

CIVIL PROCEDURE OUTLINE

I. PERSONAL JURISDICTION

A. Three Traditional Types of Jurisdiction in State Courts: A court must have power to hear a case and enforce its judgment over the parties in the dispute. There are three ways to “get the defendant into court.” [Pennoyer v. Neff (1877).]

1) **In Personam Jurisdiction:** In Personam Jurisdiction is jurisdiction gained by consent, presence or citizenship.

i) **Consent:** Consent occurs when a party comes into a jurisdiction and essentially consents to be sued there. (Foreign corporation registers in state as a condition of doing business there consents to be sued there). Jurisdiction when domiciled.

ii) **Presence:** Presence means the defendant need be present in the state for the court to have jurisdiction. Jurisdiction when served. The length of time spend in the state is irrelevant, anyone traveling in the state should expect to be sued there.

iii) **Citizenship:** Citizenship means the person is a citizen of the state; state will always have jurisdiction over its citizens.

2) **Quasi in Rem Jurisdiction:** Quasi in Rem Jurisdiction is jurisdiction over the **value** of property; plaintiff must attach (seize) defendant’s property before court can have jurisdiction.

3) **In Rem Jurisdiction:** In Rem Jurisdiction is jurisdiction over the property itself within the state’s limits. In Rem Jurisdiction is jurisdiction over the land, but not the person.

B. Expanding/Modifying the Test for Jurisdiction: The Test for Jurisdiction has been expanded by the Minimum Contacts Test.

1) **Beginnings of Minimum Contacts Test:** A “bridge” developed in between Pennoyer and the minimum contacts test. [Hess v. Pawlowski (1927): Massachusetts state court does have jurisdiction over nonresident of Massachusetts for traffic accident because of defendant’s activity in state.]

i) **Consent:** Use of a forum’s highways demonstrates consent to be sued in that state. [Hess.]

ii) **Special Appearance:** A court has jurisdiction over a party when the party makes a general appearance. If, however, the party is appearing to contest jurisdiction only, then the defendant is not subject to jurisdiction.

2) **Shift to Minimum Contacts Test:** Beginning with International Shoe, the court expanded jurisdiction wherein there was minimum contacts with the state. [International Shoe (1945): Corporation has businessmen in state, enough for jurisdiction. Court will consider 1) extent of business; 2) relatedness of activities to suit; 3) benefits to employees of being in state; 4) convenience; 5) state interest.]

i) **Systematic and Continuous Activity:** The Court required that the corporation have continuous and systematic activity in the state in order to be subject to the minimum contacts test.

– and –

ii) **Lawsuit Arises Out of Activity:** If the lawsuit arises out of the Activity, then the court has jurisdiction.

- **Specific Jurisdiction:** If the act is isolated, the court has jurisdiction over just that act.
- **General Jurisdiction:** If defendant has many contacts and thus much activity, then the defendant can be sued over all matters.

3) **The Minimum Contacts Test:** The Minimum Contacts Test has turned into a two prong test: Minimum contacts occur through the use of a state's Long Arm Statute, often pushed by the state as much as the 14th Amendment allows.

1) **Purposeful Availment:** The prong of personal availment focuses on the activities of the defendant: the **extent** of defendant's commercial activities are considered; if another **business is directly affected**; if defendant enjoys the **benefits of the laws** of the forum state; **foreseeability** and whether the defendant can expect to be hauled into court. [**Gray v. American Radiator (1961)**: Plaintiff injured when water heater exploded, manufactured all over, jurisdiction upheld in Illinois.] [**Burger King Corp (1985)**: Owning Burger Kings in Michigan headquartered in Miami sufficient for Florida jurisdiction.] [**Worldwide Volkswagen (1980)**: Driving VW in Oklahoma not sufficient for jurisdiction in Oklahoma, bought in NY, etc.]

- [**Helicopters:** Higher minimum contacts test is required of a foreign corporation.]

2) **Reasonableness:** In considering reasonableness, the court will consider such factors as whether the **exercise of jurisdiction is reasonable** and whether the **plaintiff's interest** is proper; burden on the defendant, the state's interest in settling the dispute; desire to achieve efficient resolution; shared interest of several states; fairness. [**Keeton v. Hustler Magazine (1984)**: Plaintiff not local but jurisdiction upheld, Hustler sold 10,000 to 15,000 magazines a year in forum state.]

- **Foreign Corporation:** Jurisdiction over foreign corporations may not be reasonable. [**Asahi Metal Industry Co. v. Superior Court (1987)**: Parties could settle dispute in Taiwan or Japan.]

C. Personal Jurisdiction in Federal Courts:

1) **FRCP 4(k)(1)(A) & (D):** A federal courts do not exercise "nationwide jurisdiction." Federal courts can have personal jurisdiction through use of the Long Arm Statute of the forum state in which the federal court is located or through a federal statute.

2) **FRCP 4(k)(2):** If a plaintiff cannot reach a defendant through any individual state's Long Arm Statute, then the plaintiff can reach the defendant in federal court (usually a foreign defendant).

D. Challenging Personal Jurisdiction:

1) **State Court:** Challenging personal jurisdiction in state court varies from state to state. Making a special appearance to challenge jurisdiction is generally not a waiver. Making a general appearance and arguing on the merits is usually not a waiver, either. In some state, a general appearance is a waiver.

2) **Federal Court:** Rule 12 abolishes the difference between general and special appearance.

i) **FRCP 12(b):** One may object to jurisdiction along while also arguing merits.

ii) **FRCP 12(h)(1)(B):** Challenge to jurisdiction must be made at outset, if defendant loses case, defendant must challenge jurisdiction immediately; decision is binding.

