**CIVIL PROCEDURE OUTLINE – Updated December 3, 2008 at 10 AM**

**CAN THE COURT HEAR THE CASE?**

* **JURISDICTION**
  + **SUBJECT-MATTER JURISDICTION**
    - **Subject matter jurisdiction is the court’s power to hear a case because of the nature of the dispute.**
    - **State Subject-Matter Jurisdiction**
      * **State Courts, in general, are clourts of general jurisdiction.**
      * **Unless Congress allocates jurisdic6tion to hear a claim exclusively to the federal courts, a state court is presumed to have concurrent jurisdiction and may entertain the action even though it is based entirely on federal law.**
      * There is distinction between subject matter jurisdiction and a court’s power to render a judgment on the merits. **A court may have subject matter jurisdiction, but due to statutory residency requirements of plaintiffs and dependants, may not have the power to render a judgment on the merits.** Substantive requirements for a cause for relief are different than subject-matter jurisdiction issues. (Lacks v. Lacks)
      * **A lack of subject-matter jurisdiction may permit vacatur9o of a final judgment, but an error in substantive issues of a cause for relief does not.** (Lacks v. Lacks)
    - **Federal Subject-Matter Jurisdiction - To have subject-matter jurisdiction, the court must be authorized to do so from ARTICLE 3, SECTION 2 OF THE CONSTITUTION and A STATUTE.**
      * Article 3, Section 2 is the outer limit of jurisdiction, 28 USC §1332 is how much power Congress has given the courts.
      * **Article 3, Section 2 US Constitution**
        + **“The judicial Power shall extend…**

**To all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;**

**To all Cases of admiralty and maritime Jurisdiction;**

**To Controversies to which the United States shall be a Party;**

**To Controversies between two or more States;**

**Between a State and Citizens of another State;**

**Between Citizens of different states;**

**Between Citizens of the same State claiming lands under grants of different States,**

**And between a State, or the Citizens thereof, and foreign states, Citizens or Subjects.”**

* + - * + Constitution requires minimal diversity of citizenship.
      * **Statutorily Granted Subject-Matter Jurisdiction**
        + **“A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.”** (28 USC §1359)
        + **DIVERSITY JURISDICTION:**

**Diversity Jurisdiction (28 USC §1332) - General**

1332 requires COMPLETE DIVERSITY of citizenship – there is no diversity if ANY plaintiff is a citizen of the same state as ANY defendant. (Strawbridge v. Curtiss, US Supreme Court)

The person asserting diversity of citizenship has the burden of proving its existence.

**“(a) 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;**

Note: Citizens of Overseas Territories of the United Kingdom, such as the British Virgin Islands, are “citizens or subjects of a foreign state” for purposes of Section 1332(a)(2).

**(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 the 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.**

Note: 1332 doesn’t cover a state and citizens of another state… does not create diversity of citizenship to give court diversity jurisdiction

**(c) For the purposes of this section and section 1441 of this title –**

**(1) A corporation shall be deemed to be a citizen of any State by which it has been incorporated AND of the State where it has principal place of business…**

Note: to sue a corporation under diversity jurisdiction, the Plaintiff must be diverse from both the place where the corporation is incorporated AND where the corporation has its principal place of business

Note: 1332 is not clear on where a foreign corporation is a citizen of – modern view is that the foreign corporation is a citizen of where it is incorporated and where it’s principal place of business is (like a domestic corporation)

**(2) The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same state as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.**

**(d)**

**(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of 5 million dollars… and is a class action in which [there is minimal diversity of citizenship]…**

(3) A district court may, in the interest of justice and looking at the totality of the circumstances, decline to exercise jurisdiction… over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on [list of circumstances]…

(4) A district court shall decline to exercise jurisdiction…

(A)(i)(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

[over class actions involving federal securities claims or claims related to corporate governance]

**(e) [Washington D.C. is considered a state for purposes of diversity jurisdiction.]**

Most cited reason for allowing diversity jurisdiction is to avoid discrimination against out-of-state residents in state courts.

**Civil Action >=75 people - Diversity Jurisdiction (28 USC §1369)**

**(a) IN GENERAL.- The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if –**

**(1) a defendant resides in a State and a substantial part of the accident took place in another state or other location…**

**(2) any two defendants reside in different states…**

**(3) substantial parts of the accident took place in different states.**

(b) LIMITATION OF JURISDICTION OF DISTRICT COURTS – The district court shall abstain from hearing any civil action described in subsection (a) in which

(1) the substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens; and

(2) the claims asserted will be governed primarily by the laws of that State.

(c) SPECIAL RULES AND DEFINITIONS. – For the purposes of this section-

**(1) Minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of this title;**

(d) INTERVENING PARTIES. – In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.”

**Determining Citizenship**

**“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”** (14th Amendment, US Constitution)

**Citizenship is determined at the time the complaint is filed, and does not change.** A post-filing change of citizenship cannot cure a lack of subject-matter jurisdiction that existed at the time of filing. (Grupo Dataflux v. Atlast Global Group, LP)

**Citizenship is determined by domicile, not residence.** (Mas v. Perry)

**Domicile has two parts – residence and intent to stay**

**Intent to stay = no present intention to leave**

**Residence = not necessarily a place to live, is broader**

A person’s domicile is set when they are born and is/can be changed when:

They take up residence in a different domicile; and

Have intent to remain there.

If an American citizen changes his domicile to a foreign country but does not gain citizenship there, he does not have citizenship in either country for purposes of §1332, so there is not diversity of citizenship and the case would have to be tried in a state court.

3 ways to determine a corporation’s principle place of business:

“Nerve Center” test – based on locus of corporate decision-making authority and overall control

“Corporate Activities” or “Operating Assets” test – greater weight is attached to the location of a corporation’s production or service activities

“Total Activity” test – hybrid of other two, considers all circumstances

**Limited partnerships and unincorporated associations are not treated as a citizen for purposes of federal diversity jurisdiction, but instead courts consider citizenship of each of its members.**

**Amount in Controversy**

**>$75,000 in controversy, excluding interest and costs**

**Measurement of damages**

3 Different Approaches for Determining Amount in Controversy –

Only the value to the plaintiff may be used to determine jurisdictional amount; or

View the amount in controversy from the point of view of the party seeking to invoke federal jurisdiction; or

Look at the objective sought to be accomplished by the plaintiffs’ complaint and the test is the result to either party that the judgment would directly produce.

**One plaintiff can aggregate all claims against one defendant to meet the amount-in-controversy requirement. Multiple plaintiffs cannot aggregate claims unless they seek to enforce the same title or right, in which they have a common and undivided interest.** (Troy Bank v. G.A. Whitehead & Co.)

**Court can dismiss a case for lack of diversity jurisdiction if it appears to a legal certainty that the claim is really for less than the jurisdictional amount.** (AFA Tours, Inc. v. Whitchurch)

Even if requirements of diversity jurisdiction are met, federal courts will usually decline to hear probate and domestic relations (divorce, alimony, child custody) cases and instead dismiss them.

* + - * + **FEDERAL QUESTION JURISDICTION**

**Title 28, US Code §1331: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.”**

Specific/original jurisdiction for federal courts:

Bankruptcy Cases/Proceedings (28 USC §1334)

Commerce/Anti-trust (28 USC §1337)

Patents, Copyrights, Trademarks, etc. (28 USC §1338)

Note: this is for infringement/other such violation… not for quiet title actions, etc.

Civil Rights (28 USC §1343)

US as Plaintiff (28 USC §1345)

US as Defendant (28 USC §1346)

**“A suit arises under the law that creates the cause of action” - If the federal law in question was created by a branch of the federal government, then it gives rise to a claim “arising under the laws… of the United States” for purposes of establishing §1331 federal question jurisdiction.** (HOLMES TEST, p. 282 text)

**Federal question jurisdiction must come from the plaintiff’s original statement of the cause of action.** It is not enough for it to come from the defense, either from the defendant or in anticipation by the plaintiff, or from a cross-claim or defense to a cross-claim. (Louisville & Nashville R.Co. v. Motley)

**Evolution of Federal Question Jurisdiction**

**Art. 3 Sect. 2 gives jurisdiction “whenever there exists a federal question that might be challenged”- federal ingredient test** (Osborn v. Bank of the United States)

**An action “arises” under federal law if the cause of action is dependent upon federal law – it is not enough for it to just involve a federal question.** (T.B. Harms v. Eliscu; Smith v. Kansas City Title & Trust Co.)

**Resolution of federal issue must be necessary for the resolution of the cause of action and federal element must be important for the court to have jurisdiction.** (Merrell Dow v. Thompson)

**Federal courts have jurisdiction to hear claims that:**

**Have federal claims important and necessary to resolve AND**

**Not disrupt state/federal division of labor.** (Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing)

Impact of a lack of federal private right of action:

Private right of action = suit brought by a private litigant against private persons allegedly violating a statute.

Supreme Court uses 4-part test to determine whether a private right of action should be implied from a federal statute:

Is the plaintiff “one of the class for whose special benefit the statute was enacted?

Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?

Is it consistent with the underlying purposes of the legislative scheme to imply a remedy for the plaintiff?

Is the cause of action one traditionally relegated to state law?

**The absence of a federal private right of action is evidence relevant to, but not dispositive of, congressional intent.** (Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing)

Note: *Merrell Dow* has also been said to hold that there must be a private cause of action for the violation of a federal statute to give federal jurisdiction. If this is true, *Grable* would have overturned *Merrell Dow.*

* + - * + **SUPPLEMENTAL JURISDICTION**

**Given by 28 USC §1367**

“(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, **in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.** Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

**(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction** under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20 or 24 of the FRCP, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, **when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.**

Note: this leaves out plaintiffs that are permissively joined – plaintiff’s can piggyback under supplemental jurisdiction even if the supplemental claim destroys diversity

**(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –**

**(1) the claim raises a novel or complex issue of state law,**

**(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, or**

**(3) the district court has dismissed all claims over which it has original jurisdiction, or**

Note: whether this will be proper or not is dependent upon when the other claims are dismissed… if at the beginning, the state claims can be properly remanded

**(4) in exceptional circumstances** there are other compelling reasons for declining jurisdiction.

Note: exceptional circumstance/compelling reason must really be significant (Executive Software North America, Inc. v. US District Court… of California)

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.”

**The “substantially predominate” standard for determining whether a federal court has jurisdiction is not satisfied by a numerical count of the claims the plaintiff has asserted – the weight, character and interdependence of state and federal claims must be considered.** (Borough of West Mifflin v. Lancaster)

**If the Plaintiff’s claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.** (COMMON NUCLEUS OF OPERATIVE FACT/1 TRANSACTION = 1 SUIT; United Mine Workers of America v. Gibbs)

**Before jurisdiction is given over supplemental claims, the Court also looks at the procedural posture of claims – a supplemental claim will not be added if it destroys complete diversity of citizenship** (w/ exceptions of plaintiffs permissively joined)**.** (Owen Equipment & Erection Co. v. Kroger)

The amount-in-controversy requirement of §1367(a) is satisfied in cases where some, but not all, of the plaintiffs in a diversity action allege a sufficient amount in controversy. **Supplemental claims don’t have to meet the $75K requirement individually.** (Exxon Mobil Corp. v. Allapattah Services, Inc.; Maria del Rosario Ortega v. Star-Kist Foods, Inc.)

**Unless the federal question claims removed by the defendant were “separate and independent” from the state law claims, the district court must retain the federal claim – they must hear the entire case or none of the case.** (Borough of West Mifflin v. Lancaster)

* + - **Impact of the Court Getting Subject-Matter Jurisdiction Wrong (Federal Court):**
      * **Old v. New Views:**
        + **OLD - can void a judgment for lack of subject-matter jurisdiction** (Capron v. VanNoorden)
        + **NEW – usually can’t challenge subject-matter jurisdiction in second case – the judgment of the first case is valid and cannot be re-opened (res judicata), but you can challenge subject matter jurisdiction before case is sealed** (Des Moines Navigation & R.R. Co. v. Iowa Homestead Co.)
      * **Attacks on Court’s Lack of Subject-Matter Jurisdiction (pre-Judgment)**
        + **Lack of subject-matter jurisdiction may be asserted at any time by any party, either in the answer or separate motion, or on appeal, or be raised by the court sua sponte.**
        + Parties may not create jurisdiction by agreement or consent.
        + Court order must be followed unless the Court is so obviously outside of its jurisdiction and there is no opportunity for effective appellate review of the order. (United States v. United Mine Workers)
        + FRCP Rule 8(a)(1)

“(a) A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;”

* + - * + **FRCP 12(b)(1)**

“(b) Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

* + - * + **FRCP 12(h)(3)**

(h) Waiving and Preserving Certain Defenses

(3) **If the Court determines at any time that it lacks subject-matter jurisdiction, the Court must dismiss the action.”** (note: this means subject-matter defense is never waived while the judgment is not final)

* + - * + **FRCP 60(b)(4)**

**“(b) On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons:**

**(4) the judgment is void;”**

* + - * + Title 28 USC §1653 - “Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.”

