

# Civil Procedure Outline

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## Introduction: Once Around the Track

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### 1. An Initial Overview and a Little Bit of History

- 2 distinguishing characteristics of US system
  - Adversary system
    - Canada, UK and Australia.
    - Different from Civil law systems
    - Parties has control of the litigation
    - Lawyers make the necessary investigation
    - Lawyers need to frame the legal grounds of the case
    - All of the steps are directed in a final single presentation of the case: the trial.
    - Pre-trial stage: getting the case ready for trial.
    - Decision makers: judge or jury. Reason for juries: participatory democracy.
    - Judge has a passive role in compare to a civil trial.
      - Judges are on charge of legal issues (as general rule).
      - In jury trials, the judge will instruct the jurors about the law.
      - Judge controls the litigation.
      - Judge does not develop legal theories for a case.
      - Monitors evidence. New development: judge may ask additional questions if he is not satisfied.
    - Both parties can agree on avoiding a jury trial, but each party has the right to a jury trial. It is waivable right.
    - Premise of the adversarial system: Each party will discover or present the evidence that favor its position.
      - Critic: Rely heavily in lawyers and is unfair if access to legal representations is unequal.
  - Federal system – 98% of litigation in state courts, jurisdiction sometimes exclusive to one or overlapping. Art. III, Sec. 2 defines scope of federal courts
    - Dual system of courts and laws: one body of federal law and 50 different bodies of state law.
    - Every state has its own judicial system.
    - Federal courts set up by the constitution and the congress and the cases the know are limited (art. III Sec. 2).
    - There is at least one District Court in every state.
    - There are 11 circuits plus the circuit of Columbia.
    - In cases involving federal law (original jurisdiction or diversity) it is possible to ask for a removal: 28 USC sec. 1441. Procedure 1446: you file a notice for removal and the case goes to the federal court. Motion to remand.

### 2. Stages of a Lawsuit

## a. Power of the Tribunal Over the Subject Matter of the Suit (Subject Matter Jurisdiction)

- Purposes of diversity juris.
  - Prevents bias against outsider Ds
  - Democratic participation theory
    - As they work, the rules don't track these concerns well.
- Subject matter juris. objections can be raised almost anytime – on appeal, sua sponte, after a default, even sometimes after a litigated judgment. Why?
  - Goes to the heart of the competency of the court
    - 28 USC sec. 1132 (c) (1): a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business.
    - Citizenship is defined by this provision but it doesn't address where a corporation can be sued. This is just to establish whether there is diversity (maximum diversity).
      - Hypo: P Germany v. D England. This case is not included in sec 1332, considering art. 3 of the Constitution.
    - Definition of citizenship (article 13 of the Constitution): where an individual resides and intend to reside.
    - Why should we have diversity?
      - The first inclusion of diversity was in 1789 to facilitate the interstate commerce.
      - 1875: Federal law.
        - Reasons:
          - Avoid prejudice against a non-local litigant
            - Legislator: unfair law.
            - Judges elected: interpretation of the common law against the outsider.
            - Local bias
    - 28 USC: 1652: The laws of the several states, except where the Constitution or treaties 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.
    - 1938: great procedural revolution (case XXX). The federal court applies their notion of the common law and their rules of procedure.
    - Federal courts shall resolve the case in the way their think the highest court of the state would decide it.
      - Case Rose v. Giamatti
        - What if Mr. Giamatti wins on the merits? Plaintiff may bring this issue on appeal.
        - Rose lost: what if plaintiff intends to bring a second case? General rule: res judicata.
        - Collateral arrack: Can the P bring the issue of subject matter jurisdiction in a second case? Allocation of power vs. finality. There is no a clear answer.
        - It might come up in the enforcement of the decision.
  - NYT v. Sullivan

- Sullivan brought suit before the ALA State Court.
  - \* Once you get a case in a federal court there is a way to move it into another federal court. 28 U.S. 1404 (transfer statute).
  - The equivalent to a “motion to quash” 12 (b) 1
  - NYT claims that Alabama State Court has not personal juris over it.
  - Why P served the Secretary of State? Because it was necessary to notify the D within the limits of the state.
  - Petition 6 NYT: Lack of jurisdiction. Waiver theory (P 30-31). Based on the referred waiver, the Supreme Court did not review the potential trial court’s lack of jurisdiction.
- If you have a good explanation to exercise jurisdiction over the defendant, then the court could serve him anywhere. Thus, you can serve the defendant if:
    - He’s present in the state + serve → any claim
    - He’s domiciled in the state.
  - He’s doing business. → Not general jurisdiction
- The notion that service cannot go out of the state is not longer valid, though you need a statute.
  - Jurisdiction is connected with the Constitution: due process clause.
  - First theory: arises out of business in the state.
    - Special appearance (in federal courts): Rule 12 b (2). Every state allows you to do this, to say that court has no authority over the defendant.
    - General appearance.
    - Where is a corporation found? Where are they physically present? You need to look at the activities of the corporation. Systematic and continuous presence is required.
    - If a foreign corporation does enough business in the U.S., it can be sued in any claim, i.e.: If you have an office here (airlines). England has the same rule, but they require an office.

b. Power over the Person of the Defendant (Personal Jurisdiction)

- Elements: notice and power.
- Notice - service under FRCP 4
- Since P bringing the lawsuit, logical that burden is on him to go somewhere where there is power over the D.
- Personal juris., unlike subject matter, is waivable

c. Pleadings and Certification

- **Rule 12(b)** defenses – (1) lack of subject matter juris., (2) lack of personal juris., (3) improper venue, (4) insufficient process, (5) insufficient service, (6) failure to state a claim upon which relief can be granted, (7) failure to join a rule 19 party
  - if you make a Rule 12 motion, you have to make them all at once (12(g))
    - however, certain “durable defenses” – failure to join Rule 19, 1(2b)(6) – can be made later in the pleadings

- And, of course, lack of subject matter juris. can be raised at any time
- **Rule 8** – General Rules of Pleading
  - Federal rules liberal in allowing amendments to the complaint
- Purposes of the pleading system:
  - Give notice
  - Set out factual and legal issues – narrow down to ones that are contested
  - Efficiency – dispose of non-meritorious cases w/o trial
- The Answer
  - Must respond to all the allegations in the complaint. Three choices: admit, deny, claim are without knowledge
  - Can also: raise affirmative defenses, make counterclaims, or make 12b motions
- **Rule 15** – Amended and Supplemental Pleadings
  - Can basically do anything you could’ve done in the beginning, but is at the discretion of the court
- Pros and cons of Rule 11
  - pro: counteracts loose pleading requirements to deter frivolous suits
  - con: can end up dismissing meritorious claims because of lawyer misconduct (as in *Garr* – though without prejudice)
  - con: encourages more pleadings, a “battle over fees” (the Rule 11 penalty)
  - con: encourages distrust in attorney-client relationship
- Twombly case: Brings two new issues:
  - 1. We don’t have to take conclusions as true.
  - 2. Plausibility requirement: new requirement.

#### d. Pretrial Discovery

- Means for parties to obtain information from each other and third parties
- Purposes:
  - Get all info out so that cases are decided on merits and not investigatory ability
  - Trial by surprise is unfair
  - Narrow contested issues
  - Supplements limited pleading
- Detriments:
  - Hugely burdensome and expensive
  - Imposes duties on third parties
    - Provides another incentive why plaintiffs love to litigate in US
- **Hickman** and 26(b)(3) – “work product” protection except in exceptional circumstances: a showing of “substantial need” and “undue burden” to get it yourself
- Sanctions: Discovery involving foreign parties
  - **Societe Nationale v. U.S Dist. Ct.**
    - Hague convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague or Evidence Convention”)
    - Q: to which extent a federal district court must employ the procedures set forth in the convention when litigants seek for answers to interrogatories, the production of docs and admission from a French adversary over whom the court has personal jurisdiction.
    - Petitioners: French corporations (designing, manufacturing and marketing aircrafts).
    - 1980: crash in Iowa, injuring the pilot and a passenger.

- Plaintiffs brought separate actions before District Court of Iowa, alleging that petitioners manufactured and sold a defective plane. Negligence and breach of warranty.
- Cases were consolidated. No objection to jurisdiction.
- P served a doc request, an interrogatory and a request for admissions. D: motion for protective order, based that they were French corporations and discovery sought can only be found in a foreign State: France. Petitioners state that procedure to be followed were set forth in the Convention and that, under French law, they are not obligated to respond discovery request that don't comply with the Convention.
- Magistrate rejected the motion based on: (i) the French rule was devise to impede enforcement of US antitrust laws and it has been not strictly enforced; (ii) balanced interest in the protection of the US citizens from harmful foreign products and France's interest in protecting its citizens from intrusive foreign discovery., concluding that the former is most relevant, especially considering that it will take place in the U.S.
- Court of Appeals: when district court has jurisdiction over a foreign litigant the Hague Convention dies bit apply to the production of evidence... even though the documents and information sought may be physically located within the territory od a foreign signatory to the convention.
- Supreme Court:
  - o Confirmed that the Convention is not the only source on this matter.
  - o Both the FRCP and the Convention are law of the US.
  - o Int'l treaty is in the nature of a contract between nations *Trans World Airlines*.
    - Preamble of the Convention specifies its purpose: facilitate the transmission and execution of letters of request and to improve mutual judicial cooperation. Does not exclude other existing practices.
    - Evidence Convention does not modify the internal law. It uses permissive rather mandatory language.
    - Article 23 allows a contracting state that it will not execute any letter of request in aid of pretrial discovery. If this rule had intended to replace the broad discovery powers, common law countries would not have accepted.
    - Article 27: the convention does not prevent a contracting state from using more liberal methods of rendering evidence.
    - Summary: it was intended to establish optional procedures.
    - Interpreting that the Convention is the only means would subject every court in America to the law of the corresponding 3<sup>rd</sup> country.
    - The convention did not deprive the District Court of the jurisdiction to order a foreign national party to produce evidence physically located within a signatory nation.

#### e. Disposition Without Trial: Summary Judgment

- Summary judgment (Rule 56. a) – allowed when there's "no genuine dispute as to any material fact" and moving party thus entitled to judgment as a matter of law.
- Non-meritorious cases.
- 56 (f): Court can grant summary judgment on its own motion.
- Twombly and Iqbal make the standard higher.
- Rule 12 (b) c: test the legal sufficiency of the complaint.
- Rule 12 (b) d: summary judgment: merit determination.

- In case the Defendant submit a motion in a early stage, P can answer that he has not had the opportunity to add information through discovery.
  - Often used post-discovery – evidence is affidavits, documents
- **Celotex Corp. v. Catrett**
  - Plaintiff doesn't have anything on the records to show liability of defendant.
  - Defendant moves for summary judgment because plaintiff has not proven through evidence that decedent was exposed to asbestos.
  - District court granted the motion. Appellate Court reversed stating that D did not submit positive evidence rebutting P arguments.
  - Supreme Court affirms summary judgment. You cannot go to the jury on mere speculation, must have some evidence.
  - Dissent: P showed evidence.
    - In this kind of motions, the moving party can argue that the evidence won't be admissible in trial.

#### f. Deciding the Facts: Judge or Jury

- Functions of juries: decide questions of fact. There are two classes of facts:
  - Did the defendant cross the red light?
  - Apply legal standard (given by the judge) to the facts. I.e. was the defendant conduct negligent or reckless? Was the police use of force reasonable?
- 7<sup>th</sup> Amend (civil jury) not incorporated to the states, states free to not use juries in civil cases. Also free to have non-unanimous juries. States have their own constitutional requirements for jury trials.
  - Federal system requires unanimous decisions. You might prefer to be before a state court because you don't need unanimity.
- Joinder of legal claims with claims in equity: SC has stated that right to a jury trial preempts.
- Rule 38 Demand of jury trial. If you don't do such demand, the right is waived.
- Pros and cons of civil juries (Priest article)
  - Pros:
    - **Collective** decision making (but could use a panel of judges)
    - "Lightning rod" for controversy
    - Democratic ideal (brings in community values)
    - Encourages civic participation
    - Counteracts biases of judges
    - Gives public confident
    - Community standards
    - They can disregard some legal rules when they are against the community standards.
  - Cons:
    - Irresponsible (no reasoning)
    - Prejudices by the jury
    - Why are they particularly good in assessing credibility?
    - Unpredictable
    - Many cases factually/ legalistically complicated
    - Inefficient – most cases are routine, don't need juries
    - Makes the process more slow
    - Impose a charge over the citizens

### Curtis case (p 678)

- Statutory case
- The judge said that the case is not a common law case, but a law under statutes.
- The Court of Appeals in a decision affirmed by the Supreme Court established an analogy for applying the 7<sup>th</sup> amendment (p 684 City of Monterrey case).
- Is there any way in which the P could have avoided a jury? Asking only for injunctive relief.

### g. Controlling the Jury

- Rules of evidence – limit what juries see
- Rule 51 – jury instructions
  - Wal-Mart case: preventing the jury from making inferences.
- Rule 49 –special verdicts: ask the jury certain questions. The verdict is entered consistently with the questions. (a) (Jury just finds facts, then judge rules) (b) general verdict accompanied by interrogatory answers
  - You can guide the jury to stick to its function.
  - You can localize the error in the instructions.
  - You can know what the jury decided (i.e. res judicata).
- Rule 50 –
  - (a) Judgment as a matter of law, (same standard as summary judgment) (must make 50(a) *first*)
  - A court uses grant this motion when there's no evidence whatsoever.
  - 3 "so whats" – 12(b)(6) [on pleadings], summary judgment (post-discovery), JAMOL [after trial, before jury]
    - b) Notwithstanding the verdict
  - Does Rule 50(b) violate the 7<sup>th</sup> Amend? A: 7<sup>th</sup> implies only as it was "at common law" and common law had such a procedure. **But only allowed when 50(a) motion made first.** (p 707)
  - If judge grants 50(b), why did he not grant the 50(a) motion first?
    - Hopes jury will go as he wants without need to intervene
    - If JAMOL overturned on appeal, can revert to jury verdict without new trial (if the losing party appeals, there is a verdict so it's not necessary to begin a new trial).
- Rule 59 – motion for a new trial. Post-verdict.
  - Allowed whenever it was "at common law". The reference to common law is necessary because otherwise it would be unconstitutional.
  - Judge has more discretion here than under 50(b).
  - 50(c) and (d) – judge must rule on new trial when granting JAMOL
- The review by the Court of Appeal is the *novo*. The role of the Court of Appeal is the same than the judge at the trial court: review the record of the evidence produced.
- When assessing a new trial, the standard of the appellate court is abuse of discretion.
- *Remittitur* – a threat to order a new trial under Rule 59 unless P agrees to a lower settlement (p 717-18). The reason of its existence is because it existed in common law.
- *Additur* – threat to order a new trial unless D agrees to higher settlement. This has been held to be unconstitutional under federal law before federal courts, because this institution was not a part of the common law.
- In state law, the appellate courts are being given more power to find a verdict excessive. In NY CPLR 5501 (c): it is allowed itself to order a new trial or to get remittitur or additur.