II. NOTICE

- 1) **Notice:** Notice requires that the defendant receive proper “notice” of the lawsuit pending.
 - i) **Reasonable Efforts:** In order to provide notice, the plaintiff’s efforts must be reasonably calculated, it must have a reasonable prospect of giving actual notice. [**Mullane v. Central Hanover Bank:** Notifying other bank beneficiaries, “means employed must be such as one desirous of actually informing the absentee might reasonable adopt to accomplish it.”]
 - ii) **Sufficiency of Publication:**
 - **Persons With Known Whereabouts:** Notice of at least first class mail is sufficient.
 - **Persons with Address Unknown:** Publication is sufficient.
 - **Real Estate:** Attachment of Real Estate and publication may be sufficient, people usually are aware of their possessions.
 - iii) **Default Rule:** By default, notice should be given by first class mail. [**Mullane:** “Mails today are recognized as an efficient and inexpensive means of communication.”]
 - iv) **No Notice, Due Process Violation:** If the defendant does not receive notice, defendant can object, earlier judgment will not be binding.
 - v) **If Notice is Constitutional:** If notice is constitutional, and the defendant still does not know, judgment is still binding.

III. SERVICE OF PROCESS

Notice is usually service of a summons and a complaint on the defendant directing the defendant to answer or suffer a default judgment, service should be liberally construed.

- 1) **FRCP 4(d):** Waiver of Service: A plaintiff can request from the defendant that the defendant waive formal service. The defendant has a duty to avoid unnecessary costs of serving the actual summons. If the defendant does not have good cause as to why formal service should not be waived, the defendant will incur the costs of the formal service. Waiver is not a basis for default judgment.
- 2) **FRCP 4(e):** Service Upon Individuals: If the defendant does not waive service of process, then service may be pursuant to the law of the state in which the district court resides or the state in which the service is effect [**FRCP 4(e)(1)**]; OR by personal hand delivery; OR leaving the hand delivery at the defendant’s “usual place of abode” with someone of suitable age. [**FRCP 4(e)(2)**].
 - i) **Immunity from Process:** In some jurisdictions, witnesses, parties or attorneys or anyone else in the state to participate in a legal proceeding is immune from process.
 - ii) **Fraudulent Service:** If the defendant is lured into a jurisdiction with the intent of serving the defendant, the service is fraudulent and invalid. [**Wyman v. Newhouse:** Plaintiff lures defendant to airport to see him “one last time.”] If the defendant is already in the jurisdiction, however, then luring to a specific place to serve process is valid.
- 3) **FRCP 4(h):** Service Upon Corporations: Service can be made on corporations in a manner similar to those prescribed in 4(e)(1); OR on officers or agents authorized by appointment to receive service. [**Hellenic Challenger.**]

IV. FEDERAL SUBJECT MATTER JURISDICTION

Federal Courts can only adjudicate specific types of cases or controversies.

A. Federal Question Jurisdiction: Article III, §2 permits federal courts to hear all cases arising under the laws of the US Constitution. This is adapted in **28 USC § 1331**. In **28 USC § 1337**, federal courts will have original jurisdiction to hear all cases concerning a Congressional Act which regulates commerce. To bring a case in federal court, the personal jurisdiction and subject matter jurisdiction need to be satisfied.

1) **Creation Test:** a suit arises under the law that creates the test.

i) **28 USC § 1331:** Actions with a federal question.

ii) **28 USC § 1337:** Actions arising under a federal law that concerns commerce.

iii) **28 USC § 1442:** Actions involving federal officers.

2) **Well Plead Complaint Rule:** The Federal Question needs to appear on the face of the plaintiff's "well-pleaded" complaint. The plaintiff does not raise a federal question just by anticipating a federal defense question in an answer.

3) **FRCP 12(h)(3): FSMJ Cannot be Waived,** Federal Subject Matter Jurisdiction cannot be waived, however, whenever it appears the federal court does not have jurisdiction, by motion of either party, court shall dismiss action.

4) **State Claims That Turn on Construction of Federal Law, then FSMJ:** If a state-created claim turns on the construction of a federal law, then the federal court has subject matter jurisdiction. [Smith: State claim boiled down to the issue of whether bonds the state invested in were properly issued under federal law, so FSMJ]

5) **Federal Claims That Turn on Construction of State Law, No FSMJ:** If a federal claim actually turns on the construction of state law, then there is no FSMJ. [Merrell Dow: Plaintiff brings several state claims, one federal claim, not enough for FSMJ] [Moore: Alleged violation of federal standard was an element of state law tort claim, thus no FSMJ.]

B. Diversity Jurisdiction:

Other than SMJ, a federal court will hear a case because of the citizenship of the parties.

1) **§ 1332: Diversity of Citizenship:** The Complete Diversity Rule holds that there is no diversity if any plaintiff is a citizen of the same state as any of the defendants. Diversity is decided at the time the case is filed.

i) **Individuals:** The General Rule: Party: 1) can only have one state of domicile; 2) must take up residence with the intention of remaining there; 3) if domicile is changed, the previous one counts until a new one arises [Mas.] 4) domicile unaffected if it changes after claim filed.

• **General Rule for Aliens:** foreigner may be domiciled in US, for issues of diversity, national origin. Marriage to foreigner does not change domicile.

ii) **§ 1332(c)(1): Corporations:** A corporation can be considered a business of multiple states. There are several tests:

• **Nerve Center Test (Main Test):** The locus of the corporate decision-making authority and wherever is the overall control.

• **Operating Assets/Corporate Activities Test:** Where the corporation's activities mainly take place.