Note: this allows bases of jurisdiction to be corrected, not changed, after the original filing

* + - * **Collateral Attack on a Judgment for Lack of Subject-Matter Jurisdiction** (Restatement (Second) Judgments §§12, 69)
        + **Takes the approach that the judgment in a contested action, whether or not the question of subject-matter jurisdiction actually was litigated, is beyond collateral attack unless there are no justifiable interests of reliance that must be protected and:**

**(1) The subject matter of the action was so plainly beyond the court’s jurisdiction that its entertaining the action was a manifest abuse of authority; or**

**(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency or government; or**

**(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court’s subject-matter jurisdiction.**

* + - **Removal jurisdiction** – allows a defendant a limited right to transfer a case from state to federal court.
      * Removal is automatic – no action is needed by the judge to allow the case to be removed… they can just remand it to state court if removal was not proper
      * Purpose of removal doctrine is to ensure that plaintiffs alone do not decide which cases federal courts hear.
      * **General Removal - Given by 28 USC §1441**
        + “(a) Except as otherwise expressly provided… **any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant**… to the district court of the United States for the district and division embracing the place where such action is pending…
        + **(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.**
        + **(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates…**
        + (e)(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1470(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.”
      * Removal of Specific Types of Cases to Federal Court
        + Federal Officers Sued or Prosecuted (28 USC §1442)
        + Civil Rights Cases (28 USC §1443)
        + Non-Removable Actions (action against railroad, under workman’s compensation laws, action under Violence Against Women Act) (28 USC §1445)
        + Class Actions (28 USC §1453)
      * **Removal Procedure**
        + **General Procedure for Removal (28 USC §1446)**

“(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to FRCP 11 and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.”

**(b) [notice of removal must be filed within 30 days of summons/service of original pleading]**

Note: removal based upon subject-matter jurisdiction claim must be initiated within 30 days – after that defective subject-matter jurisdiction can only be addressed by dismissal

**(d) [once filing of notice for removal has occurred, state court shall proceed no further unless and until case is remanded]”**

* + - * + Procedure After Removal (28 USC §1447)

“(a) [District Court may issue all necessary orders to bring before it all proper parties]

(b) [District Court may require copies of all records and proceedings in state court to be brought before it]

**(c) “A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal… If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded…**

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 (civil rights cases) of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.”

* + - * **A plaintiff never remove a state court action to federal court, in general or in response to a defendant interposing a counterclaim – this is because of “defendant” language of 28 USC §1441.** (Shamrock Oil & Gas Corp. v. Sheets)
  + **PERSONAL JURISDICTION**
    - **Personal jurisdiction is the power of the court to enter a judgment against a specific defendant. If the Court has no personal jurisdiction over a party, a judgment rendered is not binding (judgment not binding on non-parties).** (Pennoyer v. Neff)
    - **Personal jurisdiction either exists at the beginning of the case or never exists – “jurisdiction never goes away”.** (Pennoyer v. Neff)
    - **A court can assert personal jurisdiction only if its power is AUTHORIZED BY STATUTE and does not exceed the limitations of the DUE PROCESS clause of the Constitution.**
      * Note: the Due Process clause gives the outer limit of personal jurisdiction – courts can use less than the power given
      * For a state court, they must consider their STATE LONG-ARM STATUTE and the DUE PROCESS CLAUSE.
      * A federal court will consider whether first the DUE PROCESS CLAUSE and then the applicable federal statute (or otherwise under FRCP(k)(1).
    - **DUE PROCESS CLAUSE, 14th Amendment, Section 1, Constitution**
      * **“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”**
    - Traditional Personal Jurisdiction (Pennoyer v. Neff)
      * 4 types of jurisdiction:
        + True In-Rem – (“I want you to say that I have the absolute best title for this piece of land”)
        + Quasi In-Rem I – (“As between me and this other person, I have the best title”)
        + Quasi In-Rem II – (“I want to bring In-Personam Jurisdiction, but can’t bring the Defendant into jurisdiction, so I will proceed with a property action in this jurisdiction”)
        + In Personam – jurisdiction over the physical person
      * **“Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state’s jurisdiction for purposes of a personal judgment by means of appropriate substituted service.** The authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state.**” (Milikin v. Meyer)**
    - 2 Types of Personal Jurisdiction over a Non-Resident
      * General – the defendant must have sufficient contacts with the state to warrant asserting jurisdiction over it for all matters.
      * Specific – the defendant has contact with the forum to warrant asserting jurisdiction over it for matters related to its activity with the forum.
      * **First question when looking at personal jurisdiction is whether the actions subject of the suit “arise out of” contacts within the forum.**
        + **If yes, then use specific personal jurisdiction.**
        + **If no, general jurisdiction would have to be used.**
    - **General Personal Jurisdiction (Over a Non-Resident)**
      * **If the plaintiff’s claim against the defendant does not “arise out of” and are not “related to” the defendant’s actions within the state, the test for general personal jurisdiction is whether the defendant carries on continuous and systematic contacts with the forum.** (Helicopteros Nacionales de Colombia, S.A. v. Hall)
      * **Idea is that the contacts with the forum are so important that they should be able to be sued for anything they did in the world.**
    - **Specific Personal Jurisdiction (Over a Non-Resident)**
      * **Jurisdiction must be proper over the STATE LONG-ARM STATUTE and under the DUE PROCESS CLAUSE.**
      * **1st question is whether it is acceptable under the state’s long-arm statute**
        + If the state long-arm goes as far as the Due Process Clause, this question becomes irrelevant.
        + If the State Supreme Court judge has decided that it is okay under the state long-arm statute, the US Supreme Court will not re-address the issue – they will take it as a matter of law.
      * **Due Process Clause Test:**
        + Due process requires that the defendant (not present in the forum) have MINIMUM CONTACTS with the state such that jurisdiction over him does not offend traditional notions of fair play and justice. (International Shoe Co. v. Washington)
        + Gray v. American Radiator & Standard Sanitary Corp. – 2 different views

Any state with a substantial tie to the injury that is the basis for the cause of action can hear the case. OR

A defendant company can be sued in any forum in which they are earning revenue.

* + - * + Factors considered to establish minimum contacts (World-Wide Volkswagen Corp. v. Woodson):

Does the defendant carry on activities in the state-court jurisdiction?

Does the defendant close sales and perform services?

Does the defendant avail themselves to any of the privileges or benefits of state law?

Do they solicit business in the state?

Do they regularly sell to or seek to serve the state’s market?

NOTE: Depending on which holding you take of *Gray (see above)*, then WW Volkswagen may overrule gray – WW Volkswagen gives consideration to more factors than just whether your product causes injury within the state.

* + - * + A single and unilateral act, unintended by the non-resident defendant, does not satisfy the requirement of contact with the forum state. (World-Wide Volkswagen Corp. v. Woodson)
        + **There is a 2-prong test for whether the forum can exercise personal jurisdiction over the defendant** (Burger King Corp. v. Rudzewicz)**:**

**Sovereignty Branch – did the defendant purposefully avail themselves to the forum?**

**Fairness Branch**

**Would exercising jurisdiction offend traditional notions of fair play & substantial justice?**

**This considers interests of defendant and plaintiff, the interests of the forum, and the balance within the entire judicial system.**

* + - * + **Sovereignty Branch may be satisfied in two ways – there are two different ideas of what “purposeful availment” means (Asahi Metal Industry Co. v. Superior Court):**

**O’Conner’s View: purposeful availment = intentional direction**

**Brennan’s View: purposeful availment = knowledge of activities (i.e. good in stream of commerce)**

* + - * + **For purposeful availment to be proved based upon “purposeful direction”, the defendant must have** (Calder Test/ Pebble Beach Co. v. Caddy):

**Committed an intentional act,**

**Which was expressly aimed at the forum state, and**

**Caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state.**

* + - * + Technology issues

Telephone calls, faxes and emails sent and directed at a recipient in a forum state count as intentional contacts for personal jurisdiction purposes.

Whether or not widely available internet sites count as contacts are questionable since US Supreme Court hasn’t considered the issue. A sliding scale is usually used (Zippo Manufacturing Co. v. Zippo Dot Com, Inc.):

A purely passive website is not sufficient contacts.

An active website will almost always be sufficient contacts (i.e. customers can make purchases through the website)

* + - **Jurisdiction Based Upon Power Over Property**
      * Old view: The only essentials to the exercise of the state’s power are presence of the property within the forum, its seizure at the commencement of the proceedings, and the opportunity of the owner to be heard. (Pennington v. Fourth National Bank)
      * New view: **In order to justify an exercise of jurisdiction in rem, the defendant must still have “minimum contacts” with the state – there is no distinction of “types” of jurisdiction if the defendant is not in the state. The “Burger King” 2-prong test must be used. (Shaffer v. Heitner)**
    - **Jurisdiction Based Upon Physical Presence**
      * **Jurisdiction based upon physical presence alone constitutes due process.** (Burnham v. Superior Court) **Because…** (note: court splits 4-4, so either interpretation of “why” may be used)
        + Scalia’s view: This is one of the “continuing traditions of the legal system that define the due process standard of “traditional notions of fair play and substantial justice”. OR
        + Brennan’s view: If physical presence meets both the sovereignty branch (purposeful availment) and fairness branch of the Burger King Test, then it alone meets the due process test necessary for personal jurisdiction. In most cases, the pure physical presence of the defendant in the state will meet both these tests and jurisdiction will be proper.
    - **Jurisdiction by Consent:**
      * **A defendant may consent to personal jurisdiction either by expressly agreeing to submit to the courts or by performing certain acts that constitute a waiver of objection to personal jurisdiction or by failing to assert a defense of lack of jurisdiction.**
        + **FRCP 12(h)(1) – a defendant that fails to raise an objection to personal jurisdiction in the answer or in an initial motion under Rule 12 is precluded from raising the issue.**
      * In most states, a foreign corporation that registers to do business in a state is regarded as having consented to suit in the courts of that state even as to actions unconnected with their activities in the forum.
      * In forming a contract, parties may expressly agree to submit to personal jurisdiction in a given forum.
        + In most jurisdictions, forum clauses will be honored “unless enforcement is shown by the resisting parties to be ‘unreasonable’ under the circumstances. (M/S Bremen v. Zapata Off-Shore Co.)
        + Some jurisdictions still subject such clauses to scrutiny – idea of whether you can really contract jurisdiction. (Carnival Cruise Lines v. Shute)
    - **Federal Personal Jurisdiction**
      * **1st Question – Is there a federal statute that would give personal jurisdiction?**
        + **FRCP 4(k) – Territorial Limits of Effective Service** (agreed with by DeJames v. Magnificence Carriers, Inc.)

**(1) Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:**

**(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;**

Note: under this rule, the federal court “piggy-backs” on the long-arm statute of the state in which it sits

**(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued;**

**(c) when authorized by a federal statute.**

**(2)For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:**

**(A) the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction; and**

**(B) exercising jurisdiction is consistent with the United States Constitution and laws.**

Note: this is a limited federal long-arm provision that establishes personal jurisdiction if the defendant is not subject to jurisdiction in any state

* + - * + **FRCP 4(n)(2) – Asserting Jurisdiction Over Property or Assets**

“**On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant’s assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.”**

Note: for the court to not have personal jurisdiction in that district, the defendant merely has to show another district that the case could proceed in.

