGHT OF ACTION . . . . .</b>	<b>41</b>
<b>D. FEDERAL CORPORATIONS . . . . .</b>	<b>41</b>
<b>E. SUPPLEMENTAL (PENDENT) JURISDICTION OVER STATE CLAIMS . . . . .</b>	<b>42</b>

1. Supplemental (Pendent) Claims .....	42
a. Effect of Dismissal of Federal Claim on Supplemental (Pendent) Claim .....	42
2. Pendent Parties .....	42
F. SPECIFIC STATUTORY GRANTS .....	43
1. Exclusive Jurisdiction .....	43
V. VENUE .....	44
A. SUBJECT MATTER JURISDICTION DISTINGUISHED .....	44
B. GENERAL RULES .....	44
1. General Rules for Most Civil Actions .....	44
2. Special Venue Provisions .....	45
C. RESIDENCE .....	45
1. Natural Persons .....	45
2. Business Entities .....	45
a. Note for Corporations .....	45
3. Nonresident of United States .....	45
D. IMPROPER VENUE MAY BE WAIVED .....	46
E. TRANSFER .....	46
1. Original Venue Proper .....	46
2. Original Venue Improper .....	46
3. Effect of Forum Selection Clauses .....	46
4. Original Court Lacks Personal Jurisdiction .....	47
F. LAW APPLICABLE UPON TRANSFER .....	47
1. Original Venue Proper .....	47
2. Original Venue Improper .....	47
VI. REMOVAL JURISDICTION .....	47
A. ORIGINAL JURISDICTION NECESSARY .....	47
1. When .....	48
2. Federal Defense Insufficient .....	48
3. State Court Need Not Have Had Jurisdiction .....	48
B. ONLY DEFENDANT MAY REMOVE; ALL MUST SEEK REMOVAL .....	48

C. VENUE . . . . .	48
D. DEFENDANT MAY REMOVE SEPARATE AND INDEPENDENT FEDERAL QUESTION CLAIM . . . . .	49
E. DISMISSAL OF NONDIVERSE PARTY ALLOWS REMOVAL . . . . .	49
F. LIMITATIONS ON REMOVAL IN DIVERSITY OF CITIZENSHIP CASES . . . . .	49
1. Defendant Citizen of Forum State . . . . .	49
2. One-Year Rule . . . . .	50
G. PROCEDURE FOR REMOVAL . . . . .	50
1. Notice of Removal . . . . .	50
a. Allegation of Amount in Controversy . . . . .	51
2. Thirty-Day Rule . . . . .	51
a. Effect of Multiple Defendants on the 30-Day Rule . . . . .	51
b. Effect of Amendment on 30-Day Rule . . . . .	51
3. Procedure After Removal . . . . .	51
4. Right to Jury Trial . . . . .	52
a. Demand for Jury Trial . . . . .	52
b. Demand Not Required . . . . .	52
5. Remand . . . . .	52
a. Based on Procedural Defects . . . . .	52
b. Based on a Lack of Subject Matter Jurisdiction . . . . .	52
c. When All Federal Claims Have Been Adjudicated . . . . .	52
d. Appellate Review of Remand Order . . . . .	52
VII. CONFLICT OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS . . . . .	53
A. FULL FAITH AND CREDIT EXTENDED TO FEDERAL COURTS . . . . .	53
B. INJUNCTIONS AGAINST PENDING STATE PROCEEDINGS . . . . .	53
C. INJUNCTIONS AGAINST THREATENED STATE CRIMINAL PROSECUTIONS . .	53
D. INJUNCTIONS AGAINST STATE TAX PROCEDURES . . . . .	53
VIII. THE FEDERAL RULES OF CIVIL PROCEDURE . . . . .	53
A. COMMENCEMENT OF THE ACTION . . . . .	53
B. SERVICE OF PROCESS . . . . .	54
1. Who May Serve . . . . .	54
2. Time Limit for Service of Process . . . . .	54
3. How Service Is Made . . . . .	54
a. Individuals . . . . .	54

b.	Minors or Incompetent Persons . . . . .	54
c.	Corporations, Partnerships, Etc. . . . .	54
d.	Service Under State Rules . . . . .	54
e.	Waiver of Service by Mail . . . . .	54
1)	Effect of Waiver . . . . .	55
2)	Effect of Failure to Waive . . . . .	55
4.	Parties Served Outside State . . . . .	55
5.	Parties Served in Foreign Country . . . . .	55
6.	Immunity from Process . . . . .	56
C.	TIME PERIODS . . . . .	56
1.	Counting Time . . . . .	56
2.	Extensions of Time . . . . .	56
D.	INTERLOCUTORY INJUNCTIONS . . . . .	57
1.	Temporary Restraining Order . . . . .	57
a.	Requirements for Ex Parte Temporary Restraining Orders . . . . .	57
1)	Specific Facts Showing Immediate and Irreparable Injury . .	57
2)	Efforts to Give Notice . . . . .	57
3)	Security . . . . .	57
b.	Notice of Hearing vs. Actual Notice . . . . .	58
c.	Time Limit . . . . .	58
2.	Preliminary Injunction . . . . .	58
a.	Requirements for a Preliminary Injunction . . . . .	58
E.	PROVISIONAL REMEDIES . . . . .	58
F.	PLEADINGS . . . . .	59
1.	Complaint . . . . .	59
2.	Pre-Answer Motions . . . . .	59
a.	Rule 12(b) . . . . .	59
b.	Motion for More Definite Statement . . . . .	60
c.	Motion to Strike . . . . .	60
3.	Answer . . . . .	61
a.	Must Contain Denials or Admissions and Any Affirmative Defenses . . . . .	61
b.	Time . . . . .	61
c.	Counterclaims . . . . .	61
d.	Effect of Failure to Answer—Default and Default Judgment . .	61
1)	Default . . . . .	61
2)	Default Judgment . . . . .	61

a) Default Judgment Entered by the Clerk . . . . .	62
3) Notice Required . . . . .	62
4) Setting Aside a Default or a Default Judgment . . . . .	62
4. Inconsistent Claims or Defenses . . . . .	62
5. Special Pleading . . . . .	62
a. Capacity . . . . .	63
b. Fraud or Mistake . . . . .	63
c. Conditions of the Mind . . . . .	63
d. Conditions Precedent . . . . .	63
e. Official Document or Act . . . . .	63
f. Judgment . . . . .	63
g. Timing . . . . .	63
h. Special Damages . . . . .	63
6. Reply . . . . .	63
7. Amendment and Supplemental Pleadings . . . . .	63
a. Amendment . . . . .	64
1) Relation Back . . . . .	64
2) Changing Party . . . . .	64
3) Conform to Evidence . . . . .	64
4) Due Process Limitation . . . . .	65
b. Supplemental Pleadings . . . . .	65
8. Rule 11 . . . . .	65
a. Certification upon Presenting Paper to Court . . . . .	65
b. Sanctions . . . . .	66
1) Court's Initiative . . . . .	66
2) Party's Motion . . . . .	66
G. JOINDER . . . . .	66
1. Joinder of Parties . . . . .	66
a. Capacity . . . . .	66
b. Compulsory Joinder (Indispensable Parties) . . . . .	66
1) Should the Absentee Be Joined? . . . . .	67
2) Can the Absentee Be Joined? . . . . .	67
3) Should the Action Proceed Without the Absentee? . . . . .	67
c. Permissive Joinder—Requirements . . . . .	68
2. Joinder of Claims . . . . .	68
a. Successive Claims . . . . .	68
b. Jurisdiction . . . . .	68
c. Class Actions . . . . .	69
1) Prerequisites . . . . .	69
2) Consideration in Treating Case as a Class Action . . . . .	69

a)	Court Must Define Class Claims, Issues, or Defenses . . . . .	70
b)	Appointment of Class Counsel . . . . .	70
3)	Effect of Judgment . . . . .	70
4)	Class Action Not Mooted If Class Representative's Claim Mooted . . . . .	70
5)	Notice . . . . .	70
a)	Notice Required in Common Question Suits . . . . .	70
b)	Notice Discretionary in Other Types of Class Action Suits . . . . .	70
6)	Jurisdiction . . . . .	71
a)	Diversity Action . . . . .	71
b)	Federal Question Action . . . . .	71
7)	Court Approval of Dismissal or Settlement . . . . .	71
a)	Notice of Dismissal or Settlement . . . . .	71
b)	Procedures for Settlements of Class Action Suits . . . . .	71
(1)	"Opt Out" Provision . . . . .	72
(2)	Court Approval Required for Payment in Connection with Objection . . . . .	72
c)	Appeal of Approval of Settlement . . . . .	72
8)	Appeal of Class Action Certification Decision . . . . .	72
d.	Class Action Fairness Act . . . . .	72
1)	Subject Matter Jurisdiction Under the CAFA . . . . .	73
2)	Removal Under the CAFA . . . . .	73
3)	Excluded Actions . . . . .	73
a)	Primary Defendants Are States or Governmental Entities . . . . .	73
b)	Claims Based on Securities Laws or Regarding Corporate Governance . . . . .	73
4)	Local Considerations May Defeat Jurisdiction . . . . .	73
a)	Mandatory Decline of Jurisdiction . . . . .	73
b)	Discretionary Decline of Jurisdiction . . . . .	74
5)	Protections Under the CAFA . . . . .	74
a)	Coupon Settlements . . . . .	74
b)	Protection Against Loss by Class Members . . . . .	74
c)	Protection Against Discrimination Based on Geographic Location . . . . .	74
d)	Notification of Federal and State Officials . . . . .	74
e.	Shareholder Derivative Suits . . . . .	75
1)	Minority Shareholder Allegations . . . . .	75
2)	Corporation Named as Defendant . . . . .	75
3)	Jurisdictional Amount and Venue . . . . .	75
4)	Court Approval . . . . .	75
f.	Interpleader . . . . .	75

1) Purpose Is to Avoid Double Liability .....	75
2) Rights of Plaintiff Stakeholder .....	76
3) Jurisdiction .....	76
a) Rule 22 Interpleader .....	76
b) Federal Interpleader Statute .....	76
c) When to Use Which .....	76
g. Intervention .....	77
1) Intervention of Right .....	77
2) Permissive Intervention .....	77
3) Caveat .....	77
h. Third-Party Practice (Impleader) .....	77
1) Claims for Indemnity or Contribution .....	77
2) Non-Indemnity or Non-Contributory Claims .....	78
3) Severance of Third-Party Claims .....	78
4) Response of Impleaded Party .....	78
5) Impleading Insurance Companies .....	78
i. Cross-Claims .....	78
<b>H. DISCOVERY.....</b>	<b>78</b>
1. Duty of Disclosure .....	78
a. Types of Disclosure Required .....	78
1) Initial Disclosures .....	79
a) Exemptions from Initial Disclosure Requirement .....	79
2) Disclosure of Expert Testimony .....	79
3) Pretrial Disclosures .....	80
2. Discovery of Electronically Stored Data .....	80
a. Format for Producing Electronic Documents .....	80
b. Destruction of Electronically Stored Information .....	81
c. Remedies .....	81
d. Party Acted with Intent to Deprive .....	81
3. Scope of Disclosure and Discovery .....	81
a. In General .....	81
b. Trial Preparation Materials .....	81
1) Procedure for Claiming Work Product .....	82
c. Inadvertent Disclosure of Trial Preparation or Privileged Materials .....	82
d. Experts .....	82
e. Protective Orders .....	82
f. Supplementation of Disclosures and Discovery Responses .....	82
4. Types of Discovery .....	83
a. Pre-Action Depositions .....	83
1) Contents of Petition .....	83

2) Notice and Appointed Counsel .....	83
3) Court Order .....	83
b. Depositions .....	83
1) Oral Deposition of a Witness, Including a Party-Witness .....	83
a) Compulsory Appearance of Witnesses .....	83
(1) Subpoena Not Needed for Parties .....	83
(2) Nonparties Should Be Subpoenaed .....	84
(3) Costs When Notifying Party Fails to Attend .....	84
2) Deposition of Witnesses on Written Questions .....	84
c. Interrogatories to the Parties .....	84
1) Option to Produce Business Records .....	85
d. Production of Physical Material; Inspection .....	85
e. Physical and Mental Examinations .....	85
1) Order for Examination .....	85
2) Report of Findings .....	85
f. Requests for Admission .....	85
5. Enforcing Disclosure and Discovery .....	86
a. Motion for an Order Compelling Disclosure or Discovery .....	86
1) Motion Granted or Discovery Is Provided After Filing .....	86
2) Motion Denied .....	86
3) Motion Granted in Part and Denied in Part .....	86
b. Failure to Comply with a Court Order .....	86
c. Failure to Disclose or Supplement an Earlier Response .....	87
d. Failure to Admit .....	87
e. Party's Failure to Attend His Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection .....	87
6. Use of Depositions at Trial or Hearing .....	87
7. Errors and Irregularities in Depositions .....	88
a. As to Notice .....	88
b. As to Manner of Taking .....	88
c. As to Completion and Return .....	88
d. As to Form of Written Questions .....	88
I. PRETRIAL CONFERENCES .....	88
1. Rule 26(f) Conference of Parties—Planning for Discovery .....	88
2. Rule 16(b) Scheduling Conference .....	89
3. Pretrial Conferences .....	89
4. Sanctions .....	89
J. ALTERNATIVE DISPUTE RESOLUTION .....	89
1. Contractual Arbitration .....	89

a.	Procedure . . . . .	90
1)	Judicial Review of Award . . . . .	90
2.	Judicial Arbitration . . . . .	90
3.	Mediation . . . . .	90
K.	TRIAL . . . . .	91
1.	Jury Trial Problems . . . . .	91
a.	Right to Jury Trial . . . . .	91
b.	Jury Trials in Diversity Cases . . . . .	91
1)	Right to a Jury Trial . . . . .	91
2)	Motion for New Trial Based on Excessiveness of Verdict . . . . .	92
c.	Jury Size . . . . .	92
d.	Jury Selection . . . . .	92
1)	Jury Venire . . . . .	92
2)	Voir Dire . . . . .	92
3)	Jury Challenges . . . . .	93
e.	Jury Instructions . . . . .	93
f.	Jury Deliberations . . . . .	93
g.	Jury Verdicts . . . . .	93
1)	General Verdict . . . . .	94
2)	Special Verdict . . . . .	94
3)	General Verdict with Written Questions . . . . .	94
4)	Erroneous Verdicts and Inconsistent Findings . . . . .	94
5)	Juror Misconduct . . . . .	95
2.	Consolidation and Separate Trials . . . . .	95
3.	Involuntary Dismissals . . . . .	95
4.	Voluntary Dismissals . . . . .	95
a.	Without Leave of Court . . . . .	95
b.	With Leave of Court . . . . .	95
5.	Offer of Judgment . . . . .	95
6.	Summary Judgment . . . . .	96
a.	Standard . . . . .	96
b.	Applicable to All Civil Actions . . . . .	96
c.	Time . . . . .	96
d.	Partial . . . . .	96
e.	Support . . . . .	96
f.	Affidavits . . . . .	97
g.	Nonappealability . . . . .	97
h.	Relationship to Motion to Dismiss . . . . .	97
i.	Relationship to Motion for Judgment on the Pleadings . . . . .	97

7. Motion for Judgment as a Matter of Law (Formerly Directed Verdict) . . . . .	98
8. Renewed Motion for Judgment as a Matter of Law (Formerly Judgment Notwithstanding the Verdict (“JNOV”)) . . . . .	98
9. Motion for New Trial . . . . .	98
a. Reasons for Granting New Trial . . . . .	98
1) Remittitur . . . . .	98
2) Additur . . . . .	99
b. Renewed Motion for Judgment as a Matter of Law with Motion for New Trial . . . . .	99
10. Effect of Failure to Move for a Renewed Judgment as a Matter of Law or for a New Trial . . . . .	99
11. Nonjury (Bench) Trials and Judgments on Partial Findings . . . . .	99
<b>IX. ATTACK ON THE JUDGMENT AT THE TRIAL COURT LEVEL . . . . .</b>	<b>99</b>
A. RELIEF FROM JUDGMENT OR ORDER . . . . .	99
1. Clerical Mistakes . . . . .	99
2. Motions to Amend Prior Orders or Renew Prior Motions . . . . .	100
3. Other Grounds for Relief from Judgment . . . . .	100
B. INDEPENDENT ACTION IN EQUITY TO SET ASIDE THE JUDGMENT . . . . .	101
<b>X. FINAL JUDGMENT AND APPELLATE REVIEW . . . . .</b>	<b>101</b>
A. JUDGMENT . . . . .	101
1. Relief that May Be Given . . . . .	101
2. Judgment on Multiple Claims or Parties . . . . .	101
3. Final Decision on Merits May Be Valid Despite Lack of Subject Matter Jurisdiction . . . . .	101
B. TIME FOR APPEALS . . . . .	101
1. Extension of Time for Appeal . . . . .	102
C. REVIEWABLE ORDER . . . . .	102
1. Interlocutory Orders as of Right . . . . .	102
a. Injunction . . . . .	102
b. Receivers . . . . .	102
c. Property Possession . . . . .	102
2. Interlocutory Appeals Act . . . . .	102
3. Fewer than All Claims or Parties . . . . .	103

4. Collateral Order Rule .....	103
5. Review of Nonappealable Orders by Writ .....	103
6. Certification of Class Actions .....	103
<b>D. STANDARDS OF REVIEW .....</b>	<b>103</b>
1. On Matters of Law .....	103
2. On Questions of Fact .....	103
3. On Mixed Questions of Law and Fact .....	104
4. On Discretionary Matters .....	104
<b>E. STAY PENDING APPEAL .....</b>	<b>104</b>
1. Execution .....	104
2. Bond .....	104
3. Injunction Order .....	104
a. Power of Trial Court .....	104
b. Power of Appellate Court .....	104
<b>F. SUPREME COURT JURISDICTION .....</b>	<b>105</b>
1. Court of Appeals Cases .....	105
2. Cases from Highest State Court .....	105
<b>XI. EFFECTS OF JUDGMENT ON FUTURE CASES .....</b>	<b>105</b>
<b>A. CLAIM PRECLUSION (RES JUDICATA) .....</b>	<b>105</b>
1. Definition .....	105
2. Terminology Used to Describe Effect—“Merger” and “Bar” .....	106
3. Requirements for “Merger” and “Bar” .....	106
4. Valid, Final Judgment .....	106
5. “On the Merits” .....	106
6. Same Claimant Versus Same Defendant .....	106
7. “Cause of Action” .....	107
a. Common Examples .....	107
1) Accidents .....	107
2) Installment Obligations .....	107
<b>B. ISSUE PRECLUSION (COLLATERAL ESTOPPEL) .....</b>	<b>108</b>
1. Definition .....	108
2. Requirements .....	108

a.	Final Judgment . . . . .	108
b.	Issue Actually Litigated and Determined . . . . .	108
c.	Issue Was Essential to the Judgment . . . . .	108
d.	Due Process and Mutuality Considerations . . . . .	109
1)	Against Whom Is Issue Preclusion Used? . . . . .	109
2)	By Whom Is Issue Preclusion Used? . . . . .	109
3)	Exceptions to Mutuality When Judgment Used Defensively	109
4)	Exceptions to Mutuality When Judgment Used Offensively—Consider Fairness . . . . .	110
C.	CLAIM AND ISSUE PRECLUSION IN SPECIAL SITUATIONS . . . . .	110
1.	In Rem Judgments . . . . .	110
2.	Quasi In Rem Judgments . . . . .	111
D.	WHICH PERSONS ARE BOUND BY A JUDGMENT? . . . . .	111
1.	Parties Are Bound . . . . .	111
2.	Privies to Parties Are Bound by Issue Preclusion . . . . .	111
3.	Represented Parties May Be Bound by Claim Preclusion . . . . .	111
E.	WHICH CHOICE OF LAW RULES APPLY TO PRECLUSION QUESTIONS? . . . . .	112
1.	Case One Decided in State Court . . . . .	112
2.	Case One Decided in Federal Court Under Diversity Jurisdiction . . . . .	112

## CIVIL PROCEDURE—FEDERAL

### I. INTRODUCTION

This outline is designed to acquaint you with commonly tested areas within the fields of federal jurisdiction and procedure. These are: personal jurisdiction, subject matter jurisdiction, venue, discovery, and joinder of multiple parties.

#### A. PERSONAL JURISDICTION

Personal jurisdiction refers to the ability of a court to exercise power over a particular defendant or item of property. It may be categorized as *in personam*, *in rem*, or *quasi in rem*. The primary limitations on a court's power to exercise personal jurisdiction are found in the United States Constitution and state statutes.

#### B. SUBJECT MATTER JURISDICTION

The subject matter jurisdiction of the federal courts is limited to that authorized by the Constitution as implemented by federal statute and decisional law. In general, it may be categorized as follows:

##### 1. Diversity of Citizenship Jurisdiction

Diversity of citizenship jurisdiction under 28 U.S.C. section 1332 is grounded historically in the desire to protect out-of-state parties from local prejudice. Its main requirement is that there be complete diversity between opposing parties. Each plaintiff must be of diverse citizenship from each defendant. Also, the amount in controversy must exceed \$75,000.

##### 2. Federal Question Jurisdiction

Federal question jurisdiction under section 1331 presents fewer specific difficulties. The principal problem in this area is to determine when an action "arises under" federal law. A secondary problem is to know what types of actions are within the exclusive jurisdiction of the federal courts under other specific statutes.

##### 3. Removal Jurisdiction

Removal jurisdiction allows defendants to remove an action brought in a state court to a federal court if the federal court would have had original jurisdiction over the action.

##### 4. Supplemental Jurisdiction

The doctrine of supplemental jurisdiction is codified under section 1337 and includes, under a single name, the concepts of "ancillary" and "pendent" jurisdiction. In any form, supplemental jurisdiction allows a federal court to entertain certain claims over which it would have no independent basis of subject matter jurisdiction; that is, claims that do not satisfy diversity or federal question jurisdiction.

requirements. It is important to note that supplemental jurisdiction operates only after some claim has met the requirements for federal subject matter jurisdiction. Supplemental jurisdiction operates to bring additional claims into that case that arise from the a common nucleus of operative fact as the original claim.

### C. VENUE

Venue is the designation of the proper geographic district in which to bring an action. Venue will depend on where the cause of action arose and on the nature of the parties (whether corporate or natural persons).

### D. DISCOVERY

Discovery is the process by which litigants gather information from each other before trial, enabling them to know what evidence may be presented during the trial. The discovery issues that typically arise in court or during pretrial proceedings principally revolve around the scope of the examination allowed in discovery, the uses of depositions at trial, and the available methods of enforcing discovery rights.

### E. MULTIPLE PARTIES

Multiple party questions concern whether various types of joinder are permitted under federal law and, if so, whether there is a jurisdictional basis for a particular attempted joinder. The majority of the issues that arise in this area are grounded in the interpretation or application of statutes and the Federal Rules of Civil Procedure (“Federal Rules”), and also require knowledge of subject matter jurisdictional bases, especially supplemental jurisdiction.

## II. PERSONAL JURISDICTION

### A. OVERVIEW

There are two branches of jurisdiction: subject matter jurisdiction and personal jurisdiction. **Subject matter jurisdiction** involves the court’s power over a particular **type of case**. **Personal jurisdiction** involves the ability of a court having subject matter jurisdiction to exercise power over a **particular defendant or item of property**. This section discusses personal jurisdiction.

#### 1. Limitations on Personal Jurisdiction

The exercise of personal jurisdiction generally must be authorized by statute **and** constitutional.

##### a. Statutory Limitations

States have the power to decide over whom their courts may exercise jurisdiction. Therefore, the first place to look to determine whether the court has properly exercised personal jurisdiction usually is state law. If no state statute grants the court the power over the parties before the court, the court lacks personal jurisdiction.

**b. Constitutional Limitations**

The Due Process Clause of the Constitution places two restrictions on the exercise of personal jurisdiction. First, the defendant must have such contacts with the forum state that the exercise of jurisdiction would be fair and reasonable. Second, the defendant must be given appropriate notice of the action and an opportunity to be heard. Exercise of personal jurisdiction over a defendant in violation of these constitutional requirements is not valid, even if a statute purports to grant the court jurisdiction.

**c. Personal Jurisdiction in Federal Courts**

The main jurisdictional problem in state courts arises when the defendant over whom power is sought lives in another state. Since the federal borders encompass all states, one might expect that federal courts would encounter problems of personal jurisdiction only when the defendants were foreign nationals. However, Rule 4 of the Federal Rules provides that, absent some special federal statute, each federal court must analyze personal jurisdiction **as if it were a court of the state in which it is located**. Thus, in most cases, the assessment of whether the court has personal jurisdiction over the defendant will be exactly the same in federal court as it is in state court. Rule 4 also authorizes jurisdiction without regard to state long arm statutes over third-party defendants and parties required to be joined under the compulsory joinder rules, provided the party is served within 100 miles from the place where the summons was issued. (See VIII.B.3., *infra*.)

## 2. Three Types of Personal Jurisdiction

**a. In Personam Jurisdiction**

In personam jurisdiction exists when the forum has power over the person of a particular defendant. (Jurisdiction over a plaintiff is generally not an issue because the plaintiff accedes to the court's jurisdiction by bringing suit in that court.) In these cases, the court may render a money judgment against the defendant or may order the defendant to perform acts or refrain from acting. Such a judgment creates a personal obligation on the defendant and is entitled to full faith and credit in all other states; in other words, if a defendant is ordered to pay a sum of money to a plaintiff, the plaintiff may enforce the judgment against the defendant's property in any other state where that property is located.

**b. In Rem Jurisdiction**

In rem jurisdiction exists when the court has power to adjudicate the rights of all persons in the world with respect to a **particular item** of property. This jurisdiction is limited to situations where the property is located within the physical borders of the state and where it is necessary for the state to be able to bind all persons regarding the property's ownership and use. This occurs with respect

to actions for condemnation (eminent domain cases), forfeiture of property to the state (for example, when the property is used for the unlawful transportation of narcotics), and settlement of decedents' estates.

**c. Quasi In Rem Jurisdiction**

One type of quasi in rem jurisdiction exists when the court has power to determine whether particular individuals own specific property within the court's control. Unlike in rem jurisdiction, however, it does not permit the court to determine the rights of all persons in the world with respect to the property. A second type of quasi in rem jurisdiction permits the court to adjudicate disputes other than ownership based on the presence of the defendant's property in the forum (see E.2.a.2), *infra*, regarding applicable constitutional limitations).

**1) Defendant Is Not Bound Personally**

The basis of a court's power to exercise quasi in rem jurisdiction is the property within the state. (See E., *infra*.) The judgment does not bind the defendant **personally** and cannot be enforced against any other property belonging to the defendant.

**B. STATUTORY LIMITATIONS ON IN PERSONAM JURISDICTION**

Each state is free to prescribe its own statutory bases for personal jurisdiction. Of course, the exercise of jurisdiction in a given case must also satisfy the constitutional requirements. (See C., *infra*.) Most states have statutes granting their courts in personam jurisdiction in the following four situations:

- (i) Where the defendant is present in the forum state and is personally served with process;
- (ii) Where the defendant is domiciled in the forum state;
- (iii) Where the defendant consents to jurisdiction; and
- (iv) Where the defendant has committed acts bringing him within the forum state's long arm statutes.

Each of these bases of in personam jurisdiction will be discussed in detail below.

**1. Physical Presence at Time of Personal Service**

Most states grant their courts in personam jurisdiction over any defendant who can be served with process within the borders of the state, no matter how long he was present, even if merely passing through. The Supreme Court has upheld this type of jurisdiction, allowing a transient defendant to be served with process for a cause of action unrelated to his brief presence in the state. [Burnham v. Superior Court, 495 U.S. 604 (1990)]

## 2. State Law Exceptions to Traditional Rule

Even though jurisdiction through presence at the time of service has been upheld under the Constitution, state statutes and court decisions have limited the power of their courts in certain situations.

### a. Service by Fraud or Force Invalid

If a plaintiff brings a defendant into a state by fraud or force to serve process, most courts will find the service invalid for exercising personal jurisdiction over the defendant. [See, e.g., *Copas v. Anglo-American Provision Co.*, 73 Mich. 541 (1889)]

---

#### EXAMPLE

While in Tennessee, a driver from Ohio was in a car accident with a mechanic from Tennessee. The accident was clearly the mechanic's fault, so the driver suggested that the mechanic repair his car and return it to him in Ohio as a means of avoiding a lawsuit. The driver immediately went back to Ohio and filed suit. When the mechanic returned the car to the driver in Ohio, the driver delayed the mechanic long enough to have the process server serve the mechanic with the summons and complaint. The fact that the mechanic was served in Ohio cannot be used as a basis for personal jurisdiction over the mechanic in Ohio.

---

### b. Immunity of Parties and Witnesses

Most states likewise grant immunity from personal jurisdiction to nonresidents who are present in the state solely to take part in a judicial proceeding, or who are passing through the state on their way to a judicial proceeding elsewhere.

## 3. Domicile

Most states grant their courts in personam jurisdiction over persons who are domiciliaries of the state, even when the defendant is not physically within the state when served with process.

### a. Defined

Domicile refers to the place where a person maintains her permanent home. If a person has legal capacity, her domicile is the place she has chosen through presence (even for a moment), coupled with the intention to make that place her home. If a person lacks capacity, domicile is determined by law (for example, an infant is a domiciliary of the custodial parent's home state).

### b. Citizenship

A United States citizen, even though domiciled abroad, is subject to personal jurisdiction in the United States. The scope of this basis for jurisdiction is unclear, because states have never attempted to enact laws or rules enabling their courts to obtain jurisdiction solely on the basis of citizenship.

#### 4. Consent

Virtually every state provides for *in personam* jurisdiction through the defendant's consent. Such consent may be express or implied or through the making of a general appearance.

##### a. Express Consent

A party's express consent to the jurisdiction of local courts, whether given before or after suit is commenced, serves as a sufficient basis for *in personam* jurisdiction.

###### 1) By Contract

A person can, by contract, give advance consent to jurisdiction in the event a suit is brought against him.

###### 2) By Appointment of Agent to Accept Service of Process

A person can, by contract, appoint an agent in a particular state to receive service in that state in an action against him. The terms of the contract determine the extent of the agent's power and, thus, the scope of the jurisdiction conferred.

###### a) Appointment Required by State

When the state heavily regulates a type of business (for example, the sale of securities) to protect its citizens, it can require a nonresident engaged in that business to appoint an agent for service of process in the state. *Note:* The state cannot require every nonresident businessperson to appoint such an agent, because the state lacks power to exclude individuals from the state. However, a state can require nonresident corporations to make such an appointment before doing business in the state.

###### b. Implied Consent

When the state has substantial reason to regulate the in-state activity of a nonresident of the state, it may provide that by engaging in such activity, the nonresident thereby appoints a designated state official as his agent for service of process. Thus, for example, the Supreme Court has upheld statutes that use such implied consent to subject a nonresident motorist to jurisdiction in any state in which he has an accident. [Hess v. Pawloski, 274 U.S. 352 (1927)]

###### c. Voluntary Appearance

A defendant may consent to jurisdiction by a voluntary appearance, such as by contesting the case without challenging personal jurisdiction. Generally, any sort of appearance provides a sufficient basis for jurisdiction, but many states allow "**special appearances**" through which a defendant can object to the court's exercise of jurisdiction. The defendant usually must make this

special appearance—by stating grounds for his objection to jurisdiction—in his initial pleading to the court; otherwise, the defendant will be deemed to have consented to jurisdiction.

## 5. Long Arm Statutes

Virtually all states grant their courts *in personam* jurisdiction over nonresidents who perform or cause to be performed certain acts within the state or who cause results within the state by acts performed out of the state. *In personam* jurisdiction is granted regardless of whether the defendant is served within or outside the forum, but is limited to causes of action arising from the acts performed or results caused within the state.

### a. Unlimited Long Arm Statutes

A few states, such as California, have long arm statutes that give their courts power over any person or property over which the state can constitutionally exercise jurisdiction. (See C., *infra*.) These are known as unlimited long arm statutes.

### b. Limited (or Specific) Long Arm Statutes

Most states, however, have long arm statutes that specify in detail the situations in which their courts can exercise jurisdiction.

#### 1) Limitations in Tort Cases

Some statutes permit jurisdiction when a “tort” occurs within the state, while others require a “tortious act.” The latter language has caused problems where an out-of-state manufacturer puts his products into the stream of commerce knowing that some items will end up in the forum state. When the gravamen of the complaint is negligent manufacture, some courts have read “tortious act” narrowly and confined jurisdiction to the place of manufacture; others have read it to mean “the place the tort occurred,” interpreting that to be the place of injury.

#### 2) Limitations in Contract Cases

Many statutes permit jurisdiction if the cause of action arises out of the “transaction of business” in the state. Some states require the defendant or his agent to have been physically present in the state at the time the transaction took place, but others have taken a broader view—for example, New York has upheld jurisdiction over a California resident who made telephone bids from California on paintings being sold in New York.

#### 3) Limitations in Property Actions

Many state statutes permit jurisdiction over a nonresident defendant when the cause of action arises from ownership of property within the state—as in the case of a tort action based on negligent maintenance of realty or a contract action regarding the sale of the property. Some statutes include chattels, while others are confined to realty.

**4) Limitations in Marital Dissolution Cases**

All states provide that when a married couple last lived together in the state and one spouse then abandons the other, the remaining spouse may obtain personal jurisdiction over the absent spouse for divorce or legal separation proceedings. States vary on whether the plaintiff spouse must be living in the state at the time of abandonment (or other cause for dissolution) or whether jurisdiction may be acquired whenever the plaintiff has acquired domicile in the state.

**C. CONSTITUTIONAL LIMITATIONS ON IN PERSONAM JURISDICTION**

Once it is determined that a state has a statute that allows the court to exercise in personam jurisdiction over the parties before it, the constitutionality of the exercise must next be determined. There are two components of the constitutional aspect: contacts with the forum and notice.

**1. Sufficient Contacts with the Forum****a. Traditional Rule: Physical Power**

Traditionally, jurisdiction over a person (or res) was a consequence of the state's physical power to carry out its judgment; i.e., it was based on the power to arrest the person to force compliance with a judgment. Accordingly, the Supreme Court upheld exercises of jurisdiction whenever the defendant was served with process within the forum state. [See *Pennoyer v. Neff*, 95 U.S. 714 (1878)] The Court later expanded the states' physical power to extend not only to those defendants who were served within the state, but also to those defendants who consented to the state's power or who were domiciled in the state, regardless of where they were served.

**b. Modern Due Process Standard: Contact, Relatedness, and Fairness**

The concept of power by which a state could enforce its judgments was greatly expanded by the Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). No longer was power controlled solely by whether one of the traditional bases of presence, residence, or consent was present. Instead, the focus became whether sufficient minimum contacts exist between the defendant and the forum so that maintenance of the suit against the defendant does not offend "traditional notions of fair play and substantial justice." The Supreme Court has listed a series of factors by which to assess the constitutionality of personal jurisdiction. In general, the factors fall under three headings: contact, relatedness, and fairness.

**1) Contact**

*International Shoe* requires that the defendant have "such minimum contacts" with the forum that the exercise of jurisdiction would be fair and reasonable. In considering whether there are such contacts, a court will look to two factors: purposeful availment and foreseeability.

**a) Purposeful Availment**

Defendant's contact with the forum cannot be accidental. Rather, the contact must result from her purposeful availment with that forum. The defendant must reach out to the forum in some way, such as to make money there or to use the roads there. The court must find that through these contacts the defendant ***purposefully availed*** herself "of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." [Hanson v. Denckla, 357 U.S. 235 (1958)]

**EXAMPLES**

1) A plaintiff is injured in a car accident in Montana and brings a products liability action against Ford, the manufacturer, in Montana. The car was designed in Michigan and manufactured in Kentucky. Furthermore, the car was not sold in Montana but in another state. The Court held that Ford was subject to personal jurisdiction in Montana. By advertising in a state, shipping original replacement parts to the state, and maintaining a network of dealers that sell and repair used cars in the state, Ford created a market for its cars within Montana. Ford thus has purposeful contacts with the state, and the cause of action relates to those activities, as those contacts encourage people in the state to buy and drive Ford products. [Ford Motor Company v. Montana Eighth Judicial District Court, 141 S. Ct. 1017 (2021)]

2) Defendants, Michigan residents, entered into a franchise contract with a Florida corporation. The agreement required, among other things, that fees be sent to the franchisor's home office in Florida, and provided that Florida law would govern any dispute. The Court held that the defendants could be sued in Florida; their contact with Florida resulted from their purposeful availment of that state. [Burger King v. Rudzewicz, 471 U.S. 462 (1985)]

**COMPARE**

1) Father, in New York, agreed to give up custody of Daughter to Mother in California. Mother sued Father in California for additional support. Father's only contact with California was letting Daughter go there. The Court held that California could not obtain *in personam* jurisdiction over Father because, in acting in the interest of family harmony, Father could not be said to have purposefully availed himself of the benefits and protections of California laws. [Kulko v. Superior Court, 436 U.S. 84 (1978)]

2) Defendant, a New York car dealer, was sued in Oklahoma based on an injury that Plaintiff received from an accident in Oklahoma. The only basis for jurisdiction over Defendant was the sale of the allegedly defective

car in New York by Defendant, who knew no more than that any vehicle sold might be driven elsewhere. The Court found that there was no purposeful availment of the privileges or protections of Oklahoma. Note that this case is unlike *Ford Motor Company*, above, because the dealer, not the car manufacturer, was contesting personal jurisdiction. The New York **dealer** had insufficient contacts with Oklahoma. [World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)]

### (1) “Stream of Commerce” Cases

There is great difficulty in assessing purposeful availment in “stream of commerce” cases. Stream of commerce cases typically arise when Defendant manufactures its product in State A (or even Country A) and sells them to a second party in State B, thereby placing the product in the stream of commerce. The product eventually winds up in another state (State C) and causes an injury therein. The question is whether Defendant **purposefully availed itself** of State C. The Supreme Court has failed to reach a consensus as to when placing an item in the stream of commerce subjects the defendant to personal jurisdiction in the state where the product winds up. [Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987); J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011)] For bar exam purposes, the important points to remember are:

- (a) **Merely placing an item in the stream of commerce**, by itself, **is not a sufficient basis** for personal jurisdiction.
- (b) **It is unresolved** whether placing an item in the stream of commerce **with the knowledge or hope** that it will wind up in a particular state would be a sufficient basis for personal jurisdiction (but probably unlikely). If you encounter such a question on the exam, you should scour the question for facts showing an **intentional targeting** (purposeful availment) of the forum. (See (c), below.)
- (c) **Placing an item in the stream of commerce** coupled with some **other acts that show the intent to serve a particular state**, for example, by modifying its product to comply with state law, by maintaining sales offices within the state, by maintaining repair capabilities in the state, etc., **is a sufficient basis** for personal jurisdiction.