• **Total Activities Test: Hybrid of Both Tests:** Looks to all circumstances to determine the Principal Place of Business.

iii) § 1332(c)(2): **Represented Parties:** For representative parties like decedents, use the citizenship of the party, not the representative.

iv) § 1359: **Efforts to Create Diversity:** Parties collusively made or joined in order to

v) **Efforts to Defeat Diversity:** Parties generally have latitude in defeating diversity.

vi) **Exceptions to Diversity:** Even if there is not true diversity, the court may find diversity if the non-diverse parties are just formal or nominal. [**Rose v. Giamatti.**]

C. Jurisdictional Amount:

In addition to federal subject matter jurisdiction and diversity of citizenship, a federal court may hear a case because of the amount at issue.

1) § 1332(b): **Amount in Controversy:** The amount in controversy must be in excess of \$75,000; attorneys fees can be considered as part of the cost. Computed at the date of commencement.

i) **Good Faith and Legal Certain Test:** The claim must be made in good, appearing only as a legal possibility that the claim would actually be less than \$75,000. If it is a legal certainty that the claim will be less than \$75,000, then action dismissed.

ii) **Aggregation of Claims:** Claims can be aggregated to exceed the \$75,000 limit when: 1) all claims of single plaintiff against single defendant; 2) claims of single plaintiff against several defendants when defendants are jointly liable (such as joint property owners, but not joint tortfeasors); 3) claims of several plaintiffs against single defendants if they have a common undivided ownership; 4) as for class actions, courts are split.

D. Federal and State Claims Combined (Supplemental Jurisdiction):

In order to create judicial economy and consistency, a federal court could decide all the issues in one proceeding.

1) **Traditional Supplemental Jurisdiction:** Traditionally, there were two ways to get a state claim in federal court.

i) **Pendent Jurisdiction:** Pendent Jurisdiction occurred when the plaintiff's nonfederal/state claim was "appended" to the federal claim if they arise out of the same transaction.

ii) **Ancillary Jurisdiction:** Ancillary Jurisdiction is the power of the court to hear matters related to the plaintiff's claim by another party even though the court would not regularly be able to hear that claim.

2) § 1367: **Supplemental Jurisdiction by Statute:** Statute codified pendent and ancillary jurisdiction and "nucleus of operative facts." [**Gibbs.**]

i) § 1367(a): **Codification:** Gives federal courts jurisdiction over supplemental claims when they arise from the same case or controversy under Art. III § 2. Thus federal courts limited to power of Constitution. Supplemental claim need not be federal question, just appended to case or controversy that federal court can hear.

ii) **§ 1367(b): Limits on Supplemental Jurisdiction:** When federal subject matter jurisdiction arises solely because of diversity, in a claim by the plaintiff there is no FSMJ against those made parties by impleader, joinder, intervention.

iii) **§ 1367(c): Discretion of Court:** The federal courts will have discretion to hear claims based on supplemental jurisdiction or to dismiss claim based on supplement jurisdiction based on one of four named factors:

E. Removal: Removal is the right of the defendant to “remove” or shift a claim from state court to federal court in the district of the state court. Removal is a one-way street (can’t remove from federal to state level), case remanded to state court, not removed back to state court if removal was wrong. Federal counterclaims and federal defenses do not allow removal, nor the defendant’s omission of a federal claim in the complaint.

1) **§ 1441(a): Federal Question Raised:** If a federal court would have original jurisdiction over that case to begin with, or the plaintiff could have originally brought the claim in federal court, then the defendant can remove the case.

2) **§ 1441(b): Diversity of Citizenship:** If there is complete diversity of citizenship, then the defendant can remove to federal court. This allays fears of local prejudice. There can be no fraudulent joinder by plaintiff to defeat diversity.

3) **§ 1441(c): Separate and Independent Federal Claim:** If the plaintiff brings a separate and independent federal claim, along with a state claim(s), the defendant can remove all of them, thus the plaintiff will not join unrelated state claims to federal claim to prevent removal or “trap” federal claim. Federal Court would have discretion to dismiss, remand nonfederal claims.

F. Attacks on Subject Matter Jurisdiction:

Jurisdictional issues must normally be answered at the outset.

1) **FRCP 12(h)(3): Objection to SMJ:** A defendant can object to subject matter jurisdiction at any time before trial is final.

i) **Direct Attack:** A defendant may attack.

ii) **Collateral Attack:** A collateral attack (an attack on a previous judgment after the judgment has been rendered) is considered differently in subject matter jurisdiction attacks than in personal jurisdiction attacks. Supreme Court generally does not allow collateral attacks in the interest of finality, policy, res judicata. However Court may consider several factors in order to keep a court from overstepping its bounds:

- If lack of jurisdiction over subject matter was clear.
- If determination of jurisdiction depended on a question of law, not of fact.
- If the court was of limited, not general, jurisdiction.
- If question of jurisdiction was not actually litigated.

G. Venue and Forum Non Conveniens:

While jurisdiction considers whether the court has power to hear the case, venue concerns where the actual occurs. Even within one jurisdiction, there can be many places to hold the trial. Venue is a level of protection for the defendant, or conversely, a statutory limitation on where the plaintiff can bring the trial. Federal Court venue can be waived.

1) **State Venue:** Within a state, venue is largely by county.

2) **Federal Venue:** As with personal jurisdiction, more than one state may have proper venue over a suit.

i) § 1391(a): **Diversity Jurisdiction:** When jurisdiction is because of diversity of citizenship, venue can be: (1) where any defendant resides; (2) where substantial part of events occurred; (3) as a fallback, any district in which any defendant is subject to personal jurisdiction.

ii) § 1391(b): **Federal Question Jurisdiction:** When jurisdiction is because of a federal question, venue can be: (1) where any defendant resides; (2) where substantial part of events occurred; (3) as a fallback, any district in which any defendant is subject to personal jurisdiction.

iii) § 1391(c): **When Defendant is a Corporation:** When the defendant is a corporation, venue can be according to any judicial district in which the defendant corporation is subject to personal jurisdiction; if multiple districts, venue shall be where contacts are sufficient and most.