* + - * **2nd Question – Does the Due Process Clause grant personal jurisdiction?**
        + **Use Burger King Test for due process under the 14th Amendment, but look at contacts with the United States as a whole and fairness in relationship to the entire United States.**
        + Some courts recognize a doctrine of “pendent personal jurisdiction” – the idea that “once a district court has personal jurisdiction over a defendant for one claim, it may “piggyback” onto that claim the other claims over which it lacks independent personal jurisdiction, provided all claims arise from the same transaction.
      * Waiver of Personal Jurisdiction (FRCP 4(d)) – “Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.”
  + **28 USC §1631 – Transfer to Cure Want of Jurisdiction**
    - **“Whenever a civil action is filed in a court… and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed…”**
* **VENUE**
  + Venue “serves to allocate cases among the same type of courts within a given judicial system”.
  + Venue is a statutory decision, relating primarily to the convenience of the parties and to concerns of judicial economy.
  + **State actions - venue will be determined by applicable state statutes.**
  + **IF THE CASE IS A LOCAL ACTION (not a transitory action), VENUE IS ONLY PROPER WHERE THE LAND LIES.** Suits over property ownership (directly affecting title) and trespass cases are viewed as local actions.(Livingston v. Jefferson). **If not local, use 28 USC §1391.**
  + **Federal Actions: 28 USC §1391 – Venue Generally**
    - **“(a) A civil action wherein jurisdiction is founded only on diversity of citizenship… may be brought only in:**
      * **(1) a judicial district where any defendant resides, if all defendants reside in the same state,**
      * **(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or**
      * **(3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action in commenced, if there is no district in which the action may otherwise be brought.**
    - **(b ) A civil action wherein jurisdiction is not founded solely on diversity of citizenship… may be brought only in:**
      * **[see 1-2 of previous]**
      * **(3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.**
    - **(c)…a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.** In a state which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.
      * Note: “in which it is subject to personal jurisdiction” should be read as where there would have been personal jurisdiction if all arguments had been accurately/wholly made.
    - (d) An alien may be sued in any district.
    - (e) [Where a defendant is an officer or employee of the United States]:
      * [Same as 1-2 previous]
      * (3) the plaintiff resides if no real property is involved in the action.
    - (f) A civil action against a foreign state as defined in section 1603(a) if thus title may be brought –
      * (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;
      * (2) in any judicial district in which the vessel or cargo of a foreign state is situated [if applicable to the case];
      * (3) in any judicial district in which the agency or instrumentality is licenses to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state…
      * (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.
    - (g) A civil action in which jurisdiction of the district court is based upon section 1369 (civil action w/death 75+ people)… may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.”
  + **Court must have jurisdiction and venue to hear the case – if there is no court that both venue and jurisdiction are proper, no court can hear the case.** (Livingston v. Jefferson)
  + **FRCP 12(b)(3) – challenge to venue must occur in the proper responsive pleading or by motion before the proper responsive pleading. If it is not made at this time, it is waived.**
  + **Change of Venue**
    - **28 USC §1404 – Change of Venue**
      * **“(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”**
      * Note: Choice of Law when changing venues:
        + “A change of venue under §1404(a) generally should be, with respect to state law, but a change of courtrooms.” – So new court pulls state law from original court, carrying its choice of law. This aims to prevent forum shopping (Erie) (Van Dusen v. Barrack).
        + Federal law – choice of law theoretically doesn’t matter, because federal law should be consistent from court to court
      * Note: “where it might have been brought” = where the case could have been brought legitimately, not as a result of waiver (“might have been brought by RIGHT”) (Hoffman v. Blaski)
    - **28 USC §1406 – Cure or Waiver of Defects**
      * **“(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.**
      * (b) Nothing in this chapter shall impair the jurisdiction of a district court on any matter involving a party who does not interpose timely and sufficient objection to the venue.”
    - Change of Venue Notes:
      * §1404 is used when venue is proper but one of the parties thinks another venue is better; §1406 is used when venue is actually defective.
      * Both plaintiffs and defendants can utilize the change of venue statutes.
    - **Forum Non Conveniens**
      * **A court may resist exercising jurisdiction even when jurisdiction is authorized by a general venue statute. The private interests of the litigants and the public interest should be balanced. (note: forum non conveniens is only used when venue is technically proper)** (Gulf Oil v. Gilbert)
        + Considerations include:

Access to evidence;

Ability and cost of attaining witnesses;

Ability to view the scene of the accident/crime;

Desire to have the trial “close to home”;

Other practical problems that would affect length of trial.

* + - * + Unless the balance is strongly in favor of the defendant or public interest, the plaintiff’s choice of forum should not be disturbed.
      * **The possibility of change in substantive law should not be given weight in a forum non conveniens inquiry, unless the remedy provided by the alternative forum is so clearly inadequate such that it is no remedy at all, in which case substantial weight should be given.** (Piper Aircraft Co. v. Reyno)
      * **For forum non conveniens to be exercised, there must be another more convenient forum where the plaintiff can obtain adequate relief.**
    - Change of Venue v. Forum Non Conveniens
      * At the federal level (i.e. between federal courts), you would use change of venue statutes instead of forum non conveniens to move between federal courts. You would only use forum non conveniens if moving from federal court to state court or a court in another country.
      * It is easier to use change of venue statutes (because test is “could have been brought there”/equity and justice) than forum non conveniens (because test is balancing of private and public interests).
* **NOTICE & OPPORTUNITY TO BE HEARD**
  + **Due Process clause** (5th Amendment for Federal, 14th Amendment for State) **gives conditions that must exist before a court may render a valid judgment:**
    - **Court must have jurisdiction over the parties and issues before it and venue must be proper.** (see SMJ, PJ and venue above)
    - **Parties must have adequate notice of the commencement of the action and issues involved in it. (Notice)**
    - **Parties must have an adequate opportunity to present their side of the case to the Court. (Opportunity to be Heard)**
  + **Notice**
    - **“First ask if the court has power over the person to hear the case. When the basis of power [of the Court] is something other than personal service, then notice matters.”**
    - **Notice must be reasonably calculated, under all the circumstances and considering any alternatives, to reasonably inform interested parties of the pendency of their action and afford them an opportunity to present their objections.** (Mullane v. Central Hanover Bank & Trust Co.; Greene v. Lindsey)
    - As long as the Court gives notice (reasonably calculated), it doesn’t matter whether the notice is actually received by the Defendant. If notice is proper, the Court has jurisdiction and the verdict will be binding on the defendant.
    - Service by publication:
      * Notice by publication is incompatible with the requirements of the 14th Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. For persons whose whereabouts are unknown, service by publication is acceptable. (Mullane v. Central Hanover Bank & Trust Co.)
  + **Opportunity to be Heard**
    - **The opportunity for the defendant to be heard must be granted in a meaningful time and in a meaningful manner in order to guarantee due process under the law.** (Fuentes v. Shevin)
      * “Meaningful” = balancing test – harm to the defendant by the plaintiff holding the property or other action being delayed v. the likelihood that the defendant will actually win the case
    - **A defendant has an adequate opportunity to be heard when – in light of the interests at stake in the litigation – she is able to develop the facts and legal issues in the case. The defendant must be informed of the action long enough in advance of the time when she is required to respond so as to allow her to obtain counsel and prepare a defense.**
    - FRCP 12(a) and state statutes generally allow defendants 20 days or more after service in which to respond.
    - Note: Notice must be given before an action to deprive a person of their property regardless of their ownership status. The Due Process clause protects the right to own as well as the right to possess property.
    - Example – cases of repossession/taking of property
      * In general, repossession of purchased goods that occurs at the same time service occurs does not allow for such an opportunity to be heard. The opportunity to be heard must be given before the liberty or possessions of a person are deprived, not just before a final judgment is rendered. (Fuentes v. Shevin)
      * **A hearing (opportunity to be heard) before the deprivation of goods/property is not required if the proper procedural guards are in place, including the use of an affidavit on the part of the plaintiff that is more than conclusory and a review of the writ before issuance by a neutral decision maker.** (Mitchell v. W.T. Grant Co.)
      * The Court does not distinguish between different kinds of property (land, goods, stocks, etc) in applying the due process clause. (North Georgia Finishing, Inc. v. Di-Chem)
      * **Three factors should be considered when determining if a pre-judgment deprivation statute satisfies the Due Process Clause** (Connecticut v. Doehr)**:**
        + **The private interest that will be affected by the official action;**
        + **The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and**
        + **The interest of the party seeking the prejudgment remedy, with due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.**

**THE CASE IS IN THE RIGHT COURT, WHAT LAW SHOULD BE APPLIED?**

* **Choice of Law**
  + Once jurisdiction (SMJ and PJ) and venue are established, and notice and opportunity to be heard are given, the next question is what law the Court will apply.
  + **Basic Choice of Law Analysis (in Federal Court):**
    - **Which law do you use for substantive law and which for procedural law?**
    - **If you apply state law, which state’s law do you apply?**
    - **How does the federal judge know what to apply as state law?**
  + **Choice of Law Under the Rules Enabling Act** (old analysis)
    - **“Rules of Decision Act”, 28 USC §1652 - “The laws of the several states, except where the Constitution or treatises of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”**
    - Originally “laws” meant rules and enactments promulgated by legislative authority, not common law (court cases) as well. (Swift v. Tyson)
    - Post Erie – **“laws” = legislative enactments + common law (court decisions)**. Under Erie, except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. (Erie R. Co. v. Tompkins)
    - **Erie sought to (a) create consistency between a state and federal court in the same state and (b) prevent forum shopping.** (Erie R. Co. v. Tompkins)
    - Is it a 10th Amendment violation for the federal government to create rules for states (common federal law)? (Based upon Erie R. Co. v. Tompkins)
      * If you take Justice Brandies statement as dictum, then all that is necessary is to determine what “laws” in the Rules of Decision Act meant to solve Erie, and the Court did not establish whether the above is a 10th Amendment violation.
      * If you take it as part of the holding, then the above is unconstitutional.
    - **If the law is “outcome determinative”, it is substantive and the state law should be used.** If the law is technically procedural but still outcome determinative, state law should be used because “rights and remedies are so intertwined” that a different result would be achieved under state and federal law. **(Guaranty Trust Co. v. York)**
      * Notes re: “outcome determinative” test
        + This is consistent with Erie because it acts to prevent forum shopping.
        + When (and if) a statute of limitations begins and ends is outcome determinative, the state statute of limitations should be used.
        + A strict reading of Guaranty would mean that every procedural rule could be outcome determinative and state law should always be applied.
    - **The Court should balance federal and state interests when determining whether the federal law or state law should be applied. (Byrd v. Blue Ridge Rural Electric Cooperative, Inc.)**
      * The right to trial by jury is the kind of federal interest that will prevail over state interests and cause federal law to be applied.
      * Is this consistent with Guaranty v. York and Erie?
        + No, if you say that sometimes federal procedural laws that are outcome determinative still be used over state laws because there is a greater federal interest.
        + Yes, if you say that Guaranty v. York only applies when there is no countervailing federal interest. This would mean that if there is no federal interest the “outcome determinative” test of Guaranty v. York is used, but if there is a federal interest, use a balancing test.
  + **Choice of Law Analysis under Rules Enabling Act**
    - **US Constitution, Article I, Section 8**
      * **“Congress shall have the power… to constitute Tribunals inferior to the Supreme Court… to make all laws which shall be necessary and proper for carrying into execution the forgoing powers…”**
    - **US Constitution, Article 6, Supremacy Clause**
      * **“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”**
    - **28 USC §2072 – Rules of Procedure and Evidence; Power to Prescribe**
      * **“(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.**
        + NOTE: “RULES OF PRACTICE AND PROCEDURE” DOES NOT INCLUDE SUBSTANTIVE LAWS… is it “arguably procedural”.
      * **(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.**
        + Note: “shall not abridge, enlarge or modify…” is the test for whether the federal law is appropriate
      * (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.”
    - **If the choice of law is procedural in nature, there is a two part test to determine federal v. state law application (Hanna v. Plumer):**
      * **Is there a federal rule or statute broad enough to govern this case?**
      * **Is the federal rule or statute valid under the Constitution?**
        + Does the rule/statute affect the claims or defenses on the merits?
        + Is the rule/statute arguably procedural?
        + **If it is a rule, check to see if it is valid under the Rules Enabling Act (28 USC §2072). If it is a statute, check to see if it is valid under US Constitution, Article 6, Supremacy Clause**
      * Other Notes on Hanna:
        + **Court in Hanna grandfathers in cases prior to Erie – this means that the test for choice of law has many levels and all cases are still good law.**
        + Is Hanna consistent with Erie?

