NAILING  THE BAR

Simple CIVIL PROCEDURE Outline

[Based on Federal and California Rules]

Tim Tyler, Ph.D., Attorney at Law

NINETY PERCENT of the LAW in NINETY PAGES®

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Simple
Civil Procedure
Outline

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Attorney at Law

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Published by Practical Step Press

--www.PracticalStepPress.com–

ISBN 978-1-936160-25-9

NINETY PERCENT of the LAW in NINETY PAGES.®

It would take thousands of pages to completely explain **CIVIL PROCEDURE**. But, such extensive knowledge is unnecessary to succeed in law school or on Bar examinations.

This eBook gives a simple explanation of the law of **FEDERAL RULES of CIVIL PROCEDURE** with comparison to the **CALIFORNIA RULES** for students who will take the California General Bar Exam The purpose of this eBook is to provide law students with an **understanding** of **basic civil procedure rules** without a lot of unnecessary blather.

This eBook simply explains **FEDERAL RULES of CIVIL PROCEDURE** to the extent they must be known in law school and on Bar Exams with a comparison to CALIFORNIA RULES for the California Bar Exam. The explanation is given in **plain English** with the aid of **examples**. Some case law, such as for the development of the ***Erie*** **Doctrine** and subsequent modifications to it, is explained in some detail. Other than that, this book has --

- **NO EXTENSIVE HISTORICAL DISCUSSION OF THE LAW**
- **NO FLOW CHARTS**
- **NO EXTENSIVE CASE CITATIONS**
- **NO CHECK LISTS**
- **NO PRACTICE QUESTIONS**
- **NO EXAM APPROACHES**
- **NO EXTENSIVE DISCUSSION OF DETAILS**

The reason for these deliberate omissions is that they are **UNNECESSARY** and **more CONFUSING than helpful** to beginning law students trying to gain a basic understanding of the law. The purpose of this book is to help you **become an attorney** NOT to teach you everything you need to know to **practice as an attorney**.

YOUR PROFESSOR may focus on the details of the law in one or more narrow areas of personal interest. Those details are not covered here. **As you realize a need for more detailed knowledge** in a particular and narrow area of law, consult an appropriate **hornbook from your library** or some other authoritative reference source.

OTHERWISE, THIS eBOOK HAS ALL THAT YOU NEED to understand the basic law.

UNDERSTANDING THE LAW IS NECESSARY BUT NOT ENOUGH to succeed in law school! You must also be able to **explain** how the law applies to fact patterns presented on examinations.

THEREFORE, after you have developed an understanding of the law of contracts using this eBook, you MUST make additional efforts to prepare for your law school exams in contracts. To do that, use Nailing the Bar's **How to Write Essays for Civil Procedure Law School and Bar Exams (Ee)**.

Details on these publications and how to obtain them in both hard copy and eBook (PDF) formats are given at the back of this book.

Case Briefs, Commercial Outlines, and Law School

Law school students are generally told to buy the latest edition of hard-bound casebooks and hornbooks that are inordinately expensive.

As part of your "law school education" you will gradually realize that you can learn the law better, faster, and much cheaper by using "commercial outlines" and "canned briefs" than by trying to read casebooks and hornbooks. These materials explain the law to you in understandable terms. And if you want to see the original case decision, why not go on the internet to see the real case decision? One excellent source for viewing federal cases and the cases of many states is **http://lp.findlaw.com.** Why not read what the justices really said instead of trying to decipher a hacked up version?

Mistakes You Find

We make mistakes like everyone else. If you find mistakes in this book please tell us so we can correct them. By "mistake" we mean typos, calculation errors, reference errors and things like that. Just send us a message at **info@practicalsteppress.com.**

But we definitely do not want to hear about differences of opinion about arguable issues. So if your professor says the rule is different that what we say here, humor your professor. But also do your own independent study and decide those issues for yourself.

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Chapter 1: Civil Procedure Overview

Civil Procedure simply means the procedures to be followed by courts and parties to any legal action other than a criminal prosecution. Typically these will be actions seeking damages for **torts,** breaches of **contracts** or petitions for **declaratory relief** or **injunctive relief**.

Declaratory relief is important in the real world but seems to be of little or no interest on law school or Bar exams concerning civil procedure. Declaratory relief includes actions such as family law (divorces, child custody disputes, guardianships, etc.), probate actions (wills, trusts, estates, conservatorship, etc.), and some real estate actions such as quiet title actions.

Consequently, the focus of civil procedure questions on exams almost always involves a tort, a contract, or a movant seeking injunctive relief.

Unlike Criminal Procedure, Civil Procedure is **NOT TESTED on the Multi-state Bar Examination** (MBE).

Since Civil Procedure is only tested (if at all) on the Bar exams as an essay question, your focus as a law student should be more on being able to **explain the rules of civil procedure in general terms** and less on memorizing the fine points and legal hair splitting necessary for MBEs.

1. The Federal Rules of Civil Procedure is the Main Focus

The primary focus of civil procedure study (and Bar Examination) is usually **federal civil procedure law**. But the California Bar Examination now tests on both federal law and California civil procedure rules, so the **differences between federal and California rules will be explained** here.

If you are not sitting for the California Bar you may not need to know anything about how federal and State rules differ. If you do need to know how your State's rules differ from federal rules, you may find your State rules are similar to the California rules as explained here.

2. The Federal District Courts

The federal court system has special courts to hear **bankruptcy** petitions, **maritime-admiralty** disputes, and **patent** disputes. In addition **military courts** have jurisdiction over **court-martials**, and administrative agencies have various **administrative appeals boards** for hearing disputed claims (e.g. veteran's claims, tax disputes, etc.)

All other disputes are generally brought in **federal district courts**. There is at least one federal district court for each state, and in the larger States there are more than one federal court district. For example, in Rhode Island there is only one federal district court, but in California there are four federal court districts called the Southern (San Diego), Central (Los Angeles), Northern (San Francisco) and Eastern (Sacramento) Districts.

An **important semantic distinction** you should grasp, because it comes up on civil procedure exams is that the term **"district"** court usually means a **federal district** court. And the term **"superior"** court usually means a **State** court. This is always true on a California Bar exam.

3. The Federal Circuit Courts of Appeal

The decisions of the various federal district courts and many federal administrative decisions are appealable to a federal **Circuit Courts of Appeals**. Parties always have a **legal right to appeal** the holdings of district courts and the final decisions of State courts to a federal circuit court of appeals.

There are 13 federal circuit courts. Twelve of them are "regional circuit courts". Eleven of those are designated by numbers, the Court of Appeals for the 1st Circuit through the Court of Appeals for the 11th Circuit. California is assigned to the ninth circuit, and appeals from the decisions of federal district courts in California would be filed with the Federal Ninth Circuit Court of Appeals. The twelfth "regional" circuit court is called the United States Court of Appeals for the District of Columbia Circuit (a.k.a. "the D.C. Circuit") and it is responsible for reviewing the decision making and rule making of many federal agencies.

The thirteenth federal circuit court is the U.S. Court of Appeals for the Federal District which hears appeals from specialized trial courts, primarily the United States Court of International Trade and the United States Court of Federal Claims, as well as appeals from the district courts in patent cases and certain other specialized matters.

In addition to the federal Circuit Courts of Appeal there is also a Court of Appeals for the Armed Forces which hears appeals of court-maritals and a Court of Appeals for Veterans Claims which reviews decisions by the Department of Veterans Affairs.

An **important semantic distinction** you should grasp, because it comes up on civil procedure exams is that the term **"circuit"** court usually means a **federal appeals** court. This is always true on a California Bar exam. In contrast, the general term **"appeals court"** may mean a federal circuit court but it may also mean a State court.

4. The U.S. Supreme Court

Under Article III, Section 2, the **U.S. Supreme Court** has "original jurisdiction" over cases in which a State is a party or where the case involves foreign ambassadors, public ministers and consuls. In all other matters the Supreme Court has "appellate jurisdiction," meaning that it can review the final decisions of both State and federal courts.

Parties have a legal right to petition the U.S. Supreme Court to review the final decisions of circuit courts of appeal. That is called a **petition for certiorari**. But the Supreme Court has **discretion** whether to grant those petitions or not. There is **no legal right** to have the Supreme Court actually review any matter.

5. The State Courts

The structures of the State court systems vary from State to State. States may establish **small claims** courts, **municipal** courts, **juvenile** courts, **family** courts, **probate** courts, etc. to hear cases involving different subject matter. In each State there would be a trial court for the most serious civil matters, and that would generally but not always be called the **superior** court. Those courts have jurisdiction over all matters, both criminal and civil, although they may designate different departments (courtrooms) to handle different types of cases (probate, juvenile, family, etc.)

In California the trial courts in each County are called the Superior Court. Those have general jurisdiction over all disputes, and there are no longer any municipal courts in California. Decisions of the trial courts can be appealed to the State Courts of Appeals, and above those there will always be the State's highest court, the California State Supreme Court.

It is important to understand when reading State case decisions that the terminology used to describe State courts vary among the States. States may even call their own courts "district" courts or "circuit courts". In New York the County trial courts are called the "Supreme Courts", appeals from the Supreme Courts are made to the Supreme Court Appellate Division, and the highest court is called the "Court of Appeals".

6. Three Primary Sources of Federal Procedural Rules

Federal civil procedural law is based on three main sources, the **U.S. Constitution**, the **Federal Rules of Civil Procedure** (FRCP) and federal statutes, primarily **Title 28 of the U.S. Code**.

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A. No English Common Law Basis

Civil Procedure law has no English common law basis except for the provision of the 7th Amendment that the right to a jury trial in civil suits would remain as it existed in "suits at common law."

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B. Constitutional Procedural Provisions

The **U.S. Constitution** establishes five specific procedural rules for federal courts:

- Under Article III Congress has the power to establish "inferior" federal courts and to **define federal court rules and powers**;
- The 5th Amendment requires federal courts to give individuals **due process**;
- The 7th Amendment preserves the **right to jury trial** in "suits at common law";
- The 8th Amendment prohibits **excessive fines** and cruel and unusual punishment; and
- The 11th Amendment denies federal court jurisdiction over suits by **individuals against states**.

Under the authority of Article III, Congress has established the **Federal Rules of Civil Procedure** to define the mechanics of the federal courts and **Title 28 of the U.S. Code** at sections 1330, et seq. to define the **subject matter jurisdiction** of the federal courts.

Congress has also reserved to the federal courts exclusive jurisdiction over **bankruptcy, maritime-admiralty** and **patent** disputes. The states are bound by Congress' decision because under the Supremacy Clause of the Constitution (Article VI, Section 2) the "Judges in every State shall be bound" by the laws of the United States.

— o0o —

C. Limited Case Law Basis

While the study of Criminal Procedure involves an extensive body of case law, the study of Civil Procedure involves a relatively limited number of cases.

In general, you should cite the cases **your professor stresses**. But the cases mentioned in this outline are important and should be cited in your essay answers on your Bar Exam, even if your professor fails to stress them in your class work in law school.

7. Constitutional Limits on State Procedural Rules

The U.S. Constitution establishes two specific procedural rules for State courts:

- Under Article IV, Section 1, each state must give **full faith and credit** to the "judicial proceedings of every other state"; and
- The 14th Amendment requires State courts to give individuals **due process**;

Every State court must honor and enforce the findings and judgments of the courts in every other state, even if the finding would have been different under its own laws. This has both substantive and procedural implications.

> **For Example:** In the 1930s a divorce was hard to obtain in many States. To increase tourism and revenues Nevada changed its statutes to allow divorces to be obtained by anyone who had been in the State for six weeks. Arkansas refused to honor Nevada divorces and began arresting people for bigamy if they remarried in Arkansas after getting a Nevada divorce. Arkansas' actions were ruled to be unconstitutional because they violated the full faith and credit clause.

Further, the procedural rules of each State court must meet minimum Constitutional requirements of due process. The implication of this will be explained in detail later.

8. State Courts Have General Jurisdiction

Under the 10th Amendment states retain all powers that are not either denied to them by the Constitution or delegated to the federal government. This would include delegation by Congress under its powers. In other words, State courts have jurisdiction over every possible dispute, claim or plea unless the Constitution or a federal law specifically denies them jurisdiction.

In contrast, federal courts have limited jurisdiction. Federal courts do not have any jurisdiction over a matter unless the Constitution or a federal law expressly grants them jurisdiction.

Therefore, unless specifically prohibited by federal law State courts can hear any case, including cases based entirely on federal law. But federal courts cannot hear any case unless the subject matter is within an area for which Congress has specified federal jurisdiction exists.

This is all subject to overriding considerations of due process.

9. Federal Law Limits State Court Jurisdiction

Federal law can limit the jurisdiction of State courts over any subject matter because the Supremacy Clause of the U.S. Constitution (Article VI, Section 2) states that the "Judges in every State shall be bound" by the laws of the United States.

The most noteworthy areas where federal law denies State courts jurisdiction over disputes are those regarding:

- **Bankruptcy** proceedings;
- **Immigration** proceedings;
- **Patent** and **copyright** disputes;
- Cases involving **foreign ambassadors**, **consuls** and **treaties**;
- **Maritime** and **admiralty** jurisdiction.

10. Common Federal Civil Procedure Pleading Terms

Some of the terms commonly used in federal civil procedure are the same as terms used in State courts, and some are different.

Complaints. The pleadings filed in both federal and state civil actions begin with a **complaint** by one or more plaintiffs. In the complaint the plaintiff must name the **defendants** and allege that the matter has been filed in the proper **venue**, allege that the court has **jurisdiction** over the matter, allege that the law provides the plaintiff a **right to relief** and present a **prayer** for relief.

Venue. Venue means the **proper location** to bring the suit. Usually the proper venue is where the defendants reside or where the matters giving rise to a suit occurred. For example, New York City is the proper venue for a suit against a defendant residing in New York City concerning injuries received in a traffic accident in New York City.

Jurisdiction. Jurisdiction is the **authority of a court** (federal or state; based on statute or constitutional provisions) to hear a matter and issue a judgment binding upon the parties. For

example, a federal court has authority to hear certain types of cases. Even if a court has authority to hear a type of complaint, the court may still lack authority over the defendant.

Answers. The defendant responds to a complaint with an **answer** in which the defendant either admits or denies the allegations in the complaint and raises affirmative defenses.

Counterclaims. Once sued, the defendants may raise claims for affirmative relief against the plaintiffs. For example, the plaintiffs may have sued the defendants for $100,000 claiming breach of contract, and the defendants may respond with a **counterclaim** for $200,000 alleging that the plaintiffs committed a fraud against them. In federal court these are called **counterclaims**. In California courts these are called "cross-complaints".

Cross-claims. Once sued, a defendant may raise a claim against another named defendant. For example, Paul sues Tom and Dick for $100,000 claiming breach of contract, and the Tom may respond with a cross-claim against Dick alleging that any breach that occurred was his fault. In federal court these are called **cross-claims**. In California these are called "cross-complaints".

Joinder of Claims. In the original complaint one or more plaintiffs may join together multiple claims for relief against one or more defendants, and defendants can raise additional claims they may have against the plaintiffs (in counterclaims) or against other defendants (in cross-claims.) This is called **joinder of claims.**

Joinder of Parties, Impleading and Intervention. Parties that were not named in the original complaint may be brought into a suit by the defendants' counterclaims and cross-claims, and outside parties may enter a suit on their own initiative. This is called **joinder of parties**, and it may be either **permissive** or **compulsory**. Permissive joinder means the Court (judge) **will allow** additional parties to be joined, and compulsory joinder means the Court (judge) **must require** additional parties to be joined. When a third party is joined by the defendant, it is called **"impleading"** the third party. (In California these are called "cross-complaints".) When a third party joins a suit on their own initiative it is called **"intervention."** For example, suppose Tom, Dick and Harry have a traffic accident. If Tom files suit naming only Dick as a defendant, Dick (the defendant) may counterclaim against Tom and implead Harry claiming they both were the cause of the accident. And Harry may petition the Court (judge) to intervene on the grounds that Tom and Dick caused the accident and his injuries.

Interpleader. When a party holding an asset (the **stakeholder**) is presented with conflicting demands from two or more other parties, each claiming to be the rightful owner of the asset (the **claimants**), the stakeholder can file an **interpleader action** asking the Court (judge) to hear the conflicting claims of all the parties and decide who should be given lawful possession. For example, Tom buys life insurance from Mutual and then dies. Dick and Harry both claim they are the rightful beneficiary of the policy. Mutual can may file an interpleader action asking the Court (judge) to decide who gets the insurance proceeds.

Chapter 2: Federal Subject Matter Jurisdiction

Subject matter jurisdiction means the **authority of a court to exercise control over a type of claim**. The term "subject matter" means the nature of injury claimed, the applicable law, or perhaps the remedy sought. The authority of a court to hear a certain **type of claim** is called **SUBJECT MATTER JURISDICTION.**

Subject matter jurisdiction should always be your **first consideration** when you are presented with an exam question that says an action has been **filed in a particular court** because lack of subject matter jurisdiction prevents the court from hearing the case, and even if the court hears the case and issues a finding its judgment is unenforceable.

Subject matter jurisdiction is a major issue for discussion when an action is filed in a federal court because it has limited jurisdiction. Subject matter jurisdiction is not much of an issue when a matter is filed in a State court because it has general jurisdiction as explained above. There are only a few areas where a State court lacks subject matter jurisdiction because it is specifically denied by the Constitution or federal law (bankruptcy, immigration, patents and copyrights, matters involving foreign ambassadors, consuls and treaties, and maritime/admiralty disputes). Otherwise State courts have jurisdiction over all cases.

1. Grounds for Subject Matter Jurisdiction in Federal Court

The subject matter jurisdiction of the federal courts is defined by 28 USC §§ 1330 et seq. A federal court has SMJ if a dispute involves a **federal question** or if **diversity jurisdiction** exists.

1. **Federal Question Jurisdiction** exists if plaintiffs raises a claim or seeks remedies under the provisions of the U.S. Constitution or the laws or treaties of the United States (28 USC § 1331); and
2. **Diversity Jurisdiction** exists if the amount in controversy exceeds $75,000 and the controversy is between:
    a. The citizens of different States,
    b. Citizens of a State and citizens or subjects of a foreign state, or
    c. Citizens of different States and the citizens or subjects of a foreign state are additional parties;
    d. A foreign state (country), as plaintiff, and citizens of a State or different States (28 USC § 1332.)

Other rather unimportant situations when a federal court has **subject matter jurisdiction** are –

3. **Suits by a Citizen Against a Foreign State** in non-jury civil actions (28 USC § 1330.) This is very unimportant and highly unlikely to be tested.
4. **Interpleader** actions where citizens of two or more states claim an interest in some property held by a third party (usually an insurance company). (28 USC § 1335.)
5. **Anti-trust** actions arising under federal law (28 USC § 1337.) This is very unimportant, unlikely to be tested and simply a specific type of **federal question** claim.
6. **Patent, Copyright, and Trade-Mark** actions (28 USC § 1338.) This is very unimportant, unlikely to be tested and simply a specific type of **federal question** claim.

7. **Civil Rights** actions alleging conspiracy in violation of federal law (28 USC § 1343.) This is simply a specific type of **federal question** claim.

Finally, if a federal court has **original** subject matter jurisdiction under one of the above provisions, the court also has **supplemental jurisdiction** over other claims that are **part of the same case or controversy** even if those other claims would not have been under federal subject matter jurisdiction by themselves. Supplemental jurisdiction is explained in detail later.

2. The Well-Pled Complaint Rule

The **well-pled complaint rule** is that a complaint in federal court MUST expressly state the basis for the complaint, including **why the federal court has subject matter jurisdiction**. This is usually by citation of one of the sections of Title 28 or by citation to the U.S. Constitution, a federal law or treaty. If jurisdiction is claimed based on diversity, the complaint must allege the **citizenship of the parties** and the **amount in dispute** that creates diversity jurisdiction.

If a complaint is silent on the issue of subject matter jurisdiction it may be dismissed upon the defendant's Motion for Dismissal for Lack of Subject Matter Jurisdiction under Rule of Civil Procedure 12(b). Consequently, the "form complaint" in every practice guide for attorneys starts out with a statement of subject matter jurisdiction.

3. Subject Matter Jurisdiction Based on Federal Question

28 USC § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Federal Question Jurisdiction means that a federal district court has the authority to hear cases that **arise under** federal law. And, an action "arises under" federal law if federal law is cited and relied upon by the plaintiff as the basis for his/her claim for relief. Where all claims for relief arise out of a **"common nucleus of operative fact"** and at least one claim is based on federal law, the federal court will have jurisdiction over all of the claims, even if some of the claims are based entirely on state law.

> **For Example:** Peter sues Dan in district court citing a federal statute as the basis for one cause of action and a state statute as the basis for a second cause of action arising out of the same facts. The court will have federal question subject matter jurisdiction over the entire case because it all arises out of the same facts and at least one cause of action arises under "laws … of the United States."

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A. Claims Based on the Constitution or Federal Laws or Treaties

Sometimes it can be a close call whether a claim "arises" under federal law. If a state law creates the right to relief based on a **federal definition** or based on an **interpretation of federal law**, the claim actually "arises" under State law and not federal law.

> **For Example:** Spielberg hires Brando to play an "Indian" in his new movie. Brando walks off the set claiming the script does not actually portray him as an "Indian." Brando sues

Spielberg in district court for breach of contract on a claim the term "Indian" is defined by federal law so there is a federal question. But there is no actual federal question because the breach of contract claim "arises" under State law, not federal law. The fact federal law defines "Indian" is relevant, but it is not a federal question.

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B. Disputes with Indian Tribes may Raise Federal Questions

Exam questions involving Indian tribes may raise issues concerning federal subject matter jurisdiction. Congress has plenary (absolute) power to regulate commerce with Indian tribes (see Commerce Clause, Article I, Section 8 [3]) and the President has the power to make treaties, subject to Senate approval (Article II, Section 2 [2].) Since commerce and treaties with Indian tribes are federal issues, claims against Indian tribes or arising on Indian lands often raise federal questions.

> **For Example:** Tom has an auto accident in the parking lot at the Indian Casino. He sues the casino in federal court claiming the parking lot was negligently designed. The federal court has subject matter jurisdiction **if Tom can cite a federal law or Indian treaty** that governs premises liability.

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C. Matters Concerning Ships at Sea may Raise Federal Questions

Exam questions involving ships at sea may raise issues concerning federal subject matter jurisdiction.

> **For Example:** Tom slips and falls on a cruise ship 150 miles out of Miami. He sues the cruise line in Miami district court claiming negligence. The federal court will have subject matter jurisdiction (under Article III, Section 2 [1]) over the case **if he can cite a Coast Guard regulation or claim there is maritime or admiralty jurisdiction.**

Note that although there are separate specific provisions for federal subject matter jurisdiction for complaints against **foreign states** and those alleging **anti-trust**, **patent**, **copyright**, and **trade-mark** violations and **conspiracies to deny civil rights**, these all are closely related to federal question subject matter jurisdiction. As a practical matter these associated bases for subject matter jurisdiction are never tested in detail other than as "federal question" issues.

Therefore, in any civil procedure question involving a complaint where relief is claimed, in part, based on the application of a federal law, the Constitution or a federal treaty with a foreign nation or Indian tribe, or ships at sea, you should recognize and explain that the federal court would probably have **federal question subject matter jurisdiction**.

4. Subject Matter Jurisdiction Based on Diversity

28 USC § 1332 (a) provides:

> **"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state … as plaintiff and citizens of a State or of different States. For purposes of this section… an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled."**

Diversity is the more complex basis for federal subject mater jurisdiction, so it is heavily tested on law school and Bar exams. The exam fact pattern almost always involves a tort or contract claim based on State law.

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A. The $75,000+ Claim Limit is Subject to Increase

First, there must be an "amount in controversy" **over $75,000**. The "$75,000" amount required by 28 USC § 1332 (a) keeps getting raised over the years. It used to be less than $50,000, then it was $50,000, now its $75,000 and in the future it will be more.

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B. The $75,000+ Claim must be in Good Faith

The plaintiff must claim more than $75,000 in **good faith**, even if the plaintiff ends up receiving less (or nothing) in the end.

The **Court (judge)** will look beyond the pleadings and can dismiss if the amount claimed does not appear to have been based on good faith.

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C. Aggregating Claims to Meet $75,000+ Diversity Limit

Claims for less than $75,000 may be aggregated in a diversity action in some cases when they all arise out of the same case or controversy. In 1990 Congress established **supplemental jurisdiction** via 28 USC § 1367. That statute suggests that **where multiple claims all arise out of the same central case or controversy**, the $75,000 limit may be met by aggregating the various claims in some cases. Supplemental jurisdiction is explained in detail later.

1) Related Claims of Plaintiff against Defendant can be Aggregated

If a plaintiff has multiple claims against **a single defendant** and **the claims all arise out of the same central case or controversy**, the $75,000 limit can be met by aggregating the various claims, even though each claim alone is less than the $75,000 limit.

> **For Example:** Tom, from Utah, and Dick, from Ohio, are in an auto accident. Tom claims he has suffered $60,000 in property damages and $25,000 in lost wages. Tom can sue in federal court because the total of his claims exceeds $75,000, all of it arising from the same event, and all against the same defendant.

2) Claims Based on Common Interest can be Aggregated

If multiple plaintiffs have claims against a **single defendant** that arise out of a **single event** they can aggregate their claims to meet the $75,000 limit if all of the claims are based on a **single title or right** in which they have a **common or undivided interest**.

> **For Example:** Tom and Dick, from Utah, sue Harry, from Ohio, for breach of contract concerning the sale of a parcel of land they held as joint tenants. They claim to have suffered damages of $140,000, $70,000 each. Diversity jurisdiction exits even though the claim of each plaintiff alone would be less than $75,000 because the total amount claimed exceeds $75,000 and is based on a single, common title in which they held undivided interests.

3) No Aggregation of Plaintiffs Otherwise

If there are multiple plaintiffs with claims against a single defendant that arise out of a single event but NONE of them have a claim exceeding the $75,000 limit, they can NOT aggregate their claims to meet the $75,000 limit.

> **For Example:** Tom and Dick, from Utah, are in an auto accident caused by Harry, from Ohio. Tom and Dick each claim damages of $60,000. Their separate claims cannot be aggregated to meet the $75,000 limit.

4) Claims against Each Defendant Must Exceed Limit

If there are multiple defendants separate claims against each of them must exceed the $75,000 limit.

> **For Example:** Tom is from Utah and his $30,000 car is hit and destroyed by Dick from Ohio. Tom is unhurt. Then Harry from Ohio skids into the pileup and causes Tom $50,000 in personal injury. Diversity jurisdiction cannot be established by aggregating the separate claims against the two defendants.

But a single claim exceeding $75,000 can be made against multiple defendants.

> **For Example:** Tom is from Utah and he suffers $80,000 in damages in an accident with Dick and Harry from Ohio. Tom can establish diversity jurisdiction because he has an $80,000 claim against Dick and Harry.

5) Restrictive Class Action Rule

Before 28 USC § 1367 was adopted in 1990 the clear rule was that for a class action to be brought on a diversity basis **every member of the class** had to have an individual claim exceeding

$75,000. Later court decisions in the 5th circuit have held that under 28 USC § 1367 only the **named class representatives** in a class action have to have claims exceeding $75,000 and supplemental jurisdiction extends to the remaining non-named class members regardless of the amounts they claim in dispute.

6) Extension of Supplemental Jurisdiction to Insufficient Claims

If there are multiple plaintiffs with claims against a single defendant that arise out of a single event and any of them have claims exceeding the $75,000 limit diversity jurisdiction exists for those claims. Then other plaintiffs with smaller claims arising out of the same event **may be** joined in the suit under a claim of **supplemental jurisdiction** as long as the claims are **so closely related that they are part of the same case or controversy**. This rule has been followed by the 5th and 7th circuits.

> **For Example:** Tom and Dick, from Utah, are in an auto accident caused by Harry, from Ohio. Tom claims damages of $80,000 and Dick claims damages of $50,000. Diversity jurisdiction exists for Tom, and the Court (judge) may exercise supplemental jurisdiction over the claim of Dick.