3) **FRCP 12(b): Objection to Venue:** To object to venue, the defendant must raise it in the pleadings.

4) **FRCP 12(h)(1): Improper Venue:** Improper venue must be raised in the pleadings or it is waived.

5) § 1404(a): **Change of Venue:** If the claim could have been brought in a different venue, then for the convenience of the parties (a lesser showing of inconvenience than forum non conveniens) and in the interests of justice, venue may be changed. However, to prevent the defendant from manipulating to change venue from a place of proper venue and jurisdiction to another place proper venue and jurisdiction, the law to the transferor court will apply.

6) § 1406: **Remedying Incorrect Venue:** When venue is improper, the district court shall either dismiss the case or transfer it to a district where it could have been brought.

7) **Forum Non Conveniens (Inappropriate Forum):** Even when jurisdiction and venue are proper, a plaintiff's choice of location for the case may be grossly inconvenient.

i) **Balance Interests:** Courts will balance the interests of allowing the case to be adjudicated in the plaintiff's chosen forum. They will consider effect on the plaintiff, defendant, witnesses, local interest in deciding local controversies, appropriateness. Unless balances is strongly against plaintiffs, plaintiff's choice of forum will be dismissed.

ii) **Foreign Plaintiffs:** A foreign plaintiff's choice will be given little deference; US Courts are concerned with preventing the US from becoming a litigation magnet. [**Piper v. Reyno.**]

V. THE ERIE DOCTRINE – ASCERTAINING THE APPLICABLE LAW

A. The Erie Doctrine: The Erie Doctrine concerns the question of whether to apply state law or federal law in a federal courts. [**Erie Railroad v. Tompkins (1938):** In federal court case, question of whether to apply federal "general" common law principles or to use the common law of the state in which the case was tried, federal court should follow applicable common law principles of state in absence of Congressional statute.] Court wanted to avoid problems of **Black & White Taxi Cab Co.**

1) **No General Federal Common Law:** There is no federal common law, except in unusual circumstances in which there is no federal statute and state's law may not apply.

- 2) **Goals of Erie Doctrine:** The Erie Doctrine is designed to a) curtail forum shopping; b) bring uniformity between federal and state courts in the same district.

B. Federal v. State Law in Diversity Cases:

The Rule of Erie is that in a federal court, state substantive law and federal procedural law govern.

The lines are not always clearly drawn between the two, however.

- 1) **Outcome Determination Test:** The goal of the Outcome Determination Test is to ensure: a) that the outcome would be the same in either federal or state court; b) that litigants have another tribunal, not another body of law. [**Guaranty Trust v. York (1945):** Decision between whether to apply state's statute of limitations or federal rule of "laches" (relaxed statute of limitations), decision is for state's SOL because it is of a substantive nature.]
- 2) **Interest Balancing Test:** The goal of the Balancing Test is to [**Byrd v. Blue Ridge Electric Cooperative (1958):** Between use of federal rule requiring judge to decide status of an employee and state's rule requiring jury to decide, Court held for judge decision, created no real rule but used balancing test.]
 - i) **State's "State" Substantive Interest:** The court will look to whether the state's procedural practice is bound up in the state's substantive right. [**Byrd:** State's interest minimal.]
 - ii) **Federal Substantive Interest:** The court will look to the interest in maintaining the court's smooth functioning, etc.
 - iii) **Outcome Effect:** As in York, the court will look to make sure that following the federal practice will not affect the outcome of the suit.
- 3) **Stabilizing the Erie Doctrine:** The Tests evolved into guidance by the Rules Enabling Act.
 - i) **§ 2072: The Rules Enabling Act:** Direct Collision Test: Under the Rules Enabling Act, when a federal rule speaks to the issue, it takes precedent over the issue. However, the FRCP shall not: a) abridge, enlarge or modify and substantive right;" b) violate the Enabling Act; c) conflict with the Constitution. The Test concerns the question: Does the FRCP really deal with Procedure? [**Hanna v. Plumer:** Relaxes strain of Erie.] Since 1938, the Supreme Court has never held an FRCP violates the Enabling Act.
 - ii) **FRCP 4:** Service of Process is read broadly so the rule will prevail.
 - iii) **FRCP 3:** In a state based cause of action, state Sol applies. In a federal question jurisdiction, Rule 3 applies.

C. Ascertaining The State's Substantive Law:

Because diversity cases by definition involve parties from different states, the federal court must decide which state's law to apply. The function of the federal court is to decide what the law **is**, not what it **ought** to be.

- 1) **Following the Law:** In following the state law, the federal court will decide based on what the state's supreme court would say.
 - i) **State Supreme Court:** If the state supreme court has decided a similar issue, the federal court's job is easy.
 - ii) **State Intermediate Court:** If the state supreme court has not decided such an issue, the federal court might follow an intermediate court.

iii) **No State Court Decision:** If no state court decision exists on a similar matter, the federal court will look to prior federal district court diversity cases,

iv) **State Decision Old:** If the state decision is old, the federal court may conclude that the state supreme court would reverse the decision, and federal court would lead the way.

v) **Certify to State Supreme Court:** The federal court may certify the case to the State Supreme Court so the state can resolve the issue.

2) **Conflict of Laws:** The Rule is that the federal court will apply the law of the state in which it sits. Inherent in this is the rule that the court will follow the conflict of law rules of that state. Thus the federal court will do what the state law says, even if that means following the states' choice of law rules which require following even some other state.

VI. PLEADING

A. The Complaint and the Motion to Dismiss: A civil action (in most jurisdictions) is commenced by the filing of a complaint.