### (2) Internet Cases

The Supreme Court has not set out a specific test or standard for assessing purposeful availment based on the defendant’s Internet

activity. Many courts will look at whether the defendant has a passive website that allows people to view only content, an active website that allows people to order and download products, or something in between. The maintenance of a website for only informational purposes, without more activity in the forum, is insufficient to exercise jurisdiction over the defendant for all causes of action (that is, general jurisdiction), but it may be sufficient for a claim arising from the maintenance of the website itself and brought under the state's long arm statute (thus using specific jurisdiction) if the defendant is specifically targeting readers in the forum. On the other hand, maintenance of an active website alone would be sufficient for the exercise of general jurisdiction (that is, a claim unrelated to the website activities) if the "at home" test is satisfied. Specific jurisdiction hinges on whether the defendant was purposefully directing his activities to the forum. [Snowney v. Harrah's Entertainment, Inc., 35 Cal. 4th 1054 (2005)—Nevada hotel subject to personal jurisdiction in California when it specifically targeted California consumers by providing rate information to and accepting reservations on its website, by touting its proximity to California, and by providing driving directions from California]

**b) Foreseeability**

It must be foreseeable that the defendant's activities make her amenable to suit in the forum. In other words, the defendant must have known or reasonably anticipated that her activities in the forum would render it foreseeable that she may be "haled into court" there.

---

**EXAMPLES**

1) A national magazine is subject to *in personam* jurisdiction for libel cases in every state in which the magazine is marketed. Its publishers may reasonably anticipate causing injury in every state in which the magazine is sold, and thus should reasonably anticipate being haled into court in each state. [Keeton v. Hustler Magazine, 465 U.S. 770 (1984); Calder v. Jones, 465 U.S. 783 (1984)]

2) In *Ford Motor Company v. Montana Eighth Judicial District Court*, *supra*, the Court held that, by creating a market for its used cars in the forum state, and by continuously and deliberately exploiting that market, Ford should have reasonably anticipated being haled into a court of the state where its product failed due to an alleged design defect.

---

**2) Relatedness of Claim to Contact**

One important factor is whether the claim asserted against the defendant arises out of or relates to the defendant's contacts with the forum. If it does,

the court is more likely to find that jurisdiction is fair and reasonable. This assessment requires the court to determine the nature and quality of the defendant's contacts with the state. Some authorities consider this factor to be part of the "contact" or the "fairness" assessment; others consider it, as we do here, to be part of the "relatedness" assessment. On an essay, the important point is that you address the issue in your answer, whether under the contact, relatedness, or fairness prong of the analysis. On an MBE question, remember that if the cause of action does not arise from or is unrelated to the defendant's activities in the forum, there must be general personal jurisdiction over the defendant.

a) **Claim Arising from Activity in the State (Specific Jurisdiction)**

If the defendant's in-state activity is based on isolated acts committed within the jurisdiction, personal jurisdiction over the defendant will be proper only for causes of action arising from or relating to ***that in-state activity***; in other words, the court will have "specific jurisdiction." When there are multiple claims or parties involved, each claim of each plaintiff must arise from or relate to some in-state activity for there to be specific jurisdiction.

---

**EXAMPLE**

Eighty-six plaintiffs from California and 592 plaintiffs from other states sued Bristol-Myers Squibb, a pharmaceutical company incorporated in Delaware and headquartered in New York, in California, alleging that the drug Plavix injured them. None of the non-California plaintiffs alleged any connection to California with regard to their treatment. Because there was no activity in California as to the nonresident plaintiffs, the court lacked personal jurisdiction over Bristol-Myers Squibb as to the claims of the ***non-California*** plaintiffs, even though Bristol-Myers Squibb was subject to personal jurisdiction in California with respect to the California plaintiffs. The fact that the place of injury was outside the forum state also distinguishes this case from *Ford Motor Company v. Montana Eighth Judicial District Court, supra*. The place of injury is thus significant in assessing whether there is personal jurisdiction. [Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017)]

---

*Note:* When the injury does not take place in the forum state, there also could be a lack of statutory authorization because no state would authorize personal jurisdiction over a defendant who commits an out-of-state act that produces an out-of-state injury. However, California has an unlimited long arm statute, so the statutory authorization issue essentially rolled into the constitutional issue.

*Note also:* The court specifically stated its ruling does not apply to class actions.

**b) “At Home” in the State (General Jurisdiction)**

General jurisdiction—in personam jurisdiction for **any** cause of action against the defendant, regardless of where the cause of action arose—requires that a defendant be “**at home**” in the jurisdiction. A person is “at home” in the state in which he is domiciled, and a corporation is “at home” in the state in which it was incorporated and the state in which it has its principal place of business. [Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); Daimler AG v. Bauman, 571 U.S. 117 (2014); BNSF Railway Co. v. Tyrrell, 137 S. Ct. 1549 (2017)] A number of states have statutes that authorize personal jurisdiction over a defendant that conducts systematic and continuous activity (“doing business”) within the state. Such “authorization” statutes must be read with this constitutional requirement in mind.

*Note:* Remember that the discussion here is about **general** jurisdiction, **not** specific jurisdiction. If a plaintiff is injured in State A by a defendant, he may still sue in State A regardless of whether the defendant is “at home” in State A, because there will very likely be specific (long arm) jurisdiction. Should you need to discuss general jurisdiction in an essay answer, make sure to discuss whether the defendant is “at home” in the state, as discussed above.

**3) Fairness**

In addition to the defendant’s having relevant contacts with the forum, *International Shoe* requires that the exercise of jurisdiction not offend “traditional notions of fair play and substantial justice.” The Court has listed several factors relevant to assessing whether jurisdiction would be fair. It is possible that an especially strong showing of fairness might make up for a lesser amount of contact (although minimum contacts are always required). Note, however, that fairness is not a factor for the exercise of general jurisdiction.

**a) Convenience**

A defendant will often complain that the forum is inconvenient. The Supreme Court has emphasized, however, that the Constitution does not require that the forum be the best of several alternatives. The forum is constitutionally acceptable unless it is “so gravely difficult and inconvenient that a party is unfairly put at a severe disadvantage in comparison to his opponent.” [Burger King v. Rudzewicz, *supra*] This is a very difficult standard to meet, and the defendant usually will not be able to meet it simply by showing that the plaintiff has superior economic resources.

**b) Forum State's Interest**

The forum may have a legitimate interest in providing redress for its residents.

**EXAMPLES**

- 1) Decedent, a California resident, purchased a life insurance policy by mail from a Texas company. Decedent regularly mailed his premiums from California to the Texas company, which had no other contacts with California. In a suit brought by the beneficiary of the life insurance policy, the Supreme Court held that California had personal jurisdiction over the Texas company. Among other things, the Court noted that California had a strong interest in protecting its citizens from alleged misfeasance by insurance companies. [McGee v. International Insurance Co., 355 U.S. 220 (1957)]
- 2) Asahi, a Japanese manufacturer of tire valves, shipped valves to a Taiwanese manufacturer of motorcycle tire tubes. The valves were incorporated into tires and sold in California, where a resident was injured by a defective tire. The Taiwanese manufacturer was sued in a California court, where it sought to implead Asahi. The main case was settled, leaving only the indemnity claim by the tire manufacturer against Asahi pending. *Held:* Even though Asahi placed the defective goods in the stream of commerce knowing that some would be used in California, exercise of jurisdiction by the California court would be unreasonable considering the severe burdens of Asahi in defending in a foreign legal system, the slight interest of the Taiwanese manufacturer and California in the exercise of jurisdiction, and the international interest in not subjecting an alien corporation to United States jurisdiction. [Asahi Metal Industry Co. v. Superior Court, *supra*]

**c) Other Factors**

The Supreme Court has listed other factors relevant to the assessment of whether the exercise of jurisdiction would be fair and reasonable, but has not discussed these factors in detail: (1) the plaintiff's interest in obtaining convenient and effective relief, (2) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (3) the shared interest of the states in furthering fundamental substantive social policies.

**2. Notice**

In addition to the requirement that the defendant have such minimum contacts with the forum to render the exercise of jurisdiction there fair and reasonable, due process also requires that a ***reasonable method be used to notify the defendant***

**of a pending lawsuit** so that she may have an opportunity to appear and be heard. Due process requires that notice be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” [Dusenberry v. United States, 534 U.S. 161 (2002)—quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)]

**a. Traditional Methods of Personal Service Satisfy Due Process Notice Requirements**

Any of the traditional methods of personal service satisfy due process notice requirements. These include personal delivery to the defendant; leaving papers with a responsible person at the defendant’s residence or place of business; delivery to an agent appointed to accept service; or delivery by registered mail, return receipt requested. (See VIII.B., *infra*, for discussion of methods of service of process.)

**b. Requirement that Agent Notify Defendant**

If an agent is appointed by contract, in a case where the plaintiff chose the agent for his own benefit, or the agent is appointed by operation of law (as under a nonresident motor vehicle statute), the failure of the agent to notify the defendant will prohibit jurisdiction—since the defendant will in fact be deprived of an opportunity to be heard. (This is not true when the defendant voluntarily selects his own agent, since any failure of the agent can and will be attributed to the principal.)

**c. Requirements for Cases Involving Multiple Parties or Unknown Parties**

In *Mullane v. Central Hanover Bank & Trust Co.*, *supra*, an action was brought against a number of trust beneficiaries scattered throughout the world. The Supreme Court held that the Constitution did not require personal service on each beneficiary since the cost would have been prohibitive. However, every beneficiary had to be notified by the **best practical means** available. Thus, those whose addresses were known or could reasonably be ascertained had to be notified by ordinary mail, while those whose names or addresses were unknown could be notified by publication. Such methods of notice are valid only if all defendants have substantially identical interests.

**d. Knowledge that Notice by Mail Was Not Received**

Although *Mullane v. Central Hanover Bank & Trust Co.*, *supra*, does not require actual notice, if a party knows that the notice by mail was not received, he may not proceed in the face of such knowledge if practicable alternatives to apprise the defendant of the action exist.

---

**EXAMPLE**

In *Jones v. Flowers*, 547 U.S. 220 (2006), the state sent a certified letter to a homeowner to inform him that he was delinquent on taxes and that failure to pay would make his property subject to public sale. By statute, the taxpayer

was required to keep his address updated. The letter was returned “unclaimed,” after which the state took no further steps (such as using first class mail or posting notice on the property) to notify the taxpayer. The Court held that taking no further steps to provide notice with the knowledge that notice had not been received violated due process.

## D. IN REM JURISDICTION

As stated in A.2.b., *supra*, in rem actions adjudicate rights of all persons with respect to property located in the state. An in rem judgment does not bind the parties personally, but is binding as to the disposition of the property in the state.

### 1. Statutory Limitations

Most states have statutes providing for in rem jurisdiction in actions for condemnation, title registration, confiscation of property (such as vehicles used to transport narcotics), forfeiture of a vessel, distribution of the assets of an estate, and a grant of divorce when only the complaining spouse is present and subject to personal jurisdiction. In the last case, the “property” is the marital status of the complainant.

### 2. Constitutional Limitations

#### a. Nexus

In in rem actions the basis of jurisdiction is the presence of the property in the state. The state has a great interest in adjudicating the rights of all the world regarding this property. Therefore, the presence of the property in the state is constitutionally sufficient for the exercise of jurisdiction over the property.

##### 1) No Jurisdiction If Property Not Located in State

A court has no in rem power over property outside the state; for example, in settling a decedent’s estate, the court has no in rem power over property in other jurisdictions.

##### 2) No Jurisdiction If Property Brought in by Fraud or Force

The exercise of in rem power is prohibited when the property is brought into the state by fraud or force.

#### b. Notice

The requirements of *Mullane v. Central Hanover Bank & Trust Co.*, *supra*, apply to in rem actions. Thus, persons whose interests are affected and whose addresses are known must at least be notified by ordinary mail. [Walker v. City of Hutchinson, 352 U.S. 112 (1956)]

## E. QUASI IN REM JURISDICTION

Quasi in rem jurisdiction permits a court without in personam jurisdiction to determine certain disputes between a plaintiff and defendant regarding property when the property is located in the forum state. (See II.A.2.c., *supra*.)

## 1. Statutory Limitations

There are two types of quasi in rem jurisdiction (see 2., *infra*). The first type (type I) involves disputes between parties over their rights in property within the state. The second type (type II) involves disputes **unrelated** to the in-state property and has been severely limited by the Supreme Court. In quasi in rem cases, the plaintiff is unable to obtain personal jurisdiction over the defendant, but the defendant has property in the state that the plaintiff attaches. The court then adjudicates the dispute between the parties on the basis of its power over the property. Since the court's sole basis of jurisdiction is the property, **any judgment against the defendant can be satisfied only out of that property.**

## 2. Constitutional Limitations

### a. Nexus

The **minimum contacts standard** is applicable to **every** exercise of personal jurisdiction. The mere presence of property within a state is not, by itself, sufficient to permit a court to exercise personal jurisdiction over a defendant merely because she happens to have property in the state when the action is not related to the property. [Shaffer v. Heitner, 433 U.S. 186 (1977)]

#### 1) Quasi In Rem Type I

Thus, when the dispute involves the rights of the parties in the property itself (quasi in rem type I), jurisdiction based upon the presence of the property in the state is proper. The close connection between the litigation and the property provides the necessary minimum contacts.

#### EXAMPLE

A brother, who lives in State A, and a sister, who lives in State B, own antique furniture together. The furniture is located in State B. The sister brings an action in State B against the brother to determine who has rightful possession of the furniture. Because the furniture is located in State B, a court in State B would have personal jurisdiction over the brother in this suit to determine ownership of the furniture.

#### 2) Quasi In Rem Type II

When the dispute is unrelated to the ownership of property (quasi in rem type II), jurisdiction cannot be based solely on the presence of property in the forum state; there must be minimum contacts between the defendant and the forum. However, if the defendant has minimum contacts with the forum, it is also likely that a court could exercise **in personam** jurisdiction over a defendant under the forum's long arm statute, thus removing the limit on recovery to the defendant's in-state property. As a result, use of quasi in rem jurisdiction type II will be rare.

**EXAMPLE**

A contractor, a resident of Maine, flies to Ohio and enters into a contract with a homeowner, a resident of Ohio. All performance is to occur in Ohio. The contractor flies home to Maine. The homeowner breaches the contract. The contractor does not want to fly to Ohio to sue the homeowner, but he discovers that the homeowner has a boat docked in Maine. Attaching the boat would not provide the court with personal jurisdiction over the homeowner; the contractor would have to show minimum contacts between the homeowner and Maine.

**3) Procedural Requirements**

To obtain quasi in rem jurisdiction, a plaintiff must “bring the asset before the court” by attachment (or garnishment). This will inhibit the sale or mortgage of the defendant’s interest, since a new owner must take subject to the decision of the court. Serious questions have been raised as to whether such a pretrial interference with a defendant’s property rights is constitutional unless the defendant is afforded a hearing on the necessity of such procedures. Most commentators think the process is valid, but the Supreme Court has thus far avoided the issue.

**b. Notice**

As in in rem cases, quasi in rem cases require the best practical notice. Therefore, posting of notice or notice by publication will be insufficient where the addresses of persons affected by the action are known or reasonably ascertainable. The federal statute for the enforcement of liens or other claims to real or personal property requires personal service if practicable and service by publication if personal service is not practicable. If the defendant is not personally served, he may appear within one year of final judgment, and the court must set aside the judgment on payment of costs as the court deems just. [28 U.S.C. §1655]

### III. DIVERSITY OF CITIZENSHIP JURISDICTION

#### A. INTRODUCTION

The federal courts have been given subject matter jurisdiction over controversies between citizens of different states, even though the controversies do not involve questions of federal substantive law, in order to protect an out-of-state party from possible local bias in state courts.

#### B. DIVERSITY AMONG THE PARTIES

##### 1. Complete Diversity When Action Is Commenced

a. **Multiple Parties—Complete Diversity**

Diversity jurisdiction requires “complete diversity,” meaning that no plaintiff may be a citizen of the same state as any defendant. If one defendant and one plaintiff are co-citizens of the same state, complete diversity is lacking and there is no diversity jurisdiction.

---

**EXAMPLE**

A, B, and C bring an action against X, Y, and Z. A and B are citizens of New York; X and Y are citizens of Florida; and C and Z are citizens of Texas. Since no diversity exists between C and Z, the requirement of **complete** diversity is not satisfied, and, as structured, the case cannot be brought in federal court under diversity jurisdiction.

---

1) **But Note**

The rule of complete diversity does not require that every party be of diverse citizenship from every other party. It requires only that no plaintiff be a co-citizen with any defendant. Thus, two plaintiffs who are both citizens of Missouri may invoke diversity of citizenship jurisdiction against three defendants, all three of whom are citizens of Kansas.

b. **“Alienage” Jurisdiction**

Most bar exam questions in this general area involve basic diversity of citizenship jurisdiction, in which the dispute involves “citizens of different states,” as discussed immediately above. However, section 1332(a)(2) grants subject matter jurisdiction over “alienage” cases, in which the dispute is between a citizen of a U.S. state and an “alien”—meaning a citizen or subject of a foreign country. Jurisdiction is denied, however, if the case is between a citizen of a state and a citizen of a foreign country who has been admitted to the United States for permanent residence and domiciled in the same state as the U.S. citizen. Also note that the U.S. Constitution does not provide for federal jurisdiction over cases **by** an alien **against** an alien; there must be a citizen of a U.S. state on one side of the suit to qualify for alienage jurisdiction.

---

**EXAMPLES**

1) A, a citizen of Venezuela, sues B, a citizen of New York. This dispute would invoke alienage jurisdiction (assuming the amount in controversy requirement was also met), because it is between a citizen of a U.S. state and a citizen of a foreign country.

2) A, a citizen of Venezuela, sues B, a citizen of France. This dispute would **not** invoke alienage jurisdiction, because it is **not** between a citizen of a U.S. state and a citizen of a foreign country. There is no citizen of a state involved here.

3) A, a citizen of New York, sues B, a permanent resident alien domiciled in New York. Alienage jurisdiction would be denied because B has the same U.S. domicile as A.

### 1) Aliens as Additional Parties

28 U.S.C. section 1332(a)(3) grants jurisdiction in a case between citizens of different states in which citizens or subjects of a foreign country are additional parties. The foreign parties are disregarded for jurisdictional purposes. It appears that the restriction in example 3) above does not apply—by the statutory language, it applies **only** to section 1332(a)(2) actions. Although not entirely clear from case law, there also appears to be no subject matter jurisdiction when there are U.S. citizens on one side of the action and aliens on both sides.

#### EXAMPLE

A plaintiff from State A sues a defendant from State B and a resident alien who is domiciled in State A. By the face of the statute, jurisdiction apparently is not defeated by the fact that the resident alien is domiciled in the same state as the plaintiff.

### c. Diversity When Action Is Commenced

Diversity of citizenship (or alienage) must exist as of the time the suit is instituted. [Grupo Dataflux v. Atlas Global Group, 541 U.S. 567 (2004)] It need not exist at the time the cause of action arose, and it is not defeated if, after commencement of the action, a party later becomes a citizen of the same state as one of his opponents.

#### EXAMPLES

1) A buyer from State A breaches an \$80,000 contract with a seller from State A. Solely to create diversity, and prior to filing suit, the seller moves to State B. Diversity of citizenship exists because the seller is considered to be a citizen of State B even though it was a citizen of State A when the cause of action arose. Its intent is irrelevant.

2) A buyer from State X breaches an \$80,000 contract with a seller from State Z. Solely to defeat diversity, the seller moves to State X prior to filing suit. Diversity of citizenship does not exist because the seller is considered to be a citizen of State X even though it was a citizen of State Z when the cause of action arose. Its intent is again irrelevant.

3) A buyer from State C breaches an \$80,000 contract with a seller from State D. After suit was filed, the seller moves to State C. Diversity of citizenship is not defeated by this post-filing move.

## 2. Questions of Citizenship

### a. State Citizenship of an Individual—Domicile

The determination of the state of citizenship of a natural person depends on the permanent home to which he intends to return. The concept is the same, except in name, as domicile. A new state citizenship may be established by (1) **physical presence** in a new place and (2) the **intention to remain there**, that is, no present intent to go elsewhere. The citizenship of a child is that of her parents. In most cases, the citizenship of a party will be determined by the court, but it may be left to the jury.

### b. Citizenship of a Corporation—Possible Multiple Citizenships

For diversity purposes, a corporation is deemed to be a citizen of **every** state and foreign country in which it is incorporated and the **one** state or foreign country in which it has its principal place of business. [28 U.S.C. §1332] A corporation’s “principal place of business” is the state from which the corporation’s high level officers direct, control, and coordinate the corporation’s activities (that is, its “nerve center,” which will usually be the corporation’s headquarters). [Hertz Corp. v. Friend, 559 U.S. 77 (2010)] Thus, many corporations have **two** citizenships—their state of incorporation **and** the state in which their principal place of business is located. Although rare, it also is possible for a corporation to have more than two state citizenships because a corporation may be incorporated in more than one state. It is impossible, however, for a corporation to have more than one principal place of business. If an opposing party is a citizen of any of the corporate party’s states of citizenship, there is no diversity.

#### 1) Special Rule for Direct Actions

The rules of corporate citizenship are subject to a special rule in direct actions against an insurer. When a plaintiff sues an insurer on a policy or contract of liability insurance, and does not also join the insured, the insurer (whether incorporated or not) is treated as a citizen of all of the following: (1) the state or foreign country in which the insurer is incorporated (if it is); (2) the state or foreign country in which the insurer has its principal place of business; and (3) the state or foreign country of which the **insured** is a citizen.

#### 2) Incorporation or Principal Place of Business in Foreign Country

Because a corporation is a citizen of both its place of incorporation and its principal place of business, and either of those places may be in a foreign country, a corporation might simultaneously be an alien and a citizen of a U.S. state. In that case, there would be no alienage jurisdiction between that corporation and another alien, even though the corporation may also have U.S. state citizenship. (See 1.b., *supra*.)

**EXAMPLE**

There is no alienage jurisdiction in an action between a Delaware corporation that has its principal place of business in Canada and a citizen of Mexico.

**c. Unincorporated Associations****1) Capacity**

In federal question cases, unincorporated associations (for example, partnerships) are considered entities that may sue or be sued (this is not true under some state laws). In diversity jurisdiction cases, an unincorporated association may sue or be sued in its own name if local state law permits.

**2) Citizenship**

Regardless, the unincorporated association's citizenship is that of **each and every one** of its members. (If an unincorporated association cannot be sued in its own name, each member must be sued, so the rule is the same.)

**3) Class Action**

If the association is large, a class action is possible. If a class action is brought, the relevant citizenship is that of the **named members** who sue or are sued on behalf of the members of the association. (See e., *infra*.)

**4) Partnerships**

The citizenship of a partnership, general or limited, is that of each and every partner. [Carden v. Arkoma Associates, 494 U.S. 185 (1990)]

**5) Limited Liability Companies**

Although limited liability companies ("LLCs") are formed in a manner similar to corporations, they are treated as unincorporated associations for citizenship purposes. Thus, an LLC is a citizen of all states of which its members are citizens. [See, e.g., Belleville Catering Co. v. Champaign Market Place LLC, 350 F.3d 691 (7th Cir. 2003)]

**d. Legal Representatives**

A legal representative of an infant, an incompetent, or an estate of a decedent is deemed to be a citizen of the same state as the infant, incompetent, or decedent.

**EXAMPLE**

A commuter from State A is killed in an auto accident with a truck driver from State B. The commuter's brother, who is from State B, is appointed to administer the estate of the commuter. Complete diversity exists, as the brother effectively takes on the citizenship of the commuter.

**e. Class Actions**

If suit is brought by several named persons on behalf of a class, diversity is determined on the basis of the citizenship of the **named members** of the class who are suing. Thus, there is considerable room for maneuvering to create diversity if the class has members who are citizens of several different states.

**f. Nonresident United States Citizens**

A United States citizen **domiciled abroad** is not a citizen of any state and also is not an alien. (Alien status depends on nationality, not domicile.)

---

**EXAMPLE**

A retiree has permanently moved from State A to Country B to live out the remainder of her years, but she has not obtained citizenship in Country B. She is no longer a citizen of State A, nor of any state, and she is not a national of Country B. Thus, she is neither a citizen of any U.S. state nor a foreign national. (Of course, any claim by or against her can be brought in state court.)

---

**3. Collusion and Devices to Create or Defeat Diversity**

Diversity jurisdiction cannot be created by improperly or collusively assigning a claim or joining a party merely to create diversity jurisdiction. [28 U.S.C. §1339]

**a. Assignment of Claims**

The assignment of a claim to another party for collection only is clearly within this section. [Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969)] Thus, the assignment would be ignored in determining whether diversity exists. *But note:* There is no collusion if an absolute assignment of a claim is made and the assignor retains no interest in the assigned claim.

---

**EXAMPLE**

A supplier from State A enters into a contract with a manufacturer from State A. Naturally, a contract dispute arises. In order to create diversity jurisdiction, the supplier assigns its interest in the contract to a citizen of State B for \$1 plus 5% of any litigation proceeds. The assignment to the citizen of State B will be disregarded, and there will be no subject matter jurisdiction because complete diversity does not exist.

**COMPARE**

A home buyer from State A buys a home in State A and initially finances the purchase through a small State A bank. The total value of the mortgage is \$500,000. As a normal course of business, the lender then sells the mortgage for \$300,000 to a large bank that is incorporated in State B and has its principal place of business in State C, with the right to collect payment solely in the hands of the larger bank. Here, diversity would exist because the assignment is complete and was not intended to create diversity.

---

**b. Class Actions**

It is **not** improper to select the **named** members of a class action to ensure diversity jurisdiction exists, even if **unnamed** members of the class are co-citizens of the defendant and naming them would prevent diversity jurisdiction.

**c. Voluntary Change of State Citizenship**

As noted above, a plaintiff can create diversity by changing his state citizenship after the cause of action accrued but before suit is commenced, but the change must be genuine. In other words, a true change of citizenship can create or destroy diversity. The party's **motive** for changing citizenship is **irrelevant**.

**4. Realignment According to Interest****a. May Create or Destroy Diversity**

In determining whether diversity exists, the court will look beyond the nominal designation of the parties in the pleadings and realign them according to their true interests in the dispute. Thus, realignment may create diversity or destroy it.

**b. Shareholder Derivative Actions**

In a shareholder derivative action, a shareholder brings the action on behalf of his corporation because the corporation has failed to enforce a perceived claim against a third party. In such a case, the corporation typically is named as a plaintiff in the case even though it is antagonistic to the shareholder's claim. Recognizing the realities of the situation, the corporation is treated as a defendant for purposes of determining diversity jurisdiction. [See *Smith v. Sperling*, 354 U.S. 91 (1957)]

---

**EXAMPLE**

A shareholder from State A contends that a high level corporate officer, who resides in State B, has converted company assets for his own benefit. The company is from State B. Complete diversity exists as the company is considered to be a defendant.

---

**5. Supplemental Jurisdiction over Additional Claims**

Occasionally, a claim may be joined that could not, by itself, invoke federal question jurisdiction or diversity jurisdiction (because, for example, it is a state claim between parties who are citizens of the same state or because it does not involve the requisite amount in controversy). (See C., *infra*.) The federal court may nonetheless entertain such claims under its supplemental jurisdiction. (This type of supplemental jurisdiction used to be known as "ancillary jurisdiction.") Supplemental jurisdiction requires that the supplemental claim arise from a common nucleus of operative fact as the claim that invoked original (diversity or federal question, usually) federal subject matter jurisdiction. Some courts consider the common nucleus test to mean

that the claims must arise from the same transaction or occurrence, but the growing trend is that the common nucleus test is broader than that.

## 6. Joinder or Subsequent Addition of Parties

The Federal Rules permit numerous methods by which multiple claims or parties may be joined or added to the case. A claim by or against such a party, like any claim in federal court, must satisfy some basis of federal subject matter jurisdiction, such as diversity of citizenship or federal question. If the claim does not satisfy either of those, and it arises from a common nucleus of operative fact (see above), the party asserting the claim might invoke supplemental jurisdiction. Joinder of claims or parties is also discussed in VIII.G., *infra*.

### a. Restriction on the Use of Supplemental Jurisdiction in Diversity Cases

For cases that are in federal court based **solely** on diversity, supplemental jurisdiction may not be used to support:

- (i) Claims by **plaintiffs** against persons made parties under Rules 14 (impleader), 19 (compulsory joinder), 20 (permissive joinder), or 24 (intervention);
- (ii) Claims by persons proposed to be joined as **plaintiffs** under Rule 19; and
- (iii) Claims by persons seeking to intervene as **plaintiffs** under Rule 24;

When the exercise of supplemental jurisdiction would be inconsistent with the requirements for diversity jurisdiction.

[28 U.S.C. §1337(b)]

### b. Intervention of Right

Intervention of right must be allowed when: (1) the intervenor claims an interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may adversely affect that interest; and (3) the current parties do not adequately represent the intervenor's rights. [Fed. R. Civ. P. 24(a)] Under the supplemental jurisdiction statute, there appears to be no supplemental jurisdiction for claims by original plaintiffs against intervening defendants or for claims by intervening plaintiffs. Such claims may proceed only if there were an independent basis of jurisdiction, that is, diversity or federal question jurisdiction.

---

#### EXAMPLE

A stockholder from State A holds stock in a corporation from State B worth \$100,000. The stockholder's partner, also from State A, claims that the stock was purchased as part of an agreement and thus should have been issued in both the stockholder's and partner's name. The partner brings an action in federal court to have the stock reissued in both names. If the stockholder

intervenes as a plaintiff, he may not use supplemental jurisdiction to support his claims. Similarly, if he intervenes as a defendant, the partner may not use supplemental jurisdiction to support the partner's claim against the stockholder. Note, however, that the corporation could use supplemental jurisdiction to assert claims against the stockholder.

#### c. Permissive Intervention

Permissive intervention may be permitted in the court's discretion when the intervenor's action and the main action have a claim or defense involving a **common question of law or fact**. The claim by a permissive intervenor must invoke either diversity of citizenship or federal question jurisdiction. [Fed. R. Civ. P. 24(b)]

#### EXAMPLE

A pedestrian from State A was injured when she was hit by a work truck driven by a citizen of State B and owned by a corporation from State B. The truck was insured by an insurance company from State C. An issue in the case is whether the truck driver was in the course of his employment at the time of the accident. If the truck driver was not driving the truck in the course of his employment, the insurance company would not be required to pay any claim arising out of the accident. Accordingly, the insurance company sues the truck driver and corporation in federal court for a declaratory judgment that the accident is outside of the policy. The pedestrian should be allowed to intervene, as the common question of whether the truck driver was in the course of employment at the time of the accident is shared between her action and the insurance company's action. Note that here, presence as either a defendant or a plaintiff would not destroy diversity, and the amount in controversy would be the same in both actions.

#### d. Substitution of Parties

Substitution involves changes in parties to a lawsuit necessitated by death, incompetency, etc., of an original party after an action has been commenced. [Fed. R. Civ. P. 25] The citizenship of the substituting party is disregarded; that of the original party controls. Substitution should be distinguished from an **amendment** that allows "replacement" of an original party by the party in whom or against whom the action properly lies. A "replacement" party must be diverse to the party or parties on the opposing side.

#### EXAMPLE

A v. B. A dies and the administrator of his estate is substituted as plaintiff. Jurisdiction is not destroyed even though B and the administrator are co-citizens. However, if A sues B and subsequently discovers that C—not B—is the proper defendant, an amendment to the complaint by which B is replaced by C must show that diversity exists between A and C.

**e. Third-Party Practice—Impleader**

A third-party claim is the joinder by the defendant in the original action (who is usually called the third-party plaintiff) of another person not originally a party to the action (who is called the third-party defendant). [Fed. R. Civ. P. 14] The impleader claim asserts that the third-party defendant is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant. In other words, an impleader claim is for indemnity or contribution.

---

**EXAMPLE**

P sues D for \$500,000 for personal injuries allegedly inflicted by joint tortfeasors D and X. Applicable law provides that joint tortfeasors have a right of contribution against each other. D may implead X into the pending case. D is seeking to deflect her liability on P's claim, in part, to X. (If X owed D indemnity for some reason, then D could implead X to deflect her entire liability on the underlying claim to X.)

---

After the third-party defendant is impleaded, he may assert a claim against the plaintiff in the pending case if the claim arises from the same transaction or occurrence as the underlying suit. In addition, after the third-party defendant is impleaded, the plaintiff may assert a claim against him if it arises from the same transaction or occurrence as the underlying suit.

**1) Subject Matter Jurisdiction Required**

Of course, every claim asserted in federal court must have a basis of subject matter jurisdiction.

---

**EXAMPLES**

1) P, a citizen of Illinois, sues D, a citizen of Wisconsin, asserting a state law claim of more than \$75,000. Thus, the case invokes diversity of citizenship jurisdiction and is properly brought in federal court. Now D impleads X, who is also a citizen of Illinois, on an indemnity claim of more than \$75,000. That claim invokes diversity of citizenship jurisdiction, because it is asserted by a citizen of Wisconsin (D) against a citizen of Illinois (X) and exceeds \$75,000. The fact that P is also a citizen of Illinois is irrelevant; the claim is not by or against her, so her citizenship does not affect the impleader claim. If P wanted to assert a claim against X in this situation, however, there would not be diversity because P and X are co-citizens of Illinois. In addition, the claim would not invoke supplemental jurisdiction, because in diversity of citizenship cases, the supplemental jurisdiction statute cannot be used to override the complete diversity rule. Thus, unless the claim by P against X invoked federal question jurisdiction, it could not be asserted in the pending case; it would have to be asserted in state court.

2) P, a citizen of Alabama, sues D, a citizen of Maine, asserting a state law claim of more than \$75,000. Thus, the case invokes diversity of citizenship jurisdiction and is properly brought in federal court. Now D impleads X, who is also a citizen of Maine, on a state law contribution claim. The impleader claim does not invoke diversity of citizenship jurisdiction, because it is asserted by a citizen of Maine (D) against another citizen of Maine (X). It does not invoke federal question jurisdiction because it is based on state law. The claim invokes the ancillary form of supplemental jurisdiction, however, because it arises from a common nucleus of operative fact as the underlying case and is asserted by the defendant, not the plaintiff, thus avoiding the restriction on the use of supplemental jurisdiction in 28 U.S.C. section 1337(b).

#### f. Cross-Claims

A party may assert a claim in a pending case against a co-party, but only if the claim arises from the ***same transaction or occurrence*** as the underlying dispute. [Fed. R. Civ. P. 13]

#### EXAMPLE

A homeowner sues a carpenter and a plumber in federal court. A claim by the plumber against the carpenter (or by the carpenter against the plumber) that arises from the same transaction or occurrence as the underlying case would be a cross-claim.

#### 1) Subject Matter Jurisdiction Required

Cross-claims, like all claims in federal court, must invoke subject matter jurisdiction. Therefore, after determining that a cross-claim would be filed, assess whether that claim could invoke diversity of citizenship or federal question jurisdiction. If so, the claim may be asserted in federal court.

**However**, if a cross-claim does not invoke diversity of citizenship or federal question jurisdiction, the cross-claim could nonetheless be asserted in federal court through supplemental (ancillary) jurisdiction.

#### EXAMPLE

A homeowner from State A validly sues a carpenter and a plumber, both of whom are from State B, in federal court. If the plumber has a cross-claim for \$25,000 against the carpenter, it may be asserted in federal court under the court's supplemental jurisdiction, even though the amount in controversy is not more than \$75,000 and the parties are from the same state.

### C. JURISDICTIONAL AMOUNT: IN EXCESS OF \$75,000

Actions brought in a federal court under the diversity statute must meet the jurisdictional amount requirement. The matter in controversy must be ***in excess of \$75,000***,

exclusive of interest and costs. [28 U.S.C. §1332] The amount is determined from what is claimed in the complaint, disregarding potential defenses or counterclaims. Usually, all that is necessary is a **good faith allegation** that the amount of the damages or injuries in controversy **exceeds**, exclusive of interest and costs, the sum of \$75,000. Good faith means that there must be a legally tenable possibility that recovery will exceed the jurisdictional amount. The complaint can be dismissed only if it appears there is no legal possibility of a recovery exceeding the jurisdictional amount. Jurisdiction is not retroactively defeated by the fact that the amount actually recovered is less than the jurisdictional amount.

## 1. What Is “In Controversy”?

### a. Collateral Consequences of the Judgment

Does the collateral effect of the judgment sought by the plaintiff bring into controversy the value of other claims that may be governed by the judgment? The Supreme Court has held that the collateral effects of a judgment may **not** be considered.

---

#### EXAMPLE

An insured from State A asserts a claim for installments due under a disability policy for the past year totaling \$50,000 against an insurance company from State B. The insured is due another \$80,000 over the next year. Only the \$50,000 amount is considered, even though the judgment may control the insured's rights to payment of the \$80,000.

#### COMPARE

Same facts as above, but if the insurance company sues to cancel the contract for fraud, the value of the entire contract, \$130,000, is brought into controversy, and the amount in controversy is satisfied.

---

### b. Interest and Costs

The statute excludes interest and costs in determining the jurisdictional amount. However, attorneys' fees that are recoverable by contract or by statute are considered part of the matter in controversy rather than as costs. Similarly, interest that constitutes a part of the claim itself, as distinguished from interest payable by virtue of a delay in payment, is part of the jurisdictional amount.

---

#### EXAMPLE

Plaintiff sues on a three-year note with face value of \$70,000 and accrued interest of \$10,500. Since the interest on the note is part of the claim, the jurisdictional amount is satisfied. [See, e.g., *Brainin v. Melikian*, 396 F.2d 153 (3d Cir. 1968)]

**COMPARE**

Plaintiff sues on a one-year note with the face value of \$60,000 and accrued interest of \$10,000. But the defendant did not pay immediately, and additional interest of \$10,000 accrued between maturity and filing. The additional interest after maturity is not part of the claim.

**c. Equitable Relief**

There may be difficulty calculating an amount in controversy for a claim for equitable relief, given that the claimant does not seek money damages. For example, suppose P sues D for an injunction ordering D to remove part of D's house that blocks P's view. What is the value of the injunction and, therefore, the claim? Some courts look at the issue from the **plaintiff's viewpoint**, and ask what the value of the harm caused by the blocked view is. Other courts look at the issue from the **defendant's viewpoint**, and ask what it would cost the defendant to comply with the injunction if it were ordered. Some courts conclude that the amount in controversy requirement is satisfied if the amount under **either** test—plaintiff's viewpoint or defendant's viewpoint—exceeds \$75,000. On an essay, discuss both viewpoints; on the MBE, consider whether jurisdiction would be valid under either viewpoint before answering.

**d. Punitive Damages**

If a punitive damage claim is permitted under state substantive law, it may be used in making the dollar amount requirement because there is “no legal certainty” that the amount will not be recovered.

**2. Aggregation of Separate Claims****a. One Plaintiff Against One Defendant**

For purposes of meeting the jurisdictional amount, the plaintiff may aggregate all her claims against a single defendant. This aggregation is permitted regardless of whether the claims are legally or factually related to each other. Aggregation has nothing to do with supplemental jurisdiction.