7) Effect when Plaintiff Recovers $75,000 or Less

Prevailing plaintiffs generally have a right to recover costs against defendants. But **federal courts have discretion** to deny an award of costs to a plaintiff who bring actions based on diversity and fail to recover awards **in excess of the statutory limit** ($75,000). (28 USC § 1332 (b).) The Court (judge) may award costs to the losing defendant instead.

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D. Determining Citizenship and Diversity

Establishing diversity subject matter jurisdiction generally requires that all of the adverse parties be "citizens" of different states (or foreign states) so **no defendant can be from the same state as any plaintiff**. A complaint claiming diversity SMJ exists must state facts supporting that claim. But notwithstanding the pleadings, the Court (judge) can and will look beyond the pleadings to determine the adverse parties and whether diversity exists between them.

Complete diversity requires that **no party can be from (a "citizen of") the same state as any adverse party**. Multiple plaintiffs can be from the same state, and multiple defendants can be from the same state, but there is no diversity jurisdiction if any one of the plaintiffs is from the same state as any one of the defendants.

So if there are several plaintiffs from several states, or several defendants from several states, the chances of establishing diversity jurisdiction becomes more difficult.

> **For Example:** Alan, from New Jersey, runs over Bob, from New York, while driving a truck for Corp, headquartered in New York. Bob cannot sue Alan and Corp in district court because he is from the same state (New York) as one of the defendants, Corp.

The Court (judge) may look beyond the pleadings when deciding which parties have the "adverse" interests.

1) The State of Citizenship for Natural Persons

For natural persons the State of "citizenship" is the State of **domicile** (**not residence**.) The term "State" for purposes of diversity jurisdiction includes the District of Columbia, Puerto Rico and U.S. Territories (Guam, American Virgin Islands, etc.).

A person's **domicile is the place the person intends to return to and reside indefinitely**. So a person is the citizen of the State they consider "home" even if they are temporarily living somewhere else.

> **For Example:** Paul, from New Jersey, is a student at University of California at Berkeley. His residence is the dormitory, because that is where he is "residing." But his domicile is still New Jersey, even if he is in Berserkley for a long, long time.

2) The State of Citizenship for Corporations

A corporation is domiciled in and a "citizen" of two states – the state where it is incorporated and the state where it has its principal place of business (28 USC § 1332 (c)(1).) The "principal place of business" is generally where most activities take place. This is called the "muscle test". A second view is that the "principal place of business" is where the corporate headquarters are located. This is called the "nerve center test."

> **For Example:** Corp, a Delaware corporation, is headquartered in New York City. Therefore, Corp is a "citizen" of both Delaware and New York.

3) The State of Citizenship for Associations and Partnerships

An unincorporated organization like a partnership, union or trade association is a **citizen of every state** where any of its individual members are domiciled.

> **For Example:** The Rug Workers' Union sues Acme Company, a Delaware corporation headquartered in Ohio for $100 million in district court claiming breach of contract. There is no diversity jurisdiction if any union member is from Delaware or Ohio.

4) The State of Citizenship for Foreigners

A citizen of a foreign country that has been legally granted **permanent residence** in the United States is a "citizen" of the State where they are domiciled (28 USC § 1332 (a).) But, a foreigner that has not been granted permanent residence is a citizen of the country they came from. Diversity jurisdiction exists for disputes between citizens of States (states, districts and territories of the United States) and both **foreign countries** and **citizens of foreign states** under both 28 USC § 1332 (a) (2), (3) and (4) and the Constitution at Article III, Section 2. This is sometimes called **"alienage jurisdiction."** But federal courts do NOT have alienage jurisdiction unless one party is a citizen of a state!

> **For Example:** Yu, a citizen of California, hits Nguyen, from Los Angeles, with his car. Nguyen sues Yu in district court for $300,000. Yu challenges that there is no diversity of citizenship because Nguyen has been living in Los Angeles for the past 30 years. Nguyen responds that he is a citizen of Viet Nam and has been living in the United States illegally all this time. Thus he is a citizen of Viet Nam, not California and diversity jurisdiction is established under 28 USC § 1332 (a)(2). [This is a "Nguyen-win" situation!]

5) Citizenship for Class Actions

The diversity jurisdiction rule for class action lawsuits (explained in more detail later) is looser with respect to diversity of citizenship. Only the **named class representatives** bringing the lawsuit on behalf of the class must have diversity of citizenship vis-à-vis the defendants. However each and every one of the named representatives would probably have to satisfy the $75,000 claim limit.

> **For Example:** The Cotton Picker's Union, an association with members in Mississippi and Alabama, cannot sue Milling Corporation (headquartered in Mississippi) in federal court based on diversity because some members live in Mississippi, the same state where the corporation does business. But union members from Alabama could be the named representatives in a **class action** suit IF they have claims of over $75,000.

6) Only Citizenship of Parties in Interest Matters

When suit are brought by or against parties represented by legal representatives such as trustees, guardians ad litem or estate executors, diversity depends on the citizenship of the parties in interest, not the citizenship of the parties' legal representatives.

7) At Least One Party must be a Citizen of a State

For diversity jurisdiction to exist at least one party to the action must be a citizen of a State.

> **For Example:** Dr. No, a legally admitted student from China, hits Nguyen, an illegal alien from Viet Nam, with his car in California where both reside. Nguyen sues Dr. No in district court for $300,000. Dr. No protests that there is no diversity jurisdiction. Dr. No will win because he and Nguyen are both foreigners, and neither is a "citizen" of any State, even though they are both residents of California. [A No-win situation!]

8) Expatriates are not Citizens of Any State

For diversity jurisdiction to exist between two U.S. citizens, **both** must be domiciled in **different states.** But Americans living permanently in a foreign country (expatriates, not intending to return to any State to reside indefinitely) are not the citizens of ANY state. And they are not "citizens or subjects of a foreign state". So, unlike foreigners, they **cannot sue or be sued** in federal court on a **diversity** basis.

> **For Example:** Gertrude Stein, an expatriate American living permanently in Paris, sues Hemmingway, a U.S. citizen living in Key West, in district court for $500,000 claiming defamation. There is no diversity jurisdiction because Stein is not a "citizen" of any "State" nor is she a "citizen or subject of a foreign state."

9) When Must Diversity of Citizenship Exist?

Diversity of citizenship must exist **when the lawsuit is commenced** (when the complaint is filed.) So diversity does not have to exist when the cause of action arose, and it cannot be destroyed later by the movement of one of the parties.

> **For Example:** Dave, a citizen of California, hits Pat, also a citizen of California, with his car. Then Pat moves to Nevada before filing a lawsuit. Pat can sue Dave in district court because he **lives in a different State** than Dave at the time the action is commenced, even though he lived in the same State at the time of the accident.

5. SMJ and Removal from State to Federal Court

If a lawsuit is filed in a State court that could have been filed in federal court (because the federal court had subject matter jurisdiction under either federal question or diversity jurisdiction) the defendants can **remove the case** from State court to federal court. (28 USC § 1441.)

Removal is often treated as a separate civil procedure issue, but it is so completely related to and dependent on the issue of subject matter jurisdiction that it should be explained here.

Plaintiffs have the power to **choose the courts** (State or federal) in which cases are originally filed, the power to **cite the law** under which they claim causes of action, and the power to **claim amounts** they believe they should be awarded.

But **defendants** have the **right to remove** cases from State court to federal court **if the federal court has original subject matter jurisdiction** by filing a "Notice of Removal" within 30 days of service of the complaint.

An action that has **federal question** subject matter jurisdiction can be removed regardless of the citizenship of the parties. In other words, there does not have to be any diversity of citizenship.

An action that has only **diversity** subject matter jurisdiction can only be removed **if none of the defendants is a citizen of the State where the action is filed**.

> **For Example:** Pete, from California, sues Dan, from Nevada, for $300,000 in Nevada Superior Court. Even though diversity jurisdiction exists, Dan **cannot remove** to district court because he has been sued in **his home State**. Pete could have filed the case originally in district court (diversity jurisdiction exists) but since he did not Dan cannot remove the action from the courts of his own State.

When an action is removed by the defendant from a State court to federal court, it goes to the district court with jurisdiction over the State court where the plaintiff filed the action. And it does not matter if the State court had proper jurisdiction over the case or not.

> **For Example:** Pete, files a suit in Lincoln County Court in Oklahoma for $1 million against Mohammed, a foreign student living in Texas claiming negligence in an auto accident in Texas. In his answer Mohammed claims he was at all times a citizen of Afghanistan and not a permanent resident of any State. The State court in Oklahoma does

not clearly have **personal jurisdiction** over Mohammed (more on that subject later in Chapter 3) because both the defendant and the accident were in Texas. But since the pleadings indicate diversity subject matter jurisdiction exists and Mohammed is **not a citizen of any State**, he can move to remove the case to federal district court if he wants. It will be removed to Oklahoma Western District Court in Oklahoma City, because Lincoln County is in the Oklahoma Western District.

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A. Removal is Based on the Pleadings

Whether a defendant has a right to remove a case to federal court is evaluated based on the pleadings, the **complaint** of the plaintiffs and the **answer** of the defendants. The **court will not go beyond the pleadings** to evaluate the basis for removal.

But federal subject matter jurisdiction can be challenged by the parties at any time later.

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B. When is Right to Remove Evaluated?

Removal must be requested by **ALL the defendants together, within 30 days of service**. The basis for removal must **exist at the time the defendant files the Notice of Removal**, and if the defendant is seeking removal based on **diversity** jurisdiction the parties' diverse citizenship also has to have **existed at the time the plaintiff commenced the action**.

If an exam question says a defendant moves to remove a case to federal court a certain number of days after being served the issue being raised is whether or not the removal was requested in a timely manner.

> **For Example:** Dave, a citizen of Idaho, runs over Pete, a citizen of Idaho. There is no diversity at the time of the accident, but that doesn't matter. Dave later moves to Washington. Pete then sues Dave for $100,000, and diversity exists at the time the action is "commenced". So Dave can remove the case to federal court because diversity exists **now** and it existed **at the time Pete commenced** the action.

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C. No Federal Question Jurisdiction Created by Defendant's Claims

Federal question jurisdiction can only be based on the plaintiff's allegations. It is not created by the defendant's claims. The defendant cannot remove the case based on "federal questions" that were not initially raised by the plaintiff.

> **For Example:** Pete sues Dave for defamation. Dave cites his Constitutional right to free speech under the 1st Amendment as his defense and requests removal of the case to federal court on the ground the case raises a "federal question." Removal would be denied because **no federal question was raised by the plaintiff.**

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D. No Removal Based on Counterclaims

Only defendants can remove a case from State to federal court. Plaintiffs can never seek to remove a case, even if they are defending a counterclaim by the defendant. And defendants cannot remove a case to federal court based on federal questions raised in their own counterclaims.

> **For Example:** Pete, a citizen of Nebraska, sues Dan, a citizen of Kansas, in State court for breach of contract demanding $50,000. Dan answers and files a counter-claim for $100,000 claiming that Pete was the party that actually breached the contract. Neither Pete nor Dan can now request removal of the case even though the amount in dispute in the counter-claim exceeds $75,000.

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E. All Claims Removed if Federal Question Exists

If a plaintiff files an action in State court citing any causes of actions based on federal law, **federal question jurisdiction** exists and the case, including all causes of action, can be removed by the defendant to federal court. (28 USC § 1441 (c).)

> **For Example:** Pete sues his employer, Don, in State court claiming he was sexually harassed. He cites two causes of action, intentional infliction of emotional distress and violation of federal fair employment law, all arising out of the same event. Don can **remove the entire case** to district court because one claim raises a federal question.

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F. Remand after Removal

After a defendant has removed a case to federal court the plaintiffs may move the court to remand it back to the State court. A motion to remand must be filed by the plaintiff within 30 days after service of the Notice of Removal.

6. Supplemental Jurisdiction

If a federal court's subject matter jurisdiction over a case has been established, the Court (judge) then has **discretion** to exercise **supplemental jurisdiction** over all other claims that **are so closely related to claims in the action that they are part of the same case or controversy** even if the Court (judge) would not have had jurisdiction over those same claims had they been brought alone (28 USC § 1367.)

> **For Example:** Pete sues his employer, Dave, in district court claiming he was sexually harassed. He cites two causes of action, intentional infliction of emotional distress (a State law claim) and violation of federal fair employment law, all arising out of the same event. The district court has **federal question subject matter jurisdiction** because there is a federal question. And the court has **supplemental jurisdiction** over the State law claim because it arose out of the same facts.

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A. No Supplemental Jurisdiction over Unrelated Claims

Plaintiffs (and defendants in cross-complaints and third-party complaints) in federal court can include **all claims** that they have against the adverse parties, even if those claims concern totally unrelated events **as long as each claim independently qualifies for federal SMJ** (FRCP 18(a).)

But a federal court can only exercise **supplemental jurisdiction** over other claims that do not independently qualify for federal SMJ if they are **so closely related to a claim that does qualify** for federal SMJ that they are **part of the same controversy**.

> **For Example:** Pete, from California, sues Dan, from Nevada, in district court for $100,000 claiming sexual harassment in employment in violation of federal law. Dan files a counter-claim against Pete for $50,000 based on State law claiming breach of contract in an **unrelated matter**. Pete's claim raises a **federal question** so it qualifies for federal SMJ. But Dan's claim does not raise a federal question, and it does not qualify for diversity jurisdiction because it concerns an amount that does not exceed $75,000. So Dan's claim does not qualify for federal SMJ. Further, Dan's claim is not directly related to Pete's claim. Therefore, **supplemental jurisdiction does not apply** and the federal court has no jurisdiction over Dan's claim.

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B. No Supplemental Jurisdiction over Non-Diverse Defendants

Plaintiffs (and defendants in cross-complaints and third-party complaints) can include **claims against additional parties** and **third parties** may join or be joined in the litigation (FRCP 14, 19, 20 and 24.) But, if a federal court only has **diversity jurisdiction** over an action the court cannot exercise supplemental jurisdiction over **claims against additional parties** that would, if brought into the action, destroy complete diversity (28 USC § 1367(b).) BUT this rule does NOT APPLY to additional parties that ask to join **to press claims against <u>existing parties</u>** in the action, even if the parties to be joined could not by themselves establish diversity. (*Stromberg Metal Works, Inc. v. Press Mechanical, Inc.,* (7th Cir. 1996) 77 F.3d 928.)

If injustice would result because the court is unable to join indispensable parties that would, if joined, destroy subject matter jurisdiction, the Court (judge) must dismiss the entire action (FRCP 19(b).)

> **For Example:** Huey, from California, is beat up by Louie, from California, and Dewey, from Nevada, in a 3-way brawl.
>
> Huey sues Dewey in district court for tortious battery on the basis of diversity jurisdiction claiming he suffered injuries of $100,000. Huey does not name Louie as a defendant. If Huey had named Louie as a defendant diversity jurisdiction would not have existed.
>
> Dewey then moves the Court (judge) (under FRCP 19) to join Louie as an additional party claiming that Louie also responsible for Huey's injury. And he wants to name Louie as a third-party defendant (under FRCP 14), claiming that Louie caused him $5000 injury in the brawl.

> But Dewey's $5000 claim is below the $75,000 limit, so it can only be heard by the court under supplemental jurisdiction. And under 28 USC 1367(b) the court cannot exercise supplemental jurisdiction over Dewey's $5000 claim, even though it is part of the same controversy, because Louie raises a **claim against** Dewey, a party that would destroy diversity jurisdiction. Further, Louie cannot be joined under FRCP 19 for the same reason. So, if a just adjudication is impossible without joining Louie the Court (judge) would have to dismiss Huey's entire claim under FRCP 19(b).

But consider this similar but different result:

> **For Example:** Huey, from California, beats up Louie, from California, and Dewey, from Nevada in a brawl. Dewey sues Huey in district court for tortious battery on the basis of diversity jurisdiction claiming he suffered injuries of $100,000. And Louie joins as a plaintiff (under the permissive joinder rules of FRCP 20) claiming injuries of $20,000. Under 28 USC 1367(a) the court can exercise supplemental jurisdiction over Louie's $20,000 claim, even though it is **not more than $75,000**, and even though there is **no diversity of citizenship** between Huey and Louie because it is part of the same controversy and Louie is joined as a **plaintiff with a claim against an existing party**. This is the holding in *Stromberg,* but it is not accepted in all circuits.

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C. Supplemental Jurisdiction is Discretionary

A federal court has **discretion** whether to exercise supplemental jurisdiction. The Court (judge) can decline to exercise jurisdiction if the additional claims 1) raise unique or complex **issues of State law**, 2) **predominate** the entire action or 3) the claims that first established subject matter jurisdiction have been **dismissed** and only supplemental jurisdiction claims remain.

7. Strategies to Create or Destroy Diversity SMJ

Plaintiffs may file cases in federal court claiming diversity SMJ exists where none actually does or to change the parties or avoid joining parties to create diversity SMJ that otherwise would not exist. Or parties they may attempt to prevent defendants from being able to remove a case from State to federal court by joining additional defendants that destroy diversity SMJ. Some of these strategies are prohibited and others are allowed.

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A. Collusive Acts to Create Diversity are Prohibited

A federal court does not have jurisdiction over a matter brought improperly or collusively in order to invoke the jurisdiction of the court (28 USC § 1359.) The two means usually involved to do this are to create diversity of citizenship by **assigning litigation rights** to a third party or by **failing to name an indispensable party** in interest as a plaintiff or defendant. A plaintiff must include indispensable parties even if they have no assets from which a judgment could be paid.

If including an indispensable party would destroy diversity jurisdiction, joinder of that party by the defendant (or by a plaintiff that is defendant to a counterclaim) is barred by FRCP 19(a). But if

inability to join the party would cause injustice a dismissal of the entire matter may be required by FRCP 19(b).

> **For Example:** Chen, a businessman from Taiwan, breaches a $1 million contract with Juan, a graduate student from Mexico, concerning a high-tech invention Juan has created. Larry, an attorney domiciled in California, has Juan assign him all of his rights under the contract so that they can file suit in federal court claiming jurisdiction because it is a suit between Larry, a "citizen of a State," and Chen, a foreign citizen. In exchange for the assignment Larry promises Juan $1 plus 60% of his future recoveries in the suit. This is a collusive agreement to create diversity jurisdiction and is prohibited. Juan is actually the true party in interest and there is no diversity because neither Chen nor Juan is a "citizen of a State."

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B. Plaintiffs with Valid Claims May Join Non-Diverse Defendants

Plaintiffs may name non-diverse defendants and thereby defeat removal on diversity jurisdiction grounds if a valid claim against them actually exists. The federal court will look beyond the pleadings and may allow removal on a finding that the party named as a defendant is not actually an "adverse party" to the plaintiff.

> **For Example:** Tom, from California, sues Dick, from Nevada, for $1 million for breach of contract in State court. To prevent Dick from removing to federal court, Tom also names his pal, Harry, from California, as a defendant. Dick may still remove to federal court if he can show Tom has no bone fide claim against Harry.

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C. Plaintiffs May Reduce Claims to Defeat Removal

A plaintiff can always determine the dollar amount of damages claimed, and that can defeat removal on diversity jurisdiction grounds.

> **For Example:** Tom, from California, sues Dick, from Nevada, for <u>exactly</u> $75,000 for breach of contract in State court. Dick is prevented from removing to federal court because the claim does not **exceed** $75,000.

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D. Plaintiffs May Avoid Citing Federal Law to Defeat Removal

A plaintiff may neglect to make a claim under federal law, and that can defeat removal on federal question jurisdiction grounds.

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E. Plaintiffs May Assign Rights to Non-Diverse Plaintiffs to Defeat Removal

Early courts held that removal was blocked when plaintiffs assigned some or all of the litigation rights to non-diverse parties that became additional plaintiffs. Those decisions were based on the fact that federal statutes only prohibit collusive acts to **create** diversity and no statute prevents collusive acts to **destroy** diversity. But the modern trend is for federal courts to allow removal in such cases, especially when only a small portion of the claim was assigned.

> **For Example:** Tom assigns one percent of his negligence claim against Dick to Harry to block removal of suit from the Hog Wallow County Court. Dick and Harry are both from New York. Early court decisions allowed this maneuver to block removal. But the modern trend is for federal courts to allow removal anyway where only a small part of the litigation rights are assigned and the original plaintiff remains a party.

8. Interpleader Diversity Subject Matter Jurisdiction

Federal courts have original subject matter jurisdiction based on diversity in any civil action of interpleader if two or more adverse claimants are of diverse citizenship. (28 USC § 1335 (a).) This is a much looser diversity rule than the regular diversity SMJ rule.

An interpleader action is a case in which one party, the **stakeholder,** has possession of an asset that two or more other parties' claim belongs to them. The stakeholder asks the court to decide which of the claimants to give possession of the asset.

Interpleader is not tested very often in law school or on Bar exams. All you have to know is 1) what an interpleader action is, and 2) the federal court has subject matter jurisdiction based on diversity if **any one claimant is from a different State than any other claimant**. In other words, there does have to be some diversity, but not much.

> **For Example:** Tom dies and his Metropolitan Life insurance policy names his beneficiary as "my wife." But during the period he holds the policy he is married to Bunny, a resident of Utah, Candy, a resident of Ohio, and Bambi, a resident of Ohio. Bunny, Candy and Bambi all claim the insurance proceeds should be paid to them. So Metropolitan, the **stakeholder**, can file a federal interpleader based on interpleader diversity SMJ and ask the court to decide the matter. The fact that Candy and Bambi are both from the same State does not destroy interpleader SMJ as long as one claimant, Bunny, is from a different State.

9. Challenging Subject Matter Jurisdiction

Subject matter jurisdiction is a matter of statutory authority. Only the Congress or the Legislature of a State may authorize a court to hear cases of a particular type. The Court (judge) cannot act sua sponte to give itself expanded authority in disregard of the legislative effort to circumscribe its powers. Likewise, the parties to an action cannot assume the role of legislative authority and give to a court, through either stipulation or by the unilateral waiver of one party alone, authorities the court does not otherwise possess.

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A. Challenge in Forum Court

Parties to any dispute may challenge the subject matter jurisdiction of a court in any matter at any time in the forum court, the court where the matter has been filed and heard. This is true even if the party challenging subject matter jurisdiction was the plaintiff that chose that particular court to hear his/her case in the first place.

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B. Challenge on Appeal

Lack of subject matter jurisdiction can always be raised on appeal even when the issue was never raised in the lower court.

> **For Example:** Huey sues Louie for negligence in **district court** based on diversity jurisdiction. Huey alleges he lives in Indiana. Louie lives in Ohio and has no reason to doubt Huey, so he does not challenge subject matter jurisdiction. Huey wins a $100,000 judgment against Louie after a 12-week jury trial with dozens of witnesses. Then Louie finds out that Huey moved to Cincinnati **the day before he filed suit** although he did live in Indiana his entire life up to the time of the accident and even up to the day before his lawyer filed the suit. Can Louie appeal and have the judgment thrown out even if he never challenged jurisdiction previously? You bet'cha!

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C. Challenge of Default Judgment in Collateral Attack

A lack of subject matter jurisdiction can also be raised in a collateral attack **if a defendant has not appeared** in court and has had a "default judgment" filed against them. A **collateral attack** means that a defendant challenges a judgment when the plaintiff tries to enforce it rather than challenge it in the court that heard the matter and issued the judgment.

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D. Challenge of Contested Judgment in Collateral Attack

The courts are split on whether a defendant can mount a collateral attack on a judgment based on a lack of subject matter jurisdiction after the defendant appeared in the trial court and argued his case before that court. This is especially true when the defendant challenged subject matter jurisdiction at trial and was defeated based on the court's finding of fact. In general, the defendant must raise the issue of lack of subject matter jurisdiction in such cases through the regular appeal process for the court system that issued judgment.

> **For Example:** Huey sues Louie in **district court** based on diversity jurisdiction. Louie alleges a lack of subject matter jurisdiction claiming that Huey actually lives in Ohio, the same State where Louie lives, so there is no diversity of citizenship. The Court (judge) finds diversity exists because, as a matter of fact, Huey lives in Indiana. Huey wins a $100,000 judgment against Louie. If Louie thinks this is wrong he should appeal to the **federal circuit court**. But the appeals court would have to find a "clear abuse of

discretion" by the trial court judge, and that is a high standard of proof. If Louie does not appeal and then Huey seeks to collect on the judgment by foreclosing on Louie's real estate in **Ohio State court**, Louie cannot challenge there in collateral attack that the federal court lacked subject matter jurisdiction. The State court will hold that federal subject matter jurisdiction is **"res judicata"** (a thing that has already been decided) and it will not consider it further.

But there are exceptions to this rule as there are to most things. If a court issues a judgment **that federal or State law clearly prohibits,** a subsequent challenge of subject matter jurisdiction will be allowed because the judgment is clearly without merit.

> **For Example:** Huey files for **bankruptcy** in the **justice court** of **Freedom Township** in a rural area of **Montana** where the men are men and the sheep are nervous. Louie protests that the State court lacks subject matter jurisdiction because **federal law reserves these matters to the federal bankruptcy courts**. The judge (having read the Federalist Papers) disagrees and forgives Huey of his debt to Louie. Later when Louie sues Huey in Washington State court for the debts he is owed, Huey produces the Montana bankruptcy decree as his defense. Can Louie challenge the Montana decree in Washington State court in a collateral attack? Yes, because the Washington court knows it isn't worth the paper it's written on. A bankruptcy decree by a State court is clearly worthless. No court, State or federal, will consider it res judicata because it is clearly null and void of any value.

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E. Orders Issued without SMJ Must Still be Obeyed

The courts will not abide disrespect, even disrespect for invalid court orders. A court order issued by a Court (judge) that lacks jurisdiction may be successfully challenged on appeal, and it may even be challenged in a collateral attack in some cases. But even invalid orders cannot be disobeyed or ignored! When Courts (judges) find defendants in contempt for disobeying their orders, the invalidity of those orders is NO DEFENSE to the contempt finding. Even appeal to the 1st Amendment guarantees is no defense.

10. Subject Matter Jurisdiction Exam Issues

If an exam question concerns an action filed in a **federal court**, **subject matter jurisdiction** is always the FIRST issue you should **consider** and in many cases it is the first issue you should **explain** in your answer to a Civil Procedure question. Don't discuss it if it is not an issue at all, but always consider whether it is an issue for discussion or not. If an action is filed in a **State court** SMJ is not an issue at all UNLESS the action involves something State courts have no jurisdiction to consider such as bankruptcies or immigration actions.

Some texts and professors discuss **personal jurisdiction** (explained later in Chapter 3) BEFORE **subject matter jurisdiction**. Follow your professor's preference if there clearly is one.

Remember that **State courts have general jurisdiction**, so State courts will always be able to hear cases unless they are cases the Constitution or federal law reserves to the exclusive jurisdiction of federal courts (e.g. bankruptcy, foreign ministers, etc.). So if questions involve suits filed in State courts **subject matter jurisdiction is only relevant to removal issues.**

Usually the main focus of federal SMJ exam questions is whether **diversity jurisdiction** exists. Often this involves **aggregation** of claims to exceed the $75,000 limit and **citizenship** of the parties. If diversity jurisdiction does exist, a subsequent issue may be whether there is **supplemental jurisdiction** over **joined claims** or whether **parties can be joined** or whether joinder would destroy diversity.

Finally, if a judgment has already been issued, the issue for consideration is often whether a **collateral attack** on the subject matter jurisdiction of the court would be allowed.

NO CASES concerning **subject matter jurisdiction** are so important that you should go out of your way to cite them on exams. Rather, the statutes (28 USC §§ 1330 et seq.) and Federal Rules of Civil Procedure cited above are controlling. Your professor may disagree, so follow the professor's lead.

Chapter 3: Personal Jurisdiction

Personal jurisdiction means the **authority of a court to exercise control over a defendant**. This is determined by concepts of **due process** embodied in the guarantees of the 5th Amendment and the 14th Amendment to the Constitution that prohibit the federal government and State governments, respectively, from denying individuals due process.

While due process and personal jurisdiction over defendants is an issue as to both civil procedure and criminal procedure, it is primarily discussed and tested as a civil procedure issue in law school and on Bar exams.