1) **FRCP 8: Requirements of the Complaint:** Basic notice to other party is required. A pleading with averments need only be "a short and plain statement" of the grounds on which jurisdiction depends and the claim for which the plaintiff seeks relief. [**Dioguardi:** Lenient approach allows half-literate complaint.]

i) **Not a Requirement:** Facts sufficient to constitute a cause of action are not required.

2) **Left to Discovery:** The purpose of discovery is to determine the necessary facts, identify baseless claims, narrow the issues.

3) **Burden of Pleading:** Generally, party who has burden of production has the burden of pleading.

4) **Heightened Pleading Standards:** Heightened Pleading standards exist for civil rights issues and securities issues so as to avoid frivolous suits.

5) **FRCP 9(b): Pleading Special Matters:** For special matters such as fraud and "special damage" they must be stated with particularity/specifically.

B. The Answer: In an answer, the defendant needs to do two things:

1) **FRCP 8(d): Admit or Deny Allegations:** The defendant needs to admit or deny the allegations. Failure to deny can be considered an admission.

i) **FRCP 8(b): Specific Denials:** If the defendant admits some allegations while admitting others, he must make specific denials. Sometimes a general denial may not meet the substance of the averments and may be treated as admission.

2) **FRCP 8(c): Make Affirmative Defenses:** The defendant must make affirmative defenses, the list of affirmative defenses is not exhaustive. The purpose of the affirmative defenses is so that the plaintiff is not surprised later in trial.

i) **FRCP 12(b): Defenses Pled by Motion:** Some defenses must be pleaded in a motion; if they are not pleaded in a motion, they are waived.

C. Amendments: By amending their pleading, either party may alter or expand the case or controversy.

1) **FRCP 15(a): Amendments Prior to Trial**: Either party may amend the pleading one time before a responsive pleading is served by the other party; OR if no responsive pleading is permitted, the party may the party may amend within twenty days after it is served.

i) **After First Amending**: After the party amends, the only other way either party may amend is by leave of court; other side's permission; OR when "justice so requires."

2) **FRCP 15(b): Amendments at Trial**: After the trial has begun, the court may favor substance over form, thus promoting resolution of case on merits so amendment will reflect actual litigation. FRCP allows parties to amend based upon unexpected evidence. Amendments must be relevant and reasonably foreseeable to the litigation. Failure to object to amendments is consent. Basic question: does amendment prejudice other party?

3) **FRCP 15(c): Relation Back Doctrine**: If the plaintiff seeks to amend the complaint after the statute of limitations would have run on the claim, the plaintiff can amend the complaint if it "relates back" to the date of filing of the original complaint. The amended claim will be allowed if the claim in the amended pleading (2) arose out of the same **conduct, transaction or occurrence** set forth in the original pleading. (3) If adding a new party, part (2) must be satisfied and new party was aware of the action within 120 days of the filing, knew or should have known, was not named by mistake.

4) **FRCP 15(d): Supplemental Pleadings**: Supplement pleadings may be added to cover events which occur after the original pleading.

D. Sanctions: If a party violates a certain requirement, the court **may** impose sanctions. Sanctions must give rise to level of contempt.

1) **FRCP 11(a): Signature**: Every pleading must be signed by an attorney or the person himself if the party is not represented.

2) **FRCP 11(b): Representation**: By signing the pleading, the party makes certain promises. Sanctions will not be imposed on the plaintiff for a (b)(2) violation, just attorney.

3) **FRCP 11(c): Nature of Sanctions**: An attorney will have a 21 day safe harbor after the other party moves for sanctions (based on an 11(b) violation); giving the attorney time to amend "mistake."

VII. JOINDER

A. Joinder of Claims by Plaintiff: There are rules for joining claims.

1) **Rule 18(a): Joinder of Claims**: A party may as many claims as they have, either independent or alternate, against the opposing party. So regardless of subject matter, there are no restrictions for the joinder of claims.

i) **Limits by Res Judicata**: The Principle of Res Judicata prohibits the splitting of a single cause of action into two or more suits often compels the plaintiff to join all related claims.

ii) **FRCP 20(a): Limits on Multiple Parties**: While there are no restrictions on the joinder of claims by a single party against a single party, thus the joinder of claims in multi-party cases is limited to those for which there is an independent bases for subject

matter jurisdiction (at least one of the claims against each party must “arise out of the same transactions” and involve a “common question of law or fact.”

iii) **FRCP 20(b), 42(b): Limits: Judges Discretion on Joinder of Claims:** The judge has discretion to split the issues into separate trials if necessary.

iv) **FRCP 12(h), FRCP 21: Misjoinder:** Misjoinder must be raised at start of litigation, otherwise the defect is waived. Court may raise it on its own, however, it is not grounds for dismissal.

B. Counterclaims: As part of the defendant’s answer, the defendant may raise claims against the plaintiff.

1) **FRCP 13(a): Compulsory Counterclaims:** If there is a logical relationship between plaintiff’s claim and a possible counterclaim by the defendant against the plaintiff, arising out of the same transaction or occurrence, the counterclaim is compulsory and must be brought then or it will be barred. (Same transaction or occurrence means: common issues of fact or law, effect of res judicata, use of same evidence, logical relationship between claim and counterclaim).

i) **Third Parties:** Third parties over whom the court does not have jurisdiction are not required.

ii) **Supplemental Jurisdiction:** If the counterclaim would be acquired by supplemental jurisdiction, it may be brought, but does not need to be.

iii) **Res Judicata:** Res Judicata applies on each separate claim, to avoid extra trials, etc.