### **Judge trial cases**

- Rule 52 – in trials without a jury, findings of fact will only be overturned when “clearly erroneous”
  - Not quite as inviolate as a jury.
  - 52 (c).

### h. Appeals

- Are error-correcting
- Also have a supervising-function
- Provide guidance for future cases. Relevant in system based on precedents.
  - It is not possible to introduce new evidence;
  - It is not possible to nor new issues;
  - Jury verdicts are almost untouchables.
- Collegial courts (also exist in banc)
- 28 USC 1291 – federal appeals only on a “final judgment” (in most circumstances –exceptions in 1292)
  - pros: prevents “yo-yo-ing” in the middle of a trial
  - cons: often inefficient – early errors corrected only after expense of the trial
  - Collateral orders.
- Appeals court does not typically review factual determinations

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## **Personal Jurisdiction and Other Court-Access Rules**

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### **1. Introduction to the Traditional Model**

- Court access doctrine
- Personal jurisdiction:
  - Does the court has jurisdiction over the defendant?
  - If there is a basis for jurisdiction, does it comply with the constitution (5<sup>th</sup> and 14<sup>th</sup> amendment)?
- Venue rules: where in the state the P should be heard?
- Forum non-convenience: more than one state has jurisdiction. EU regulation has a limited number of possibilities. It is used in federal courts primarily in foreign cases.
- Transport: move a case from one federal court to another.
- *Full Faith and Credit Clause*: “Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”
  - Compels the enforcement of a state’s judgment in every other state
  - Not enforceable where the original state did not have proper jurisdiction
- *Due Process Clause*: “no State shall ... deprive any person of life, liberty, or property, without due process of law.”
  - Used to prevent excessive assertions of jurisdiction



## **Pennoyer v. Neff** – physical presence

Key elements:

- Power theory of jurisdiction
- D has to have notice of the lawsuit.

*Issue:*

- Can substituted service via publication be a means of service for a nonresident D?
- How much power do states have over jurisdiction in regards to one another?

*Holding:*

- Substituted service by publication is ok if the property is attached at the outset of the case
- Personal jurisdiction requires some sort of physical presence

*Facts:*

- Mitchell sued Neff, who was in CA, in Oregon
- Mitchell obtained jurisdiction by notice through newspaper publication in accordance with Oregon statute

*Discussion:*

- State autonomy: states have exclusive jurisdiction and sovereignty over persons and property in their territory, which limits the jurisdictional reach of other states to its residents
- Publication as notice of service would not be seen by the interested parties, so would be unfair
- Attached property would be different because law assumes that property owner would be aware of its seizure

*Notes:*

- *In personam* – court imposes liability on a D under the D (specific performance)
- *In rem* – rights declared over a thing
- *Quasi in rem* – judgments affecting the interests of a party over a thing
  - *Type I* – Settles claims to the property on which jurisdiction is based
  - *Type II* – Seeks a judgment on a claim unrelated to the property upon which jurisdiction is based (as in *Pennoyer*). Attachment jurisdiction is limited to the value of the property.
    - You may be interested in attaching property for security (Rule 4 (n)). Rule 64: provisional and final remedies.
    - Enforcement of a judgment (is still viable for this purposes, notwithstanding *Shaffer*)
- Publication suffices for in rem and quasi in rem actions
- If Neff had appeared at the original case, could have filed 12(b)(2) motion for lack of personal jurisdiction
  - Objecting after default judgment (*collateral attack*) is risky because if motion is denied, cannot argue on the merits or appeal
- P 65: going further of the power of the court infringes the constitution.

## **2. More on Traditional Thinking: the most common jurisdiction is based on domicile**

- *Special Appearance* – an appearance in a suit solely for the purpose of objecting to jurisdiction
- **Milliken v. Meyer** - domicile
  - D, Wyoming resident, served in Colorado and defaulted. Contested judgment for lack of jurisdiction, but Supreme Court held otherwise.

- Importance is notion of one's domicile. This does not disappear just because one is outside of the state.
- *Domicile/State Citizenship*- the place where a person resides and intends to remain there for the indefinite future
- One can be subject to jurisdiction through *consent*. i.e. a P would be subject to jurisdiction to a counterclaim in a state by bringing a claim there
- *Derogation* – takes away jurisdiction from the more obvious forum
  - *Forum Selection Clause* – usually occurs in commercial setting and select a certain forum for jurisdiction at the exclusion of all others
  - In **Carnival Cruise Lines v. Shute**, the Supreme Ct. upheld a forum selection clause using the rationale that it benefits customers because decreased litigation costs are reflected in the prices
  - Confession of judgment or “cognovit note clauses” are not per se contrary to due process, but the court will assess circumstances as the bargaining power of the parties to determine their validity.

**Hess v. Pawloski** – state statute & driving

*Issue:*

- Does the MA statute providing that a nonresident subjects him to jurisdiction by driving in the state contravene due process?

*Holding:*

- Because of the power to exclude nonresident drivers, a state can confer jurisdiction upon them by deeming the use of its highways as equivalent to appointing an agent of service.
- Notice is always an issue.

*Facts:*

- D, resident of PA, hit P in accident in MA
- MA statute provided that a nonresident subjected himself to jurisdiction there by driving in the state

*Discussion:*

- A state can withhold the right to operate a motor vehicle (special circumstance because they are dangerous) within it unless the driver appoints an agent of service – power of exclusion
- Although the process of a court of one state cannot run into another, having an agent in the first state is acceptable as actual service within the state.

*Notes:*

- This case shows the law developing in half steps. The state wants jurisdiction over causes of action that arise out of the activity taken place there because of litigation convenience and the authority of the state over its territory.
- This jurisdiction extends only to a case arising out of the accident.

**3. The “Minimum Contacts” Standard**

**Due process: Minimum contact + notice**

Systematic/continuous: related claims – Int'l show

Systematic/ continuous: unrelated claims – Per He Goodyear  
(Yes) (No) (No)

Single/isolated: related: McGee VW Asahi McIntyre  
(Yes) (No) (No) (No.)

Single/isolated: unrelated: Hanson (No)

- Corporations are subject to general jurisdiction:
  - In its state of incorporation
  - At its principal place of business
  - Where it has appointed an agent of service
  - Where it has extensive activities as to establish *presence*, that state would have *general jurisdiction*. Doing business jurisdiction.
    - How much activities you need will depend on due process notions.
      - Goodyear case.
- Where it did not have enough activity to establish presence, but the claim arose out of the activity in that state, there would be *specific jurisdiction*
  - In this situation, the corporation is said to have *impliedly consented* to jurisdiction

Pag. 76: Rule 4(e). Corporate presence and consent.

### **International Shoe Co. v. Washington** – minimum contacts

The action was brought in Washington because is a tax matter (see dissent).

*Issue:*

- Can a Delaware corporation be subject to jurisdiction in Washington by its activities there, consistent with the due process clause?

*Holding:*

- In order to subject a D to suit in a state absent physical presence, there must be “*minimum contacts* with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”
- Besides just minimum contacts, this case sets out a spectrum of jurisdiction ranging from no jurisdiction to specific to general jurisdiction. Fairness must be analyzed based on the circumstances of the case.

*Facts:*

- Suit to recover unpaid contributions to the state unemployment compensation fund
- D is Delaware Corp. with principal place of business in MO
- Regular business conducted in WA through 11-13 salesmen residing there who have no power to enter into contracts
- No offices, stock of merchandise, deliveries of intrastate commerce in WA

*Discussion:*

- The term *presence* symbolizes the contacts of the corp. with the state that would make it *reasonable* to subject it to suit there. Considerations of reasonableness:
  - An “estimate of the inconveniences” of bringing the corp. to suit away from its home
  - The degree to which a corp. enjoyed the benefits of the laws of that state
  - How “systematic” and “continuous” the activity was
  - Issue of state’s interest in the suit (here it is very interested in collecting taxes)
- Some activities are so continuous and substantial as to subject a corp. to suit in a state for an action entirely distinct from those activities (general jurisdiction)
- In some cases, a single contact is substantial to establish specific jurisdiction, but not contacts that are “casual” or “isolated”

- Due process depends on the “quality and nature” of the activities of the corp. in relation to the “fair and orderly administration of the laws” that due process ensures

*Notes:*

- Two generally distinct inquiries for ascertaining whether jurisdiction exists over a D:
  - Did the state authorize an assertion of jurisdiction?
  - Is the state’s assertion of jurisdiction consistent with due process?
- Limitation to minimum contacts jurisdiction: Because the court’s power derives from the D’s voluntary relation to the state, that power should be limited to causes arising out of that relation.
  - Why bother about the contacts (claim arises out of...): Expectations of the defendant to be sued, litigational convenience (there’s a proxy), interest of the state (interest analysis).

#### **4. Distinguishing Between General and Specific Jurisdiction**

- *General Jurisdiction* – a party is suable for any claim even if not related to its activities in the forum
- **Perkins v. Benguet Consolidated Mining Co.** – continuous and systematic
  - Non resident brought suit in Ohio against Philippines Co. for claims not arising from activities in Ohio
  - Benguet was conducting some activities in Ohio because Japanese halted operations in the Philippines
  - Supreme Court allowed Ohio to have general jurisdiction because Benguet’s activities were continuous and systematic
  - Also, there was no alternative forum at this point in time
- General jurisdiction can sometimes be found over a nonresident individual who has continuous and substantial activities in a state, as in **Abko Industries v. Lennon**
- Jurisdiction over a parent company does not by itself give jurisdiction of a subsidiary unless the parent company controls and dominates the subsidiary
- **Ratliff v. Cooper Laboratories, Inc.** – agent not enough
  - Ps sued foreign company with appointed agent in South Carolina for actions occurring in different states
  - Ct. held that even though there was an agent, due process requires more than just an agent satisfying a state statute for general jurisdiction

**Helicopteros Nacionales de Colombia S.A. v. Hall** – too little contacts

*Issue:*

- Can a state exercise general jurisdiction over a foreign corporation based on minimal contacts?

*Holding:*

- A state can exercise general jurisdiction over a foreign corporation if there are sufficient contacts
- Purchases, even at regular intervals, are not enough to warrant general jurisdiction

*Facts:*

- Ps brought suit against Helicol, Colombian company, in Texas for crash in Peru
- Helicol’s contacts with Texas included purchasing helicopters, sending CEO for a meeting, drawing checks from a Houston bank, and sending pilots for training. It was not authorized to do business there and had no agent for service.

*Discussion:*

- Helicol’s activities in Texas cannot be described as continuous or systematic

*Dissent:*

- The transformation of the national economy makes it necessary for states to have broader jurisdiction over nonresident corporations
- Court should also consider contacts relating to, not just arising out of, the cause of action

*Notes:*

- The Supreme Ct. did not have the power to interpret the Texas statute that granted jurisdiction, only to evaluate if this grant of jurisdiction violated due process
- The added burden of a foreign D to come to the U.S. to litigate must be considered
- A state can exercise jurisdiction up to the limits of the constitution
- **Gator.com v. L.L. Bean** – targeted marketing
  - L.L. Bean was subject to general jurisdiction in CA because of marketing in CA, contacts with CA vendors, and its website was deliberately directed to CA
  - Is the state's assertion of jurisdiction consistent with due process?

### **5. More on Specific Jurisdiction**

- *Specific Act Statutes* – state asserts jurisdiction over nonresident from a claim arising from a minimal or even single act

**McGee v. International Life Insurance Co.** – specific-act statute

*Issue:*

- Can a state statute exercise specific jurisdiction based on the single act of an insurance contract with a resident of the state?

*Holding:*

- Due process can be satisfied by a suit based on a contract which had substantial connection with the state, even if this was the D's only contact there

*Facts:*

- P, CA resident, bought a life insurance policy from an AZ company that D then took over. D refused to pay after P's death. This was D's only contact in CA.
- CA based jurisdiction on a statute subjecting nonresident companies to suit on insurance contracts with residents of CA
- Texas refused to enforce judgment because CA's jurisdiction violated due process

*Discussion:*

- Trend of expanding states' jurisdiction of nonresident Ps, reflects modern economy
  - A lot of mail goes across state lines
  - Less burdensome for D to litigate in different state
- CA has an interest in providing redress for residents when their insurers refuse to pay

*Notes:*

- This is the furthest any court has extended general jurisdiction
- The jurisdictional reach of the federal courts is limited to that of the states.
- Federal ct.s do not have specific-act statutes but can serve process according to the authority of the state's specific-act statute in which they sit

**Gray v. American Radiator & Standard Sanitary Corp.** – stream of commerce (Ill Supreme Court)

*Issue:*

- Does a tortious act occur at the place of injury, and if so, would a statute subjecting a D to jurisdiction there without any other contacts violate due process?

*Holding:*

- Where a cause of action arises from the use of a D's products in ordinary commerce in the state, the D has sufficient contacts to justify specific jurisdiction there
- The place of a wrong is where the last event took place that is necessary to make the actor liable (place of injury is a regulatory interest. Also, litigational convenience).

*Facts:*

- A water heater exploded in IL and injured resident P. Alleged that D, an OH resident, negligently constructed the safety valve and therefore injuries were caused.
- IL had specific-act statute that subjected a nonresident who "commits a tortious act within the state" to jurisdiction
- D had no contacts with the state except that its product was incorporated in PA into a hot water heater which through stream of commerce reached IL

*Discussion:*

- The place of injury is IL because that is the last place where an action occurred to make D liable
- D enjoyed the benefits of the laws of IL by selling to the state
- Expanded jurisdiction reflect modern economy

*Notes:*

- This is the furthest any court has extended specific jurisdiction
- This is a Supreme Ct. of IL case so does not have a huge precedential effect
- Single or isolated contacts cannot give rise to general jurisdiction without offending due process
- *Sky's the limit statute* – authorizes a state to exercise jurisdiction on any basis not inconsistent with the Constitution
- Two important questions regarding jurisdiction:
  - How do we interpret a state's specific act statute re jurisdiction?
  - If the state's statute is very broad, when does it violate due process?