No, if you say Hanna encourages forum shopping because it allows plaintiffs to pick federal court to use FRCP.

Yes, if you say that Erie only applies to substantive issues and Hanna only deals with procedural issues.

* + - * + Is Hanna consistent with cases following Erie?

Yes, if you say that when dealing with procedural issues, the court found the federal law not to be broad enough to cover the issue so state law was used.

* + - * + Impact of Hanna on federalism – Hanna increases federal power and decreases state power because federal consistency is allowed to trump state supremacy.
    - **If you can honor the state law without infringing too much on federal interests, then you should accommodate the state interest. (Gasperini v. Center for Humanities)** 
      * Note: Gasperini court did not address whether the applicable state law was broad enough – we can either read this to mean that the Court felt the rule was so clearly not broad enough that it wasn’t worth mentioning or overruling the idea in Hanna that the rule must be broad enough.
      * **When there is a valid state interest, the choice of law may be analyzed through Gaspareni rather than Hanna.**
  + **CHOICE OF LAW ANALYSIS (COMPREHENSIVE)**
    - **(Hanna Test, Pt. 1) Is there a valid federal rule/statute to cover the question?**
      * **If yes, then (Hanna Test, Pt. 2) is it valid under the Constitution?**
        + **If yes, apply federal law.**
        + **If no, see below, starting with Byrd Test…**
      * **If no, then (Byrd Test) use a balancing test between state and federal interests – is the federal interest outweigh the state interest?**
        + **If yes, federal interest outweighs, apply federal law.**
        + **If no, state interest outweighs, then…**

**(Guaranty v. York test) Is the federal law outcome determinative such that it influences the choice of forum?**

**If yes, apply state law.**

**If no, apply federal law.**

* + When the laws conflict – 3 stages/approaches:
    - Single-factor test: apply the law of where specific issue occurred (where the accident happened, where contract was performed, etc) – MOST STATES USE THIS APPROACH
    - Greatest contact: apply the law of the state with the greatest contact with the litigation, weighing the issues.
    - Assume the single-factor test is right, but in an egregious case, the Court may apply the law of the state with the greatest contact
  + **In federal court, what is the appropriate state law to use?**
    - **In order to promote the desired uniform application of substantive law within a state, federal courts must apply the conflicts-of-law rules of the states in which they sit.** (Klaxon Co. v. Stentor Electric Mfg. Co.)
      * Is this consistent with Erie?
        + Yes - it creates consistency between a federal and state court sitting in the same state
    - **How to choose appropriate state law in federal court:**
      * **Look to the state courts in the state where the federal court is sitting;**
      * **Which state law would that state apply?**
        + i.e. if the federal court is in Texas and the accident is in Oklahoma, and Texas choice of law rules say that the law should be used from the state where the accident occurs, then apply Oklahoma law in the federal court
    - **A state has great leeway in choosing which substantive law to use – it may apply its own substantive law in a case, so long as the state has sufficient contacts or aggregation of contacts with the parties and the transaction.** (Allstate Ins. Co. v. Hague)
    - **What is the content of the state law to apply?**
      * Look at 3 things – state court cases at all levels, what the rest of the country is doing (cases from other jurisdictions), and law review and other articles
      * **When deciding what (the content of) the state law is that should be used, statutes and common law precedent should be used, but also the dicta of following cases for judicial trends to predict the opinion that the applicable state Supreme Court would hold at the present time.** (Mason v. American Emery Wheel Works; McKenna v. Ortho Pharmaceutical Corp.)
      * **When state law is not clear, certification provides another method of ascertaining state law.** Certification is a procedure that allows the court of one system to petition the court of another system for the answer to an unresolved legal question.
        + Problems with certification: slow, time intensive; state court must be willing to certify the issue, etc.
      * Is this consistent with Erie?
        + Yes, if you say that it gives the federal and state court sitting in the same state the equal ability to change state law, which creates consistency
        + No, if you say that this allows a plaintiff to pick federal court if they believe that the federal court is more inclined to overturn an existing state court precedent. If you bring the case in federal court, you are guaranteed to get two more chances to argue that the state precedent should be overturned, because the only time you may be able to argue that in state court is to the Supreme Court. Use of Mason may destroy federalism sought under Erie because the judge can effectively make state law.
  + **Application of Federal Law in State Court**
    - **When a state court attempts to adjudicate a right that is based upon federal law, the Supremacy Clause requires the application of federal law.**
    - **US Constitution, Article 6, Supremacy Clause:**
      * **“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution o Laws of any State to the Contrary notwithstanding.”**
    - **When there is a rational argument that the law is both procedural and substantive, and the law is closely bound with federal rights or obligations, federal law should govern the claim. State law cannot use its procedures to unduly burden federal rights.** The state court should apply the federal standard of full trial by jury when passing judgment on a federal claim when the jury trial is a substantial part of the rights afforded under the federal act. (Dice v. Akron, Canton & Youngstown R. Co.)
      * Is this consistent with Byrd?
        + Yes, because in both cases, federal law trumps state law when the federal interest of a jury is greater than state interests
        + No, because if Dice is accurate, then shouldn’t state procedural law be used to decide a state claim in federal court if federal law is used to decide a federal claim in state court?
        + Courts in Byrd and Dice care more about the Supremacy Clause than the 10th Amendment – supremacy of federal govt is more important than federalism.

Note: this means that unless Dice and Byrd overturned Erie, the 10th Amendment part of Erie was dicta, not holding.

* + - **Is there federal common law** (i.e. judge made, not in statutes)**?**
      * **According to Erie, there is no general common law. General common law would be new, not against the existing constitutional background.**
      * **There are 7 areas defined as “not general”, where there may be federal common law:**
        + **Against the existing constitutional backdrop/ on the idea that only federal law can interpret federal statutes**

**Constitutional/Statutory Interpretation**

Ex. Roe v. Wade – Court went from substantive due process rights, to a right to privacy, to a right to bodily integrity, to allowing abortion during the 1st two trimesters

**Implied Rights of Action**

**Common law adds an implied right of action based on existing acts/statutes, where common law allows the right to recover/enforce**

This is okay if Congress implied a private right of action (hypothetical/projected intent)

**“Filling in the Gaps” in Federal Statutory Law**

**The idea is that no forward looking statute can foresee every problem that will arise under the statute – this allows federal courts to fill in the gaps as time goes on or problems arise. Federal court may fill in the gaps with state law.**

* + - * + **Areas where federal law can exist, even though it may border on general common law (and are as a result controversial):**

**Common Law Authority Based on Jurisdiction**

Ex. In Admiralty cases

**Occurs where federal courts have exclusive jurisdiction and there are sufficient policy reasons for uniform federal law. This is arguably creating new law.**

**Property Interests Created by Federal Law**

**When Legal Relations of the United States are Involved**

Ex. Federal issue of bonds

**When International Relations of the United States are involved**

**WHAT CLAIMS/ PARTIES SHOULD BE JOINED?**

* **JOINDER OF CLAIMS**
  + **FRCP 18 – Joinder of Claims**
    - **“(a) A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.**
    - **(b) A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties’ relative substantive rights…”**
  + **Counterclaim**
    - Note: counterclaim as it is today did not exist in 1791 – its precursors were set-off and recoupment found in courts of equity.
    - **FRCP 13 – Counterclaim and Crossclaim**
      * **(a) COMPULSORY Counterclaim.**
        + **(1) In general. A pleading must state as a counterclaim any claim that – at the time of its service – the pleader has against an opposing party if the claim:**

**(A) arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim; and**

Note: this doesn’t require absolute identity of fact patterns between the claims, only a logical relationship between them. Four tests to determine if they are out of the same transaction:

Are issues of fact and law raised by the claim and counterclaim largely the same?

Would res judicata bar a subsequent suit on the defendant’s claim absent the compulsory counterclaim rule?

Will substantially the same evidence support or refute the plaintiff’s claim as well as the defendant’s counterclaim?

Is there any logical relation between the claim and counterclaim?

**(B) does not require adding another party over whom the court cannot acquire jurisdiction.**

* + - * + (2) Exceptions. The pleader need not state a claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

* + - * **(b) PERMISSIVE Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.**
      * (c) Relief Sought in a Counterclaim.
      * (d) Counterclaim Against the United States.
      * (e) Counterclaim Maturing or Acquired after Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.
      * (f) Omitted Counterclaim. The court may permit a party to amend a pleading to and add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.
      * **(g) Crossclaim Against a Coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action…**
      * (j) Separate Trials; Separate Judgments. If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party’s claims have been dismissed or otherwise resolved.
    - **Effect of compulsory v. permissive counterclaims** (United States v. Heyward-Robinson)**:**
      * **This is the tie between FRCP 13 and 28 USC §1367 – same definition of “same case or controversy”/”same transaction”.**
      * **If they are permissive under FRCP 13(b), there is no federal jurisdiction over them by nature of the counterclaim unless they rest on independent jurisdictional grounds.**
      * **If they are compulsory under FRCP 13(a), they are ancillary to the claim asserted in the complaint and no independent basis of federal jurisdiction is required.**
    - **Effect of Failing to Plead a Counterclaim**
      * **Federal**
        + **FRCP 13 is silent as to the consequences of failing to plead a compulsory counterclaim, but most courts use res judicata or waiver or estoppel to bar a subsequent suit.**
        + **Common law exception to FRCP 13(a) – when the fragmentation of claims is compelled by federal law, FRCP 13(a) does not compel the counterclaim to be made in whichever of the two suits the first responsive pleading was filed.** (Southern Construction Co. v. Pickard)
      * **State – Failure to raise a compulsory counterclaim on a state court action is not clear from current statutes, so in the absence of clearer Congressional intent, federal courts cannot enjoin state court actions for failure to raise a compulsory counterclaim in a previous suit.** (Fantecchi v. Gross)
      * Note: If you bring a counterclaim in the first case and it is denied under a 12(b) motion, you can bring it in a subsequent case, regardless of whether it should have been defined as compulsory or permissive in the first case.
  + **Consolidation**
    - **FRCP 42(a) – Consolidation**
      * **“(a) If actions before the court involve a common question of law or fact, the court may:**
        + **(1) join for hearing any or all matters at issue in the actions;**
        + **(2) consolidate the actions; or**
        + **(3) issue any other orders to avoid unnecessary cost or delay.”**
* **JOINDER OF PARTIES**
  + **Basic Joinder Rules – Court can act with discretion in allowing/requiring joinder, with the following restrictions:**
    - **Action must be brought by the “real party in interest”;**
    - **Parties must have the capacity to sue/be sued;**
    - **Persons joined must be “proper” parties if their joinder is permitted (FRCP 20);**
    - **Persons so related to the dispute that their joinder is “necessary if feasible” must be joined if that can be reasonably accomplished; and**
    - **Actions may not proceed if persons “indispensible” to the litigation cannot be joined.**
    - **A party seeking a judgment binding on another cannot obligate that person to intervene, he must be joined.** (Martin v. Wilks)
  + **Permissive Joinder of Parties**
    - **FRCP 20 – Permissive Joinder of Parties**
      * **(a) Persons who may be joined**
        + **(1) Plaintiffs – Persons may join in one action as plaintiffs if:**

**(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence or series of transactions or occurrences; and**

**(B) any question of law or fact common to all plaintiffs will arise in the action.**

* + - * + **(2) Defendants – [Parties] may be joined in one action as defendant if:**

**(A) any right to relief is asserted against them jointly, severally or in the alternative with respect to or arising out of the same transaction, occurrence or series of transactions or occurrences; and**

**(B) any question of law or fact common to all defendants will arise in the action.**

* + - * (b) Protective Measures – The court may issue orders – including an order for separate trials – to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.
  + **Compulsory Joinder of Parties**
    - **2 subcategories:**
      * **“NECESSARY” parties who must be joined if feasible but whose nonjoinder will not result in dismissal AND**
      * **“INDISPENSIBLE” parties whose joinder is compelled even at the cost of dismissing the action.**
    - **FRCP 19 – Required Joinder of Parties**
      * **(a) Persons Required to Be Joined if Feasible – “NECESSARY” Parties**
        + **(1) Required party – a person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined if:**