2) **FRCP 13(b): Permissive Counterclaims:** The defendant is also allowed to make other counterclaims that do not rise out of the same transaction or occurrence. Thus if the plaintiff’s claim is due to a federal question, the defendant’s counterclaim must also be due to a federal question or other independent ground of federal jurisdiction.

C. Cross-Claims: A cross-claim is a defendant’s claim against a co-defendant.

1) **FRCP 13(g): Same Transaction/Occurrence:** One party’s suit against another party can only be brought if the claim arises out of the same transaction or occurrence.

2) **FRCP 13(h): Addition of New Parties in Cross-Claim:** The basic cross-claim is against a co-defendant, however, the defendant may bring in another party. The cross-claimant’s claim must grow out of the same transaction, and must be actual damages, it cannot be for indemnification.

3) **Cross-Claims Between Co-Plaintiffs:** Co-Plaintiffs may bring cross-claims against each other generally only if the defendant counterclaims that plaintiff.

D. Impleader: If the defendant (as “third party plaintiff”) may have a right to indemnity by a third party (as “third party defendant”), the defendant may implead, or bring in a third party, in case “third party plaintiff” loses to the main plaintiff, “third party defendant” may be liable to “third party plaintiff.”

1) **FRCP 14(a): Third Party Who May be Liable:** Allows third party plaintiff to bring claim against third party defendant. In doing so, third party plaintiff may make claim against plaintiff, plaintiff may make claim against third party defendant.

i) **§ 1367(b): Limits on Supplemental Jurisdiction:** In diversity suits, the court does not have supplemental jurisdiction over the plaintiff’s claim against the third party defendant. The court only has supplemental jurisdiction over the defendant’s claim for injuries against the third party defendant.

E. Interpleader: Interpleader is a very limited use device that allows a party (“stakeholder”) against whom many claims are asserted to join all of the plaintiffs so as to avoid a multiplicity of suits and judgment.

1) **FRCP 4(k)(C)(1), FRCP 22: FRCP Interpleader**: Interpleader only in a diversity case, stricter rules, basically exists for those who do not meet requirements of statutory interpleader.

2) § 1335: **Statutory Interpleader**: Essentially, through statutory method, jurisdictional limits are broadened; a) minimum diversity is allowed, so there does not need to be complete diversity; b) the amount in controversy need only be \$500 or more; c) § 2361: Service of process is nationwide; d) § 1397: venue can be any district where claimant resided.

F. Necessary and Indispensable Parties: Generally, parties who are necessary and indispensable to resolution of the dispute must be joined. The court focuses on the practical consequences of a party’s absence from the court. A **necessary** party is one the court should join, but if the court cannot, the court could proceed. An **indispensable** party is one that the court must join, otherwise there is no suit.

i) **FRCP 19(a): Necessary Parties When Joinder is Feasible**: “Necessariness.” A party with an interest in the pending action shall be joined as a party if: (1) in absence of party complete relief cannot be accorded; OR (2)(i) absence of party would be substantially prejudicial to that party OR (2)(ii) any person already a party would be subjected to inconsistent obligations.

ii) **FRCP 19(b): Joinder of Party Not Feasible**: If the joinder of the “necessary” party is not feasible (because the court does not have jurisdiction over the party) then the court will decide “in equity and good conscience” if the action should proceed without the “indispensable” party. The court will consider several practical considerations: 1) the extent to which any judgment rendered would be prejudicial to the interests of all parties; 2) extent to which prejudice could be lessened; 3) adequacy of judgment in person’s absence; 4) whether plaintiff will have an adequate remedy if action is dismissed for nonjoinder.

G. Intervention: Intervention allows a nonparty with an interest in the suit to join the suit – in a timely manner – when not brought in by original plaintiffs or defendants. The goals of intervention are to avoid inconsistency of results or multiplicity of litigation, balanced however with plaintiff’s ability to be “master of his action.” There are two kinds of intervention:

1) **FRCP 24(a): Intervention of Right**: A applicant shall be permitted to intervene when (1) a federal statute confers an unconditional right to intervene (§ 2403); (2) intervenor claims an interest relating to the property or transaction, absence may impede intervenor’s rights.

2) **FRCP 24(b): Permissive Intervention**: A nonparty may intervene, even if no “intervention of right” when (1) a federal statute confers a conditional right to intervene; (2) a question of law or fact in common with the main action is part of the applicant’s claim or defense.

i) **No Intervention If**: The court will not grant intervention if it causes an undue delay or if it will prejudice rights of original parties.

ii) **Judgment Binding on Intervenor**: Judgment is binding on the intervenor as if they had been party.

VIII. CLASS ACTIONS

A. Class Certification: Soon after the commencement of a class action, the “class” must be certified. To be certified as a class action, the “class” must past certain requirements.

1) **FRCP 23(a): Class Action Prerequisites**: The prerequisites for a class action suit are as follows: (1) **Numerosity**: There are so many people to be represented that joinder of all members of the class is impractical or extremely difficult; (2) **Commonality**: There are common questions

of law or fact to the class, the questions do not have to be identical and some divergence is allowed; (3) **Typicality**: The claims or defenses of the representative must be typical of the claims or defenses as the other class member. (4) **Representativeness**: The representative will adequately and fairly protect the interests of the class, vigorously prosecuting the interests of the class through adequate counsel.

2) **FRCP 23(b): Grounds for Class Actions**: The class action may be warranted on anyone of the following grounds:

(1): **Prejudice From Separate Actions**: A class action is permissible if separate actions would result in: (A): Incompatible standards of conduct for defendant through inconsistent adjudications; OR (B): Substantially impair the interests of other members of the class.

- **No Notice Required** or left to discretion of court.
- **Parties Cannot Opt Out**

(2): **Equitable Relief Sought as to Rights Held in Common**: A class action is permissible if relief to one plaintiff necessarily affects the whole class. Essentially, declaratory of injunctive relief would benefit the class as a whole.