## **6. Purposeful Acts and Products Liability Cases**

**Hanson v. Denckla** – purposeful availment

- Donner, resident of PA, established a trust in DE for her 3 daughters and later moved to FL
- Daughters later fought over the trust and brought suits against DE trustee in DE and FL
- DE held that DE law applied and the trust was valid, FL that FL applied and the trust was invalid and both decisions were challenged by due process and full faith and credit in the Supreme Ct.
- The Supreme Ct. held the FL decision was not valid because it didn't have jurisdiction over the trustee. The *unilateral activity* of those who claim some relationship with the nonresident D is not enough, the D must *purposefully avail* himself upon the forum state, thus invoking the benefits and protections of its laws
- Restrictions on jurisdiction are more than a protection against inconvenient litigation; they are a consequence of territorial limits on power of states. Without minimum contacts, a state doesn't have power.

**World-Wide Volkswagen Corp v. Woodson** – no traveling jurisdiction

NY v. Germany  
NJ  
NY dist  
NY deal

Defendants intended to remove the case to Fed Courts and later transfer to NY.

*Issue:*

- Can an OK ct. exercise jurisdiction over a nonresident automobile retailer when the D's only contact with the state is that an automobile it sold to the P was involved in an accident there?

*Holding:*

- The relationship between the D and the forum must be such that it is reasonable to require the corp. to defend the particular suit there

*Facts:*

- Ps purchased automobile from D in NY and got into an accident while passing through OK
- Ps brought suit in OK state ct. justifying jurisdiction through OK's long-arm statute
- D's only contact with OK was its product traveling there

*Discussion:*

- Burden on D is a primary concern in reasonableness but should be considered with other factors:
  - Forum state's interest in adjudicating the dispute
  - P's interest in obtaining convenient and effective relief
  - Efficiency for the interstate judicial system
  - Shared interest of the several states in furthering substantive social policies
- Due process acts as an instrument of interstate federalism by preventing jurisdiction over a D with no contacts, even if all of the other concerns listed above were met
- Foreseeability that a product will wind up in the forum state is not enough to meet due process, but foreseeability is relevant in that a D's connections with the forum state are such that he should reasonably anticipate being hauled into court there

*Dissent:*

- The sale of the automobile was a purposeful availment into the stream of commerce, parallel to chain of distribution
- Due process should not be offended if there is no inconvenience to the D so the only reason preventing jurisdiction is crossing a state line
- OK has an interest in keeping its highway system safe

*Notes:*

- Minimum contacts is not just intended to prevent inconvenience to the D but also to preserve the states as coequal sovereigns in a federal system
- D did not purposefully avail itself onto OK in this situation
- Foreseeability is a circular test. How can you anticipate being dragged into court somewhere if there is no clear rule under minimum contacts?
- VW case prevents "portable torts", otherwise you would have to defend anywhere the product ended up
- **Kulko v. Superior Court of CA** – purposeful availment with family situation
  - Divorced couple – mom is in CA, dad is in NY with the kids, but eventually allowed them to go to CA with the mom
  - Wife brought suit for increased child support in CA and CA Supreme Ct. held that jurisdiction was ok because dad sent his kids to CA (like placing product into stream of commerce)

- Supreme Ct. reversed because this single act wouldn't make it foreseeable to be brought to suit in CA and finding jurisdiction here would place a burden on family relationship because it would make the dad not want to let his kids go to CA

**\* Asahi Metal Indus. Co. v. Superior Ct. of CA** – foreign D & stream of commerce

*Issue:*

- Can jurisdiction be exercised over a foreign D whose only contact with the forum is its product being sold there without its purposeful direction?
  - First question: are there minimum contacts?
    - Justice O'Connor: putting a product into the street is not enough.
    - Justice Brennan
    - Justice Stevens: I don't need to answer the question of minimum contacts.

*Holding:*

- (i) To find minimum contacts, the D must purposefully direct an action toward the forum state. (ii) These contacts must then be considered under the standard of reasonableness.

*Facts:*

- P filed products liability against Cheng Shin and Cheng Shin, cross-complained seeking indemnification against Asahi
- Asahi is a Japanese corp. that sells product to Taiwanese corp. Cheng Shin (accounting for about 1% of its business), which then sells to CA as well as the whole U.S.
- The only contact Asahi has with CA was its product being sold there, but it did not control the distribution that brought it there

*Discussion:*

- The placement of a product in the stream of commerce is not in itself an act purposefully directed to the forum state
- Purposeful direction into a state could be designing product for the market, advertising there, establishing channels for providing regular advice to customers, or marketing the product through a distributor who agrees to serve as sales agent in forum state
- The unique burden of a D having to come to a foreign legal system should have significant weight
- CA's interest in the suit is diminished because P is not a CA resident

*Brennan dissent:*

- The stream of commerce is a regular flow of products, so awareness that the product is being marketed in the forum state should make the possibility of a lawsuit there foreseeable

*Stevens dissent:*

- Chain of distribution should be purposeful avilment

*Notes:*

- Even though a majority of justices believed there were contacts, the majority did not believe it was reasonable to subject Asahi to suit in CA
- "Stream of commerce" refers to cases where the D uses a distributor to market to the forum state, but other factors must be considered to see if the D purposefully directed sales to the forum state
- What is the relationship between minimum contacts and reasonableness?
  - Reasonableness criterion could suggest a free-form fairness inquiry

**J. McIntyre Machinery v. Nicastro**

An accident severed four fingers off the right hand of Robert Nicastro who was operating a recycling machine used to cut metal. A British company manufactured the machine and sold it through its exclusive U.S. distributor. Nicastro sued J. McIntyre Machinery, Ltd., the British company, and its U.S.



distributor, McIntyre Machinery America, Ltd., in New Jersey state court for product liability. The state supreme court reversed a trial court's dismissal, finding that the foreign company had sufficient contacts with the state.

### **Question**

May a consumer sue a foreign manufacturer in state court over a product that the foreign company marketed and sold in the United States?

### **Holding**

No. The Supreme Court reversed the decision of the lower court in a plurality opinion by Justice Anthony Kennedy. "Although the New Jersey Supreme Court issued an extensive opinion with careful attention to this Court's cases and to its own precedent, the 'stream of commerce' metaphor carried the decision far afield," Kennedy wrote. "Due process protects the defendant's right not to be coerced except by lawful judicial power." Justice Stephen Breyer, joined by Justice Samuel Alito, concurred in the judgment, writing: "I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences." Meanwhile, Justice Ruth Bader Ginsburg dissented, joined by Justices Sonia Sotomayor and Elena Kagan. "Inconceivable as it may have seemed yesterday, the splintered majority today 'turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.'"

Rule 4 (k)2 does not apply to this case because such a rule is referred to federal law.

Due process clause operates like a limitation to jurisdiction

## **Goodyear**

### **Facts of the Case**

The families of two North Carolina teenagers killed in a bus crash in France brought suit in North Carolina state court, alleging faulty tires. The tires were made in Turkey, and the plaintiffs sued Goodyear's Luxembourg affiliate and its branches in Turkey and France. A North Carolina appeals court held that the foreign defendants had sufficient contacts in the state to support general personal jurisdiction.

### **Question**

May a consumer sue a foreign manufacturer in a U.S. court when the manufacturer's only connection with the United States is that another company sells its products in this country?

### **Holding**

No. The Supreme Court reversed the lower court order in a unanimous decision by Justice Ruth Bader Ginsburg. "A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction," Ginsburg wrote. "Such a connection does not establish the 'continuous and systematic' affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation's contacts with the State."

"At home"

## **Calder v. Jones** - libel

*Issue:*

- Can jurisdiction be exercised over nonresident Ds who directed an injury at the forum state?

*Holding:*

- Ds who knowingly caused injury in the forum state can be subject to jurisdiction there even without other contacts

*Facts:*

- P brought suit in CA against FL Ds, writer and editor, for libel in article of national magazine with large circulation in CA
- Ds closest contact with CA is that one of them travels there on business

*Discussion:*

- Lack of contacts here will not defeat jurisdiction

*Notes:*

- **Keeton v. Hustler Magazine, Inc.** – libel & statute of limitations
  - Supreme Ct. allowed NH to exercise jurisdiction over a NY P seeking redress for libel from an Ohio Corp. with principal place of business in CA
  - Reasoning was that NH had an interest in redressing injury to reputation occurring within its borders. Even though P was not a resident, that was outweighed by the fact that D benefited from the NH market by selling there
  - But the U.S. has a *single publication rule* which allows Ps to receive damages for injury to reputation occurring nationwide, which would make this an exception to specific jurisdiction
- **Griffis v. Luban** – online libel
  - Jurisdiction not found over a nonresident D who libeled P on an on-line discussion group because the action was targeted at the P and not necessarily the state
- Basing jurisdiction on a wrongful act goes to the merits of the case, while personal jurisdiction should not be making those considerations
  - This could give the paradoxical result that a finding on the merits of no wrongful act would deprive the court of jurisdiction

## **7. Commercial Contract Cases**

### **Burger King Corp. v. Rudzewicz** – purposeful availment

*Issue:*

- Can jurisdiction be exercised over nonresident Ds who had a contract with the P in the forum state and had continuous business dealings with them?

*Holding:*

- To establish personal jurisdiction, a party must have purposeful availed herself upon a state to the extent that meets fair play and substantial justice

*Facts:*

- Burger King, FL corp., brought suit in FL against MI Ds for breaching their franchisee obligations
- Ds contest jurisdiction because claims did not arise from their contacts with FL
- Although Ds dealt directly with the MI district headquarters, their contract was with the Miami headquarters and they engaged in communications with them

*Discussion:*

- A D has fair warning of the possibility of being sued in a state by purposefully directing its activities at residents in the forum state and the litigation arises from injuries that arose out of those activities
- Modern reality is that contacts are not always physical. Mail and wire communications can be minimum contacts if they are purposefully directed at the forum state.
- Considerations of reasonableness from VW sometimes serve to establish jurisdiction upon a lesser showing of minimum contacts
- Purposeful availment in itself (such as the existence of a contract) does not automatically grant jurisdiction, it still must meet “notions of fair play and substantial justice”
  - This can be shown by considering factors such as the parties’ prior negotiations, future consequences, the terms of the contract, and the course of dealing
- Ds who purposefully avail themselves upon a state must make a strong showing that there are other factors that make jurisdiction invalid
- Choice of law provision in the contract reinforced the possibility of litigation in the forum state.

## **8. The Specialized Problem of Nationwide Jurisdiction**

### **FRCP 4(k)(2)**

- Confers on all federal courts world-wide jurisdiction over Ds in cases arising under federal law when the D is not subject to jurisdiction in any state
- This only applies to foreign Ds
- This does not apply to diversity cases

### **Graduate Management Admission Council v. Raju** – 4(k)(2) nationwide jurisdiction

*Issue:*

- Is there personal jurisdiction over a foreign citizen who does not have enough contacts with the forum state but who has enough contacts with the United States in general?

*Holding:*

- Internet test for specific jurisdiction: a state (or the nation under 4(k)(2)) may exercise jurisdiction over a nonresident if he (1) directs electronic activity into the state, (2) with the intent of engaging in some activity with the state, and (3) the cause of action arises out of that activity
- FRCP 4(k)(2) provides nationwide jurisdiction when (1) the exercise of jurisdiction is consistent with the Constitution and the laws of the U.S., (2) the claim arise under federal law, and (3) the D is not subject to jurisdiction in any state

*Facts:*

- GMAC is a VA corp. that is suing Raju, a citizen of India, for copyright and trademark infringement in VA
- The website contains a purported testimonial from a VA citizen, the website sold to two VA residents, and the website contains ordering information for U.S. citizens

*Discussion:*

- Determination of personal jurisdiction requires considering (1) whether the state has authorized jurisdiction through a statute, and (2) whether the long-arm statute’s reach exceeds its constitutional grasp.
- In determining whether or not there is specific jurisdiction, the court must consider (1) the extent to which the D purposefully availed himself of the privilege of conducting activities in the state, (2) whether the P’s claims arise out of those activities, and (3) whether the exercise of jurisdiction is constitutionally reasonable

- The fact that the P did not plead 4(k)(2) is ok because the federal court should apply the proper body of law whether it is named or not

*Notes:*

- Jurisdiction under 4(k)(2) would not just grant jurisdiction to the original forum but also to any state in the United States, but transfer could change the venue under 1404
- 4(k)(2) puts the D in an odd position in that to disprove jurisdiction under this rule, the D has to prove he is amenable to jurisdiction in a state

## **9. Why Litigants Care about Choice of Forum**

- Convenience is an important consideration for the P in choosing where to bring the claim
- Diversity jurisdiction was created to mitigate local biases of the judge and juries
- American courts are seen as being preferential towards plaintiffs
- Forums apply “conflict of laws” rules to determine which state’s laws it will apply
  - Under the 2<sup>nd</sup> restatement, the law of the state with the most significant relationship to the occurrence of the parties applies
- **Kozoway v. Massey-Ferguson** – choice-of-law strategy
  - Canadian P sues in the U.S., preferable because of jury trial, contingency fees, discovery, etc.
  - Does not sue in IA, the D’s location, because their statute says the jurisdiction must be at the place of injury, which would be back in Canada
  - P sues in Colorado because the defendant is a large nationwide company which has general jurisdiction there. Allows P to forum shop for the best laws

### **Allstate Insurance v. Hague** – choice of law

*Issue:*

- Can a state apply its own substantive law to an accident that occurred in a different state?

*Holding:*

- It is unconstitutional for a state to apply its own substantive law if it only has insignificant contact with the parties and the occurrence
- A state must have significant contacts to create state interest in order to apply its choice of law

*Facts:*

- P died in accident in WI by WI drivers. P worked in MN.
- Decedent’s wife moved to MN and brought suit against insurance co. in MN because MN law allows insurance for each vehicle to be stacked

*Discussion:*

- The fact that P was a member of MN’s workforce gives it significant interest in applying its laws
- The P’s status as a resident of WI does not outweigh his status as an employee in MN
- P’s wife moving to MN after the accident also gives MN more interest in the suit

*Notes:*

- Silberman argues that a D should have to do something to submit to a state’s laws. Why should there be a stricter standard for jurisdiction and not choice of laws?
  - More concern where the D will be hanged instead of whether he will be hanged

### **Phillips Petroleum Co. v. Shutts** – choice of law

*Issue:*

- Can a state apply its own substantive law to a class action with a small portion of the members being from that state and a miniscule amount of the controversy relating to it?

*Holding:*

- A state must have significant contacts to the claims asserted by the members of the class action creating state interests in order to apply its law without being unfair
- A state using its own choice of laws when another state's would be more appropriate is unfair

*Facts:*

- D is DE corp. with principal place of business in OK. Ps are 28,000 royalty owners from all 50 states
- Ps brought class action in KS with named representative from KS. Less than 1,000 of the class resides in KS and less than 1% of the gas leases involved are in KS.