**(A) in that person’s absence, the court cannot accord complete relief among existing parties; or**

**(B) that person claims an interest relating to the action and is so situated that disposing of the action in the person’s absence may:**

**(i) as a practical matter impair or impede the person’s ability to protect the interest; or**

**(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.**

* + - * + **(2) Joinder by Court Order – if a person has not been joined as required, the court must order that the person be made a party…**
        + **(3) Venue – If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.**
      * **(b) When Joinder is Not Feasible – If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed…” (“NECESSARY” v. “INDISPENSIBLE PARTY”)**
    - **The court may proceed without a party who “should be joined if feasible” if joining the party destroys subject-matter jurisdiction or is not feasible, but not without a party if the party is indispensible.** (Provident Tradesman Bank & Trust Co. v. Patterson)
    - **Four interests must be considered when determining whether the court should proceed without a party – i.e. “Necessary” v. “Indispensible”** (Provident Tradesman Bank & Trust Co. v. Patterson)**:**
      * **The plaintiff’s interest in having a forum (What happens to the original plaintiff if their claim cannot be brought because an indispensible party cannot be joined?)**
      * **The defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another.**
      * **Interest of the outsider whom it would have been desirable to join.**
      * **Interest of the courts and the public in complete, consistent, and efficient settlement of controversies.**
  + **Effect of Misjoinder/Nonjoinder of Parties**
    - **FRCP 21 – Misjoinder and Nonjoinder of Parties**
      * **“Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.”**
      * Note: While the adding/dropping of a party is discretionary, where parties/claims are properly joined, the court will generally maintain the joinder, especially when doing so promotes trial convenience, prevents extra lawsuits and extra expense to the parties, etc. (M.K. v. Tenet; United Mine Workers v. Gibbs)
* **IMPLEADER**
  + **FRCP 14 – Third-Party Practice**
    - **(a) When a Defending Party May Bring In a Third Party**
      * **(1) *Timing of the Summons and Complaint.* A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who IS OR MAY BE liable to it for all or part of the claim against it. But the third party plaintiff must, by motion, obtain the court’s leave if it files the third-party complaint more than 10 days after serving its original answer.**
      * **(2) *Third Party Defendant’s Claims and Defenses.* [The third party defendant]:**
        + **Must assert any defense against the third-party plaintiff’s claim under Rule 12;**
        + **Must assert any counterclaim/crossclaim under Rule 13;**
        + **May assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff’s claim;**
        + **May also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff.**
      * **(3) *Plaintiff’s Claims against a Third-Party Defendant.* The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff. [See (2) for assertions by third-party defendant.]**
      * **(4) *Motion to Strike, Sever or Try Separately.* Any party may move to strike the third-party claim, to sever it, or to try it separately.**
      * **(5) *Third-Party Defendant’s Claim Against a Nonparty.*** **A third party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.**
      * **(7) *When a Plaintiff May Bring in a Third Party.* When a claim is asserted against a Plaintiff, the Plaintiff may bring in a third party if this rule would allow a defendant to do so.**
  + **The Court will have supplemental jurisdiction over claims made through impleader if they arise out of the same transaction (Gibbs Test).**
* **INTERPLEADER**
  + **Interpleader is an equitable procedure by which a person holding property who is or who may be subject to inconsistent claims on that property can bring together all claimants in a single action.**
  + **Benefits of Interpleader** (Pan American Fire & Cas. Co. v. Revere)
    - **So that the person liable doesn’t have to pay twice.**
    - **Advantage to claimants – ensures that they have a fair and equal chance at receiving the money (preventing a “race to the judgment”)**
  + **Exposure to undue harassment by a multiplicity of suits is a sufficient ground for interpleader.** (Pan American Fire & Cas. Co. v. Revere)
  + Original Common Law Requirements of Interpleader
    - Same debt
    - Same source
    - Disinterested stakeholder
    - No other claim besides money
    - Compared to Current law (FCRP 22/28 USC §1335)
      * 1st 3 requirements are removed
      * 4th requirement – not addressed by FCRP 22 or 28 USC §1335, so either:
        + The requirement is still there since it has not been explicitly removed OR
        + Requirement no longer exists because as long as you meet the listed affirmative points, interpleader is allowed.
  + **By Rule:**
    - **FRCP 22 – Interpleader**
      * **(a) Grounds.**
        + **(1) By a Plaintiff. Persons with claims that MAY** (note: this includes possible future claims) **expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:**

**(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or ad adverse and independent rather than identical; or**

**(B) the plaintiff denies liability in whole or in part to any or all of the claimants.**

* + - * + **(2) By a Defendant. A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.**
      * Note: nothing in FRCP 22 opposes use of jury trial in interpleader action
      * Note: FRCP 22 is a procedural means of joinder – jurisdiction (SMJ and PJ) and venue must still be met, as with any other civil action
  + **By Statute:**
    - **28 USC §1335 – Interpleader (subject matter jurisdiction statute)**
      * **(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, [etc]… having in his or its custody or possession money or property of the value of $500 or more… or providing for the delivery of… such amount of value… if**
        + Note: $500 is the amount in controversy requirement
      * **(b) Two or more adverse claimants, of diverse citizenship as defined in (a) and (d) of section 1332 of this tile, are claiming or may claim to be entitled to such money or property…; and if (2) the plaintiff has deposited such money or property…**
        + Note: 28 USC §1335 only requires minimum diversity amongst claimants. This is constitutional because Constitution only requires minimum diversity. If the person seeking interpleader is also a claimant, they count for obtaining minimum diversity.
      * **(c) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.**
    - **28 USC §1397 – Interpleader (venue statute)**
      * **Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.**
    - **28 USC 2361 – Process and Procedure (personal jurisdiction statute)**
      * **In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any Stateor United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court… and shall be addressed to and served… where the claimants reside or may be found.**
        + Note: this means that the party can be served anywhere. This is constitutional if you apply Burnham. There is no need to apply a Burger King/minimum contacts test under 28 USC §1361.
      * **Such district court shall hear and determine the case…**
  + **Interpleader by Rule v. by Statute** (State Farm Fire & Cas. Co. v. Tashire)
    - **FRCP 22 is a procedural means of accomplishing joinder of parties when all other requirements of jurisdiction/venue are met. FRCP 22 uses the “regular” subject matter, personal and venue statute to achieve jurisdiction.**
    - **28 USC §1335 is a subject matter jurisdiction statute and is used in conjunction with 1397 and 2361 to accomplish interpleader.**
    - **1335, 1397 and 2361 CANNOT be used when interpleader is accomplished through FRCP 22.**
    - **If there is not minimal diversity of citizenship, 28 USC §1335 cannot be used and interpleader must be done through FRCP 22, using another jurisdiction statute (like federal question jurisdiction under 1331, etc).**
    - **There is no minimum deposit required in FRCP 22 as there is in 28 USC §1335.**
    - **FRCP 22 requires exposure to/a possibility of multiple liability, 28 USC §1335 does not (it just requires adversity).**
  + **28 USC §2283 – State of State Court**
    - **A court in the United States may not grant an injunction to stay proceedings in a State court except:**
      * **as expressly authorized by Act of Congress** (note: FRCP 22 is used to create interpleader, then 28 USC §1335 cannot be used to authorize injunction)
      * **or where necessary in aid of its jurisdiction,**
      * **or to protect or effectuate its judgments** (note: this can usually apply because of property before the court)**.**
    - In a case of statutory interpleader, the court can generally grant injunctions of restrictions concerning the money or property subject of the suit, but for matters outside that. (State Farm Fire & Cas. Co. v. Tashire)
* **INTERVENTION**
  + **Intervention permits someone who is not a party to an action to join the litigation to protect her interests.**
  + **FRCP 24 – Intervention**
    - **“(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:**
      * **(1) is given an unconditional right to intervene by a federal statute; or**
      * **(2) claims an interest relating to the property or transaction that is the subject of the action, AND is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, UNLESS existing parties adequately represent that interest.**
    - **(b) Permissive Intervention**
      * **(1) In general. On a timely motion, the court may permit anyone to intervene who:**
        + **(A) Is given a conditional right to intervene by a federal statute; or**
        + **(B) Has a claim or defense that shares with the main action a common question of law or fact.**
      * **(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.**
      * (4) Notice and Pleading. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.”
  + **Adequacy of Representation:**
    - **So long as the party has demonstrated sufficient motivation to litigate vigorously and present all colorable contentions, a judge may find that the interests of the intervenor are adequately represented.** (Natural Resources Defense Council v. NY State Department of Environmental Conservation)
    - **Grounds for asserting the inadequacy of representation for purposes of intervening as right** (Smuck v. Hobson)**:**
      * **The applicant’s interest is not directly represented by a party to the lawsuit.**
      * **The applicant and attorney who supposedly represents his interests are antagonistic.**
      * **There is collusion between an otherwise representative party and adverse parties.**
  + **Intervention of Right v. Permissive Intervention**
    - **Intervention of Right – there is an implicit judgment that the non-party’s right to participate should predominate over other concerns, if the 3 criteria under FRCP 22(b) are met.**
    - **Permissive Intervention – the court must first ascertain whether the interests of the original parties will be prejudiced by allowing the outsider access to the litigation – intervention will be at discretion of trial judge**
  + **Whether or not a party is allowed to intervene is a balancing of two goals – to achieve judicial economies of scale by resolving related issues in a single lawsuit AND to prevent the single lawsuit from becoming fruitlessly complex.** (Smuck v. Hobson)
  + **Note: A party will not be allowed to intervene when jurisdiction is founded solely on 1332 and doing so would destroy diversity of citizenship. If not founded solely on 1332, citizenship of intervenor has no effect.**

**CLASS ACTIONS**

* **Class action practice developed to address situations in which it is not feasible for a plaintiff to sue individually or for all those relevant to a dispute to be joined in a single class action. Class actions allow a single plaintiff to represent similarly situated persons and to advance their claims** (this makes them good for the “little guy”). A negative is that corporations may be strong-armed to settle because class actions are a business distraction, bad PR, etc.
* **Different jurisdictions have different opinions on the usefulness/constitutionality/worth of class actions. How you view class actions will determine how you apply the rules** (i.e. Supreme Court does not like class actions and have actively sought to not allow them on appeal).
  + Note: Texas carries the view that if there is one individual question, a class action cannot occur.
* **Each decision about whether to proceed on a class basis obliges a judge to balance advantages of a single adjudication with fairness to absent people whose claims may be extinguished by the action.**
* **Operation of the Class Action Device**
  + **Initiation of Class Actions:**
    - **Generally same as other lawsuits, with a filing of complaint and service of summons.**
    - **Difference is that a class-action lawsuit is filed in a representative capacity on behalf of persons who are similarly situated to the named plaintiff.**
  + **Certification**
    - **Federal Rule 23(a) – “Prerequisites to a Class Action”**
      * **Requirement of a Class – “a proposed class definition must be precise, objective and presently ascertainable” and “must not depend on subjective criteria or the merits of the case or require extensive factual inquiry to determine who is a class member”**
      * **Class Representative Must Be a Member of the Class** – comes from language within FRCP 23(a) that “one or more members of a class may sue or be sued as representative parties”.
      * **(1) Joinder of all Members is “Impracticable” – FRCP 23(a) requires that the class be so numerous that joinder of all members is “impracticable”**
        + **If class >40, this is usually met**
        + 25<class<40, variable such as geographic dispersion of class members and size of individual claims becomes important
        + If class<25, requirement isn’t met
      * **(2) Questions of Law or Fact Common to the Class – action must raise questions of law or fact common to the class.**
        + Question is whether “differences in the factual background of each claim will affect the outcome of the legal issue”
      * **(3) The Representative Claims or Defenses “are Typical” of the Class – claims or defenses brought must be typical of the class**
      * **(4) The Representative will Fairly and Adequately Protect the Interests of the Class – two reasons:**
        + **Due process concern that a class action judgment ought not to bind parties who have not literally had their “day in court” unless as members of a defined group with similar claims and proper representation, they have had a figurative day in court.**
        + **Defect in adequacy of representation may leave the judgment vulnerable to collateral attack.**
    - **Federal Rule 23(b): Types of Class Actions**
      * **“Prejudice Class Actions” under FRCP 23(b)(1)**
        + **Rule applies when different results in individual actions would place the non-class party in a position of uncertainty, not knowing how to treat the class as a whole, OR when individual actions would impair the ability of other claimants to have their interests met.** Does not refer to the situation in which the defendant in a series of actions would have to pay damages to some claimants but not to others.
        + **FRCP(b)(1)(A) – looks for prejudice to the non-class party**
        + **FRCP(b)(1)(B) – inquires into prejudice to members of the class**
        + **Certification under FRCP 23(b)(1) creates a “mandatory” class action – the absentee cannot opt-out of the class.**
      * **Injunctive and Declaratory Relief under FRCP 23(b)(2)**
        + **Used when “the party opposing the class has acted… on grounds that apply generally to the class, so that FINAL injunctive relief or… declaratory relief is appropriate respecting the class as a whole.”**
        + **Primary application is in injunction suits such as civil rights, employment discrimination, consumer or environmental cases in which the goal is to change the defendant’s behavior or policy prospectively and not to provide individual compensation to class members.**
        + **Notice is not deemed necessary in these cases on the ground that an injunctive class is cohesive.**
        + **Defendant’s conduct need only to be “generally applicable” to the class – there is no requirement that the conduct be damaging or offensive to every class member.**
        + Note: FRCP 23(b)(2) does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages.
      * **Damage Class Actions under FRCP 23(b)(3)**
        + **Two prerequisites:**

**Questions of law or fact common to the class members must “predominate” over any questions affecting only individual class members.**

**Court must find that a “class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”**

* + - * + 4 factors that the court should consider in deciding the superiority and predominance questions:

(A) Class member’s interests in individually controlling the prosecution or defense of separate actions;

(B) The extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) The likely difficulties in managing a class action.