- **Parties Cannot Opt Out**

(3): **Common Predominant Question: The Catch All Test**: Questions of law or fact common to the class predominate over questions affecting only individual members and a class action is the superior means to adjudicate the controversy. Court considers (A) Interest of individual members; (B) Nature and extent of any litigation involving the same controversy; (C) Desirability of consolidating all claims; (D) Difficulties of managing class action. [**Casey v. PanAm**: Court must compare relative importance of common questions and individual questions, not just number.]

- **Notice Required** [**Eisen**: Individual Notice required to all member who can be identified through reasonable effort.]
- **Parties Can Opt Out**

3) **FRCP(c)(1): Certification**: After commencement of an alleged class suit, a hearing should be held to determine whether the action should proceed as a class suit.

B. Due Process: Due Process is satisfied and the judgment will be binding on all class members when the interest of the class is adequately represented during the suit. Though, parties are not bound by decisions in which they are not a party, the exception is class action suits where res judicata applies to all members of the suit. However, exception to exception is that member of class not bound if there is no due process.

1) **Adequacy of Representation**:

i) **Two Part Test**: There is a two-part test to challenge the adequacy of representation: 1) Did the first court correctly determine that the representative would adequately represent the class?; 2) After the suit, did the representative adequately protect the interests of the class? There cannot be conflict between members of class for there to be adequate representation.

ii) **Third Party Challenges**: It is the burden of the parties in the litigation to use mandatory joinder to bring 3rd parties in.

2) **FRCP 23(c)(2): Due Process Notice**: Under a FRCP 23(b)(3) class action, notice is required.

C. Mass Tort Class Actions: Generally, courts have been reluctant to apply class action device to mass tort claims because all the plaintiffs have individual interests, are seeking differing damages. [**Amchem**: Court certifies class action for asbestos mass tort claim, anyway.]

D. Jurisdictional Complications: There can be jurisdiction in the class action suit because of either Federal Subject Matter Jurisdiction or personal Jurisdiction.

1) **Federal Subject Matter Jurisdiction**: Federal court may have by FSMJ.

i) **Diversity of Citizenship**: Accommodates Plaintiff: Diversity of Citizenship is based upon the named parties only. The class members citizenship is irrelevant, only the representative's is important.

ii) **Amount in Controversy**: Accommodates Defendants: Courts are currently split, some say that the every member's claim need to be more than \$75,000, while others say representative's claim need be \$75,000 and the other claims will come under supplemental jurisdiction.

2) **Personal Jurisdiction**: A state court may have jurisdiction if the parties in the class has the opportunity to opt out but chose not to do so.

IX. DISCOVERY

A. General Scope of Discovery: According to the Supreme Court, discovery is available only with regard to matter "relevant to the claim or defense of any party."

1) **FRCP 26(b)(1): In General**: The information sought must be reasonably calculated to lead to admissible evidence. This is broader than admissible. Party can get information even though it is not admissible at trial. In suing for breach of K, party can not get net worth. In suing for tort, possibly.

2) **FRCP 26(b)(2): Limitations**: Court may make limitations on the number of depositions or interrogatories if: (i) discovery is unreasonably cumulative; (ii) the party has already had opportunity for discovery; (iii) discovery is unduly burdensome and those burdens outweigh any likely benefit.

1) **FRCP 26(c): Protective Order**: A party can get a protective order to protect privacy of parties or information.

3) **FRCP 26(d): Timing and Sequence of Discovery**: Methods of discovery may be used in any sequence, at judicial discretion, for the convenience of witnesses, parties, in the interest of justice and in accordance with **FRCP 26(f)** in which parties meet to lay out discovery plans.

B. Discovery Devices:

1) **FRCP 30: Oral Depositions**: A deposition is an examination of a witness under oath in the presence of a court reporter. These can be used to get info from the other party. **FRCP 31** concerns written depositions. Use of depositions can lead to greater judicial efficiency when deposing a witness is more cost effective for the case or than in having a witness, or submitting and re-submitting interrogatories.

2) **FRCP 33: Interrogatories**: Interrogatories may sometimes be a better discovery tool than a deposition. An interrogatory is form of written questions from one party to another requiring written responses in return. Interrogatories: a) find facts; b) find issues in contention; c) can avoid unnecessary testimony and wasteful preparation. Interrogatories can only be addressed to a party. The court may grant an extension of time, etc.

3) **FRCP 34: Production of Things**: The court construes a person's control over things liberally, "with reasonable particularity." The party is required to produce the thing if they are in

possession, custody or control. Things must be turned over in a reasonably usable form and in the order in which they are kept during the ordinary course of business. If they cannot have person do it, they can use **FRCP(c)(1)**.

4) **FRCP 35: Physical and Mental Examinations**: In order to get a physical or mental examination; a) the physical or mental condition of a person must be in controversy; b) there must be good cause needing a higher showing of cause than with other motions; c) examinations are limited to a party or person to the controversy, thus an eye witness cannot be subject to a physical or mental examination.

5) **FRCP 36: Requests for Admissions**: A request for admission is a written request for admission or denial of a fact and helps narrow the issue; court can compel a response; response is conclusive unless later withdrawn and cannot be contradicted at trial; party responds under oath; party can object to a request.

C. Mandatory Disclosure:

1) **FRCP 26(a)(1): Mandatory Disclosures**: At three different times the party must produce evidence, even if it is not requested. This is very controversial.

D. Work Product Privilege:

1) **FRCP 26(b)(3): Work Product Privilege/Trial Preparation**: Certain material is off-limits. Only way to get is if: 1) There's a substantial need; 2) The information is not otherwise available. The goal of this rule is: a) **protection** of the individual's privacy and attorney's legal conclusions, thoughts, mental impressions, theories; b) **preventing free-riders** by discouraging opposing counsel from not doing any work and then relying on the other counsel; c) **alternatives** could be used such as interrogatories, etc.