Even if courts have the authority to exercise control over defendants, personal jurisdiction also requires that defendants be give **adequate notice** of legal actions being pursued against them and an **opportunity to be heard** in opposition to those actions before any final decisions can be reached.

DUE PROCESS simply means treatment in a manner that does not offend **traditional notions of fair play and substantial justice**.

While the **subject matter jurisdiction** of federal and State courts over **cases or claims** is limited by the Constitution and statutes, the **personal jurisdiction** of courts over **defendants** is limited by traditional notions of fairness and justice.

Personal jurisdiction has also been called **territorial jurisdiction** because the early view that will be explained next in regard to the case of *Pennoyer v. Neff* was that due process considerations restricted each court's authority to the parties physically within the same State or "territory" where the court physically was located.

1. Substantive versus Procedural Due Process

A distinction is often made between "substantive" due process and "procedural" due process. This distinction is gives the misleading impression that "substantive" due process is more important than "procedural" due process. **Substantive** due process means that a government act denying an individual interest in life, liberty or property must be **inherently fair**, no matter how the act is performed. **Procedural** due process typically means that the government deprivation of an individual's interests must be done in a **procedurally proper** manner, giving the person proper **notice** and **opportunity to object** to the government action.

Violations of "procedural" due process are often viewed as less serious than violations of substantive due process, but it all depends on if it is your ox that is getting gored.

> **For Example:** After notice and a cursory hearing Judge Roy Bean issues an injunction banning the practice of Islam west of the Pecos. This is a violation of **substantive due process** because freedom of religion is a fundamental right guaranteed in the Constitution and it cannot be infringed without a full, evidentiary hearing. Later that day, Judge Bean issues a second order without notice or a hearing terminating Myron's employment as a County employee. This is a violation of **procedural due process** only because holding a government job is not a fundamental right. But due process promises Myron the right to

notice and some kind of a hearing. So, is Myron any less injured than the local Moslems? Not if you ask him!

2. The Three *Pennoyer v. Neff* Criteria for Personal Jurisdiction

The **first important case** in Civil Procedure concerning personal jurisdiction (PJ) as taught and tested in law school was ***Pennoyer v. Neff*** and you must understand and be prepared to cite and explain this early case. This case established the basic tenet that the due process guarantees embodied in the 5th and 14th Amendments limit the powers of all courts to exercise jurisdiction over defendants regardless of whether the courts have statutory authority or not. Further, it expressly established **three criteria** recognized for personal jurisdiction over a defendant: 1) **consent,** 2) **presence** and 3) **domicile**.

Although *Pennoyer v. Neff* did not expressly state that courts also have personal jurisdiction over defendants in "forum related causes of action" it seems that was an implicit assumption of the decision. A "forum related cause of action" (FRCA) means litigation or a prosecution alleging a wrongful act was committed by the defendants within the territorial jurisdiction of the court.

> **For Example:** Tom, a California resident, is attending law school at Harvard in Massachusetts when he is involved in an auto accident with Dick, a resident of Massachusetts. Dick can sue Tom in a Massachusetts court and the court will have personal jurisdiction over him because the accident occurred in Massachusetts and that makes it a "forum related cause of action". This would be so even if Tom left the State and went elsewhere before he is served with the suit.

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A. The Facts in *Pennoyer v. Neff*

Usually the only part of case law worth knowing is the rule that comes out of it. But knowing the facts of *Pennoyer v. Neff* will help you understand the Supreme Court's ruling that the 14th Amendment restricts State courts in exercising jurisdiction over individuals. The case involved an illiterate pioneer, Neff, who homesteaded some land in Oregon in 1850. His land was secretly taken from him by crooked lawyers and politicians.

Neff had consulted with lawyer J.H. Mitchell in 1862 about his homestead claim. Neff paid Mitchell $6.50 for his services. Neff stayed in Oregon for **three more years** and Mitchell never claimed he owed him anything more. But **as soon as Neff moved** out of Oregon to California in 1865, Mitchell filed a suit in the local State court claiming that Neff owed him $300 for legal fees. Neff, in California, was never given actual notice of the suit, and Mitchell concealed it from him by giving "notice by publication" in an obscure weekly newspaper in Oregon devoted to religion. Since Neff was in California and unaware of the suit, he failed to answer. Mitchell obtained a default judgment. With that he had Neff's land sold at a "sheriff's sale" in 1866 where he bought it himself for about $300. The land was allegedly worth $15,000. Mitchell immediately sold it to Pennoyer, another crooked lawyer and politician.

Mitchell's true name was John Hipple, a crooked Pennsylvania schoolteacher-turned-lawyer that had seduced and impregnated one of his 15-year-old students, abandoned her for a mistress, stole $4,000 of his client's money and took off for Oregon. He later became a United States Senator

from Oregon and remained in that office for 33 years despite being convicted of a felony for a massive land fraud scheme. Pennoyer became Governor of Oregon in about 1887. [Sound likes politicians today, doesn't it? Some things never change.]

The 14th Amendment was adopted in 1868, and Neff sued to recover his land in 1874. He won in the circuit court on a finding that Mitchell's original affidavit in the Oregon court was procedurally flawed. Pennoyer appealed for review by the U.S. Supreme Court.

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B. The Court's Holding in *Pennoyer v. Neff*

The Supreme Court found for Neff in *Pennoyer v. Neff,* but not because of procedural errors. Instead the court established the rule that **due process** prohibits any court from exercising authority over the **personal rights** of any individual beyond its **"territorial jurisdiction."** The court held that this was anyone that 1) **does not consent** to the court's jurisdiction and is not 2) **physically present** or 3) **domiciled** within the territorial boundaries of that court's political jurisdiction. This sweeping doctrine was called the **territorial jurisdiction** of the court, but now it is generally called **personal jurisdiction** (PJ).

Under *Pennoyer* the judgments of any court without personal jurisdiction over defendants violate due process and are **subject to challenge**. As a result Mitchell's $300 judgment against Neff in *Pennoyer* was ruled **null** and without effect. Neff got to keep his farm, but not because of "procedural error".

This doctrine concerns a court's power to determine the **legal rights and liabilities** of an individual, such as the person's liability for a crime, a debt, a tort or a breach of contract. There is less of a due process issue when the subject of a dispute is property (e.g. land) claimed by two or more individuals and that property is located within the geographic territory of the court. This is referred to as an ***in rem*** action and it is explained more below. It is important to bear in mind that *Pennoyer v. Neff* was NOT an *in rem* action. It rose from Mitchell's claim that Neff owed him a debt of $300, not out of a claim that he owned any interest in Neff's land.

1) Consent, Waiver and Long-Arm Statutes

People can waive their right to **due process** because it is a personal right of the individual. And **plaintiffs waive the right** by implication when they file an action with the court. Therefore, **personal jurisdiction** is only an issue with respect to **defendants**.

A defendant can expressly waive any objection to a court's personal jurisdiction, but more importantly defendants **impliedly waive** objection to personal jurisdiction if they **answer** complaints, file counterclaims or otherwise **avail themselves of the powers and protections** of the forum court **without otherwise objecting** to the **personal jurisdiction** of that court.

Many States require people doing business within the State to **expressly consent** to the personal jurisdiction of the State. Some State laws may also require businesses to designate an **agent for service of process** that is physically present within the State.

> **For Example:** California requires every foreign (out-of- State) corporation operating within the State to expressly consent to personal jurisdiction of California courts and to designate an agent for service of process located within the State. California also requires used car dealers to expressly consent to the Director of the Department of Motor Vehicles being their "agent for service of process" if they are sued for defrauding customers.

Long-Arm Statutes. Even if defendants do not **expressly consent** to the jurisdiction of a State's courts, the State may declare by statute that the State's courts have jurisdiction beyond the State boundaries in certain circumstances. These are called **long-arm statutes** because they extend the jurisdiction of State courts beyond the State's borders.

A long-arm statute may provide that when defendants engage in certain activities within the State, or act affecting the State's residents, they **impliedly consent** to the personal jurisdiction of the State's courts. These might be such activities within the State as **driving vehicles, selling products, selling insurance** or other acts that could cause injury to State residents. In these cases the State statutes may also allow service of process on public officials as agents for the defendants within the State.

> **For Example:** Bud, from Ohio, is injured by Lou, a driver from Utah passing through on vacation. Bud can sue Lou in Ohio State court if Ohio's long-arm statute declares Lou has **impliedly consented** to personal jurisdiction in Ohio courts by driving within the State. But even if there is no such statute it can be argued that Bud's complaint is a "forum related cause of action" so it does not "offend traditional notions of fair play and substantial justice" for an Ohio court to exercise authority over Lou.

This statutory "implied consent" rationale is increasingly unimportant because of the non-statutory "minimum contacts" and "forum related cause of action" concepts that will be explained later. But the personal jurisdiction of **federal district courts** within a State are circumscribed by the long-arm statutes of the States because Federal Rules of Civil Procedure **define the personal jurisdiction of federal district courts by reference to State laws.** This will be explained more below.

2) Voluntary Presence when Process is Served

A court has personal jurisdiction over all people that are **voluntarily present** within the geographic territorial boundaries of the court's political jurisdiction at the time they are served with notice of a legal action against them (i.e. they are served with a summons and complaint or some other petition giving them notice of a legal action). In other words, if you are in Utah voluntarily at the time you are served with notice of a law suit you are subject to Utah courts. This rule applies to both federal and State courts and usually means the defendant must be found **within the State boundaries** if personal jurisdiction is going to be claimed based on "presence." "Voluntary presence" means that the person must be present in the State **of their own free will at the time they are served with notice** of an action against them.

The procedures for serving a defendant with notice of a suit are set by State and federal law. Usually they require handing the defendant a **summons and complaint**. [1] That is called **personal**

[1] Many civil actions involve service of "petitions" rather than summons and complaints (e.g. divorces) but for law school purposes it is common to speak of every civil action in terms of "complaints".

service of process. But **"substitute service"** is often allowed by delivering the summons and complaint to the defendant's agent, home or business. Substitute service by mail is also allowed in some cases. While personal jurisdiction is a major issue in Civil Procedure, the exact mechanics for serving complaints are not, so don't worry about them. The main concern regarding **service of process** is that the defendant must be given **notice** of the legal proceeding affecting their rights in a **reasonable manner**, and the defendant must be present within the State where the court is seated at the time of service if personal jurisdiction over the defendant is to be claimed based on "presence".

A Court (judge) has **discretion** to exercise personal jurisdiction over a defendant that has entered the geographic territory of the court **involuntarily** but it will **usually refuse** to exercise jurisdiction in such cases.

> **For Example:** Bud steals Lou's car in Los Angeles and wrecks it. Lou sues him for conversion in California State court, and the District Attorney also charges Bud with grand theft. When Bud, a resident of Nevada, is arrested in Nevada and extradited to Los Angeles, Lou serves him with his complaint. Bud can argue that there is no personal jurisdiction because his presence in California was NOT VOLUNTARY. The Court (judge) will usually refuse to exercise jurisdiction in such cases.

And a Court (judge) will almost never exercise personal jurisdiction when the defendant is in the State because of a **ruse or trick**. The courts simply don't want to be party to such acts.

> **For Example:** Bud tells Lou he has won a new car in a "Sweepstakes" so he can get him to "voluntarily enter" California. When Lou enters California to get his "new car" he gets a summons and complaint instead. Lou can argue that there is no personal jurisdiction over him because his presence in California was the result of a TRICK. The Court (judge) will usually refuse to exercise jurisdiction in such cases.

In fact, parties are usually given statutory **immunity** from service of process when they are required to enter a State as a **party** or **witness** to litigation (including as a **deponent**).

But if defendants are present within a State voluntarily when they are served with notice of legal actions against them the courts within the State have personal jurisdiction over them **even if their presence was brief or transitory**. The Court (judge) will exercise jurisdiction in this type of "gotcha!"

> **For Example:** Bud, a resident of Colorado, flies from Denver to Hawaii, non-stop. When the pilot says, "Ladies and Gentlemen we have crossed into California, and beautiful Lake Tahoe can be seen passing below the plane," Lou rises from his seat and hands Bud a complaint for a lawsuit filed in federal district court in California. This is sufficient to establish **personal jurisdiction based on presence** because Bud has voluntarily flown into California's airspace, even if he is not on the ground.

The "Presence" of a Corporation. A corporation is always "present" in the State where it is incorporated (where it is a **domestic** and not a **foreign** corporation.) And it is also "present" where it has designated a **corporate agent for service of process.** And it is also "present" where it carries on **actual corporate operations**.

But under the modern "minimum contacts" view a corporation comes under the **personal jurisdiction** of every State where it carries on actual operations in a continuous and systematic way. This is explained below in the explanation of *International Shoe* because it is actually a different and broader concept that the "presence" concept established in *Pennoyer v. Neff*.

A corporation "presence" should not be confused with the "citizenship" of a corporation for purposes of subject matter jurisdiction based on diversity as required in 28 USC § 1332. Above it was stated that a corporation is a "citizen" of only two possible States for purposes of proving **diversity jurisdiction** – the State of incorporation and the State where the majority of business activities take place. That is statutory and remains true for purposes of subject matter jurisdiction.

But a corporation is NOT present for purposes of **personal jurisdiction** merely because of the **presence of employees or officers** within a State. The corporation must actually be carrying on business or engaged in some activities in a State that are more than occasional or casual to be judged "present" there.

> **For Example:** Tom sues DotCom, a Nevada software corporation, in a California court. Tom argues there is **personal jurisdiction** because Dick, the president of DotCom, attends the annual internet trade show every year in Los Angeles. This is not sufficient to establish personal jurisdiction over DotCom unless there is evidence that the corporation carries on some type of systematic business activities in California (e.g. buying, selling, manufacturing, transporting, advertising, etc.).

3) Domicile

The courts of the States where defendants are **domiciled** also have personal jurisdiction over them.

> **A person's DOMICILE is that place to which they intend to return and reside indefinitely.**

An individual's State of "domicile" is effectively their "home State". The most common situations when a person is **not residing in their State of domicile** are:

1) Armed forces personnel stationed outside their home State;
2) Students at an out-of- college; and
3) Employees on temporary out-of-State assignment.

In these situations the State of domicile retains personal jurisdiction over the defendant, even if the defendant has been absent from the home State for an extended period of time.

A person does NOT have to have a **dwelling** in the State of domicile. It strictly depends on their intent to return to the State of domicile immediately or at some time in the future and to stay there indefinitely thereafter.

> **For Example:** Tex, a Texas resident, sues Dick, a full-time student from Texas attending Harvard Law School in Massachusetts, in a Texas State court. Dick is **not present or residing** in Texas when served. He has been residing in Massachusetts for the past three years and is not sure if or when he will ever return to Texas. But Dick is "from Texas" so he will probably LOSE a challenge of personal jurisdiction unless he can show he has a

> Massachusetts **driver's license**, has **registered to vote** in Massachusetts or some other evidence that he intended to reside in Massachusetts indefinitely rather than return to reside in Texas.

Domicile of a Corporation. The concept of "domicile" has no meaning for a corporation. Corporations have "citizenship" for determining diversity SMJ and "presence" for determining PJ, but not "domicile".

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C. Personal Jurisdiction Compared to *In Rem* Actions

The concept of **personal jurisdiction** concerns the court's jurisdiction over the **parties** (i.e. **defendants**) themselves and NOT the court's jurisdiction for ***in rem* actions** where the court is exercising its authority over **things** (called the ***res***) in which various parties claim an interest. If the *res* is within the territorial jurisdiction of the court, the court has jurisdiction over the *res*, even if the parties claiming interests in the *res* are outside the State. A court may exercise *in rem* jurisdiction over both **tangible property** and **intangible property** such as **rights**.

1) Property *In Rem* Actions

Typical *in rem* actions involving **tangible property** are **land** actions to **quiet title** or **foreclosure of liens** on real property. But parties can bring an *in rem* action against other properties such as "claims against **ships."** A court has jurisdiction over all property within its territorial jurisdiction.

A **quiet title** action is a request for the court to settle conflicting claims or possible claims to a particular property that would otherwise "cloud the title" and make the property difficult or impossible to sell.

Clearly the court does NOT have personal jurisdiction over every possible **person** that might claim an interest in all property in its jurisdiction because those people could be anywhere in the entire world. But the court DOES have jurisdiction over the **property** physically located within its territorial jurisdiction. So, people claiming an interest in property must come forward to defend those claims, after being given notice of the pending action, or else the court has the power to declare their claims null and the property title cleared.

> **For Example:** Tom sells Dick a house in Texas on a recorded installment contract under which Dick will get title when he makes the last payment. Then Dick has contractor Harry make improvements to the house. And Harry records a mechanics lien to protect his right to payment. Dick defaults on the sales contract, and Tom is left with a house that has "clouds" on its title – the claims of Dick and Harry. He can't easily sell the house with these unresolved claims looming over the property, so he files a **quiet title** action to clear the title. Tom must take reasonable steps to notify Dick and Harry. Then the Texas court can declare the house title free and clear of the claims of Dick and Harry. It can do this, even if they have left the State and disappeared, because the house itself is within the court's **territorial jurisdiction**.

2) Status and Rights *In Rem* Actions

With respect to **intangible property,** a court can exercise jurisdiction over the **rights** of a person such as **marital rights**. The court may **grant divorce** of a marriage to one spouse within the State even if the other spouse is outside the State and beyond the personal jurisdiction of the court. In this case it is **the marriage** that is **the thing in dispute**.

> **For Example:** Jones' wife Buffy runs off with a vacuum cleaner salesman. So he moves from New Jersey to Nevada and after living there for six months files for a divorce from Buffy. The Nevada court can grant Jones a divorce without having personal jurisdiction over Buffy because it has jurisdiction over the thing in dispute, the **marital status** of Jones, a resident of Nevada

3) Distinction of *In Rem* Action From *Pennoyer v. Neff*

Remember that *Pennoyer v. Neff* was NOT an *in rem* action. It involved a dispute over Neff's land in Oregon, but the original dispute was a claim by Mitchell that Neff **personally owed** him $300 in attorney fees. That is the claim Mitchell used to get Neff's land via a "Sheriff's Sale." The Supreme Court held that the judgment in *Pennoyer* was invalid because the Oregon court had **no jurisdiction over Neff**. But the Oregon court clearly **had *in rem* jurisdiction over Neff's land** because it was in Oregon, and the Supreme Court never said otherwise.

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D. Understanding *Quasi In Rem*

Since a court has jurisdiction in an *in rem* action involving **rights** of parties, including their rights to property, without having personal jurisdiction over the parties themselves, a perplexing type of action arose in history called a ***quasi in rem*** action.

A *quasi in rem* action may be in either federal or State courts. But *quasi in rem* actions in **State court** are mostly IRRELEVANT now because of the 1977 Supreme Court holding in *Shaffer v. Heitner*. But some understanding of what they are (or maybe were) is still important.

A *quasi in rem* action was an action to collect **personal debts** owed by defendants outside the court's personal jurisdiction, by **seizing their assets** within the court's jurisdiction. It used to be a lot like kidnapping. The plaintiff that could not sue the defendant seized the defendant's assets and held those until the defendant submitted to the court's personal jurisdiction.

> **For Example:** Paul, in Maryland, claims that Dan in North Carolina owes him $300. But instead of suing Dan in North Carolina, Paul seizes or attaches $100,000 of Dan's assets located in Maryland. If Dan comes to Maryland to object to the seizure, he becomes "present" and comes under the personal jurisdiction of the Maryland court. If Dan does not come to defend his property, Paul could win by default.

Another *quasi in rem* angle was that plaintiffs (creditors) could claim an interest in debts owed to the defendant (a debtor) by a third-party and bring a *quasi in rem* action similar to a **quiet title** action. This was like a little shell game with three shells and a pea. The courts held that the defendant's right to payment from the third-party was an "asset in dispute" located in the State

where the third-party was located. If the defendant did not come forward to defend his rights to that asset, the court would declare that the plaintiff had the right to be paid the debt. If the defendant DID come forward to challenge the claim, he suddenly came under the personal jurisdiction of the out-of-State court. This produced a confusing situation and bad law, much of it arising out of the case of *Harris v. Balk* (1905). *Harris* conflicted with *Pennoyer v. Neff,* and it was effectively overruled in *Shaffer v. Heitner* in 1977. But for 72 years *Harris* was considered good law.

> **For Example:** Harris, in North Carolina, owed Epstein, in Maryland, $300. Harris was beyond the personal jurisdiction of Maryland courts so Epstein was going to have to sue him in North Carolina to collect. But Harris was owed $180 in turn by Balk, who was in Maryland. So, instead of suing Harris in North Carolina, Epstein sued Balk in Maryland in a *quasi in rem* action of garnishment claiming that Balk should pay him the $180 because Harris owed him money. Balk notified Harris of the suit, but Harris did not appear in the Maryland court. The Maryland court ordered Balk to pay Epstein, and later a North Carolina court told Harris he could not collect from Balk because Balk had already paid Epstein. So Epstein got $180 from Harris through the back door.
>
> The Supreme Court reasoned in *Harris* that this would be OK because Balk was being sued in Maryland, where he was present at the time of suit, and Harris could have sued Balk in Maryland, too. The Court reasoned that if Balk could be sued by either party in Maryland he was no worse off being sued by Epstein than he would be if sued by Harris. And, Harris was on notice and could have appeared in the action. So the court ruled due process was not violated.
>
> The Court failed to recognize that the Maryland court was taking away Harris's right to collect from Balk and giving it to Epstein. And, the Maryland court had no real power to do that under *Pennoyer v. Neff*, because the Court had no personal jurisdiction over Harris. The ploy effectively allows the Maryland court to deny Harris's right to collect from Balk, a personal right, without having any personal jurisdiction over him. And it forced Harris to appear in the courts of a State where he has no personal connection in order to defend his rights.

***Quasi In Rem* Distinguished from *In Rem*.** A *quasi in rem* action is different from an *in rem* action because it is an action against **property** based on a **claim** (not a court judgment) that the owner of the property owes an **unrelated debt**. In contrast *in rem* actions are against property itself, based on the plaintiff's claim of a **direct interest** in that property. Usually this would be a security interest but it could also be a lien arising out of a court judgment as in *Pennoyer.*

The Logical Conflict Between *Pennoyer* and *Harris.* *Harris* directly conflicted with *Pennoyer v. Neff.* In *Pennoyer* the Supreme Court held that it was a violation of due process for the Oregon court to exercise authority over Neff, a California resident, **regarding a claimed debt** because he was beyond its territorial jurisdiction. The Court reasoned that Neff should not have to travel all the way back to Oregon to defend himself from Mitchell's claim regarding the debt.

In contrast, in *Harris* the Supreme Court held that it was NOT a violation of due process for a Maryland court to exercise authority over Harris, a North Carolina resident, **regarding a claimed debt** even if he was beyond territorial jurisdiction. There the Court reasoned that Harris could

have gone to Maryland to defend himself from Epstein's claim regarding the debt, and if he did not do that Epstein could collect the debt from Harris' creditor, Balk.

The Demise of *Quasi In Rem.* *Quasi in rem* actions no longer have much relevance because in 1977 the Supreme Court correctly resolved the dilemma by holding in *Shaffer v. Heitner* that it violates due process for a court to exercise jurisdiction in a *quasi in rem* action against **property** where the underlying claim is actually one of **personal liability** unless the same court has **personal jurisdiction** over the party with that personal liability.

> **For Example:** Suppose the same circumstance where Harris, in North Carolina, owes Epstein, in Maryland, $300, and Harris is owed in turn $180 by Balk. Under *Shaffer* Epstein cannot bring a *quasi in rem* action against Harris's property (the debt owed him by Balk) in the Maryland court unless that court has personal jurisdiction over Harris himself, because the **underlying claim** is actually one of a **personal debt**.

Shaffer effectively ended the use of *quasi in rem* in State courts because the only good reason for using *quasi in rem* actions in the first place was when the defendant was beyond the court's personal jurisdiction. So *Shaffer* effectively prohibited the use of *quasi in rem* actions in the only situation where they were of any particular use. And *Shaffer* effectively overturned *Harris*, even if it was not expressly stated as such by the court.

***Quasi In Rem* Actions in Federal Court.** *Quasi in rem* actions can still be used in **federal court** to seize a defendant's assets within the federal district if 1) the defendant is reasonably **beyond the personal jurisdiction** of the court and 2) the **State law** within which the district is located allows *quasi in rem* actions. This is usually going to be a situation where a defendant is a **fugitive from justice**. This is such a rare situation you will never be tested on it in law school.

In summary, *quasi in rem* actions are an historical idea that almost never has any practical application modernly. Consequently, that is about all you need to know about them.

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E. State Personal Jurisdiction Generally Limits Federal Courts

If a State's courts have jurisdiction over all people in the State, doesn't it seem logical that federal courts would have jurisdiction over everyone in the nation? Ha, ha, dream on! Sometimes they do, but usually they do not.

In fact, the personal jurisdiction of a federal district courts is **usually the same**, for both diversity and federal question cases, **as the jurisdiction of the State courts in the same State** where the federal district court is located. This is not a Constitutional limit on federal courts. It is a limit imposed on the federal courts by Congress in FRCP 4(k)(1)(A) which says a federal district court can exercise personal jurisdiction over any person **subject to the jurisdiction of courts of general jurisdiction in the State** where the district court sits. So if the State courts don't have jurisdiction over the defendant, the federal district courts **in the same State** don't have it either.

There are some relatively unimportant situations when federal courts have personal jurisdiction nationwide. For example, federal law gives federal courts **nationwide personal jurisdiction** in **interpleader** actions. (FRCP 4(k)(1)(C).)

Long-arm Statutes, Again. A State can extend the personal jurisdiction of its courts far beyond State lines via a "long-arm" statute. And if its "long-arm" statute is **as broad as it can be** it extends the State court's personal jurisdiction to the fullest extent allowed by the due process considerations established by *Pennoyer* (and *International Shoe* as explained later.) This, in turn, extends the personal jurisdiction of the federal district courts in the same State to that extreme limit. But if the State "long-arm" statute is very restrictive (Would that be a "short-arm" statute?) it will equally limit the jurisdictional powers of the federal district courts in the same State.

> **For Example:** Suppose the State law of California says, "California courts shall have jurisdiction over all parties to the fullest extent allowed by federal law and the U.S. Constitution." Then both California courts and all federal district courts seated in California would have the broadest possible jurisdiction over all defendants.

The simple upshot of this is that **the personal jurisdiction of a federal district court is the same as the jurisdiction the State courts in the same State where the federal district is located** except for certain situations that you should not bother worrying about.

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F. The Use of the Limited Appearance

Some States allow a party to appear in an *in rem* or *quasi in rem* action without subjecting themselves to court personal jurisdiction beyond the amount in dispute. This is called a **"limited appearance,"** not to be confused with the "special appearance." Special appearances are explained below. While the FRCP are silent on the subject of limited appearances, **most federal district courts have followed the State law** in the State where the district is located. This is never going to be a central issue on law school exams.

> **For Example:** Suppose Harris, in North Carolina, owes Epstein, in Maryland, $300, and Harris is owed in turn $180 by Balk. If Maryland had a **limited appearance** statute it would allow Harris to appear in the Maryland court to protest he did not owe Epstein anything, not even $180. This would subject Harris to the personal jurisdiction of the Maryland court, but only **up to liability of $180** because of the "limited appearance" statute. Harris' exposure would not be Epstein's entire claim of $300.

3. Minimum Contacts: *International Shoe*

Another **central case** in Civil Procedure, and one you should understand and be prepared to cite, is the 1945 case of ***International Shoe.*** This case established that courts have personal jurisdiction over defendants with **sufficient minimum contacts** with the forum State, even if the clear but rigid criteria of *Pennoyer* indicated personal jurisdiction did not exit.

This doctrine was established because after *Pennoyer* corporations cleverly structured their activities to avoid the jurisdiction of the State courts where they carried on much of their business activity. They avoided the jurisdiction of the State courts where they had employees and sold products by avoiding the establishment of a "corporate presence" within those States. They did this so their employees and customers could not sue them where they lived. Rather, unhappy

employees and customers would have to travel to the corporation's "home State" to pursue any litigation against it, and this gave the corporation clear legal and financial advantages.