* + - * + **When the class action involves state law and an immature tort, the Court should take those attributes into consideration when considering predominance and superiority… often a class action will not be appropriate where it would involve weighing of multiple state laws and is based upon the adjudication of a new/immature tort.** (Castano v. American Tobacco Co.)
      * **“Hybrid” Class Actions – balancing test of whether the request for injunctive or monetary relief is greater. This determines whether it is treated as type (a), (b) or (c).**
    - **Certification must be determined at an “early practicable time” after a person sues as a class representative. The Court may change this at any time. (FRCP 23(c)(1)(A))**
    - **The certification order will define substantive claims, issues or defenses the suit will consider.**
    - **Judge may issue a “partial” class action on only a limited number of factual issues related to a larger cause of action.**
  + **Notice**
    - **Before an absent class member may be forever barred from pursuing an individual damage claim, due process requires that he receive some form of notice that the class action is pending and that his damage claims may be adjudicated as part of it.** (Johnson v. General Motors Corp.)
    - **Notice to the class serves 2 purposes:**
      * **Check adequacy of representation being provided to the class**
      * **Render viable the right of unnamed class members to take certain protective measures, specifically to intervene or to opt out of the lawsuit.**
    - **The Court’s Role**
      * **Notice is DISCRETIONARY for those classes certified as a prejudice class under FRCP 23(b)(1) or as an injunctive class under FRCP 23(b)(2), but is REQUIRED in damages class actions under FRCP 23(b)(3) (because potential class members may opt out).** Why?
        + Claims under (1) and (2) are more cohesive – there is more of a chance that the class will not be truly representative under (3).
        + A judgment in FRCP 23(b)(3) action binds only those class members who do not expressly opt out, so notice apprises members of their right to be excluded and thus not be bound by any judgment that is entered.
    - **The Content of Notice and Who Should Receive Notice**
      * **Using “plain, easily understood language”, the notice must set out basic information about the lawsuit, as well as explain the class member’s rights, focusing on the nature of the action, the definition of the class certified, and the class claims, issues or defenses.**
      * **Notice must also explain the abstentee’s rights regarding appearance, exclusion from the class and binding effect of any judgment rendered.**
      * **Notice should generally be mailed.**
    - **Costs**
      * **Costs of providing notice must be borne by the party seeking class treatment.** (Eisen v. Carlisle & Jacquelin). In the past litigants have tried to put the burden of costs of notice on the other party through requesting a plaintiff-class mailing list from the other party. This was disapproved by the Supreme Court. (Oppenheimer Fund, Inc. v. Sanders)
      * **If the class suit is successful, the costs of sending notice may be subtracted from the class recovery, thus making each class member share the costs on a pro-rata basis.**
  + **Orders Appointing Class Counsel**
    - **Rule 23(g) – requires the court to designate a lawyer as class counsel, whose assignment is to “fairly and adequately represent the interests of the class”. Factors considered in selecting the counsel include lawyer’s knowledge of the law, prior class-action experience and resources available to represent the class.**
    - **If the class representative/their lawyer does not adequately represent interests of the class and is collusive with the opposing party, the judgment will not be binding on the “true” members of the class – those whose interests were not actually represented (because 24(a)(4) has not been met). This is generally not a problem in class actions because all views are represented by parties.** (Hansberry v. Lee; Pennoyer v. Neff)
  + **Interlocutory Appeals from Certification Orders**
    - **Rule 23(f) includes a provision allowing the Courts of Appeals to accept an appeal from an order granting or denying class certification.**
    - **When an appeal should be granted** (Waste Management Holdings, Inc. v. Mowbray)**:**
      * **When a denial of class status effectively ends the case.**
      * **When the grant of class raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle.**
      * **When it will lead to clarification of a fundamental issue of law.**
  + **Orders Regulating the Conduct of Pretrial and Trial Proceedings**
    - **Rule 23(d) authorizes the district court to issue other orders regulating the proceedings.**
    - **Because class representatives, in practice, may be only an incomplete proxy for the abstentee’s interests, the court sometimes must supplement treatment of the class representative’s claims with proceedings designed to evaluate some aspect of each individual class member’s claims.** Ways of doing this:
      * Single trial to determine both liability and amount of damages.
      * Bifrucated trial – first trial addresses liability, second trial for damages if liability is found (may be made highly individualized)
      * Sampling – judge selects some cases at random to adjudicate, then combines the outcomes of sample cases statistically to yield results for the larger class population.
      * Fluid class recovery – class award is used to provide a general benefit to class members rather than to compensate them individually
  + **Settlement**
    - **Rule 23(e) provides that a class action cannot be settled, dismissed, or compromised without court approval and that notice be given to all class members first.**
    - **Once notice is sent, class members have a second opportunity to opt-out of the class or object to the terms of the settlement and make their views known to the court.**
    - **Court will consider any objections and the fairness of the settlement to the members of the class before accepting it.**
  + **Attorney’s Fees**
    - **Rule 23(h) authorizes the court to award a reasonable attorney’s fee in any action certified as a class action.** This can either be done by looking at the benefit the lawsuit produced and awarding a portion of the settlement or through a “lodestar” which considers the average hourly rate of the attorneys on the project and hours worked.
* **Jurisdiction/venue issues:**
  + **Only worry about named plaintiffs and defendants for SMJ, PJ and venue.**
* **Choice of law - which state law is applied in a class action suit?**
  + **Differing views as to whether the character of individual trials must remain constant in a class action (i.e. that state law should be applied as it would have on the individual claim) or whether the character of individual trials should change in order to allow the class action to occur.**
* **Binding Effect of a Class-Action Judgment**
  + **If the requirements and prerequisites for a class action are satisfied, the resulting decree will be binding on all class members whether they actually participated in the case or not.**
  + **Class action suits are an exception to the general rule that judgments only bind those over which the court had personal jurisdiction (i.e. under Pennoyer v. Neff)**
  + **It is not necessary to satisfy the minimum contacts standard normally applied to out-of-state defendants in order to obtain a judgment binding absent class members.** This is because the plaintiffs have not been “haled” anywhere to defend themselves on pain of a default judgment, are being represented by the named class member, and notice and opportunity to opt-out provide other procedural protections. (Phillips Petroleum Company v. Stutts)
  + **4 considerations that must be met in a FRCP 23(b)(3) damage class action for absent plaintiff class members to be bound by the judgment** (Phillips Petroleum Company v. Stutts)**:**
    - **Absentee must receive notice plus an opportunity to be heard.**
    - **Notice must meet standards of Mullane v. Central Hanover Bank.**
    - **Absent class member must be provided an opportunity to opt out of class action.**
    - **Named plaintiff must adequately represent the class.**

**JURY TRIAL**

* **US Constitution, 7th Amendment** (remember, this is federal)
  + **“In Suits at common law… the right of trial by jury shall be PRESERVED, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”**
  + **NOTE: THE 7TH AMENDMENT DOES NOT “CREATE” A RIGHT TO JURY TRIAL**
  + **“the right of trial by jury shall be preserved” – meaning:**
    - **This interpreted to mean that the current right to a trial by jury should be as it existed in 1791, so in determining the right to jury trial, proper role of jury, etc, what was done in 1791 should be the first question.**
      * **In 1791 there were two different courts – common law court** (king’s court) **and court of equity** (chancery court)**. So there were two different causes of action - action at law and action in equity.**
        + **Common Law Court**

**Used when seeking compensatory and punitive damages, ejectment, replevin**

**Had jury trials**

* + - * + **Court of Equity**

**Used when seeking injunctions, specific performance, “clean up damages”**

**No jury trial**

* + - * Problems with 1791 View:
        + **FRCP 2 – “There is one form of action – the civil action.” – there is no longer a split between court at law and equity. This leads to a “historical test”.**
        + When there is a case with claims that would have been split between court at law and court at equity in 1791.

**To deal with this we ask whether the common law or equitable claim is greater/more important. Trial court will use its discretion, but the jury trial should be preserved by going first in most cases where there are both legal and equitable claims (factual issues/ legal claims by jury first, then equitable claims by judge).** (Beacon Theaters v. Westover)

Is this constitutional?

Yes – if you say that the right to a jury trial hasn’t changed, only the procedure has

No – if you say that the right to jury trial has been expanded in cases where you could not have gotten one in 1791

**Test to determine legal v. equitable (Ross v. Bernhard):**

**1) The pre-merger custom with respect to the cause of action/issue**

**2) The remedy sought**

**3) Practical abilities and limitations of juries**

Note: Supreme Court hasn’t ruled on this. Some lower courts have read this as a basis for denying a jury trial in cases viewed as “too complex”. Argument is that:

Because this practice was recognized in 1791, it is just preserving the right of jury trial that existed at that time;

Because there are practical limitations on juror’s knowledge, etc, complex cases are best entrusted to fact-finding capacity of an experienced judge;

It is a violation of the litigant’s due process rights for a jury to handle a complex case exceeding its capacity.

**If the first two prongs are met for giving the trial to a jury, the third prong is not relevant.** (Curtis v. Loether). **The second prong is more important than the first when they conflict.** (Chauffeurs, Teamsters and Helpers Local 391 v. Terry)

Exceptions:

The proceedings of a bankruptcy court are inherently proceedings in equity so there is no 7th amendment right to a jury trial for determination of objections to claims. (Katchen v. Landy)

A derivative suit has always been viewed as a single equitable cause of action. So there is no 7th Amendment right to a jury trial. (Ross v. Bernhard)

* + - * + When a claim arises that didn’t arise in 1791.

**To deal with this we ask what the claim is like**

ex. An anti-trust claim seeking damages is most like a business tort, which would seek compensatory damages, so it would have been heard in a common law court, or, if you are seeking a declaratory judgment, you look at what cause of action the declaratory judgment would be on.

**For statutes/statutory rights not existing in 1791 - 7th Amendment is applicable to actions enforcing statutory rights and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.** (Curtis v. Loether). **Test for determining this is** (Tull v. United States):

**Compare the statutory action to actions brought in 1791;**

**Examine the remedy sought and determine whether it is legal or equitable in nature** (note: court notes this second prong as more important)

Note: 7th Amendment rights to jury trial are more important than statutory intent

**For statutory causes of action that have been created (since 1791) where Congress has provided that enforcement of the rights must proceed in a specialized statutory proceeding, hearings before an administrative law judge, when appropriate, are not violations of the 7th Amendment. Preference for administrative fact-finding is justifiable only in situations involving “public rights”.** (Atlas Roofing Co. v. Occupational Safety & Health Co.)