**EXAMPLE**

A plaintiff from State A has a breach of contract claim for \$50,000 and a tort claim for \$50,000 against a defendant from State B. He may add those two claims together to satisfy the amount in controversy requirement.

**b. One Plaintiff Against Several Defendants**

A plaintiff who has an action against several defendants cannot aggregate claims based on **separate** liabilities. However, there is **no aggregation problem** if the plaintiff asserts a **joint** claim against multiple defendants. With a joint

claim, courts look at it as one claim, and look to the total value of the claim to determine whether the amount in controversy is satisfied.

---

**EXAMPLE**

A homeowner contracts with a roofer to put a new roof on his house in the summertime and a home improvement contractor to remodel his kitchen in the fall. The contracts for each are \$50,000. Turns out, the roofer installs the roof poorly, and the contractor never shows up after accepting a \$30,000 advance payment. The homeowner may not aggregate the two claims. They are separate claims.

**COMPARE**

A pedestrian is hospitalized when he is injured by two drag racers. The hospital bills run \$80,000. The pedestrian sues the drag racers in federal court. Here, the amount in controversy is satisfied because the claim is based on ***joint liability***. Either drag racer may be held liable for the total amount of the claim.

---

**c. Several Plaintiffs Against One Defendant**

Several plaintiffs can aggregate their claims only where they are seeking “to enforce a single title or right in which they have a common or undivided interest . . . .” If the claims are separate and distinct, aggregation may not be used.

---

**EXAMPLE**

Two investors own Blackacre, an empty lot worth \$100,000, as an investment as joint tenants. They bring a quiet title action against a neighbor in federal court. The amount in controversy requirement is met, because joint tenancies are undivided interests in the whole land, so we use the total value of the land.

**COMPARE**

A driver is in a collision with a city owned bus. Two passengers were injured. One passenger has a claim of \$50,000, the other has a claim worth \$30,000. Because their claims are separate and distinct from one another, aggregation is not allowed and the amount in controversy is not satisfied.

---

**d. Significance in Class Actions**

This rule has special importance in class actions, in which the rule is that the claims of the class members cannot be aggregated if their rights are “separate” rather than “joint” or “common.” One class representative’s claim must exceed \$75,000, and the court will have supplemental jurisdiction over the claims that do not exceed \$75,000. [Snyder v. Harris, 394 U.S. 332 (1969)]

**3. Supplemental Jurisdiction over Claims Not Exceeding \$75,000 in Diversity Cases**

A claim by a joined plaintiff (a co-plaintiff) that does not meet the amount in controversy requirement for diversity of citizenship jurisdiction may use supplemental

jurisdiction if the claim arises from a common nucleus of operative fact as the claim that invoked diversity of citizenship. However, in such a case, the supplemental jurisdiction **cannot** be used to override the complete diversity rule as between the co-plaintiff and defendant(s). [Exxon Mobil Corp. v. Allapattah Services, 545 U.S. 546 (2005)]

#### **EXAMPLE**

A plaintiff from California asserts a state-law claim for \$100,000 against a defendant from Arizona. This claim may use diversity of citizenship jurisdiction, as it is between a citizen of California and a citizen from Arizona, and the amount in controversy exceeds \$75,000. In the same case, a co-plaintiff, who is also from California, wants to assert a state-law claim against the same defendant for \$50,000 that arises from a common nucleus of operative fact as the first claim. The claim by this co-plaintiff cannot use diversity of citizenship jurisdiction because it does not exceed \$75,000. Nonetheless, the claim by the co-plaintiff can be heard in federal court under supplemental jurisdiction.

#### **COMPARE**

A plaintiff, a citizen of California, asserts a claim for \$100,000 against a defendant, a citizen of Arizona. That claim invokes diversity of citizenship jurisdiction. In the same case, a co-plaintiff, a citizen of Arizona, wants to assert a claim against the same defendant for \$50,000 in the same case. The claims by plaintiff and co-plaintiff again arise from a common nucleus of operative fact. The claim by co-plaintiff cannot invoke diversity of citizenship jurisdiction because it is by a citizen of Arizona against a citizen of Arizona and the amount in controversy is not sufficient. Here, the co-plaintiff cannot use supplemental jurisdiction because it cannot be used to override the complete diversity requirement. Thus, that claim may be asserted only in state court.

### **4. Counterclaims**

A defendant's counterclaim [see Fed. R. Civ. P. 13] cannot be combined with the plaintiff's claim to reach the jurisdictional amount; for example, if the plaintiff claims \$20,000, the amount in controversy is not satisfied even if the defendant counter-claims for \$100,000. Does a counterclaim itself have to meet the requirements of the jurisdictional amount?

#### **a. Compulsory Counterclaim Need Not Meet Jurisdictional Amount**

A compulsory counterclaim (arising out of the **same** transaction or occurrence) does not need to meet the jurisdictional amount requirement. The court has **ancillary** (supplemental) jurisdiction over such a counterclaim just as it does over a third-party claim under Rule 14 impleader.

#### **EXAMPLE**

A driver from Colorado is in an accident with a trucker from Illinois. The driver sues the trucker in federal court for \$100,000 to cover his medical bills. The trucker's truck was damaged to the tune of \$10,000 in the accident. The coun-

terclaim arises out of the same transaction or occurrence, so the trucker **must** assert this claim in federal court in the same action. He may use supplemental jurisdiction to have his claim heard in federal court, because the claim, by necessity, arises out of a common nucleus of operative fact, and the claim is asserted by a party other than the plaintiff.

**b. Permissive Counterclaim Must Meet Jurisdictional Amount**

A defendant's permissive counterclaim (arising out of a **completely unrelated** transaction) must have an independent jurisdictional basis, and thus **must meet the jurisdictional amount** requirement because the common nucleus test is not satisfied. A growing body of case law, however, holds that supplemental jurisdiction is available if there is some sort of factual relationship between the two claims.

**EXAMPLE**

A driver from Colorado is in an accident with a trucker from Illinois. The driver sues the trucker in federal court for \$100,000 to cover his medical bills. The trucker's truck was damaged to the tune of \$10,000 in the accident. By coincidence, the trucker also has a separate and distinct breach of contract claim against the driver for \$50,000. There is no supplemental jurisdiction over the contract claim.

**c. No Removal to Federal Court Based on Counterclaim**

As will be discussed later, if a plaintiff brings a case in state court that could have been brought in federal court, the defendant typically has a right to remove the case to federal court. However, the same is not true regarding plaintiffs and counterclaims: A plaintiff who claims \$75,000 or less in a state court action who is met with a counterclaim for more than \$75,000 may not remove the suit to federal court, regardless of whether the counterclaim is compulsory or permissive, because removal is permitted only to defendants. The weight of authority also holds that in a situation where the plaintiff has not met the jurisdictional amount, the **defendant** who must assert a compulsory counterclaim in the state suit **may not remove** the action, even though the counterclaim is over \$75,000 and there is complete diversity. Thus, a plaintiff with a small claim can require a defendant with a large claim to litigate it in state court simply by being the first to file. *But note:* Even though this is the **traditional rule**, there is a **trend allowing removal**. If you encounter such a question on the exam, use the traditional rule, but, on an essay, note the trend for allowing removal.

**EXAMPLE**

A trucker from Illinois is in an accident with a driver from Colorado. The trucker sues the driver in state court for \$10,000. The driver has medical bills totaling \$100,000. Under the traditional rule, the driver may not remove the case to federal court.

## D. **ERIE DOCTRINE AND THE LAW APPLIED UNDER DIVERSITY JURISDICTION**

A federal court, in the exercise of its diversity jurisdiction, is required to apply the **substantive law of the state** in which it is sitting, including that state's conflict of law rules. [Erie Railroad v. Tompkins, 304 U.S. 64 (1938); Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941)] However, the federal courts apply **federal procedural law**.

### 1. **Federal Statutes or Federal Rules of Civil Procedure**

To determine whether federal law should be applied, the first question to ask is whether there is a federal law (such as a statute, Federal Rule of Civil Procedure) on point. If there is, the federal statute or federal rule will apply, provided that it is valid. (Since the Supreme Court reviews and sends proposed rules to Congress prior to enactment, it is very unlikely that a Federal Rule would be held invalid.) Of course, if there is a federal constitutional provision (for example, a right to jury trial in cases over \$20), it applies.

---

#### **EXAMPLES**

1) Federal Rule 4 permits substituted service of process. Suppose that state law (of the state in which the federal court sits) does not permit substituted service. The court will apply the Federal Rule, because it is on point and is valid. A Federal Rule of Civil Procedure is valid if it is “arguably procedural.” [Hanna v. Plumer, 380 U.S. 460 (1965)]

2) In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. 393 (2010), a plaintiff brought a diversity jurisdiction class action under a New York law for recovery of interest on claims paid late by insurance companies. A New York statute would have denied class action status to claims seeking such recovery. A majority of the Court held that Federal Rule of Civil Procedure 23 governed regarding class action status and refused to apply the New York statute. Under the Rules Enabling Act, a Federal Rule is valid if it deals with “practice or procedure” and does not “abridge, enlarge, or modify” a substantive right, and concluded that Rule 23 is valid.

---

#### a. **Caution**

Sometimes it is difficult to determine whether a federal statute or rule is on point. For example, Federal Rule 3 provides that a case is commenced when the complaint is filed. Many people thought that the rule thus was a directive that the statute of limitations would be tolled from the date of filing the complaint. The Supreme Court held, however, that Rule 3 did not address tolling at all, and thus did not constitute a federal directive on the tolling question. [Walker v. Armco Steel, 446 U.S. 740 (1980)]

## 2. If There Is No Federal Statute or Rule on Point, Is the Issue Substantive or Procedural?

If there is no federal statute or rule on point, can a federal judge refuse to follow state law on a particular issue? The answer depends on whether the law on that issue is substantive or procedural. If it is a matter of substance, the federal judge must follow state law in a diversity case. If it is a matter of procedure, the federal judge may ignore state law. Most questions will deal with the clearly established situations discussed below.

### a. Some Situations Are Clearly Established

In some instances, the characterization as substance or procedure is well established. For example, the Supreme Court has established that **statutes of limitations and rules for tolling statutes of limitations** are substantive for *Erie* purposes; therefore, a federal judge in a diversity case must follow state law on those issues. [Guaranty Trust Co. v. York, 326 U.S. 99 (1945)] **Choice of law rules** are also substantive for *Erie* purposes, and a federal judge in a diversity case must follow state law on that issue as well. [Klaxon v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941)] Finally, of course, **elements of a claim or defense** are substantive. If tested, most MBE questions should come from these clearly established areas.

*Note:* There can be two issues presented in a conflict of laws problem. The first issue involves determining **whether federal or state law** applies. The second issue involves determining **which state's laws apply**. Both questions are often resolved using “substantive” and “procedural” language, but a determination that a law is “substantive” for the federal vs. state question does **not** mean that it **has to be** “substantive” for the state vs. state question.

---

### EXAMPLE

A driver from State A is injured in an automobile accident in State A by a trucker from State B. The driver files a state tort-law claim in federal court for \$80,000 against the trucker in State B. Assume that the action would be barred by one of the state's statute of limitation, but not the other. Which statute should the federal court in State B apply? As explained above, because the issue is “substantive,” the federal court must apply State B law, **including State B's choice of law rules**, and not federal law. But you do **not** automatically apply State B's statute of limitation. You have to use State B's “substantive” choice of law rules to determine which statute of limitation actually applies. State B law might follow the traditional approach, call the issue “procedural,” and tell you to apply the State B statute. Or State B might follow another approach and apply State A's statute, which a federal court in State B would have to follow. If all this confuses you, just remember that a federal court in State B will do whatever a state court in State B would do on “substantive” issues.

### b. Law Is Unclear in Other Situations

Outside these areas, when there is no federal directive on point, it is often difficult to determine whether an issue is substantive or procedural for *Erie* purposes. The Supreme Court has given different “tests” at different times on this point, and has failed to integrate the tests comprehensively. One such test is **outcome determination**, which holds that an issue is substantive if it substantially affects the outcome of the case. [Guaranty Trust Co. v. York, *supra*] Another test is **balance of interests**, in which the court weighs whether the state or federal judicial system has the greater interest in having its rule applied. [Byrd v. Blue Ridge Electric Cooperative, Inc., 356 U.S. 525 (1958)] Yet another test is **forum shopping deterrence**, which directs that the federal judge should follow state law on the issue if failing to do so would cause litigants to flock to federal court. [Hanna v. Plumer, *supra*] If you get a question on an “unclear” area at all, it will most likely be on an essay. Just discuss each approach and come to some reasonable conclusion.

### 3. Statutes Involving Both Substance and Procedure

Sometimes, a state statute or rule may be both substantive **and** procedural. In one case, the state tort reform law relaxed the standard for granting a new trial, making it easier to grant a new trial than under the basic federal standard. Also, the state **appellate** court was charged with the responsibility to consider whether a new trial should be ordered. In a diversity case under this state law, the standard for granting a new trial was held to be substantive, so the federal court had to apply the state standard for granting a new trial. However, the requirement that the appellate court consider whether a new trial should be ordered was held to be procedural, so a federal **trial** court would determine whether a new trial should be ordered, using the aforementioned state standard, rather than an appellate court. [Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996)—in diversity case, federal trial court applied New York “excessive damages” standard for new trial rather than federal “shock the conscience” standard]

### 4. Interpreting State Law

The federal court is bound to apply the substantive state law that would be applied by the highest court of the state. If the state courts have not decided the issue that is before the federal court, or if the decisions on point are old and no longer current with the decisions of other jurisdictions, the federal court may consider the law of other jurisdictions in reaching its decision. However, the focus of the federal court is to **determine what decision the highest court of the state would reach** if confronted with the issue.

#### a. De Novo Review of District Court’s Decision

On appeal, the federal appellate court reviews the federal trial judge’s decision as to state law **de novo**. [See *Salve Regina College v. Russell*, 499 U.S. 225 (1991)]

**b. Subsequent State Court Decisions**

If the highest state court renders a decision on an issue after the federal court has made its determination, the decision of the district court may be changed to conform to the new decision of the highest state court until the disposition of the final federal appeal. [See *Thomas v. American Home Products, Inc.*, 519 U.S. 913 (1996)]

## E. FEDERAL COMMON LAW

**1. When Federal Courts Create Federal Common Law Rules**

Although *Erie* held that federal courts cannot create “federal general common law” rules to govern state-law claims, *Erie* did not change the authority of federal courts to create “federal common law” (that is, to rely on federal precedent).

**a. Interpretation of Federal Statute or Constitution**

The federal courts create substantive rules of federal common law when interpreting the meaning of federal statutes or the federal Constitution.

**b. Creating Rules to Fill Gaps in Federal Regulatory Schemes**

The federal courts may also create substantive rules of federal law based on the determination that Congress has expressly or by implication authorized the federal courts to do so for the purpose of filling in gaps or silences in a federal regulatory statute.

**1) Formulating Uniform Federal Standard**

In some instances, the federal courts have determined that a uniform judge-made standard is necessary as a matter of federal common law. Examples of such cases include suits involving the rights and obligations of the United States, admiralty cases, border disputes between states, and disputes involving relations with foreign states. But ordinarily, in the absence of congressional authorization to formulate substantive rules of decision, federal common law will not be created outside these areas.

---

**EXAMPLE**

Even though no federal statute supplies a rule of decision, *Clearfield Trust Co. v. United States*, 318 U.S. 744 (1943), held that rules for the negotiability of checks payable by the United States should be governed by uniform judge-made federal law rather than by state law.

**2) Borrowing State Standard**

When borrowing a legal rule from state-law authority, a federal court may select a rule that is used by a majority of state courts. Or, if there is little need for federal uniformity, and if the parties might expect that state law

would apply, then the borrowed rule may be the one that would be applied under the law of the state forum.

**EXAMPLE**

In *De Sylva v. Ballentine*, 351 U.S. 570 (1956), the Court held that the meaning of the term “children” in the federal copyright statute should be defined in accordance with ordinary usage under state law, and that it would be up to the federal courts to determine which state’s definition would be applicable.

**2. When Federal Courts Create Federal Implied Rights of Action**

In some decisions, federal courts have exercised the authority to provide judicial recognition for “implied” remedies in the form of causes of action that are not specified in federal statutes or federal constitutional provisions that establish particular rights.

**a. Implied Right of Action Based on Federal Statute**

Initially, federal courts looked to several factors in determining whether an unspecified remedy could be viewed as “implied” in a statute. These factors looked to the questions of whether the plaintiff belonged to a class for whose special benefit the statute was enacted, whether evidence of legislative intent supported an implied remedy, whether such a remedy would be consistent with the underlying purposes of the legislative scheme, and whether a remedy should not be implied because the cause of action was one traditionally relegated to state law. This approach led to the recognition, for example, of an implied cause of action under the nondiscrimination provision of Title IX (a law prohibiting discrimination on the basis of gender in schools receiving federal funds).

**1) Need for Affirmative Congressional Intent**

More recently, federal courts have required a showing of affirmative congressional intent for implied remedies in federal statutes, the absence of which led to the judicial rejection of an implied cause of action under the nondiscrimination provisions of Title VI of the Civil Rights Act.

**b. Implied Right of Action Based on Constitution**

The federal courts have recognized several implied causes of action for damages against federal officials for the violation of particular constitutional rights. These rights include the Fourth Amendment protection from unreasonable searches and seizures, the Equal Protection right to nondiscrimination in employment on the basis of gender under the Fifth Amendment, and the right of a prisoner to not be deprived of medical treatment under the Eighth Amendment’s prohibition on cruel and unusual punishment. In other cases, federal courts have declined to recognize additional implied remedies based on the existence of alternate federal statutory remedies. Note that the violation of federal constitutional rights by a federal official is not cognizable under

42 U.S.C. section 1983 (which provides for a cause of action for constitutional deprivations performed under color of law because section 1983 applies only to defendants who are state or local officials).

## F. EXCEPTIONS TO DIVERSITY OF CITIZENSHIP JURISDICTION

For historical reasons, even though the requirements for diversity of citizenship jurisdiction are satisfied, federal courts will not exercise jurisdiction over domestic relations or probate proceedings.

### 1. Domestic Relations

The federal court will not take jurisdiction over actions “involving the issuance of a divorce, alimony or child custody decree.” [Akenbrandt v. Richards, 504 U.S. 689 (1992)] Note that this exception is quite narrow. Federal courts may maintain actions upon state court decrees, such as those for alimony. They also may hear cases involving intra-family torts. They refuse only cases involving issuance of decrees of divorce, alimony, or child custody.

### 2. Probate Proceedings

Federal courts will not entertain cases to probate a decedent’s estate. To fall within this exception to diversity of citizenship jurisdiction, however, the claim asserted **must involve actual probate or annulment of a will or seek to reach property in the custody of a state probate court.** [Marshall v. Marshall, 547 U.S. 293 (2006)]

#### EXAMPLE

The federal court had jurisdiction over a claim for damages for alleged tortious interference with testator’s efforts to create a trust benefiting the plaintiff (who was Anna Nicole Smith). [Marshall v. Marshall, *supra*]

## G. MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT

The Multiparty, Multiforum Trial Jurisdiction Act applies to accidents meeting the statutory definition. The principal points are these:

### 1. Requirements

#### a. The Action

The Act grants jurisdiction to federal district courts of civil actions that (1) arise “from a **single accident**, (2) **where at least 75 natural persons have died** in the accident (3) **at a discrete location.**” [28 U.S.C. §1369(a)]

#### b. Minimal Diversity

Such jurisdiction attaches based on **minimal diversity of citizenship**; thus, all that is required is that at least one plaintiff be of diverse citizenship from at least one defendant.

c. **One Additional Condition**

In addition, however, **one of three other conditions** must be satisfied: either (1) a defendant resides in a different state from the place where a substantial part of the accident took place (even if the defendant also resides where the accident took place); (2) any two defendants reside in different states; or (3) substantial parts of the accident took place in different states.

---

**EXAMPLE**

A popular nightclub frequented by tourists and located in Massachusetts burns down. Eighty patrons from various states, including some from Massachusetts, are killed in the fire, and another 40 are injured. The owners of the nightclub are from Massachusetts and New York. Jurisdiction would be authorized even though some plaintiffs and the defendant are from Massachusetts.

d. **Limitation on Jurisdiction**

The federal court must abstain from hearing a case that meets the criteria in a. - c. above if (1) the substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens; and (2) the claims asserted by the plaintiffs will be governed by the laws of that state.

---

**EXAMPLE**

Same facts as above, except now 115 of the potential plaintiffs are from Massachusetts, and the club is owned only by a citizen of Massachusetts. The limitation would arguably apply, given the Massachusetts connection and the fact that Massachusetts law will likely apply.

**2. Intervention**

Anyone “with a claim arising from the accident” is **permitted to intervene** as a plaintiff, even if she could not have maintained an action in the district where the case is pending. [28 U.S.C. §1369(d)]

---

**EXAMPLE**

Same facts as the first example. An injured patron from Massachusetts with a claim less than \$75,000 would be able to intervene as a plaintiff in the case.

**3. Service of Process**

Finally, the Act provides for **nationwide service of process**. [28 U.S.C. §1697]

## **IV. FEDERAL QUESTION JURISDICTION**

**A. INTRODUCTION**

It is difficult to formulate a summary of the case holdings as to when an action “arises under” federal law. The best one can do, perhaps, is the following: A case arises under

federal law if the plaintiff is alleging a right or interest that is substantially founded on federal law, which consists of federal common law, federal constitutional law, federal statutory law, treaty law, and federal administrative regulations. For exam purposes, there is no amount in controversy requirement for federal question cases.

## B. FEDERAL QUESTION MUST APPEAR IN THE COMPLAINT

The federal question must appear as part of the *plaintiff's cause of action* as set out in a well-pleaded complaint. It is therefore sometimes necessary to determine whether certain allegations are proper in pleading the cause of action, and whether the federal element is essential to the plaintiff's case.

### 1. Defendant's Answer or Defense Is Irrelevant

The content of the defendant's answer is not relevant; the existence of a defense based on federal law will not give federal question jurisdiction. Likewise, the court may not look to a counterclaim asserted by the defendant to determine whether the plaintiff's complaint states a federal question claim. [Holmes Group, Inc. v. Vornado Air Circulation System, Inc., 535 U.S. 826 (2002)]

### 2. Anticipation of a Defense

Similarly, a complaint does not create federal question jurisdiction if it alleges federal issues only in anticipation of some defense.

---

#### EXAMPLE

A sues B for specific performance of a contract and alleges that B's refusal to perform is based on B's erroneous belief that federal law prohibits his performance. No federal question jurisdiction exists because the federal question presented by the plaintiff's complaint is merely in anticipation of B's defense. [Louisville & Nashville Railroad v. Mottley, 211 U.S. 149 (1908)]

## C. IMPLIED FEDERAL RIGHT OF ACTION

It is not essential that the federal statute expressly provide for a civil cause of action for an alleged violation. Thus, federal question jurisdiction was held to exist in an action involving an alleged violation of the Fourth and Fifth Amendments [Bell v. Hood, 327 U.S. 678 (1946)] and an alleged violation of the Securities Exchange Act of 1934 [J. I. Case v. Borak, 377 U.S. 426 (1964)], although neither the Constitution nor the act involved created a "remedy" for the wrongs complained of. However, not all federal provisions creating duties are held to create an implied private right of action. [Cort v. Ash, 422 U.S. 66 (1975)]

## D. FEDERAL CORPORATIONS

Federal question jurisdiction does not arise merely from the fact that a corporate party was incorporated by an act of Congress *unless* the United States **owns more than one-half** of the corporation's capital stock, in which case it is treated as a federal agency that can sue or be sued on that basis in federal court. [28 U.S.C. §1349]

## E. SUPPLEMENTAL (PENDENT) JURISDICTION OVER STATE CLAIMS

As previously discussed (*supra*, III.B.5.), claims sometimes can invoke supplemental jurisdiction when the supplemental claim arises from a common nucleus of operative fact as the original claim, whether the case got into federal court by diversity of citizenship or federal question jurisdiction. Supplemental jurisdiction in federal question cases is discussed here.

### 1. Supplemental (Pendent) Claims

In some cases, the plaintiff will have both federal and state claims against the defendant. Although there may be no diversity, the federal court has **discretion** to exercise supplemental (pendent) jurisdiction over the claim based on state law if the two claims “derive from a common nucleus of operative fact” and are such that a plaintiff “would ordinarily be expected to try them all in one judicial proceeding.” [United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966)] Essentially, this means that the two claims must arise from the same transaction or occurrence. The supplemental jurisdiction statute [28 U.S.C. §1337(a)] adopts this standard for the grant of supplemental jurisdiction.

#### EXAMPLE

P, a citizen of Arkansas, asserts two claims against D, who is also a citizen of Arkansas, in federal court. Importantly, both claims arise from a common nucleus of operative fact. Claim #1 is for violation of a federal statute, and thus invokes federal question jurisdiction. Claim #2 is based on state law, and thus does not invoke federal question jurisdiction (because it is based on state, not federal, law). Also, Claim #2 does not invoke diversity of citizenship (because P and D are citizens of the same state). Nonetheless, Claim #2 invokes supplemental jurisdiction because it arises from a common nucleus of operative fact as the claim that invoked federal question jurisdiction.

#### a. Effect of Dismissal of Federal Claim on Supplemental (Pendent) Claim

The court may exercise supplemental (pendent) jurisdiction over the state claim even though the federal claim is dismissed on the merits. However, the state claim should probably also be dismissed (without prejudice) if the federal claim is dismissed before trial. Indeed, the supplemental jurisdiction statute provides that the court may refuse supplemental jurisdiction if the federal claim is dismissed, if the state claims are complex or novel, or if the state claims predominate substantially over federal claims.

### 2. Pendent Parties

Pendent party jurisdiction is relevant in cases in which the plaintiff sues more than one defendant, there is federal jurisdiction over the claim against one defendant, and the claim against the second defendant does not invoke federal question or diversity of citizenship jurisdiction. Under the supplemental jurisdiction statute,

the claim against the second defendant might invoke supplemental jurisdiction if it arises from a common nucleus of operative fact as the claim against the first defendant. Pendent party jurisdiction also can arise when multiple plaintiffs assert claims against one defendant.

---

#### EXAMPLES

- 1) A school employee from State A asserts a section 1983 claim against a school district and joins a transactionally related state law (not federal question) claim against the principal. The school employee and the principal are citizens of the same state. The claim against the principal cannot invoke federal question jurisdiction (because it is based upon state law) and cannot invoke diversity of citizenship jurisdiction (because the school employee and the principal are citizens of the same state). The claim against the principal falls within the court's supplemental jurisdiction, however, because it arises from a common nucleus of operative fact as the claim that invoked federal question jurisdiction and is asserted by the plaintiff in a federal question case.
  - 2) The estate of a husband asserts a section 1983 claim for violation of his constitutional rights against the sheriff arising out of his arrest and death while in custody. In the same case, the wife asserts a state law claim against the sheriff based on loss of consortium. The wife and sheriff are citizens of the same state. The claim by the wife falls under the court's supplemental jurisdiction because it arises from a common nucleus of operative fact as the federal question claim by the estate against the sheriff.
- 

## F. SPECIFIC STATUTORY GRANTS

### 1. Exclusive Jurisdiction

Congress has expressly provided that the jurisdiction of the federal courts shall be exclusive of state courts in:

- a. **Bankruptcy Proceedings** [28 U.S.C. §1334]

- b. **Patent and Copyright Cases** [28 U.S.C. §1338]

- c. **Many Cases Where United States Is Involved**

Cases involving fines, penalties, or forfeitures under the laws of the United States; crimes against the United States; tort suits against the United States; or customs review. (Because of the doctrine of sovereign immunity, there is no jurisdiction in the courts to hear lawsuits against the United States unless the United States has consented to be sued.)

- d. **Foreign State—Caveat**

28 U.S.C. section 1441(d) permits a foreign state (or agency thereof), if sued in state court, to remove the action to federal court.

- e. **Postal Matters** [28 U.S.C. §1339]
- f. **Internal Revenue** [28 U.S.C. §1340]
- g. **Securities Exchange Act** [15 U.S.C. §78aa]

## V. VENUE

### A. SUBJECT MATTER JURISDICTION DISTINGUISHED

Subject matter jurisdiction and venue are very often confused. Subject matter jurisdiction is the **power** of the court to adjudicate the matter before it, whereas venue relates to the **proper geographic district** in which to bring the action. [28 U.S.C. §1390] Subject matter jurisdiction is a question of power or authority; venue is a question of geography. Subject matter jurisdiction cannot be conferred by agreement; venue can be. A court can have subject matter jurisdiction without being a proper venue.

#### EXAMPLE

Smith, a citizen of Georgia, brings a personal injury suit arising in Florida against Jones, a citizen of New York. Suit is brought in the federal district court in California. The amount in controversy exceeds \$75,000. Under section 1332, the district court has diversity jurisdiction, but venue is improper and the case is subject to transfer or dismissal.

### B. GENERAL RULES

#### 1. General Rules for Most Civil Actions

Venue in civil actions in the federal courts is proper in:

- (i) A judicial district in which **any defendant resides**, if all defendants are residents of the state in which the district is located;
- (ii) A judicial district in which **a substantial part of the events or omissions giving rise to the claim occurred**, or **a substantial part of property that is the subject of the action is situated**; or
- (iii) If there is no district anywhere in the United States which satisfies (i) or (ii), a judicial district in which **any defendant is subject to the court's personal jurisdiction** with respect to the action.

[28 U.S.C. §1391] Note: Unlike past federal practice and the existing practice in many states, local actions (like those involving real property) and transitory actions (like tort actions) are treated under the same venue provision in federal court.

**EXAMPLE**

A roofing contractor from Nebraska entered into a contract to put a new roof on a homeowner's home in Kansas. The roofing contractor did a poor job, resulting in substantial damages to the homeowner. Venue in this case would be in **either** Nebraska (in which the roofing contractor resides) **or** Kansas (in which the home is located, as it is the place where a substantial part of the events or omissions occurred).

**2. Special Venue Provisions**

There are many venue provisions applicable only to specified types of actions. One is worth noting: Where the defendant is the United States or an agency thereof, or an officer, employee, etc., of the United States acting in his official capacity, a civil action may be brought where: (1) a defendant resides; (2) a substantial part of the events or omissions giving rise to the action occurred, or a substantial part of property that is the subject of the action is situated; or (3) the plaintiff resides if no real property is involved in the action. [28 U.S.C. §1391(e)]

**C. RESIDENCE****1. Natural Persons**

For venue purposes, a natural person, including an alien lawfully admitted for permanent residence in the United States, is deemed to reside in the judicial district in which that person is domiciled. [28 U.S.C. §1391(c)(1)]

**2. Business Entities**

An entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, is deemed to reside, if a defendant, in any judicial district in which the defendant **is subject to the court's personal jurisdiction** with respect to the civil action in question. [28 U.S.C. §1391(c)(2)]

**a. Note for Corporations**

In a state having more than one judicial district and in which a **corporate** defendant is subject to personal jurisdiction at the time the action is commenced, the corporation is deemed to reside in any district in that state within which the corporation's contacts would be sufficient to subject the corporation to personal jurisdiction if the district were a state. If there is no such district, the corporation is deemed to reside in the district within which it has the most significant contacts. [28 U.S.C. §1391(d)]

**3. Nonresident of United States**

A defendant who is not a resident of the United States—whether a U.S. citizen or an alien—may be sued in any judicial district. The joinder of such a defendant, however, is disregarded in determining where the action may be brought with respect to any other defendants. [28 U.S.C. §1391(c)(3)]

**EXAMPLE**

While on a trip in Wyoming, a driver from Kansas has a car accident with a driver from Germany. The Kansan could sue the German in any judicial district within the United States.

**COMPARE**

If a citizen from Montana were also involved in the accident, the driver would be limited to where venue is proper as to the Montana citizen—either Wyoming (the place of the accident) or Montana (the residence of the Montana citizen).

**D. IMPROPER VENUE MAY BE WAIVED**

Unlike jurisdiction over the subject matter, venue may be waived by the parties. Venue is considered to be waived unless timely objection (in a pre-pleading motion or, where no such motion is made, in the answer) is made to the improper venue.

**E. TRANSFER****1. Original Venue Proper**

Section 1404(a) allows transfer to another district where the action “***might have been brought***” or “***to which all parties have consented***,” even though venue has been properly laid in the court before which the motion to transfer is made. The policy behind section 1404 is that while venue may be correct, the parties or the witnesses might be greatly inconvenienced by the trial in the original forum. By balancing the relative convenience offered by the alternative forums, the original court has discretion to transfer the action to a court in which the action “might have been brought” in conformity with the rules governing: (1) subject matter jurisdiction, (2) in personam jurisdiction over the defendant, and (3) venue. Another alternative is transfer to a court to which all parties have consented (even if venue ordinarily would not be proper there). If the superior forum is in another judicial system, the court may dismiss or stay the action under the doctrine of *forum non conveniens*.

**2. Original Venue Improper**

When a case is filed in an improper venue, a court must dismiss, or, in “***the interests of justice***,” transfer the case to a venue in which it could have been brought (in other words, subject matter jurisdiction, personal jurisdiction, and proper venue must exist). [28 U.S.C. §1406(a)] **Transfer** is more appropriate than dismissal except in extraordinary circumstances.

**3. Effect of Forum Selection Clauses**

If the transaction involved in the suit included an agreement as to where a suit should be brought in case of litigation (that is, a forum selection clause), the clause will be enforced by means of a motion to transfer “in the interests of justice” unless exceptional ***public interest*** factors dictate otherwise. [Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas, 571 U.S. 49 (2013)]

#### 4. Original Court Lacks Personal Jurisdiction

The Supreme Court has held that the original court's lack of personal jurisdiction over the defendant does **not** affect its power to transfer a case under section 1406(a). [Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962)] There is also authority to support the conclusion that the same is true in transfers under section 1404(a). [See, e.g., United States v. Berkowitz, 328 F.2d 358 (3d Cir. 1964)]

### F. LAW APPLICABLE UPON TRANSFER

#### 1. Original Venue Proper

If venue in the transferring court was proper, the transferee court applies the law the transferor court would apply, including its choice of law rules, unless the transfer was ordered to enforce a forum selection clause. [Atlantic Marine Construction Co., *supra*] This is true even where the plaintiff initiates a transfer for convenience after initially choosing the inconvenient forum. [Ferens v. Deere Co., 494 U.S. 516 (1990)]

---

#### EXAMPLE

P sued D in a federal district court in Pennsylvania. D moves to transfer to the Federal District Court of Massachusetts. The court must apply the law that would have been applied in Pennsylvania. [Van Dusen v. Barrack, 376 U.S. 612 (1964)]

---

#### 2. Original Venue Improper

A transfer on the ground that the original choice of venue was improper generally results in a change of the law applicable under *Erie*; that is, the law of the transferee court will apply.

---

#### EXAMPLE

P sued D in the federal district court in Maryland. D moved to transfer to New York under section 1406(a) because Maryland was an improper venue. The law applied in the transferee court (New York) would be its own law.

---

## VI. REMOVAL JURISDICTION

### A. ORIGINAL JURISDICTION NECESSARY

A **defendant** sometimes may remove an action that was brought by the plaintiff in state court when the action could have originally been brought in the federal courts (that is, the case satisfies the requirements for diversity or federal question jurisdiction). [28 U.S.C. §1441]

---

#### EXAMPLE

While in State A, a law firm partner (also from State A) is driving his \$200,000 Lamborghini

down the road when he hits a poor, heavily indebted law student from State B. The Lamborghini is totaled. The partner sues the student in a State A state court for the value of his car. The student may remove the case to federal court in State A (see C., *infra*).

### 1. When

Complete diversity must exist when the original complaint is filed in state court and when the case is removed.

### 2. Federal Defense Insufficient

A defendant cannot remove on the ground that she has a defense grounded in federal law, since the existence of a federal defense is insufficient to confer original federal question jurisdiction under section 1331.

#### EXAMPLE

To settle a claim, a railroad gave a passenger a lifetime pass on its railroad. After a number of years passed, Congress made the provision of such lifetime passes illegal. The passenger sues the railroad for breach of contract. The fact that the passes are now illegal is a federal defense to the breach of contract action, which does not give the federal court jurisdiction based on a federal question.

### 3. State Court Need Not Have Had Jurisdiction

By statute, the federal court **may** hear and decide a claim in a removed civil action even where the state court had no jurisdiction because the action is exclusively federal.

## B. ONLY DEFENDANT MAY REMOVE; ALL MUST SEEK REMOVAL

Only defendants can exercise the right of removal. Thus, a plaintiff cannot remove on the ground that a counterclaim against him could have been brought independently in a federal court. If there is more than one defendant, **all defendants** who have been properly joined and served must join in or consent to the removal. (Note: The Class Action Fairness Act relaxes this rule for some class actions. See VIII.G.2.d., *infra*.)

## C. VENUE

Venue for an action removed under section 1441(a) lies in the federal district court “embracing the place where such [state] action is pending.” In removal cases, section 1441(a) determines proper venue, not section 1331(a). Thus, in a properly removed case, venue is proper in the federal court of the state where the case was pending, even if venue would have been improper had the plaintiff originally filed the action in the federal district court of that state.

#### EXAMPLE

Linda, a citizen of State A, sues Jim, a citizen of State B, in the state court in State Z in

the amount of \$2 million for negligent acts Jim committed in State B. Jim may remove the case to the federal district court of State Z because the court has diversity jurisdiction and Jim is not a citizen of State Z. Although under section 1331(a) venue would have been improper if Linda had filed her case in the State Z federal district court, under section 1441(a) venue is proper in the federal district court of State Z because it “embraces the place” where the state court action was pending.

#### D. DEFENDANT MAY REMOVE SEPARATE AND INDEPENDENT FEDERAL QUESTION CLAIM

If a case filed in state court contains a claim that would arise under federal law, and it is joined with state law claims that do not come within the court’s diversity or supplemental jurisdiction, the entire case can be removed to federal court. The federal court, however, must then sever and remand the state law claims to state court. Only those defendants against whom a federal claim is asserted are required to join in the removal.

#### E. DISMISSAL OF NONDIVERSE PARTY ALLOWS REMOVAL

If no federal question is involved and diversity jurisdiction does not exist because a party is a co-citizen of an opposing party, removal will be permitted if the nondiverse parties are thereafter dismissed from the action and there is complete diversity between the remaining parties, subject to the limitations discussed below.

#### F. LIMITATIONS ON REMOVAL IN DIVERSITY OF CITIZENSHIP CASES

##### 1. Defendant Citizen of Forum State

When the jurisdiction of the federal court is based **solely** on diversity and one of the defendants is a citizen of the state in which the state action was brought, the action is not removable. [28 U.S.C. §1441(a)(2)] *Rationale:* Diversity jurisdiction was created to ensure that defendants could get a fair hearing in a neutral court, rather than in a state court that might favor its own citizens. When the state court involved is a court in the state in which the defendant lives, no such concern arises.