These practices were ended by *International Shoe* which established a much more flexible concept of personal jurisdiction than *Pennoyer*. Under this holding a more extensive analysis of the facts is required to determine if the court has personal jurisdiction, so law school professors love to test on this. And the court left the term "minimum contacts" deliberately vague so that it might be argued to exist in a wide variety of scenarios. The underlying question is always whether the defendants' acts were such that **they could have reasonably anticipated they could be forced to litigate in the forum State**.

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A. The Facts in *International Shoe*

In *International Shoe* the defendant corporation actively sold shoes in the State of Washington, but it claimed Washington courts had no personal jurisdiction over it because it was "not actually present" in the State.

The defendant corporation claimed it was not "present" because it was **incorporated** in Delaware and **headquartered** in Missouri. Further, it had cleverly established **no offices** in Washington, and it employed a staff of salesmen there that were only **order takers** who did not to "offer to sell" shoes. The shoe orders taken by the salesmen were portrayed as "contract offers" that had to be approved at the home office in Missouri. So all **sales contracts** were actually completed in Missouri, and all **shoes were shipped** directly to customers from the home office in Missouri.

Therefore the defendant slyly argued that since it had no offices, entered into no contracts and technically sold no shoes in Washington, it was technically "not present" in Washington at all.

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B. The Court's Holding in *International Shoe*

The Supreme Court held in *International Shoe* that regardless of whether the defendant corporation was "present" in Washington in the technical sense of that term as used in *Pennoyer*, **due process was not violated** when the Washington courts exercised authority over the defendant. The court reasoned that the defendant had engaged in **continuous and systematic activities** in Washington to the extent it **"could have reasonably anticipated it might be forced to litigate in the forum State."** Therefore, it **"did not offend traditional notions of fair play and substantial justice"** for the Washington courts to exercise jurisdiction over the defendant.

This concept of whether or not there was a "sufficient connection" between a defendant and a forum State for personal jurisdiction to exist was referred to as **"minimum contacts"**. If defendants engage in "**continuous and systematic activities"** (CASA) in the forum State, the forum State has personal jurisdiction (PJ) over the defendants. And it was also implicit in the court's holding in *International Shoe* that a **"forum related cause of action"** (FRCA) is also sufficient to give the forum State PJ over defendants..

International Shoe and subsequent cases established a number of criteria for determining when sufficient contacts (a level of **"minimum contacts"**) existed that the exercise of personal

jurisdiction did not violate due process. Learn these because this is what you will be tested on. They are **when the defendants**,

1. Have engaged in **continuous and systematic activities** (CASA) within the forum State;
2. Have **availed themselves** of the benefits and protections of forum State laws;
3. Have acted to cause the plaintiff's **injury within the forum State** (FRCA);
4. Have acted outside the forum State to cause the plaintiff's **injury within the forum State** (FRCA);
5. Have **consented in advance** to submit disputes to the forum State courts (consent); or
6. Otherwise **should have expected to be forced to litigate** in the forum State courts.

These criteria have often been reduced to three basic concepts. They are that **"minimum contacts"** exist when there are **Continuous and Systematic Activities** (CASA)**, Forum Related Causes of Action** (FRCA), or defendants otherwise have **Availed Themselves of the Benefits and Protections** of the forum State.

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C. Continuous and Systematic Activities

Continuous and systematic activities are business activities such as the sales efforts in *International Shoe*. But a private party can also engage in continuous and systematic activities within a State. If a business **advertises, sells products, collects payments, employs labor, buys raw materials, manufactures** or otherwise engages in systematic and continuous activities within a forum State, it can hardly claim that that it should be regarded as beyond the jurisdiction of the forum State courts.

> **For Example:** Bob bought an insurance policy in Texas and moved to California. Later Oppressive Insurance re-issued the policy and Bob **kept making payments** to Oppressive on the re-issued policy. When Bob died Oppressive refused to pay his family under the policy. They sued Oppressive in California courts. Oppressive claimed lack of personal jurisdiction because it did not solicit business in California and only operated in Texas. The Court (judge) held that Oppressive was subject to the personal jurisdiction of the California courts because it re-issued the policy and kept taking Bob's money after he had moved to California. It did not offend traditional notions of fair play for Oppressive to be subject to the laws of California since it was insuring the life of a California resident.

However, some affirmative acts by the **defendant** are necessary. The unilateral movement of a **plaintiff** to another State is not alone enough to claim "systematic activities" there by the defendant.

> **For Example:** Bob opened a bank account in Maryland when he lived in Baltimore and after he moved to Florida the Bank of Maryland sent him his bank statements and advertisements about loans the bank offered. It was held that Florida courts had no personal jurisdiction over Bank of Maryland simply because Bob moved there.

And sporadic or occasional activities alone are not enough to constitute "continuous and systematic activities."

> **For Example:** A Mexican brewery, XXX, buys a corporate jet from a Texas manufacturer. Pilots and aircraft maintenance workers employed by XXX are trained in Dallas. And, once a year the plane is serviced in Texas. These activities alone are NOT enough to claim a Texas court has personal jurisdiction over XXX because of "continuous and systematic activities" in Texas.

Whether activities are "continuous enough" and "systematic enough" to justify personal jurisdiction by a court depends on the facts and is arguable in borderline situations. When these situations arise on exams you should objectively assess both sides of the dispute (paddle on both sides of the canoe).

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D. Forum Related Causes of Action

Forum Related Causes of Action are injuries that result from acts within the forum State, acts that injure residents of the forum State, or causes of action in which the forum State otherwise has a strong interest.

Pennoyer v. Neff never expressly said whether or not courts have personal jurisdiction over defendants in forum related causes of action without proof of consent, presence or domicile. But *International Shoe* made it much clearer that due process is not violated unless a court's exercise of jurisdiction offends "traditional notions of fair play and substantial justice." In fact, that is a better focus on the holding of that case than "minimum contacts."

Generally traditional notions of fair play are NOT violated is when the plaintiff's cause of action arose from the defendants' own alleged acts within the forum State, even if the defendant disputes those allegations. Clearly a State has a legitimate interest in protecting its citizens from tortious or wrongful conduct by outsiders, and it does not offend "traditional notions" for a State court to exercise jurisdiction over out-of-State defendants that are alleged to have caused injury to the State's residents.

The claim that a **debt arose** within the forum State is usually NOT enough to claim a forum related cause of action against a non-resident defendant because the failure to pay the debt is a wrong that continues to the other State where the defendant actually lives.

> **For Example:** Mitchell, in Oregon, claims that Neff, a resident of California, owes him $300 for services rendered in Oregon. This is not a "forum related cause of action" because the injury arises from Neff's **failure to pay after he has gone to California**.

But **tortious conduct** within a State or causing injury to residents within the forum State is usually a cause of action sufficiently related to the State to give it personal jurisdiction over the defendants.

> **For Example:** Fearless Fosdick, an FBI sniper from New York, goes to Ruby Ridge, Idaho and shoots Farmer without warning. Then he high-tails it back to New York to hide behind his badge. It would not offend traditional notions of fair play for Farmer to sue Fosdick in an Idaho court since Fosdick caused Farmer's injury in Idaho, and **Fosdick**

> **could reasonably anticipate** he will be forced to litigate in Idaho courts after he shoots people in Idaho.

Likewise, the breach of a **contract formed within a State** generally is a forum related cause of action.

> **For Example:** Bill agrees to build a house for Owen in Florida for $100,000. Then, realizing that he underbid the contract, Bill splits for the north slope of Alaska. Owen has to pay another contractor $150,000 to complete the job. Owen sues Bill in Florida courts. It does not offend traditional notions of fair play for a Florida court to exercise jurisdiction over Bill because he entered the contract in Florida, and he breached it in Florida. Bill would have reasonably anticipated he would be sued in Florida, and Owen should not have to travel 6,000 miles to Alaska to sue him.

Likewise, a State's exercise of jurisdiction over defendants for **out-of-State acts** (or failures to act) that cause **in-State injuries** may not offend due process.

> **For Example:** Bob bought an insurance policy from Oppressive Insurance in Texas and moved to California. Bob dies and Oppressive refuses to pay the beneficiaries. A California statute says the State's courts have jurisdiction over all "contracts of insurance" held by State residents. In a similar case the Supreme Court held that States have a strong interest in protecting State residents from suffering injury from out-of-State insurance companies, so it does not offend traditional notions of fair play for the California courts to exercise jurisdiction over the defendants in such cases.

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E. Availed of Benefits and Protections

Another related argument that a State court's exercise of jurisdiction over a defendant does not "offend traditional notions of fair play and substantial justice" arises when defendants have or would have **"availed themselves of the benefits and protections"** of the very same forum State courts. This might be characterized as "what's good for the goose is good for the gander" because the defendant can hardly claim the exercise of State court jurisdiction is unfair and unexpected if they have used or would have used the same courts themselves for their own advantage.

> **For Example:** Bob, in Michigan, runs a business using suppliers in Illinois and has used Illinois courts to sue one of them, Dan. Dan later sues Bob in the very same Illinois court over a breach by Bob. It does not offend "traditional notions of fair play and substantial justice" for the Illinois court to exercise jurisdiction over Bob when he has been availing himself of the benefits and protections of that very same court.

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F. "Minimum Contacts" Widens a Plaintiff's Choices of Courts

International Shoe loosens or relaxes the **personal jurisdiction** requirements of *Pennoyer* with respect to **defendants** and does NOT narrow, replace or overrule those requirements. *International Shoe* added "another arrow to the quiver" of plaintiffs, not defendants.

Pennoyer is based on the right to due process, a personal right that can always be waived. **Plaintiffs** always waive the right and consent by implication when they file their complaint with the forum court. The plaintiff needs no "contacts" with the forum State to do this.

> **For Example:** U.S.A. Today prints an article that states Peter is a "pervert." The article appears in every State. Peter sues the newspaper for defamation in Iowa because the law and jury there are favorable to him. Peter has never been to Iowa or had any contacts with that State. The defendant newspaper can NOT argue that it is unfair for Peter to use the Iowa courts because he has no "minimum contacts" because that concept **limits a court's jurisdiction over defendants, NOT plaintiffs.**

4. Perfecting Personal Jurisdiction: Notice and Hearing

The focus of the courts in *Pennoyer* and *International Shoe* was on whether defendants were **sufficiently connected to the forum State** so that exercise of court jurisdiction over them did not violate considerations of **substantive due process.** But substantive due process is not alone enough because **procedural due process** demands that the defendants also be given **proper notice** of the pending litigation and an **opportunity to voice objections** and defensive arguments.

The required procedures for serving defendants with proper notice are called **"service of process"** and they are statutory and mechanical in nature. But they are also necessary for the plaintiff to **"perfect"** the court's personal jurisdiction over the defendant. This is the **plaintiff's duty.**

This gives rise to an important question:

> **Has the COURT'S JURISDICTION over the DEFENDANT been perfected in accordance with STATUTORY and DUE PROCESS requirements?**

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A. Reasonable Notice: *Mullane*

The one **big, important case** regarding notice requirements is the 1950 case of *Mullane v. Central Hanover Bank & Trust* 339 U.S. 306. There the Supreme Court said,

> **"An elementary and fundamental requirement of due process in any proceeding to be accorded finality is notice reasonably calculated to apprise interested parties of the pendency of the action and afford them opportunity to present their objections."**

You should recall that in *Pennoyer* the defendant, Neff, was never given any actual notice of the action filed by Mitchell. Instead, Mitchell just published a "public notice" in an obscure Oregon religious newspaper of limited circulation to meet Oregon's statutory requirement for "constructive notice." Of course he hoped Neff would not learn of his suit because he wanted to

seize Neff's homestead. He failed, but the Supreme Court did not decide *Pennoyer* in favor of Neff because of that procedural issue at all.

Notice and opportunity to be heard is necessary when any **liberty or property interest** will be **deprived with finality**.

But in *Mullane* the Supreme Court held that **regardless of the State's statutory service requirements, no court has personal jurisdiction** over any defendant unless the defendant has been given EITHER **actual notice** OR the plaintiff has made a 1) **reasonable effort calculated** to inform the defendant that 2) a **proceeding is pending** that may affect them.

In either case the defendant must also be given an **opportunity to object**.

If defendants have **actual notice** a proceeding against them is pending and are afforded **an opportunity to "be heard"** almost all courts will hold that due process has been afforded. So most disputes over procedural due process involve situations where defendants are NOT given actual notice but plaintiffs allege the defendants received **constructive notice**.

A **reasonably calculated effort** means that if the plaintiff knows where the defendant is, the plaintiff must usually deliver the summons and complaint to the defendant personally. That is called **personal service.** But if the defendant cannot be personally served after reasonable effort is made, the plaintiff may be allowed to serve the defendant by mail and/or by leaving the summons and complaint at the defendant's home or place of business. This is called **substitute service.** And the plaintiff may be allowed to serve defendants that cannot be found by any other means by publishing a public notice.

But the basic holding of *Mullane* is that if the defendants are not given proper notice in a reasonably calculated manner the court has **NO personal jurisdiction** over them. And this may be true **even if they learn of the pending proceeding** by some other means! This is always arguable.

> **For Example:** Larry files an action to evict Rene from an apartment he owns. But instead of serving Rene with the summons and complaint, Larry posts it on the bulletin board in the apartment clubhouse. Friend sees the notice and thoughtfully brings it to Rene's attention. Does the court have personal jurisdiction over Rene? It is arguable. Clearly Rene was **not given notice in a manner "reasonably calculated" to give her notice**. So she may reasonably believe it to be a hoax and disregard it. In that case the court has no personal jurisdiction over her. But if she admits to the court that she got actual notice, considered it to be genuine and deliberately ignored it, the Judge will usually find she got actual notice and is subject to the personal jurisdiction of the court.

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B. The Opportunity to be Heard: *Mathews v. Eldridge*

Typically Civil Procedure classes don't talk about the defendant's right to some type of a hearing because civil litigation is usually focused on lawsuits between private parties that lead to full-blown civil trials. So this is usually ignored, and it is probably never going to be tested. But it is important. Civil litigation also encompasses **administrative actions** by government entities where important rights are often determined in improperly abbreviated proceedings. Whether you represent the government agency or the private party, you should bear in mind that under *Mullane* a tribunal has **no personal jurisdiction** over any party denied due process, and **due process is denied** if the party is **not given an adequate opportunity to object** to a proposed governmental action.

What is an "adequate opportunity" to object? That is defined by *Mathews v. Eldridge* (1976) 424 U.S. 319 where the Supreme Court said that due process demands a **full evidentiary hearing** if a **fundamental right** is at stake. Where non-fundamental rights are at issue, the type of hearing required by due process depends on a **balancing three factors**: 1) the **importance of the private interest** at stake, 2) the **risk the private interest might be wrongfully deprived** and associated usefulness of additional procedural safeguards, and 3) the **importance of the government interest** in avoiding the burdens of providing additional procedural safeguards.

> **For Example:** The State Welfare Department (SWD) decides to castrate Bud, a mentally retarded youth, because he has been masturbating. He is brought in front of an SWD hearing officer without an attorney and the hearing officer orders him to be castrated after only a few minutes discussion. Bud's mother franticly hires attorney Al to stop the operation. Al can file a temporary restraining order (TRO) challenging that the order by the SWD hearing officer is **null** because **no personal jurisdiction** was established over Bud without a full evidentiary hearing since 1) a **fundamental private interest** (procreation) was at stake, 2) **wrongful deprivation posed a serious risk** (just ask Bud), and 3) the **government did not have an important reason** to rush to judgment on such an important issue.

5. Challenging a Court's Personal Jurisdiction

Usually, the defendant can only challenge the **personal jurisdiction** of a court as a threshold issue at the outset of litigation. Unlike **subject matter jurisdiction,** personal jurisdiction is a court-created law based on the Constitutionally guaranteed personal right of the defendant to due process, not a statutory limit placed on the powers of the court. Therefore, defendants waive the issue forever unless they challenge the personal jurisdiction of the court at the **outset**. Once the defendant waives the issue by not raising it, the issue cannot be raised at a later time or on appeal. An **exception** is when the defendant **defaults**.

To challenge the personal jurisdiction of a **federal court** the defendant must file a motion for dismissal under Federal Rule of Civil Procedure 12(b) (a "12(b) motion") **before or concurrently with** the filing of any other motions or of an answer to the plaintiff's complaint. If the defendant files any other threshold motions ("12(b) motions") or an answer without voicing objection to the court's personal jurisdiction, the issue is impliedly waived and cannot be raised again later. Some State courts follow similar rules.

> **For Example:** Tom sues Dick in **district court**. Dick files an answer that objects to a lack of personal jurisdiction. Dick **has NOT waived** the issue by answering because he objected to personal jurisdiction within his answer.

In many other **State courts** the defendant must object to lack of personal jurisdiction by making a **special appearance before answering** the complaint. This is often called a **Motion to Quash,** and it requires the defendant to request a special appearance at which they object to the court's exercise of personal jurisdiction.

> **For Example:** Tom sues Dick in **State court**. Dick files an answer in which he objects that the court lacks personal jurisdiction over him. Dick **HAS POSSIBLY WAIVED** the jurisdiction issue by answering because he must make a **special appearance** before the court objecting to personal jurisdiction in many States rather than objecting within the answer itself.

Denial of Objection Must be Appealed or is Deemed Waived. If defendants object that the court lacks personal jurisdiction over them, the court may either agree, granting a motion to dismiss or disagree, denying a motion to dismiss. When a court disagrees and denies the motion to dismiss, the defendant must **either appeal** the issue to the appeals court **or else the issue is waived** forever. An appeal of this type is a "direct attack" on the lower court's holding and not a "collateral attack." The actual mechanics of such an appeal vary from State to State.

No Collateral Attack if Personal Jurisdiction Objection Waived. After the issue of personal jurisdiction has been waived, defendants can NOT later raise the issue in collateral attacks in other courts (courts other than the appeals court). It does not matter if the issue was waived because the defendants **never challenged** the court's personal jurisdiction in the first place or because the defendants **did not appeal** the first court's denial of jurisdictional challenges that were raised.

Collateral Attack Allowed in Case of Default Judgment. But if defendants **never answer** plaintiffs' complaints at all, and plaintiffs obtain **default judgments,** the issue of lack of personal jurisdiction is **not waived.** In this case defendants MAY challenge the court's lack of personal jurisdiction over them in collateral attacks. This would typically be when plaintiffs attempt to enforce default judgments against the defendants.

> **For Example:** Tom sues Dick in a California State court. But Tom never serves the summons and complaint on Dick because he is on safari in Africa and totally unaware of the suit. Tom gets a **default judgment**. But when he tries to enforce it through a sheriff's sale of Dick's palatial estate in New Hampshire, Dick challenges the original judgment claiming the California court lacked personal jurisdiction over him. This is a **collateral attack** because Dick is challenging a California court judgment in a New Hampshire court. But it is permissible because it is a default judgment.

Appealing a Denial of Personal Jurisdiction Challenge. The necessary procedures for appealing the denial of a challenge of personal jurisdiction are seldom tested because they vary from one State to the other. Some States allow an "interlocutory" appeal, meaning that denial of a motion challenging the court's personal jurisdiction (i.e. Motion to Quash) can be immediately appealed before the parties proceed to trial. Other States may require the defendant to proceed to trial (or not answer and suffer entry of a default judgment) before the denial of the motion to quash can be appealed. The possibilities are so varied it is not worth memorizing.

6. Summary of Personal Jurisdiction

Subject matter jurisdiction and **personal jurisdiction** are two of the **most important concepts** of civil procedure and you absolutely will be tested extensively on both of them.

What should you know to say about personal jurisdiction? You need to cite the fact that *Pennoyer v. Neff* established personal jurisdiction over the defendant as a Constitutional **due process requirement** that can be satisfied when the defendant is 1) **present** in, 2) **domiciled** in or 3) **consents** (by answering the complaint) to the jurisdiction of the forum State. And you need to cite that *International Shoe* established that personal jurisdiction will exist when the defendants have 4) **sufficient minimum contacts** with the forum State based on **continuous and systematic activities** or a **forum related cause of action** or have **availed themselves** of the benefits and protections of forum State laws such that **traditional notions of fair play and substantive justice are not offended** by the court's exercise of jurisdiction. However, you should also state that under *Mullane* **procedural due process** also demands that the defendant be given 5) **reasonably calculated notice** and 6) an **opportunity to raise objections**.

Chapter 4: Venue

Venue is considerably less important than subject matter and personal jurisdiction in a lot of ways but it still has been and can be tested on Bar exams.

Venue means the proper place within a **sovereign jurisdiction** (usually within a state) for a case to be heard. Some courts with jurisdiction over the subject and defendants are not a proper venue.

Venue should always be considered **AFTER subject matter and personal jurisdiction** because the proper venue can **never be in a court that does not first have jurisdiction** over 1) the subject matter and 2) the defendants. Secondly, even if a court has subject matter and personal jurisdiction, the **venue rules may still eliminate it** as a proper place for trial. Finally, the federal venue rules themselves depend on the type of subject matter jurisdiction (diversity or federal question) and the means for finding personal jurisdiction.

Venue alone is strictly statutory and has no Constitutional implications, but it can have important implications on 1) whether the plaintiff can get **the defendants into court** and 2) the **choice of law** that will be used to decide the case. This second issue will be explained in more detail later and in the explanation of **The *Erie* Doctrine**.

1. State Venue Rules

The law school reality is that you are unlikely to be tested on State venue rules at all, so you only need to have a general idea of the.

Each State establishes its own venue rules, so they can hardly all be listed here or memorized by you. California law is representative of many State venue laws. It provides that court venue will always be proper in the court of a county where 1) the **defendants live** or 2) a claimed **injury occurred**. But if the action is for the recovery of property, unlawful detainer or foreclosure the **county where the property is located** is the proper venue. And if the action is for a divorce the proper venue is often the **county where one of the spouses resides**. Most States follow similar approaches.

Refusal to Exercise Jurisdiction over Certain Lands: Trials cost courts time and money, and they cause inconvenience to the local residents that are required to sit on the jury. And courts have the discretion to **refuse to exercise jurisdiction**. So a court may save itself some time and money by refusing to hear a case on the rationale that it is more closely connected to another jurisdiction where trial would be more appropriate. In particular, State courts may refuse to exercise jurisdiction over cases that involve **land in other jurisdictions.** Such cases will be termed **"local"** to the jurisdiction where the land is located. Cases that are not considered "local" are termed **"transitory,"** but there is no bright line distinguishing the "land" cases that are local from the "land" cases that are transitory.

Refusal to Exercise Jurisdiction for Forum Non Conveniens. Both State and federal courts have discretion to refuse to exercise jurisdiction on a finding of *forum non conveniens.* This means there is a finding that some other jurisdiction is a more appropriate forum for the action, either because of **convenience to the parties** or because of the **interests of the State**. The Court (judge) may consider the inconvenience of the venue to the **witnesses,** or where **another State's law will**

determine the case. A State court may even refuse to exercise jurisdiction because the **plaintiff** is a resident (and taxpayer) of another State.

Dismissal When Venue Denied. In **State courts** a case will be **dismissed** if the Court (judge) either finds venue is **improper** OR if the court refuses to hear the case on grounds of ***forum non conveniens***. Dismissal forces the plaintiff to file the complaint a second time in another court.

2. Federal Venue Rules

If you are tested on venue at all, the law school reality is that you will almost certainly be tested on federal venue rules instead of State rules. Federal venue rules are defined in 28 USC § 1391. These are the only venue rules you might reasonably be expected to know well.

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A. General Federal Venue Rule

In **all** federal actions the **general rule** is that the proper venue for trial is where:

1) **Any defendant resides if all defendants reside in the same State**; or
2) **A substantial part of the events or omissions** giving rise to the claim occurred or where **the property in dispute** is located; BUT OTHERWISE,
3) In any district where there is **personal jurisdiction over all the defendants.**

(Note: this "general rule" is actually repeated word for word twice in 28 USC § 1391(a) and (b). The difference in those two paragraphs is strictly regarding the "category 3" situations, and that is a misleading difference as explained below.)

It should be noted that it is actually "residence" that determines venue under "category 1" and NOT "domicile", the factor that determines diversity for subject matter jurisdiction.

> **For Example:** Al, from Ohio, and Bob, from Iowa, are chums at Harvard. They get drunk and negligently injure Carl in Massachusetts. Carl can sue them in district court in Massachusetts claiming diversity because he is not **domiciled** in Ohio or Iowa, the States where they are "citizens". And he has venue over them in Massachusetts because they both **reside** in that State while attending Harvard.

1) "Residence" of Corporations and Associations for Venue Purposes

For the purposes of this venue rule a corporation or association is deemed to be a "resident" of **any State where it is subject to personal jurisdiction**, and that would be determined by 1) the "long-arm" statute of the State, subject to 2) the existence of "minimum contacts" per *International Shoe.* (28 USC § 1391(c).) Note that this is much different from "citizenship" for purposes of subject matter jurisdiction based on diversity.

2) Venue Does Not Guarantee Personal Jurisdiction

Clearly **if all of the defendants reside in the same State** that has venue, **that State will have personal jurisdiction** over them, automatically.

But when the defendants do not all reside in the same State, personal jurisdiction over some defendants may not exist in the place where a "substantial part" of the events causing injury took place. Sometimes the defendants did not have "continuous and systematic activities" in the States where "substantial parts" of the events took place.

> **For Example:** Al, an investment advisor **residing** in New York, goes to Massachusetts and makes **fraudulent statements there** by mail to Carl. That induces Bob to go to Florida where he **buys** swampland from Al's confederate, Bob. Bob is residing in Florida, although his domicile is actually New York. Bob wants to sue them for "mail fraud" under federal law. But he cannot establish proper venue over Al and Bob under "category 1" in any State because the defendants **reside** in different States, New York and Florida. Further, Bob cannot claim venue in Massachusetts under "category 2" because there is no personal jurisdiction over Bob there based on "minimum contacts". Bob cannot claim venue in Florida where he bought the swamp under "category 2" because there is no personal jurisdiction over Al there. And, he cannot claim venue in New York under "category 2" because none of the events occurred there. Bob should consider "category 3".

And in some cases no "substantial part" of the events causing injury took place in <u>any</u> State.

> **For Example:** Al, **from** New York, and Bob, who **lives** in New Jersey but works in New York, go to **Mexico** for spring break where they get drunk and negligently injure Carl, from Texas. Carl cannot establish proper venue under "category 1" in any State because the defendants reside in different States. And Carl cannot establish proper venue under "category 2" either, because none of the events causing injury occurred in ANY State. Carl should look at "category 3".

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B. Federal "Escape Hatch" Venue Rules

The federal venue rules at 28 USC § 1391 contain an "escape hatch" provision as "category 3" that can be applied when neither "category 1" nor "category 2" can be used to establish venue. The exact rule sounds different depending on the type of subject matter jurisdiction that applies – **diversity** or **federal question**. But there actually is no real difference between the two in application. That is explained below.

1) The Escape Hatch for Diversity Actions

In **diversity actions** where an action cannot be brought under the "category 1" and "category 2" rules, venue (under 28 USC § 1391(a)(3)) may be had:

> In any district in which any defendant is **subject to personal jurisdiction.**

This is misleading because it implies all defendants could be sued anywhere there is jurisdiction over just one defendant. In fact, an action cannot be brought anywhere there is personal jurisdiction over **just one** defendant. There must be personal jurisdiction over **all** of the defendants.

> **For Example:** Al, from New York, and Bob, who lives in New Jersey but works in New York, go to Mexico for spring break where they get drunk and negligently injure Carl. Carl cannot establish proper venue under "category 1" in any State because the defendants **reside** in different States. And Carl cannot establish proper venue under "category 2" either, because none of the events **occurred** in ANY State. But Carl CAN establish proper venue in New York because he can get **personal jurisdiction** over both of them there. He can perfect personal jurisdiction over Al in New York because he is **domiciled** there. And he can get personal jurisdiction over Bob in New York because he "works there." That means Carl can either claim **minimum contacts** or he can simply effect **personal service** on Bob in the elevator when he shows up for work – ba-bing, that establishes **presence** under the rules of *Pennoyer*.