*Discussion:*

- The absent class members will be held to the same judgment as those present as long as the named parties adequately represented them. Therefore, absent class members do not have to opt in to be part of the class but can just not opt out.
- The application of KS law would be ok as long as there is no other law conflicting with it.

*Dissent:*

- The Supreme Ct. should not be involved with the substantive merits of state court decisions in determining which law to apply

### **Sun Oil Co. v. Wortman** – statute of limitations

*Issue:*

- Can a statute of limitations be considered a procedural so that a state may use its own statute of limitations when applying a different state's substantive law?

*Holding:*

- A state may choose to apply its own statute of limitations when a different state's substantive laws are being applied

*Facts:*

- Same situation as Shutts, class action to recover interest on royalty payments

*Discussion:*

- A state may apply its own procedural rules to actions in its courts because it is competent to legislate in that area
- The purpose of the substance-procedure dichotomy in the context of Full Faith and Credit is to delimit spheres of state legislative competence

*Concurrence:*

- Statutes of limitations cannot be characterized as purely substantive or procedural
- The contact a state has with a claim by being the forum creates a sufficient procedural interest to allow it to apply its own limitations to out-of-state claims

*Notes:*

- A state is not required to apply its own statute of limitations, it only may if it wants to
- A state applying its own longer statute of limitations will incentivize forum-shopping

## **10. Re-evaluation of Property-Based Jurisdiction**

- Types of Property-Based Jurisdiction:
  - *In rem* – claims taken directly against a property, a property's rights to the world are before the court

- *Quasi in rem I* – claims arising from the property
- *Quasi in rem II* – property is attached at the outset of the suit to get power over the defendant, but the property is not related to the suit. Way of forcing the defendant to come into court. This was the situation in *Pennoyer*.

<u>Jurisdiction</u>	=	<u>Power</u>	+	<u>Notice</u>
In personam		Presence		Personal Service (in state)
In rem		Presence of Property		Publication
<u>Quasi in rem type I</u>		<u>Presence of Property</u>		<u>Publication</u>
Quasi in rem type II		Presence of Property		Attachment + Publication

- *Quasi in rem II* jurisdiction provides a mechanism for suing nonresident Ds who might not be subject to *in personam* jurisdiction, but liability is limited to the value of the property attached
  - This is overruled in *Shaffer* and all personal jurisdiction must meet minimum contacts
- **Mullane v. Central Bank & Trust Co.** – attachment is not notice
  - Rejected the position in *Pennoyer* that a court could assume that a caretaker of a property would inform the owner of the pendency of an action

**Shaffer v. Heitner** – no more quasi in rem II

*Issue:*

- Can a P attach intangible property of nonresident Ds in order to obtain jurisdiction over them?

*Holding:*

- The presence of property alone does not support jurisdiction
- All assertions of state-court jurisdiction must meet the standard of minimum contacts

*Facts:*

- P, a nonresident of DE, owns one share of stock in Greyhound and filed a shareholder’s derivative suit against 28 officers of Greyhound who are not residents of DE for actions taking place in OR
- P sequestered 82,000 shares of Greyhound stock belonging to the Ds in DE, although none of the stock certificates were in DE. Under DE statute, the stocks were considered to be in DE.

*Discussion:*

- Property cannot be attached for service unless reasonable efforts have been made to give the property owner actual notice
- The only role played by attaching property is as security to bring a D into court
- The Ds’ positions as officers of a DE corp. also does not justify jurisdiction in DE
- The presence of a statute granting jurisdiction in this case would show the state’s interest

*Powell Concurrence:*

- The existence of some forms of property might provide the contacts necessary for jurisdiction

*Stevens Concurrence:*

- Due process requires fair warning that a particular activity will subject oneself to jurisdiction in a particular state, and owning stocks does not give this kind of warning

*Brennan Concurrence:*

- A flat out rule against jurisdiction in this situation would be bad because a state may have an interest in resolving these types of conflicts

*Notes:*

- Quasi in rem II jurisdiction is now basically meaningless and part of *Pennoyer* is overruled
- The holding of this case does not apply to status, i.e. marriage travels with either person

- *Limited appearance* – D submits to jurisdiction to defend on the merits but the only liability awarded would be the value of the property in the state
- FRCP 4(n)(2)—federal courts do not have their own quasi in rem II statutes
  - May use the attachment statute of the state the district court is sitting in

## 11. Continuing Tensions

### **Burnham v. Superior Court** – tag jurisdiction

*Issue:*

- Does due process require minimum contacts for jurisdiction over a nonresident who was served with process while visiting the state in a suit unrelated to his activities in the state?

*Holding:*

- Jurisdiction based on physical presence alone constitutes due process because it is a continuing tradition of the legal system that defines “traditional notions of fair play and substantial justice”

*Facts:*

- Divorced couple, mom moves to CA with kids, dad in NJ
- Mom filed for divorce and sues for child support in CA and tagged dad with service while he was visiting CA

*Discussion:*

- Most firmly established principle for personal jurisdiction is physical presence
- The standard from *International Shoe* was a reaction to modern trends and applies to cases where there is no physical presence (specific jurisdiction)
- A principle that is firmly approved by tradition and still favored should not be struck down
- Using the determination of fairness instead of tradition would lead to very subjective assessments

*Brennan Concurrence:*

- Tradition is not enough, all rules must satisfy contemporary notions of due process
- Reasoning for allowing jurisdiction is that the D purposefully availed himself upon the forum
  - Asymmetry would arise from allowing D access to the forum’s courts while not allowing the forum jurisdiction over him

*Notes:*

- Marital status has been traditionally seen as a *res* and therefore the domicile of either party is sufficient to provide a basis of jurisdiction for divorce
  - The domicile of the children have also been traditionally sufficient for jurisdiction (now coded in the *Uniform Child Jurisdiction and Enforcement Act* for suits regarding custody)
- Brennan’s concurrence suggest nationwide jurisdiction because a D can take benefits of any states’ court systems

## 12. Comparative Look at Jurisdiction

### **EU/Brussels I (European) Regulation**

- Article 5—specific jurisdiction
- Article 2—general jurisdiction
  - If you’re domiciled in a country, you may be sued for any claim in courts of that country (regardless of nationality)
- What about a corp?

- General jurisdiction over a corporation is limited to suit at its domicile
  - Includes statutory seat, central administration, principle place of business
  - No general “doing business” jurisdiction like in the US
- Article 5(5)—allows specific jurisdiction over a claim against a corp. in the place where a branch office is located, but only if the claim “arises out of” activities of the branch
- Bases of jurisdiction not specifically mentioned are prohibited

### Comparisons with U.S. Cases

- Keeton relevance – to get full recovery in a libel case, must sue where the publisher is located
  - Suing where the material was distributed will only get recovery in that state
- Gray relevance – the harmful event can be where the harmful act occurred or the place of injury
- Kulko relevance – outcome would be the same because maintenance creditor can sue from where they are located
- Burnham relevance - no tag jurisdiction, considered exorbitant

### 13. Notice and the Mechanics of Service of Process

- Acquiring jurisdiction requires:
  - Some relationship between the D and the forum court (power)
  - Notice given to the D about the commencement of the suit
- The requirement of notice furthers the value of having affected parties participate in the adjudication
- **FRCP 12(b)(5)**
  - Give a defense for insufficient service
  - This is not usually fatal to the P, just has to serve properly

**Mullane v. Central Hanover Bank & Trust Co.** – published notice not enough

*Issue:*

- Is notice through newspaper publication adequate to afford due process?

*Holding:*

- Due process requires notice reasonably calculated to reach the interested parties and must convey the required information and give a reasonable time for the interested parties to make their appearance

*Facts:*

- Notice regarding common trust fund given to beneficiaries via newspaper publication in accordance with NY law
- Names of the interested parties were not used in the publication

*Discussion:*

- Notice via publication alone is not sufficient because other reasonable means of notification could have been used, like mailing, to inform interested parties of their rights before the courts
- The right to be heard is of little worth unless one is informed of the matter and can choose to appear or default
- The state has a vital interest in any issues as to its fiduciaries to a final settlement, but this can only be done if their interests can actually be determined
- Published notice regarding property is usually sufficient because the owner of a property will likely already have arranged means to learn of its attachment



- Publication for missing or unknown persons via publication is ok because that is all that the situation permits
- Notice reasonably calculated to reach most of the interested parties should be sufficient because the ones who actually get the notice should take care of the interest of all
- Court does not say what would be reasonable service, this is to be determined by the states

#### **FRCP 4 – Summons**

- **(d)(1)** Waiver of service – waiver of personal service, the D can accept service by mail without acknowledgement
- **(k)(1)(a)** allows federal courts to exercise jurisdiction to the extent to which state in which they sit in does
- **(m)** Time Limit for Service – gives 120 days time limit for service from the time the complaint is filed. Summons must be reissued if time runs out.
- **(n)** Seizure of Property - allows attachment of property to obtain jurisdiction to the extent of those assets if jurisdiction cannot be obtained by other means

- **Kadic v. Karadzic** – more tag
  - Karadzic (D), a self-proclaimed president of an unrecognized state
  - Found not to be immune from process while on a visit to NY to speak at the UN while outside of the “UN District”

#### **14. Local Action & Formal Venue Rules**

- *Venue* is supposed to be concerned more with the convenience of trial, while jurisdiction has to do with the power to adjudicate
- Venue is somewhat redundant given the considerations of litigational efficiency (i.e. convenience to parties, location of evidence and witnesses, etc.) into modern notions of jurisdiction
- *Local Action Rule* - old rule that provided that a suit regarding land could only be brought in the district where the land was situated
  - Has characteristics of subject-matter jurisdiction

#### **28 U.S.C. §1391 – Venue**

- Operates intra-jurisdictionally to allocate a case with a multidistrict state and inter-jurisdictionally to allocate a case within the nationwide federal judicial system
- Venue rules reduce the range of P’s choice of forum from all districts where D could be brought to only those districts that have proper venue
- Proper venue is where the single D resides **((a)(1) & (b)(1))** or where a substantial part of the events giving rise to the claim occurred **((a)(2) & (b)(2))**
- Proper venue for a corp. is anywhere it is subject to personal jurisdiction
- In a suit with multiple Ds, venue will be appropriate where the events occurred
- When suits cannot be maintained because venue is not proper because of lack of personal jurisdiction, the fall-back venue is any district in which the D may be subject to personal jurisdiction (for diversity jurisdiction), or any district where the D may be found (federal question jurisdiction)
- Venue rules do not apply to removal cases

## 15. Forum Non & Transfer

- *Forum non conveniens* (fnc) attempts to direct the litigation to a more convenient forum
- Goal of fnc is to not allow the P to vex the D inflicting trouble on him through an inconvenient forum
- Fnc also provides for less administrative costs
- Courts have an interest in having local controversies resolved at home
- Fnc is not a transfer but dismissal of an action that can be brought to another court

### **Piper Aircraft Co. v. Reyno** – forum non-convenience

*Issue:*

- Can a trial be held in the U.S. when there is a more convenient forum abroad but this forum would result in an unfavorable change in law for the P?

*Holding:*

- Dismissal for fnc will be given when trial in the P's chosen forum would impose a heavy burden on the D or the court and there is a more convenient forum

*Facts:*

- P, representative of Scottish estates, brought claim in the U.S. for airplane crash in Scotland
- U.S. laws would be more favorable than Scottish laws in this suit
- Decedents were Scottish, wreckage was in England, but Ds are American

*Discussion:*

- The possibility of a change in substantive law should not be given conclusive weight in a fnc decision, this would allow forum-shopping
  - However, this factor may have substantial weight if the alternative law would provide for no remedy at all

Is Scotland an adequate forum?

*Notes:*

- The SC says that the most favorable law should not play a role in this assessment because that would imply a choice of law analysis.
- The SC wanted to deter forum shopping by foreign P in the US.
- If there were no remedy at all in the other forum that circumstance would be weighed.
- Private interest (convenience)/Public interest (jury duty) factors.
- Fnc can result in reverse forum-shopping, but this gives Ds an equal footing with Ps who can forum-shop in the first place
- Private interest factors in fnc analysis include convenience and costs to the parties, the availability of witnesses and evidence, and the enforceability of a judgment
- Fnc almost always requires that there be an adequate alternative forum
- Fnc is subject to the discretion of the trial court
- Fnc is not exactly redundant with reasonableness considerations for jurisdiction, because reasonableness is used for specific jurisdiction while fnc may be used for general jurisdiction
- In Federal courts it's related to transfer

### **28 U.S.C. §1404** - transfer

- Allows a case to be transferred to anywhere it could have originally been brought for the convenience of the parties
- Unlike fnc, D must submit to jurisdiction in the new forum
- Original forum's choice of law travels to the new forum

- 1404(a) is a transfer and not a dismissal, so ct.s have broader discretion to grant it than in fnc
- Can be used by either the P or D

**Ferens et ux. v. John Deere Co.** – ultimate forum-shopping

*Issue:*

- Can a P move for a transfer under 1404(a) and have the law of the original forum apply?

*Holding:*

- The laws of the original forum state apply in a transfer under 1404(a) even when initiated by the P

*Facts:*

- P sued D in diversity action in MS for an accident that occurred in PA because PA's statute of limitations had already run out
- P knew that the federal court would use MS's choice-of-law rules which would apply PA substantive law and MS procedural law, including its statute of limitations
- P then moved to transfer back to PA under 1404(a) on the ground that it was a more convenient forum, and assumed that under MS's choice-of-law would be preserved

*Discussion:*

- If 1404(a) allowed for a change of laws, it would be used as a forum-shopping measure instead of for convenience
- Applying the transferor law in this situations would not give the P any legal advantage because that is the law that would be originally used, but will just give the D a nonlegal disadvantage in that it has to litigate in a different state
- Litigation in an inconvenient forum harms everyone, so allowing the P to transfer is not unfair
- 1404(a) is discretionary, so will not always result in a transfer

*Dissent:*

- Congress probably did not intend to allow a P to appropriate the law of an inconvenient forum in which he did not intend to litigate and carry it back as a prize to the state where he wishes to be
- Application of the transferor state's law would result in forum-shopping between federal and state courts on the basis of differential substantive law

- **28 U.S.C. §1406**

- If original forum was incorrect, you can transfer to a proper forum under 1406
- Choice of law is that of the new forum, since the original forum was improper

- **28 U.S.C. §1407**

- Allows consolidation of multidistrict cases into a single forum for pre-trial hearings
- Can be any forum in which the action could have been brought
- If it's decided that a case will go to trial, it is transferred back to the original forum

There's no fnc in federal courts except in int'l cases.