##### EXAMPLE

Jones, a citizen of State A, sues Brown, a citizen of State B, and Smith, a citizen of State C, in the state court in State B. Although diversity jurisdiction would have existed originally (assuming the jurisdictional amount had been met), Brown and Smith cannot remove. Had Jones brought the action in the state court in State A, Brown and Smith could remove. [28 U.S.C. §1441(b)]

When the original jurisdiction of the district court would have been based on a federal question, the defendants can remove without regard to the citizenship of the parties.

## 2. One-Year Rule

A case may not be removed on the basis of diversity of citizenship jurisdiction more than one year after it was commenced in state court. [28 U.S.C. §1446(b)] Note also that a case must be removed no later than 30 days after the defendant discovers, through service of an amended pleading, order, etc., that the case has become removable (see G.2., *infra*). Because most cases will be removable, if at all, at commencement of the action, the one year deadline generally will not be difficult to meet. The provision may be important, however, if the case is not removable at the outset, but becomes removable later.

*But note:* The one year rule does not apply to removals based on federal question jurisdiction, nor does it apply if the district court finds that ***the plaintiff has acted in bad faith*** (for example, by fraudulently joining a nonresident party or by intentionally failing to disclose the true amount in controversy) ***in order to prevent a defendant from removing the action.***

---

### EXAMPLES

- 1) A homeowner from Illinois sues a contractor from Wisconsin in an Illinois state court, seeking damages of \$100,000. The case is removable at its commencement because the case meets the requirements of diversity of citizenship jurisdiction and no defendant is a citizen of Illinois. The contractor must remove the case within 30 days of being served with process.
  - 2) A pedestrian from Illinois sues a driver from Illinois and a trucker from Wisconsin in an Illinois state court based on joint liability arising out of a car accident. The pedestrian seeks damages of \$250,000. The case is not removable at its commencement because the pedestrian and the driver share Illinois state citizenship. However, if the pedestrian later voluntarily dismisses the claim against the Illinois driver, the case becomes removable. The trucker must then remove within 30 days. But if more than one year has passed since the state case was commenced, the trucker generally cannot remove on the basis of diversity of citizenship.
- 

## G. PROCEDURE FOR REMOVAL

### 1. Notice of Removal

A defendant seeking removal must file a notice of removal—containing a short and plain statement of the grounds for removal and signed under Rule 11—in the federal district court in the district and division within which the action is pending. A copy of the notice should be sent to the other parties ***and*** to the state court. Once this is done, the state court can no longer deal with the case. If the state court attempts to do so, the federal court can enjoin the state court's action.

a. **Allegation of Amount in Controversy**

In cases seeking nonmonetary relief, or in cases in which the plaintiff (under state law) is not required to state an amount in controversy or in which recovery may be in excess of the damages stated, the defendant may state that the amount in controversy exceeds \$75,000, and the district court may keep the case if it finds, by a preponderance of the evidence, that the amount does exceed \$75,000.

2. **Thirty-Day Rule**

Generally, a defendant must file a notice of removal within 30 days “after receipt by or service on that defendant of the initial pleading or summons.” [28 U.S.C. §1446(b)] The statute is intended to address different state approaches to the order of filing a case and serving process. For instance, in some states, the defendant is served with a summons but not a copy of the complaint. For such defendants, the 30-day removal period would start to run upon formal receipt of the complaint. Informal notice does not start the ticking of the 30-day clock.

---

**EXAMPLE**

A plaintiff files an action against a defendant in state court. The plaintiff e-mails a “courtesy copy” of the complaint to the defendant, but does not have formal process (a summons and complaint) served for two weeks. The defendant removes the case within 30 days after being served with process, but more than 30 days after receiving the e-mailed copy of the complaint. Was removal timely? Yes. The 30 days ran from service of process on the defendant. [Murphy Brothers v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999)]

---

a. **Effect of Multiple Defendants on the 30-Day Rule**

If defendants are served at different times, and a later served defendant initiates timely removal, the earlier served defendant may join in the removal even though his 30-day period for initiating removal may have expired.

b. **Effect of Amendment on 30-Day Rule**

A defendant also may file a notice of removal within 30 days of receipt of an amended pleading, motion, order, or other court paper (such as discovery or other state court pleadings) that shows ***that a nonremovable case (or an apparently nonremovable case) is in fact removable.*** [28 U.S.C. §1446(b)(3)] This provision is significant in states that either prohibit the plaintiff from alleging or do not require the plaintiff to allege a specific amount of damages and in cases in which a nondiverse defendant has been dismissed. In such cases, the 30-day window to remove may begin much later than after the service of the initial pleading.

3. **Procedure After Removal**

After removal, the case proceeds according to the federal rules of procedure.

Repleading is not necessary unless the court so orders. If the defendant has not answered, she must answer or present the other defenses or objections available to her under the Federal Rules within 21 days after being served, or within seven days after filing the petition for removal, whichever period is longer. Amendments may be made to pleadings filed before removal.

#### 4. Right to Jury Trial

##### a. Demand for Jury Trial

The right to a jury trial in a case removed to a federal court may be waived unless a timely demand for a jury trial is filed. If, at the time of removal, all necessary pleadings have been served, a trial by jury will be granted to a party so entitled. The removing party must file a demand for jury trial within 14 days after the notice of removal is filed. The nonremoving party generally must file for jury trial within 14 days after service on her of the notice of filing for removal.

##### b. Demand Not Required

A party who, **prior to removal**, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. In addition, if **state law** applicable in the court from which the case is removed does not require the parties to make an express demand in order to claim trial by jury, they need not make such demand after removal unless the court directs they do so.

#### 5. Remand

##### a. Based on Procedural Defects

A plaintiff can file a motion to have the case remanded (sent back) to the state court. If the plaintiff bases this motion on a defect other than subject matter jurisdiction (for example, a defect in removal procedures), the motion must be brought within 30 days of removal.

##### b. Based on a Lack of Subject Matter Jurisdiction

A motion to remand for lack of federal jurisdiction, on the other hand, may be made at any time. If the court erroneously fails to remand, but the subject matter defect is cured before trial begins, failure to remand does not require that the federal judgment be vacated. [Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996)]

##### c. When All Federal Claims Have Been Adjudicated

The federal court has discretion to remand a case to state court once all federal claims have been resolved, leaving only state claims over which there would be no diversity jurisdiction. [28 U.S.C. §1447(c)]

##### d. Appellate Review of Remand Order

Appellate review of remand orders is generally barred [28 U.S.C. §1447(d)]; however, appeal is allowed where a case involving civil rights is remanded to

state court. Remand orders can also be reviewed by means of a mandamus if the remand represented a refusal to exercise plainly proper jurisdiction. [Thermtron v. Hermansdorfer, 423 U.S. 336 (1976)]

## VII. CONFLICT OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS

### A. FULL FAITH AND CREDIT EXTENDED TO FEDERAL COURTS

The Constitution's Full Faith and Credit Clause—which requires a state to recognize the legislative acts and judicial decisions of its sister states—is applicable only where a state court judgment is sought to be enforced in another state. However, an implementing federal statute provides that this Clause is extended to the federal courts. Therefore, recognition of judgments is required between state and federal courts **and** between federal courts.

### B. INJUNCTIONS AGAINST PENDING STATE PROCEEDINGS

Potentially, a case also could be filed in state court by one party and in federal court by the other party. In such a case, federal court is prohibited from enjoining ***pending*** state court proceedings unless ***expressly*** authorized by statute (that is, the interpleader provision expressly authorizes injunctions against state court proceedings), or “where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” [28 U.S.C. §2283] The case coming to a final decision first will have preclusive effect on the other. (See XI.B., *infra*.)

### C. INJUNCTIONS AGAINST THREATENED STATE CRIMINAL PROSECUTIONS

Threatened state criminal prosecutions, where state court proceedings have not already been instituted, will be enjoined only when necessary ***to prevent irreparable harm*** which is clear and imminent **and** where ***appellate remedies in the criminal case are clearly inadequate to provide relief***. Such injunctions are almost invariably denied, except where a federal right of free speech or assembly or a federally protected civil right is threatened by the state criminal proceeding, and it is shown that the prosecution is in bad faith or is for the purpose of harassment. Relief by declaratory judgment will ordinarily be denied if an injunction would be denied.

### D. INJUNCTIONS AGAINST STATE TAX PROCEDURES

A statute [28 U.S.C. section 1341] prohibits injunctions against the assessment, levy, or collection of state taxes “where there is a plain, speedy and efficient remedy . . . in the courts of such State.” [See Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981)]

## VIII. THE FEDERAL RULES OF CIVIL PROCEDURE

### A. COMMENCEMENT OF THE ACTION

An action is commenced by ***filing a complaint*** with the court. [Fed. R. Civ. P. 3] Filing a complaint before the statute of limitations has run will satisfy the statute of limitations in federal question cases and in diversity cases where the state rule is similar. However, the

Supreme Court has held that a state rule that an action is commenced for purposes of the statute of limitations **only upon service of process** must be applied in diversity cases. (For example, a state rule might say that filing is effective for commencement purposes only if service of process is perfected within a certain time period, like 90 days. That rule must be followed in diversity cases.) [Walker v. Armco Steel Corp., 446 U.S. 740 (1980)]

## B. SERVICE OF PROCESS

[Fed. R. Civ. P. 4]

### 1. Who May Serve

Any person who is at least 18 years old and not a party to the action may serve the summons and complaint (together known as “process”). A party may request that service be made by a United States marshal.

### 2. Time Limit for Service of Process

Service within the United States ordinarily must be made within 90 days of the complaint being filed; however, the court must extend this period for good cause shown.

### 3. How Service Is Made

#### a. Individuals

An individual may be served by (1) personal service, (2) service left at the defendant's usual place of abode with one of suitable age and discretion **residing therein**, or (3) service upon an authorized agent of the defendant. A person of suitable age and discretion is generally a person who is older than 14 years.

#### b. Minors or Incompetent Persons

A minor or incompetent person **must** be served **only** in accordance with the rules of the state in which service is to be made.

#### c. Corporations, Partnerships, Etc.

A corporation, partnership, or association may be served by serving an officer, a managing or general agent, or an authorized agent of the corporation.

#### d. Service Under State Rules

In addition to the above methods (and other than on a minor, incompetent person, or a person whose waiver has been filed), service may be made as provided by the rules of the state in which the federal court sits or the state in which service is to be effected, regardless of the basis of subject matter jurisdiction. Hence, federal courts can use state long-arm provisions.

#### e. Waiver of Service by Mail

The plaintiff may also request the defendant to waive service of process. To request a waiver of service, the plaintiff must mail the defendant certain items,

the most important of which are a formal request to waive service (that also informs the defendant of the consequences of failing to waive service), two copies of the waiver form, and a copy of the complaint. The defendant generally has 30 days (60 days if outside the United States) from the date that the request was sent to return the waiver.

#### 1) Effect of Waiver

A defendant who waives formal service of process has **60 days** (90 days if outside the United States) from the date the request was sent, instead of the usual 21 days (see F.3.b., *infra*) to answer the complaint. The waiver of service does **not** waive the defendant's right to object to venue and jurisdiction.

#### 2) Effect of Failure to Waive

If the defendant does not waive service of process, the plaintiff must serve him using one of the methods described in 3., *supra*. However, a defendant who is located in the United States is liable for the cost of such service if he does not have good cause for failing to waive service.

### 4. Parties Served Outside State

The court will acquire personal jurisdiction over parties served outside the state:

- a. Under statute and rules for extraterritorial service of the state in which the federal court sits (domiciliaries, long arm jurisdiction, and in rem jurisdiction);
- b. If they are third-party defendants [Fed. R. Civ. P. 14] or required to be joined for just adjudication [Fed. R. Civ. P. 19], if served within 100 miles from the place where the summons was issued (but within the United States);
- c. If out-of-state service is permitted by federal statute (such as the interpleader statute);
- d. **For cases that involve a federal question**, when a defendant is served with process (or waiver thereof), provided that the defendant is **not subject to general jurisdiction in any state court**, that the defendant has **sufficient contacts with the United States** to warrant the application of federal law, and that the exercise of jurisdiction is **not prohibited by statute**.

### 5. Parties Served in Foreign Country

Unless a federal law provides differently, a court will acquire personal jurisdiction over a party served in a foreign country:

- a. As provided in an **international agreement**;
- b. In absence of an agreement, as provided by **the foreign country's law or as directed by a foreign official** in response to a letter of request (but the method must be reasonably calculated to provide notice);

- c. Unless it is prohibited by the foreign country's law, **by personal service or by mail**, signed return receipt requested. (However, a corporation may not be served by personal service, and a minor or incompetent person may not be served by either of these methods); or
- d. **Any method the court orders** (so long as the method is not prohibited by international agreement).

## 6. Immunity from Process

The federal courts recognize the immunity from service of process of parties, witnesses, and attorneys who enter a state to appear in another action. In addition, if a party was induced by the plaintiff's fraud or deceit to enter a state so that he could be served, the service is invalid and the court does not acquire personal jurisdiction.

### EXAMPLE

A driver from State A is sued in two different cases in federal court in State B. The driver has not yet been served in case one, and is set to be deposed in State B for case two. If the driver were to be served in State B while being deposed in case two, such service would not be effective.

## C. TIME PERIODS

### 1. Counting Time

When a time period is expressed in days, the day of the event that **triggers the period is excluded**, and the **last day of the period is included**, when determining on what day an action must be taken. **Intermediate Saturdays, Sundays, and legal holidays are included**, except that if the last day of the period falls on a Saturday, Sunday, or legal holiday, the due date becomes the next workday. Three days are added to the period when service of the paper is made by mail, by leaving the paper with the clerk, or by other means to which the parties have consented. [Fed. R. Civ. P. 6(a)] Note: It is unlikely that a question would expect you to get an exact date down without providing you a calendar.

### 2. Extensions of Time

The district court may extend the period within which actions under the Federal Rules must be performed (for example, when a paper is delivered late in the day). However, certain time periods may never be extended. The following motions **must** be filed, with no extensions, **within 28 days after entry of judgment**: a renewed motion for judgment as a matter of law, a motion to amend judgment, a motion for a new trial, a motion to amend findings of fact in a nonjury case, and a grant of a new trial on the court's initiative. [Fed. R. Civ. P. 6(b)]

## D. INTERLOCUTORY INJUNCTIONS

An injunction is an equitable remedy by which a person is ordered to act or to refrain from acting in a specified manner. Injunctions may be granted at the conclusion of a case as a remedy, but several types of injunctions may be granted while a case is pending (broadly known as interlocutory injunctions). Interlocutory injunctions are granted to maintain the status quo until a trial on the merits may be completed. There are two main types of interlocutory injunctions: temporary restraining orders (“TROs”) and preliminary injunctions. They differ in duration and evidentiary requirements. Briefly, TROs usually are sought at the very beginning of a case, can be issued without formal notice or an adversary hearing, and are of limited duration. Preliminary injunctions require formal notice and an adversarial hearing and they may last until the end of the case.

### 1. Temporary Restraining Order

A TRO usually is sought at the beginning of a case to prevent irreparable injury that will result before a preliminary injunction hearing can be held.

#### a. Requirements for Ex Parte Temporary Restraining Orders

Generally, oral or written notice of the hearing for the issuance of the TRO must be given before a TRO is issued. However, a court may grant a TRO **without notice of the hearing to the adverse party** if three requirements are met [Fed. R. Civ. P. 65(b), (c)]:

##### 1) Specific Facts Showing Immediate and Irreparable Injury

The moving party must give specific facts in an affidavit or in the verified complaint to establish that immediate and irreparable injury will result to the moving party before the adverse party can be heard in opposition.

---

#### EXAMPLE

The probability that the defendant would hide or dispose of the subject matter of the litigation would be an adequate showing of irreparable injury.

---

##### 2) Efforts to Give Notice

The moving party must certify in writing all efforts she made to give notice of the hearing to the adverse party and/or the reasons why notice should not be required.

##### 3) Security

The moving party must provide some security, the amount of which is determined by the court, to pay for any costs and damages incurred by the adverse party if he was wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

**b. Notice of Hearing vs. Actual Notice**

Although a TRO may be issued without notice of the hearing, due process requires that a person must receive actual notice (through service of process or otherwise) of the TRO (or any other injunction for that matter) before he may be held in contempt for violating it. [See Fed. R. Civ. P. 65(d)]

**c. Time Limit**

The TRO will expire within 14 days unless the restrained party consents to an extension or good cause is shown for an extension for a like period. If the TRO is extended beyond 28 days from its issuance, it is considered to be a preliminary injunction for purposes of appeal.

**2. Preliminary Injunction**

As mentioned above, like a TRO, a preliminary injunction is intended to maintain the status quo while a trial is pending to prevent irreparable injury that can arise before a full trial on the merits of the complaint can be concluded. Unlike a TRO, a preliminary injunction is sought by a party prior to a trial on the merits of the complaint. A preliminary injunction may not be issued without formal notice to the adverse party. [Fed. R. Civ. P. 65(a)]

**a. Requirements for a Preliminary Injunction**

A preliminary injunction ordinarily will be granted when:

- (i) The plaintiff will suffer **irreparable harm** before the conclusion of the trial if the injunction is not granted;
- (ii) The harm to the plaintiff if the injunction is not granted **outweighs** the harm to the defendant if the injunction is granted;
- (iii) The plaintiff shows that he is **likely to be successful on the merits**; and
- (iv) The **public interest** favors granting the injunction.

Irreparable harm is the most important factor. If the party seeking injunctive relief has an adequate remedy at law (for example, money damages will adequately compensate the party), the injunction will be denied.

**E. PROVISIONAL REMEDIES**

“Provisional remedies” provide for the pretrial seizure of property for the purpose of securing satisfaction of a judgment that may be entered in the case. Federal Rule 64 specifically authorizes the use of provisional remedies but notes that the remedy’s precise name and the precise procedure to be used will be governed by state law. Some of the more common remedies (which are also listed in Rule 64) are:

- (i) **Garnishment**—A court order directing that money or property in the hands of a third party (for example, wages) be seized;
- (ii) **Attachment**—A process by which another's property is seized in accordance with a writ or judicial order for the purpose of securing a judgment yet to be entered (see II.E.2.a.3), *supra*, and II.E.2.b., *supra*, for some restrictions on the use of attachment); and
- (iii) **Replevin**—A process by which the plaintiff takes possession of and holds disputed property during the lawsuit (possession pendente lite).

Procedure will vary from state to state, but the party seeking the remedy generally must make out a *prima facie* case on the underlying claim and show that the property will likely not be available after trial if relief is not granted.

## F. PLEADINGS

Pleadings serve the function of giving **notice** to the opposing parties.

### 1. Complaint

Each claim for relief should contain:

- (i) A short statement of the grounds for the court's jurisdiction;
- (ii) A short statement of the claim showing that the pleader is entitled to relief; and
- (iii) A demand for judgment for relief, which may be in the alternative.

The federal pleading rules generally require only that a pleader put the other side on notice of the claim being asserted; detailed assertions of facts underlying the claim generally are not required. However, the Supreme Court in recent years has required that the plaintiff state facts supporting a **plausible** (not just possible) claim. [Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009)]

### 2. Pre-Answer Motions

#### a. Rule 12(b)

Prior to filing an answer, the defendant may, if he chooses, file a motion and raise any or all of the following defenses:

- (i) Lack of subject matter jurisdiction;
- (ii) Lack of personal jurisdiction;
- (iii) Improper venue;
- (iv) Insufficient process;

- (v) Insufficient service of process;
- (vi) Failure to state a claim upon which relief can be granted (that is, even if plaintiff's allegations are taken as true, relief could not be granted); or
- (vii) Failure to join a party needed for a just adjudication (includes necessary and indispensable parties).

The first defense (subject matter jurisdiction) may be raised at any time—even for the first time **on appeal**. The defendant must raise defenses (ii) through (v) **at the time he files a motion or his answer (or an amendment as of right thereto)**—whichever is first. If he does not, the defendant waives these defenses. The last two defenses (if limited to failure to join an “indispensable party”) can be made **at any time prior to trial or “at trial.”** The defendant may choose not to file a motion and instead raise these defenses in his answer. A motion to dismiss for failure to state a claim that raises issues outside of the pleadings will be treated as a motion for summary judgment.

---

**EXAMPLE**

A plaintiff from Wyoming files a negligence claim against a corporate defendant that is incorporated in Delaware and has its principal place of business in New York. The claim arises out of a breach of contract for the sale of goods in New York. The plaintiff files the case in Wyoming, and the defendant files a motion to dismiss for lack of subject matter jurisdiction without raising the issues of personal jurisdiction or incorrect venue. The defendant has waived both those issues.

---

**b. Motion for More Definite Statement**

A party may move for a more definite statement **before responding** (by filing an answer or reply) to a pleading (a complaint) that is so vague or ambiguous that a responsive pleading cannot reasonably be framed. The opposing party has 14 days after notice of an order to obey unless the court fixes a different time. If not obeyed, the court may strike the pleading or issue any other appropriate order. [Fed. R. Civ. P. 12(e)]

**c. Motion to Strike**

Before responding to a pleading or, if no responsive pleading is permitted, within 21 days after service of the pleading, a party may move to have stricken any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter. Such motion may also be made upon the court's initiative at any time. [Fed. R. Civ. P. 12(f)]

*And note:* An objection of failure to state a legal defense to a claim is not waived merely because a motion to strike is not made. Such a defense can be made by motion for judgment on the pleadings, or at the trial. [Fed. R. Civ. P. 12(f), (h)]

### 3. Answer

#### a. Must Contain Denials or Admissions and Any Affirmative Defenses

The answer must contain a **specific** denial or admission of each averment of the complaint, or a **general** denial with specific admissions to certain averments. Where the defendant is without knowledge or information sufficient to form a belief, a statement to that effect constitutes a denial. A **failure to deny** constitutes an **admission**. The answer must also state any **affirmative defenses** the defendant may have, such as statute of limitations, Statute of Frauds, res judicata, etc.

#### b. Time

If no Rule 12 motion is made, a defendant who was formally served with a summons and complaint must present an answer within **21 days** after service; a defendant to whom the complaint was mailed and who waives formal service must answer within **60 days** after the request for waiver was mailed to her. If a Rule 12 motion is made and the court does not fix another time, the responsive pleading is to be served within **14 days** of the court's denial or postponement of the motion. The answer is due within **14 days** of service of a more definite statement if the court grants a Rule 12(e) motion (see 2.b., *supra*.) The same timing rules apply to answers to counterclaims and cross-claims.

#### c. Counterclaims

Claims that the defendant may have against the plaintiff may be pleaded in the answer as counterclaims. If a counterclaim arises out of the **same transaction or occurrence** as one of the plaintiff's claims, it is a **compulsory** counterclaim and must be pleaded or it will be barred. Any other counterclaim is permissive and may be asserted (assuming there is subject matter jurisdiction) even though there is no connection at all between it and the plaintiff's claim.

#### d. Effect of Failure to Answer—Default and Default Judgment

A **default** is simply a notation in the case file by the clerk that there has been no answer filed within the time permitted by the rules. A **default judgment** is a judgment, with the same effect as any other judgment, that is entered because the defendant did not oppose the case.

##### 1) Default

If a party against whom a judgment for relief is sought has failed to plead or otherwise defend, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party. Once the default has been entered, the party may not proceed with the action until the default has been set aside by the court. [Fed. R. Civ. P. 55]

##### 2) Default Judgment

A defendant against whom a default is entered loses the right to contest

liability. However, the amount of damages must still be determined before a default judgment may be entered, and the defaulting party can be heard at the hearing for damages. A default judgment may be entered against a minor or incompetent person only if she has a personal representative who has appeared in the case.

**a) Default Judgment Entered by the Clerk**

On request of the plaintiff, supported by an affidavit as to the amount due, the clerk may sign and enter judgment for that amount and costs against the defendant if: (1) the plaintiff's claim against the defaulted defendant is for a ***sum certain***; (2) the default was entered because the ***defendant failed to appear***; (3) the defaulted defendant is ***not an infant or incompetent person***; and (4) the damages amount requested is not greater than the amount requested in the complaint. [Fed. R. Civ. P. 54(c), 55(b)(1)]

**3) Notice Required**

If the defendant has “appeared,” even though he has not answered, he must be notified of the request for a default judgment ***by first-class mail at least seven days before the hearing on the application for a default judgment***. Appearance includes any actual formal appearance before the court and any other action that clearly indicates that the defendant intends to contest the case on the merits (for example, the defendant’s continued settlement negotiations). [Fed. R. Civ. P. 55(b)(2)]

**4) Setting Aside a Default or a Default Judgment**

An entry of default may be set aside for “good cause shown.” Although not specifically required by the rules, a majority of courts also will require that the defendant have a meritorious defense. A default judgment may be set aside as provided in Rule 60 (relief from judgments) (see IX.A., *infra*).

**4. Inconsistent Claims or Defenses**

A party may set out as many alternative claims or defenses as he may have regardless of consistency.

**5. Special Pleading**

The general rule of pleading is for short and plain statements, but there are certain rules for special circumstances. [See Fed. R. Civ. P. 9] Note that in some of these situations (notably concerning fraud, mistake, and special damages), the Federal Rules require a party to state more detail than simply a short and plain statement. These situations requiring greater specificity are narrow, however, and the Supreme Court has emphasized that courts have no power to impose such rigorous pleading requirements outside the areas addressed by Federal Rule or statute. [Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)—lower court erred by requiring detailed pleading

of employment discrimination claim; Leatherman v. Tarrant County, 507 U.S. 163 (1993)—lower court erred by requiring detailed pleading of civil rights case against municipality]

**a. Capacity**

Capacity or authority to sue or be sued **need not be alleged**. A person wishing to challenge a party's capacity has the duty to raise the issue by specific negative averment, including such particulars as are within his knowledge.

**b. Fraud or Mistake**

Circumstances that establish fraud or mistake must be stated with **particularity**. By statute (the Private Securities Litigation Reform Act), plaintiffs in federal securities fraud cases must plead with particularity facts relating to the defendant's acting with the required scienter.

**c. Conditions of the Mind**

Malice, intent, knowledge, or other conditions of the mind may be averred **generally**.

**d. Conditions Precedent**

The performance of conditions precedent may be alleged **generally**. Denial of performance or occurrence must be made specifically and with particularity.

**e. Official Document or Act**

When dealing with an official document or act, it is **sufficient** to aver that it was issued or the act was **done in compliance with the law**.

**f. Judgment**

It is **not necessary to aver jurisdiction** when a domestic or foreign court or a board or officer renders a judgment or decision.

**g. Timing**

Time and place averments are **material** for the purpose of testing the sufficiency of a pleading.

**h. Special Damages**

Elements of special damages must be **specifically** stated.

**6. Reply**

A reply **by the plaintiff** to the defendant's answer is required **only** if the court orders the plaintiff to file one. A plaintiff need not reply to an affirmative defense; he is deemed to deny or avoid the allegation of the defense. [Fed. R. Civ. P. 7, 12]

**7. Amendment and Supplemental Pleadings**

### a. Amendment

As a matter of course, a pleading may be amended **once** within 21 days of serving it or, if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or a pre-answer motion. Thereafter, a pleading may be amended only by the written consent of the adverse party or by leave of the court upon motion. Leave of the court is “freely given when justice so requires.” [Fed. R. Civ. P. 15]

#### 1) Relation Back

For statute of limitations purposes, an amendment to a pleading that arises from the same conduct, transaction, or occurrence that was set forth (or was attempted to be set forth) in the original pleading generally is deemed filed on the date that the original pleading was filed. (In other words, the filing of the amendment **relates back** to the filing date of the original pleading.) Amendments also relate back if relation back is permitted by the law that provides the statute of limitations applicable to the action. [Fed. R. Civ. P. 15(c)] Of course, the original complaint must have been filed within the applicable statute of limitations period.

#### 2) Changing Party

An amendment changing the party or the naming of the party against whom a claim is asserted relates back if the amendment **concerns the same conduct, transaction, or occurrence** as the original pleading **and** if, within the period for filing a complaint and serving process, the party to be brought in by amendment:

- (i) Has **received such notice of the action that she will not be prejudiced in maintaining her defense** on the merits; and
- (ii) Knew or should have known that, **but for a mistake concerning the proper party's identity**, the action would have been brought against her.

[Fed. R. Civ. P. 15(c)(1)(C)] The Supreme Court has emphasized that it is the knowledge of the party to be brought in by amendment (not of the plaintiff) that is relevant. [Krupski v. Costa Crociere S.p.A., 560 U.S. 538 (2010)] And again, the original complaint must have been filed within the applicable statute of limitations period.

#### 3) Conform to Evidence

A pleading may be amended during or after trial, or even after judgment, to conform to the evidence, reflect an issue actually tried by the express or implied consent of the parties, or permit the raising of new issues at trial. However, a party may not raise a new claim or defense for which the

opposing party had no opportunity to prepare and which would result in prejudice in maintaining his action or defense. [Fed. R. Civ. P. 15(b)]

**4) Due Process Limitation**

Amendments to pleadings must satisfy due process. For example, in *Nelson v. Adams U.S.A. Inc.*, 529 U.S. 460 (2000), the trial court permitted a post-verdict amendment to add a defendant, and simultaneously entered judgment against that new defendant. The Supreme Court held that this procedure violated the new defendant's due process rights. The Federal Rules are meant to provide an opportunity for an added defendant to respond to a claim, and do not permit such "swift passage from pleading to judgment in the pleader's favor."

**b. Supplemental Pleadings**

Supplemental pleadings relate to matters **occurring after** the date of the original pleading. The permission of the court, upon motion, is required. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or a defense. [Fed. R. Civ. P. 15(d)]

**8. Rule 11**

**a. Certification upon Presenting Paper to Court**

In federal civil cases, the attorney (or unrepresented party), by presenting to the court a pleading, written motion, or other paper, certifies that to the best of her knowledge, information, and belief formed after an inquiry reasonable under the circumstances:

- (i) The paper is not presented for any **improper purpose** (harassment, delay, etc.);
- (ii) The legal contentions in the pleading are **warranted by existing law** or a nonfrivolous argument for the **modification of existing law** or the establishment of a new law;
- (iii) The allegations and factual contentions either have, or upon further investigation or discovery are likely to have, **evidentiary support**; and
- (iv) Denials of factual contentions are **warranted on the evidence** or, where specified, are reasonably based on a lack of information and belief.

The certification applies anew each time an attorney or unrepresented party "later advocates" a position contained in a pleading, motion, etc. Thus, a paper that was not sanctionable when first presented may become sanctionable if the attorney or party later advocating a position contained in the paper has since learned or should have learned that the position no longer has merit.

**b. Sanctions**

For violations of the requirements listed above, the court has discretion to impose sanctions limited to what is sufficient to deter repetition of such conduct by the parties or parties in other cases (that is, general deterrence is a valid consideration). When appropriate, sanctions may be imposed against parties, attorneys, or law firms, and may consist of nonmonetary directives or monetary penalties including payment of expenses and attorneys' fees incurred because of the improper paper. However, a monetary sanction may not be imposed on a represented party for violation of a.(ii), *supra*.

**1) Court's Initiative**

A court on its own initiative may enter an order describing the matter that appears to violate Rule 11 and direct the proponent to show cause why sanctions should not be imposed.

**2) Party's Motion**

A party who believes that his opponent has presented a paper in violation of Rule 11 may serve a motion for sanctions on the party. If the party does not withdraw or correct the matter within 21 days, the moving party may then file the motion for sanctions with the court.

## G. JOINDER

### 1. Joinder of Parties

**a. Capacity**

An individual's capacity to sue or be sued is determined by the law of her domicile; the capacity of an organization (for example, an association or partnership) is determined by the law of the state where the federal court sits, except that a partnership or unincorporated association always has capacity where a substantive federal right is asserted by or against it.

**b. Compulsory Joinder (Indispensable Parties)**

In certain situations, a plaintiff must join all interested parties or face dismissal of the lawsuit. The dismissal is usually sought under Rule 12(b), and the issue may be raised any time up until judgment. [Fed. R. Civ. P. 19] Analysis of a compulsory joinder issue follows a three-step process:

(i) **Should** the absentee be joined?

(ii) **Can** the absentee be joined?

(iii) If not, **should the action proceed in his absence** (in other words, is the absentee "*indispensable*")?

**1) Should the Absentee Be Joined?**

The absentee should be joined as a party when:

- (i) **Complete relief cannot be accorded** among the other parties to the lawsuit without the absentee being made a party; or
- (ii) **The absentee has such an interest in the subject matter** of the lawsuit that a decision in his absence will:
  - i. As a practical matter, **impair or impede his ability to protect the interest**; or
  - ii. Leave any of the other parties subject to **a substantial risk of incurring multiple or inconsistent obligations**.

**2) Can the Absentee Be Joined?**

Assuming that the absentee should be joined under the analysis above, the next question is whether he can be joined, that is, whether the court can obtain **personal** jurisdiction over the absentee and whether the court will still have **subject matter** jurisdiction over the action after joinder of the absentee. (28 U.S.C. section 1367 does not permit supplemental jurisdiction over claims by or against parties joined under Rule 19, so joinder of a party who would destroy diversity is not possible under the compulsory joinder rules.) If the court has personal jurisdiction over the absentee, and his joinder will not destroy diversity or venue, he **must** be joined.

**3) Should the Action Proceed Without the Absentee?**

If the absentee cannot be joined (for example, plaintiff cannot serve process on the absentee), the court must determine whether "**in equity and good conscience**" the action **should proceed** among the parties before it, **or should be dismissed**, the absentee thus being regarded as **indispensable**. The decision requires consideration of:

- (i) The extent of **prejudice to the absentee or available parties** of a judgment;
- (ii) The extent to which the **prejudice can be reduced or avoided** by means of protective provisions in the judgment, the shaping of relief, or other measures;
- (iii) The **adequacy of a judgment** rendered without the absentee; and
- (iv) Whether the plaintiff will have **an adequate remedy in another forum if the case is dismissed** for nonjoinder.

*Note:* The Supreme Court has held that a joint tortfeasor subject to joint and several liability is not a person needed for just adjudication. [Temple v. Synthes Corp., 498 U.S. 5 (1990)]

### c. Permissive Joinder—Requirements

Parties may join as plaintiffs or be joined as defendants whenever:

- (i) Some claim is made by each plaintiff and against each defendant relating to or arising out of the ***same series of occurrences or transactions; and***
- (ii) There is a ***question of fact or law common*** to all the parties.

---

#### EXAMPLE

It is very common for all persons injured in an automobile accident to join as plaintiffs. The common issue is the defendant's negligence; the other issues of contributory negligence and damages are tried individually for each plaintiff.

The court is given wide discretion to order separate trials where joinder would be unfair to a party not sufficiently involved in all the claims. Note that the court still must have subject matter jurisdiction over the claim.

## 2. Joinder of Claims

The policy of the Federal Rules is to permit the adjudication of all claims between the parties and all claims arising out of a single transaction. A plaintiff can join any number and type of claims against a defendant; when multiple plaintiffs or multiple defendants are involved, it is essential only that at least one of the claims arise out of a transaction in which all were involved.

### a. Successive Claims

A plaintiff may join two claims when success on the first is a prerequisite to the second, such as a claim for money damages and a suit to set aside a conveyance that was fraudulent because of the debt asserted in the first claim. [Fed. R. Civ. P. 18]

### b. Jurisdiction

When jurisdiction is based on the diversity of citizenship between the plaintiff and defendant, the plaintiff may aggregate all claims she has against the defendant to satisfy the jurisdictional amount. When jurisdiction is based on a "federal question" claim, and diversity jurisdiction is not available, a nonfederal claim can be joined only if the court has supplemental (pendent) jurisdiction over it. The court will have supplemental (pendent) jurisdiction over the claim if it is regarded as part of the same case or controversy as the federal claim.

**EXAMPLE**

Plaintiffs claimed that the defendant appropriated plaintiffs' literary work in such a way as to (1) infringe federal law copyright, and (2) constitute state law unfair competition. There was federal pendent jurisdiction over the state claim. [Hurn v. Oursler, 289 U.S. 238 (1933)]

**c. Class Actions****1) Prerequisites**

Named representatives will be permitted to sue on behalf of a class if:

- a) The class is so **numerous** that joinder of all members is impracticable;
- b) There are **questions of law or fact** common to the class;
- c) The **named parties' interests are typical** of the class;
- d) The named representatives will ensure the **fair and adequate representation** of the interests of absent members of the class [Fed. R. Civ. P. 23(a)]; and
- e) The **action meets the definition** of any of the following three types of class actions found in Rule 23(b):
  - (1) Separate actions by class members would create a **risk of inconsistent results** or, as a practical matter, **would impair the interests of other absent members of the class**; or
  - (2) A defendant has acted or refused to act on grounds applicable to the class and **injunctive or declaratory relief is appropriate** for the class as a whole (as in employment discrimination claims; but note that in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Supreme Court rejected an effort to recover monetary relief in such a class action); or
  - (3) There are **questions of fact or law common to members** of the class that **predominate** over individual issues and a class action is superior to the alternative methods of adjudication.

**2) Consideration in Treating Case as a Class Action**

The court should determine at an early practicable time whether the action may be maintained as a class action, that is, whether to "certify" a class, but may determine at any time thereafter that the action is not an appropriate one for class action treatment. In determining whether to treat the

case as a class action, the court should consider, *inter alia*, the following factors: (1) the interest of individual control, (2) the extent and nature of litigation elsewhere on the same subject, (3) the desirability of having the whole package in this court, and (4) the difficulties in managing the class action.

**a) Court Must Define Class Claims, Issues, or Defenses**

The court, in certifying a class, must “define the class and the class claims, issues, or defenses.”

**b) Appointment of Class Counsel**

The court must appoint class counsel for every certified class, who must fairly and adequately represent the interests of the class. [Fed. R. Civ. P. 23(g)(1)]

**3) Effect of Judgment**

**All members** of a class will be **bound** by the judgment rendered in a class action **except** those in a “**common question**” class action [Fed. R. Civ. P. 23(b)(3)] who notify the court that they do not wish to be bound (“opting out”). Members of the other types of class actions may not opt out.

**4) Class Action Not Mooted If Class Representative’s Claim Mooted**

If the substantive claim of the individual representing the class is mooted, this **does not** render the class action moot. [United States Parole Commission v. Geraghty, 445 U.S. 388 (1980)—release from prison of named plaintiff in class action suit challenging parole procedure did not moot entire class action suit]

**5) Notice**

**a) Notice Required in Common Question Suits**

Notice to all members of the class **of the pendency** of the class action is required under Rule 23 only in “**common question**” **suits** [Fed. R. Civ. P. 23(b)(3)], so that class members can opt out. The notice must state (1) the nature of the action, (2) the definition of the class, (3) the class claims, issues, or defenses, and (4) the binding effect of a class judgment. Notice may be by first-class mail, electronic means, or other appropriate means.

**b) Notice Discretionary in Other Types of Class Action Suits**

Notice to members of the class of the pendency of the class action in other class suits is discretionary with the court. [See Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Oppenheimer v. Sanders, 437 U.S. 340 (1978)]

**Note:** Notice of **dismissal or settlement** is a separate notice that must be given to class members of all types of class actions. (See 6)a), *infra*.)