2) The Escape Hatch for Federal Question Actions

In **federal question actions** where an action cannot be brought under the "category 1" and "category 2" rules, venue may (under 28 USC § 1391(b)(3)) be had:

> In any district in which **any defendant may be found**.

This is misleading because an action cannot simply be brought anywhere **just one** defendant is "found." That would deny due process to the other defendants. There must be personal jurisdiction over **all** of the defendants. And, in actual application courts just interpret "found" to mean a State where there is personal jurisdiction over the defendants.

> **For Example:** Al, an investment advisor residing in New York, goes to Massachusetts and makes fraudulent statements there by mail to Carl. That induces Carl to go to Florida where he buys swampland from Al' confederate, Bob. Bob is residing in Florida, although his domicile is New York. Carl wants to sue Al and Bob for "mail fraud" under federal law. But he cannot establish proper venue under "category 1" or "category 2", all as explained in the above example. But he can establish venue under "category 3" because he can **find** Al there (at his residence) and he can establish personal jurisdiction over both Al and Bob in New York because they are both **domiciled** there.

3) No Real Difference Between Diversity and Federal Question Escape Hatches

Although the text in § 1391 makes a very clear distinction between the escape hatch for a **diversity action** and the escape hatch for a **federal question action** there actually is NO real difference in practice as exercised by the district courts. Despite the apparent differences, each provision AND each of them should properly be understood as meaning that where venue cannot be established under "category 1" or "category 2" the proper venue should be understood to be:

> **In any district where there is personal jurisdiction over all the defendants.**

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C. Challenging Venue

Objections to venue must be raised promptly at the threshold by motion of the defendant or else they are **waived**. And **no collateral attack** is allowed on a claim of "improper venue" even in the case of a **default judgment.**

> **For Example:** Al, a Nevada resident, sues Bob, a San Francisco resident, in district court in Los Angeles for $100,000 over an auto accident that occurred in San Francisco. The venue is improper, but Bob fails to answer. Consequently Al obtains a default judgment. When Al seeks to collect Bob challenges that the judgment is invalid because the venue was wrong (wrong county court). Bob will LOSE because improper venue cannot be challenged in collateral attack. And he cannot challenge **personal jurisdiction** because the district court clearly had personal jurisdiction over him as a California **resident.** And there was **subject matter jurisdiction** based on diversity.

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D. Change of Venue in Federal Court

In response to a venue challenge, a federal district court may grant a **change of venue.** This could be for one of two reasons. In either case, the case will be **transferred rather than dismissed** as it would be in a State court. This means the plaintiff will not have to file the complaint again in a new court. Transfer will be to another district **where the case could have been brought originally**. That means the court will transfer the case to another district court, if there is one, where venue is proper and personal jurisdiction over the defendants can be obtained.

One reason for a change of venue is for ***forum non conveniens*** considerations the same as State courts. The rules for that are specified at 28 USC § 1404(a).

The second reason a federal court may refuse to exercise jurisdiction on a finding that **venue is improper**. The rules for that are specified at 28 USC § 1406(a).

A change of venue raises a **choice of State law** issue. It is explained below.

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E. Venue Determines Applicable State Law

An interesting question frequently tested is,

> **WHICH STATE'S LAWS apply when VENUE is changed to a different State?**

State laws affect the plaintiff's rights in federal district court. First, a federal district court's **personal jurisdiction** over the defendant is defined by the "long-arm" statute of the State where the court is located. Second, the laws of the State where the district court is located will define the **substantive law that will be applied** to a plaintiff's State-law causes of action. Such State-law claims arise in **diversity** actions and under the court's **supplemental jurisdiction** in a **federal question** action.

> **For Example:** Al sues Bob on a State-law claim of negligence in federal district court in Reno. The **substantive law** that will be applied to determine the claim is the **Nevada law on negligence**, since the federal court is in Nevada. It doesn't matter if this is a **diversity** action or a claim joined under the court's **supplemental jurisdiction** with some other claim based on a **federal question**.

1) Plaintiff's Alternative Venue Choices

Sometimes a plaintiff can get **personal jurisdiction** over defendants in two or more States. And sometimes the plaintiff can chose from two or more States as places with **proper venue**. In these situations the comparative differences in the State laws becomes a very important factor in **choosing the forum State** where the suit will be filed.

> **For Example:** Bob, a resident of Arizvada, has a trucking company that operates trucks in the States of both Arizvada and Caligon. One of his trucks negligently injures Al, a resident of Caligon, while **in Caligon**. **Proper venue** would be in both Arizvada (where Bob resides) and Caligon (where a "substantial portion" of the events occurred.) And both States have **personal jurisdiction** over Bob because he **lives** in Nevada while carrying on **continuous and systematic activities** in Caligon. But, Al was partly to blame for the accident, and Arizvada law recognizes contributory negligence as a complete bar to recovery. In comparison, Caligon law has adopted pure comparative negligence. So Al should file his suit in Caligon district court, not Arizvada district court where his suit would be barred by contributory negligence.

2) Deliberately Chosen Incorrect Venue

A plaintiff may deliberately select an **improper venue** hoping to get a legal advantage from the laws of that venue. If the defendant does not promptly object to the improper venue, the plaintiff can pull a fast one because the **venue issue is waived** if the defendant does not promptly object.

> **For Example:** Bob, a resident of Arizvada, has a trucking company that operates trucks in the States of both Arizvada and Caligon. One of his trucks negligently injures Al, a resident of Caligon, **in Arizvada**. Venue in Caligon is **improper** because **Bob resides** in Arizvada and the **events** causing injury were in Arizvada. But both States have **personal jurisdiction** over Bob. And if Al files suit in Caligon, the laws of Caligon will apply to the case **unless Bob promptly objects** that venue in Caligon is improper. If Bob fails to object to the venue in Caligon, he **waives objection** permanently. So, wake up Bob!

3) Transfer From Improper Venue

If a defendant **successfully challenges an improper venue** the district court will transfer the case to a proper venue under 28 USC § 1406(a), as was explained in the previous section. In this case the State law of the **new (receiving) court** is applied to the case.

> **For Example:** Al files a negligence action against Bob in Caligon district court where **venue is WRONG** because both Bob (the defendant) and the events (an accident) occurred in Arizvada. But Al deliberately files suit in Caligon because knows he would be barred from recovery by the contributory negligence statute in Arizvada law. But, if Bob **objects to venue** in the Caligon court, the Court (judge) will **transfer** the case to Arizvada district

court under 28 USC § 1406(a). Then Arizvada law will be applied, and that will save Bob's bacon.

4) Transfer for *Forum Non Conveniens*

But if a defendant **successfully challenges venue on *forum non conveniens*** considerations the result is quite different. As explained in the previous section, the venue of a case may be changed for convenience purposes under 28 USC § 1404(a). In that case the law of the **original (transferring) court is still applied** to the case, even though the case has been transferred to a different State.

> **For Example:** Al files a negligence action against Bob in Caligon district court where **venue is proper** because the events giving rise to the suit (an accident) occurred in Caligon. But Bob begs the court to transfer the case to the Arizvada district court because his witnesses are all in Arizvada, his dog is sick, he is a single parent, etc. (boo hoo, boo hoo.) The Court (judge) may **transfer** the case to Arizvada district court under 28 USC § 1404(a), but the law of Caligon will continue to apply. Bob cannot get the law applied to the case changed by pleading for sympathy.

5) Due Process Limits on Use of Forum State Laws

There is a possibility that a federal district court might refuse to apply the law of the "forum State" where a suit is filed because it would **violate due process**. That situation is when the **defendant is a corporation** that has "minimum contacts" with the forum State, but the **claim has nothing to do with the forum State**, and the forum State has been chosen by the plaintiff solely because of its favorable laws. (See *Phillips Petroleum Co.* (1985) 472 U.S. 797)

This point touches on the issue of **"forum shopping."** That means a situation when plaintiffs search for a State with favorable laws as the "forum-State" where they file suit against a defendant (usually a corporation) that would be subject to personal jurisdiction in several States. This is discussed further in the next chapter on the ***Erie* Doctrine.**

Forum shopping does have its limit, and the limit is called "due process."

> **For Example:** Paul, from Alaska, sues Head Corporation (a Delaware corporation) in Hawaii on a products liability claim concerning injury he received in Alaska using a pair of Head skis in Alaska. Paul chose Hawaii as the place to file suit because its product liability law is the most favorable. He has **personal jurisdiction** over Head in Hawaii because it sells tennis rackets there, providing a claim of "minimum contacts." And there is **venue** because a corporation is a "resident" for venue purposes everywhere there is personal jurisdiction. The district court may hold that it violates due process for Hawaiian law to be applied to the case when it has absolutely nothing to do with Hawaii and the defendant's contacts with the forum State have absolutely nothing to do with the subject matter of the case.

Chapter 5: The *Erie* Doctrine: Federal Choice of Law Rules

The previous chapter on venue illuminates that **State-law claims** raised in federal district court (under **diversity subject matter jurisdiction** or **supplemental jurisdiction** rules) are determined by substantive State law. The term "State-law" claims means claims by plaintiffs that are not based on a federal law or federal question. Even when subject matter jurisdiction is based on a **federal question,** the plaintiff may also raise additional State-law claims under the **supplemental jurisdiction** provision if it arises out of the same central events, and defendants can do likewise.

At the same time, claims raised in federal court are generally subject to the court's procedural rules, the FRCP. But if a State **procedural** rules would be dispositive of a State law claim the question arises whether that "substantive" result makes the rule State procedural rule "substantive" or if it remains merely "procedural".

This question brings us to the Shaggy-Dog story of the "***Erie* Doctrine**." By "Shaggy-Dog story" we mean that your professor will probably drone on for several lectures telling you the entire, drawn-out and conflicted historical development of the *Erie* Doctrine, and you will be so bored by the time old Prof gets to the end of it that you are more confused than educated.

So rather than bore and confuse you here, we will first explain **what the law really is**, and it is really very simple. Then we will give you a summarized version of the historical development that Prof wants you to know for examination purposes concerning **how the law came to be what it is**.

1. Procedural Rules in Federal Court Diversity Actions

The current law, as interpreted and applied by the federal courts, is simply that **the Federal Rules of Civil Procedure (and federal laws, in general) control the procedures followed in federal courts** in all actions, including actions brought under diversity subject matter jurisdiction or addressed under supplemental jurisdiction rules. That statement seems so logical and obvious that it hardly seems necessary to state it. Unfortunately it is very necessary to state it because it often gets lost in the confusion surrounding the Shaggy Dog.

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A. Conflicting Procedural Rules

When a Federal Rule (or statute or policy) specifies a certain federal **court procedure** that is the procedure the federal court will follow, even if 1) State-law claims are being litigated under diversity SMJ or supplemental jurisdiction and 2) State procedural rules **conflict** with the Federal Rules. Why? Because the **supremacy clause** of the U.S. Constitution dictates that a federal law will take precedence over a State law when the two conflict, and the FRCP is a federal law. There is a conflict between State and federal rules if 1) the provisions of the two rules **clearly conflict**, or else 2) the federal rule was clearly **intended to be controlling** in all circumstances (To "occupy the field," so to speak.) And this is true, **even if it has a significant effect on the outcome.**

> **For Example:** Costello sues Abbott in State court claiming he violated State law banning discrimination in employment based on obesity. Abbott removes to federal district court on a **diversity SMJ** basis. State law provides that no jury trials may be requested by any party in a "fat-discrimination" case. But upon removal Abbott demands a jury trial citing his 7th

Amendment right to a jury trial. Costello doesn't want Abbott to get a jury because Costello is not only fat, he is ugly too! Although the claim is entirely based on State law and was filed in State court, and despite the fact that State law says no jury may be requested, State law does not control whether Abbott gets a jury. Rather, federal law and federal rules will determine if Abbott will get a jury trial because he is now in a federal court. Sorry, Costello!

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B. Purely Substantive Law

But if a State-law claim is being litigated in federal court, the court will apply the **substantive** law of the State, because that is the source law that gives rise to the claim itself. So, what is the difference between substantive and procedural law?

- **Substantive law** is that which regulates **the behavior of defendants <u>outside the court</u>** and **establishes the plaintiff's right** to pursue damages; and
- **Procedural law** is that which regulates **the behavior of the parties <u>inside court</u>** in their efforts to **prove injury** and **raise defenses**.

For Example: Wang sues Gump in district court on a diversity basis claiming damages based on State law because Gump racially discriminated against him. But federal law also has provisions concerning racial discrimination. The federal court will apply <u>only the State laws</u>, not the federal laws, because the State laws are the **substance of the plaintiff's claim**. Wang could have cited federal law, but he did not. That was his choice, and moving parties define the causes of action. Federal laws against race discrimination are **substantive,** not procedural, because they were enacted to **regulate out of court behavior**.

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C. Mixed Issues of Procedure and Substance

In some situations federal and State rules are different, but <u>not clearly conflicting</u>. And it may not be clear if they are purely procedural or purely substantive. A rule that appears procedural in nature can have a substantive effect. In these situations **if the State rule is not clearly in conflict with a federal rule,** the federal court must **balance the federal and State interests** in determining which of the two rules to apply. If there is a stronger reason to follow the State rule, it will be followed.

For Example: Patience sues Dr. Welby in State court for medical malpractice because Dr. Welby left a leech inside her six years earlier during surgery. (Don't worry, the leech is fine and practicing law for an insurance company in Los Angeles.) Dr. Welby removes to district court on a diversity SMJ basis, and then moves for a dismissal because federal law requires negligence actions to be brought within five years of the negligent act. But State law allows medical malpractice claims to be brought two years from the discovery of the negligent act. Patience argues that the State law is intended to regulate **out of court behavior** because it is intended to hold physicians accountable for negligent acts no matter when they are discovered. Dr. Welby argues that the federal law is procedural because it requires plaintiffs to **prove injury in court** before the claims become dated or stale. The federal court would balance the federal and State interests and find for Patience on the

ground that the State law gives plaintiffs a **substantive right** to bring a claim upon its discovery, even if discovery is many years after the negligent act causing the injury. In contrast the federal rule seems more perfunctory and not so important to the federal interest that it should be allowed to control.

This "statute of limitations" situation was addressed in *Guaranty Trust Co. v. York* (1945) 326 U.S. 99 where it was decided that **a federal court will always apply the statutes of limitation set in State laws** when State law is controlling over the cause of action. In other words, the court found that statutes of limitation were so important to State interests that they were substantive in nature, not procedural. But there is something of a federal exception to this called the "Relation Back" rule. That is explained below.

But preservation of the right to a jury trial in federal courts has been held to be a procedural right, so important to the federal interest that it is preserved **despite conflicting State laws** that might deny a jury trial on certain matters.

The effect of State statutes of limitation and federal rights to jury trial are tested on Bar exams.

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D. Summary of Current Choice of Law Rules

In summary, the actual rules are very simple and were delineated in the case of *Hanna v. Plumer* (1965) 380 U.S. 460. This is not actually "the *Erie* Doctrine" itself but the law that grew out of the chain of historical development that is generally referred to as the *Erie* Doctrine. To summarize, the current rules of law applied to a State-law matter heard in federal court are basically as follows:

1. When a cause of action based on State law (a State-law claim) is heard in federal court, **substantive law of the forum State** is always applied to determine the case. The forum State is the State where the case was **first filed under proper venue,** even if the case was later transferred from a proper venue for *forum non conveniens* reasons.
2. A rule is **substantive** if it is clearly intended to **regulate out-of-court behavior**. But a rule is **procedural** and not substantive if it is clearly intended to **regulate in-court behavior**.
3. The **procedural rules** in the Federal Rules of Civil Procedure and other federal statutes and policies concerning procedural matters are always used in federal courts if they **directly conflict** with a State procedural rule, even if the choice of rules has substantive impact.
4. But, where a State rule is **procedural in nature**, but has a **substantive impact** on a case, and it is **not in direct conflict** with a federal procedural rule, the court will decide the choice of law by **balancing** the State and federal interests.
5. It is settled that **State statutes of limitation** are substantive and will be applied by a federal court, subject to the Relation Back rule (see below).
6. And it is settled that the **right to jury trial** is preserved in federal court as a procedural right, even if it directly conflicts with State law.

2. The Shaggy *Erie* Dog

Old Prof will probably spend a lot of time explaining the historical development of the *Erie* Doctrine to you. Prof wants you to repeat this back, even though it no longer has much application to anything important. Humor Prof and learn enough of this to get a good grade. The following should be enough.

The historical development that culminated in *Hanna v. Plumer* is called the *Erie* Doctrine, arising out of the Rules of Decision Act, 28 USC § 1652, in 1789. (You might note that the U.S. Constitution was adopted about then, so this is old stuff.) The Rules of Decision Act basically said that when State-law claims were heard in federal courts, **they would apply the rules of the States where they were located, unless federal law conflicts.**

But *Swift v. Tyson* ruled in 1842 that federal courts could use federal common law (federal case-law) rather than State law in deciding claims that were not federal questions (**diversity** or **supplemental jurisdiction** claims based on State law) if the matters did not involve real estate or other essentially local matters. This was a bad idea.

Since local State laws applied in federal courts in diversity cases, plaintiffs that could sue defendants in several different State courts went "forum shopping" for the State that had the most favorable laws. This was almost always because the defendant was a corporation that was "present" or had "minimum contacts" in many States. But since federal courts could apply their own case law in many matters, instead of the laws of the States where they were located, defendants might have good cause to remove to federal court.

Forum shopping by plaintiff's attorneys became the rage, and designing complaints so that defendants could not remove to federal court also became an art. There was also confusion about whether the court should apply the laws of the State where the matter was filed, the laws of the State where the matter was heard or the Federal Rules. Sometimes defendants claiming diversity could get into federal court and have complaints dismissed on procedural grounds, but other equally-situated defendants that could not claim diversity were confined to State court where the outcome would be quite different.

This all led to questionable practices and unjust results. Finally in *Erie Railroad v. Tompkins,* (1938) 304 U.S. 64, the rule of *Swift* was overruled. It was held that the Rules of Decision Act required all federal courts to apply the **substantive law of the States** where they were located rather than apply "federal common law." That same year, 1938, the Federal Rules of Civil Procedure (FRCP) were adopted, and those were to define the **procedural rules** in federal court. The next problem to develop was determining whether a State law was "substantive" or "procedural".

The FRCP was adopted in 1938 under the authority of the Rules Enabling Act of 1934, and that said the FRCP could not "abridge, enlarge, nor modify the substantive rights of any litigant." Because of this, *Guarantee Trust* (1945) and other cases held that **State laws were substantive if they would determine the outcome** of the case. This was called the **outcome-determination rule.** So if application of a State law would determine a case it had to be followed because it was "substantive." This was a bad idea, too, because it was silly to categorize rights as "procedural" or "substantive" simply by whether they were important to case outcome.

The outcome-determination test was rejected in favor of a **balancing test** in *Byrd v. Blue Ridge Rural Electric Coop* (1958) where the Supreme Court held that a party in a federal court has a right to a jury, even if a State law claim was involved, and even if the State law said the party had no right to a jury trial. The court reasoned that even if the result was determinative, the 7th Amendment guarantee of the right to a jury trial in federal courts was more important, on balance, than the State interest which seemed to be to promote judicial economy. The court did not entirely reject the outcome-determination test, but held that it should not be applied in a rigid and mechanical way.

Finally, in *Hanna v. Plumer* in 1965 the court generally established the current rules listed above in the first section of this chapter.

Even though *Byrd* rejected the "outcome determination test" and *Hanna* downplayed it, the concept was never clearly overruled, and it continues to be cited in some fact-bound cases as a valid rule. Nevertheless, the **balancing test** of *Byrd* and *Hanna* cited in the first section above appears to be the current bright line rule of general application.

For some reason Profs generally like to relate the long and twisted development of the "*Erie* Doctrine" in detail, and they expect you to eat it up. So, on an exam a good strategy is to feed a little of it back to them, starting with "Under the *Erie* Doctrine…" and ending with "modernly, under the holding in *Hanna* …" If you can do that you will make the grade.

But don't obsess over this. You don't have to give more than a brief synopsis. And no Bar Readers really want to hear about it at all other than to see that you know what the current law is on this issue.

Chapter 6: Joinder of Claims and Parties

After you, as a law student in an exam situation, determine whether 1) the court has **subject matter jurisdiction**, 2) the court has **personal jurisdiction**, 3) if the court is the **proper venue** and 4) the **rules of law** that should be applied, you must next consider which **claims, additional plaintiffs, or additional defendants** can be drawn into the suit.

"Joinder" means the combination of multiple claims by or against multiple parties in one legal action or lawsuit. Fortunately the rules of joinder in federal courts (explained here) are essentially the same as for State courts.

1. Joinder of Claims

Joinder of claims means for a party to claim more than one injury or more than one legal theory for claiming damages or relief against the **opposing party** in the same litigation or lawsuit. Under FRCP 18(a) a party asserting any claim for relief as an original claim can join as many claims as they have **against the opposing party**, as long as the court has either subject matter or supplemental jurisdiction. The claims can be of any type – legal, equitable or maritime.

Under the rules of **supplemental jurisdiction** (28 USC §1367) if **original subject matter jurisdiction** exists over any one claim, the court has supplemental jurisdiction over all other claims of the same parties **that are part of the same case or controversy**.

Claims can be complaints, counterclaims, cross-claims or third-party claims. Those are forms of pleading that will be explained further in a later chapter. In State courts the "counterclaims" and "cross-claims" may be called "cross-complaints".

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A. Types of Claims Joined

Parties may join all of the related, alternative or independent claims they have against the opposing parties into the litigation, depending on circumstances.

1) Related Claims

Related claims are claims for **different injuries** that all arise out of the **same transaction, incident or occurrence**. These can always be joined, and supplemental jurisdiction will apply against original parties.

> **For Example:** Able sues Baker in federal court for negligence claiming both 1) personal injury and 2) property damage resulting from an auto accident. These are related claims because they are for different injuries arising from the same event.

2) Alternate Claims

Alternate claims are alternative claims for the **same injury** based on **alternate legal theories** (causes of action). Supplemental jurisdiction will apply against original parties.

> **For Example:** Able sues Baker in federal court claiming both 1) tortious battery because Baker deliberately hit him with his car and 2) negligence in the alternative because Baker accidentally hit him with his car. These are alternate claims (causes of action) because they are actually two alternative legal theories claiming liability for the same injury.

3) Independent Claims

Independent claims are claims of **different injuries** arising out of **completely different events** from the original claim. Federal supplemental jurisdiction will NOT apply here.

> **For Example:** Able sues Baker in federal court claiming 1) personal injury because Baker hit him with his car in June and 2) injury because Baker violated his Constitutional right to vote the next year. These are independent claims because they concern injuries arising out of completely different events.

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B. Supplemental Jurisdiction May Apply to Related and Alternate Claims

The **original claim** that other claims are joined with under Rule 18(a) must be within the **subject matter jurisdiction** of the court based on **diversity** or **federal question.** And the court must have jurisdiction over each joined claim as well.

When the joined claims concern the **same case or controversy** and are **against the same parties already in the action** they will always be within the court's **supplemental jurisdiction** under 28 USC § 1367 which gives the court jurisdiction over all other claims that are sufficiently related to the original claim that they form "part of the same case or controversy."

> **For Example:** Able sues Baker in federal court in a **diversity** action claiming personal injury of $100,000 from negligence because Baker hit him with his car. Baker counterclaims for personal injuries of $50,000 on a claim that Able caused the accident. The court has supplemental jurisdiction over Baker $50,000 claim, even though it is less than the $75,000 limit required for diversity claims, because it arises out of the same event that is the subject of Able's original claim.

But if the original claim is based on **diversity** and the joined claims are **AGAINST new parties** to be joined in the action (additional defendants to any claim, joined after original subject matter jurisdiction is established) the court will NOT have **supplemental jurisdiction** UNLESS the new parties **independently satisfy the diversity requirements.**

However, if the original claim is based on **diversity** and the joined claims are brought **BY new parties** to the action (additional plaintiffs, not the original plaintiff or original defendant) the court WILL have **supplemental jurisdiction** EVEN IF the new parties do NOT satisfy the diversity requirements. This will be explained more below.

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C. Independent Subject Matter Jurisdiction Needed for Independent Claims

When **independent claims** are joined **by any party** supplemental jurisdiction under 28 USC § 1367 does NOT apply because the claims are not arising from "the same case or controversy." Therefore, **independent subject matter jurisdiction** must be shown for each independent claim.

> **For Example:** Charley sues Delta in federal court in a **diversity** action claiming personal injury from negligence because Delta hit him with her car. Able joins a second claim that he has suffered financial losses because Delta breached a contract to buy widgets. Since this second claim does not arise out of the same events as the first, and since it does not raise a federal question, it must be supported independently by **diversity** subject matter jurisdiction. And since this is an unrelated claim, Able cannot aggregate damages from each claim to reach the $75,000 limit. Therefore, Able's negligence and contract claims against Delta must each be for more than $75,000.

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D. Compulsory Joinder of Claims

The text of FRCP 18(a) implies that joinder of claims is never compulsory, but that is not true in reality. In reality a party must usually join all **related and alternate claims** against the opposing parties in the **same litigation** or else **claim preclusion** will generally bar the party from raising those additional claims in the future. Claim and issue preclusion will be explained further in a later chapter.

Joinder of claims raises the question of "What is a related or alternate claim?" Basically a **"claim"** is 1) an allegation that a **particular transaction, occurrence or event caused injury** combined with 2) an allegation that the **opposing party is liable** for that injury.

Litigation is intended to settle all claims between the **particular parties** arising out of the **particular transaction, occurrence or event**. Thereafter the parties are barred from raising the same claim or any other **related or alternate claim against the opposing party** in new litigation that could have been raised in the original litigation.

> **For Example:** Moe hits Larry in the nose. Larry sues Moe for **battery** claiming Moe deliberately hit him. Larry loses the case because the jury rules it an accident. Larry is now barred from bringing a second suit **against Moe** over the **same injury**, in **any court**, on a negligence theory or **any other alternate theory.**

In contrast, joinder of **independent claims** in one action is **never required.**

> **For Example:** Larry sues Moe for battery claiming Moe deliberately hit him, but he does not present a claim against Moe for breach of contract on a different matter. Larry is not barred from suing Moe later for breach of contract because that is a different claim arising from a different event.

2. Joinder of Parties

Joinder of parties means for anyone besides a single plaintiff and single defendant to join in one legal action.

Two or more plaintiffs can join together in a suit against two or more defendants. In this case each plaintiff is a **co-party** of the other plaintiffs, and each defendant is a co-party of the other defendants. The plaintiffs and defendants are **opposing parties** to each other.

And, plaintiffs may amend their complaints after they are filed to name **additional defendants**.

Plaintiffs can also file **class action** suits either on behalf of a class of plaintiffs, or against a class of defendants.

Defendants can respond with counterclaims (which may be called "cross-complaints" in State law terms) against plaintiffs and join **additional plaintiffs** by naming them in the counterclaim. And, in response to counterclaims plaintiffs may file counterclaims of their own, naming yet more defendants.

Defendants can also join **third-parties** by filing complaints naming them as **third-party defendants**, and the original defendants are termed **third-party plaintiffs** in this case.

Both plaintiffs and defendants can petition the court to **compel third parties to join** an action, without filing claims against them, but on the grounds their participation in the litigation is necessary to protect the interests of the existing parties. And **outsiders** can move to **intervene** as parties to pending litigation on the same grounds.

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A. Permissive Joinder of Parties

Two or more plaintiffs may agree to join together voluntarily in an action against defendants. And plaintiffs may join two or more parties as defendants. This is called **permissive joinder** and is controlled by FRCP 20(a).

1) A Linking Occurrence and Common Issues of Law and Fact Required

Permissive joinder requires that the parties share a nexus to both a linking occurrence and common issues of law or fact.

Multiple plaintiffs are allowed to join together if they all have claims jointly, severally or in the alternative against the defendant(s), arising from 1) the **same transaction, occurrence or a series of transactions or occurrences**, and 2) there is a **substantial question of law or fact common to all the plaintiffs**.