- Some states do not permit fnc.
- In other cases if P is resident, the state cannot dismiss the case.
- In some instances, a state court may be more attractive for P. I.e. Piper case, dismissed in fed court.
- NY general obligation law: allows choice of law in contracts over \$M1 and says no to fnc.
- You see fnc more often when D are sued at home. I.e. Piper. Also in cases with foreign D.
- It might be arguable that there is a discriminatory treatment against foreign Ps.
- Fnc might be understood as a matter of committee.

- What explains why an American court would dismiss a case when an American D is sued at home when the activity took place abroad? To not create a competitive disadvantage for American companies in the international market, since the foreign companies won't be subject to US jx.
- D makes de motion and has to show the existence of an **adequate alternative forum**. The burden is on the D.

Hypo: US chemical company supplies chemical used in foreign banana plantations operated by American companies. P brings class action for activities that took place abroad.

D would have the following incentives: avoid class actions, jury trials, local bias, anti-American feelings, and interim payments. But sometimes is better to be in the U.S. Besides, you can have an exception for the enforcement of the decision.

## Subject Matter Jurisdiction of the Federal Courts and Related Doctrines

### 1. The Statutory Scheme: A Review; Justiciability

#### Article III Constitution

- Limits federal courts' adjudicative authority
- Section 1 established the Supreme Court and give Congress the power to create other federal courts and delineate the power of new courts
- Section 2 limits the power of the federal courts to hear cases involving ambassadors, citizens of different states, states and foreigners, and cases involving federal law

#### 28 U.S.C. §§

##### 1331 – Federal Question (just in 1875)

- Federal district courts have original jurisdiction over civil actions arising under the constitution, laws, and treaties of the U.S.

##### 1332 – Diversity of Citizenship (prior to fed question)

- Does not require complete diversity
- Amount in controversy must exceed \$75,000
- (c) provides that a corp. is considered a citizen of its place of incorporation and principal place of business
- This jx is concurrent w state jurisdiction

##### 1359 – Parties cannot be collusively joined to obtain federal jurisdiction

- Why a P might want to be in fed courts?
  - Rules of Civil Procedure
  - Timing to have a trial
  - State courts are elected while Fed are appointed
- Why a P might want to be in state courts?
  - NY has a commercial list of judges who have a particular qualification for these matters.
  - Local jury.
  - State courts do not need unanimous decisions.
  - Fed courts are required to apply state law precedents (Erie).

- Because lower federal courts must be established by congressional acts, the subject matter jurisdiction of those courts must be conferred by statute. This is done by 1331 and 1332.
- Subject matter juris must be ascertained in two steps:
  - Finding congressional authorization of jurisdiction through a statute
  - Finding that jurisdiction is consistent with Article III
- *Justiciability* – limitation of the judicial powers of the United States. Purposes:
  - Judicial competence – limits the court to questions presented in the adversary context
  - Separation of powers – defines the role of the judiciary so that it does not intrude into areas reserved for other branches of the government
- Components of justiciability:
  - Standing – P must have a personal stake in suit because he has directly been injured and relief must be likely to redress that injury
  - Appropriateness of suit for judicial resolution
    - Federal courts are prohibited from issuing advisory opinions concerning the legality of proposed legislation (separation of power concern)
    - Senate not judiciary holds impeachment trials
- Suits must fall under article III section 2 and under a statute to have federal juris.
- Lack of subject matter juris. can be found at any time without being raised by parties, and it cannot be waived

## 2. Diversity of Citizenship Jurisdiction

Purpose:

Concern by potential bias or prejudice against out-staters.

Modern justification: democratic theory.

State citizenship is a factual determination: domicile + intention.

Corporations: 1332(c) place where is incorporated or has its main place of business. SC (2010): the nerve center of the corporation.

Unincorporated persons: all of the members.

Class actions: if you have a nationwide class: SC: you will look only at the named parties (that gives you some control to create diversity).

Exceptions and Other Issues

- Federal courts have traditionally refused to hear cases dealing with domestic relations and probate
- 1339: won't consider collusive diversity.
- P 258: legal representative of an estate: decent citizenship is the only that is going to count.
- Rule 19 is the only limit to structure your lawsuit as you want to create diversity.
- Citizenship for diversity purposes is determined at the time of the commencement of the lawsuit
  - Reflects local bias rationale by focusing on bias at the time of the suit, but allows parties to manufacture diversity by moving before the cause of action has commenced
- Section 1332(c) gives an insured's citizenship to the insurer in addition to the insurer's own state of citizenship
- The Supreme Court generally does not give an unincorporated association entity status for the purpose of diversity jurisdiction

1446: procedure (c1): one-year limit unless the P was in bad faith.

**Strawbridge v. Curtiss** – complete diversity

*Holding:*

- There must be complete diversity between parties to support diversity jurisdiction in federal courts (two adverse parties cannot be citizens of the same state)

*Notes:*

- The presence of co-citizens amongst adverse parties blunts a concern with local bias
- Diversity requirement creates an opportunity for plaintiffs to join co-citizens as nominal defendants to defeat complete diversity (like in *Rose*)
- Ps of a forum state can invoke diversity jurisdiction even though they should not have any local bias against them
- Because firms are only citizens of their state of incorporation and their principal place of business (sec. 1332(c)), they can benefit from local bias in states where they have substantial facilities

### **Carden v. Arkoma Associates** – limited partners

*Issue:*

- Should the citizenships of the limited partners of a limited partnership or the state under whose laws the limited partnership was created be taken into account to determine diversity of citizenship?

*Holding:*

- Unincorporated entities will not be considered as corporations for the purpose of diversity citizenship unless so determined by the legislature

*Facts:*

- Arkoma Associates, a limited partnership of Arizona, brought suit in District Court of Louisiana against D Carden, citizen of Louisiana
- D moved to dismiss for lack of diversity jurisdiction because one of the partners was also a citizen of Louisiana

*Discussion:*

- Majority concedes that unwillingness to extend citizenship to a limited partnership is not due to logic but follows precedent
- Whether unincorporated entities should be considered citizens of the state in which they are created is left for the legislature

*Dissent:*

- The “real parties to the controversy” test should be used to determine citizenship of a limited partnership, which would show that the limited partners actually have no control over the entity
- Complete diversity is not constitutionally mandated but interpreted in *Strawbridge*

*Notes:*

- In recent amendments to section 1332(d), Congress declared that an unincorporated association shall be a citizen of its State of principle business and the state under whose laws it is organized for Class Actions

### **Rose v. Giamatti** – fraudulent joinder

*Issue:*

- Should the citizenship of nominal defendants be ignored for determining diversity jurisdiction?

*Holding:*

- Diversity jurisdiction cannot be defeated by the fraudulent joinder of non-diverse defendants against whom the P has no real cause of action
- Jurisdiction must be determined based on the real parties to the controversy

- Taking defensive action in a preliminary proceeding that does not reach the merits of the case does not constitute a waiver of the right to removal

*Facts:*

- Giamatti initiated an investigation against Rose
- Rose (citizen of Ohio) sought an injunction in the Ohio State Ct. against the pending disciplinary proceedings and named Giamatti (citizen of New York), Major League Baseball (unincorporated association of New York), and the Cincinnati Reds (Ohio limited partnership) as Ds
- Giamatti filed a notice to remove the action to federal court because of diversity, but Rose sought to remand this action because a lack of complete diversity

*Discussion:*

- MLB, because it is an unincorporated association, is a citizen of every state in which its members is a citizen and is therefore a citizen of Ohio
- But the Cincinnati Reds and MLB are at best nominal parties because Roses' beef is really with Giamatti
- A waiver of the right to removal occurs when the parties have fully litigated the merits of the dispute

*Notes:*

- The local Ds are not dropped from the lawsuit, their citizenship is just discounted for the purpose of diversity jurisdiction
- Section 1446(b) requires that a removal for diversity jurisdiction be done within one year after the commencement of the action
- Sometimes the court realigns parties in accordance with their "ultimate interests" before determining if there is diversity jurisdiction
- Access to a federal court for removal in diversity cases is available to an in-state P but not an in-state D

**Alienage Jurisdiction**

- Section 1332 allows diversity jurisdiction for suits involving citizens of a foreign state in certain situations
- This does not extend to entities that the United States does not recognize
- Dual nationals can sometimes destroy diversity
- American citizens living abroad are not aliens and also not citizens of any state. Therefore, they do not fall under any of the categories of diversity under 1332
- U.S. law (state of incorporation and principal place of business) determines the citizenship of a foreign corporation, even if that country's laws may determine it differently

**Amount in Controversy**

- Article III does not set out a requisite amount in controversy for diversity jurisdiction. This was included in Judiciary Act of 1789. Today, the requisite amount in controversy is \$75,000
- No amount in controversy requirement for actions arising under federal law
- The sum of the amount in controversy is determined by the P's sought-for relief at the commencement of the suit
- Some courts have aggregated the amount sought in a compulsory counterclaim, but none have counted the amount sought in a permissive counterclaim to meet the amount in controversy
- Multiple claims made by a single P against a single D may be aggregated to meet the jurisdictional amount regardless of the relationship between the two claims

- Aggregation of claims from multiple Ps cannot aggregate against a single D (unless is permitted when they have a common and undivided interest (not permitted in torts))
- Aggregation of claims against several Ds will depend on whether Ds liability is joint and several.
- Special rules for class actions (FRCP 23):
  - Each class member, including unnamed absent members, must individually meet the amount in controversy (except for supplemental jurisdiction, *Ortega*)
  - In *Zahn v. International Paper Co.*, the Supreme Ct. held that diversity jurisdiction could extend to those members who met the amount in controversy – overruled by *Exxon v. Allapattah*
  - The *Class Action Fairness Act of 2005* allows federal courts jurisdiction over class actions with an aggregate amount in controversy of at least five million dollars and *minimal diversity*
- The *Multiparty, Multiforum Trial Jurisdiction Act* (section 1369) allows original jurisdiction to federal courts over an action arising from an accident involving at least 75 deaths when there is minimal diversity and certain other conditions
- Rule 13 counterclaim: doesn't have to have any connection but you need to have subject matter jurisdiction.

### **3. Federal Question Jurisdiction**

#### **28 U.S.C. § 1331**

- The general grant of federal question, or “arising under” jurisdiction
- The district ct.s shall have original juris. over all civil actions arising under the Constitution, laws, or treaties of the United States

#### **Concurrent Jurisdiction**

- States are subject to the command of the Constitution's Supremacy
- Federal law-based defenses often appear in cases largely involving state based claims
- Absent a clear intention of Congress to give the federal ct.s exclusive jurisdiction, state courts have concurrent jurisdiction on claims based on federal law
- Advantages to a system that allows adjudication of fed. claims in state ct.: shared workload, local state ct.s may be more convenient for many litigants, and promotes commitment to national law

#### **Louisville & Nashville Railroad Co. v. Mottley** – well-pleaded complaint

The SC raised this case on its own motion because is subject matter.

*Issue:*

- Does a cause of action with a federal question anticipated in its answer warrant federal subject matter jurisdiction?

*Holding:*

- The anticipation of a federal defense is not sufficient for subject matter jurisdiction
- *Well-pleaded complaint* - A case arises under federal law only if the federal law issue appears on the face of the complaint
- SC said that this claim doesn't arise under fed law.

*Facts:*

- Ps injured by negligence of D, waived claims in exchange for free ride passes for life
- D stopped issuing passes after Congress passed an act prohibiting this practice



Notes:

- The courts want to be able to determine jurisdiction immediately, efficiency concern
- D also could not have removed to federal ct. based on a federal defense, this would bring up a concern of mixing state and federal laws
- What if the Mottley go to state court and Railroad answered invoking the fed statute? Is it removable? 1441 requires "original jurisdiction". Whether the P could have sued in there.
- There some statutes that allow removal based on an answer in fed law. I.e. sec 2.05, Chapter 2, FAA.
- These fed issues may go up to the SC 28 USC 1257
- Article 3: "all cases these arising" is different than "arising under" (statute v. Constitution)
- If your remedy was given for common law or statute was the test.

**Smith v. Kansas City Tile & Trust Co.** federal question without federal remedy = federal jurisdiction

*Issue:*

- Does a cause of action that does not have a federal remedy warrant federal jurisdiction if it requires the interpretation of a federal law to resolve the case?

*Holding:*

- Federal question jurisdiction is present so long as it appears from the complaint that the right to relief depends upon the application of federal law

*Discussion:*

- A case arises under federal law if its correct decision depends upon the construction of the Constitution of the laws of the United States

*Dissent:*

- To obtain federal jurisdiction, the case should arise under the law which created the cause of action

**Merrell Dow Pharmaceuticals Inc. v. Thompson** – no federal private right of action = no fed. juris.

*Issue:*

- Does the incorporation of a federal standard into a state-law private action give arising under jurisdiction when Congress has intended that there be no private right of action under the standard?

*Holding:*

- There is no indication that Congress did not intend a private right of action here and this indicates that they did not want to grant federal-question jurisdiction

*Discussion:*

- A federal issue in a state cause of action does not necessarily grant federal question jurisdiction

*Dissent:*

- An issue of federal law should have federal jurisdiction
- If anything, Congress' intent not to create a private right of action shows concern with accurate implementation and supports jurisdiction in federal, not state ct.

Notes:

- *Merrell Dow* could be read as saying that you need to have both a remedy and a fed. law to get into fed. ct.
- Because the fed. government didn't care to provide a right of action, the ct. does not want to see states interpreting statutes to have private rights of action because it may open the floodgates into fed. ct.

**Grable & Sons Metal Products v. Darue** – serious federal interest = federal jurisdiction

*Issue:*

- Does the incorporation of a federal standard into a state-law action give arising under jurisdiction when Congress has intended that there be no private right of action under the standard?

*Holding:*

- Federal jurisdiction demands not only a contested but also a substantial federal issue that indicates serious federal interest

*Facts*

- The IRS seized P's property to satisfy P's tax delinquency. IRS then sold the property to D.
- P did not exercise its right to redeem the property within 180 days of the sale even though P was given notice of the sale through certified mail.
- 5 years later, P brought a quiet title action against D and claimed that P was not notified in the exact manner required by federal statute. (Personal service v. certified mail)
- D removed the case to Federal District Court as presenting a federal question because the claim of title depended on the interpretation of the notice statute in federal law.
- P sought to remand the case to state court. District Court denied and granted summary judgment to D.