* + - **The prerequisite to maintain a suit for an equitable remedy is the absence of an adequate remedy at law. Where the proper remedy is normally equitable, the party wishing to not have a jury must show that the case is so complicated that only the judge can unravel them. In most cases, if properly instructed, a jury can readily determine the recovery.** (Dairy Queen v. Wood)
    - **7th Amendment is designed to preserve the basic institution of jury trial in only its most fundamental elements, not every aspect of procedural form or detail.** (Galloway v. United States) – **“History still matters, but it’s not conclusive.”**
    - **7th Amendment speaks to “right of trial by jury”, FRCP 38 and 39 state that jury must be demanded within 10 days of being served with the original demand (either party can request jury), unless the court on its own motion orders a jury trial.**
    - Note: there is no right to a trial by bench – this only speaks of right of trial by jury
    - Underlying the jury trial analysis, courts make a judgment about the utility and value of jury trial in a modern civil-litigation system.
    - Beacon 🡪 Ross 🡪 following cases
      * Court has tended more and more to find right to jury trial – right to jury trial exists as to any issue that is an element of a claim that could be one at law, even if that claim appears to be less significant than the part of the claim at equity.
      * “expansive right to jury trial”
* **Judgment Notwithstanding the Verdict (j.n.o.v.)**
  + **It was an established common law practice to reserve questions of law during trial (by jury) and of taking verdicts subject to the ultimate ruling of questions reserved, and the reservation carried with it authority to make such ultimate disposition of the case as might be necessary under the reservation. A j.n.ov. is therefore not a violation of the 7th Amendment.** (Baltimore & Carolina Line, Inc. v. Redman)
  + It is a different case once the trial court has denied a defendant’s directed verdict motion and allowed the case to go to the jury. In that case, the court cannot order a judgment contrary to the jury verdict – they can only order a new trial. Overruling the jury verdict with a j.n.ov. would be a 7th Amendment violation. (Slocum v. New York Life Insurance Co.) – NOTE: WITH THE ADOPTION OF FRCP 50, THIS IS NO LONGER RELEVANT – FRCP 50 gives an automatic reservation of decision by the Court.
  + **There is no constitutional bar to an appellate court granting j.n.o.v. – this is no more of a 7th Amendment violation than the trial court granting it.** (Neely v. Martin K. Eby Construction Co.)
* **Remmititur/Additur**
  + **It was an established practice in common law in 1791 that the trial court had the authority to deny a motion for new trial because damages were found to be excessive and that remmittitur could be used to facilitate the lowering of damages (with order of new trial as alternative).** (Dimick v. Schiedt)
  + **Additur (used to facilitate an increase of damages with order of new trial as alternative) was not a practice in 1791 and common law has not allowed it since. This is different than a remmititur because no jury has passed on the increased amount. To allow additur would be to “compel the plaintiff to forego his constitutional right to the verdict of a jury.”** (Dimick v. Schiedt**)**
* **FRCP 50 – Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling (DIRECTED VERDICT, j.n.o.v.)**
  + **Note: motion for directed verdict may be made by either party**
  + **“(a) Judgment as a Matter of Law**
    - **(1) In general. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:**
      * **(A) resolve the issue against the party; and**
      * **(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.**
    - **(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury…**
  + **(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment – or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged – the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on a renewed motion, the court may:**
    - **(1) allow judgment on the verdict, if the jury returned a verdict;**
    - **(2) order a new trial; or**
    - **(3) direct the entry of judgment as a matter of law.**
  + **(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.**
    - (1) In general. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.
    - (2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment’s finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.
  + **(d) Time for a Losing Party’s New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after the entry of the judgment.**
  + **(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.”**
* **FRCP 59 – New Trial; Altering or Amending a Judgment**
  + **“(a) In General.**
    - **(1) Grounds for a New Trial. The court may, on motion, grant a new trial on all or some of the issues – and to any party – as follows:**
      * **(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or**
      * **(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.**
    - **(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.**
  + **(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 10 days after the entry of judgment.**
  + **(d) New Trial on the Court’s Initiative or for Reasons Not in the Motion. No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party’s motion.** After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.
  + **(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.”**
  + **On a FRCP 59 motion, it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based on evidence that is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. This is not a violation of the 7th Amendment… it is a historic safeguard to the right to a jury trial.** (Aetna Casualty & Surety Co. v. Yeatts)
  + 7th Amendment violation?
    - No – new trials were granted in 1791 and the standard is the same.
  + New Trial v. j.n.o.v. or summary judgment or directed verdict
    - New trial standard is “against the clear weight of the evidence”
    - For others, the standard is whether a reasonable jury would have found the evidence to meet the requisite burden of proof.
    - This means it is easier to take the case away from the jury than it is to get a new trial.
* **Summary Judgment**
  + **FRCP 56 mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, on which that party will bear the burden of proof at trial.** (Celotex Corp. v. Catrett)
  + **FRCP 56 – Summary Judgment**
    - **(a) By a Claiming Party – A party claiming relief may move, WITH OR WITHOUT supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:**
      * **(1) 20 days have passed from commencement of the action; or**
      * **(2) the opposing party serves a motion for summary judgment.**
    - **(b) By a Defending Party – A person against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.**
    - **(c) Serving The Motion: Proceedings – The motion must be served at least 10 days before the day set for hearing… The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.**
      * **Note: “genuine issue of material fact” test is:**
        + **“would a reasonable juror have to find of clear & convincing evidence that X fact existed”** (Anderson; note: “clear & convincing” is replaced by whatever burden of proof standard the substantive law uses)
    - **(d) Case Not Fully Adjudicated on the Motion**
      * **(1) Establishing Facts – If a summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue… The facts so specified must be treated as established in the action.**
    - **(e) Affidavits; Further Testimony**
      * **(2) Opposing Party’s Obligation to Respond – When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.**
  + **The party seeking summary judgment bears the initial responsibility of informing the district court of the basis for motion and identifying the documents that demonstrate the absence of a genuine issue of material fact. There is no requirement that the moving party support its motion with affidavits negating the opponent’s claim.** (Celotex Corp. v. Catrett) **They may do this in two ways:**
    - **By submitting affirmative evidence, negate an element essential to the opposing party’s claim or defense.**
    - **Show that the opposing party lacks sufficient evidence to establish an essential element of its claim or defense.**
    - How is Celotex consistent with Adickes?
      * Adickes may be read as stating that the moving party is required to sustain its burden of proving the absence of a genuine issue of a material fact by affirmative evidence only if it must utilize the first method, or a combination of the two methods, of obtaining summary judgment. If the moving party is able to use the second element exclusively, it is only required to show that the opposing party has failed to establish sufficient evidence of an essential element of its claim or defense. Celotex is therefore consistent with Adickes.
  + **On summary judgment, the inferences to be drawn from the underlying facts contained in the movant party’s materials must be viewed in the light most favorable to the party opposing the motion.** (Unless these facts are blatantly contradicted by the record – Scott v. Harris) **Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.** (Adickes v. S.H. Kress & Co.)
  + **Summary judgment is inappropriate where the inference that the parties seek to be drawn deal with questions of motive, intent, subjective feelings and reactions. A judge may not, on a motion for summary judgment, draw fact inferences.** (Cross v. United States)
  + **Credibility of witnesses is normally within the judgment of the jury. A problem with witness credibility alone will not prevent the court from directing a verdict if all the objective evidence indicates that the testimony is credible.**
    - **The honesty/character of a potential witness will not be an issue where they are a disinterested party.** (Lundeen v. Cordner)
  + **A clear and convincing affidavit from the only person in a position to be aware of a factual situation may serve as a basis for summary judgment.** (Lundeen v. Cordner)
  + **Evidence used to obtain summary judgment must be admissible at trial, with the exception that you can present any affidavit that would be admissible if the person were on the stand.** (Celotex Corp v. Catrett)
  + If the information presented entitles one to a directed verdict, a summary judgment is proper. (Lundeen v. Cordner)
  + **A balance is required between 7th Amendment Right to Trial by Jury and efficiency in judicial process through summary judgment – FRCP 56 should be construed with due regard for not only the rights of persons asserting claims to have those claims tried to a jury, but also for the rights of persons opposing such claims to demonstrate prior to trial that those claims have no factual basis.** (Celotex Corp. v. Catrett)
    - Is the judge usurping the jury/7th Amendment right through a summary judgment?
      * The answer should be no, because the judge should only give summary judgment when an unreasonable jury would side alternatively.
      * In 1791 demurrer existed. Summary judgment is like a demurrer. Difference is that today the moving party has a higher burden of proof to meet for summary judgment to be granted than under demurrer. (change is substantive, not procedural)
  + Are summary judgments efficient?
    - May be inefficient if the summary judgment hearing is a “mini-trial” before the larger later trial
    - May be efficient because it quickly concludes lawsuits where one party will clearly win