Plaintiffs may join multiple defendants if there are claims jointly, severally or in the alternative against the defendants, arising from 1) the **same transaction, occurrence or a series of transactions or occurrences**, and 2) there is a **substantial question of law or fact common to all the defendants.**

Each of the individual plaintiffs can join other, independent claims against one or more of the defendants. If some of the plaintiffs have no claims against some of the defendants, the Court (judge) can schedule separate trials for such claims as necessary to promote judicial efficiency (FRCP 20(b).)

> **For Example:** Tom and Dick sue Harry for $100,000 in diversity for breach of contract. This is **permissive joinder of plaintiffs** under FRCP 20(a). Tom asserts a separate claim against Harry for $80,000 for personal injury from negligence. This is **joinder of claims** under FRCP 18(a). Since Dick has no negligence claim against Harry, the Court (judge) may separate the trials of the claims as necessary to prevent confusion, delay and expense according to FRCP 20(b).

2) Personal Jurisdiction Is Required Over Every Defendant

The court must be in a State where the courts have personal jurisdiction over every individual defendant joined by the plaintiffs under FRCP 20. Where this requirement is met the venue would always be proper, because that is the "escape hatch" provision when 1) all defendants do not reside in the same State and 2) no substantial portion of the events occurred in any State.

3) A Separate $75,000 Claim Is Required Against Every Separate Diversity Defendant

The court must have subject matter jurisdiction over every individual defendant joined by the plaintiff(s) **in a diversity action** under FRCP 20 because **supplemental jurisdiction does not apply** under 28 USC § 1367(b) to claims **AGAINST** additional parties. This means that a plaintiff (or plaintiffs) suing on a diversity basis **cannot aggregate claims across multiple defendants**. If the suit is based on diversity the claim of the plaintiff(s) against **each** defendant joined under FRCP 20 named must be over $75,000.

> **For Example:** Tom, from Ohio, sues Dick, form Utah, in district court for $80,000 in damage caused when Dick crashed his exotic sports car. Tom tries to join a claim of $30,000 against Harry, from Utah, claiming that he failed to repair the car properly after Dick wrecked it so he had to pay additional amounts to knowledgeable mechanics. Even though Tom's claim against Dick establishes diversity jurisdiction, Tom's claim against Harry lacks subject matter jurisdiction because he does not have a claim against Harry, a defendant, for over $75,000.

4) But Supplemental Jurisdiction Covers Claims of Additional Plaintiffs

If the court has subject matter jurisdiction over the defendant(s) for **any one plaintiff** the supplemental jurisdiction specified by 28 USC § 1367(a) extends to the related claims of **all other plaintiffs** against the defendant(s), even if they are for less than $75,000. (*Stromberg Metal Works, Inc. v. Press Mechanical, Inc.,* (7th Cir. 1996) 77 F.3d 928.) This is because 28 USC § 1367(b) applies only to **claims AGAINST new parties to be joined** by FRCP 20 (and other rules) and NOT to **claims BY new parties to be joined** by those same rules. And under *Stromberg* the additional plaintiffs apparently do not even have to be from different States than the defendants, as long as at least one plaintiff with a $75,000 claim is from a different State than all the defendants.

> **For Example:** Huey, from Ohio, sues Louie, from Utah, in district court for $80,000 in damage caused when Louie crashed into his exotic sports car. Diversity jurisdiction is established. Now Dewey, from Utah, who was injured in the **same accident** can voluntarily join the suit against Louie under FRCP 20 to claim injuries of $30,000. Under *Stromberg* supplemental jurisdiction would extend to Dewey's claim, even though it is less than $75,000 AND even though he is from Utah, the same State as Louie!

5) Understanding *Stromberg*

To conceptualize the holding in *Stromberg* consider that Congress had conflicting goals in drafting the supplemental jurisdiction rules of FRCP § 1367. First, it probably wanted supplemental jurisdiction to **promote judicial economy** by extending the jurisdiction of the federal court over all claims that arise out of the same case or controversy. But on the other hand, Congress probably did not want plaintiffs filing **inappropriate actions** in district courts by deliberately **neglecting to name important defendants** that would destroy "diversity" and then joining those same defendants later under a claim of supplemental jurisdiction.

So FRCP § 1367(b) is a compromise. It prohibits joining new **defendants** (parties against whom claims are made) in a diversity action unless they meet the diversity requirements. But new **plaintiffs** (parties with claims against existing parties) can join voluntarily (under FRCP 20 or 24) or be compelled (under FRPC 14 or 19) to join under supplemental jurisdiction, even if they did not meet the diversity requirements for **original** jurisdiction.

The 5th Circuit had a holding similar to *Stromberg* in *Free v. Abbott Laboratories* (5TH Cir. 1995) 51 F.3d 524, and that holding was affirmed by the Supreme Court in *Free v. Abbott Labs* 529 U.S. 333 (2000).

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B. Compulsory Joinder of Parties

Joinder is "compulsory" when joinder is <u>necessary</u> to afford substantial justice to the parties. Parties can be compelled to join an action as additional plaintiffs, additional defendants, or as "third-party" defendants. This process is called **compulsory joinder** and is defined at FRCP 19(a).

Further, defendants can join **third party defendants** for claims **arising from the same events** alleged by the plaintiffs, by filing complaints against them under FRCP 14.

> **For Example:** Moe negligently repairs the brakes on Larry's car. Larry cannot stop and hits Curly. Both Larry and Curly are injured. Curly sues Larry for negligence. Larry then files a **third-party claim** under FRCP 14 against Moe. In this action Curly is the plaintiff and Larry is the defendant. But Larry is also a **third-party plaintiff** against Moe, a **third-party defendant**.

1) Inadequate or Inconsistent Remedies Otherwise

Under FRCP 19 a third-party may compelled to join in existing litigation if **their participation is necessary** because without it 1) the parties already in litigation cannot obtain an **adequate remedy**, or 2) the third-party **claims an interest** in the subject matter of the action. A third-party

claiming an interest in the litigation can be compelled to join if either 1) the interest would otherwise be **impaired or impeded**, or 2) the parties already in litigation could face the risk of **multiple, double or inconsistent obligations.**

A **defendant** can **move to join** the third-party.

> **For Example:** Tom, driving a car rented from Dick, is in an auto accident with Harry. Tom sues Harry in diversity for $100,000 in personal injury claiming that Harry caused the accident through negligence. Harry counterclaims that Tom caused the accident. Dick suffered $10,000 in property damage but declines to be a plaintiff in the suit. Harry (the defendant) can move to join Dick (the third-party) in the suit under FRCP 19(a) as an involuntary plaintiff on the grounds that he cannot otherwise obtain **complete relief** because Harry could win his case against Tom yet still be sued by Dick later. And Harry faces a **risk of inconsistent obligations** because he might win in the first suit filed by Tom yet lose in a second suit by Dick.

A **plaintiff** can also **move to join** the third-party.

> **For Example:** Tom, driving a car rented from Dick, is in an auto accident with Harry and files a suit claiming Harry caused the accident and that he has $100,000 in personal injuries. Dick claims that he has suffered $10,000 in property damage. Harry's insurance is only for $100,000. Tom (the plaintiff) can move to join Dick (the third-party) as an involuntary plaintiff because Harry's insurance is not enough to cover all of the claims. If Dick is not joined he might settle his claim against Harry by stipulation, reducing the remaining insurance assets available to less than Tom's injuries, thereby impeding Tom's ability to obtain relief.

If the Court (judge) orders a party to join an action as a plaintiff, and the party refuses to join as a plaintiff, the court may order the party joined as either a defendant or as an involuntary plaintiff. (FRCP 20(a).)

2) No Compulsory Joinder if Jurisdiction Would be Destroyed

A party **cannot be joined** by compulsory joinder if joinder would **deprive the court of jurisdiction.** (FRCP 19(a), 28 USC § 1367(b).) This is a commonly tested issue. Under the supplemental jurisdiction provided by 28 USC § 1367 and as interpreted in *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.,* (7th Cir. 1996) 77 F.3d 928, this only prevents joinder of parties **AGAINST whom** claims are being made unless those claims independently meet the jurisdictional requirements. It would not prevent joining parties **BY whom** such claims could be brought. This is the same rule as if the party sought permissive joinder under FRCP 20.

> **For Example:** Huey, from Utah, is in an auto accident with Louie, from Ohio. Louie is driving a car rented from Dewey, from Utah. Louie sues Huey for $100,000 in district court. This is a **diversity** suit because no federal question is involved. Huey has **no claim against** Dewey**,** but Dewey has a potential claim against Huey. So Huey moves to join Dewey as an involuntary plaintiff so that he (Huey) will not be subject to a second, possibly inconsistent lawsuit by Dewey in the future. This motion would be **allowed** because it would NOT destroy diversity jurisdiction. The reason it would not destroy diversity (even though Huey and Dewey are opposing parties from the same State) is that

supplemental jurisdiction extends to Dewey's claim against Huey under 28 USC § 1367(a), and 28 USC § 1367(b) does not apply because Dewey is not being joined to have a claim asserted **against him**. Rather he is being joined to settle the potential claim **by him**.

3) Dismissal for Improper Venue Hardly an Issue

FRCP 19(a) provides that a party joined by compulsory joinder must be dismissed if joinder causes the venue to be improper. This is seldom going to be an issue because there must be personal jurisdiction over the defendant anyway, and the "escape hatch" provisions of 28 USC § 1391 makes venue proper anywhere there is personal jurisdiction over the defendants.

4) Dismissal for Lack of Indispensable Parties

If a **necessary party** cannot be joined because 1) the court has **no personal jurisdiction** over them or 2) it would deprive the court of **subject matter jurisdiction**, and the Court (judge) **must dismiss the ENTIRE CASE** if it determines the participation of that party is **indispensable** for just adjudication.

The Court (judge) must consider if 1) there would be **prejudice** to other parties, 2) the **prejudice cannot be avoided,** 3) judgment without their participation would be **inadequate,** and whether 4) the plaintiff would have an **adequate remedy** if the action is dismissed.

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C. Intervention

An **outsider** to a lawsuit can move the Court (judge) to be joined as a party under FRCP 24. This is called **intervention.** This is seldom tested and the only difference between intervention and compulsory joinder is that intervention is joinder **instigated by an outsider** while compulsory joinder is joinder **instigated by a party** to the action.

A party has an **automatic right** to intervene under FRCP 24(a) if a **federal statute establishes the right** or if 1) they have an **interest** in the subject of the pending litigation, 2) their **interest may be impaired** or endangered by the litigation, and 3) their interest is **not adequately protected** in the existing litigation.

Even when parties have no right to intervene, the Court (judge) has **discretion** to allow them to join in an action under FRCP 24(b) if they have a **claim or defense involving a question of law or fact in common** with the parties to the action.

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D. Class Actions

Class action lawsuits are a form of **compulsory joinder** because parties that are members of the class automatically become parties to litigation over which they have little or no control. Class actions are seldom tested in law school.

A **class action** suit is one brought by or against a class of persons that have common characteristics by or against **representative parties** of the class. The representatives are called the **named class members.** The rules regarding class actions are defined by **FRCP 23** which requires,

1) That the **representative parties (named class members) be typical** of the class members,
2) That the **representatives fairly and adequately represent** the interests of the class members,
3) That there be **questions of law or fact common** to the class members, and
4) That there be such a **large class that joinder of individual members is infeasible.**

All class action lawsuits must be **approved or certified** by the Court (judge).

1) Type 1 and 2 Class Actions: Compulsory Joinder with No Opt Out

There are three basic types of class action lawsuits. Two of them (FRCP 23(b)(1) and (2)) are of little or no interest on law school exams. Those are applicable to situations where individual lawsuits are not feasible, might result in inconsistent decisions or might impair the rights of non-parties. An example of these would be a suit seeking injunctive relief to stop industry-wide civil rights abuses.

The class members in these two situations have no right to "opt out" of the class, and any judgments that result are binding on all members of the class.

2) Type 3: Compulsory Joinder But Opt Out Allowed

The most common type of class action suit is under FRCP 23(b)(3). Typically a large class of plaintiffs brings a **mass tort** action. These are cases that are more efficiently litigated in a consolidated forum, even though it would have been possible for the individual parties to litigate their claims individually, because there are many plaintiffs, the individual claims are small and the controlling facts and injuries suffered are extremely similar.

The plaintiff class members of a Type 3 class action suit must all be given **individual notification** by the class representatives, and an **opportunity to opt out** of the class. This notice must be paid for by the named representatives.

The judgment rendered in a class action lawsuit is binding on all class members that do not "opt out" of the class.

In deciding whether to **certify** a Type 3 class action the Court (judge) will consider the **size** of the class, the **judicial efficiency** of trying the case as a class action, the **homogeneity of claims** across class members, and the **ability of the class representatives** to adequately **notify** and **represent the class** members.

> **For Example:** Paul's attorney, Larry, files a class action against Endrun Corp on behalf of all consumers that have been injured by unfair trade practices (price fixing.) Paul (or Larry as his attorney) would have to pay for all members of the class to be given individual notification of the suit. The Court (judge) will refuse to certify the action if Paul (Larry) cannot prove he has the money or experience necessary to notify and adequately represent the class.

3) Minimal Diversity Requirement

A federal court has **diversity subject matter jurisdiction** over a **class action** if the **named class members** meet the diversity requirements of 1) diverse citizenship and 2) claims over $75,000. And **venue** is proper for the suit if it is proper for the named defendants. None of the remaining class members need to meet the diversity requirements because supplemental jurisdiction extends to them under 28 USC § 1367 (*Free v. Abbott Labs* (5th Cir. 1995) 51 F.3d 524 in a holding similar to that in *Stromberg*) *Free* held that 28 USC § 1367 as currently drafted is new law that effectively overrules a contrary 1973 Supreme Court holding. The Supreme Court subsequently affirmed that decision in *Free v. Abbott Labs* 529 U.S. 333 (2000).

4) Settlement Approval by Court Required

Once a class action has been certified by the Court (judge) it cannot be settled by the parties without court approval.

5) Challenging Class Action Judgments

The judgment in a class action is binding on all members of the class, even if the named class members failed to adequately represent the interests of the class members. But the judgment might be effectively challenged on the grounds that the party in question was **not a member of the class** bound by the judgment.

> **For Example:** Able develops a real estate tract called Righteous Acres and puts a restriction in the deed for each lot that the land can never be sold to homosexuals. Baker files a class action suit on behalf of all homeowners (the class) challenging the restriction. The case is settled by a stipulation (agreement) that the restrictions will remain in effect and never be challenged again by the class members. Maybe Able and Baker were in collusion. The Court (judge) approves the settlement, so it becomes binding on all landowners. Ten years later Charlie, a recent landowner, tries to sell his home to a lesbian, and Able seeks an injunction to block him. When Charlie argues the sales restriction is an illegal restraint on alienation, Able argues that he cannot challenge it at all because the earlier class action settlement is binding on him as a class member. Rather than challenge the prior settlement directly (and thereby challenge the court that approved it) Charlie might better argue that he **did not own land** when the stipulation was reached, so **he was not in the class** represented by Baker.

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E. Interpleader

Interpleader was discussed earlier regarding subject matter jurisdiction. An interpleader action is filed by a party (the **"stakeholder"**) presented with conflicting claims from two or more claimants for possession and title to an asset. For example the stakeholder might be a life insurance company and several heirs of a deceased claim the proceeds of a life insurance policy. The stakeholder essentially asks the court to decide the matter, and the claimants are joined as parties in the litigation. This joining of the claimants is called **"interpleading"** the claimants.

Interpleader is established as a special procedure for joining parties (the various claimants) because the court often does not have personal jurisdiction over all of them for application of FRCP 20, and also, diversity jurisdiction may not exist because the amount in dispute is less than $75,000 or there is no diversity of citizenship.

1) Statutory Interpleader

Under 28 USC § 1335 a federal court 1) has **nationwide personal jurisdiction** over all parties, 2) **subject matter jurisdiction** exists based on **diversity** if **any two parties** are citizens of different States, and) **only $500** has to be at stake, and 4) **venue is proper** in any district where any single claimant resides. This is called a **statutory interpleader** action.

2) Rule Interpleader

The Federal Rules of Civil Procedure provide a second, relatively unimportant interpleader provision at FRCP 22. This is called a **rule interpleader** action. But it is inferior to 28 USC § 1335 in most ways because it does NOT relax jurisdictional or venue rules.

3. State Joinder Rules

Parties and claims can be joined in State courts in the same basic way they can be joined in federal courts but the rather complicated federal rules given above arise primarily because federal courts have limited jurisdiction. Consequently, joinder of both claims and parties is considerably less complicated in State courts because they have general jurisdiction.

Chapter 7: Claim and Issue Preclusion

When parties go to court and lose, what prevents them from getting a **second bite at the apple**?" The answer is the rules of **claim and issue preclusion**. Litigants can be barred from raising the same **claims** in subsequent litigation, and they may even be barred from arguing the same **issues** in subsequent litigation. The prohibition against re-litigating the same claim is called **claim preclusion** and the bar against arguing issues again is called **issue preclusion.**

Unlike most of the rules of civil procedure, which are statutory, the rules of claim and issue preclusion are **common law concepts** that go far back in history. Therefore, these rules apply to both federal and State courts in much the same manner, and are far less likely to be codified.

Always be prepared to discuss claim and issue preclusion whenever **previous litigation** is mentioned in an exam question.

1. Claim Preclusion

Claim preclusion was discussed briefly above with respect to joinder of claims.

> **Claim preclusion means that a party is barred from raising the 1) same claim (of injury) that was 2) previously litigated between the 3) same parties if it resulted in a 4) final judgment on the merits.**

Since the purpose of litigation is to settle all claims between the **particular parties** arising out of the **particular transaction, occurrence or event**, the parties **cannot re-litigate the same claim** a second time (other than via the appeal process, of course). If that was allowed nothing would ever be settled and anarchy would reign.

Further, the **Full Faith and Credit** clause of the U.S. Constitution requires all courts to respect the judgments of all other courts. So once a claim is decided it cannot be decided a second time.

You might hear claim preclusion referred to as **res judicata**. That term means a "thing decided" and it implies that once a court decides a claim it cannot be raised again in the same or any other court. The term "res judicata" can also refer to a court's decision of an **issue** rather than a claim, and that is an equally valid use of the term because courts can decide both issues and claims. So here we will use the term "claim preclusion" to avoid confusion.

You might also see claim preclusion referred to as **merger and bar**. That is archaic language for the idea that plaintiffs' claims for damages **"merge"** into the court judgments when they win, but are **"barred"** from being re-litigated when they lose. (How quaint. Yawn.)

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A. The Same Claim

A **"claim"** is 1) an allegation that a **particular transaction, occurrence or event caused injury** combined with 2) an allegation that the **opposing party is liable** for that injury.

> **For Example:** Burns is in an auto accident with Allen. He breaks his arm. He is in pain and can't work. He sues Allen for his medical expenses, but raises no claim for the pain and lost wages. He wins at trial. But can he file another suit against Allen to seek recovery for the pain and lost wages? NO. Since his claim resulted in a final judgment on the merits, he cannot re-litigate it.

1) General Rule Against Claim Splitting

The **broadly applied** general rule is that a plaintiff cannot "split a claim" so that if the plaintiff sues on **any part** of the claim arising from an event the **remaining parts** of the claim are forever barred. The court wants the parties to settle all claims at one time and not to engage in a series of endless sequential litigations.

> **For Example:** Lucy rents a house to Desi for $1000 a month. Desi fails to pay the rent for three months. Rather than sue Desi in superior court for $3000, Lucy decides to sue Desi three times in small claims court, once for each month's rent. After Lucy collects the first $1000 in her first suit he is barred from pursuing the other rental debts because she has "split" her claim.

And a plaintiff that litigates a claim on **any legal theory** or in **any court** barred forever from re-litigating the claim on **any other theory** or in **any other court**.

> **For Example:** Miles refuses to promote Chang because of his race, an act prohibited by both federal and State anti-discrimination laws. But the federal and State laws have different provisions and burdens of proof. Chang sues Miles in State court claiming that Miles violated State law. Chang loses. Then Chang sues Miles in federal court for violating federal law. Change's suit is barred, even though federal law is different, because he should have voiced the federal law claim in the first litigation in State court.

2) Defendant's Counterclaims Arising From the Same Event

In **federal courts and many States** this rule extends to all parties, and it is **compulsory** for defendants to raise any and all counterclaims they have **arising from the same event** that gave rise to the plaintiff's claim. Claim preclusion applies thereafter to all counterclaims that are raised or that could have been raised. And in **all jurisdictions** the defendant that raises **ANY one counterclaim must then raise ALL counterclaims** arising out of the **same event**.

> **For Example:** Ace is in an auto accident with Gomez. Both are hurt and suffer property damage. Ace sues Gomez, but Gomez does not counterclaim against Ace. Even if Ace is found at trial to have been negligent, Gomez is barred from filing a suit against him later in federal court and many States because he could have counterclaimed in the first litigation.

3) Small Minority View: Different Injuries From the Same Event

A small minority of courts will recognize **different injuries** arising from the **same event** as a **different claim,** so they are not barred from suing twice, once for each injury.

> **For Example:** Ace is in an auto accident with Gomez. He is hurt and his car suffers damage. He sues Gomez for his **property damage only** and settles out of court. Then he sues Gomez for his medical expenses. A small minority view is that this is for a **different claim** because it is a **different injury.**

4) Majority View: Claims Not Barred if Factually Impossible to Litigate Previously

Most courts will NOT bar a claim that **could not have been litigated previously** because of a **factual impossibility** even if it arises from the **same event** as a previously litigated claim.

> **For Example:** Junior and his father Senior are in an auto accident with Dan. Junior sues Dan for his injuries and settles out of court. Then Senior dies from his injuries. Most courts view that Junior can bring a **wrongful death** claim against Dan for the death of his father, Senior, because it is a **different claim** that could not have been included in the previous action (because it was not "claimable" until Senior died.)

5) Claims Are Barred if Legally Impossible to Litigate

All courts WILL BAR a claim arising from changes in law from being litigated after a final judgment is issued under the old law (unless the new law specifically provides for it), even if the claim could not be raised earlier.

> **For Example:** Paul and his "domestic partner" Vic are in an auto accident with Dan. Vic dies from his injuries. Paul sues for his personal injuries, but can not sue for the wrongful death of Vic because current law does not give such rights to a domestic partner. After final judgment new statutes establish the right of a domestic partner to sue for wrongful death. Nevertheless Paul would be barred because his claim arises from a change in law after the final judgment has been rendered.

6) Claim Preclusion May Apply to Claims in Both Law and Equity

An action at either law or equity may be bared by claim preclusion if it is based on the same event or transaction that was the subject of a previous action at law or equity, but this depends on the exact circumstances.

> **For Example:** Dan builds a dam on a creek on his property to create a duck pond. His neighbor Paul files a nuisance action against Dan seeking damages claiming the restriction of water flow in the creek prevents him from being able to use and enjoy his land. It may be that Paul wins and is awarded damages for his lost property value and inconvenience. Or it may be that Paul loses, either because he fails to prove Dan's actions were unreasonable, or because he fails to show he has suffered damages. In either event Paul is barred by claim preclusion from filing a subsequent action seeking a court order to force Dan to remove the same dam. The fact that the first action (nuisance) was at law and the new action (injunction) is at equity is irrelevant. Paul could have asked for the injunction

in the first action, and by failing to seek an injunction at that time he is barred from seeking it in a second action.

But claim preclusion does not always bar subsequent actions.

> **For Example:** Dan starts to build a dam on a creek on his property to create a duck pond, and his neighbor Paul petitions the Court (judge) in equity for an injunction to stop the dam from being built. The Court (judge) denies the petition. Perhaps the judge was unconvinced that Dan's dam would cause Paul injury. But after the dam is completed Paul files a nuisance action (at law) against Dan seeking damages claiming the restriction of water flow in the creek prevents him from being able to use and enjoy his land. Paul's second action (at law) will NOT be estopped by claim preclusion because it seeks compensation for damages incurred AFTER the first action was decided because Dan finished the dam. That is a different claim from the first action which was based on speculation damages would occur in the future if the dam was completed.

Further, claim preclusion does not prevent subsequent actions where there is an ongoing or continuing series of actions such as a continuing nuisance or continuing trespass.

> **For Example:** Dan plays loud music in his home. Neighbor Paul petitions the Court (judge) in equity for an injunction to stop Dan from creating a nuisance. The Court (judge) denies the petition. Perhaps the judge was unconvinced that Dan's music caused Paul injury. But after that Dan continues to play loud music and Paul can file either a nuisance action (at law) or again seek an injunction (at equity) because the acts Paul now complains about occurred AFTER the first action and are DIFFERENT acts from those complained about in the first action.

7) First Court Claim Preclusion Rule Applies in Second Court

The claim preclusion rules of the **first court** are the rules that bar a claim in a **second court** under the doctrine of **full faith and credit**.

> **For Example:** Paul is in an auto accident with Dan. Both are hurt and suffer property damage. Paul sues Dan in **federal court**, but Dan does not file a counterclaim. Dan cannot file any claim later against Paul **in any State court**, because he failed to raise a counterclaim concerning the same event in the federal court where it was compulsory. The law of the **second court is irrelevant** because the purpose of the rule is to pay respect to the first court.

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B. The Same Parties

Claim preclusion applies to the same parties that are in the previous litigation and **anyone in privity** with them. Parties in "privity" are generally 1) **successors in interest,** 2) **indemnitors** (insurers) and 3) **trustees vis-à-vis beneficiaries** of a trust.

Note that husbands and wife are NOT considered to be "in privity" with each other.

> **For Example:** Ace hits a car driven by Bob and insured by Oppressive Insurance. Bob sues Ace and loses. Then Oppressive is barred from suing Ace because they are an **indemnitor** in privity with Bob. They are **in privity** with a party to the prior litigation. So when Bob lost, they lost too.
>
> **For Example:** Ace sues Bob because his fence encroaches onto Ace's land. Ace loses when the court decides there is an easement by prescription. Ace is so mad he sells the land to Dan. Dan is barred from suing Bob a second time because he is **in privity** with Ace as a **successor in interest** to the land.

Claim preclusion does not stop a plaintiff from bringing the same claim raised in a first action against a **different defendant** in a subsequent action, even if the new defendant could have been sued by the plaintiff in the first action.

> **For Example:** Ace is hit by a car driven by Bob and owned by Dan. He sues Bob for negligence and wins. But Bob is broke and Ace can't collect. So Ace sues Dan in a second action for negligent entrustment (loaning his car to Bob). He is not prevented from suing Dan after suing Bob because Dan is a **different party.**

Claim preclusion does not stop a **different plaintiff** from bringing a claim over the same event against the **same defendant**, even if the new plaintiff could have joined in the first action.

> **For Example:** George and his wife, Martha, are hit by a car driven by Dan. George sues Dan for negligence and wins a claim for his personal injuries and property losses. Then Martha sues Dan for her injuries and property losses. She is not barred because she is a **different party** from the previous suit. And she is **not in privity** with George, even though they are married.

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C. Final Judgment on the Merits

Claim preclusion does NOT apply if there is no **final judgment on the merits**. There is NO final judgment if the first tribunal **dismisses** the action for 1) **lack of subject matter or personal jurisdiction**, 2) **improper venue**, or 3) **failure to join** an indispensable party (FRCP 19(b)).

And, there is NO final judgment on the merits if the Court (judge) dismisses **"without prejudice."**

But there **is a final judgment** when the Court (judge) grants 1) **summary judgment**, grants 2) a **judgment on the pleadings**, and generally when the Court (judge) 3) dismisses a claim for **failure to state a cause of action** and the plaintiff **fails to** either **amend the complaint** or **appeal the dismissal**. In other words, the plaintiff cannot just file the same suit in another court.

And there **is a final judgment** when the plaintiff dismisses the complaint **"with prejudice."**

> **For Example:** Peter sues Dick for $100,000 for negligence. Dick agrees to pay Peter $10,000, and Peter dismisses the complaint **"with prejudice."** Dick fails to pay the $10,000. But Peter is **barred from refilling** his first complaint because the dismissal was a "final judgment on the merits." So he can only sue Dick for breach of contract (of the

agreement), get a judgment for the $10,000 and try to collect on that. (Good luck, Peter. Next time get the $10,000 before you dismiss.)