## 6) Jurisdiction

### a) Diversity Action

In class actions founded on diversity, only the **citizenship of the named representatives** of the class is taken into account to establish diversity. The Supreme Court held that the amount in controversy requirement is satisfied in a class action that invokes diversity of citizenship if **any named representative's** claim exceeds \$75,000.

The class action may proceed in federal court **even if class members' claims do not exceed \$75,000**. The claims by the class members that do not exceed \$75,000 come within the court's supplemental jurisdiction. [Exxon Mobil Corp. v. Allapattah Services, III.C.3., *supra*]

### b) Federal Question Action

If the class asserts a claim arising under federal law, it can invoke federal question jurisdiction. In that sort of case, of course, the citizenship of the parties and the amount in controversy are irrelevant. (See IV., *supra*.)

## 7) Court Approval of Dismissal or Settlement

The court must approve the dismissal or settlement of a class action. The class must satisfy the requirements for certification under Rule 23(a) and (b) before a court can approve a class settlement (see 1), above).

### a) Notice of Dismissal or Settlement

Moreover, notice of the proposed dismissal or settlement must be given to all members of the class in a manner as directed by the court. [Fed. R. Civ. P. 23(e)] This notice is required in all types of class actions, unless the judgment will not bind the class. The purpose of notice to class members is to allow them to object to the proposed dismissal or settlement when the court holds a “fairness hearing” to determine whether to approve the dismissal or settlement. (See below.)

### b) Procedures for Settlements of Class Action Suits

The court must hold a settlement hearing (usually called a “fairness hearing”) if the judgment will bind the class and permits settlement only if the court finds the terms to be fair, reasonable, and adequate, considering such factors as whether:

- (i) The class representative and class counsel have fairly and adequately represented the class;

- (ii) The settlement was negotiated at arm's length;
- (iii) The relief provided to the class is adequate in light of the risks and delays of further litigation, the effectiveness of distributing relief to the class, and attorneys' fees; and
- (iv) The settlement treats all class members equitably.

The court must make a finding supporting its conclusion that the settlement meets that standard. Parties seeking approval of a settlement must inform the court of any collateral agreements made in connection with the class settlement. [Fed. R. Civ. P. 23(e)]

**(1) “Opt Out” Provision**

The court may refuse to approve a settlement of a common question class action if members are not provided a new opportunity to opt out. Thus, members who received notice of the pendency of the class action (see 4, above) but declined to opt out may be permitted a second opportunity to opt out, essentially to reject the terms of the settlement and proceed on their own.

**(2) Court Approval Required for Payment in Connection with Objection**

The court also must approve, after a hearing, any payments or other consideration made to a party so that she will forgo an objection or appeal.

**c) Appeal of Approval of Settlement**

A class member who objects to the approval of settlement may bring an appeal of the approval of settlement. [Devlin v. Scardelletti, 536 U.S. 1 (2002)]

**8) Appeal of Class Action Certification Decision**

Although a court's order granting or denying the certification of a class is not a final judgment in the case, a party may seek review of the decision in the court of appeals under Rule 23(f). (See X.C.6., *infra*.) The court's decision on the type of notice to give may not be immediately appealed.

**d. Class Action Fairness Act**

The Class Action Fairness Act (“CAFA”) relaxes federal jurisdictional requirements for **some** class actions in an effort to make it easier for class action plaintiffs to file in federal court and for class action defendants to remove class actions from state to federal court. (Congress had concluded that some state courts had certified class actions inappropriately and that greater access to federal courts would protect defendants from such perceived abuses.)

## 1) Subject Matter Jurisdiction Under the CAFA

Under the CAFA, subject matter jurisdiction is established if:

- a) **Any** class member (not just the representative, but anyone in the plaintiff class) is of diverse citizenship from **any** defendant;
- b) The amount in controversy **in the aggregate** (that is, adding all the class claims together) **exceeds \$5 million**; and
- c) There are at least **100 members** in the proposed class or classes.

## 2) Removal Under the CAFA

Additionally, in a case falling under the CAFA, **any** defendant, rather than **all** defendants, may remove the case from state to federal court. Moreover, there is no in-state defendant limitation on removal—the case may be removed under the CAFA even if a defendant is a citizen of the forum.

## 3) Excluded Actions

### a) Primary Defendants Are States or Governmental Entities

There is no federal court jurisdiction under the CAFA if the primary defendants are states, state officials, or other governmental entities against whom the court may be foreclosed from ordering relief.

### b) Claims Based on Securities Laws or Regarding Corporate Governance

There is no federal court jurisdiction under the CAFA over a class action that **solely** involves a claim under **federal securities laws**, or that relates to the **internal affairs of a corporation and is based on the laws of the state of incorporation**.

## 4) Local Considerations May Defeat Jurisdiction

The CAFA has some provisions designed to defeat federal jurisdiction in class actions that are relatively local in nature. These provisions contain some unclear terms.

### a) Mandatory Decline of Jurisdiction

A district court **must** decline jurisdiction provided by the CAFA if: (1) **more than two-thirds** of the members of the proposed plaintiff class are **citizens of the state in which the action was filed**; (2) a defendant from whom “**significant relief**” is sought is a **citizen of that state**; (3) the “**principal injuries**” were incurred **in the state in which the action was filed**; and (4) no similar class action has been filed within **the prior three years**.

**b) Discretionary Decline of Jurisdiction**

A district court **may** decline jurisdiction provided by the CAFA if **more than one-third but less than two-thirds** of the proposed plaintiff class are **citizens of the state in which the action was filed** and the “**primary defendants**” are **also citizens of that state**. In that case, the court considers a variety of factors, including whether the claims involve matters of national interest, whether the claims will be governed by the law of the state in which it was filed, and whether the state has a “distinct nexus” with the class members, the alleged harm, or the defendants.

**5) Protections Under the CAFA**

The CAFA adds a number of protections that apply to settlements in **all** class actions in federal court.

**a) Coupon Settlements**

Sometimes, class action settlements provide that the class members are to receive coupons good for purchase of further goods or services from the defendant. The court may approve such a settlement only after **holding a hearing** and **making a finding that the settlement is fair**, and it may also require that **unclaimed coupons be distributed to charitable organizations**. If attorneys’ fees in such cases are to be based on the value of the settlement to the class, they must be limited to the value of the coupons actually redeemed by class members, rather than the total amount available to class members. Alternatively, attorneys’ fees can be based on the amount of time class counsel reasonably expended on the action.

**b) Protection Against Loss by Class Members**

In some consumer class actions, some class members have actually lost money, because attorneys’ fee awards required them to pay the lawyers more than they received from the settlement. A court may approve a settlement that would have that effect only if it makes a written finding that nonmonetary benefits to the class member **substantially outweigh** the monetary loss.

**c) Protection Against Discrimination Based on Geographic Location**

The court may not approve a settlement that provides larger payouts for some class members than others solely because the benefitted class members are located closer to the court.

**d) Notification of Federal and State Officials**

Settling defendants are required to give notice of proposed settlements to identified federal and state officials. Final approval of the proposed

settlement may not be issued until at least 90 days after the notice is served. A class member who demonstrates that required notice was not provided may choose not to be bound by the settlement.

**e. Shareholder Derivative Suits**

[Fed. R. Civ. P. 23.1]

**1) Minority Shareholder Allegations**

A minority shareholder, suing on behalf of other minority shareholders to enforce some right of the corporation which the corporation refuses to assert, **must allege** in a **verified** complaint that:

- (i) She was **a shareholder at the time** of the transaction complained of (or received her shares thereafter by operation of law);
- (ii) The action is not a **collusive** effort to confer jurisdiction on the court that it would otherwise lack; and
- (iii) She made a **demand on the directors** and, if required by state law, on the shareholders, or the reasons why she did not make such demands. For this requirement, facts must be pleaded with particularity.

Rule 23.1, like Rule 23, requires that the class representative be able to fairly and adequately represent the class.

**2) Corporation Named as Defendant**

The corporation must be named as a defendant if those who control the corporation are antagonistic to the action sought by the plaintiffs. If not so named, the court will align the corporation as a defendant to reflect the antagonism.

**3) Jurisdictional Amount and Venue**

The judgment runs to the corporation; therefore, the jurisdictional amount looks to the damages allegedly suffered by the corporation. By statute, venue is proper wherever the corporation could have sued the same defendants (usually in the state of its incorporation). [28 U.S.C. §1401]

**4) Court Approval**

The court must approve the dismissal or settlement of a derivative suit.

**f. Interpleader**

**1) Purpose Is to Avoid Double Liability**

Interpleader permits a person in the position of a stakeholder to require two or more claimants to litigate among themselves to determine which, if any,

has the valid claim where separate actions might result in double liability on a single obligation. (See example below.) Interpleader is available under Rule 22 and under the Federal Interpleader Statute. [28 U.S.C. §1335]

## 2) Rights of Plaintiff Stakeholder

The plaintiff stakeholder does not have to admit liability to any claimant and the claims do not have to have common origin. Once the court has allowed interpleader, a trial by jury is available to determine the issues of fact.

## 3) Jurisdiction

### a) Rule 22 Interpleader

If Rule 22 interpleader is relied on, the normal rules as to subject matter jurisdiction apply. Therefore, there must be either a federal question claim, or complete diversity between the stakeholder and the claimants and more than \$75,000 in controversy.

### b) Federal Interpleader Statute

Under the Federal Interpleader Statute, on the other hand, the jurisdictional requirements are less restrictive. The federal statute permits jurisdiction where the amount in controversy is \$500 or more and where there is diversity between **any two contending claimants**. Venue lies where any claimant resides, and process may be served anywhere in the United States under the statute (but not under Rule 22). The plaintiff stakeholder must deposit the amount in controversy (or a bond) with the court.

### c) When to Use Which

If the plaintiff-stakeholder makes no claim to the stake (that is, the stakeholder is **disinterested**), and the claimants are all from the same state, statutory interpleader would not be available. But if the plaintiff-stakeholder makes a claim against the stake (that is, the stakeholder is **interested** in the stake), statutory interpleader potentially would be available.

---

### EXAMPLE

An insurance company, a State A citizen, is unsure to which claimant it should pay \$80,000 of life insurance proceeds, so it wants to file an interpleader action to have a court determine the issue. The company makes no claim to the insurance proceeds. All potential claimants to the life insurance policy are citizens of State B. Statutory interpleader would not be available because no two **contending** claimants are diverse, but Rule 22 interpleader would be available because complete diversity exists between the insurance company-plaintiff and all claimant

defendants and the amount in controversy exceeds \$75,000. If the insurance company were to make a claim against the proceeds, most courts would hold that statutory interpleader would be available, as the insurance company would then be considered a contending claimant.

**g. Intervention**

Intervention may be granted to a party of right or permissively. [Fed. R. Civ. P. 24]

**1) Intervention of Right**

Intervention of right is available whenever the applicant claims an interest in the property or transaction that is the subject matter of the action, and the disposition of the action without her may impair her ability to protect that interest (unless her interest is already represented). The possible *stare decisis* effect of a judgment may be sufficient “interest” to authorize intervention of right. Jurisdiction is discussed in III.B.6., *supra*. The United States has a right of intervention in all cases where the constitutionality of a United States statute is raised.

**2) Permissive Intervention**

Permissive intervention is available when the applicant’s claim or defense and the main action have a question of fact or law in common; no direct personal or pecuniary interest is required. A claim in permissive intervention must not destroy complete diversity (if it does, intervention will be denied), and ***must be supported by its own jurisdictional ground***.

Permissive intervention is discretionary with the court.

**3) Caveat**

In all cases of intervention, the application must be timely, which is a matter within the court’s discretion.

**h. Third-Party Practice (Impleader)**

**1) Claims for Indemnity or Contribution**

A defending party may implead a nonparty, but only if the nonparty is or may be liable to her for any part of a judgment that the plaintiff may recover against her. Usually, such an impleader claim will be for indemnity or contribution. If the indemnity or contribution claim by the defending party against the third-party defendant does not meet the requirements for diversity of citizenship or federal question jurisdiction, it will invoke supplemental (ancillary) jurisdiction, because such claims will meet ***the “common nucleus of operative fact” requirement of supplemental (ancillary) jurisdiction***. (See III.B.5., 6.e., *supra*.) Thus, the defending party may assert an indemnity or contribution claim in federal court even if there is no diversity between the defending party and the third-party defendant and the third-party claim is

based on state law. Furthermore, ***venue need not be proper*** for the third-party defendant.

**2) Non-Indemnity or Non-Contribution Claims**

As part of the third-party complaint, the third-party plaintiff (that is, the original defending party) may join ***other*** (non-indemnity or non-contribution) claims she may have against the third-party defendant. ***If these other claims do not meet the requirements of diversity of citizenship or federal question jurisdiction, they would need to come within the court's supplemental (ancillary) jurisdiction*** (see III.B.5., 6.e., *supra*), although it is less likely that the “common nucleus” test could be met.

**3) Severance of Third-Party Claims**

In any event, ***even if jurisdiction exists***, the court ***may sever any third-party claim*** to be tried separately ***if it is just to do so*** (such as when addition of those claims would lead to unfair prejudice to one of the parties).

**4) Response of Impleaded Party**

After he is joined by the third-party complaint, the third-party defendant may assert defenses to the plaintiff’s original claim, as well as defenses to the third-party liability asserted against him.

**5) Impleading Insurance Companies**

In some states, a defendant may not implead its own insurance company, but if the insurance company denies coverage and refuses to defend, then the defendant may implead the company and have that issue decided in the same case.

**i. Cross-Claims**

Co-parties may assert claims against each other that arise out of the same transaction or occurrence as the main action by filing cross-claims. Since a cross-claim is, by definition, transactionally related to the existing action, it is commonly considered to come within the court’s supplemental jurisdiction, at least if the claim is by a defendant against a co-defendant.

## H. DISCOVERY

**1. Duty of Disclosure**

Parties are required to disclose certain information to other parties without waiting for a discovery request. However, parties may stipulate, or the court may order, modifications of some disclosure requirements. [Fed. R. Civ. P. 26]

**a. Types of Disclosure Required**

Before making disclosures, a party has an obligation to make a reasonable inquiry into the facts of the case. The rules require parties to disclose all

information “then reasonably available” that is not privileged or protected as work product. A party is not relieved from her obligation to disclose merely because she has failed to complete her investigation or because another party has not made his disclosures or has made inadequate disclosures. Three types of disclosure are required: ***initial*** disclosures, disclosure of ***expert testimony***, and ***pretrial*** disclosures.

### 1) Initial Disclosures

Without waiting for a discovery request, a party must provide to other parties (unless stipulation or court order provides otherwise):

- (i) The names, addresses, and telephone numbers of individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
- (ii) Copies or descriptions of documents, electronically stored information, and tangible things that are in the disclosing party’s possession or control and that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
- (iii) A computation of damages claimed by the disclosing party and copies of materials upon which the computation is based; and
- (iv) Copies of insurance agreements under which an insurer might be liable for all or part of any judgment that might be entered.

These disclosures must be made ***within 14 days*** after the meeting of the parties required by Rule 26(f) (discussed at I.1., *infra*), unless a different time is set by court order or by stipulation.

#### a) Exemptions from Initial Disclosure Requirement

Initial disclosures are not required in particular types of cases, such as actions to review an administrative record, actions to enforce an arbitration award, pro se litigation brought by prisoners, actions to quash or enforce subpoenas, or habeas corpus petitions. [Fed. R. Civ. P. 26(a)(1)(B)]

### 2) Disclosure of Expert Testimony

A party must also disclose to other parties the identities of expert witnesses expected to be used at trial. If the expert witness has been specially retained to provide expert testimony, or if the expert’s duties as the party’s employee regularly involve giving expert testimony, the disclosure must be accompanied by a report prepared and signed by the expert witness stating her qualifications, the opinions to be expressed,

and the basis for those opinions, along with a list of cases in which he has testified in the past four years and his compensation, among other items. Otherwise, no report is required, and instead these disclosures are required: the identity of the expert, the subject matter on which the expert is expected to present evidence, and a summary of the facts and opinions to which the witness is expected to testify. This disclosure must be made at the time directed by the court or, in the absence of any directions or any stipulations among the parties, at least 90 days before trial; if the evidence is intended solely to rebut another party's disclosure of expert testimony, it must be made within 30 days after disclosure of the evidence being rebutted.

### 3) Pretrial Disclosures

At least 30 days before trial, a party must disclose to the other parties and file with the court a list of (1) the witnesses she expects to call at trial, (2) the witnesses she will call if the need arises, (3) the witnesses whose testimony will be presented by means of a deposition and a transcript of pertinent portions of the deposition, and (4) documents or exhibits she expects to offer or might offer if needed. Evidence or witnesses that would be used solely for impeachment need not be disclosed. Within 14 days after this disclosure, a party may serve objections to use of the depositions at trial and to the admissibility of disclosed documents and exhibits. Such objections are waived if not made at this point, except for objections that the evidence is irrelevant, prejudicial, or confusing under Federal Rules of Evidence 402 and 403.

## 2. Discovery of Electronically Stored Data

The Rules require parties to discuss the discovery and preservation of electronically stored data and to report to the court on those discussions. Electronically stored information need not be produced if the responding party identifies it as from a source not reasonably accessible because of undue burden or cost. On motion to compel or for a protective order, that party must show to the court's satisfaction that its assertion is justified. Even then, the court may order the information produced for good cause, but it may also impose conditions such as cost-shifting or cost-sharing. [Fed. R. Civ. P. 26(b)(2)(B)]

### a. Format for Producing Electronic Documents

A requesting party may specify the form or forms for producing electronically stored information, and the responding party must use that form unless it objects (but the party must still produce other items to which it has no objections). The court will determine if the objection is valid. If the request does not specify the form for producing electronically stored information, the responding party may use any form in which the information is maintained or a form that is reasonably usable by the requesting party. [Fed. R. Civ. P. 34(b)]

**b. Destruction of Electronically Stored Information**

There are remedies for discovering parties and sanctions against parties who fail to take **reasonable steps** to preserve electronically stored information **when litigation is reasonably foreseeable**. [Fed. R. Civ. P. 37] If reasonable steps were taken, or if litigation was not reasonably foreseeable, no sanctions may be imposed for the destruction of discoverable information.

**c. Remedies**

If unpreserved electronically stored information **can be restored or adequately replaced through additional discovery**, no other remedial measures need be imposed. If the information cannot be restored or replaced, and the discovering party is prejudiced by the lack of information, the court may order remedial measures **no greater than necessary to cure the prejudice**, taking into consideration the importance of the information to the case and the expenses resulting from restoring or replacing the information.

**d. Party Acted with Intent to Deprive**

**If the disclosing party acted with intent to deprive the discovering party of the information**, the court **may** (1) presume the lost information was unfavorable to the party; (2) instruct the jury that it may or must presume the information was unfavorable to the party; or (3) dismiss the action or enter a default judgment. The imposition of these measures is discretionary with the court.

### 3. Scope of Disclosure and Discovery

**a. In General**

Unless the court limits discovery by order, discovery may be had of “**any nonprivileged matter that is relevant to any party’s claim or defense**” and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefits. “Any matter” encompasses both documentary evidence and individuals with knowledge of any discoverable matter. Furthermore, information need not be admissible at trial to be discoverable. [Fed. R. Civ. P. 26(b)(1)]

**b. Trial Preparation Materials**

**Work product** of a party or a representative of a party (for example, a lawyer), made **in anticipation of litigation**, is discoverable only upon showing **“substantial need”** and to **avoid “undue hardship”** in obtaining materials in an alternative way. If the court orders the disclosure of work product, it must take steps to avoid the disclosure of mental impressions, conclusions, opinions, or legal theories of the disclosing party. However, a party may

obtain, without a court order and without showing need and hardship, a copy of any statement or recording previously made by **that party**. Draft reports and draft disclosures of “trial” experts are work product. Confidential communications between such experts and counsel for the party are generally protected as trial preparation materials, except for communications relating to the expert’s compensation or to facts or data the attorney provided to the expert. [Fed. R. Civ. P. 26(b)]

**1) Procedure for Claiming Work Product**

When a party claims that certain discoverable information is privileged trial preparation material, he still must disclose the existence of the material in sufficient detail to the opposing party so that the opposing party may assess the claim of privilege.

**c. Inadvertent Disclosure of Trial Preparation or Privileged Materials**

If a party inadvertently discloses trial preparation or privileged material to opposing parties, he may still invoke a claim of work-product protection or any privilege by notifying the opposing parties of the inadvertent disclosure and the basis for the claim of work product or privilege. Once so notified, the opposing party may not use or disclose the trial preparation or privileged material until the claim is resolved, and he must take reasonable steps to retrieve the material if he disclosed it to others.

**d. Experts**

A party may depose experts who are expected to be called at trial (**testifying experts**). If a report from the expert is required, the deposition may take place only after the report is provided. The opinions of experts who are retained in anticipation of litigation but who are not expected to testify at trial (**consulting experts**) may be discovered only upon a showing of exceptional circumstances under which it is impracticable to obtain facts or opinions by other means. [Fed. R. Civ. P. 26(b)(4)]

**e. Protective Orders**

Protective orders may be obtained to limit the nature and scope of examination or to terminate examination if discovery is abused. The court also may allocate the expenses of discovery among the parties. [Fed. R. Civ. P. 26(c)]

**f. Supplementation of Disclosures and Discovery Responses**

A party **must** timely supplement required disclosures and prior responses to interrogatories, requests for production, or requests for admissions if she learns that the information disclosed was materially incomplete or incorrect and the new information has not been made known to the other party in discovery or in writing. The duty to supplement also applies to an expert’s reports and information from any deposition of an expert. [Fed. R. Civ. P. 26(e)]

#### 4. Types of Discovery

##### a. Pre-Action Depositions

Prior to a lawsuit being filed, or while an appeal is pending, a potential party or party to an appeal may ask the court to order the deposition of any person in order **to perpetuate her testimony**. To do so, the potential party must file a verified petition in the federal court for the judicial district in which **any expected adverse party resides**.

###### 1) Contents of Petition

The request for a court order is included within the petition itself. The petition also must show that, among other things, the petitioner **expects to be a party** to an action cognizable in a court in the United States but is **presently unable** to bring it or cause it to be brought. All expected adverse parties must be named.

###### 2) Notice and Appointed Counsel

At least 21 days before the hearing date for the court order, the potential party must serve each expected adverse party with a copy of the petition and a notice of hearing. The manner of service is the same as for an original petition (see VIII.B., *supra*). If the expected adverse party cannot be so served, the court must appoint counsel for that party.

###### 3) Court Order

If the court finds that ordering a deposition may prevent a failure or delay of justice, it will issue an order that specifies the person being deposed, the subject matter of the deposition, and the manner of the deposition.

##### b. Depositions

A party may not take more than **10 depositions**, nor may she depose the same person more than once, without leave of court or stipulation of the parties.

###### 1) Oral Deposition of a Witness, Including a Party-Witness

A common form of discovery is the oral deposition. [Fed. R. Civ. P. 30] If the deponent is not available at trial, the deposition may be used in lieu of her appearance as a witness. The deposition may be recorded by sound, sound and visual, or stenographic means. Depositions may be taken by telephone or through other remote electronic devices. All parties may pose questions to the deponent. A deposition may not exceed “one day of seven hours” absent court order or stipulation to the contrary.

###### a) Compulsory Appearance of Witnesses

###### (1) Subpoena Not Needed for Parties

It is not necessary to serve a subpoena on an adverse party or an

officer, director, or managing agent of a party to compel appearance; the notice of deposition is sufficient to compel attendance. For organizations, the notice may name the organization and state with “reasonable particularity” the matters to be covered. The organization and the requesting party must then confer about the topics to be covered during the deposition, and the organization will designate individuals to testify about those topics. [Fed. R. Civ. P. 30(b)(6), 37]

**(2) Nonparties Should Be Subpoenaed**

If the witness to be deposed is not a party to the action, he should be subpoenaed. The subpoena may be served by any person who is not a party and is not less than 18 years old. Service is made by delivering a copy of the subpoena with any necessary fees to the person named in the subpoena. A nonparty organization may be required by subpoena to confer and designate individuals to testify, as in (1), *supra*. A subpoena may command a person to appear only within 100 miles from where he resides, works, or regularly transacts business in person; or within the state where he resides, works, or regularly transacts business in person so long as he would not incur substantial expense. A subpoena is enforceable in the court it was issued or the court in which the action is pending or transfer from the issuing court. [Fed. R. Civ. P. 30, 45]

**(3) Costs When Notifying Party Fails to Attend**

When the party who notices the deposition does not appear (in person or by an attorney) to take the deposition, and the other party does appear, the latter can obtain his costs of attending, including reasonable attorneys' fees.

**2) Deposition of Witnesses on Written Questions**

To facilitate depositions of witnesses living a great distance from the parties, a deposition may be taken by written questions to witnesses (including parties). All parties can pose questions to the deponent, which must be served on all parties before the deposition. [Fed. R. Civ. P. 31]

**c. Interrogatories to the Parties**

Written interrogatories also may be submitted to parties. The party must respond in writing with not only facts which she herself knows, but also facts that are available to her. The party may also be asked to give opinions, even on the application of law to facts. Initially, the requesting party may not serve more than **25 interrogatories including subparts** without court order or stipulation, but leave may be granted to serve additional ones.

**1) Option to Produce Business Records**

If the answer to an interrogatory may be ascertained from the responding party's business records (including electronically stored information), and the burden of ascertaining the answer will be essentially the same for the parties, the responding party may (1) specify the records that must be reviewed, in sufficient detail to enable the requesting party to locate and identify them as readily as the responding party could; and (2) give the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

**d. Production of Physical Material; Inspection**

A party may ask (1) for the production by a **party** (or, if accompanied by a subpoena, a nonparty) of physical material, including documents and electronically stored information, relevant to the pending action; and (2) that a party be required to permit entry onto land for relevant testing. [Fed. R. Civ. P. 34] Notice must be given to all other parties before a nonparty subpoena issues. A subpoena is limited to production at a place within 100 miles of where the person resides, works, or regularly transacts business in person.

**e. Physical and Mental Examinations****1) Order for Examination**

The discovery rules provide for an independent physical or mental examination of a party when that party's physical or mental condition is in controversy. Such exam is available only if ordered by the court, on showing of good cause. [Fed. R. Civ. P. 35] Traditionally, the Rule has allowed exams only by "physicians." Now, however, it allows exams by a "suitably licensed or certified examiner," which would include, for example, doctors, dentists, occupational therapists, and any others required to be licensed and qualified to comment on a physical or mental condition.

**2) Report of Findings**

The person examined may request a copy of the examiner's report, but if that person so requests or takes a deposition of the examiner, she waives any privilege and must produce, upon demand, copies of her own doctor's reports of any other examinations of the same condition.

**f. Requests for Admission**

Any party may serve on any other party a written request for admission as to the truth or genuineness of any matter or document described in the request. The matters will be considered admitted unless the party upon whom the request was served returns a sworn statement denying the truth of the matters set forth in the request, or explaining why she cannot admit or deny them. Alternatively, the party upon whom the request was served can file written

objections to those requests that she has a legal basis for not answering. A party may be asked to admit matters that are genuine issues for trial. The admission is for the purpose of the pending action only and may not be used against the party in any other proceeding. [Fed. R. Civ. P. 36]

## 5. Enforcing Disclosure and Discovery

### a. Motion for an Order Compelling Disclosure or Discovery

On notice and motion, a party may seek an order compelling discovery from the court. (An evasive or incomplete response to discovery essentially is treated as a failure to make discovery.) The movant must certify that he has, in good faith, conferred or attempted to confer with the person or party failing to make discovery in an effort to avoid court intervention. If the motion is to compel a party to make discovery, the motion must be filed in the court in which the action is pending; if the order is sought against a nonparty, the motion must be made in the court in which discovery will be taken. [Fed. R. Civ. P. 37(a)]

#### 1) Motion Granted or Discovery Is Provided After Filing

If the motion is granted, or if the discovery is provided after the motion was filed (and, of course, after the movant conferred or attempted to confer to resolve the dispute), the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both, to pay the moving party's reasonable expenses incurred in making the motion, including attorney's fees, unless the nondisclosure was ***substantially justified or other circumstances exist that make an award of expenses unjust.***

#### 2) Motion Denied

If the motion is denied, the court may issue a protective order and must, after giving an opportunity to be heard, require the movant and/or the attorney filing the motion to pay the opposing party's or deponent's reasonable expenses, including attorney's fees, incurred in opposing the motion unless the motion was ***substantially justified or other circumstances exist that make an award of expenses unjust.***

#### 3) Motion Granted in Part and Denied in Part

If the motion is granted in part and denied in part, the court may issue a protective order and/or, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

### b. Failure to Comply with a Court Order

A party or deponent may be held in contempt of court for failing to obey a court order (except for an order for a mental or physical examination). There are further sanctions that may be available against a party. The court in which the

action is pending may: (1) take designated facts as true for the purposes of the action; (2) prohibit the nondisclosing party from supporting designated claims or defenses; (3) strike pleadings; (4) stay the proceedings until the order is obeyed; (5) dismiss the action in whole or in part; (6) render a default judgment against the nondisclosing party; and/or (7) order the party and/or his attorney to pay reasonable expenses, including attorney's fees. [Fed. R. Civ. P. 37(b)]

**c. Failure to Disclose or Supplement an Earlier Response**

If a party fails to provide information or identify a witness, the party is not allowed to use that information or witness to supply evidence in a motion, or at a hearing or at trial, **unless** the failure was **substantially justified or harmless**.

In addition to or instead of this sanction, the court, on motion, may (1) order payment of the reasonable expenses, including attorney's fees, caused by the failure; (2) inform the jury of the party's failure; and (3) impose other appropriate sanctions. A motion to compel is not required for these sanctions. [Fed. R. Civ. P. 37(c)(1)]

**d. Failure to Admit**

If a party fails to admit a fact that is the subject of a request for admissions, and the requesting party later proves the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must order payment of expenses unless: (1) the request was held objectionable; (2) the admission sought was of no substantial importance; (3) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or (4) there was other good reason for the failure to admit. A motion to compel is not required for this sanction. [Fed. R. Civ. P. 37(c)(2)]

**e. Party's Failure to Attend His Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection**

If a party, after being served with proper notice, fails to attend his own deposition, or if a party fails to provide **any** response to interrogatories or a request for inspection, the requesting party may, instead of moving to compel, apply for immediate sanctions against the nondisclosing party. However, the movant (requesting party) must certify that he made a good faith attempt to resolve the discovery dispute. That a request is objectionable does not serve as a defense **unless** the nondisclosing party has a pending motion for a protective order. Permissible sanctions are the same as those described above. [Fed. R. Civ. P. 37(d)]

**6. Use of Depositions at Trial or Hearing**

**Subject to the rules of evidence**, a deposition may be used (at trial or in a hearing) against any party who was present at the deposition or had notice of it:

- a. **To impeach** the testimony of the deponent as a witness;
- b. For any purpose if the court finds that the deponent (including a party-deponent) is **dead**, at a distance greater than **100 miles** from the place of trial (unless the absence was procured by the party offering the deposition), **unable to testify** because of age, sickness, or imprisonment, or the party offering the deposition could not procure the witness's attendance by subpoena;
- c. For any purpose if, on notice and motion, the judge permits the deposition to be so used due to exceptional circumstances; or
- d. For any purpose if the **deponent is an adverse party**.

[Fed. R. Civ. P. 32]

## 7. Errors and Irregularities in Depositions

[Fed. R. Civ. P. 32]

### a. As to Notice

Errors and irregularities relating to the notice of deposition are waived unless written objection is promptly served on the party giving notice.

### b. As to Manner of Taking

Errors of any kind which could have been obviated if promptly presented are waived unless **seasonable** objection is made at the time of taking the deposition (applies to form of questions, oath, conduct of parties, etc.).

### c. As to Completion and Return

Errors and irregularities as to the completion and return of the deposition are waived unless a motion to suppress is made with reasonable promptness after the error was or should have been discovered (applies to signing, sealing, certification, and transmittal).

### d. As to Form of Written Questions

Objections to the form of written questions are waived unless served on the party propounding them within the time for serving succeeding questions and within five days after service of the last questions authorized.

## I. PRETRIAL CONFERENCES

### 1. Rule 26(f) Conference of Parties—Planning for Discovery

As soon as practicable, and in any event before the Rule 16(b) scheduling conference (see below), the parties must confer to consider **their claims and defenses, the possibility of settlement, initial disclosures, any issues concerning the preservation of evidence, and a discovery plan**. The parties must submit to the court a proposed discovery plan within 14 days after the conference addressing the timing

and form of required disclosures, the subjects on which discovery may be needed, the timing of and limitations on discovery, and relevant orders that may be required of the court. Unless the parties stipulate or the court orders otherwise, a party may not seek discovery until after this conference is held, with the exception that the party may serve a request to produce, which will be considered served on the date of the first conference.

## 2. Rule 16(b) Scheduling Conference

The court must (except in classes of cases exempted by local rule) hold a scheduling conference among the parties or counsel. The scheduling order will limit the time for **joinder, motions, and discovery**. The order may also include dates for **pretrial conferences, a trial date, and any other appropriate matters**. This schedule cannot be modified except by leave of court upon a showing of good cause. [Fed. R. Civ. P. 16(b)]

## 3. Pretrial Conferences

The court may also hold pretrial conferences as necessary to expedite trial and foster settlement. A **final pretrial conference**, if any, is held as close to the time of trial as reasonable, and is for the purpose of formulating a plan for the trial, including the admission of evidence. This conference is to be attended by at least one of the lawyers for each side who will actually be conducting the trial, and by any unrepresented parties. After a pretrial conference, an order must be entered that **controls the subsequent course of events** in the case. Thus, the final pretrial conference order is a blueprint for the trial, usually listing witnesses to be called, evidence to be presented, factual and legal issues needing resolution, and like matters. It is thus said to supersede the pleadings and may be modified only to prevent manifest injustice.

## 4. Sanctions

A party or counsel may be sanctioned for failure to attend a conference or obey an order entered pursuant to a conference, for being substantially unprepared to participate in a conference, or for acting in bad faith. The court has a broad range of available sanctions including contempt, striking pleadings, and prohibiting the introduction of evidence. In addition, the court must require the disobedient party or counsel to pay expenses incurred (including attorneys' fees) by other parties, unless the court finds that circumstances make such an award unjust.

# J. ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution (“ADR”) is a process in which a neutral person resolves a dispute or helps the parties to resolve their dispute. Examples of these processes include contractual arbitration, judicial arbitration, and mediation.

## 1. Contractual Arbitration

The Federal Arbitration Act (“FAA”) governs written arbitration agreements involving interstate or international commerce and preempts conflicting state law. [9 U.S.C. §§1 et seq.]

### a. Procedure

A written agreement to arbitrate a dispute is valid and enforceable unless a contractual ground for revocation exists (for example, fraud in the inducement of the arbitration clause, illegality or unconscionability of the arbitration clause). Court proceedings are stayed until the arbitration proceedings are completed. The appointment of the arbitrator usually will be provided for in the arbitration agreement. At the arbitration proceeding, the arbitrator can subpoena witnesses and require them to bring documentary evidence to the hearing. After the arbitrator renders the award, a party can move to have the court confirm the award. The opposing party may move to vacate the arbitration award on the grounds below. If the award is confirmed, it is considered to be final and binding, and it is enforceable as a court judgment.

#### 1) Judicial Review of Award

An arbitration award may be vacated, even on appeal, only on narrow statutory grounds, such as ***fraud or bias*** of the arbitrator, the arbitrator's ***refusal to delay proceedings*** for sufficient cause, or the arbitrator's ***failure to follow the arbitration agreement*** to such a degree as to affect the outcome. Additionally, an arbitration award also may be overturned when it represents a ***manifest disregard of the law***, which is a judicially created and extremely deferential standard that requires the complaining party to show that the arbitrator knew the applicable law but chose to disregard it. A party may also move to ***modify*** the award ***to correct miscalculations, to modify an award that goes beyond the scope of the arbitration agreement, or to correct minor imperfections of form.*** [9 U.S.C. §10]

### 2. Judicial Arbitration

"Judicial arbitration" is a dispute-resolution process conducted by a neutral person under the auspices of the court in an attempt to resolve the action without trial. At the federal level, participation in arbitration procedures is voluntary, and even then certain actions (cases involving a violation of constitutional rights, certain civil rights actions, and cases alleging an amount in controversy of more than \$150,000) may not be referred to ADR even if the parties consent. Within 30 days of the arbitration award, a party may reject the award and request trial de novo. Any evidence that the case was arbitrated is generally excluded. [28 U.S.C. §§654 et seq.]

### 3. Mediation

Mediation involves the use of a neutral person to help parties to a dispute reach a mutually acceptable agreement. The mediator does not have decisionmaking power; his role is to facilitate the process by which the parties reach their own voluntary agreement. In federal court, mediation is accomplished by local district rule. By local rule, mediation may be made mandatory for certain cases. [28 U.S.C. §§651, 652]

## K. TRIAL

### 1. Jury Trial Problems

A party who desires a jury trial (on some or all fact issues) must file a written demand with the court and serve it on the parties. [Fed. R. Civ. P. 38] (Such demand may be indorsed upon a pleading of the party.) Failure to make such a demand within 14 days after the service of the last pleading directed to the jury-triable issue constitutes a **waiver** by that party of any right to trial by jury. A court may, within its discretion, order a trial by jury if the plaintiff's waiver was not intentional. In the absence of compelling reasons to the contrary, a court should grant relief from waiver if the issue is one normally tried by a jury. [Cox v. Masland & Sons, Inc., 607 F.2d 138 (5th Cir. 1979)] A jury demand may be withdrawn only if **all** parties consent.

#### a. Right to Jury Trial

The Seventh Amendment preserves the right to a jury trial in federal courts of facts in all “suits of common law” where the amount in controversy exceeds \$20. The determination is historical and turns initially on whether the claim or relief was available at law or in equity in 1791. The Supreme Court has demonstrated a clear **preference for jury trial** in doubtful cases by holding that:

- 1) If legal and equitable claims are joined in one action involving common fact issues, the **legal claim should be tried first to the jury** and then the equitable claim to the court (the jury's finding on fact issues will bind the court in the equitable claim);
- 2) If a procedure formerly available only in equity, such as a class suit, interpleader, or derivative action, is now permitted under the Federal Rules for determining a “legal” claim, a **jury should try the fact issues**;
- 3) If damages are claimed as part of an action seeking an injunction, the defendant **cannot be denied a jury on the damages issues** on the ground that they are “incidental” to the equitable relief; and
- 4) If a new claim is created that did not exist at common law, a right to a jury trial will exist if the claim is similar to a claim for common law rights and remedies, unless the statute creating the right provides otherwise. [See, e.g., *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998)—statutory damages under Copyright Act to be tried to jury]

#### b. Jury Trials in Diversity Cases

##### 1) Right to a Jury Trial

The federal court **must permit a jury trial** in any diversity “suit at common law” even though the state court would deny a jury (the Seventh

Amendment prevails over state law in *Erie* situations); and a federal court will generally **follow the federal practice** of submitting issues of fact to the jury even though the state law assigns the issue to the court. [Byrd v. Blue Ridge Electric Cooperative, Inc., III.D.2.b., *supra*] If the state rule requires submission of a fact issue to the jury, the federal court may nonetheless direct a verdict under the usual standards or otherwise follow a federal practice that calls for the court to be the trier of fact. Likewise, state law is disregarded in determining the sufficiency of the evidence to create a jury issue; that is, the directed verdict standards are always federal.