**BINDING EFFECT OF PAST JUDGMENTS**

* **Stare Decisis – describes the generally binding effect of previous judicial decisions on present litigation (questions of law, not fact)y**
* **4 principles that explain preclusion:**
  + **A party ordinarily gets only one change to litigate a “claim” – if a party litigates only a portion of a claim the first time around, she risks losing the chance to litigate the rest.**
  + **A party ordinarily gets only one chance to litigate a factual or legal “issue” – once litigated, she cannot ask a second court to decide it differently later.**
  + **A party is entitled to at least one “full and fair” chance to litigate before being precluded.**
  + **Preclusion may be waived unless it is claimed at an early stage of the litigation.**
* **“Res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication.”** (Allen v. McCurry)
* **Difference between claim preclusion and issue preclusion –** 
  + **Claim preclusion prevents relitigation of claims; issue preclusion prevents relitigation of issues.**
  + **Claim preclusion applies regardless of whether there has been an adversary contest on a particular matter, issue preclusion operates only when an issue has been litigated fully.**
  + **Claim preclusion precludes only subsequent suits on the same cause of action, issue preclusion may preclude relitigation of the same issues in later suits on any cause of action.**
* **CLAIM PRECLUSION (res judicata)**
  + **In certain circumstances, when a second suit is brought, the judgment in a prior suit will be considered conclusive on the parties to the judgment, as to matters that were actually litigated or should have been litigated in the first suit. (“merger and bar”)**
  + While generally a court will have no reason to overturn res judicata, there are some situations where considerations of justice and fairness dictate that prior judgments not be given preclusive effect:
    - When judgment was obtained by use of fraud;
    - When there was a clear and fundamental jurisdictional defect that should have prevented the first court from hearing the suit.
  + **Generally:**
    - **Every available defense must be asserted in the first suit.**
    - **Defendant need not assert any counterclaim, cross-claim, or third-party claim unless required to by specific statutory provision.**
    - **Once asserted by the defendant, the determination of a counterclaim, etc, will be accorded the same claim preclusion effect as if it would have been an original complaint.**
  + **1st issue is always defining the matters that might and should have been litigated in the first action… these are what will be precluded in a future claim.**
  + **Three elements necessary for claim preclusion:**
    - **Judgment must be final, valid and on the merits.**
      * Final = has the court conclusively disposed of the lawsuit in the rendering court, notwithstanding appeal/appeal ability?
      * Valid = was there proper jurisdiction? (for personal, was it waived?)
      * On the Merits = disposition based on validity of plaintiff’s claim, rather than on a procedural ground (consider FRCP 41(b); note, 12(b)(6) dismissal is treated as a judgment on the merits)
    - **Parties in the subsequent action must be identical to those in the first action.**
      * This comes from Pennoyer v. Neff – a judgment generally is not binding on parties that the court lacked personal jurisdiction over.
      * There are some claims that will be binding on all parties, even those without personal jurisdiction in the first case – ex. class actions, other instances where the interests of all parties are adequately represented (Martin v. Wilks).
    - **Claim in the second suit must involve matters properly considered in the first action (meaning what the first action decided or should have decided).**
  + **One “transaction” = one cause of action**
    - **If the Plaintiff does not bring all claims in the first case resulting from the same injury, he cannot bring them in future cases.** (Rush v. Cityof Maple Heights)
    - **Critical issue is whether the two actions under consideration are based on the same nucleus of operative facts.** (Petro-Hunt LLC v. United States)
    - **Considerations relevant to determining whether a factual grouping constitutes a single transaction (Restatement (Second) Judgments ):**
      * **whether the facts are related in time, space, origin, or motivation;**
      * **whether they form convenient trial unit;**
      * **whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage**
    - **If the conduct that is the subject of the first action continues after judgment in the first action, claim preclusion would not prevent a second suit. This is related to the idea that if the right didn’t exist in the first case, you are not barred from bringing it in a second case.** (Russell v. Place)
    - **There is an exception to claim preclusion for claims the party attempted to bring in the first suit but the claim was not allowed by the judge – these claims, even if it the same transaction, can be brought in a subsequent suit.**
    - **Test is flexible and includes policy considerations, which produces uncertainty.**
      * Procedural rules and the division of law and equity in the court in which the first action is brought determine the extent to which it is reasonable to require litigants to advance their claims and defenses in the same lawuit. (ex. FRCP give abundant opportunity to litigate all claims together and provide for compulsory counterclaims)
      * Degree to which the court is committed to judicial economy.
  + **What is the effect on future claim preclusion if there are two possible separate and independent holdings? Either…**
    - **Neither is a holding (so there is no res judicata**, but if the Court of Appeals decides any issue against a losing party, that issue becomes collaterally estopped**);**
    - **Both are holdings (so both have res judicata effect**, except that if the losing party appeals and court of appeals reaches judgment on only one issue, then only that issue has collateral estoppel effect**); or**
    - **More narrow holding is the “real” holding of the case.**
    - Note: consider extrinsic aspects to determine court’s intentions in judgment
    - Note: dictum is persuasive, not binding – this is because dictum isn’t always necessary to the judgment, the holding is
  + Harsh effects of claim preclusion:
    - Claim preclusion may preclude a plaintiff from pursuing an otherwise meritious claim that was never litigated because of a minor procedural error or because a lawyer failed to anticipate the effect the first judgment would have on future litigation.
    - Forecloses relitigation of claims regardless of whether the original decision was correct.
  + Certain valid and final judgments are not preclusive (Section 20(a) of Restatement (Second) of Judgments):
    - Dismissal for lack of jurisdiction, improper venue, for nonjoinder or misjoinder of parties
    - Election or direction of a nonsuit
    - Other types of judgments
* **DEFENSE PRECLUSION**
  + **Three situations in which defendants must take the doctrine into account:**
    - **When a former defendant seeks to advance a claim against the original plaintiff.**
      * **The claim involves matters that were not advanced in the first action.**
      * **The claim involves matters that were advanced in the first action but are not foreclosed by issue preclusion** (either because counterclaim wasn’t compulsory under governing rules, or with an absence of compulsory counterclaim rules, it was not out of the “same transaction)
    - **A second action by the original plaintiff in which the defendant seeks to raise defenses that were equally available in the first action but were not advanced there.**
  + **A party cannot split a cause of action, to use one portion of it for defense in that suit and to reverse the remainder for offense in a subsequent suit.** (Mitchell v. Federal Intermediate Credit Bank)
  + **Failure to raise a compulsory counterclaim will generally bar a subsequent claim under res judicata. Generally a defendant’s failure to raise a counterclaim that is not compulsory does not preclude a later action.** However, some federal courts apply a judicially created preclusion to protect the prior judgment if the claim that the defendant seeks to assert would undermine the basis of the prior judgment. (Linderman Machine Co. v. Hillenbrand Co.)
    - **Note:** **the same standard that determines whether a counterclaim is compulsory determines whether it would be barred by res judicata (same transaction test)**
* **ISSUE PRECLUSION (collateral estoppel)**
  + **General rule is that a FACT (NOT LAW) distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties; and even if the second suit is for a different cause of action, the fact once so determined must, as between the same parties, be taken as conclusively established.** (Southern Pacific Railroad Co. v. United States)
  + **For issue preclusion to exist, a proceeding must involve the same issue as a previous suit. More than a mere duplication of issues is required…**
    - **Issue must be exact same as in the first case;** 
      * **Question of fact v. question of law v. application of law to facts**
        + **Issue preclusion operates to bar subsequent trials of questions of fact**
        + **Mixed questions of law and fact – application of law to facts – are treated as questions of fact and collateral estoppel may be used** (United States v. Moser)
    - **Issue in the 1st case must have been fully litigated (FULL & FAIR OPPORTUNITY)**
      * **Did the losing party have enough incentive to litigate?**
      * **Were there sufficient procedures? (discovery, cross-examination, etc)**
        + **Could the party have appealed the judgment?**
    - **The issue raised in a second suit actually must have been ACTUALLY LITIGATED in the first action, and must have been decided by the first court.**
      * **Inquiry is to what was ACTUALLY LITIGATED, not what might have been litigated.** (Cromwell v. County of Sac)
      * How can a matter be “directly and distinctly put in issue”/actually litigated?
        + In the course of actual litigation.
        + Or through pleadings – if a material proposition is clearly asserted and a party is called upon to admit or deny the proposition.
      * Note – this is different than claim preclusion – claim preclusion bar any and all claims and defenses out of the same transaction, issue preclusion only bars those that were actually litigated
    - **issue must have been necessary to the court’s judgment.**
      * **Resolution of the issue is necessary to the judgment if the judgment “turned on it”.** (Rush v. City of Maple Heights)
      * A finding of fact by a jury or a court which does not become the basis or one of the grounds of the judgment rendered is not necessary to the judgment and is therefore not conclusive against either party to the suit. Extrinsic evidence – jury record, what the testimony was, etc, may help 2nd court determine what was necessary to the judgment. (Russell v. Place; Rios v. Davis)
    - **Judgment in 1st case must be VALID, FINAL and ON THE MERITS.**
    - **“Mutuality of Estoppel” – parties must be identical\*\*\***
      * **Note: this requirement is going away**
  + **Issue preclusion can be invoked offensively or defensively…**
    - **Offensively, when the plaintiff in the second action seeks to preclude litigation of an issue that was decided favorably to him in a prior action.**
    - **Defensively, when the defendant in the second suit seeks to preclude re-litigation of an issue that was decided in his favor in a prior suit.**
  + **Before a party can invoke the collateral estoppel doctrine, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment.** (Commissioner of Internal Revenue v. Sunnen)
  + **Issue preclusion is designed to prevent repetitious lawsuits over matters which have once been decided and have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, therefore causing inequities among people of the same class.** (Commissioner of Internal Revenue v. Sunnen)
  + **The presence of even a “harmless” error in the rulings of the trial court upon whose findings a second court is being urged to rely upon can be a “serious obstacle” to offensive claim preclusion.** (Jack Faucett Associates v. American Telephone & Telegraph Co.)
  + **7th Amendment and order of Jury Trial/Judge:**
    - Note: Beacon Theatres held that a jury trial should come before a bench trial within the same adjudication – but in estoppel cases, you are dealing with two different trials, so this is not a 7th amendment violation
    - **If an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue (in a second case) before a jury may be foreclosed by res judicata or collateral estoppel.** (Parklane)
  + **Note: sometimes policy will trump use of collateral estoppel** (ex. no collateral estoppel in Commissioner of Internal Revenue v. Sunnen because IRS policy of consistency between taxpayers is more important than estoppel, but in Moser, the policy reason of fair payments to members of the military isn’t great enough to outweigh estoppel)
  + Can a state court finding of fact have estoppel effect in a future federal action on a cause of action that is under exclusive federal jurisdiction?
    - While federal courts have the exclusive authority to determine the ultimate question of whether the federal law has been violated, the findings on the underlying facts decided by the state court should be given preclusive effect.
    - **So long as fair procedures were used in the state trial courts, there was no justification for allowing relitigation of the federal issues in federal court. (Allen v. McCurry)**
* **Who can benefit from issue preclusion?**
  + Traditional role of issue preclusion was that persons benefited from a prior judgment only if they were bound by it… rule of mutuality (party or one in privity with party). Modern trend has been an erosion of this requirement of mutuality (starting with Bernhard v. Bank of America).
  + **Criteria for determining who may assert a plea of res judicata differ from the criteria for determining against whom a plea of res judicata may be asserted.**
    - **Requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. He is bound by that litigation only if he has been a party to it.**
    - **There is not the same due process reason for requiring that the party asserting the plea of res judicata must have been a party to the earlier litigation.**
  + **The theory of “virtual representation” may allow preclusion to be used against a nonparty. The idea is that once an issue has been adjudicated by a court in an adequate adversarial contest, it should be considered settled once and for all.**
  + **Defensive nonmutual collateral estoppel:**
    - **Against a former plaintiff - Is allowed – idea is that when the plaintiff picks the forum and claims in the first case, it is not unfair to bind them with collateral estoppel in the second case.** (Bernhard v. BOA)
    - **Against a former defendant – Is allowed if the defendant had a full and fair opportunity to litigate in the first case.** (Allen v. McCurry)
  + **Offensive nonmutual collateral estoppel:**
    - **In cases where a plaintiff could have easily joined in the earlier action or where the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.** (Parklane Hosiery Co. v. Shore)
    - **In deciding whether or not to allow the civil plaintiff to employ offensive collateral estoppel, courts consider** (Parklane)**:**
      * **Was the Plaintiff trying to play games in the 1st case by staying out of it?**
      * **Did the defendant have a full and fair opportunity (and incentive) to litigate in the first case?**
      * **Have there been multiple/conflicting findings in the past that would make binding the defendant to one finding unfair?**
* **INTERSTATE PRECLUSION**
  + **US Constitution, Article 4, Section 1 – full faith and credit between states**
    - **“Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”**
  + **28 USC §1738 - State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit – gives full faith and credit to state judgments in federal courts**
    - **“… Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”**
    - **Although §1738 applies only to state courts, it generally imposes the same principles on federal courts, requiring them to accord full faith and credit to the judgments of state courts.** (Allen v. McCurry)
    - There may be some instances where public policy outweighs preclusion, but an exception to §1738 must be “express and very weighty”. (Allen v. McCurry)
  + **2 step approach for determining the preclusive effect of a state court judgment in a subsequent suit over which federal courts have exclusive jurisdiction** (Marrese v. American Academy of Orthopaedic Surgeons):
    - **Applying the Full Faith and Credit Statute, the federal court must determine whether state claim-preclusion law would preclude the federal suit.**
      * **If not, there is no preclusion.**
      * **If yes, federal court must determine whether the relevant federal law contains an implied or explicit exception to Section 1738.**
    - Note: in most cases, Marrese will prevent preclusion because most states prohibit preclusion of a claim beyond the rendering court’s jurisdiction. Since state courts cannot hear cases when the federal court’s jurisdiction is exclusive, the prior jurisdictional competency rule would prevent a state court from precluding such cases.
  + **Because of the full faith & credit clause and personal jurisdiction over the present defendant, you can collect judgment in a different place than you sue. Even if the first case is wrong, the judgment must still be honored.** (Fauntleroy v. Lum)
  + **Federal State Preclusion**
    - **General requirement is that federal judgments be given full faith and credit in state courts. This stems from the Supremacy Clause (Constitution, Article 6**
    - **Question is which rules of preclusion the state should apply.**
      * **Federal preclusion rules usually apply in a state court when the prior federal court judgment involved a federal question.**
      * **State preclusion rules should be used when those rules are important to the effectuation of substantive state policies.**
    - **If the plaintiff brings an action in federal court and fails to include related state claims that may have been heard under pendent jurisdiction, they should be precluded from bringing the state claims in a subsequent state action.**
  + **Intersystem Administrative Preclusion**
    - **Supreme Court has held that 28 USC §1738 is limited in scope to the judgments of courts and does not apply to decisions of administrative agencies, the trend is to give preclusive effect to such decisions.**
    - **When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had a FULL AND FAIR OPPORTUNITY to litigate, the courts have not hesitated to apply res judicata.** (United States v. Utah Construction & Mining Co.)
  + **Preclusion of International Judgments – requires that…**
    - **The country passing judgment in the first case give full faith and credit to US judgments and**
    - **We feel that they have a “civilized court system”**

**MISCELLANEOUS RULES/STATUTES**

* **LEVEL OF APPELLATE REVIEW**
  + **Constitution, 7th Amendment – “… no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”**
  + **“Abuse of discretion” by the lower court judge is the appropriate standard of review.**
    - **Note: this is also the standard of review of a judge for damages given by a jury**
* **COMMENCING AN ACTION**
  + **FRCP 3 – Only has real relevance for purposes of summary judgment**
* **DISMISSAL OF ACTIONS**
  + **FRCP 41(b) – “Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.”**
* **Constitutional Amendments**
  + **Powers of the States – 10th Amendment**
    - **“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.”**