*Discussion:*

- A fed. ct. can hear state claims as long as they substantially involve a dispute or controversy regarding federal law
- *Merrell* made a private right of action sufficient but not necessary for federal jurisdiction
- The federal issue will qualify for federal jurisdiction if it does not disturb the balance between state and federal court responsibilities
- The meaning of the federal tax provision is an important issue of federal law and justifies the use of a federal forum to solve the federal gov.'s own interest

*Notes:*

- This case is distinct from *Motley* because the fed. issue is legitimately on the face of the complaint
- Distinct from *Merrell Dow* because Congress did intend a federal remedy here

### **Shady Grove Orthopedics Associates V. Allstate Insurance Co.**

Rule 23 FRCP establishes requirements of class actions NY 9.1.b set forth that you cannot use class actions to recover a penalty (not included in FRCP).

*Facts of the Case*

Shady Grove Orthopedics Associates (Shady Grove), on behalf of a class of plaintiffs, sued Allstate Insurance Company (Allstate) in part for Allstate's alleged failure to pay interest penalties on overdue insurance payments as prescribed by New York statute. Allstate moved to dismiss relying on New York's rules of civil procedure which instruct that class action lawsuits are inappropriate unless specifically prescribed by statute. The U.S. District Court for the Eastern District of New York agreed that Shady Grove's class action claim was not authorized and thus dismissed its claim.

On appeal, Shady Grove argued that the New York rules of civil procedure conflict with Rule 23 of the Federal Rules of Civil Procedure and thus were not applicable. The U.S. Court of Appeals for the Second Circuit disagreed with Shady Grove and affirmed the district court. The Second Circuit, reasoning from the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*, stated that the New York rules of civil procedure did not conflict with Rule 23 and thus Rule 23 did not control.

### *Question*

- 1) Can a state legislature prohibit federal courts from using a federal class action rule for a state law claim?
- 2) Can a state legislature dictate civil procedure in federal courts?

### *Holding*

No. No. The Supreme Court held that §901(b) of the New York rules of civil procedure does not preclude a federal court sitting in diversity from entertaining a class action under Rule 23 of the federal rules of civil procedure. With Justice Antonin Scalia writing for the majority as to Parts I and II-A, the Court stated that if Rule 23 answers the question in dispute, it governs, unless it exceeds its statutory authorization or Congress' rulemaking power. Here, the Court reasoned that Rule 23 answers the question in dispute – whether Shady Grove's suit may proceed as a class action – and is therefore controlling. With Justice Scalia writing for a plurality as to Parts II-B and II-D, he stated that the Rules Enabling Act, not Erie controls the validity of a federal rule of civil procedure, even if that results in opening the federal courts to class actions that cannot proceed in state court. With Justice Scalia writing for a distinct plurality as to Part II-C, he concluded that the concurrence's analysis conflicted with the Court's precedent in Sibbach – that the federal rules "really regulate procedure."

Justice Stevens wrote separately, concurring. He agreed that Rule 23 applies in this case, but also recognized that in some cases federal courts should apply state procedural rules in diversity cases because they function as part of the state's definition of substantive rights and remedies. Justice Ruth Bader Ginsburg, joined by Justices Anthony M. Kennedy, Stephen G. Breyer, and Samuel A. Alito, dissented. She criticized the majority opinion for using Rule 23 to override New York's statutory restriction on the availability of damages and consequently turning a \$500 case into a \$5,000,000 one. She cautioned that it is important to interpret the federal rules with sensitivity to state regulatory policies.

## **4. Specialized Problems**

### **Implied Private Right of Actions**

- If congress has expressly provided a private cause of action in fed. court, then the fed. court has subject matter juris.
- If not expressly implied, court must determine whether there is a federal cause of action. If person is not of the class protected by the statute, they do not have standing.
- **Biven v. Six Unknown Named Agents of Federal Bureau of Narcotics**
  - First case to recognize a private damages remedy for a violation of a constitution right.
  - Court reasoned the absence of affirmative action by Congress did not bar damages, but the court would refuse to imply a damage remedy if Congress has legislated in the area in question.
- When congress has provided for enforcement of a statutory right by public suit, the court must apply a four part test to determine if there is a private right of action against government officials or agencies.
  - Is P one of protected class
  - Is there legislative intent to give a remedy
  - Is the remedy consistent with purpose of statute
  - Is state or fed law the appropriate regulator of the area
- When a court finds there is no cause of action, the suit is dismissed based on its merits not on lack of sub matter juris. This distinction may be significant in terms of a courts power to hear related state claims.

### Outer Limits of Article III

- 1331 and *Mottley* fall short of article III juris. and thus do not implicate the arising under language in article III
- Article III covers suits arising under federal common law

### 5. Supplemental Jurisdiction (before “pending” jurisdiction.

**United Mine Workers of America v. Gibbs** – common nucleus of operative fact for pendent jurisdiction

*Issue:*

- Can a state claim based on the same events as a federal claim still be heard in federal court through pendent jurisdiction if the federal claim is dismissed?

*Holding:*

- Pendent jurisdiction over a state claim is allowed, even if the federal claim was dismissed, if the claims derive from a common nucleus of operative fact
- If the P’s claims are such that they would ordinarily be expected to be tried together (regardless of their state or federal character), then the federal courts have power to hear the whole, assuming the federal issue is substantial
- The reference in this case is to article 3 of the Constitution (this case is prior to any statute). The court said that it has the power.
- Furthermore, the court also said that it had discretion.

*Facts:*

- Federal claim and state claim in federal court
- Federal claim dismissed but state claim remains in the federal court

*Discussion:*

- Jurisdiction in federal ct. over state claim based on doctrine of pendent jurisdiction. This furthers the goals of efficiency, judicial economy, convenience and fairness to the litigants
  - This is particularly the case when the federal claim must be heard in federal court, such as with copyright laws
- Pendent jurisdiction is a discretionary, not the P’s right. Courts can decline to exercise supplemental jurisdiction when:
  - The state claims are novel or complex
  - The state claim predominates
  - The claims that jurisdiction was based on were dismissed before the trial

**Moore v. New York Cotton Exchange** – same transaction for ancillary jurisdiction over counterclaim

*Issue:*

- Should a state-based counterclaim be dismissed in federal court if the federal claim upon which it was based is dismissed on the merits?

*Holding:*

- A state law-based counterclaim may have ancillary jurisdiction if it arose out of the same transaction that is the subject matter of the suit and the logical relationship between the claim and the counterclaim
- A federal claim being dismissed on the merits does not preclude supplemental jurisdiction over the state law-based counterclaim if the dismissal is on the merits and not for jurisdiction

*Facts:*

- The first suit in a federal claim, the counter-claim is a state law claim

- Federal claim dismissed but state claim remains in the federal court because the trial had already proceeded into the merits

*Discussion:*

- The counterclaim here arises out of the transaction that is the subject matter of the suit
- The essential facts alleged by the first claim do not have to be exactly identical to the counterclaim

*Notes:*

- *Pendent jurisdiction*—plaintiff's joinder of a related state claim with a claim based on a federal question
- *Ancillary jurisdiction*—federal court's willingness to hear a jurisdictionally defective claim (whether asserted as a claim, counterclaim, third-party claim, or joinder of additional parties) because of its close relationship to P's original federal claim
- *Moore* equates the existence of ancillary jurisdiction with the status of the counterclaim as compulsory
- **Hurn v. Ousler** – the federal court can decide both federal and non-federal claims if it constitutes one cause of action

### **Owen Equipment & Erection Co. v. Kroger** – no non-diverse 3<sup>rd</sup> party for diversity juris.

*Issue:*

- Can subject matter juris. be extended to a nondiverse 3<sup>rd</sup> party with no independent basis of federal jurisdiction?

*Holding:*

- There must be an independent basis of jurisdiction when joining a non-diverse party to a diversity proceeding

*Facts:*

- P brings a claim to federal court under diversity and D impleads a non-diverse 3<sup>rd</sup> party D
- The original D gets summary judgment, leaving only P and the non-diverse 3<sup>rd</sup> party D

*Discussion:*

- To have supplemental jurisdiction, there must be constitutional power (such as the *Gibbs* common nucleus of operative fact test) and statutory support
  - There is no statutory conference of jurisdiction here because 1332 requires complete diversity
- Deciding to maintain federal jurisdiction here would allow Ps to obtain federal jurisdiction by suing diverse Ds who they know will implead non-diverse 3<sup>rd</sup> party Ds

*Dissent:*

- P had no control over D's decision to implead a 3<sup>rd</sup> party so diversity should still exist

*Notes:*

- *Impleader*- permits D to bring in a 3<sup>rd</sup>-party who is claimed to owe an indemnification or contribution obligation to D

### **Finley v. United States** - no pendant party jurisdiction (**overruled by § 1367**)

- Federal claim brought against one D. Additional claim added to an additional non-diverse party
- Strongest possible context for pendant party jurisdiction because federal court had exclusive jurisdiction
  - If not allowed to join non-diverse D, P would be forced to split her claims between state and federal ct.
- Court finds that it lacks authority to assert jurisdiction over state claims against 3<sup>rd</sup> party Ds lacking an independent basis of federal jurisdiction

- Extends to prohibiting the addition of 3<sup>rd</sup> parties who lack an independent basis for federal jurisdiction in general
- The efficiency of the court in this situation is not enough
- Up to the Congress to change it if it disagrees, which it does with 28 U.S.C. § 1367

Aggregation in class actions is that you can considerer just the named parties.

#### 28 U.S.C. § 1367 - Supplemental Jurisdiction

- Supplemental jurisdiction allowed to the limits of Art III – “common nucleus of operative facts” – unless excepted in (b)
- (b) exceptions: when suit based on diversity only, no supplemental jurisdiction over claims by Ps against persons made parties under Rule 14 (impleader), 19 (compulsory joinder), 20 (permissive joinder), or 24 (intervening) parties...
- ...or claims by persons joined as Ps under Rule 19 (compulsory joinder), or seeking to intervene as Ps under Rule 24, when exercising jurisdiction over those claims would not meet 1332 requirements
- (c) discretion to decline jurisdiction when state claims are novel or complex, state claims predominate, claims upon which jurisdiction was originally based have been dismissed, or other

#### More on § 1367

- Does not overrule *Kroger* because the third party was impleaded under rule 14
- Explicitly reverses *Finley*—supplemental juris. may include the joinder of additional parties that do not have an independent basis of federal jurisdiction
- 1367(b)—no exclusion for supplemental jurisdiction over Rule 23 class members who lack jurisdictional amount
  - Overrules **Zahn**, which held that all members of a class action needed to meet the requisite amount in controversy
  - But House Report indicates the statute is not meant to overrule Zahn
  - SC: then write the statute well.
- Basic things to take away: Supplemental jurisdiction and what it does?
- Nothing breaks up the maximum diversity rule to get into general courts. It stays forever.

#### **Exxon Mobil Corp. v. Allapattah Services, Inc.**

#### **Rosario Ortega v. Star-Kist Foods, Inc.** – 1367 exceptions

*Issue:*

- Can supplemental jurisdiction be granted in a diversity suit to claims that do not meet the requisite amount in controversy?

*Holding:*

- When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy and there are no other jurisdictional defects, the district court can have supplemental jurisdiction over those claims

*Facts:*

- In *Exxon*, the named parties meet the jurisdictional amount for diversity jurisdiction, but the unnamed parties do not
- In *Ortega*, one of the Ps meets the jurisdictional amount for diversity jurisdiction, but the others do not

*Discussion:*

- 1367(b) does not exclude supplemental juris. for parties joined as Ps under rule 20 (permissive joinder) or rule 23(class action) Ps, so supplemental jurisdiction over these claims is allowed even if they do not meet the amount-in-controversy
- Overturned *Zahn* and ignored legislative history, which says that the section is not intended to affect the jurisdictional requirements of 1332 for class actions
- The contamination theory does not apply here because that only applies to lack of complete diversity, not amount-in-controversy

*Dissent:*

- *Zahn* should not be overruled because it was not the Congressional intent to do so

## 6. Removal Jurisdiction

### 28 U.S.C. §1441 - Removal

- (a) If federal court has original jurisdiction, civil action may be removed by D to federal district court, to the analogous fed. ct. to the state court in which the case is filed
- (b) If the federal courts have original juris. founded on "arising under" claim, civil action is removable without regard to parties' citizenship or residence. If no "arising under" original jur, action is removable only if none of the Ds are citizens of state in which action is brought, i.e. D cannot remove to federal ct within his own state
- (c) When a separate and independent claim or cause of action within the jurisdiction conferred by 1331(arising under) is joined with a non-removable claim, entire case may be removed to a district court. District court can determine all issues in action or may remand those issues in which state law predominates.
- (d) Foreign state D may remove to federal district court. Applies even to corporations owned by foreign states, so long as majority of its shares are owned directly by the sovereign

### 28 U.S.C. §1445 - Non-Removable Actions

- In certain cases, e.g. against a railroad or its receivers, against a carrier or its receivers or trustess in certain instances, workmen's comp, Violence Against Women Act, P has the absolute right of forum choice so the action cannot be removed
- There is no review for a remand motion under 1477(d) is a fed. ct. decides a case is not removable
- There are specialized rules of removal for class actions. See 1453. If case could be brought under CAFA, 1432d, then you can remove.

### Examples from Class

- 1. State law libel claim brought in state court. D raises a 1st Am. defense. Is this removable?
  - Is there original jurisdiction here? No under *Mottley*. **Federal defense is not a basis to get into fed ct. The *Mottley* test is an interpretation of 1441 and not the Const.**
  - This is the general rule. There are some exceptions to this. 1442: suing a fed officer, P can't bring it in fed ct but we give fed officer the right to remove.
- 2. NY v. TX for \$1M. If case is brought in NY state court. Can D remove?
  - Yes, because of 1441(b) the D is a non-citizen of NY.
  - What if brought in MA state court? Same point. So yes.
  - What if in TX? No, because he's a citizen of that state.
- 3. Mex. v. LA in TX. Removable?
  - LA can remove under alienage

- Suppose P wants to stay in state court in TX and joins a TX D. Can D remove? All parties have to be non-citizens. So, no removal. Anything LA can do? Yeah, can file the removal notice in the federal court, which automatically removes the case, and then claim fraudulent joinder of the TX D.
- 4. State contract claim. 2 NYers. No diversity.
  - A sues B for failure to pay credit card bill. B asserts a counterclaim against A for violation of Fed. Truth and Lending Statute.
  - Can B remove this case? No. We look to P's complaint not to D's counterclaim.
  - What about A? A is now a D to a counterclaim. That's not the right way to look at it. In the *Shamrock Oil* case, the Sup Ct, because the prior statute had authorized removal by either party, then Ct changed that to only Ds and said that they would construe that as only the original D.
  - If you're B, you might try to file a separate fed action for counterclaim. But, suppose the state has a compulsory counterclaim, then you might be stuck but we'll look at this later.
    - If B does file a separate fed action, and then there's still the state action of A v. B, can A keep case in state court? There will be a race to see who gets a judgment first and then issue preclusion will kick in and FFC.
  - What about NY v PA for \$10K and \$100K counterclaim. They arise out of same nucleus of fact. A as a D to the \$100K claim cannot remove because he's not an original D but rather a D to a counterclaim. How about B? No because there's no original jur because even though there's an diversity, there's no requisite amount because counterclaim isn't included.