**2) Motion for New Trial Based on Excessiveness of Verdict**

The Supreme Court has required federal trial courts to apply a state standard when considering a motion for a new trial based on excessiveness of the verdict. [Gasperini v. Center for Humanities, Inc., III.D.3., *supra*] Under the Seventh Amendment, federal appellate review of whether a trial court properly denied a motion to set aside a verdict as excessive is limited to whether the trial court abused its discretion in denying the motion. In contrast, a jury's determination of the amount of a punitive damage award is reviewed de novo on appeal. [Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001)]

**c. Jury Size**

In federal civil cases, a jury must begin with at least six jurors and not more than 12 jurors. A juror may be excused for good cause (such as illness) without causing a mistrial, so long as at least six jurors participate in reaching the verdict. Parties may stipulate to accept a jury of fewer than six. [Fed. R. Civ. P. 48]

**d. Jury Selection**

**1) Jury Venire**

Jury selection process begins with individual potential jurors being summoned to appear in court. At this stage, the potential jurors together are called a “venire,” and the jurors who will actually hear the case are chosen from the venire. The venire must be a reasonable cross-section of the community.

**2) Voir Dire**

Typically, the potential jurors will be asked to fill out a questionnaire to discover if the juror has some potential bias in the case (for example, whether the juror knows any of the parties or attorneys involved in the case, whether the juror has been involved in a similar case, whether the juror owns stock in one of the parties, etc.). The juror likely will be asked questions individually also. This process is known as “voir dire.”

### 3) Jury Challenges

If the questioning of a potential juror reveals that the juror is biased, that juror may be excused **for cause**. Bias may be actual or implied. Actual bias **may** be inferred by the juror's **deliberately** lying during voir dire. Implied (or presumed) bias arises when it is very unlikely that an average person in the juror's shoes would be impartial. Examples of implied bias include when the juror is closely related to one of the parties or attorneys, when the juror is employed by one of the parties, when the juror was the victim of a similar crime or suffered a similar injury, or when the juror has a financial stake in one of the parties. In such cases, the juror must be excused, even if the juror states that she can be fair and impartial.

### e. Jury Instructions

At the close of the evidence, or sooner at the court's direction, a party may file proposed instructions. Ordinarily, the judge will inform the parties of the instructions she intends to give, and the party will be given an opportunity to object on the record and outside of the jury's presence before the instruction is actually given, and must do so to preserve the issue for appeal unless the erroneous instruction was plain error that affected a party's substantial rights. The plain error standard is a difficult standard to meet. [Fed. R. Civ. P. 51]

#### EXAMPLE

An instruction that misstates or misplaces the burden of proof might be reversible on appeal without objection if the aggrieved party can show the incorrect instruction likely affected the outcome of the case.

### f. Jury Deliberations

Jurors may take into the jury room **all papers or exhibits in evidence and their own notes**. Instructions, pleadings, or other matters are generally improper for use in the jury room, except when they are formally admitted into evidence. A jury may not engage in experiments in the jury room, and jurors may not make private studies of documents or items outside of the jury room. Jurors may not view property or places involved in the case, except by court order. Jurors **must not communicate with any nonjuror** regarding the trial; in fact, **any** private communication between jurors and counsel or parties is serious misconduct that may lead to a new trial. It is error for a juror, in the jury room, to state facts not in evidence; however, jurors are entitled to evaluate evidence presented in light of their general knowledge and experience.

### g. Jury Verdicts

The jury verdict must be unanimous unless the parties agree otherwise. The trial court has discretion to decide the type of verdict to be used (that is, general vs. special; see below). [Fed. R. Civ. P. 49] Jurors cannot decide a verdict by

flipping a coin or averaging (although averaging may be proper as a starting point for discussion).

**1) General Verdict**

In a general verdict, the jury finds for the plaintiff or defendant and gives the amount of damages or relief due. A general verdict implies that all essential issues were found in favor of the prevailing party.

**2) Special Verdict**

In a special verdict, a jury is asked to make a finding on all material conclusions of fact, and the court applies the law. The procedure for a special verdict is to submit to the jury a series of questions regarding each ultimate fact. The court then makes legal conclusions based on those facts. Each question must deal with a single fact only and must not assume the existence of facts in dispute. A party waives objections to the form of the questions if she does not object when they are given. If the court fails, on request, to submit an issue to the jury, the case will be reversed unless the omission was harmless. If no request was made, a jury trial on the issue is generally held to be waived, and the court will decide it. [See Fed. R. Civ. P. 49]

**3) General Verdict with Written Questions**

Sometimes, a jury is asked to give a general verdict and also to answer specific written questions concerning certain ultimate facts in the case. The purpose is to ensure that the jury properly considered the important issues. The questions must be submitted with the general verdict to test the verdict's validity. [See Fed. R. Civ. P. 49(b)]

**4) Erroneous Verdicts and Inconsistent Findings**

Inconsistent determinations in a verdict make the verdict erroneous if the determinations are irreconcilable (for example, when a verdict is rendered against a person vicariously liable and the principal wrongdoer is exonerated). Any clear compromise verdict is also erroneous, as is any verdict that simply finds for the plaintiff "for actual damages suffered." When a verdict is erroneous, the jury may be asked to reconsider it, or a new trial may be ordered. When answers to special interrogatories are **consistent with each other**, but one or more is inconsistent with the general verdict, the court may (1) enter judgment in accord with the special interrogatories; (2) have the jury reconsider its answers or verdict; or (3) order a new trial. When the answers to the special interrogatories are **inconsistent with each other** and one or more is inconsistent with the general verdict, judgment cannot be entered, and the court must either have the jury reconsider its answers and verdict, or the court may order a new trial. A jury may completely change its answers or verdict when redeliberation is ordered.

## 5) Juror Misconduct

A new trial is appropriate if a juror **gave false testimony on voir dire or concealed material facts relating to his qualifications to serve**. A verdict will not be set aside if the alleged misconduct was harmless.

## 2. Consolidation and Separate Trials

A court may consolidate actions then before it when the actions have a common question of law or fact, or order separate trials of any claim, cross-claim, counter-claim, or other issues when such separation will foster judicial economy. [Fed. R. Civ. P. 42]

## 3. Involuntary Dismissals

On the defendant's motion or on its own motion, a court may order an involuntary dismissal against a plaintiff for failure to: (1) prosecute; (2) comply with the Federal Rules; or (3) comply with a court order. [Fed. R. Civ. P. 41(b)] An involuntary dismissal is with prejudice, meaning that it operates as adjudication on the merits, unless the court orders otherwise.

## 4. Voluntary Dismissals

The plaintiff can give up his case voluntarily by way of a voluntary dismissal, either with or without leave of court. [Fed. R. Civ. P. 41(a)]

### a. Without Leave of Court

If the defendant has not answered or filed a motion for summary judgment, the plaintiff may dismiss her case by filing a notice of dismissal. A dismissal by notice is without prejudice unless the plaintiff has previously dismissed any federal or state court action on the same claim, in which case the dismissal by notice is with prejudice. (This is known as the "two dismissal rule.") The parties may also stipulate to a voluntary dismissal at any time. A stipulated dismissal is without prejudice unless the stipulation states otherwise. The plaintiff is charged with costs only if she files the action again after the dismissal.

### b. With Leave of Court

When a voluntary dismissal without leave of court is not available (that is, there has been an answer or a motion for summary judgment), the court has discretion to grant dismissal on such terms and conditions as the court deems proper. The dismissal is without prejudice unless the court specifies otherwise. If there is a **counterclaim pending in the action**, there can be **no dismissal** over the defendant's objection **unless the counterclaim remains pending**.

## 5. Offer of Judgment

A party defending against a claim or counterclaim may serve, at least 14 days before trial, **a formal offer to have a judgment entered against it on specified terms with costs then accrued**, thereby settling the case out of court. A defending party may

also serve an offer of judgment after it has been determined to be liable to another party, but before actual damages have been set; such an offer must be made at least 14 days before the hearing on damages. If the claiming party rejects the offer, and the ultimate judgment is less favorable to him, he must pay costs incurred after the offer was made. So long as the offer does not explicitly or implicitly **exclude** costs, it is a valid offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs. Unlike the practice in a number of states, only defending parties may make a formal offer to have a judgment entered voluntarily. [Fed. R. Civ. P. 68]

## 6. Summary Judgment

[Fed. R. Civ. P. 56]

### a. Standard

Summary judgment may be granted if, from the pleadings, affidavits, and discovery materials, it appears that there is **no genuine dispute of material fact** and the moving party is entitled to judgment as a matter of law. The court may not decide disputed fact issues on a motion for summary judgment; if there is a genuinely disputed material fact (meaning a dispute backed by evidence on both sides of the issue), the case must go to trial.

### b. Applicable to All Civil Actions

A summary judgment motion may be made by any party in any civil action that is subject to the Federal Rules, and may be made as to any claim (that is, any cross-claim, counterclaim, impleader claim, etc.).

### c. Time

Unless local rule or court order dictates otherwise, a party may file a motion for summary judgment any time until 30 days after close of all discovery. [Fed. R. Civ. P. 56(b)] If a motion is premature, the court may defer ruling on it.

### d. Partial

Summary judgment may be partial (as well as complete).

### EXAMPLE

Summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

### e. Support

The motion may be supported or opposed with affidavits or other declarations made under penalty of perjury, depositions, sworn pleadings, admissions, answers to interrogatories, or other materials in the record.

f. **Affidavits**

- 1) Affidavits or declarations must: (1) be made on **personal knowledge**; (2) set forth such facts as would be **admissible** in evidence; and (3) show the affiant is **competent to testify**.
- 2) A party **may object** that the material cited to support or dispute a fact **cannot be presented in a form that would be admissible** in evidence.
- 3) If a party fails to support an assertion of fact or fails properly to address another party's assertion of fact, the court may **consider the fact undisputed** for purposes of the motion, **grant summary judgment** if appropriate, **give an opportunity to address the fact**, or issue any other appropriate order.
- 4) When the party opposing the motion shows by affidavit or declaration that he cannot present facts, he **may state the reasons** for their unavailability or declarations. The court may then **deny** the motion, **order a continuance** to permit affidavits to be obtained or depositions to be taken, or **make such other order** as is just.
- 5) When affidavits or declarations are made in **bad faith**, the court may order the party using them to **reimburse** the other party for those expenses that the affidavits caused him, including attorneys' fees and/or adjudge in **contempt** the offending party or attorney.

g. **Nonappealability**

The denial of a motion for summary judgment is generally not appealable.

h. **Relationship to Motion to Dismiss**

A motion pursuant to Rule 12(b)(6) to dismiss a complaint for failure to state a claim upon which relief can be granted differs from a motion for summary judgment in that the former is addressed only to the **legal sufficiency of the complaint**.

i. **Relationship to Motion for Judgment on the Pleadings**

A motion for judgment on the pleadings presents the moving party's contention that **on the face of the pleadings**, he is entitled to judgment. Theoretically, matters outside the pleadings are irrelevant to a decision on either of these motions. However, a party making such a motion and accompanying it with an affidavit or other matters outside the pleadings may in reality be making a motion for summary judgment, putting the wrong label on the motion. The court is expressly authorized to treat such a motion as one for summary judgment and to conduct subsequent proceedings on the motion in accordance with the rule on summary judgment, giving the parties full opportunity to present material made relevant by that rule.

## 7. Motion for Judgment as a Matter of Law (Formerly Directed Verdict)

Historically, a judge could direct a particular verdict whenever the evidence—viewed in the light most favorable to the party against whom the verdict was directed (including legitimate inferences in that party's favor) and without considering the credibility of witnesses—was such that reasonable persons could come to only one conclusion. Today, this can be done pursuant to a party's ***motion for judgment as a matter of law*** ("JMOL"). The motion may be made by any party any time before submission of the case to the jury, and the moving party must specify the judgment sought and the law and facts on which the party is entitled to judgment. The motion may be granted only after the nonmoving party "***has been fully heard***" on the matter. To grant the motion, the court must find that "***a reasonable jury would not have a legally sufficient basis*** to find for the [nonmoving] party on that issue." [Fed. R. Civ. P. 50(a)]

## 8. Renewed Motion for Judgment as a Matter of Law (Formerly Judgment Notwithstanding the Verdict ("JNOV"))

Historically, a party against whom judgment was entered could move for JNOV if the judgment was based upon a verdict that reasonable persons could not have reached and if the moving party had sought a directed verdict at the close of all the evidence. Now, the motion for JNOV is called a ***renewed motion for judgment as a matter of law***. It must be filed no later than 28 days after entry of judgment and the party making the renewed motion must have moved for judgment as a matter of law ***at some time during the trial***. In theory, a party may raise only those issues raised in the motion for a JMOL. The standard is the same as for the motion for judgment as a matter of law. [Fed. R. Civ. P. 50(b)]

## 9. Motion for New Trial

A motion for a new trial must be filed no later than 28 days after judgment is entered. Within that period, the court may order a new trial on its own motion. [Fed. R. Civ. P. 59]

### a. Reasons for Granting New Trial

The court may grant a new trial because of an error during the trial (usually going to the admissibility of evidence or the propriety of the instructions), because the verdict is against the weight of the evidence (limited to cases where the judge finds the verdict seriously erroneous), because of juror misconduct, or because the verdict is excessive or inadequate.

#### 1) Remittitur

If the trial judge believes that the jury's compensatory damages award is so excessive as to "shock the conscience" (or in a diversity case if the award meets the state standard for excessiveness), the judge may order a new trial or may offer the alternative of remittitur. When offered remittitur, the plaintiff is given the choice between accepting an award less than that given her by the jury or submitting to a new trial. Note that the court cannot

simply lower the award given by the jury. It must offer the plaintiff the alternative of a lower award or a new trial. [Hetzell v. Prince Williams County, 523 U.S. 208 (1998)]

**2) Additur**

If the trial judge believes that the jury's compensatory damages are inadequate, she may **not** offer the defendant the choice of accepting a higher award or submitting to a new trial. "Additur" has been held to violate the Seventh Amendment (which is not applicable to the states). However, inadequate damages may be a basis for a new trial.

**b. Renewed Motion for Judgment as a Matter of Law with Motion for New Trial**

When a renewed motion for judgment as a matter of law and a motion for a new trial are made **in the alternative** and the renewed motion is granted, the court must rule hypothetically on the new trial motion so that no remand is required if the ruling on the judgment as a matter of law is subsequently reversed on appeal.

**10. Effect of Failure to Move for a Renewed Judgment as a Matter of Law or for a New Trial**

If a party fails to move for either a renewed judgment as a matter of law or for a new trial on the basis of insufficiency of the evidence, that party is precluded from raising the question of evidentiary sufficiency on appeal, to support either judgment as a matter of law or a new trial. [Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006)]

**11. Nonjury (Bench) Trials and Judgments on Partial Findings**

In a **nonjury** trial, the judge may enter a judgment as a matter of law against a party on any issue whenever there are **sufficient facts to resolve the issue**, provided that the **party has been fully heard** on the issue. If the issue is dispositive of a claim or defense, the judge may enter judgment as a matter of law against a party on that claim or defense. The judge may also wait until the close of all evidence to render judgment. Because the judge is acting as the trier of fact, she decides issues of disputed facts, and she may consider the credibility of witnesses. The judgment must be supported by findings of fact and conclusions of law, either in writing or orally on the record. [Fed. R. Civ. P. 52]

## **IX. ATTACK ON THE JUDGMENT AT THE TRIAL COURT LEVEL**

### **A. RELIEF FROM JUDGMENT OR ORDER**

#### **1. Clerical Mistakes**

A clerical error is one arising from oversight or omission, and may occur in

judgments, orders, or other parts of the record. The court can correct clerical errors **on its own motion or the motion of any party**. [Fed. R. Civ. P. 60(a)] There is no time limit for the correction of clerical errors, and the court order correcting the error dates back to the time judgment was entered. As a result, the battle over what constitutes a clerical error is acute.

## 2. Motions to Amend Prior Orders or Renew Prior Motions

Motions to amend a final order (that is, one that disposes of the litigation) may be brought when: (1) new evidence has been discovered that was not previously available; (2) there has been an intervening change in controlling law; (3) there is a need to correct a clear error of law or fact; or (4) there is a need to prevent manifest injustice. Such a motion must be brought within 28 days of the order; otherwise, the party must seek relief from judgment under Rule 60 (discussed below) or appeal. [Fed. R. Civ. P. 59(e)] It should be noted that an order that does not dispose of all parties and claims is not a final order and may be modified.

## 3. Other Grounds for Relief from Judgment

On motion and just terms, the court may relieve a party from a final judgment or order on the following grounds:

- (i) **Mistake, inadvertence, surprise, or excusable neglect;**
- (ii) **Newly discovered evidence** that by due diligence **could not have been discovered** in time to move for a new trial (but note that the newly discovered evidence must have been in existence before judgment to fall under this provision);
- (iii) **Fraud, misrepresentation, or other misconduct** of an adverse party;
- (iv) The judgment is **void**;
- (v) The judgment has been **satisfied, released, or discharged**; a **prior judgment** on which it is based has been **reversed or otherwise vacated**; or it is **no longer equitable** that the judgment should have prospective application; or
- (vi) **Any other reason** justifying relief from the operation of the judgment.

For grounds (i), (ii), and (iii), the motion must be made within a reasonable time not to exceed one year; for the other grounds, the motion must be made within a reasonable time. [Fed. R. Civ. P. 60(b)] Note: Ground (iv) does not apply simply because the judgment was erroneous; such errors are to be remedied on appeal. Ground (iv) applies only if there was a fundamental flaw such as lack of jurisdiction or deprivation of due process by failure to give notice or opportunity to be heard. [United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010)]

## B. INDEPENDENT ACTION IN EQUITY TO SET ASIDE THE JUDGMENT

A court, in its discretion, may entertain an independent action to relieve a party from a judgment or order. The plaintiff must show that he is likely to win if a new action is allowed. The only advantage of an independent action is that it will not be barred by the specific time limits outlined in A., above. However, the aggrieved party must act promptly once he knows or should know of the ground for relief. An independent action will be rejected if a motion to set aside the judgment has been rejected on the merits.

# X. FINAL JUDGMENT AND APPELLATE REVIEW

## A. JUDGMENT

### 1. Relief that May Be Given

Except in default cases, the court is not limited to the demand for relief in the pleadings and may give **any relief** that is appropriate based on the evidence. Thus, damages may exceed the plaintiff's demand and an injunction may be entered although not requested. Interest on a money judgment is awarded at the rate provided under state law from the date of judgment.

### 2. Judgment on Multiple Claims or Parties

When multiple claims or multiple parties are involved in an action, the court may enter a final judgment as to fewer than all of the claims or parties only on an **express determination that there is no just reason for delay** and an entry of judgment. **Unless** the trial judge makes such an **express determination**, the order determining the merits of fewer than all of the claims or dismissing fewer than all of the parties is **not a final judgment and is not appealable**. This is in accord with the traditional policy against piecemeal appeals. [Fed. R. Civ. P. 54(b)]

### 3. Final Decision on Merits May Be Valid Despite Lack of Subject Matter Jurisdiction

Occasionally, lack of subject matter jurisdiction is not raised until the decision is final and all appeals are completed. The question then is whether the decision may be collaterally attacked—that is, be set aside in an independent proceeding or treated as invalid in a later case. The factors that must be balanced in making this determination are: (1) lack of jurisdiction is clear; (2) jurisdiction depends on a question of law, not fact; (3) the court is of limited, not general, jurisdiction; (4) the question of jurisdiction was not litigated; and (5) strong policy exists against the court acting beyond its jurisdiction.

## B. TIME FOR APPEALS

An appeal may be taken by filing a notice of appeal with the district court **within 30 days** from the entry of the judgment appealed from (60 days where the United States is a party to the action). [Fed. R. App. P. 3, 4] However, if a **timely** (within 28 days) renewed

motion for judgment as a matter of law, a motion for new trial, or a motion to set aside or amend the judgment is made, the running of the 30 days is terminated. Upon the entry of an order based on such post-trial motions, a new 30-day period begins to run. A notice of appeal filed during the pendency of such a post-trial motion will become effective on final disposition of the motion by the trial court.

### 1. Extension of Time for Appeal

Upon a showing of excusable neglect, made within 30 days after the time to appeal has expired, the district court may extend the time for filing a notice of appeal by 30 days from the time it would otherwise have run, or 14 days from the date of the order granting the extension, whichever is later. The court also may reopen the time to appeal for a period of 14 days when (1) the party did not timely receive notice of entry of judgment; (2) the motion for extension is filed within 180 days of the judgment or within 14 days of receiving notice of judgment, whichever is earlier; and (3) the opposing party will not be prejudiced.

## C. REVIEWABLE ORDER

Generally, **only final orders** are reviewable on appeal. A final order is one that disposes of the whole case on its merits, by rendering final judgment not only as to all the parties but as to all causes of action involved. [Cunningham v. Hamilton County, 527 U.S. 198 (1999)—order imposing sanctions on attorney is not a final order even when the attorney no longer represents a party to the case] However, certain interlocutory orders are **also reviewable**:

### 1. Interlocutory Orders as of Right

#### a. Injunction

A party may appeal as of right any order granting, continuing, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction. A TRO is not an injunction for appeals purposes.

#### b. Receivers

A party may appeal as of right any order appointing a receiver, or refusing to wind up or take steps to accomplish purposes of receiverships (for example, directing sales or other disposals of property).

#### c. Property Possession

A party may appeal as of right any order whereby possession of property is changed or affected, such as orders dissolving writs of attachment and the like.

### 2. Interlocutory Appeals Act

Review under the Interlocutory Appeals Act [28 U.S.C. §1292] is **discretionary** and may be available when: (1) the trial judge certifies that the interlocutory order involves a controlling question of law, as to which there is substantial ground for

difference of opinion, and immediate appeal from the order may materially advance the ultimate termination of the litigation; and (2) the court of appeals then agrees to allow the appeal. A party obtaining such a certificate from the trial judge must, within **10 days**, apply to the court of appeals, where two out of three judges must agree to hear the appeal.

### 3. Fewer than All Claims or Parties

(See A.2., *supra*.)

### 4. Collateral Order Rule

If the claim or issue is separable from and collateral to the main suit and is too important to require deferring appellate review, it may be classified as a judgment in a separate (“collateral”) proceeding and thus be appealable. [Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993)—governmental entity’s claim of Eleventh Amendment immunity from suit denied; issue appealable immediately under collateral order rule because failure to permit interlocutory appeal would effectively eviscerate Eleventh Amendment immunity from suit in federal court by requiring entity to litigate to final judgment before appealing]

### 5. Review of Nonappealable Orders by Writ

In exceptional cases, nearly all jurisdictions allow some circumvention of the final judgment rule through the appellate writs of mandamus and prohibition. Mandamus commands a trial judge to act, and prohibition commands the judge to refrain from acting. The writs are available only if an appeal will be insufficient to correct a problem and the trial court’s actions constitute a serious abuse of power that must be immediately corrected.

### 6. Certification of Class Actions

A district court’s order granting or denying certification of a class action can be appealed within 14 days of entry of the order. [Fed. R. Civ. P. 23(f)] The court of appeals has complete discretion in deciding whether to hear the appeal. If the court decides to hear the appeal, proceedings are **not stayed** at the district court unless the district court or court of appeals so orders.

## D. STANDARDS OF REVIEW

### 1. On Matters of Law

On appeal, when it is alleged that the trial judge erred on a pure matter of law, the appellate court may substitute its judgment for that of the trial judge. This is called a *de novo* review.

### 2. On Questions of Fact

In a bench trial, the trial judge will make findings of fact (see VIII.K.11., *supra*). The trial judge’s findings of fact will not be disturbed on appeal unless they were “clearly

erroneous.” [Fed. R. Civ. P. 52(a)(6)] A factual determination by the jury is afforded even greater weight on appeal. Findings of fact by a jury will be affirmed on appeal if, while viewing the evidence in the light most favorable to affirming the jury’s verdict, a reasonable jury could have reached the same conclusion. (This is similar to the standard a trial judge faces when deciding whether to grant a judgment as a matter of law; see VIII.K.7., *supra*.)

### 3. On Mixed Questions of Law and Fact

Mixed questions of law or fact are reviewed *de novo*. It is often difficult to determine whether the question is purely factual, purely legal, or mixed. Generally speaking, whether a set of facts meets a legal definition (for example, whether the use of copyrighted material is “fair use” under copyright law) is considered to be a mixed question of law and fact.

### 4. On Discretionary Matters

Many decisions a trial judge makes are left to her discretion (for example, whether to consolidate or sever cases, whether to grant leave to amend a pleading, etc.). On appeal, the standard of review is whether the judge “abused her discretion” in making her decision. This means that the judge’s ruling will not be overturned on appeal unless it plainly wrong or without an appropriate basis.

## E. STAY PENDING APPEAL

Stays are governed generally by Rule 62.

### 1. Execution

No execution on judgments is allowed for 30 days after entry except injunctions or receiverships, which are not held up unless otherwise ordered by a court. If the case follows the usual route to appeal, the appellate court ordinarily will continue the stay or issue a new stay.

### 2. Bond

A bond or other security is required in sufficient size to satisfy the judgment, costs, interest, and damages for delay, should the appeal be dismissed or affirmed. Upon filing such a bond, an appellant has a stay pending appeal.

### 3. Injunction Order

#### a. Power of Trial Court

When appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such bond or other security as it considers sufficient to protect the adverse party.

#### b. Power of Appellate Court

An appellate court has similar power to grant a stay or injunction pending

appeal, or to vacate one granted by the trial court, or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered. Ordinarily such a stay or injunction pending appeal must be sought in the trial court before the appellate court will entertain it.

## F. SUPREME COURT JURISDICTION

### 1. Court of Appeals Cases

Cases in the courts of appeals may be reviewed by the Supreme Court:

- a. **By certiorari** granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree; or
- b. **By certification** by the court of appeals of any question of law in any civil or criminal case as to which it desires instructions. Upon such certification, the Supreme Court may give binding instructions or may require the entire record to be sent to it for decision of the entire case.

[28 U.S.C. §1254]

### 2. Cases from Highest State Court

Final judgments rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court **by certiorari** in the following circumstances:

- (i) Where the validity of a **treaty or federal statute** is drawn into question; or
- (ii) Where the validity of a **state statute** is drawn into question on the ground that it is repugnant to the federal Constitution or to a treaty or federal statute; or
- (iii) Where any **title, right, privilege, or immunity** is claimed under the federal Constitution or treaty or federal statute.

[28 U.S.C. §1257] Only the Supreme Court may hear appeals coming from the state court system.

## XI. EFFECTS OF JUDGMENT ON FUTURE CASES

### A. CLAIM PRECLUSION (RES JUDICATA)

#### 1. Definition

Once a **final** judgment **on the merits** has been rendered on a particular cause of action, the claimant is barred by claim preclusion (res judicata) from asserting the **same cause** of action in a later lawsuit.

## 2. Terminology Used to Describe Effect—“Merger” and “Bar”

When the **claimant wins** the earlier lawsuit, the cause of action is said to have been **“merged”** into the judgment. When the **defendant wins**, the claimant is said to be **“barred”** by the earlier adverse judgment. Both terms simply mean that the **claimant cannot sue again** on the same cause.

## 3. Requirements for “Merger” and “Bar”

Before merger or bar apply, it must be shown that (1) the earlier judgment is a **valid, final judgment “on the merits”**; (2) the cases are brought by the **same claimant** against the **same defendant**; and (3) the **same “cause of action”** (or “claim”) is involved in the later lawsuit.

## 4. Valid, Final Judgment

Claim preclusion (*res judicata*) flows from the entry in an earlier case of a valid, final judgment “on the merits.” A judgment is valid as long as it is not void (for example, for lack of subject matter jurisdiction). The process for determining whether a judgment is final for these purposes is generally the same as whether it is final for purposes of taking an appeal. (See X.C., *supra*.)

## 5. “On the Merits”

Usually, the more difficult issue is whether the valid, final judgment is considered “on the merits” for purposes of claim preclusion. Often, a judgment will be based on actual litigation between the parties, but it can also be a default judgment entered as a penalty against a party (such as a dismissal for willful violation of discovery orders) or an involuntary dismissal closely related to the merits (such as for failure to state a claim upon which relief may be granted). In contrast, other involuntary dismissals not involving the merits (such as those based on lack of jurisdiction, improper venue, or failure to join an indispensable party) are not a judgment on the merits and do not have claim preclusive effect. Although Federal Rule 41(b) indicates that all dismissals are to operate “as an adjudication on the merits” unless based on jurisdiction, improper venue, or failure to join an indispensable party, the Supreme Court has held that Rule 41(b) does **not** govern whether the judgment is “on the merits” for purposes of claim preclusion. [Semtek, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001)] Thus, jurisdictions may take different views of whether a particular dismissal—such as a dismissal because the statute of limitations has run—is deemed “on the merits” for purposes of claim preclusion.

## 6. Same Claimant Versus Same Defendant

Traditionally, claim preclusion applies only if the earlier case and the latter case are brought by the same claimant against the same defendant. It is not enough that the same litigants were also parties in the previous case; they must have been in the same configuration of one asserting a claim against the other.

---

**EXAMPLES**

- 1) In Case One, a trucker sues a driver to recover damages for personal injuries suffered in an automobile accident. A valid, final judgment on the merits is entered. Now the trucker sues the driver again, this time to recover damages for property damage inflicted in the same wreck. Assuming that both cases involve the same “cause of action” (discussed immediately below), claim preclusion would apply, because both cases were brought by the trucker against the driver.
- 2) In Case One, the trucker sues the driver to recover damages for personal injuries suffered in an automobile accident. A valid, final judgment on the merits is entered. Now the driver sues the trucker to recover for her personal injuries suffered in the same wreck. Claim preclusion **does not apply**. Here, the second case is brought **by the driver against the trucker, while the first case was brought by the trucker against the driver.**

*Note:* The driver may be barred from asserting her claim because of the compulsory counterclaim rule, but not because of claim preclusion. The compulsory counterclaim rule requires a defending party to assert against the claimant **in the pending case** any claims arising from the same transaction or occurrence as the claimant's claim. (See VIII.F.3.c., *supra*.)

## 7. “Cause of Action”

While various tests have been used to define “cause of action,” the modern approach is to require assertion of all claims arising out of the same transaction or occurrence that is the subject matter of a claim asserted by the claimant.

### a. Common Examples

#### 1) Accidents

The claimant seeks to recover separate damages from the same accident in separate actions. The claimant may not seek damages for neck injuries in one action and leg injuries in another. Likewise, most courts would not permit the claimant to sue for personal injuries and property damage in separate actions. However, if the claimant is insured for property damage and, after payment of the claim, the claimant assigns her cause of action for property damage to the insurance company, most courts would consider the property damage claim and personal injury claim as two separate causes of action.

#### 2) Installment Obligations

In the situation of a series of obligations, such as installment payments on a debt or lease, the claimant is required to sue on all installments due at the time of suit, but not later installments. But if the contract has an acceleration clause that makes all installments due if earlier ones are not paid,

the claimant must sue for all installments (unless the acceleration clause is optional and the claimant elects not to exercise the option). This rule does not apply if the installment obligations are represented by separate notes; in such cases, suit as each note comes due represents suit on a separate cause of action.

## B. ISSUE PRECLUSION (COLLATERAL ESTOPPEL)

### 1. Definition

A judgment binds the plaintiff or defendant (or their privies) in subsequent actions on different causes of action between them (or their privies) as to **issues actually litigated** and **essential to the judgment** in the first action. This conclusive effect of the first judgment is called issue preclusion (or collateral estoppel). Note that issue preclusion is narrower than claim preclusion. Claim preclusion focuses on something relatively large—the scope of a “**cause of action**.” If it applies, the result is usually to bar the claimant from asserting a second case. Issue preclusion, in contrast, focuses on something relatively narrow—**an issue** that was litigated and determined in the first case, and that is relevant in a second case. With issue preclusion, the issue is deemed established in the second case without need to proffer evidence on it.

### 2. Requirements

#### a. Final Judgment

The traditional view is that the final judgment requirement for issue preclusion (collateral estoppel) is very similar to the final judgment requirement for claim preclusion. (See A.4. - 5., *supra*.) However, recent decisions have relaxed the final judgment rule for issue preclusion. A judgment may be “final” even if it is subject to post-trial motions or appeals. Several factors may be weighed in determining whether to give preclusive effect to a judgment not entered as final, such as whether the prior decision was adequately deliberated, whether the court’s decision is supported by reasoned opinion, and whether the prior decision was subject to appeal or is on appeal.

#### b. Issue Actually Litigated and Determined

The issue on which issue preclusion applies must actually have been litigated and determined in the previous case. Thus, if a **default** or **consent** judgment is entered, there is generally no issue preclusion as to the fact issues that would have been tried had the case gone forward.

#### c. Issue Was Essential to the Judgment

- 1) It must be clear exactly how the issue was decided by the trier of fact.

**EXAMPLE**

P sues for personal injuries based on D's negligence. D pleads contributory negligence as a defense. If the jury renders a general verdict for D, the decision will have no issue preclusive effect in a subsequent case involving either P or D's negligence, because there is no way of knowing whether the jury found that D was not negligent or that P was contributorily negligent, or both.

**COMPARE**

However, if the jury found for P for the full amount of his injuries, it clearly had to decide that D was negligent and P was not. Thus, both issues could have issue preclusive effect in a later case.

- 2) The judgment must depend on the issue of fact decided.

**EXAMPLE**

If, in a personal injury action, the jury specially finds that neither P nor D was negligent—thereby rendering a verdict for D—the finding that P was not negligent was **not** essential to judgment and will have no issue preclusive effect in a later suit.

- 3) Note that the “essential fact” rule tends to reduce the number of cases in which issue preclusion can be applied, thus eliminating some of the burden from the first suit.

**d. Due Process and Mutuality Considerations****1) Against Whom Is Issue Preclusion Used?**

Issue preclusion may be asserted **only against** someone who was a party (or in privity with a party) to the previous case (the case in which the issue was actually litigated and determined). This requirement is imposed by due process, and thus is the rule in every jurisdiction.

**2) By Whom Is Issue Preclusion Used?**

Under the traditional “mutuality” rule, only someone who was a party (or in privity with a party) in the previous case can use issue preclusion. This requirement is not imposed by due process, however, and has been subject to modification in certain circumstances to allow nonparties to take advantage of a prior judgment.

**3) Exceptions to Mutuality When Judgment Used Defensively**

When a nonparty wishes to utilize a prior judgment **to avoid liability** in a subsequent suit, there are often compelling reasons for allowing her to do so. **Fairness** to the party being bound will also be considered.

**EXAMPLE**

If P unsuccessfully sues a person primarily liable (such as an employee), P's later suit against a person secondarily liable (for example, against the employer for the employee's acts) will be barred by issue preclusion in virtually all courts. Similarly, if P unsuccessfully sues a person secondarily liable, there is little reason why the person primarily liable should be subjected to a separate suit, and most courts so hold.

**4) Exceptions to Mutuality When Judgment Used Offensively—Consider Fairness**

Courts have been very reluctant to permit a nonparty to use issue preclusion to aid him (as a plaintiff) to obtain relief.

**EXAMPLE**

Suppose one of many passengers in a public vehicle successfully sues the driver for injuries received in an accident, and other passengers wish to utilize the judgment to establish liability. While a few courts have permitted such use, others refuse. They fear a situation in which 10 plaintiffs each sue and lose, and the 11th plaintiff wins, and all other potential plaintiffs seek to ignore the first 10 suits and rely solely on the 11th; application of issue preclusion in such a situation is considered ***unfair and demeaning to the legal system***.

However, the United States Supreme Court, in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), upheld the use of issue preclusion offensively. In the first action, brought by the Securities and Exchange Commission, the defendant was held to have violated the federal securities laws. The second suit, brought by a private plaintiff against the same defendant, alleged damages resulting from the same violation established in the first action. The Court allowed the latter plaintiff to rely on issue preclusion to establish the existence of the violation since under all the circumstances it ***was fair*** to the defendant to do so. Thus, in cases of ***nonmutual*** issue preclusion used ***offensively***, the key often is whether such use is ***fair and equitable***.

**C. CLAIM AND ISSUE PRECLUSION IN SPECIAL SITUATIONS****1. In Rem Judgments**

If a court exercises in rem jurisdiction over some property or status within its control, and if proper notice has been given to all interested persons, the judgment as to title or status is ***binding on all persons***.

## 2. Quasi In Rem Judgments

A quasi in rem judgment determines the rights of the parties only in the specific property before the court. **No personal judgment** is granted against anyone, and **no other property is affected**.

# D. WHICH PERSONS ARE BOUND BY A JUDGMENT?

## 1. Parties Are Bound

Parties are persons named as parties who have the power to control the action or who, if they lack capacity, are represented by guardians. **Nonparties** normally are **not bound**. Even where the lawsuit raises an issue as to performance or rights, nonparties normally are not bound by the judgment; for example, an assignor who has no control over the suit and no interest in the outcome, or an employee who allegedly was negligent, where the suit is filed only against the employer.

## 2. Privies to Parties Are Bound by Issue Preclusion

Persons who control the litigation and who will be affected by the outcome are bound by issue preclusion as to **all issues litigated**. For example, if the owner of a patent assumes control of an infringement suit brought by her licensee against a competitor, and the court holds the patent invalid, the owner is barred on that issue should she sue the same competitor. The owner has had her day in court.

## 3. Represented Parties May Be Bound by Claim Preclusion

Persons whose interests are represented and privities also may be bound by claim preclusion. For example, **beneficiaries** are bound by an action brought or defended on their behalf by the fiduciary, provided the fiduciary is operating within her authority. **Holders of future interests** are bound. **Unborn or unascertained** persons having future interests in property are bound by judgments as to the property if their interests are identical to those of parties to the action, or if a special representative is appointed for them. This rule reflects public policy favoring free marketability of property. **Members of a class** are bound by a valid class action judgment. **Successors in interest** are bound. **Transferees of property** are in privity with prior owners and thus are bound by a prior judgment concerning the property. This rule protects the public as to security of titles.

Note, however, that one is not barred from asserting a claim simply because she is asserting the same claim that a previous claimant has already litigated.

---

### EXAMPLE

Citizen A sues to challenge a tax as unconstitutional and loses. Citizen B is not barred from suing to challenge the same tax on the same basis unless Citizen A and Citizen B are in privity or Citizen A represented Citizen B in bringing the first suit.  
[Richards v. Jefferson County, 517 U.S. 793 (1996)]

---

In ***vicarious liability*** situations (employer-employee, principal-agent, insurer-insured) a judgment exonerating either generally is held to preclude an action on the same claim against the other.