2. Issue Preclusion

Issue preclusion means that a previous court's findings of fact or law may preclude a party from disputing that factual or legal finding in subsequent litigation.

> **Issue preclusion means that a 1) party to prior litigation is barred from disputing a finding of fact or law that was 2) actually, fully and fairly litigated in the prior litigation if it was 3) essential to the prior judgment.**

Issue preclusion is also called **"collateral estoppel."** The term **"estoppel"** here means that the party trying to re-argue an issue a second time is "estopped" from doing so because the other party has brought the current action in reasonable reliance on the prior tribunal's determination of the issue. And the term **"collateral"** means that the issue is being raised in a different case from that where the issue was first decided. "Collateral estoppel" is a confusing term so here we will say "issue preclusion."

> **For Example:** Tom, Dick and Harry are in a three-vehicle auto accident. Harry sues Tom for negligence. A jury finds that Harry was the negligent driver who caused the accident. Harry then sues Bob for negligence. **Claim preclusion** does not stop Harry from suing Bob. But Bob can use **issue preclusion** to prevent Harry from denying that it was his own negligence that caused the accident because the prior trial established that factual issue.

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A. Party to Prior Litigation

A person can only be bound by issue preclusion if **they were a party** to prior litigation that determined that factual or legal issue. They have to have been a plaintiff, defendant or **in privity** with a plaintiff or defendant in the prior litigation. Privity here is the same as for claim preclusion.

A person that was not a party to a prior action (a "stranger" to it) may **claim issue preclusion applies to the other party**, but they can **never be bound themselves.**

> **For Example:** Tom, Dick and Harry are in a three-vehicle auto accident. Harry sues Tom for negligence. A jury finds that Harry and Dick were the negligent drivers, not Tom. Harry then sues Dick for negligence. Dick can stop Harry from denying his own negligence because that was proven in the prior litigation. But Harry cannot stop Dick from denying liability because Dick was NOT A PARTY to the prior action.

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B. Actually, Fully and Fairly Litigated

A finding of fact or law is actually, fully and fairly litigated if the parties appear at a tribunal and the finding is discussed, disputed, agreed, stipulated, etc.

> **For Example:** Tom and Dick are injured when Harry hits them with his car. Tom sues Harry for $1000 for negligence, and Harry pays Tom the $1000 to dismiss the suit. Dick then sues Harry for $100,000. Harry answers denying that he was negligent. Dick cannot claim that Harry has been proven "negligent" in the prior litigation because his negligence was never "litigated." Clearly Harry may have decided to pay Tom a minor amount rather than incur greater legal expenses.

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C. Essential to the Final Judgment

Issue preclusion only applies if the determination of the factual or legal issue in dispute was **essential to the prior judgment**. Conversely, it does not apply if the prior judgment was concluded based on some other legal or factual finding or if the issue in dispute was less than essential to the outcome of the prior litigation.

> **For Example:** Driver Tom and passenger Dick are injured in Caligon in an auto accident with Harry. Tom sues Harry, a resident of Arizvada, for negligence in federal district court in Arizvada based on diversity jurisdiction. Arizvada recognizes contributory negligence as a complete bar, and the Arizvada jury finds Tom was 10% at fault. Tom is completely barred from recovery. Dick then sues both Tom and Harry in the Caligon district court. Caligon recognizes pure comparative negligence but Tom and Harry both deny they were negligent at all. Can Dick use issue preclusion to prevent Tom from denying he was 10% at fault, and to prevent Harry from denying he was 90% at fault? No, because all that was essential to the Arizvada judgment was for Harry to prove that Tom was **partially responsible**. It was **not essential** to Harry in the first trial to prove the **actual degree of fault** of each party. So Tom and Harry are not barred from re-litigating the **relative negligence of each party** in the second trial.

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D. No Use in Trials With Higher Burdens of Proof

Issue preclusion does not properly apply when the second court must apply a higher burden of proof than was applied in the first trial.

> **For Example:** O.J. is sued for wrongful death in a civil trial, and the jury finds, as a matter of fact, that he killed his wife. The Los Angeles D.A. then charges O.J. with murder. The D.A. cannot use issue preclusion to prevent O.J. from denying that he killed his wife. The D.A. must still prove that O.J. killed his wife **beyond a reasonable doubt** because the civil jury only had to conclude the fact by the **preponderance of the evidence.**

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E. Defensive Use: Issue Preclusion by Defendants Generally Allowed

In almost all courts issue preclusion can be used as a **defensive** weapon **by a defendant** when a **plaintiff has already lost** the same argument over that same issue in prior litigation where the issue was essential to the prior trial outcome.

> **For Example:** Moe is hit by a car driven by Larry and owned by Shemp. Moe sues Larry for negligence. Larry counterclaims, and Moe loses on a jury finding that he was the cause of the accident.. Then Moe sues Shemp claiming negligent entrustment. Shemp can stop Moe from claiming the accident was anybody's fault but his own because 1) the prior trial **proved Moe was the cause of the accident** 2) Moe was a **party** to that trial, 3) the issue was **fully and fairly litigated** and 4) the issue was **essential** to the prior judgment. (nyuk, nyuk, nyuk!)

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F. Offensive Use: Issue Preclusion by Plaintiffs Often Disallowed

But many courts will NOT allow issue preclusion to be used as an **offensive** weapon **by a second plaintiff** against a **defendant that has already lost** the same argument over that same issue in prior litigation against other plaintiffs. The reasons are 1) the defendant may have had **little incentive** to argue this particular issue with much vigor in the prior trial, 2) the defendant might have **lacked evidence** that was discovered later, and 3) maybe the defendant was pitted against a **more powerful opponent** in the first trial that elicited more **jury trust and sympathy**. Moreover, it is inherently unfair to use prior losses as a weapon against a defendant when the same defendant is barred from claiming prior victories as a shield.

> **For Example:** Shrek is in an accident with a minivan driven by Snow White and the seven dwarfs. **Snow White** sues Shrek claiming he was negligent and loses. **Doc** sues Shrek. Shrek cannot use issue preclusion against him because **Doc was not a party to the prior suit**. But Shrek wins again anyway. Then **Grumpy** sues Shrek and loses. Then **Sleepy** sues Shrek and loses. Then **Dopey** sues Shrek and loses. Then **Sneezy** sues Shrek and Shrek LOSES (Sneezy has a good lawyer). Should the remaining dwarves (Happy, Horney, Thumper or whatever) be allowed to use Shrek' **single loss** to Sneezy against him to prove negligence when Shrek is barred from using his **multiple victories** as a shield to prove he was not negligent? No. So **many courts will bar the offensive use of issue preclusion.**

Chapter 8: Pleadings

The primary pleadings in any case in any courts consist of the following:

1. **Complaints** (including counter-claims and cross-complaints);
2. **Answers**; and
3. **Motions**.

No Verification. Generally pleadings filed in federal court do not have to be verified, sworn to be true by the party submitting them (Federal Rule of Civil Procedure 11). The main exception is that complaints requesting **temporary restraining orders** must be verified.

In State courts some petitions MUST be verified. For example, in California all petitions, responses, motions and oppositions in probate actions must be verified. This will never be tested on exams.

Sanctions for False or Frivolous Pleadings. Under FRCP 11 an **attorney** filing a pleading must **sign** the pleading and thereby **certifies the pleading is accurate and proper** based on a **reasonable inquiry** by the attorney into the alleged facts. This is a huge difference between State and federal law and may be tested on the California Bar Exam! It is NOT a reasonable inquiry when the attorney files a pleading based solely on a client's statements **without reviewing supporting evidence that is readily available**. But filing a pleading based on "information and belief" is allowable, when the allegations are clearly identified as such.

In any court, federal or State, both attorneys and clients may be sanctioned if **frivolous** or **false pleadings** are knowingly filed for purposes of **harassment or delay**, but attorneys are far more likely to be sanctioned in federal court under FRCP 11 than in State courts. The court sanctions are **discretionary** and could be a **monetary fine, censure** by the court or **striking** the pleading. A client is not liable for **monetary** sanctions because a pleading raises a frivolous legal argument, but clients are liable for making false statements that result in the filing of improper pleadings.

If a **previously filed pleading** in federal court is discovered to be false or improper, attorneys have a duty to immediately withdraw it or face Rule 11 sanctions. In State courts attorneys who realize pleadings that have been filed are false or improper are more often required to seek client permission to withdraw or amend the pleading, and if the client refuses the attorney may be required to withdraw from representation and may be barred from withdrawing the pleading.

Federal courts have the discretion to levy Rule 11 sanctions even if they **lack subject matter jurisdiction** over the suit, and even if attorneys or clients **voluntarily withdraw** pleadings because the sanctions are for filing false or improper pleadings in the first place.

Pleading in the Alternative. Pleadings may always state conflicting claims as alternative bases for damages or defenses. For example, a complaint may allege injury from the intentional tort of battery in one count yet plead the same injury was caused by unintentional negligence in another count. Another example would be that an answer can deny negligence as one defense, and also claim that if there was any negligence by the defendant it did not cause any injury to the plaintiff.

1. Complaints

The complaint is a plaintiff's claim of injury or other request for a remedy. In reality plaintiffs may also file "petitions" such as divorce petitions and petitions for injunctive relief. In those situations the "moving party" is called a "petitioner" and not a "plaintiff". But for purposes of law school and Bar exams the initial pleading that begins an action ("litigation") is considered to be a "complaint" and the party that files it is considered to be a "plaintiff". But when a defendant files a counterclaim, cross-claim or third-party claim, the defendant assumes the role of plaintiff for purposes of that claim.

Federal courts use **NOTICE PLEADING** in complaints. This means the complaint (or counterclaim, cross-claim or third-party claim) only has to be a **generalized statement** of the claim with sufficient detail to give the adverse party notice of **three things**:

1. Why the federal court has **jurisdiction**;
2. The **incident** or **action** for which the defendant is being sued; and
3. A **demand or "prayer"** stating the **relief or damages** requested by the plaintiff.

State courts often require **CODE PLEADING** for complaints. This is an area where **California and federal courts** differ and this may be tested on the California Bar Exam! Plaintiffs do not have to explain why State courts have jurisdiction because they have general jurisdiction. But plaintiffs often must give a more detailed statement of the ultimate facts alleged in ordinary and concise language that are not so general as to be mere legal conclusions but not so detailed as to be evidence.

> **For Example:** Pete is driving his car after Dan repaired the brakes. The brakes fail and Pete is injured. In his complaint Pete must say more than "my brakes failed" or "Dan was negligent". And it is too detailed for Pete to say, "Dan failed to replace the third screw on the brake pad at the back left wheel". Rather Pete has to allege a legal claim like, "The brakes failed, causing me injury, because Dan failed to repair them in a workmanlike manner."

The complaint should set forth each individual claim or **cause of action** as a **separate count,** and each count should be divided into numbered paragraphs.

Jurisdiction. A complaint filed in federal court must state WHY the federal court has jurisdiction based on either **diversity** or a **federal question**, even if the facts support a finding of jurisdiction.

Statement of Facts. The plaintiff's **"statement of the case"** in a federal court usually has to be only a short, plain statement of **basic facts**, and **no legal theory** has to be stated under "**notice pleading**". But in a State court the legal theory alleged for each cause of action must often be stated under "**form pleading**" rules. And in either court facts must be stated to show the basis for the claim. A mere statement of legal conclusion alone is not enough in any court.

> **For Example:** Al sues Bob and his complaint says, "Bob illegally discriminated against me." This would be an insufficient pleading in any court because it only states a legal conclusion and gives no facts that would put Bob on notice of the incident or acts by him for which Al is suing him.

Certain Allegations to be Pled with Particularity. However, if a plaintiff's complaint alleges certain enumerated causes of action in federal court, the supporting facts for those allegations must be **pled with particularity** under FRCP 9. Among these "special situations" are allegations:

- That a **party lacks legal capacity** to sue or be sued;
- That there was **fraud or mistake**;
- That **conditions precedent** did not occur;
- That **special damages** (lost profits) were suffered;
- That the plaintiff relies on **prior judgments** or **official documents**; or
- That the plaintiff relies on material facts regarding **times** and **places**.

Prayer. The **prayer,** or demand for relief, should specify the remedy the plaintiff seeks, and this is true in every court. This would be a request for a **money judgment**, an order of **injunctive relief** or a **declaratory judgment**. But when the court finds in favor of a party after trial, the court must grant the winning party **appropriate relief,** even if that is different from the relief that had been requested in the complaint.

Effect on Statutes of Limitations. The filing of a complaint based on State law in a federal court is sufficient to satisfy the statutes of limitation set in State laws, unless the statute requires **service** on the defendant within the statutory period. In that case the State statute of limitations continues to run until service is perfected.

Dismissal of Complaint. A defendant may move for dismissal of a complaint for "failure to state a claim on which relief may be granted." This, and a number of other motions, is specified in Federal Rule of Civil Procedure 12(b). But a complaint can ONLY be dismissed in this manner if it is **"beyond doubt that the plaintiff cannot prove any facts that would entitle him to relief."** Further, dismissal in this manner would generally be **with leave to amend,** meaning that the plaintiff would be allowed to correct the complaint by amendment and resubmit it. As stated above, a failure to amend and resubmit a complaint after dismissal for this reason (or failure to appeal the dismissal) bars the plaintiff from filing the same claim in any other court because of claim preclusion.

2. Answers

The answer is a defendant's response to a complaint. The answer is also a **short, plain statement.**

In reality "answers" to petitions are generally called "responses" or "objections", and the answering party is called a "respondent" or "objector". But for purposes of law school and Bar exams the response to the complaint or petition that begins an action ("litigation") is considered to be an "answer" and the party that files it is considered to be a "defendant". And if defendants file counterclaims, cross-claims or third-party claims, the parties that respond to those claims are considered defendants for purposes of those claims.

In federal courts any allegation in the complaint (except for the plaintiff's claim that damages were suffered) that is **not denied** in the answer is **admitted to be true**. State statutes often put forth the same principle, but State court judges are often less likely to enforce this rule as strictly as federal judges. This is an important difference between State and federal civil procedure rules that might be tested on the California Bar Exam.

Denials. Answers can deny the plaintiff's allegations three basic ways.

1. **General Denial:** A general statement that the defendant denies **each and every allegation** in the plaintiff's complaint. This includes a denial of the plaintiff's claim that the court has jurisdiction over the matter and the defendant.
2. **Specific Denial:** A statement that denies the allegations in a **specific paragraph** of the complaint.
3. **Qualified Denial:** A denial of **part of the allegations in a specific paragraph** of the complaint.

Basis for Denial. Denials can be based on three levels of assertion.

1. **Full Denial:** A statement that the plaintiff's allegation **is untrue**.
2. **Information and Belief:** A statement that the plaintiff's allegation is **believed to be untrue** based on information related by others.
3. **Lack of Knowledge:** A statement that the plaintiff's allegation is denied solely because the **defendant lacks any information** to indicate that the assertion is true.

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A. Affirmative Defenses

After denying (or admitting) the plaintiffs allegations, the defendant may raise affirmative defenses. **Affirmative defenses are those defense claims that are NOT stated or otherwise raised by the complaint**. Often they involve **facts solely within the defendant's knowledge.** Specific affirmative defenses that must be pled are listed in FRCP 8(c), and some of them are:

1. Assumption of the risk;
2. Contributory negligence;
3. Duress, Fraud, Illegality;
4. Estoppel, Laches;
5. Lack of consideration;
6. Statute of Frauds;
7. Res Judicata (claim or issue preclusion).

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B. Counterclaims

Answers may include counterclaims of the defendant against the plaintiff. Counterclaims may be **compulsory** or **permissive** as defined by FRCP 13. In State courts they may be called "cross-claims".

Counterclaims are a possible affirmative response to any claim. They may be a defendant's claim against the plaintiff or the claim of any other party joined to the action, such as third-party defendants joined by defendants, against any other "opposing party." A plaintiff can also file a counterclaim to a defendant's counterclaim.

> **For Example:** Al and Bert were business partners. Al sues Bert in district court for negligence. Bert counterclaims against Al claiming that he took partnership assets (conversion). Al counterclaims back against Bert claiming he has been libeled (defamation). Bert also files a third-party claim against Carl, an employee, accusing him of causing the injury that Al alleges. Carl counterclaims against Al claiming he is owed back wages.

Counterclaims cannot be raised if they would require joining parties that are beyond the personal jurisdiction of the court or where joinder would destroy diversity jurisdiction (FRCP 19,20.) Further, supplemental jurisdiction does not apply if joinder would destroy diversity jurisdiction. (28 USC 1367(b).)

1) Compulsory Counterclaims

Compulsory counterclaims are those against **any opposing party** that 1) arise out of the **same transaction, occurrence or incident** the opposing party's claim is based on, and 2) do not require joining **third-parties outside the court's personal jurisdiction**. (FRCP 13(a).)

But counterclaims are **NOT compulsory** if 3) the same claim is **already being litigated** in some other pending action, or 4) as a response to an action **arising from a claim of attachment** rather than a claim of personal jurisdiction over the defendant (e.g. an *in rem* or *quasi in rem* action does not compel counterclaims that would subject the claimant to the personal jurisdiction of the court.) (FRCP 13(a).)

A defendant that **fails to assert** a compulsory counterclaim **waives** the claim and is barred by principals of **claim preclusion** (res judicata) from raising the claim at a later time. This will be explained in more detail later. A defendant that fails to raise a counterclaim in the answer may petition the court, before the matter is heard, for permission to file an amended pleading.

A counterclaim is compulsory and arises from the **same transaction, occurrence or incident** if it is so **logically connected** to that event that it **would not exist but for** the event the plaintiff's complaint addresses. The Court (judge) will generally hold the counterclaim is compulsory if **much of the same evidence** (witnesses, documents, etc.) is involved in both the plaintiff's complaint and the defendant's counterclaim.

Supplemental jurisdiction extends to all compulsory counterclaims against **existing parties** because they arise from the same transaction that is already before the court under either **diversity** or **federal question** subject matter jurisdiction. But supplemental jurisdiction does NOT apply to a counterclaim that joins a new party to a **diversity action** unless the claim against the new party **satisfies diversity requirements**. (28 USC §1367(b).)

2) Permissive Counterclaims

Permissive counterclaims are those against opposing parties that **do not arise out of the same transaction, occurrence or incident** that the plaintiff's complaint is based on.

Supplemental jurisdiction never extends to permissive counterclaims, so subject matter jurisdiction must always be **independently established**.

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C. Application of Statutes of Limitation to Counterclaims

1) Time-Barred State-Law Counterclaims

If a **counterclaim based on State law** is time-barred at the time a claim is filed in federal court it still may be allowed as an affirmative defense. But usually it will not be allowed as a claim for damages beyond that.

> **For Example:** Rogers hired Hammerstein under contract as an actor in his theatrical production. Hammerstein was injured during a performance and refused to complete the contract. Rogers files suit against Hammerstein 40 months later in district court (on diversity basis) for breach of contract. Hammerstein counterclaims against Rogers for personal injury arising out of Rogers' negligence. The injury and the breach of contract all arise out of the same event. Rogers' action is not time-barred because the State's statute of limitations gives four years for contract actions. But Hammerstein's counterclaim is time-barred because the statute requires personal injury cases to be filed within two years. Since Hammerstein's counterclaim is time-barred, federal courts will not allow him to use it to seek an affirmative recovery. But most federal district courts will allow Hammerstein to assert his time-barred counterclaim as a defense to reduce Rogers' recovery.

But some federal courts hold on the basis of **due process** that a **counterclaim based on State law** is NOT time-barred in federal court if it was not time-barred at the time the claim of the opposing party (the complaint) was filed, was the same "age" and was a compulsory counterclaim arising out of the same event, even though the State statute of limitations runs before the counterclaim is raised.

> **For Example:** Al and Bob are in an auto accident. **23 months and 29 days later** Al files suit against Bob in district court (on diversity basis) alleging Bob as negligent. Bob is **served** 24 months and 5 days after the accident, 5 days after the two-year statute of limitations has run. Bob counterclaims. Although Bob's counterclaim is time-barred at the time he raises it, the federal court may hold that due process demands that both parties claiming injury from the same exact event must be given equal treatment.

2) Time-Barred Federal -Law Counterclaims

In the case of **counterclaims based on federal law** federal courts **will not allow** a time-barred counterclaim to be used to seek **affirmative recovery**. And **most will not even allow** a time-barred counterclaim to be used as a **defense**.

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D. Cross-Claims

Cross-claims are claims against a **co-party,** a claim by one plaintiff against another plaintiff or by one defendant against another defendant.

Cross-claims must 1) arise out of the **same transaction, occurrence or incident** that resulted in the original claim or counterclaim and 2) **actually demand damages** or relief.

Since cross-claims always arise out of the **same event** and involve the **same parties** as the original claim, **supplemental jurisdiction** always applies and no independent subject matter jurisdiction needs to be shown.

Cross-claims are **never compulsory** so failure to file a cross-claim in the original litigation does not bar raising the claim at a later date.

> **For Example:** Huey and Louie are in an auto accident. Louie is driving Dewey's car. Huey sues both Louie and Dewey, claiming that Louie drove negligently and Dewey was negligent when he entrusted his car to Louie. Dewey can file a **cross-claim** against Louie claiming that Louie damaged his car. But Dewey can NOT file a cross-claim against Louie claiming simply that "it was all Louie's fault" that Huey was hurt. That would just be a **denial** and would not be a claim for **actual damages**.

3. Motions

Some motions are directed against the complaint at the beginning of litigation. Others may be filed after the answer has been filed or discovery has been conducted.

When motions are filed they may be filed by "plaintiffs" or "defendants" but the filing parties are always referred to as the "**movants**" and the opposing parties will always be called the "**respondents**" or "**objectors**" as to those motions.

Motions generally involve four separate pleadings:

- The Motion, a summary statement that movant is moving the Court (judge) to do something (e.g. Motion for Summary Judgment);
- Notice of Motion, a summary statement as to when and where a hearing on the motion will be held;
- A detailed Brief in support of the motion citing the **legal authority** supporting the motion (statutes and case decisions) and how the **facts alleged** by the movant apply to that body of law to prove that the movant should be granted the relief sought, and
- Affidavits (sworn declarations) stating the facts alleged by witnesses to the events alleged.

The Motion and Notice of Motion are often combined into one brief document, and its main purpose is to give interested parties legal notice of the hearing (providing procedural due process).

In California a Brief in support of a motion is called a Memorandum of Points and Authorities.

Motions are heard by judges (not juries) and the Rules of Evidence are substantially suspended. Witnesses are seldom allowed or heard. Rather, statements by witnesses are admitted by affidavits, statements alleging personal knowledge and sworn to under penalty of perjury. But if a witnesses' claim of personal knowledge is a challenged, the witness might be allowed to testify.

It is a settled rule of law that a movant generally cannot win on the basis of pleadings alone, and motions must be supported by the accompanying affidavits. A properly filed Motion usually must be granted by the Court (judge) unless it is opposed, and an opposition or response must also be accompanied by a supporting Brief and Affidavits. Therefore, any time a party files a Motion or Objection without filing accompanying sworn affidavits the Court (judge) is required to find against that party, by law. This has been tested on Bar Exams. So if a party says anything in response to a Motion like, "We stand on the allegations put forth in our Complaint (or Answer)," that party is going to lose, by law.

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A. Motions against the Complaint

Under FRCP 12(b) a party against whom a claim is made (a complaint, counterclaim, third party complaint or cross-claim) may file the following motions as a defense **before or concurrent with filing a responsive pleading** to the claim:

1. Lack of subject matter jurisdiction;
2. Lack of personal jurisdiction;
3. Improper venue;
4. Insufficiency of process;
5. Improper service of process;
6. Failure to state a claim on which relief can be granted;
7. Failure to join an indispensable party.

The party against whom a claim is made may also file a Motion for More Definite Statement under FRCP 12(e) if the pleading presenting the claim is claimed to be vague or ambiguous.

The Rule 12(b) motions are considered solely on the pleadings.

A Motion to Dismiss for Failure to State Claim can only be granted if it would be **impossible for the plaintiff to recover under any legal theory**. In a State court this type of motion is often called a **demurrer**.

> **For Example:** Bubba gets drunk, sits in the middle of the railroad tracks, and is hit by a train. He sues Witt, a bystander, solely on the grounds that Witt breached his "Christian Duty" to pull him off the tracks. Since Witt did not cause Bubba's injury and had no legal duty to rescue him, Bubba cannot recover under any legal theory. Rather than answer the complaint, Witt can move for dismissal.

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B. Other Preliminary Motions

1) Motion for Judgment on Pleadings

After an answer has been filed either party may file a Motion for Judgment on the Pleadings. This is usually a request by the defendant that the Court (judge) dismiss the complaint for insufficiency. However, a plaintiff may also move for judgment on the pleadings on the grounds that the defendant's answer admits liability to the plaintiff's claim. But if either party presents evidence to the court that is outside or additional to the statements in the pleadings themselves (outside the complaint and answer) the Court (judge) will treat the Motion as a Motion for Summary Judgment (explained below).

2) Motions to Amend

After a complaint or answer has been filed it may be amended by the party upon motion to the Court (judge) and the granting of that motion. (FRCP 15.)

The Court (judge) has **discretion** over whether to grant a motion to amend a pleading, but permission to amend should be granted "freely" when justice requires it. In such cases the main concern of the Court (judge) is whether amending the pleading will **actually prejudice** the opposing party. The Court (judge) may also deny a motion to amend when it presents a **drastic change** in the case at a late stage in litigation.

But under FRCP 15(b) a Court (judge) must "freely" permit amendments of pleadings to conform the pleadings to the evidence at trial unless the objecting party can show prejudice. The objecting party must usually show that the party offering evidence at odds with the pleadings **intentionally omitted** the claim being proven and thereby caused the objecting party to **waste preparation** for trial.

3) The Relation-Back Rule

The Relation-Back Rule (for Civil Procedure statute of limitations purposes) means that an amended pleading in a diversity action meets the applicable State **statutes of limitation** in federal court if it relates back to an original pleading that satisfied the same State statute. This is a civil procedure issue that seems to have been frequently tested.

Under the **Relation-Back Rule** of FRCP 15(c), the claims or defenses in an amended pleading in federal court relate back to the original federal court pleading if 1) the claim is based on State law and the "relation-back" rule provided by **State law is satisfied** or 2) the claims or defenses **arise out of the same events** set forth in the original pleading which satisfied the State action.

But if the purpose of an amended pleading is to **name different or additional defendants** 1) the new claim must arise out of the **same events**, 2) the new defendant to be named has **enough notice** of the action that they will not be prejudiced**,** and 3) the new defendant **knew or should have known** they would have been a defendant but for a **mistake of identity**.

> **For Example:** Tom sues Dick in federal court in a diversity action for injury in a traffic accident. In discovery, after the statue of limitations has run, Dick reveals that his pal, Harry, was actually driving the car and not Dick. Can Tom amend the complaint to name

Harry after the statute has run? Yes, because 1) his **original complaint** against Dick was **timely**, 2) his claim against Harry **arises out of the same event** that was the subject of the original complaint and 3) Harry **knew or should have known** that Tom sued Dick instead of him because of a **mistake in identity**, as long as 4) Harry gets enough **notice to avoid prejudice**.

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C. Motions for Summary Judgment

After discovery is completed, either party may move for Summary Judgment under FRCP 56 based on a showing that 1) **no genuine issue of material fact is in dispute** and based on the facts established 2) one of the parties is **entitled to judgment as a matter of law**. These two points are important to remember because they have been the subject of Bar Exam Performance Tests. But Motions for Summary Judgment in federal and State courts are very similar and do not seem to be tested very much as to Bar Exam essay questions.

The motion may either call for a judgment of the entire claim or a judgment regarding certain issues raised by the claim.

The Motion for Summary Judgment would be based on 1) **affidavits** submitted by the parties and 2) the **evidence produced in discovery.** Discovery is explained later.

The movant has the burden of proof by production of evidence that clearly shows there is no factual dispute AND based on the undisputed or admitted evidence the movant is entitled to judgment on either the overall claim (called "summary judgment") or else as to certain issues that have been disputed in the pleadings (called "summary adjudication").