## 7. Challenges to Subject Matter Jurisdiction

- **FRCP 12(h)(3)** says that court has responsibility on its own to ensure that it has subject matter jurisdiction
- Defects in a court's subject matter juris. are not waivable and hence not subject to waiver because of untimely assertion or acquiescence
- Traditional view is that judgment rendered without subject matter juris. is null and void and that a challenge could be by direct attack at any time or by collateral attack
  - Null and void doctrine as well as collateral attack have been restricted by the Supreme Ct.
- Test is to balance need for finality against institutional interests in the particular case
  - More modern approach taken by the RST Second of Judgments suggests that it depends on what happened in the first case, i.e. how important the issue of subject matter juris. was in the first case.
- Court must establish subject matter juris. before it has authority to make any ruling on the merits
- Court later held that it may dismiss for lack of personal juris. without first resolving complex question of subject matter juris. (*Ruhrgas A.G. v. Marathon Oil Co.*)

## **Relationship of Removal and Supplemental Jurisdiction**

- Hypo: Gibbs v. Union. Labor is federal claim. Interference claim is state. This is brought in state court. Can D remove this case? Gibb's original claim is a federal claim but is brought in state court under concurrent jurisdiction.
  - If 1441(c) is about removal of unrelated claims, this is exactly the opposite of supplemental juris. because that's about relatedness but 1441(c) is about unrelatedness and tells us that if there are separate and independent cases one with arising under juris. and one that is non-removable and they are joined, then the D can remove the entire thing.



- Back to original hypo of Gibbs where claims are related. If there's supp juris. due to common nucleus, they are removable because of 1331 and 1367.
- If there's a 1331 claim, everything is removable one way or another, either as related claims under 1367 or as unrelated claims under 1441(c)

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## The Applied Law in Federal Courts

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### Introduction

- 1938: “Revolution” in the federal court system. Two changes:
  - Congress passes 28 U.S.C. 2071-77, empowering the federal courts to construct the FRCP (until this point, federal courts applied rules of procedure of state in which court sat)
  - *Erie R. Co. v. Tompkins* (U.S. 1938)
- What law should the federal courts apply in diversity cases? Guidance from:
  - Constitution
    - *10<sup>th</sup> Amendment* – reserves non-enumerated powers to the states
    - *Article III* – grant of judicial power, justifying creation of federal courts
  - **28 U.S.C. §1652** – “*Rules of Decision Act*”
    - State laws are rules of decision “except where Constitution or Acts of Congress otherwise require or provide”

### Setting for Erie

- Traditional view of common law: “brooding omnipresence in the sky” for enlightened philosopher judges to divine.
- **Swift v. Tyson** – state common law in federal hands
  - Case law is evidence of common law, but does not constitute “laws” for the purpose of the Rules of Decision Act. Each federal judge is free to issue their own interpretations.
  - State statutes are what matter under the Rules of Decision Act
  - Common law is not viewed as the law of a particular state but as universal rules shared by the American legal system
    - Under this view, state courts do not make law but interpret existing common law
  - Resulted in rights under the unwritten “general” law vary according to whether suit was brought in the state or federal court
    - This was discriminatory because afforded different rights to diverse and non-diverse parties
    - Especially unfair for D sued in home state by out-of-state P because he cannot remove

**Erie R. Co. v. Tompkins** – state law to be used in diversity court

*Issue:*

- Should the federal court in diversity use PA common law or its own determination to establish liability?

*Holding:*

- Federal courts sitting in diversity must apply the law of the states except in matters governed by the Federal Constitution or acts of Congress

*Facts:*

- PA P sues NY corporation in NY federal court for injuries due to PA railroad accident

- P would be considered a trespasser under PA common law but not under federal law

*Discussion:*

- There is no universal common law that can be determined by federal courts
- Equal protection concerns: *Swift* prevented uniformity in the administration of the law of the state
- Forum-shopping concerns: under *Swift*, Ps could avail themselves upon the different federal rule by resort to diversity jurisdiction
- Federalism: it is unconstitutional for the federal courts to regulate areas of law left for the state's powers (10<sup>th</sup> amendment)

*Notes:*

- The big case of federalism in the US.
- CS says that because of its previous bad decisions there was an incentive to forum shopping.
- While *Erie* may have decreased vertical forum-shopping, it may have increased horizontal forum-shopping after states began to use different choice of law rules
- By overruling *Swift* and reinterpreting the Rule of Decision Act, the Court avoided declaring the act itself unconstitutional
- One situation in which a P has complete control of the choice of state or federal forum: nonresident P against a resident D (because resident Ds cannot remove)
- **Klaxon Co. v. Stentor Electric Manufacturing Co.** – federal ct.s must apply the same state law as would be applied in the state forum
  - So federal ct.s are not just bound to the state's substantive law, but also choice of law

## 2. Ascertaining State Law

- When a federal court uses state law, federal diversity litigants do not have access to state appellate courts to determine unsettled law
- Therefore, if diversity litigants are really to be treated the same, the federal trial court should be to decide the case as would the highest state court
- This goal is difficult if there is no existing state precedent

**Salve Regina College v. Russel** – de novo for appellate review

*Issue:*

- Should a federal court of appeals review a district court's determination of state law at a different standard than that required by federal law in accordance with *Erie*?

*Holding:*

- The federal ct. of appeals should review district ct.s' predictions of state law de novo

*Facts:*

- Diversity case regarding application of RI law. District ct. predicted that RI Supreme Ct. would extend substantial performance to the case even though they had limited its use to construction contracts
- Ct. of appeals used plenary review and affirmed

*Discussion:*

- The trial courts are not suited for complicated legal questions, where as ct. of appeals employs multi-judge panels and don't have to determine facts so can devote time to legal issues
- The twin aims of the *Erie* doctrine are furthered by de novo appellate review because deferential appellate review invites divergent development of state law decisions among the federal trial courts

- Using de novo review is an extra safeguard to make sure the state law determinations are accurate and prevent forum shopping for certain district courts

*Dissent:*

- The district judges have superior experience, so may have a better sense of state ct. trends
- Appellate courts are likely to ponder policy implications, which are unnecessary when the goal is to determine state law

*Notes:*

- Generally, the standard of “clearly erroneous” is used in appellate review
- Erie doesn’t eliminate forum shopping, just establishes a new system lawyers can game.
  - Lawyer filing suit here would consider whether the federal courts consider themselves bound by state precedent, or as is this case, interpret it as they believe the highest state court would, even if contrary to state precedent
- Federal ct.s can determine the intentions of the highest state court through a certification procedure, where available, but the result is discretionary and the case will be extended for much longer
  - This could also ruin the point of diversity jurisdiction, since the state ct. would play a role in the trial

### 3. More Amplification of the Erie Doctrine

- Despite Erie, Congress has authority via Art. III and “necessary and proper” to craft procedural rules
- Neither the Constitution nor the Rules of Decision Act compel the federal courts to follow state procedural rules

#### **Guaranty Trust v. York** – outcome determination

*Issue:*

- Should a federal court in diversity use the state’s statute of limitations when it would result in barring recovery for the P?

*Holding:*

- If consequences resulting from the use or nonuse of a state law would determine the outcome of a case, the state law should be used

*Facts:*

- Diversity suit that if heard in state court, would have been barred by statute of limitations

*Discussion:*

- The distinction between substantive and procedural is immaterial. Importance is outcome.

*Notes:*

- Allowing the federal statute of limitations would result in vertical forum-shopping
- Problem with test: any procedural rule can possibly affect the outcome
- Ignores federalism aspect of Erie – should consider whether applying own statute of limitations impedes on regulatory powers left to the states (see Harlan’s test)
- *Sun Oil* – allows states to apply own statute of limitations

#### **Byrd v. Blue Ridge Rural Electric Cooperative** – essential function of the federal court

*Issue:*

- Should a federal court follow a state rule that factual issues be decided by a judge or the federal rule that it be decided by a jury?

*Holding:*

- Essential functions of the federal court will rule in diversity cases even where it may result in a change of outcome

*Discussion:*

- An essential function of the federal court system is the right to a jury trial under the 7<sup>th</sup> amendment
- The outcome may not necessarily come out differently here if the facts are decided by a judge or jury

*Notes:*

- Although using a jury instead of a judge may not necessarily determine outcome, it could still result in vertical forum-shopping

#### 4. Erie and the Federal Rules of Civil Procedure

- **The Rules Enabling Act - §2072**
  - Congress gives Supreme Court power to craft rules of practice and procedure so long as they do not modify any “substantive right”
    - No rule has yet been struck down on this ground
  - Rule making process
    - Rules proposed in various committees, eventually approved by the Supreme Court, and then Congress can object – if they don’t within 7 months, rules enacted
    - Issues: lack on congressional oversight, statutes should trump rules (but don’t, more recent trumps)

**Hanna v. Plumer** – twin aims of the *Erie* Doctrine

- Diversity action. Car accident in South Carolina.
- P: Ohio (injured)
- D: Mass (deceased)
- Summons and complaint in Mass according to Fed Rule 4 (d)(1).
- D move to dismiss cause service was not made in conformity with Mass statute.
- District court dismissed based on Guaranty trust. Court of Appeals affirmed.
- SC (Warren) reversed disregarding “outcome-determination” approach as talisman. **“The court has been instructed to apply the Fed. Rule...”**

*Issue:*

- Does the federal court have to follow the state rule requiring personal service when it would affect the right to recovery in this case?

*Holding:*

- The consideration of outcome determination must be weighed in regards to the twin aims of Erie: 1) forum shopping, 2) inequitable administration of the laws

*Discussion:*

- In some sense, every procedural variation could be outcome determinative
- Here, the procedural rule in question is not substantial enough to raise concerns about forum-shopping or equal protection of the laws
- When a diversity case is covered by one of the Federal Rules, must apply the Federal Rule unless the rule transgresses either the terms of the Rules Enabling Act or constitutional restrictions

- The Constitution grants Congress the power to make rules concerning matters falling within the uncertain area between substance and procedure

*Harlan's concurrence:*

- Erie, at its core, is concerned with federalism
- The application of a rule (and a proxy for the substance/procedure distinction) should depend on whether or not its application would "substantially affect those primary decisions regulating human conduct" which should be left to state control (p 472)

*Notes:*

- *Hanna* establishes a two-track resolution for *Erie* problems:
  - 1. Unguided track when there is no federal rule or statute that covers the question
  - 2. Track where there is a pertinent federal rule or statute
- Timeframe of the outcome determination test in *Hanna*: the impact of the choice between state and federal law must be apparent when the litigants are selecting the forum. **At the beginning.**

## 5. Erie and the Federal "Procedural" Statutes

**Stewart Organization, Inc. v. Ricoh Corp.** – federal statute that controls the issue

*Issue:*

- Should a federal court in diversity apply state or federal law in enforcing a forum-selection clause?

*Holding:*

- A federal court in diversity must apply a federal statute that (1) controls the issue before the court and that (2) represents a valid exercise of Congress' constitutional powers

*Facts:*

- State law regarding transfers clashed with federal transfer statutes

*Discussion:*

- Between two choices in a single field of operation, instructions of Congress are supreme

*Dissent:*

- Application of the federal statute here would encourage forum-shopping

*Notes:*

- Ct. pulls back from "direct collision" with federal rule/ statute "broad enough to cover the dispute"
- Takes Warren's views in *Hanna* to extreme: since a statute – 1404- covers the dispute, and since 1404 valid exercise of Congressional power, federal rule trumps
- Harlan would see application of federal rule as interfering with state regulatory power over contracts, so state law should trump
- The state's substantive interests in its law are overlooked

## 6. The Supreme Court's Latest Word

**Gasperini v. Center for Humanities, Inc.** – application of *Erie* progeny

*Issue:*

The case involved an important issue of what standard of review should be used by a federal court in measuring the excessiveness of a jury verdict. The standard typically applied by federal courts was that a verdict was excessive if it "against the great weight of the evidence". Abusive discretion. But in New York the standard included as a part of a tort reform initiative, codifying in CPLR §5501(c), is that an

award was excessive if it "deviates materially from what would be reasonable compensation." The question arose as to whether the standard was substantive or procedural, as the Erie Doctrine stipulated that the federal court should apply the substantive law of the state and federal procedural law.

*Holding:*

- Does the NY Rule conflict with 7<sup>th</sup> amendment? No. In a 5-4 plurality decision, authored by Justice Ruth Bader Ginsburg, the Court ruled that New York's law controlling compensation awards for excessiveness or inadequacy can be given effect, without detriment to the Seventh Amendment, if the review standard is applied by the federal trial court judge, with appellate control of the trial court's ruling confined to "abuse of discretion."

*Facts:*

- Large judgment given in diversity case for negligent loss of original transparencies taken in Central America

*Discussion:*

- Arguments for federal standard:
  - There is a strong federal interest in the role of the jury in not reexamining their findings at the appellate system. 7<sup>th</sup> amendment concern, as in *Byrd*
  - Rule 59 covers the issue, so federal standard trumps unless unconstitutional under *Stewart*
- Arguments for state standard:
  - The state's objective in the rule is substantive
  - Applying the federal rule would lead to forum-shopping because would lead to different amounts of recovery in state and fed. ct.
  - There is no direct collision with Rule 59, so federal rule would not trump

*Stevens Dissent:*

- *Erie* requires application of the state standard so the 7<sup>th</sup> amendment should not influence this decision

*Scalia Dissent:*

- In accordance with *Byrd*, the 7<sup>th</sup> amendment gives a strong federal interest in the characteristics of the federal jury so the Fed. Rules should be used

## **7. Substantive Federal Common Law**

- *Federal common law* derives from area falling under Art. I of the Constitution, where Congress could legislate
  - This common law, under Supremacy clause, applies to both federal and state courts
- Federal common law "fills the gaps" of Congress' regulations – crafted by courts when state law as applied frustrates identifiable congressional purpose

**Boyle v. United Technologies Corp.** – federal common law

*Issue:*

- In the absence of specific federal legislation, could federal common law trump state common law?