---

**EXAMPLE**

P sues Principal claiming injuries as a result of Agent's negligence. P alleges Agent was acting in the course and scope of agency at the time of harm. A judgment in favor of Principal on the ground that Agent was not negligent would in some jurisdictions preclude suing Agent thereafter on the theory that Agent was negligent in causing the harm. If P first sued Agent and Agent was found not negligent, P should thereafter be barred from suing Principal for the negligence of Agent causing the harm.

---

**E. WHICH CHOICE OF LAW RULES APPLY TO PRECLUSION QUESTIONS?**

Preclusion questions—whether claim preclusion or issue preclusion—always involve at least two cases. One case has gone to a valid, final judgment on the merits. Preclusion law determines whether that judgment (in “case one”) precludes litigation of any matters in a pending case (“case two”). (By the way, note that “case one” was not necessarily filed first; it is “case one” because it went to judgment first.) A choice of law issue arises when case two is brought in a different jurisdiction than case one; that is, what law does the court in case two use to determine whether the judgment in case one is entitled to claim or issue preclusion?

**1. Case One Decided in State Court**

When case one has been decided in state court, the court in case two (whether state or federal) generally will apply the claim or issue preclusion law of the jurisdiction that decided case one.

---

**EXAMPLE**

Judgment is entered in a case in Kansas. A second case is brought in Missouri. To decide whether that case is subject to claim or issue preclusion, the judge in Missouri should generally apply Kansas law on claim or issue preclusion.

---

**2. Case One Decided in Federal Court Under Diversity Jurisdiction**

What if case one was decided in a federal court under diversity jurisdiction? Here, the Supreme Court held that the court in case two should apply federal law (because a federal court decided case one). However, it also held that usually the federal law in such an instance would be the state law of the state in which the federal court sat.

---

**EXAMPLE**

After plaintiff files suit in a California state court, defendant removes the case to federal court based on diversity jurisdiction. Plaintiff's federal court case is then

involuntarily dismissed because it is barred by California's statute of limitations. Plaintiff files the same claims in state court in Maryland (which has a longer statute of limitations). In determining whether to dismiss the case under claim preclusion, the Maryland state court should look to federal law. But, despite the language of Federal Rule 41, federal law would adopt the California law (unless "state law is incompatible with federal interests"). Because California law would allow the plaintiff to file in a jurisdiction with a longer statute of limitations, the Maryland court should not dismiss under claim preclusion. [Semtek, Inc. v. Lockheed Martin Corp., A.5., *supra*]

---



## REMOVAL ISSUES

The key points to remember are:

- A **federal court must have jurisdiction** over the case; **jurisdiction need not have been proper in the state court.**
- Removal is to the federal district court **whose territory encompasses the state court.**
- Only defendants can remove;** **all** defendants generally must join in the removal.
- A case **based on diversity** may **not be removed** if **any defendant** is a **citizen of the forum** state.
- Notice of removal must be **filed within 30 days** of the date defendant receives a copy of the initial pleading.
- If a case later becomes removable (as by dismissal of a nondiverse defendant), the case may be removed **within 30 days of the date it becomes removable, but (for diversity cases) not more than one year after it was brought in state court.**
- The one-year rule may be disregarded if the plaintiff **has acted in bad faith** to defeat removal.

CMR Chart

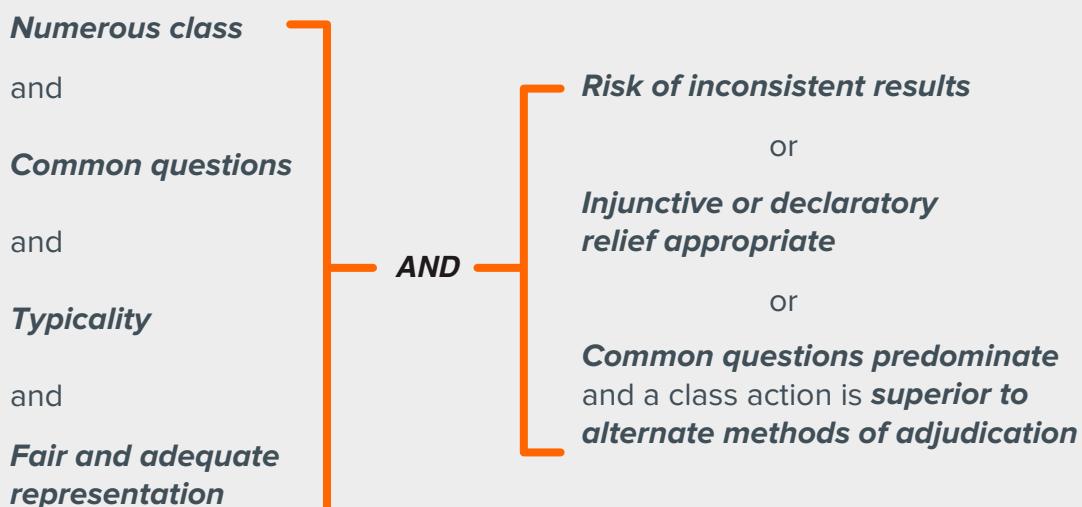
## TIMING OF PRE-ANSWER MOTIONS

Motion	Timing
1. Lack of jurisdiction over the <b>subject matter</b>	May be raised any time, even on appeal
2. Lack of jurisdiction over the <b>person</b>	
3. Improper <b>venue</b>	Waived if not raised by motion or answer, whichever is first
4. Insufficiency of <b>process</b>	
5. Insufficiency of <b>service of process</b>	
6. Failure to <b>state a claim</b> upon which relief can be granted	May be raised any time before trial or at trial
7. Failure to <b>join a party</b> under Rule 19 (indispensable party)	

CMR Chart

## FEDERAL CLASS ACTION REQUIREMENTS

A federal class action must meet all four requirements on the left side of the chart and one of the requirements on the right. The three alternatives on the right determine the type of federal class action. Only the third type, i.e., the common question type, **requires** notice to all class members and allows opting out.



CMR Chart

## PROCEDURAL DEVICES THAT MAY TERMINATE CASE

<b>Method</b>	<b>Circumstances</b>	<b>Timing</b>
<b>Pre-Answer Motion</b> [Rule 12(b)]	Addresses the following preliminary matters: defects in subject matter jurisdiction, personal jurisdiction, venue, process, and service of process; failure to state claim; failure to join needed party.	(See “Timing of Pre-Answer Motions” chart <i>supra</i> for timing of Rule 12 defenses.)
<b>Voluntary Dismissal by Plaintiff</b> [Rule 41(a)]	Without prejudice once as a matter of right; also possible by stipulation or court order.	If dismissed as a matter of right without prejudice, must be done before defendant files answer or motion for summary judgment.
<b>Involuntary Dismissal</b> [Rule 41(b)]	Plaintiff fails to prosecute the case or to comply with the Rules or a court order.	Any time.
<b>Motion for Judgment on the Pleadings</b> [Rule 12(c)]	On the face of the pleadings (without considering matters outside the pleadings), the moving party is entitled to judgment. Treated as motion for summary judgment if accompanied by outside matters.	After pleadings are closed but not so late as to delay trial.
<b>Summary Judgment</b> [Rule 56]	No genuine dispute of material fact and moving party is entitled to judgment as a matter of law. May support by pleadings, affidavits, discovery materials.	Unless local rule or court order dictates otherwise, a party may file a motion for summary judgment at any time until 30 days after close of discovery. If a motion is premature, the court may defer ruling on it.
<b>Judgment on Partial Findings</b> [Rule 52]	In a nonjury trial, the judge may enter a judgment as a matter of law if she makes dispositive partial findings on the claim.	During trial, once the judge has heard sufficient evidence to make dispositive findings and all parties have been fully heard on the issue.
<b>Motion for Judgment as a Matter of Law (Directed Verdict)</b> [Rule 50(a)]	Evidence viewed in light most favorable to motion's opponent leads reasonable person to conclusion in favor of moving party.	After opponent has presented case but before submission of case to jury.
<b>Renewed Motion for Judgment as a Matter of Law (“JNOV”)</b> [Rule 50(b)]	The verdict returned could not have been reached by reasonable persons. Moving party must have previously sought judgment as a matter of law sometime during the trial.	Within 28 days after entry of judgment.

CMR Chart

## CIVIL PROCEDURE MULTIPLE CHOICE QUESTIONS

### INTRODUCTORY NOTE

You can use the sample multiple choice questions below to review the law and practice your understanding of important concepts that you will likely see on your law school exam. More questions are available through the 1L and 2L/3L Mastery programs on the BARBRI website.

#### Question 1

The plaintiff and defendant in a lawsuit were in an accident in which the plaintiff was injured. As a result of the accident, the plaintiff incurred medical expenses of \$100,000. At the time of the accident, the plaintiff and defendant both lived in State A. Before the action was filed, the plaintiff moved permanently to State B. The plaintiff then filed a negligence action against the defendant in federal district court, with subject matter jurisdiction being based on diversity of citizenship. After the action was filed but before the defendant was served with process, the defendant was transferred by his employer and moved permanently to State B.

For purposes of evaluating the court's diversity of citizenship jurisdiction, what are the citizenships of the two parties?

- (A) Both are citizens of State A.
- (B) The plaintiff is a citizen of State B and the defendant is a citizen of State A.
- (C) The plaintiff is a citizen of State A and the defendant is a citizen of State B.
- (D) Both are citizens of State B.

#### Question 2

A resident of State A moved to State B to attend medical school. During her final year of medical school, the medical student was in a car accident with a classmate from State B. The classmate, however, waited until after graduation and after the medical student had moved to State C for her residency and permanent job to file suit in federal court in State B. The medical student filed a motion to dismiss for lack of diversity of citizenship.

How should the court rule?

- (A) Deny the motion, because the medical student was not a citizen of State B at the time the lawsuit was filed.
- (B) Deny the motion, because the medical student was a citizen of State A when she enrolled in medical school.
- (C) Grant the motion, because the classmate clearly acted in bad faith by waiting until the medical student moved to State C, and requiring her to defend such a claim would be unfair, inconvenient, and unreasonable.
- (D) Grant the motion, because the medical student was residing in State B at the time of the accident.

## 2. CIVIL PROCEDURE MULTIPLE CHOICE QUESTIONS



### Question 3

A homebuyer filed a breach of contract action in a State A state court against the contractor (a corporation) that agreed to build the home and sell it to the buyer. The homebuyer's complaint joined as an additional defendant the contractor's agent who negotiated the contract and signed it on behalf of the contractor. The action sought \$150,000 in damages from both defendants. The contractor is a citizen of State B. The homebuyer and the contractor's agent are citizens of State A. Six months after filing the action, the homebuyer dismissed the claims against the agent, leaving only the claims against the contractor. The corporation immediately and appropriately filed a notice of removal.

May the contractor remove the action to federal district court?

- (A) Yes, because the action can be properly removed at any time after the action was filed.
- (B) Yes, because, while the action was not properly removable when it was filed, it now can be properly removed to federal district court.
- (C) No, because, while the requirements for diversity of citizenship jurisdiction now are satisfied, the time in which removal is allowed has passed.
- (D) No, because removal is allowed only if federal subject matter jurisdiction exists at the time the complaint is filed.

### Question 4

While driving in State A, the defendant, a State B resident, was in an automobile accident with the plaintiff, a resident of State A. The plaintiff filed a negligence action against the defendant in a State A state court consistent with State A's long arm statute, and properly served the State B defendant pursuant to the State A long arm statute. The State B defendant immediately filed a motion to dismiss the action on the grounds that the State A court does not have personal jurisdiction.

How should the court rule on the motion to dismiss?

- (A) The court should deny the motion, because the defendant has purposeful contacts with State A that are directly related to the claim being asserted.
- (B) The court should deny the motion because the plaintiff is a State A resident.
- (C) The court should grant the motion unless the defendant is subject to general jurisdiction in State A.
- (D) The court should grant the motion because State A courts lack constitutional authority to assert jurisdiction over defendants outside of State A unless such defendants consent to the State A courts' jurisdiction.

**Question 5**

Three American drivers were involved in a three-car accident in Canada. One of them intends to file a tort action against the other two in a United States district court. The plaintiff resides in the District of State A. One defendant resides in the District of State B, and the other defendant resides in the District of State C.

In which federal district(s) is venue proper?

- (A) The District of State A only.
- (B) The District of State B and the District of State C only.
- (C) The District of State A, the District of State B, and the District of State C.
- (D) Venue is not proper in any district because actions arising from an automobile accident outside of United States territory may not be maintained in United States courts.

**Question 6**

A pedestrian filed an action against a driver in federal district court, alleging negligence. The attorney for the driver has interviewed an eyewitness whose testimony will clearly indicate that the driver was at fault.

Must the driver disclose the existence and identity of the eyewitness to the pedestrian?

- (A) No, because the identity of the eyewitness is protected from discovery under the work product doctrine.
- (B) No, because the driver is not likely to use the eyewitness as part of her case.
- (C) Yes, because the driver must disclose all witnesses who have discoverable information, even without a specific request.
- (D) Yes, but only in response to an appropriate interrogatory.

**Question 7**

The plaintiff in a negligence action in federal district court was injured when the defendant's car crashed into his. The defendant's friend was a passenger in the defendant's vehicle at the time of the accident. The defendant's attorney sent an email to the passenger asking the passenger to describe in detail what the passenger remembered about the accident and the events leading up to it. In response, the passenger sent the defendant's attorney an email describing the events. The plaintiff served on the defendant the following request for documents: "Please produce for inspection or copying any and all statements obtained by you or your attorney that relate in any way to the events and/or issues that are the subject of this legal action."

Must the defendant produce the passenger's statement?

- (A) Yes, because the statement is relevant to the parties' claims and defenses.
- (B) Yes, because the work product doctrine does not apply to emails and other digitally stored information.
- (C) No, because the statement is protected from discovery pursuant to the work product doctrine.
- (D) No, because the statement is privileged.

**Question 8**

A corporation filed a breach of contract action against an individual in federal district court. Attached to the complaint was a written contract providing that the individual agreed to pay the corporation \$100,000 over a period of years for specified services. The contract also contained the individual's signature. The individual told his lawyer that the signature was a forgery and that she had never signed or entered into the contract. On the basis of the individual's statement, the lawyer drafted, signed, and filed an answer. The answer denied the claim on a number of grounds and denied that the signature on the contract was

that of the individual. The individual's lawyer later served on the corporation a request for production of documents. When the corporation objected to some of the requests, the lawyer filed a motion to compel production. Shortly before the hearing on the motion to compel, the individual advised the lawyer that the signature on the contract was in fact hers, but she and the lawyer agreed that she nonetheless should not be liable on the contract for other reasons. The lawyer thus continued to assert the motion to compel production. At the hearing on the motion, the lawyer referred to the complaint and the answer to justify the relevancy of the requests for production, but he did not mention the signature in any way.

Has the lawyer violated Rule 11 of the Federal Rules of Civil Procedure?

- (A) No, because when the lawyer signed the complaint, he had evidentiary support in the expected testimony of the individual who denied signing the contract.
- (B) No, because the lawyer failed to state in the motion hearing that the signature on the contract was not that of the individual.
- (C) Yes, because when the lawyer referred to the answer in the motion hearing, he renewed his certification that facts in the answer had evidentiary support at the time of the hearing.
- (D) Yes, because the lawyer should not have signed the answer without having the individual sign a sworn statement that the signature on the contract was not hers.

**Question 9**

While driving a new car he recently purchased from an authorized dealer, a consumer's car caught fire for an unknown reason. The fire not only damaged the car, but also injured the consumer. The consumer filed a products liability action against the manufacturer of the car in federal district court, seeking to recover compensatory damages for his injuries. The complaint alleged that parts of the electrical system in the car were defective and that the defects caused the fire. The manufacturer filed an answer that denied the existence of any defects and denied that any defects caused the fire, but stated that it lacked sufficient knowledge and information to know what caused the fire. During discovery, the consumer served an interrogatory on the manufacturer that asked the manufacturer to "identify and summarize all evidence of which the manufacturer [was] aware that indicated that the fire was not caused by a defect in the car." The manufacturer's response stated that it did not have, and was not aware of, any evidence indicating that the fire was not caused by a defect. Based on that interrogatory response, the consumer filed a motion for partial summary judgment on the issue of causation to establish that any fire was caused by defects.

How should the court rule on the motion?

- (A) Grant the consumer's motion for summary judgment.
- (B) Grant the consumer's motion for summary judgment unless the manufacturer files affidavits or other evidence indicating that the fire was not caused by a defect.
- (C) The court should deny the consumer's motion, because it addresses an ultimate issue in the case.
- (D) The court should deny the consumer's motion, because, unless the consumer has presented evidence that a defect caused the fire, the manufacturer does not need to present evidence regarding causation.

**Question 10**

A State A citizen and a State B citizen were involved in a car accident. The State B citizen filed a negligence action against the State A citizen in federal district court, seeking \$500,000 for injuries incurred in the accident. The State A citizen believes that she was not at fault and that the accident was caused by the negligence of the State B citizen.

May the State A citizen assert in the pending action a negligence claim against the State B citizen, seeking \$400,000 for the injuries the State A citizen suffered in the accident?

- (A) No, joinder is improper under these circumstances.
- (B) Yes, and the court has discretion to grant or deny the motion in the interest of justice.
- (C) Yes, as a counterclaim in the pending action, or she may assert it as an independent action.
- (D) Yes, but only as a counterclaim in the pending action and will be barred from asserting it as an independent action.

**Question 11**

A plaintiff sued a defendant in federal district court for breach of contract. Based on a preliminary investigation, the defendant's attorney believes that no legally enforceable contract ever existed. Unfortunately for the defendant, however, his attorney is unsure whether she can prove that point at trial. If a valid contract did exist, the defendant's attorney believes that the defendant did not breach it. She also thinks that she has a better chance of prevailing on that point.

Which of the following is true regarding the defendant's ability to assert as defenses both that no contract existed and that the defendant did not breach the contract if one did exist?

- (A) The defendant may plead only one of these defenses because they are inconsistent.
- (B) The defendant may plead both defenses, but the plaintiff will then be able to have one defense stricken.
- (C) The defendant may plead both defenses, as long as he labels them as affirmative defenses.
- (D) The defendant may plead both defenses regardless of how they are labeled.

**Question 12**

A plaintiff filed a breach of contract action against a defendant in federal district court, invoking the court's diversity of citizenship jurisdiction. The defendant filed an answer denying the material allegations in the complaint. Approximately two months after the answer was served, the court entered a scheduling order that required the parties to complete all discovery within 10 months after the entry of the scheduling order. Two months later (four months after service of the answer and two months into the discovery period), the defendant sought to amend his answer to add an affirmative defense that the plaintiff's claim was barred by the statute of limitations.

Which of the following statements is correct regarding the defendant's right to amend his answer to add an affirmative defense?

- (A) The defendant has a right to amend his answer any time before trial.
- (B) The defendant must obtain leave of the court to amend his answer, but the court should freely grant leave.
- (C) The defendant may amend his answer to add the affirmative defense only if he can show he could not, with due diligence, have discovered the defense prior to serving his answer.
- (D) The defendant may not amend his answer more than 21 days after serving it.

## ANSWERS TO MULTIPLE CHOICE QUESTIONS

### Answer to Question 1

- (B) The plaintiff is a citizen of State B and the defendant is a citizen of State A. In addition to an amount in controversy that exceeds \$75,000, diversity of citizenship jurisdiction requires complete diversity, meaning that each plaintiff must be a citizen of a different state from every defendant. Whether complete diversity exists is determined when the suit is filed, not when the cause of action arose or when the defendant is served with process. The citizenship of a natural person is the state in which he is domiciled. A new state citizenship may be established by (i) physical presence in a new place; and (ii) the intention to remain there permanently. In this question, the plaintiff was originally from State A, but then moved permanently to State B *before* suit was filed. *After* suit was filed, the defendant also moved to State B from State A. Because the plaintiff's move to State B was before he filed suit, he is considered to be a citizen of State B for purposes of diversity jurisdiction, whereas the defendant is considered to be a citizen of State A because his move did not occur until after suit was filed. Thus, complete diversity exists. Choices (A), (C), and (D) are incorrect for the reasons stated above.

### Answer to Question 2

- (A) The court should deny the motion. Diversity of citizenship must exist when the action is commenced (i.e., when the lawsuit is instituted). It need not exist at the time the cause of action arose. A new state of citizenship may be established by (i) **physical presence** in a new place, and (ii) **the intention to remain there**, i.e., no present intent to go elsewhere. Here, the medical student had moved to State C for her residency and permanent job, which fulfills both the physical presence in State C and the intention to remain there requirements to establish State C as her new state of citizenship. Since her classmate filed the lawsuit after she moved, diversity of citizenship has been established and the motion to dismiss should be denied. (B) is wrong because her citizenship at the time she started medical school predated the cause of action and has no relevance to subject matter jurisdiction based on diversity. Again, the relevant date for diversity purposes is when the action was commenced. (C) is wrong because this unfairness and inconvenience argument does not apply to a motion to dismiss for lack of diversity of citizenship, which is what this question's motion was based on. Instead, this choice would apply if the motion to dismiss was based on lack of personal jurisdiction, as this argument pertains to violating the fairness prong of the constitutional minimum contacts test for in personam jurisdiction. (D) is wrong because diversity is measured when the action is commenced, not when the action occurred.

### Answer to Question 3

- (B) The contractor may remove the action. A defendant may remove an action that could have originally been brought in the federal courts (because subject matter jurisdiction based on either a federal question or on diversity of citizenship was present). Diversity of citizenship jurisdiction is available when (i) there is complete diversity of citizenship, meaning that each plaintiff is a citizen of a different state from every defendant; and (ii) the amount in controversy exceeds \$75,000. Generally speaking, a defendant has 30 days from the date he receives the initial summons or complaint to remove a case. However, if a case becomes removable on the basis of diversity at a later date, he has 30 days to remove the case from the date the defendant is served with the document that first makes the case removable. That said, for cases based on diversity, removal may not take place more than one year after the case was filed. In the instant case, the

## 8. ANSWERS TO MULTIPLE CHOICE QUESTIONS



homebuyer (from State A) initially sued the agent (also from State A) and the contractor (from State B) for \$150,000. Thus, the case was not initially removable. The case then became removable when the homebuyer dismissed the agent from the case, leaving the State B corporation as the sole defendant. At this point, the corporation has 30 days to remove the case, and the one-year restriction does not come into play because the facts state that only six months have passed since the case was filed. As a result, (B) is the correct answer. (A) is incorrect because the case was not initially removable. The claim was for a state law breach of contract, so no federal question was presented, and complete diversity was initially lacking, so diversity of citizenship jurisdiction was not available. (C) is incorrect because the 30-day period has been met (since the corporation immediately filed a notice of removal), and only six months have passed since the case was filed in state court, making the case removable on the basis of diversity of citizenship jurisdiction. (D) is an incorrect statement of the law. The grounds for removal need not exist at the time the case is filed. If grounds for removal come up later, the case may still be removed, subject to certain restrictions.

### Answer to Question 4

- (A) The court should deny the motion. The question provides that service was made pursuant to the State A long arm statute. The assertion of personal jurisdiction is statutorily authorized, in that it is consistent with State A's long arm statute, and the exercise of personal jurisdiction is constitutional, given that the claim arises from or relates to the defendant's purposeful activities (using roads) in State A. Thus, a court in State A may properly exercise personal jurisdiction over the defendant from State B, even if the defendant does not consent to personal jurisdiction and is not domiciled there. (B) is incorrect because personal jurisdiction cannot be exercised against a defendant based on the *plaintiff's* domicile. (C) is incorrect. There are two types of personal jurisdiction: general and specific. Here, the defendant's activity in the state allows State A to exercise specific jurisdiction (jurisdiction for the specific claim arising from the activity). General jurisdiction (jurisdiction for all causes of action) is not needed. (D) is incorrect because consent is not necessary to assert personal jurisdiction over a defendant, as explained above. Consent is one basis for exercising personal jurisdiction over a defendant, but not the only basis.

### Answer to Question 5

- (B) Federal venue in civil actions is proper in (i) the district where any defendant resides, if all defendants are residents of the state in which the district is located; and (ii) the district in which a substantial part of the events or omissions giving rise to the claim occurred. Here, the defendants' residences are not a basis for proper venue because the defendants do not reside in the same state, and the events giving rise to the action occurred in Canada, not in any United States judicial district. When there is no other district in which an action may be brought, venue is proper in any district in which any defendant is subject to the court's personal jurisdiction with respect to the action. Each of the defendants is subject to personal jurisdiction in the district where he resides, thereby rendering each of those districts proper. Thus, (B) is correct and (A) is not correct. However, the plaintiff's residence is not a proper basis for venue; this makes (C) an incorrect answer choice. Note that, although the District of State B and the District of State C are proper venues, the issue of each court's personal jurisdiction over both defendants would remain. However, the question does not address that issue. It is possible, as demonstrated here, that venue is proper without the court having personal jurisdiction over one or more of the defendants. As a result, (D) is not correct.

**Answer to Question 6**

- (D) The driver must disclose the identity of the witness in response to an appropriate interrogatory. Federal Rule 26(a) requires, as an initial disclosure, a party to reveal the name and contact information of individuals who are likely to have discoverable information and who the disclosing party may use to support his claims or defenses (unless the use would be solely for impeachment). After initial disclosures are made, discovery proceeds, and the parties may continue with discovery of nonprivileged information that is relevant to any party's claim or defense, including the names and contact information of any person who knows of any discoverable matter. Here, the eyewitness would not need to be disclosed as an initial disclosure because the driver obviously will not use the eyewitness to support the driver's claim or defense. However, the identity of the eyewitness would need to be disclosed eventually, assuming the pedestrian submits a proper discovery request. This makes (D) correct and (B) incorrect. (A) is incorrect because the work product doctrine does not prevent the disclosure of the existence of the eyewitness. Any materials generated by the attorney would probably be protected under the work product doctrine (unless a showing of substantial need and undue hardship can be made); however, the eyewitness's name and contact information would not be protected. (C) is an overbroad description of the initial disclosure requirements and is, thus, incorrect.

**Answer to Question 7**

- (C) The defendant does not need to produce the passenger's statement. Work product prepared in anticipation of litigation is discoverable only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the work product. Here, there is no indication that the passenger is unavailable or cannot recall the accident. Thus, it is unlikely that the plaintiff will be able to show substantial need and undue hardship in obtaining a statement from the passenger as to her recollection of the accident. As a result, the statement is protected from discovery. (Note that this analysis is applicable to the statement only; the existence of the passenger as a witness must be disclosed either as an initial disclosure—assuming the defendant is going to use passenger to support her claim or defense—or in response to a properly submitted interrogatory.) (A) is an overbroad statement of the requirements for discovery. Federal Rule 26(b)(3) specifically exempts documents prepared in the anticipation of litigation from discovery, and the passenger's statement falls into this category. (B) is an incorrect statement of the law; the fact that the statement was electronic does not prevent it from becoming protected under the work product doctrine. (D) is incorrect because the statement is not "privileged" per se (such as the doctor-patient evidentiary privilege), but rather is exempt from discovery under the work product doctrine under Federal Rule 26(b)(3). As described above, there are exceptions to the work product doctrine.

**Answer to Question 8**

- (C) The lawyer has violated Rule 11. By "presenting" a document to the court, Rule 11 provides that a lawyer certifies that he believes the denials of factual contentions in the document are warranted on the evidence and that his belief is formed after a reasonable inquiry. One "presents" a document not only by signing or filing it, but also by "later advocating" it. Thus, Rule 11 imposes a continuing certification requirement, applicable any time a matter is presented to the court. At the time he signed the complaint, the lawyer believed there was evidence that the individual did not sign the contract based on the individual's own statement. When the lawyer referred to the answer in the motion hearing, the lawyer "presented" the answer to the court anew and renewed his certification, despite the fact that he never discussed the signature. At that time, the lawyer no longer believed that all the facts in the answer had evidentiary support. He knew that he

## 10. ANSWERS TO MULTIPLE CHOICE QUESTIONS



lacked evidence to support the answer's denial that the signature on the contract was that of the individual. Thus, (C) is correct and (B) is incorrect. (A) is incorrect because it does not take into consideration the "later advocated" basis for presenting a document under Rule 11. (D) is incorrect because an attorney need not have his client sign a sworn statement for every fact that the client tells the attorney.

### Answer to Question 9

- (D) The court should deny the consumer's motion. The plaintiff must prove the elements of the *prima facie* case for her claim. Absent proof of an element of the *prima facie* case, summary judgment for the plaintiff is not appropriate. Thus, (A) is incorrect and (D) is correct. Furthermore, although a party is generally required to respond to a motion for summary judgment with affidavits, the facts here indicate that the consumer has not come forward with any evidence pertaining to the manufacturer's fault for the damage and injury. Thus, because the consumer has not properly supported his motion for summary judgment with relevant, admissible information, there is no need for manufacturer to produce any evidence to survive a motion for summary judgment. This makes (B) incorrect. (C) is an incorrect statement of the law. A motion for summary judgment may be granted even though the motion addresses an ultimate issue in the case.

### Answer to Question 10

- (D) The State A citizen must assert her claim. Because the State A citizen's claim arises from the same transaction or occurrence as the claim asserted against her in the pending action, the State A citizen's claim is a compulsory counterclaim which must be asserted in the pending action, or it is lost. As a result, (D) is correct and (A) is incorrect. (B) is incorrect in that it is not a discretionary call with the judge whether the claim may be filed as a counterclaim. (C) is incorrect because the claim may not be asserted as an independent action. FRCP 13 states that the pleader need not state a compulsory counterclaim if the subject matter of the compulsory counterclaim was *already pending* in another court. However, if the pleader has not filed suit on the subject matter of the compulsory counterclaim (which she has evidently not done here), she must file the compulsory counterclaim.

### Answer to Question 11

- (D) The defendant may plead both defenses regardless of how they are labeled. The Federal Rules of Civil Procedure expressly permit inconsistent pleadings in the alternative or hypothetically, reasoning that the discovery process will operate to sort out the viable pleadings. For this reason, (A) and (B) are incorrect. (C) is incorrect because the Rules do not limit inconsistent claims or defenses to "affirmative" defenses.

### Answer to Question 12

- (B) The defendant may amend with leave of the court. A party may amend a responsive pleading of right within 21 days after serving it. Thereafter, according to Federal Rule 15, the party may amend only with consent of all parties or with leave of the court, but the "court should freely grant leave when justice so requires." With so much time left for discovery and before trial, a court would almost certainly grant leave to amend. (A) is incorrect because, as stated, the time for amendment as of right is 21 days after serving it, not any time before trial as (A) implies. (C) is incorrect in that due diligence in discovering the defense need not be shown. (D) is incorrect. The 21-day period applies to amendment as of right, but a court may grant leave to amend after that period.

## APPROACH TO EXAMS

### CIVIL PROCEDURE

**IN A NUTSHELL:** To determine where to file a case, a plaintiff must find a court that has power over the defendants (“personal jurisdiction”) and power over the type of case (“subject matter jurisdiction”), and the location (“venue”) must be proper. The plaintiff drafts a complaint (sometimes called a “petition”) that will inform the defendant of the plaintiff’s claims; the plaintiff files the complaint with the court. Once filed, the plaintiff must provide the defendant with timely notice the complaint has been filed (“service of process”), using a method authorized by law. After the defendant is served with process, the defendant may challenge the merits of the case or defects in the complaint or petition by filing an answer and/or various motions (e.g., a motion to dismiss). The defendant may also file a claim against the plaintiff. Thereafter, the parties disclose to each other the evidence each may have (“discovery”). If a party discovers that his opposing party may not be able to prove a claim or defense at trial, he may ask the court to dismiss the case for lack of evidence (“motion for summary judgment”). If the plaintiff’s case survives to this point, it is tried before a jury (if requested) or a judge. In certain circumstances, the case may be withdrawn from the jury, or the jury’s verdict may be set aside, or the case may be appealed.

### I. JURISDICTION OVER THE PERSON

State law must authorize jurisdiction, and the exercise of such jurisdiction must be constitutional

#### A. Types of Personal Jurisdiction

1. *In personam*—forum has personal jurisdiction over defendant
2. *In rem*—forum has power to adjudicate rights of all persons to a particular item of property; defendant not personally bound
3. *Quasi in rem*—two types
  - a. *Quasi in rem type I*—court adjudicates rights of parties in property based on property being in forum; close connection between case and property provides minimum contacts
  - b. *Quasi in rem type II*—court attaches property to bring defendant into forum on unrelated claim; defendant must have minimum contacts with forum

#### B. Statutory Limitations on Personal Jurisdiction

1. Federal court must analyze personal jurisdiction as if it were a court of the state in which it is located
  - a. State law must authorize jurisdiction
  - b. Most, if not all, states authorize jurisdiction over a defendant who:

## 2. APPROACH TO CIVIL PROCEDURE

- 1) Is present in forum state and personally served with process therein;
- 2) Is domiciled in forum state;
- 3) Consents to jurisdiction; or
- 4) Commits an act covered by the long arm statute

## C. Constitutional Limitations on Personal Jurisdiction

1. Traditional rule—physical power
2. Modern due process standard—contact and fairness
  - a. Defendant must have such minimum contacts with the forum such that the exercise of personal jurisdiction over him is fair and reasonable
    - 1) Consider whether defendant purposefully availed himself of the benefits and protections of state law and whether he could have anticipated being brought into state court
  - b. Notice also required
    - 1) Traditional methods of personal service satisfy notice requirements
    - 2) Requirement that agent notify defendant
    - 3) Requirement for cases involving multiple or unknown parties

## II. SUBJECT MATTER JURISDICTION IN FEDERAL COURTS

### A. Diversity of Citizenship Jurisdiction

1. Complete diversity
  - a. Every defendant must be of diverse state citizenship from each plaintiff—this is “complete diversity”
  - b. Must have complete diversity when action commenced
    - 1) Interpleader exception
  - c. Alienage jurisdiction—citizen of U.S. state and foreign citizen
  - d. Questions of citizenship
    - 1) Individuals—domicile
    - 2) Corporations—every state/country where incorporated and one state/country of principal place of business, which is the place from which the corporation’s high level officers direct and control its activities
    - 3) Unincorporated associations and limited liability companies—citizenships of its members
    - 4) Legal representatives—domicile of the represented person
    - 5) Class actions—domiciles of the named members
    - 6) Nonresident U.S. citizens—not a citizen of any state and not an alien
  - e. Realignment of parties according to their true interest
    - 1) Shareholder derivative actions
  - f. Supplemental jurisdiction
    - 1) Must be one claim with original jurisdiction
    - 2) Supplemental claim must arise from a common nucleus of operative fact as

- the original jurisdiction claim such that the claims should be tried together
- g. Subsequent addition of parties and claims
    - 1) Intervention of right—no supplemental jurisdiction
    - 2) Substitution of parties—citizenship of original party controls
    - 3) Impleader—supplemental jurisdiction as to claim of Defendant v. Third-Party Defendant; claim of Plaintiff v. Third-Party Defendant must have original jurisdiction in diversity case
    - 4) Cross-claims—supplemental jurisdiction
  - 2. Jurisdictional amount in excess of \$75,000
    - a. Amount in controversy does not include interest and costs or counterclaims
      - 1) Attorneys' fees and interest that are recoverable by statute or as part of claim are included
    - b. Aggregation
      - 1) One plaintiff may aggregate claims against a single defendant
      - 2) One plaintiff may not aggregate **separate** claims against several defendants
      - 3) One plaintiff may sue several defendants on a joint liability claim if it exceeds \$75,000
      - 4) Several plaintiffs may aggregate claims against one defendant if seeking to enforce single title or right
    - c. Supplemental jurisdiction over claims by permissively joined plaintiffs not exceeding \$75,000 possible in diversity cases
    - d. Counterclaims
      - 1) Compulsory counterclaim may invoke supplemental jurisdiction
      - 2) Permissive counterclaim needs original jurisdiction
      - 3) Citizenship generally not an issue—if diversity exists between Plaintiff v. Defendant, it exists between Defendant v. Plaintiff
  - 3. *Erie* doctrine and law applied in diversity cases—state substantive law, federal procedural law
  - 4. Exceptions to diversity of citizenship doctrine—no probate, divorce, alimony, or child custody cases
  - 5. Multiparty, Multiforum Trial Jurisdiction Act

## B. Federal Question Jurisdiction

- 1. Federal question must appear in complaint
- 2. Implied federal right of action possible
- 3. Supplemental jurisdiction
  - a. Pendent claims—federal court has discretion to hear state law claim if it arises from a common nucleus of operative fact as the federal claim such that the claims should be tried together
  - b. Pendent parties—must be common nucleus of operative fact
- 4. Specific statutory grants of exclusive federal jurisdiction

### III. VENUE

#### A. Subject Matter Jurisdiction Distinguished—Venue Is Proper Geographic District

#### B. General Rules

1. Venue proper in federal district where any defendant resides (if all defendants reside in the same state), where a substantial part of events or omissions occurred, or where a substantial part of property situated
2. Fallback provisions—if no district satisfies above, venue proper in federal district where any defendant is subject to court's personal jurisdiction
3. Unlike subject matter jurisdiction, venue can be waived

#### C. Residence for Venue Purposes

1. Individuals—domicile
2. Business entities—where subject to court's personal jurisdiction
3. Nonresidents—any judicial district

#### D. Transfer

1. Original venue proper—transfer for convenience to venue where case might have been brought or to venue to which parties consent
2. Original venue improper—transfer to venue where case could have been brought to correct error
  - a. Dismissal if transfer not available or if some extraordinary circumstance exists

### IV. REMOVAL JURISDICTION

Defendant can remove an action that could have been brought originally in federal court

#### A. Requirements

1. Original jurisdiction
  - a. Diversity jurisdiction
    - 1) Dismissal of nondiverse party allows removal
    - 2) Case cannot be removed based solely on diversity if any defendant is a citizen of the forum state
    - 3) Case cannot be removed based solely on diversity more than one year after case was filed unless defendant can show plaintiff acted in bad faith to prevent removal
  - b. Federal question jurisdiction
    - 1) Having a federal defense is insufficient
    - 2) Entire case is removed
    - 3) State law claims may be severed and remanded to state court

2. State court need not have had jurisdiction
3. Only defendants may remove
4. Venue—federal district where state action was filed

## B. Procedure for Removal

1. Time—30 days
  - a. Generally starts to run after formal service of complaint
  - b. If later pleading, motion, etc., is filed that shows case is now removable, period begins to run on service of that pleading, motion, etc.
2. Remand to state court if no federal subject matter jurisdiction

## V. CONFLICT OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS

### A. Injunctions Against State Court Proceedings

1. Federal court generally may not enjoin pending state proceedings
2. Threatened state criminal proceedings—to prevent clear and imminent harm that cannot be remedied with a criminal appeal