Once a proper Motion for Summary Judgment (and/or Summary Adjudication) has been filed, the opposing party has the burden of rebutting the allegations and **cannot rely on the pleadings** alone. But the trial Court (judge) must give the opposing party the benefit of the doubt and **interpret the factual evidence presented in the light most favorable to the opposing party**.

Chapter 9: Discovery

Discovery is the process by which the parties in litigation **gather evidence** and **define the disputed issues** to be resolved at trial. It begins immediately after the initial pleadings are filed and it continues until the date for trial approaches.

The subject of discovery in Civil Procedure spills over to an extent into the study of Evidence, and the portion tested on law school or on Bar Exams with regard to Civil Procedure is rather limited.

The GENERAL RULE in federal law is that **all evidence that is relevant to the subject matter of pending litigation is discoverable unless it is privileged.** (FRCP 26(b).) And that is generally the approach of State laws as well. In fact, many of the rules and means of discovery applicable to federal law apply equally to the State courts.

1. Automatic Disclosure

Since 1993 federal rules require **automatic disclosure**. (FRCP 26(a).) The parties must meet and develop a **discovery plan** soon after an action is commenced, and each party must **automatically provide** the other parties with certain information whether it is requested or not. This is substantially different from State law. This information is non-privileged evidence of 1) the names, addresses and phone numbers of witnesses; 2) copies or descriptions of all documents and other tangible evidence in possession or control; 3) damage calculations; 4) insurance agreements; 5) identity of expert witnesses who are expected to testify.

Further, in federal court attorneys have a continuing duty to reveal relevant evidence as it is discovered.

Most States do not have any automatic disclosure requirements. In **California** parties to litigation have NO DUTY to reveal evidence to other parties unless the evidence is properly and expressly **demanded in discovery** and, in fact, it is often a violation of the rules of professional responsibility for an attorney to reveal any evidence harmful to clients unless and until it is properly demanded by opposing parties.

This is a major difference between federal and State rules and should be considered carefully by plaintiff's attorneys in crafting a complaint.

> **For Example:** Al, from Alabama, and Jerry, from New Jersey, are in an accident. Al suffers $75,100 in damages. At the accident scene Jerry says it was his fault, and there don't appear to be any other witnesses. But later Al's attorney, Larry the Lawyer, is called by a witness, Georgia, who says she saw the accident and it was all Al's fault, not Jerry's. If Larry files a complaint in federal court, under diversity jurisdiction, he has an affirmative duty to reveal Georgia's statement to Jerry's attorney, Annie. But if Larry files in State court he has NO duty to reveal Georgia's statement and actually has a duty to conceal it until and unless, Annie demands all witness statements in his possession. And if Annie believes what Jerry believes, that the accident was his fault and there are no other witnesses, maybe Annie won't ask for the statement of a witness she does not even know exists. Is it wrong for Larry to file a complaint at all? No, because he does not know if

Georgia is right or not. But why not file the complaint seeking $75,000 instead of $75,100 so Annie can't remove to federal court and get the benefits of automatic discovery?

2. Relevance

Evidence at trial is admissible if it **would tend to prove any material fact.** But evidence is relevant for discovery if it **would be admissible at trial OR MIGHT LEAD to admissible evidence**. This is a much broader definition of relevance, and evidence is subject to discovery **even if it is inadmissible** evidence such as hearsay.

However evidence is not discoverable if it is **privileged** information, and sometimes parties demand evidence that seems to have no relevance at all.

Even demands for marginally relevant evidence can be disputed if the burdens of production far outweigh the possible benefits obtainable from production, and this is often disputed in Motions to Compel Production.

3. Privilege

There are NO EVIDENCE PRIVILEGES established by federal law. Rather, **federal law incorporates the evidence privileges of the States** through FRE 501.

The evidence privileges most often tested or discussed in Civil Procedure classes are the **attorney-client** and **attorney-work-product** privileges. The **client holds** these privileges, meaning that clients have the right to reveal any statements made to or by their attorney and the right to obtain their file from their attorney and reveal its contents to others if they wish.

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A. Attorney-Client Privilege

The attorney-client privilege is an **absolute privilege.** It covers all **confidential communications** between the attorney and the client related to the legal representation. A communication is confidential only if **no outsider is a party** to the communication (no one but the client, the attorney and the attorney's staff). This information is **beyond discovery.**

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B. Attorney-Work-Product Privilege

The attorney-work-product (AWP) privilege applied to documents created by or for the attorney. It is an **absolute privilege** with respect to some information and a **qualified privilege** with respect to other information.

1) Absolute Privilege

The AWP privilege is **absolute** with respect to documents showing the attorney's **thoughts, opinions, factual conclusions, legal theories** or **mental impressions.** This information is **beyond discovery.**

2) Qualified Privilege

The AWP privilege is a **qualified privilege** with respect to all other documents prepared **in anticipation of trial**. Some examples of this would be 1) photographs, 2) documents, 3) witness statements, or 4) investigative reports prepared or created for litigation purposes. These materials **are discoverable IF** the party seeking discovery can show 1) **substantial need** for the information and 2) the information is **not otherwise available.**

> **For Example:** Al and Bob are in an accident. Al's attorney, Larry the Lawyer, quickly locates the only witness, Carl, and he provides a written statement of what he saw. Carl has disappeared. Even though the witness statement is the product of the quick response by Larry, Bob may be able to acquire a copy of it because he has 1) **substantial need** and the witness' statement is 2) **not otherwise available**.

But "statements" prepared for an attorney may be absolutely privileged if they reveal the attorney's own thoughts and mental impressions.

> **For Example:** Al and Bob are in an accident. Al's attorney, Larry the Lawyer, quickly locates the only witness, Carl, and records Carl's responses to **questions Larry asks** him. Carl has disappeared. Bob may NOT be able to acquire a copy of Carl's responses because they embody Larry's thoughts, legal theories and mental impressions as **revealed by the questions he asked**.

3) In Anticipation of Trial

The attorney-work-product privilege extends to any documents or compilations of evidence made by or at the direction of an attorney in anticipation of even **possible future litigation**. But if the documents are used for other **operational uses** they are no longer **attorney-work-product** and the privilege will not apply.

> **For Example:** Larry the Railroad Lawyer advises the railroad to keep a record of accidents for his use in future litigation. But then the railroad starts sharing the same records with its insurance carrier for purposes of negotiating its liability insurance rates. Since the accident records have been **revealed to outsiders** they are **no longer confidential** and are now prepared for purposes other than **anticipated litigation.** Therefore the attorney-work-product privilege no longer clearly applies.

4) Questions about Factual Beliefs Versus Questions About Legal Theories

The attorney-work-product privilege does not prevent a party from posing questions to opposing parties in discovery (in interrogatories as explained below) asking them their **factual beliefs about their legal claim or defense**. This would be about the party's beliefs concerning the facts of the original transaction, occurrence, incident or event that resulted in the litigation. But the privilege prevents discovery questions about the party's beliefs about the **legal theories regarding their claim or defense**. These would prevent questions concerning the party's theory as to **how the law applies** to the facts. This can be a very subtle distinction.

For Example: Al sues Bob for defamation for calling him a "criminal." Al's attorney asks Bob (in interrogatories) 1) what laws did Bob believe Al had violated when he called him a "criminal", and 2) what facts show that Bob did not make the statements about Al negligently. This is tricky because the first question is actually proper (even though it says "laws") because it really asks what **facts** Bob believed **at the time of the original event** that indicated Al was a "criminal." This would go to whether Bob acted with malice, negligence or after reasonable investigation. And the second question is actually improper (even though it says "facts") because it asks Bob to reveal the **legal theories upon which he now plans to argue** that he was not "negligent."

4. Discovery Methods

In addition to automatic discovery in federal court as set forth in FRCP 26, the federal rules also provide for discovery by means of **depositions, interrogatories** and requests for **documents, admissions** and **physical and mental examination**. And these are the sole means of discovery under most State rules. These are seldom tested in Civil Procedure essay questions. But rather they have been tested on Performance Tests.

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A. Deposition

Under FRCP 27-32 a party can depose **any person** by serving a **deposition subpoena** and ask them to answer questions under oath, in writing or in person, concerning their knowledge of the events or facts that are the subject of a dispute. States follow the same approach. The same is true of a **trial subpoena** or a **hearing subpoena** but those are considered more "trial" to prove a case or position rather than "discovery" to unearth the true facts. Opposing parties may pose questions to the deponent. The deponent may be asked to produce documents, and in that case the deposition notice is called a **subpoena *duces tecum*** (sub-peena duces take-em).

This is the only discovery method to get information from non-parties (i.e. people who are not plaintiffs or defendants).

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B. Interrogatories

Under FRCP 33 parties may pose written questions (interrogatories) to any **other parties** (not witnesses that are not parties) asking them questions about the events, their claims or defenses, identity of participants, existence and names of witnesses, existence of supporting evidence, insurance coverage, etc. States follow the same approach.

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C. Requests for Documents and Things

Under FRCP 34 parties may ask any **other parties** (not non-parties) to produce documents, including witness reports, photographs, tape recordings, objects, "things", and data compilations related to the case for copying and inspection, if they have not already been produced in automatic discovery. States follow the same approach.

In many States any party may inspect the records held by a **non-party** (not a party) by serving a **records subpoena** and sending a copy service to photocopy the records.

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D. Requests for Physical and Mental Examinations

Under FRCP 35 parties may ask any **other parties** (not non-parties) to submit to a physical or mental examination **if the physical or mental condition is a material issue**. States have the same approach.

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E. Requests for Admissions

Under FRCP 36 parties may ask any **other parties** (not non-parties) to admit facts or admit to the accuracy or genuine character of documents, photographs, etc. States follow the same approach.

5. Compelling Discovery

In automatic discovery parties may reveal evidence exists but refuse to provide it to the opposing parties on a claim that it is privileged evidence. And parties may also refuse or fail to comply with discovery demands. Sometimes this is on a claim that the demands are unduly burdensome.

Under FRCP 37 parties may file a Motion to Compel other parties to respond to discovery requests and ask for an award of sanctions. State rules are substantially the same. A hearing on the motion will be held, and if the motion is granted the Court (judge) will order the respondent (the uncooperative party) to comply with the discovery request and has discretion to award the movant **sanctions**. If the motion is denied the Court (judge) has discretion to award **sanctions** against the movant. Generally sanctions are awarded to compensate the winning party for attorney fees and costs incurred. These do not constitute a finding of "contempt".

If parties violate automatic discovery rules, conceal evidence, ignore deposition subpoenas, fail to respond to interrogatories or ignore production requests the Court (judge) may award other sanctions after a hearing. These may include **issue sanctions** (e.g. a finding against them as to fault) or **dismissal** of the complaint with prejudice. Here again, this does not constitute a finding of "contempt".

If parties refuse or fail to obey a court order compelling discovery they may be found in **contempt** of court after a trial and fined or even jailed. A party charged with contempt generally has a right to demand a jury trial to determine if they actually were in contempt of court or not. This has been tested on Bar Exams.

Chapter 10: Trial, Verdict and Post-Trial Procedure

As with discovery and pleading, you need to know something about trial, verdict and post-trial procedure but little of it is ever tested on law school exams or Bar Exams.

1. Trial Procedures

A. Summary Adjudication

A matter may be summarily adjudicated without trial.

1. A matter may be **dismissed** by the Court (judge), perhaps because the plaintiff **fails to prosecute** the matter.
2. A matter may be decided under a **Motion for Summary Judgment** when the Court (judge) finds based on **affidavits** and **evidence produced in discovery** that there is **no genuine issue of material fact** and one party is **entitled to judgment as a matter of law.** The Court (judge) must evaluate the evidence in the light most favorable to the party opposing summary judgment.

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B. Jury Trial

In some cases there is **no right** to a jury trial. For example, divorces, probate actions and petitions for equity, such as petitions for injunctive relief, are not jury matters.

The 7th Amendment guarantees the right to jury trial in federal courts in "suits at common law." But even when parties have a right to a jury trial they can always **waive the right**. The right to a jury trial can be **waived** by implication if a party **does not request** a jury in their pleadings.

The size of juries varies from court to court. Federal courts can have as few as six jurors.

Juries in federal courts must be selected from a **panel** that is **representative** of the local community. Juries are selected after questioning by the attorneys for the opposing parties, a process called ***voir dire*** ("vwah deer", more or less.) Some can be removed from the jury by a "challenge for cause" and others by "peremptory challenge."

In federal courts the jury must reach a unanimous verdict, but that is not true of State courts where majority verdicts may be allowable.

A party may request that the jury deliver a **special verdict**. That is one in which the jury presents their verdict with respect to **specific issues raised** in addition to a verdict regarding the overall outcome of the case. This might be desirable when the case involves a number of technical issues that affect the rights of one or more parties.

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C. Burden of Proof at Trial

The **plaintiff has the burden of proof** in a civil case by a **preponderance of the evidence**. In other words, plaintiffs must prove their case by evidence, not literate pleadings and courtroom melodrama.

Preponderance of the evidence means that the jury must be **more convinced than not** that the plaintiff claim is correct. Mathematically this is perhaps 51 percent certainty. This is much less than the certainty required in a criminal prosecution where the prosecution must prove the defendant guilty **beyond a reasonable doubt**. That concept defies exact mathematical measurement, but is less than 100 percent certainty. Arguably "beyond a reasonable doubt" is beyond 95 percent certainty.

This means the civil plaintiff must 1) first, produce **some evidence** that at least tends to prove **each disputed element** of the plaintiff's claim and 2) second, **persuading** the finder of fact (e.g. the jury) with the use of that evidence as to each element. These two facets are sometimes referred to as the **burden of production** and the **burden of persuasion.**

This can be very confusing, but the important point is that the plaintiff has to produces at least **some evidence** to prove each disputed material element of the claim. If not, the defendant will move and get a **directed verdict** from the Court (judge) at the close of the plaintiff's case-in-chief. The judge MUST grant the motion, no matter how persuasive the plaintiff has been on all of the other elements of the case, if no evidence is presented as to a critical element because the jury (or judge in a bench trial) cannot have been persuaded on that element of the case if the plaintiff has provided **no evidence at all** to prove the element.

> **For Example:** Abbott agrees to pay Costello $3,000 to have his house painted. Costello paints part of the house and quits. Abbott sues Costello for breach. He must prove 1) **a contract existed**, 2) Costello's **contract performance was due**, 3) Costello **didn't finish**, and 4) it caused a **measurable monetary loss**. But suppose Abbott presents no **evidence** that he **paid someone else** to finish the job or **what it would have cost** to finish the job. Abbott's **claims in pleadings** that he has suffered a loss must be **proven by evidence**. Otherwise the judge must grant a Motion for a Directed Verdict against him.

Implied Proof by Circumstantial Evidence. Circumstantial evidence presented by the plaintiff is sufficient to prove a claimed element if it raises an inference that a **reasonable jury could conclude** proves the claim, even if no direct evidence regarding the element is presented.

> **For Example:** Pete requests damages for pain and suffering arising from personal injuries. He proves he suffered a broken arm but does not testify that he suffered any pain. Even so, he has met the burden of proof because a reasonable jury can conclude that a broken arm caused Pete to suffer pain.

Shifting the Burden of Production. Once the plaintiff has produced some evidence supporting each element of the claim it establishes a **prima facie case**. At that point the burden of production shifts to the defendant who then has the burden to produce evidence to disprove one or more elements of the plaintiff's causes of action and to support each required legal element of each affirmative defense the defendant has raised.

Proof by Presumption. Sometimes an element cannot be proven directly, but statute or case law will provide a **legal presumption** that the element can be proven if some associated fact is proven. This shifts the burden of production and persuasion. An irrebuttable presumption cannot be countered, but a rebuttable presumption can be countered with contrary evidence.

> **For Example:** A State probate code may say fraud is a rebuttable presumption if a witness to a Will is also a beneficiary under its terms. Witt is a witness on his father's will, and it gives him a gift. Therefore, fraud is presumed by law, and a person challenging the Will does not have to prove anything else to establish the presumption of fraud. Fraud must be presumed by the jury unless Witt can produce persuasive evidence there was no fraud.

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D. Directed Verdict and JNOV

Any party may move the Court (judge) to decide the case or any issue without letting the jury decide 1) **after all evidence** on the case or issue has been presented by the opposing party, and 2) **before the matter has been submitted** to the jury. In federal court this is called a **"judgment as a matter of law"** and is defined at FRCP 50. In State courts it is usually called a **"directed verdict."**

The granting of a **Motion for a Directed Verdict** (or judgment as a matter of law) is justified if the evidence is so clear that **no reasonable person could differ** as to the result.

After the jury has returned a verdict, a losing party **that previously requested a directed verdict** may ask the Court (judge) to overturn the jury decision and rule for them in a **JNOV** (abbreviation for the Latin phrase, ***non obstante veredicto***). The term JNOV essentially means a directed verdict **after the jury has returned an opposite verdict.** Although it is NOT what JNOV really means, you might think of it as a **"judgment notwithstanding opposite verdict."**

A JNOV might arise when the Court (judge) denies a request for a directed verdict solely because it might establish grounds for the losing party to appeal. So instead the judge may give the case to the jury, hoping it will find for the party requesting the directed verdict. But, if the jury comes back with a verdict against the party requesting the directed verdict, the judge can grant the JNOV for the party requesting directed verdict and set the jury verdict aside.

> **For Example:** Huey sues Louie who is represented by Oppressive Insurance Company. Huey presents evidence that Judge Dewey finds convincing. Huey requests a directed verdict, but Judge Dewey submits the case to the jury to avoid giving Louie (and Oppressive) grounds for an appeal. But when the jury returns a verdict for Louie and against Huey, the judge sets it aside and rules for Huey on a JNOV. Louie (and Oppressive) may still appeal, but the JNOV was forced on Judge Dewey by the jury's incorrect verdict.

In federal law a JNOV may be entered on **either a claim or a defense**.

2. Verdict Issues

A. Punitive Damages and Excessive Awards

The 8th Amendment prohibits the imposition of "excessive fines" or "cruel and unusual punishments." And the 5th and 14th Amendments prohibit the denial of "due process" by the federal and State governments, respectively. Since **punitive damages** are imposed on defendants as a punitive measure, they are limited by these Constitutional protections.

Excessive punitive damage awards are Constitutionally invalid. *State Farm Insurance v. Campbell* (2003) 538 U.S. 408 held that punitive damage awards exceeding nine times actual damages will almost always be unconstitutional. Appropriate punitive damages depend on a number of factors. On **appeal** courts consider factors such as:

1) If the punitive award is **excessive compared** to **actual damages**;
2) If the punitive award is **excessive compared** to prescribed **statutory penalties**;
3) If the defendant will otherwise **escape criminal penalties**;
4) If the defendant will be **punished in other lawsuits**;
5) If the defendant's acts were **egregious** (outstandingly bad);
6) If the defendant **deliberately** and **repeatedly** engaged in tortious acts;
7) If the defendant's acts were **arbitrary** (unnecessary and avoidable).

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B. New Trial Motions, Additur and Remittitur

A trial Court (judge) has broad **discretion** to grant a party's motion for a **new trial**. The most common reasons a judge would grant a new trial are:

1) **Prejudicial conduct** by a party, witness or counsel;
2) **Juror misconduct**;
3) An **excessive or inadequate** damage award by the jury;
4) **Newly discovered evidence**;
5) Jury **verdict is against the weight of the evidence**;
6) **Judicial error**.

In general, a Court (judge) will order a new trial if the **judge feels the outcome of the case is likely to be overturned on appeal** because defects in the proceeding negatively affected the substantive rights of one of the parties. Further, granting a new trial is less likely to be overturned as a violation of due process than a directed verdict or JNOV.

A judge may grant a new trial on a conditional basis unless the other party agrees to **remittitur** or **additur** where the jury has awarded **excessive** or **inadequate** damages that could lead to reversal on appeal.

1) Remittitur

A judge that feels a plaintiff has been awarded an **excessive damage award** may grant the defendant a new trial **unless** the plaintiff agrees to **remittitur**, a **reduction of the damage award** to an amount the Court (judge) considers the **highest amount the jury could properly award** given Constitutional limits. Remittitur is allowed in all courts.

> **For Example:** Granny sues McDonalds because it served her coffee that was too hot. The jury awards her $4 million. Judge Bean believes the award is Constitutionally invalid and will be overturned on appeal. So Bean announces he will order a new trial (granting McDonald's motion) unless Granny agrees to a reduction (remittitur) of the award to $100,000. Granny agrees, and Judge Bean in response denies McDonalds' motion for a new trial.

2) Additur

If a judge feels that a plaintiff has been awarded **insufficient damages** the judge in **many States** may conditionally grant a new trial to the plaintiff unless the defendant agrees to an **additur**, an increase in the damage award. Additur is **not allowed in federal court** because it is held to be a violation of the 7th Amendment right to jury trial. So in federal court a judge that strongly feels the jury has awarded an insufficient remedy can only grant a motion for a new trial.

3) Partial New Trial

If a Court (judge) feels the jury reached an incorrect verdict only on specific issues, the judge can award a new trial only as to those specific issues. For example, if the judge feels the jury **failed to award proper damages** the judge may accept the verdict on the issue of liability and order a **new trial on the issue of damages** only.

4) New Trial Based on New Evidence

When parties request a new trial based on **new evidence** they must demonstrate that 1) the evidence is **so material** that the prior trial arguably resulted in a **plainly unjust result**, 2) the evidence was **not actually undiscovered until after** the prior trial ended; and 3) the new was undiscovered despite **reasonably diligent discovery efforts** by the party seeking new trial.

5) Appeal of New Trial Order

In **federal court** there is **no appeal** from a court order of a **new trial** because it is not a "final judgment."

In **State courts** an order for (or denial of) a new trial may be subject to appellate review, and may be reversed where there was either an **error of law** or an **abuse of discretion** by the judge.

3. Appeal and Collateral Attack

A. Right of Appellate Review.

Due process generally demands that a party may have the **final judgment** of any tribunal **reviewed on appeal**. A "tribunal" may be a court of any type, including an administrative hearing, a review board, etc. But a party may not appeal an **interlocutory** or other tribunal decision that is **not final** to a higher authority unless immediate review is provided by statute. Some decisions that are **not final** and do not give rise to an immediate right of appeal on Constitutional due process grounds are orders for **new trial, discovery** decisions, and decisions to **admit or exclude evidence** at trial. Some statutes provide for interlocutory review.

Administrative decisions are not "final judgments", and cannot be appealed to a State or federal court until **all administrative remedies have been exhausted**. Generally administrative agencies provide an appeal or review process that must be completed before a court of law can be petitioned to review the adverse findings or orders of the agency.

Appeal from an administrative decision would be to either a State or federal trial court where subject matter jurisdiction exists. There a **trial de novo** usually is provided with respect to both matters of law and fact.

A trial court decision is reviewed by the appeals court of the same court system. In the federal court system the decisions of district courts are reviewed by the circuit court. In State court systems the State appeals court will generally review the judgments of the State superior courts. The appeals court standard of review is explained below.

The **right to appellate review** means that a party not only has a **right to file an appeal**, but that they have a right to have that appeal **actually reviewed and considered** by the appellate court.

But parties only have the **right to petition supreme courts** to ask for review, and generally do NOT have any absolute right to demand supreme court review because supreme court review is usually discretionary. These petitions for review are called **certiorari petitions**.

But an individual may appeal the **final judgment** of a State court, after all appeals have been exhausted, to a federal court on Constitutional grounds (habeas review) and thereby obtain review. And the final judgment of a State supreme court may be petitioned to the U.S. Supreme Court for discretionary (certiorari) review.

> **For Example:** Dr. Welby has his medical license revoked by the State Health Department on a finding he is incompetent. He must generally appeal to the Administrative Appeals Board to exhaust his administrative remedies. If it upholds the department he can petition the State superior court or federal district court for trial de novo. If that court holds against him, he has a right to appellate review by the appropriate (State or federal) appeals court. If the State appeals court holds against him he can petition the State supreme court for discretionary review. After he has exhausted his appellate remedies in the State courts, he can petition the federal courts for habeas review (claiming denial of due process). And he can petition an adverse State supreme court decision to the U.S. Supreme Court. But the right to petition any supreme court is generally only a right to ask for review, not a right to

demand review. The review of a case by any supreme court is generally at that court's discretion.

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B. Standard of Appellate Review

The appeals court will review the **trial record** to determine 1) whether the lower **court erred** and 2) whether the error was **harmless error**. Harmless error is an error that is deemed to have had negligible effect on the outcome. Review is strictly based on the trial record, so it is important that the trial record reflect the issue raised on appeal. If the appeals court finds that the lower court erred, and the error is not a harmless error, it will either order a new trial or order that the lower court reconsider the case.

1) Questions of Law – De Novo Standard of Review

On appeal, claims that a lower **judge** interpreted or applied the law incorrectly, excluded or admitted improper evidence or gave the jury incorrect instructions are subject to **de novo review.** That means that the appeals court will apply the correct law to the facts (evidence) without regard to the manner in which the lower court interpreted the law.

2) Questions of Fact – Abuse of Discretion Standard of Review

On appeal, the factual findings of the lower court finder of fact (**jury** or **judge** in a bench trial) will be given great deference and will only be rejected if a **clear abuse of discretion** is found. The appeals court must find that **no reasonable person or jury** could have reached the same finding.

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C. Comity, Full Faith and Credit and Collateral Attack

The concept that the State and federal courts must cooperate with and give effect to the respective holdings of each other is called **comity.** The doctrine of comity is embodied in two Constitutional provisions. Section 1 of Article IV of the Constitution provides that each State give full faith and credit to the judicial proceedings of every other State. This is called the **full faith and credit clause.** And Section 2 of Article VI provides that the judges of every State shall be bound by the federal laws. This is called the **supremacy clause.**

While considerations of **due process** embodied in the 5th and 14th Amendments dictate that each individual should have the right to appeal the final judgments of any court, considerations of **comity** generally prohibit a **collateral attack** on any court holding. A collateral attack is a challenge of one court's decision in a different court, other than a **direct attack** through the appropriate appeal process.

Generally a collateral attack is only allowable in the case of a **default judgment** and it can be based on a challenge of either **personal or subject matter jurisdiction**.

Generally collateral attacks are not allowed except for default judgments. The only exceptions are peculiar to clear denials of due process, bad faith attempts to deny fundamental rights or judgments otherwise wholly without merit.

Chapter 11: Conclusion

This outline provides a summarized explanation of the black letter law and bright line rules of **CIVIL PROCEDURE**.

Black letter law means statutes and basic rules of broad theoretical application. And **bright line rules** are those decisional rules or logical guidelines created by the courts for the determination of close cases.

To make the explanation here simple and avoid unnecessary confusion some of the details and minor splits of authority have been ignored or avoided in this outline. But the foregoing reflects about ninety percent of everything you should know to succeed in law school, and more than enough explanation of the rules of law for you to pass any bar examination.

Among the materials that have been excluded from this outline are legal theories that have been widely abandoned, extreme minority views, rare exceptions, fact-bound cases, history of the law's development, most cases, highly unusual situations and dwelling on subtle distinctions. These issues and concepts are either unnecessary for your legal education, OR your professor will direct them to your attention.

Each professor of law, in every subject, holds a keen interest in narrow areas of the law of personal interest. Frequently this interest is based on their own legal education or their experiences in the courts. When your professor expounds on an area of law given summary treatment in this outline it will be necessary for you to consult authoritative reference materials such as hornbooks to gain a greater understanding.

If your professor is adamant about some theoretical concept note that proclivity and modify your explanation of the law as necessary to humor those proclivities. But, you will find the bar examiners far less interested in such marginal issues and much more concerned with the breadth of your knowledge of the rules of law set forth herein.

Other than those cases where a professor demands further knowledge in a narrow area, the foregoing should be entirely sufficient to impart an adequate **understanding** of the **law of civil procedure**. However, mere **understanding is NOT ENOUGH** for you to succeed. Law school and the bar examinations require **both understanding** and ability to **explain the application** of the **law to the facts and facts to the law**.

This outline is NOT written for the purpose of explaining to you how you should explain the law on your examinations. You are urged to consult Nailing the Bar's **"How to Write Essays for Civil Procedure Law School and Bar Exams"**. Information about that publication is available <u>at the back</u> of this outline.

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