E. Sanctions: Sanctions may be made due to two factors.

1) **FRCP 37: Gross Negligence**: Gross negligence by an attorney in failure to obey an order compelling discovery can justify sanctions. Courts take sanctions seriously to curb attorney who drag out litigation or run up legal fees.

X. ADJUDICATION WITHOUT TRIAL

A. Summary Judgment:

1) **FRCP 56: Summary Judgment**: The purpose of summary judgment is to screen out cases that do not need a trial. The party must show a) that there is no dispute as to material fact; b) they are entitled to judgment as a matter of law. Courts take great pains to favor nonmoving party. If summary judgment granted, party gets Judgment as a Matter of Law.

i) **Burden of Proof**: The moving party has the burden to show that there is no factual dispute, even if nonmoving party would bear burden of persuasion during trial. The nonmoving party just need show that there is an issue.

ii) **FRCP 56(c): Duty to Respond**: The nonmoving party only has a duty to respond when the moving party has established facts

B. Default Judgment:

1) **FRCP 55: Default Judgment**: Default judgment operates to punish the defendant. Default judgment is not available when one party has appeared at trial but other fails to appear. Rule authorizes default when a party fails to plead or otherwise defend.

- i) **FRCP 60(b)(1), (4): Mistake/Void:** Case may come alive again for various reasons.

XI. THE TRIAL STAGE

A. Trial by Jury:

1) **The Right to a Jury Trial:** There almost always is a right to a jury trial, unless the case is in equity or if there is a complexity exception.

- i) **FRCP 42(b): Discretion of Court:** The Discretion of the court is very limited and should be exercised to preserve the right to a jury trial;

- ii) **Determining Right to a Jury Trial:** To determine the right to a jury trial, court looks at how case would have been brought in 1791; based upon 7th Amendment; judge may decide an equitable claim first; type of relief sought may also be determinative (declarative, specific, compensatory).

- iii) **FRCP 48: Number of Jurors:** The number of jurors must be between 6 and 12, unless parties otherwise agree, verdict must be unanimous.

2) **Jury Selection:** Evidence of bias or prejudice may disqualify a juror. The bias must affect the juror to such a degree that it renders them incapable of impartiality.

- i) **Voir Dire:** Challenges can be made, but only for good cause.

- ii) **§ 1863(b)(5)(A): Excusal from Jury Service:** A juror is exempt from service in the cases of undue hardship and extreme inconvenience.

B. Judicial Control Over Jury Decision:

1) **The Province of the Jury:** The jury decides facts, judge decides law. In a dispute as to who should answer a particular question – judge or jury – it is best left up to judge as lone judicial actor. Court must also balance need of letting society decide.

2) **FRCP 49: Jury Misconduct:** When a jury verdict is ambiguous, court may throw it out or give interrogatories, which may be preferred so as to know why jury decided as such.

- i) **Award Averaging :** Award Averaging is grounds for reversal. [Kimble.]

3) **Judicial Power to Override Jury:**

- i) **FRCP 50(a): JMOL (formerly was Directed Verdict):** The judge has the power to take the case away from the jury if, in light most favorable to nonmoving party, there is no evidence on which a reasonable person could conclude against the moving party. Judges usually do not like to grant, if reversed on appeal then there will be a re-trial.

- ii) **FRCP 50(b): Renewed JMOL (formerly was JNOV):** Jury returns verdict, judgment is entered, loser brings renewed JMOL.

- iii) **FRCP 59(a): Motion for New Trial:** Judge may grant a new trial if there is a concern about a possible error. Less radical than JMOL. Verdict may be set aside and new trial granted if verdict is against the weight of the evidence or if there was no reason for JMOL.

• **Additur**: Judge will grant plaintiff's motion for a new trial unless **defendant accepts an increase** in the award.

• **Remittitur**: Judge will grant defendant's motion for a new trial unless plaintiff accepts a decrease in the award.

C. Extraordinary Relief from Judgment:

1) **FRCP 60(b)**: Judge may grant if concerned about prejudice to opposing party, length of delay and impact on proceedings, reason for delay, whether moving party acted in good faith.

XII. THE BINDING EFFECT OF DECISIONS

A. Res Judicata (Claim Preclusion): Claim preclusion prevents a plaintiff from re-asserting a claim that it **did bring or could have brought** and it saves parties from having to relitigate claim again and again.

1) **Judgment on the Merits** : In order to have preclusive effect, the judgment must have been on the merits. It must be a final, valid decision. The parties in the second suit must be identical to the parties in the first suit and claim in second suit must have been properly concluded in first suit. Plaintiff cannot split claims and wait; fairness may overlook claim preclusion. Plaintiff should present all legal theories in first suit, if law changes after first decision, tough, plaintiff should have appealed.

i) **Transactional Test**: Second claim is precluded if it was part of same transaction as previously litigated claim.

B. Collateral Estoppel (Issue Preclusion): Issue preclusion is narrower than res judicata and prevents a plaintiff from raising an issue that actually was litigated in a previous suit between the two parties and was "essential to the judgment."

1) **Collateral Estoppel Test** :

i) Previous case must have ended in valid judgment on the merit.

ii) Same issue was actually litigated and determined in the first case.

iii) Issue was essential to the first case.

iv) Collateral Estoppel can only be asserted against someone who was a party in the first case.

v) No offensive collateral estoppel: courts generally do not like it when the plaintiff is the party asserting collateral estoppel, but instead, the defendant, "Non mutual defensive collateral estoppel."