## VI. FEDERAL RULES OF CIVIL PROCEDURE

### A. Commencement of Action—Complaint and Service of Process

### B. Service of Process

1. Personal service, abode service, service on agent; also state rules and waiver of service (by mail)
2. Parties served outside of state or in foreign country
3. Immunity from process for parties, witnesses, attorneys in another action, or fraud or deceit

### C. Interlocutory Injunctions—Maintain Status Quo Until Trial

1. Preliminary injunctions—require notice
2. Substantive requirements—irreparable harm, harm to party seeking injunction outweighs harm to party to be bound, likelihood of success on the merits, public interest factors
3. Temporary restraining orders—necessary to prevent irreparable injury

### D. Pleadings

1. Complaint—notice of plaintiff's claim
2. Pre-answer motions

## 6. APPROACH TO CIVIL PROCEDURE

- a. Motion to dismiss for (i) lack of subject matter jurisdiction; (ii) lack of personal jurisdiction; (iii) improper venue (transfer probably); (iv) insufficient process or service of process; (v) failure to state a claim; and (vi) failure to join a party
- b. Motion for more definite statement
- c. Motion to strike
- 3. Answer—specific or general denials by defendant
  - a. Compulsory counterclaims—arises out of same transaction or occurrence; must be pleaded
  - b. Permissive counterclaims—any other counterclaim
  - c. Inconsistent claims or defenses allowed
- 4. Special pleading for, e.g., fraud, mistake, special damages; must be more detail
- 5. Reply by plaintiff generally not required
- 6. Amendment of pleading and supplemental pleadings
  - a. Relates back to filing date of original complaint if it concerns same conduct, transaction, or occurrence
  - b. If party is charged, relates back if, within period for service of process, new party (i) received notice of the action such that party will not be prejudiced; and (ii) knew or should have known that, but for plaintiff's mistake concerning identity, new party would have been made a party originally
- 7. Rule 11
  - a. Attorney certifies proper purpose upon presenting paper to court
  - b. Sanctions—judge has discretion limited by deterrence factor

## E. Joinder

- 1. Compulsory joinder
  - a. Court cannot accord complete relief without absentee
  - b. Absentee has interest that will be impaired by lawsuit
  - c. Parties are at substantial risk for multiple or inconsistent judgments without absentee
  - d. If a., b., or c. is true, and absentee's presence will not destroy subject matter jurisdiction or venue, and the court can obtain personal jurisdiction over absentee, he must be joined
  - e. If absentee can be joined, court must consider whether to proceed without absentee, looking at:
    - 1) Prejudice to absentee and parties
    - 2) Whether judgment can be shaped to avoid prejudice
    - 3) Adequacy of judgment without absentee
    - 4) Whether another forum can hear entire case
- 2. Permissive joinder—arises out of same occurrence and transaction and common question of law or fact
- 3. Joinder of claims
  - a. Class actions

- 1) Requirements
    - a) Numerous class so joinder of all is impracticable;
    - b) Common questions of law or fact;
    - c) Named parties' interests are typical;
    - d) Named parties will ensure fair and adequate representation of absent members; and
    - e) Either (i) separate actions risk inconsistent results or harm absent members; (ii) injunctive or declaratory relief is appropriate; or (iii) common questions of law or fact predominate and class action is superior to other methods
  - 2) Effect of judgment—all members bound unless opt out
  - 3) Notice of pendency required in “common question” suit so members can opt out
  - 4) Jurisdiction—for diversity, named parties control whether diversity and amount in controversy are satisfied
  - 5) Notice of settlement must be given to class members so they can object at “fairness hearing”
  - 6) Court must approve dismissal or settlement after “fairness hearing”; if class action based on common question of law or fact, court may refuse settlement unless members are given second chance to opt out
- b. Class Action Fairness Act
    - 1) Federal jurisdiction if:
      - a) Any member of the plaintiff class is of diverse state citizenship from any defendant
      - b) Aggregated amount in controversy exceeds \$5 million
      - c) 100 members to the class
    - 2) Local considerations may defeat jurisdiction
  - c. Shareholder derivative suits
    - 1) Must have been a shareholder at time of transaction (or received shares by operation of law); not collusive effort to confer jurisdiction; made demand on directors if required
    - 2) Jurisdictional amount—consider corporation's damages
    - 3) Venue—where corporation could have sued the same defendants
  - d. Interpleader
    - 1) To avoid double liability
    - 2) Mnemonic: Rule 22 interpleader must follow the regular rules; statutory interpleader has special, simple standards
4. Intervention
    - a. As of right—intervenor has an interest in property or transaction that is subject of the action and action may adversely affect interest
    - b. Permissive—intervenor's action has common question of law or fact
    - c. No supplemental jurisdiction in federal court
  5. Impleader—generally to bring in nonparty to get indemnity or contribution

- a. Supplemental jurisdiction over claim by defendant/third-party plaintiff against third-party defendant, but no supplemental jurisdiction over claim by original plaintiff against third-party defendant
- 6. Cross-claims—co-partners may sue each other for claims arising out of same transaction or occurrence
  - a. Supplemental jurisdiction available

## VII. DUTY OF DISCLOSURE AND DISCOVERY

### A. Disclosure Requirements

- 1. Types of disclosure required without discovery request
  - a. Initial disclosures—generally disclosure of witnesses who support claims or defenses and materials that support claims or defenses
  - b. Disclosure of expert testimony—testifying experts and their reports must be disclosed
  - c. Pretrial disclosures—trial witnesses, depositions to be used at trial, exhibits, etc.
- 2. Scope of disclosure and discovery—generally any relevant nonprivileged matter that is proportional to the needs of the case
  - a. Trial preparation materials—only if substantial need and to avoid undue hardship
  - b. Experts
    - 1) Testifying experts—may depose
    - 2) Consulting experts—only if exceptional circumstances
  - c. Protective orders may limit or end discovery if abused
- 3. Supplementation of disclosures and discovery response required if learned information given is materially incomplete or incorrect

### B. Types of Discovery upon Request

- 1. Pre-action depositions to perpetuate testimony
- 2. Oral depositions
  - a. Notice of deposition compels appearance of parties
  - b. Nonparties must be subpoenaed
- 3. Written depositions—questions to deponent submitted in writing
- 4. Interrogatories to parties—written questions to parties
- 5. Production of physical material—nonparties need to be subpoenaed
- 6. Request for admissions as to truth or genuineness of any matter or document

### C. Enforcing Disclosure and Discovery

- 1. Motion to compel disclosure
  - a. Must certify good faith attempt to resolve dispute with opponent
- 2. Failure to comply with court order
  - a. Sanctions
  - b. No sanctions if substantially justified or unjust
- 3. Failure to disclose or supplement
  - a. No use of material unless substantially justified or harmless

- b. Sanctions
- 4. Failure to admit
  - a. Pay expenses for proving matter unless generally some good reason for not admitting
- 5. Failure to attend own deposition, serve answers to interrogatories, respond to request for inspection
  - a. Must certify good faith attempt to resolve dispute with opponent
  - b. Sanctions
  - c. Must seek order of protection to avoid sanctions if request objectionable

#### D. Use of Depositions at Trial or Hearing

Subject to the rules of evidence, depositions can be used:

- 1. To impeach the witness
- 2. For dead, unavailable, or absent witness
- 3. For any purpose if deponent is the adverse party

#### E. Pretrial Conferences

- 1. Rule 26(f) conference of parties—planning for discovery
- 2. Rule 16(b) scheduling conference
- 3. Sanctions for failure to attend, obey an order, etc.

### VIII. TRIAL

#### A. Alternative Dispute Resolution

- 1. Contractual arbitration—written agreement to arbitrate
- 2. Judicial arbitration—voluntary arbitration under auspices of court
- 3. Mediation—use of neutral person to facilitate voluntary settlement between the parties

#### B. Trial

- 1. Jury trial problems
  - a. Right to jury trial—7th Amendment
  - b. Jury size—at least six, no more than 12 jurors
  - c. Jury instructions—objections must be made before jury retires
  - d. Jury verdicts—general (for plaintiff or defendant and amount of damages) or specific (jury makes findings on material issues of fact)
- 2. Involuntary dismissal—with prejudice
- 3. Voluntary dismissal—by plaintiff, with or without leave of court
- 4. Summary judgment—if no genuine dispute of material fact, party entitled to judgment as a matter of law (no trial necessary)
- 5. Judgment as a matter of law (directed verdict)
  - a. Evidence viewed in light most favorable to nonmoving party
  - b. Witness credibility is not considered

- c. Standard—evidence is such that a reasonable jury would not have a legally sufficient basis to find for the party on that issue
- 6. Renewed motion for judgment as a matter of law (a.k.a. JNOV)
  - a. Same standards as above
- 7. Motion for new trial—some error occurred at trial (e.g., juror misconduct)
  - a. If made with renewed motion for judgment as a matter of law, and renewed motion is granted, judge must rule hypothetically on new trial motion
- 8. Party waives “sufficiency of the evidence” argument on appeal if he fails to move for a renewed motion for judgment as a matter of law or for a new trial

## IX. POST-TRIAL MOTIONS AND APPEALS

### A. Attack on the Judgment at the Trial Court Level

- 1. Relief from judgment or order is given for:
  - a. Clerical mistakes
  - b. Other grounds for relief from judgment
- 2. Independent action in equity to set aside the judgment

### B. Final Judgment and Appellate Review

- 1. Judgment
  - a. Appropriate relief that may be given
  - b. Final decision on merits may sometimes be valid despite lack of subject matter jurisdiction
- 2. Time for appeals—generally 30 days
- 3. Reviewable order—final orders reviewable on appeal
  - a. Interlocutory orders as of right—reviewable
  - b. Interlocutory Appeals Act—review discretionary
  - c. Collateral order rule—reviewable
  - d. Orders may be made appealable (or nonappealable) by writ
  - e. Certification of class action—can be appealed within 14 days of order
- 4. Stay pending appeal may be granted
- 5. Supreme Court has jurisdiction to hear federal appellate cases (certiorari or certification) and state supreme court cases (by certiorari) where federal issue

## X. CLAIM AND ISSUE PRECLUSION

### A. Effects of Judgment on Future Cases

- 1. Claim preclusion (res judicata)—a final judgment on the merits bars claimant from asserting same claim in later action
- 2. Issue preclusion (collateral estoppel)—a judgment binds parties (or their privies) in subsequent actions between them as to issues actually litigated and essential to judgment in first action

## B. Who Is Bound by Judgment?

1. Parties and their privies are bound
2. Mutuality rules
  - a. Traditionally, if a nonparty was not bound by a judgment, he could not use issue preclusion against one who was bound by the judgment
  - b. Some states (and federal courts) have relaxed mutuality rule when issue preclusion is used defensively
  - c. Some states (and federal courts) employ a four-part test to determine if issue preclusion can be used offensively—if all of the following are answered affirmatively, issue preclusion can be used offensively
    - 1) Are the issues identical?
    - 2) Is there a final judgment on the merits?
    - 3) Did the party against whom the judgment is to be used have a fair opportunity to be heard?
    - 4) Is it not unfair or inequitable to apply issue preclusion?



## ESSAY EXAM QUESTIONS

### INTRODUCTORY NOTE

The essay questions that follow have been selected to provide you with an opportunity to experience how the substantive law you have been reviewing may be tested in the hypothetical essay examination question context. These sample essay questions are a valuable self-diagnostic tool designed to enable you to enhance your issue-spotting ability and practice your exam writing skills.

It is suggested that you approach each question as though under actual examination conditions. The time allowed for each question is 60 minutes. You should spend 15 to 20 minutes spotting issues, underlining key facts and phrases, jotting notes in the margins, and outlining your answer. *If* you organize your thoughts well, 40 minutes will be more than adequate for writing them down. Should you prefer to forgo the actual writing involved on these questions, be sure to give yourself no more time for issue-spotting than you would on the actual examination.

The BARBRI technique for writing a well-organized essay answer is to (i) spot the issues in a question and then (ii) analyze and discuss each issue using the “CIRAC” method:

- C — State your ***conclusion*** first. (In other words, you must think through your answer **before** you start writing.)
- I — State the ***issue*** involved.
- R — Give the ***rule(s)*** of law involved.
- A — ***Apply*** the rule(s) of law to the facts.
- C — Finally, restate your ***conclusion***.

After completing (or outlining) your own analysis of each question, compare it with the BARBRI model answer provided herein. A passing answer does ***not*** have to match the model one, but it should cover most of the issues presented and the law discussed and should ***apply the law to the facts*** of the question. Use of the CIRAC method results in the best answer you can write.

## 2. CIVIL PROCEDURE EXAM QUESTIONS



### EXAM QUESTION NO. 1

Plaintiff filed a complaint in the United States District Court in State X, alleging in substance the following:

Plaintiff resides in State X; the shopping area nearest to plaintiff's residence is in State Y. Plaintiff read, in a national magazine, an advertisement for an electrical device called "Warnem" which, when installed in a home in accordance with instructions, was designed to sound an alarm bell and turn on the lights if an intruder entered the premises. "Warnem" was manufactured by defendant, Warnem Corporation, incorporated and having its company headquarters in State W; it sells the "Warnem" device f.o.b. its plant in State W to retailers throughout the United States. Plaintiff purchased a "Warnem" from a retailer in State Y and installed it in his home in State X in accordance with instructions. While the "Warnem" was installed and plaintiff was asleep in his home, intruders entered the home and destroyed a rare antique vase worth \$5,000. The device failed to function. Plaintiff claims damages of \$5,000 for the value of the vase and \$100,000 for mental anguish resulting from its loss.

The summons and complaint, issued by the federal district court in State X, were served on Warnem by personal delivery to the president of the corporation at the corporate office in State W.

You have been consulted by Warnem Corporation. Your research into State X law establishes that the Supreme Court of State X has recently held that there can be no recovery of damages for mental anguish from unintentional conduct unless there has been an impact. What are the various motions that you might make or pleadings that you might file prior to filing an answer in the case, and how would you expect the court to rule on each? Discuss.

**EXAM QUESTION NO. 2**

Company, a manufacturer incorporated and with its plant and headquarters in State X, asks Bookkeeper, an accountant from State Y, to prepare a financial statement for publication with a nationwide issue of Company's securities. Company mails its books to State Y, where Bookkeeper prepares a favorable report, negligently failing to discover that Company has fraudulently concealed several million dollars of debts. Company mails the report from State X to stockbrokers in every state. Investor, a resident and businessperson of State Z, reads the report in State Z and in reliance thereon purchases in State Z a number of shares of Company stock. He is later compelled by the economic instability of Company to sell the shares in State Z at a loss.

Investor sues both Company and Bookkeeper for damages in a State Z court, serving both defendants by registered mail, return receipt requested, in their home states in accordance with a State Z statute.

Both Bookkeeper and Company move to dismiss for lack of jurisdiction over the person. How should the court rule on the motions? Discuss.

**EXAM QUESTION NO. 3**

Ped is a resident of State A. Driver is a resident of State D. Health is a corporation incorporated in State H with its company headquarters in State A. Ped was injured when struck by a motor vehicle being operated by Driver in State A. Ped was hospitalized in the Health hospital and his injuries were aggravated, allegedly as a result of the hospital's negligence.

Ped sued Driver and Health in state court in State A, claiming damages in the sum of \$100,000 and alleging that he was uncertain as to which defendant was responsible for his damages.

(1) Upon Health's timely notice of removal, the case was removed to the United States District Court in State A. Thereafter Ped moved to have the case remanded to the state court in State A. That motion was granted.

(2) After remand, Health moved to dismiss on the grounds of misjoinder of parties defendant and improper joinder of several causes of action. The motion was overruled.

(3) Both Health and Driver filed answers denying liability and damages. Ped then filed timely requests for admissions, asking that each defendant admit liability, reserving for trial only the issue of damages. Both defendants filed timely objections on the grounds that the requests called for legal conclusions. The objections were sustained.

(4) Following a jury trial, a verdict was returned in favor of Ped and against both defendants in the sum of \$43,652.89. Ped moved for a new trial on the issue of damages or, in the alternative, on all issues. He supported his motion by the affidavits of five jurors that stated that: (a) immediately after entering the jury room, the jurors took a ballot on the issue of whether Ped should recover and the vote was 12 to zero in favor of Ped and against both defendants; (b) then each juror wrote down his idea of the amount of the recovery, the figures were totaled, divided by 12, and the result was \$43,652.89; and (c) all jurors then agreed that their verdict would be \$43,652.89. Based upon defendants' objections, the court refused to consider the affidavits and denied Ped's motion for a new trial.

Assume for purposes of this question that State A's rules of civil procedure are the same as those in federal court. Discuss the correctness of the court's rulings, setting forth the arguments that might reasonably be made in support of and in opposition to each of the following:

- (1) Health's motion to remand;
- (2) Health's motion to dismiss;
- (3) Ped's requests for admissions; and
- (4) Ped's motion for a new trial.

**EXAM QUESTION NO. 4**

Valco is a corporation incorporated in State B with its principal place of business in State A. It manufactures pressure valves for use on compressed air tanks. It purchases from Mity, a corporation, the “collars” affixed to the pressure valves, which are used to attach the valve to the air tank. Mity is incorporated and has its sole place of business in State A.

The Valco pressure valve on a piece of machinery owned by Peter and Quincy, and used by them in State C, exploded. Peter and Quincy were seriously injured. At all times Peter was a resident of State C. At the time of the explosion, Quincy was a resident of State A, but after the accident he moved to State B, where he now lives.

Peter and Quincy wish to assert claims against Valco and Mity on the theory that the valve exploded because of a defective “collar.” Valco has informed Peter and Quincy that it will claim as a defense that a written notice recalling the valves had been sent to them, and to all other users of this model valve, and that Peter and Quincy ignored the notice.

(1) If Peter, as sole plaintiff, institutes an action against Valco, as sole defendant, in United States District Court in State C, may Valco object to the failure to join Mity as a defendant? May Valco bring Mity into the case as a defendant and, if so, how? Discuss.

(2) If Peter and Quincy institute an action against Valco and Mity in United States District Court in State C for \$100,000 damages each, what issues might be raised as to joinder of parties plaintiff, joinder of parties defendant, joinder of causes of action, jurisdiction over the defendants, and jurisdiction over the subject matter? How should the trial court rule on each issue? Discuss.

(3) If an action by Peter, as sole plaintiff, against Valco and Mity is commenced and tried in United States District Court in State A, should the trial court apply State A law, State C law, or federal law on the two issues of (a) whether plaintiff must plead freedom from contributory fault, and (b) who has the burden of persuasion on the issue of contributory fault? Discuss.



## ANSWERS TO ESSAY EXAM QUESTIONS

### ANSWER TO EXAM QUESTION NO. 1

#### Motion to Dismiss for Lack of Subject Matter Jurisdiction

I could make a motion to dismiss for lack of subject matter jurisdiction, which the court should grant. The district court's power to hear and determine this case turns on whether it has *jurisdiction over the subject matter*, otherwise the suit must be dismissed. Since the facts present no "federal question," jurisdiction must proceed based on diversity of citizenship, which requires that all plaintiffs be of diverse citizenship from all defendants, and that there be more than \$75,000 in controversy.

Clearly, the diversity element is met (plaintiff residing in State X and Warnem a resident of State W); however, it is debatable whether the amount in controversy exceeds \$75,000. The jurisdictional amount is ordinarily determined from the prayer of the complaint, subject to a good faith limitation that there be some reasonable expectation of recovery in excess of \$75,000. If it appears to a legal certainty that recovery cannot go above \$75,000, the action must be dismissed.

Although plaintiff's complaint alleges \$105,000 in damages, \$100,000 of this is for mental anguish, and the recent decision of the State X Supreme Court indicates that those damages are not recoverable when there is no impact. Since a federal court sitting in a diversity case must apply the same substantive law as would the highest court of the state in which it is sitting [Erie v. Tompkins], the federal court in this case is bound by the State X decision. This would require disregarding the \$100,000 claim for mental anguish, with the result that there will be a lack of subject matter jurisdiction and the case must be dismissed.

#### Motion to Dismiss for Lack of Personal Jurisdiction

I could also make a motion to dismiss for lack of personal jurisdiction. The district court's power over Warnem turns on whether it has *personal jurisdiction* over it. Since plaintiff is seeking to recover money damages (an "in personam" action) from Warnem, there must be a showing of some constitutionally sufficient contact between Warnem and State X to subject the company to the court's personal jurisdiction. Assuming State X statutes empower its courts to exercise jurisdiction up to the constitutional limits, the question is whether those limits would be exceeded in Warnem's case. However, it is unclear whether such a motion would be successful because there are insufficient facts to draw a definitive conclusion.

Constitutional limits are couched in terms of fair play and substantial justice and require a finding of some purposeful forum-related activity by the defendant. This case also presents a "stream of commerce" scenario. When a manufacturer merely places its product in the stream of commerce, and does not do anything further, it will not be subject to personal jurisdiction in a particular state. However, it is unresolved whether a manufacturer is subject to personal jurisdiction in a particular state when it places its product in the stream of commerce and it knows (or hopes) that its product will end up in a particular state. When dealing with a "stream of commerce" case, the clear case for personal jurisdiction occurs when the manufacturer places its product in the stream of commerce and does something else (for example, it advertises or maintains a sales force within a state, changes its product to conform to state regulation, or maintains repair capabilities within the state, etc.) to serve the market in that state. It's this last stream-of-commerce activity that Warnem may have done.

The facts state that Warnem sells its product to retailers throughout the United States, presumably to retailers in State X as well, and that the plaintiff bought Warnem's product in State Y and brought it back to his home in State X. No other facts detailing Warnem's connection to State X are given, nor is it clear how close State Y is to State X, but the facts imply that the two states are close together since the shopping center in State Y was the nearest shopping area to plaintiff.

Thus, it could turn out that Warnem sells to other retailers in State X, but that plaintiff chose to buy the product in State Y only due to distance. If Warnem sells its products in State X, that might show

Warnem's intent to serve the market in State X. (A better case would be if Warnem does something else in State X, such as repairing its product in State X, allowing customers to return its alarm in State X for refunds, etc.) If that is the case, there would be an argument that a State X court would have personal jurisdiction over Warnem. In other words, if Warnem has deliberately established a systematic and continuous market in State X for its alarm, it would not be unreasonable to assert personal jurisdiction over Warnem in State X even though the actual sale took place in State Y. If it established a market in State X, Warnem should be able to anticipate that it could be sued in State X when the product fails.

On the other hand, if there were no specific jurisdiction, we would have to show that Warnem is subject to general jurisdiction in State X. It would have to be shown that selling to retailers in State X makes Warnem "essentially at home" in State X. However, a corporation likely is "essentially at home" only in the states where it is incorporated and where it has its principal place of business. Since Warnem is incorporated and has its headquarters in State W, it is subject to general jurisdiction in State W. As a result, a general jurisdiction theory for personal jurisdiction would fail.

For these reasons, I could move the court to dismiss the claim based on the lack of personal jurisdiction over Warnem, but, although not entirely clear or certain, I would probably not prevail on this motion.

## ANSWER TO EXAM QUESTION NO. 2

Bookkeeper's and Company's motions to dismiss should be denied. The issues are whether Bookkeeper and Company have sufficient minimum contacts with State Z, and whether service by mail, return receipt requested, is a constitutionally permissible method of service of process.

In order for the court to exercise personal jurisdiction over a defendant, personal jurisdiction must be authorized by state statute, and the exercise of personal jurisdiction must be constitutional. For the exercise of personal jurisdiction to be constitutional, the defendant must have sufficient purposeful contacts with the jurisdiction such that the exercise of personal jurisdiction over the defendant would be fair and reasonable, and he must be provided with sufficient notice of the action.

### Statutorily Authorized

The question does not set forth the provisions of the State Z statute, and mere notice to a nonresident outside the state is not sufficient to establish personal jurisdiction. Assuming, however, that State Z has enacted a long arm statute, the court could assert jurisdiction over nonresident individuals and corporations as to causes of action arising out of, among other things, the transaction of business or the commission of a tortious act within the state. Here, since Investor is bringing suit on a tort theory, apparently the "tortious act" part of the statute is being relied on to establish jurisdiction.

**Company:** Company's fraudulent concealment of its debts was a misrepresentation committed in each state to which it mailed the report and offered its securities for sale. It had a duty to disclose its debts to prospective purchasers, not merely to Bookkeeper. Thus, since the report was sent to State Z and Investor purchased shares in reliance thereon, both the wrongful act (failure to disclose) and the injury to Investor (loss on resale) occurred in State Z, and the statute is applicable.

**Bookkeeper:** Bookkeeper's negligent failure to discover the concealed debts occurred in State Y, while Investor's injury occurred in State Z. In this situation—where an act is done outside the state that causes injury within the state—the cases are in conflict as to whether the long arm statute applies. Some courts have adopted the "place of effect" theory, holding that a tortious act occurs "within" the state if injury occurs there and defendant should have known that his acts might take effect there. Other courts insist that the defendant must be shown to have acted while (physically) within the state.

If State Z follows the "place of effect" approach, Bookkeeper comes within the statute because he was told that his financial statement was for nationwide issue and thus should have known that his act

would affect investors in State Z. However, if State Z follows the “place of act” approach, the statute would not apply to Bookkeeper—since he “acted” in State Y—and, hence, there would be no basis for asserting jurisdiction over him.

### Service of Process

The defendants, Company and Bookkeeper, were served by registered mail in their home states in accordance with a statute of State Z. Service by registered mail, return receipt requested, is reasonably calculated to provide the defendant with actual notice of the action. As a result, service by mail, return receipt requested, is constitutional, and thus adequate.

### Constitutionality

**Company:** The Court in *International Shoe v. Washington* set forth the “minimum contacts” approach for testing whether a state can constitutionally assert personal jurisdiction over a nonresident: It must appear that there are sufficient minimum contacts between the defendant and the forum state such that the “maintenance of suit locally does not offend traditional notions of fair play and substantial justice.” The modern interpretation of this test merely requires a showing that defendant purposefully engaged in forum-related activity and that the quality of that activity makes it reasonable to expect him to appear and defend.

In this case (as indicated above), Company has committed a tortious act in State Z that injured a local resident. Moreover, it purposefully entered the State Z marketplace by mailing its financial report and offering its securities for sale there. These two factors combined establish constitutionally sufficient contacts for the exercise of personal jurisdiction over Company. Therefore, Company’s motion to dismiss should be denied.

**Bookkeeper:** Should it be held that Bookkeeper has not committed a tort within the state, the State Z long arm statute would not apply and the constitutional question need not be reached. However, if it is concluded that Bookkeeper *has* committed a tort within the state, the argument made for jurisdiction over Company applies to him as well. It is immaterial that Bookkeeper is not a corporation because the minimum contacts test applies to *any* nonresident defendant. Bookkeeper’s knowledge that his report would be circulated nationwide and his probable expectation of a fee for a job that would have consequences in State Z establish the type of purposeful forum-related activity required under the Due Process Clause. Hence, a finding of an adequate basis for personal jurisdiction would be proper, and Bookkeeper’s motion to dismiss should be denied.

## ANSWER TO EXAM QUESTION NO. 3

### (1) Removal to Federal Court and Motion to Remand

The remand back to state court was the correct ruling. At issue is whether removal on the basis of diversity citizenship was permissible. Cases within a state court’s jurisdiction that could have been brought originally in federal court can generally be *removed* to federal court at defendant’s request. However, a case cannot be removed on the basis of diversity if one of the defendants is a resident of the forum state.

The only possible basis for federal jurisdiction over the case is *diversity of citizenship* (no federal question was presented). Diversity of citizenship jurisdiction requires an amount in controversy of more than \$75,000, and every plaintiff must be of diverse state citizenship from each defendant. The citizenship of an individual is determined by his domicile (i.e., his permanent home to which he intends to return). A corporation is a citizen of every state in which it is incorporated and the one state in which it has its principal place of business, defined as the place from which the corporation’s officers direct and control the corporation’s activities. Here, Ped is a citizen of State A, and Health is a citizen not only of State H (state of incorporation), but also of State A, where it has its company headquarters, from which its officers presumably direct and control its activities. Therefore, diversity did *not exist*, and there was no removal jurisdiction.

Moreover, even if diversity had existed, removal is not permitted if any defendant is a citizen of the state where the action was filed. Because Ped brought suit in State A, of which Health is a citizen, removal should have been prohibited.

When an action is improperly removed, the appropriate remedy is a *remand* back to the state court. Therefore, the federal court ruled correctly.

### (2) Joinder of Defendants

The court properly overruled Health's motion to dismiss as to the joinder of the defendants. At issue is whether a plaintiff may properly assert claims against different defendants in the same action.

Today, federal courts have liberal joinder rules. Defendants can be joined where the claim against them arises from the same transaction or series of transactions and involves at least one common question of law or fact.

Both criteria are met here: There are common questions of negligence law, and aggravation of an injury during treatment is considered part of the same series of events as the original injury.

As a result, Health's motion to dismiss on the grounds of misjoinder of parties was therefore appropriately overruled.

### Joinder of Claims

The court also properly overruled Health's demurrer as to the joinder of the claims. At issue is whether a plaintiff may properly assert different claims against different defendants in the same action.

Federal and most state courts allow for the liberal joinder of claims. The policy permits the adjudication of all claims arising out of a single transaction. (Furthermore, when one claim is properly joined against all defendants, the plaintiff may join any claim he has against any defendant, subject to the court's power to order severance. It is essential only that at least one of the claims arose out of a transaction in which all were involved.)

Here, as stated above, the claims are related and thus may be joined together. (Driver's liability and Health's liability each will be affected by a determination of the other's liability.)

As a result, the court did not err in overruling the demurrer as to joinder of claims.

### (3) Ped's Requests for Admissions

The objections to the request for admissions were properly sustained. At issue is whether a party, by use of a request for admission, can request another party to admit or deny a bald legal conclusion.

Any party may serve on any other party a written request to admit the truth of any relevant matter, the purpose being to narrow the issues. Generally, the answering party cannot object solely because the requested admission calls for a legal conclusion, as long as the legal conclusion relates to the facts of the case. Thus, for example, it is proper to ask the adverse party to admit that he was "negligent."

Arguably, however, in this case the request to admit "liability" was improper because it calls for a final legal conclusion. On the other hand, it seems logical that the form of the request should not govern, and since requesting an admission of liability really only calls for an admission of negligence, objections to the requests should not have been sustained. Nonetheless, this court might well be sitting in a jurisdiction that does not permit requests as to *ultimate issues*. If this is the case, Ped's requests were inappropriate and discovery was properly withheld.

### (4) Motion for New Trial

The court was correct in refusing to consider the affidavits. At issue is whether jurors may give evidence of juror misconduct occurring during deliberations.

Misconduct in jury deliberations is ground for a new trial in whole or in part. One form of such misconduct is the use of "*quotient verdicts*"—that is, where the jurors agree *beforehand* that the measure of recovery will be arrived at by totaling the amount favored by each juror and dividing that total by 12 (number of jurors). A quotient, however, can be used as a starting point for discussion, and here the jurors agreed to the quotient after it was derived; therefore, the verdict is probably proper.

Even if the verdict were improper, however, it is not clear that it could be impeached by use of the

juror's own affidavits. Many states—as well as the Federal Rules—do *not* permit juror testimony as to matters occurring during deliberation, so that the quotient verdict apparently could not be attacked by the affidavits used here.

Thus, the court's refusal to consider Ped's evidence in support of his motion was proper, so that there could be no basis for ordering a new trial.

#### ANSWER TO EXAM QUESTION NO. 4

##### (1) Peter v. Valco

**Joinder of Defendants:** Valco may not compel Peter to join Mity as a defendant. Whether Valco has ground for challenging Peter's failure to join Mity turns on compulsory joinder rules.

To determine whether a party must be (compulsorily) joined as a defendant, a three-step process is used, first asking whether the proposed defendant *should be joined*, followed by determining *whether the proposed defendant can be joined* (i.e., determining whether the proposed defendant is subject to personal jurisdiction in the chosen forum, and whether his presence would affect subject matter jurisdiction or venue), concluding with a determination that, if the party cannot be joined, whether the action should proceed or be dismissed.

A party should be joined if (i) complete relief cannot be accorded among the other parties to the lawsuit without the proposed defendant being made a party; or (ii) a decision without joining the proposed defendant would impair or impede that defendant's ability to protect that interest, or his absence would leave other parties subject to a substantial risk of incurring multiple or inconsistent obligations.

Here, it does not appear that Mity's joinder is required. Its interests are not in danger because a determination in the present suit will not bind Mity in the future. If the state follows joint and several liability rules, Peter may recover any award in the entirety from either Valco or Mity. If the state apportions liability among joint tortfeasors, liability is typically apportioned among tortfeasors even if one is absent from the trial. The absent defendant would not be bound by such a determination, as res judicata or collateral estoppel would not apply because, at a minimum, the absent party would not have had an opportunity to be heard in court on the matter. Thus, the "should be joined" prong of the compulsory joinder analysis is not satisfied, as complete relief can be accorded among the other parties and no party would be subject to inconsistent or multiple liabilities. (Although Peter might be able to collect more money by joining both defendants, it is his tactical decision to proceed without one of the defendants unless it prejudices another party or the absentee, and Valco can implead Mity (*see below*).)

Hence, joinder of Mity is not compulsory and an objection by Valco should be overruled.

**Impleader:** Valco should file an impleader action against Mity. At issue is how a defendant may bring another party in who might be liable to him for some or all of the plaintiff's claim. When a stranger to a pending lawsuit may be liable for all or part of plaintiff's claim against defendant (i.e., defendant has a potential right to indemnification), that third party can be brought into the suit by *impleader*. A third-party claim is deemed *supplemental* to the main claim and has no effect on jurisdiction.

In the instant case, if the state follows joint and several liability, and Valco faces the possibility of paying for the entire award, impleader would be appropriate. If the state apportions liability, Valco would not need to implead Mity because Valco would not have to pay more than its apportioned liability.

Here, since it is likely that the underlying cause of the explosion was Mity's fault (allegedly defective "collar"), Valco could have a valid claim for indemnification, and might be able to implead Mity. Moreover, the fact that both Valco and Mity are citizens of A, and hence not diverse, does not destroy the court's jurisdiction. Valco can (and should) file an impleader claim against Mity (depending on how the state apportions tort liability).

**(2) Peter and Quincy v. Valco and Mity**

**Joinder of Parties:** Peter and Quincy would be allowed to join together as plaintiffs. At issue is whether two plaintiffs may join together in a single action for separate injuries sustained in the same accident. The Federal Rules allow liberal joinder of plaintiffs and defendants, provided that any right by or against them arises from the same transaction or series of transactions, and that there is at least one question of law or fact common to all.

In this case there are many common questions (e.g., both plaintiffs injured by same defective pressure valve), and the “same transaction” requirement is met by the fact that one single incident caused the harm. Hence, joinder on both sides is warranted.

**Joinder of Claims:** Peter and Quincy would also be allowed to join their claims together. Again, the issue is whether two plaintiffs may join together in a single action for separate injuries sustained in the same accident. The policy of the Federal Rules is to permit adjudication of all claims between the parties and all claims arising out of a single transaction. Here, Peter and Quincy were both injured when the collar manufactured by Mity, and incorporated into a pressure valve by Valco, exploded and injured both Peter and Quincy. As a result, a single trial is warranted, and joinder of the claims was proper.

**Jurisdiction over Defendants:** It is unclear whether a federal court in State C would have personal jurisdiction over Valco and Mity. At issue is whether placing a product in the stream of commerce subjects the manufacturer to personal jurisdiction wherever that product winds up. Assuming State C has a long arm statute that would give a state court jurisdiction over Valco and Mity, the federal court will follow it, and the only problem is whether application of the statute would violate due process. Under the standard established in *International Shoe v. Washington*, it need only appear that there are sufficient, purposeful **minimum contacts** between the defendants and the forum state such that the maintenance of suit locally does “not offend traditional notions of fair play and substantial justice.”

This case also presents a “stream of commerce” scenario. Generally speaking, when a manufacturer merely places its product in the stream of commerce, and does not do anything further, it will not be subject to personal jurisdiction in a particular forum. However, it is unresolved whether a manufacturer is subject to personal jurisdiction in a particular state when it places its product in the stream of commerce and it knows (or hopes) that its product will end up in a particular forum. When dealing with a “stream of commerce” case, the clear case for personal jurisdiction occurs when the manufacturer places its product in the stream of commerce and does something else (for example, it advertises or maintains a sales force within a state, changes its product to conform to state regulation, or maintains repair capabilities within the state, etc.) to serve the market in that state.

In the instant case, the facts state both Valco and Mity have their principal places of business in State A. Presumably, that is where Mity manufactures the collar and where Valco incorporates it into the pressure valve. It is unclear how the collar managed to get into State C. (Furthermore, personal jurisdiction over each company must be considered separately. They are treated here together because there are no facts indicating how the valve assembly got into State C—the facts are equally silent as to both.) If Valco and/or Mity did nothing purposeful to have its valve wind up in State C, personal jurisdiction over Valco and/or Mity would not be permissible in State C. If Valco and/or Mity only knew or hoped that its valve would wind up in State C, it is unclear whether personal jurisdiction could be based on this knowledge or hope. If Valco and/or Mity did something else to purposefully serve the State C market, there would unquestionably be personal jurisdiction over Valco and/or Mity. But again, the facts are silent, so it is unclear whether there will be personal jurisdiction in State C over either Valco or Mity.

**Jurisdiction over Subject Matter:** There is no federal subject matter jurisdiction over this case. At issue is whether the citizenship of an individual is determined when the cause of action accrues or when suit is filed. Since no federal question is presented, jurisdiction can only be based on **diversity of citizenship**—which requires that more than \$75,000 be in controversy and that no plaintiff be a citizen

of the same state as any defendant. The citizenship of an individual is his permanent domicile (i.e., the permanent home to which he intends to return). A corporation is a citizen of every state in which it is incorporated and the one state in which it has its principal place of business. Citizenship is determined when suit is filed, not when the cause of action accrues.

Here, there is **not** complete diversity between the parties. Since citizenship for diversity purposes is determined **when the suit is filed**, Quincy and Valco are both citizens of B (state of Valco's incorporation and Quincy's residence when suit commenced). Therefore, the court has no power to decide the case and must dismiss for lack of subject matter jurisdiction.

### (3) Peter v. Valco and Mity

**What Law Applies?** A federal court sitting in the district court in State A would apply federal law as to the pleading of freedom from contributory negligence, but apply state law as to the burden of persuasion. When determining whether to apply state or federal law, the court must look at whether the issue involved is substantive or procedural. If Peter alone sues Valco and Mity, there would be complete diversity. In diversity cases, a federal court is bound to apply the law of the state in which it is sitting on all substantive matters [*Erie v. Tompkins*]; however, federal procedural rules control.

**Questions of pleading** (here, whether plaintiff must plead freedom from contributory fault) clearly involve the mechanics of the federal court system, and as such, the Federal Rules apply.

**Burden of persuasion**, on the other hand, involves basic policy considerations regarding the substance of the case, so that the federal court must follow *Erie* and apply the same law as would the highest court in State A. Hence, if State A would apply its own law, so would the district court, but if on conflict of law principles State C law would govern (place of injury), the federal court would similarly be bound thereby.