*Holding:*

- A few areas involving uniquely federal interests are so committed to the Constitution and the laws of the United States that they pre-empt and replace state law in that area
- Displacement will only occur when a significant conflict exists between identifiable federal policy and state law

*Facts:*

- Diversity suit against helicopter manufacturer for wrongful death of Marine
- Conflict between VA law and “military contractor defense” in federal common law, which is not explicitly part of the controlling Federal Tort Claim Act

*Discussion:*

- Federal contracts and the liability of federal officials are two areas of unique federal concern
- This is an area of significant concern to the U.S. because it would affect the U.S. financially

*Dissent:*

- The Ct. extends federal common law, which should be limited to very few situations, too far and intrudes upon the legislative role
- The Ct. takes the state’s role and tips the balance of federalism, which was the concern in *Erie*

*Notes:*

- The Ct.’s decision could be seen as filling in the gaps of legislation
  - But you could also take this as saying that Congress did not intend such a result because it was not explicitly stated
- Expanding federal common law could create more opportunities for access to the federal courts through arising under jurisdiction
- *Reverse Erie Doctrine* – when federal substantive law is applied in the state courts, some state procedures may be preempted because they do not adequately vindicate the federal right
  - In this situation, both parties would have equal access to the federal court so there would not be an issue of unilateral forum-shopping

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**Prior Adjudications: Claim and Issue Preclusion**

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**1. Overview**

- *Res Judicata* – issue and claim preclusions. Justifications:
  - Stability is needed in the form of final decisions
  - Lack of finality would put an excessive burden on the D to keep defending himself
  - Promotes judicial efficiency
- There are competing interests to reach the truth and also for a speedy and efficient judicial system
- Claim and issue preclusion both operate intrastate according to that state’s laws
- The finality of a court’s decision can be challenged by an appeal or collateral attack
- §1738 Full Faith and Credit recognizes issue and claim preclusion standards of other states
- *Claim preclusion* – forbids the relitigation of claims that were or should have been brought in a subsequent proceeding
  - Requires that the parties in a subsequent proceeding were parties to the first proceeding
  - Promotes efficiency because requires a party to consolidate multiple theories of recovery in a single cause of action
- Claim preclusion operates as a compulsory joinder rule
- *Issue preclusion aka collateral estoppel* – forbids relitigation of specific determinations made in prior proceedings
  - The issues must have actually been litigated and were necessary to the prior judgment

- Does not require the same parties as the first proceeding, but can never be asserted against a party who was not in the first proceeding.
  - Patent holder who sues infringer A. Infringer says that patent is invalid and the patent holder is the winner. Now patent holder sues infringer B. Infringer B says the patent is invalid. Is B bound for decision between holder and A? No, because he was not a party.
  - If patent loses in claim 1 and then sues B, B can argue that the patent holder is precluded because the latter was a party to the lawsuit.
  - The most modern view is that mutuality of the estoppel is not necessary anymore.
- Issue preclusion has the potential to be used unfairly i.e. taken out of context, used in an unforeseeable way, etc.
- P 822: limitations to issue preclusion: REE.

## 2. Claim Preclusion (Merger and Bar)

**Rush v. City of Maple Heights** – claim preclusion for same accident

*Holding:*

- A P can only bring one cause of action for damages arising from the same occurrence

*Facts:*

- P recovered damages sustained to her motorcycle from an accident, then filed another cause of action for personal injuries stemming from the same accident

*Discussion:*

- Merging claims is necessary to prevent multiple suits, burdensome expense, delays to Ps, and vexatious litigation against Ds

*Notes:*

- Claim preclusion ensures that decisions are stable, parties do not have to go through additional litigation, there is no double recovery, and there is no needless burden on the courts
- **Rule 18** allows permissive joinder of claims, no compulsory joinder, but claim preclusion acts as a mechanism of compulsory joinder
- **P 785 Dimensions of claim for purposes of merger or bar.**

**Herendeen v. Champion International Corp.** – no claim preclusion for independent claims

*Issue:*

- Is P barred from bringing an independent claim against the same D in a second suit?

*Holding:*

- Relevant criteria for deciding whether or not a claim is precluded are:
  - Whether a different judgment in the second action would impair rights or interests established by the first
  - Whether the same evidence is necessary in the 2<sup>nd</sup> action
  - Whether the essential facts and issues are the same in both actions

*Facts:*

- P lost first suit against employer for acting fraudulently by inducing him to leave his position
- P brought a second suit against D to obtain payments D owes him. This suit was dismissed because of res judicata



Notes:

- A cause of action does not consist of facts, but of the unlawful violation of a right
- **R2J §24** says that the final judgment of an action precludes any further suits by P for remedies against D with respect to all or any part of the transaction out of which the action arose
- Questions about claim preclusion do not arise until after the initial claim is settled
- *Gibbs* “nucleus of operative fact” test allows a wider range of claims to receive supplemental jurisdiction than would be given res judicata effect

**Federated Department Stores, Inc. v. Moitie** – should have appealed

Issue:

- Should Ps be allowed to bring a suit that should be barred by claim preclusion because the precedent upon which the first case was dismissed has changed?

Holding:

- A judgment based on an erroneous view of law is not open to collateral attack by another action upon the same cause, but can be corrected only by direct review through an appeal

Facts:

- Ps had first suit involving federal act dismissed. Some of the Ps filed a second suit based on the same facts alleging state law claims, the other Ps appealed the decision
- In the interim, a relevant issue of law was decided in a different case that would have meant the Ps’ first case wouldn’t have been dismissed

Discussion:

- A judgment is final, even if it was wrong or rests upon a legal principle that is overturned because a contrary rule would give uncertainty to the finality of judgments
- The doctrine of res judicata serves the public interest that there be an end to litigation, which is much broader than the “simple justice” of an individual case

Notes:

- Latent injuries can present a problem in claim preclusion because one does not want to bring the claim too soon and be barred from recovering for further injuries, but the statute of limitations prevents waiting for too long
  - This causes people to be pushed into litigation prematurely and courts to speculate on damages
- **Rule 60(b)** allows a party to be relieved from final judgment for various reasons, including the discovery of new evidence
- **R2J §26** gives exceptions to the general rule against splitting claims, such as when the judgment in the first action was plainly inconsistent with the statutory scheme

### **3. Defense Preclusion**

- Claim preclusion can be used by both Ps and Ds
- *Defense preclusion* – application of preclusion against parties who were Ds in the first suit
  - This is mostly governed by **Rule 13(a)** compulsory counterclaims. If a claim was compulsory, a party is barred from asserting it by res judicata.

**Mitchell v. Federal Intermediate Credit Bank** – don’t split your claims

*Issue:*

- Is P barred from bringing what should have been a compulsory counterclaim in a second suit?

*Holding:*

- If claims are part of the same cause of action, a party cannot divide them between different suits
- You have to plead your compulsory counterclaim or else you will be barred by res judicata

*Facts:*

- Mitchell was sued by bank in federal ct. and also commenced another suit against the bank in state ct. based on the same occurrence. Mitchell defended himself with the same facts that he alleged in his action, but did not counterclaim, and won
- The state ct. then decided that Mitchell's claims were merged in the fed. suit so he was barred by res judicata from seeking damages for his claim
- Claim was not compulsory at that time because state procedural rules were still being used

*Discussion:*

- One cannot use the same defense as both a sword and a shield
- The use of a defense in a claim precludes its use as the basis for an independent suit

*Notes:*

- If Mitchell did not even raise the defense, he may not have been precluded from bringing his claim
- If two similar claims are being tried at once, the first to reach final judgment will have res judicata
- This is an example of merger because Mitchell was successful in the first suit, just chose to split his claims
- Asserting a compulsory counterclaim means that you as a P to that claim cannot choose your own forum
- **R2J §22** – P is barred from bringing claims that he did not bring as a compulsory counterclaim in a previous suit or that would result in an inconsistent result from the first suit if successful
- Mitchell would have been allowed to split his claims under the restatement because the claim was not compulsory and successful prosecution of the second claim would have been consistent with the results in the first claim

#### **4. Adjudication Not on the Merits**

- A case must be disposed of on the merits to have claim preclusive effect

**Costello v. United States** – not on the merits = no claim preclusion

*Holding:*

- A judgment must be determined on the merits in order for it to act as a bar to another suit

*Facts:*

- The first suit was dismissed that was not specified to be “without prejudice” because the Gov. failed to file a form correctly
- The Gov. brought the same suit again with the form filed correctly

*Discussion:*

- Supreme Ct. says that the dismissal of the first case was equivalent for dismissal for lack of jurisdiction, so did not reach the merits (and therefore an exception to dismissal under Rule 41(b))

*Notes:*

- A dismissal with prejudice is a necessary, but not sufficient condition for claim-preclusive effect

- **Dozier v. Ford Motor Co.** – claim that did not meet jurisdictional amount barred by res judicata from being brought again with the requisite amount
  - Distinguished from *Costello* because the defect there was curable, whereas here it would have to mean a change of facts

### **Semtek International Inc. v. Lockheed Martin Corp.** – “on the merits”?

*Issue:*

- Is the claim preclusive effect of a federal judgment in a diversity suit determined by the law of the state in which the federal court sits?
- Does a dismissal “on the merits” always bar a subsequent suit?

*Holding:*

- A district court must look to the state law in which it sits to determine the claim preclusion rule, but the federal common law will determine its effect
- The claim preclusive rule from the state where the case was dismissed will be used in a subsequent suit no matter where it is later brought
- A case must actually reach its substantive merits to have claim preclusive effect

*Facts:*

- P’s claim was dismissed “on the merits” in a diversity suit because of the state’s statute of limitations in CA
- P then brought the claim to MD where there was a longer statute of limitations, but was barred according to federal law because the claim was dismissed on the merits

*Discussion:*

- A judgment “on the merits” according to Rule 41(b) does not necessarily have res judicata effect unless it actually passes to the substance of a claim. Using 41(b) to determine res judicata in state courts would violate the Rules Enabling Act.
- Using claim preclusion here would result in forum-shopping because its result would differ from state to federal court
- Dismissal for statute of limitations does not necessarily extinguish a substantive right so does not have claim-preclusive effect and other states with a longer statute of limitations can hear the claim
- Dismissal “on the merits” in this context just bars a claim from being brought to the same court
- The fed. ct.s will not reference state law for preclusive effect if the state law is incompatible with federal interests, then federal common law would be used

*Notes:*

- If statute of limitations was viewed as substantive in CA, then MD should not have been able to use its statute of limitations
- A full trial, summary judgment, and directed verdicts technically reach the merits and carry preclusive effect

## **5. Issue Preclusion**

### **Little v. Blue Goose Motor** – issue preclusion

*Issue:*

- Can D1 win a suit against P1 after his negligence as to the same occurrence has already been determined in a prior suit between the same parties?

*Holding:*

- Collateral estoppel is used when a material fact essential to the issue was determined in a prior suit between the same parties or between parties with whom the parties are in privity

*Facts:*

- Little collided with a bus.
- Trial 1: Bus sued Little for damages and won.
- Trial 2: Little sued Bus for personal injuries and Bus alleges that issue of Little's negligence was already decided in the first trial so Little cannot recover because of contributory negligence

*Notes:*

- The question of issue preclusion is not raised until it is determined that claim preclusion does not bar the suit entirely
- **R2J §27** – an issue of fact must be 1) actually litigated, 2) determined by a final judgment, that is 3) essential to the outcome, in order for it to be precluded
  - Matters that are not pursued at trial or suffer a default judgment are not said to be actually litigated
  - An issue is also not actually litigated if the defendant does not raise it as an affirmative defense or if the issue is raised and the defendant does not adduce evidence against it
- Collateral estoppel problems
  - #1: P v. D for property damages, P wins, and D determined negligent. #2A: P v. D for personal injuries. #2B: D v. P for personal injuries
    - A: if P not barred by claim preclusion, D will not be allowed to re-litigate on negligence. If contributory negligence is a defense and he failed to raise it in #1, he may be able to raise it in #2.
    - B: this is Blue Goose. D will be precluded from re-litigating D's negligence. D will not be able to litigate on P's negligence if it was litigated on in #1.
  - #1: P v. D for property damage, judgment for D. #2A: P v. D for personal injury. #2B: D v. P for personal injury.
    - A: Verdict for D in #1 means D not negligent *or* P contributorily negligent or both. Either result bars suit in 2A, so there is issue preclusion.
    - B: There is no issue preclusion as you need both for D to win, and it's not clear which reason the jury chose (i.e., it may not have been essential to the judgment). If there was a special verdict stating that D was not negligent *and* P was contributorily negligent, then D would be able to use issue preclusion.
  - #1: P v. D for property damage. Special verdict finding both negligent.
    - P can't bring a new suit for injury, but D can, since he had no chance to appeal in #1.
- **R2J §28** - Exceptions to issue preclusion
  - (1) the party being precluded did not have a right to appeal the 1<sup>st</sup> determination
  - (2) the issue is one of law and:
    - the two claims are unrelated, or
    - a new determination is warranted
  - (3) a new determination is warranted due to differences in the quality/ procedures of the courts
    - eg, first determination was in an administrative court
  - (4) the party being precluded had a heavier burden of proof in the 1<sup>st</sup> action, or the burden has otherwise shifted as to be unfair
  - (5) there is a clear and convincing need for a new determination as:

- (a) adverse public interest effects, or
  - (b) preclusion was not foreseeable at the time of the 1<sup>st</sup> action
  - (c) the party sought to be precluded did not have an adequate opportunity or incentive to litigate fully
    - eg, first was small claims case
- **Kossover v. Trattler** – default judgment for doctor in medical services suit should not have preclusive effect on later malpractice claim, as the issue was not actually litigated. Even if it was, stakes in first suit so small relative to later suit that it would fall into R2J §28 exception.

**Kaufman v. Eli Lilly & Co.** – nonmutual offensive issue preclusion

*Issue:*

- Can factual findings from a suit with a different P be used to collaterally estop the D in a subsequent suit?

*Holding:*

- A D cannot be collaterally estopped from relitigating the jury's findings concerning an unresolved question of law
- Collateral estoppel requires that 1) the identical issue must have been decided in the prior action and be decisive to the present action, and 2) the party being precluded must have had a full and fair opportunity to litigate

*Facts:*

- Suit over DES, drug that increased risk of cancer in daughters of women who took it
- *Bichler* case decided against drug manufacturer, Kaufman wishes to use offensive nonmutual issue preclusion against Eli for 6 issues that were decided in the previous case

*Discussion:*

- Collateral estoppel effect will only be given to matters actually litigated, which D did not do in the first case regarding the concerted action theory and there is no identity between that issue in the first action and in the present case
- The other factual determinations from the first trial will not be estopped
- The issue of proximate cause will also be relitigated because this is unique to each situation
- court breaks down by issues:

*Notes:*

- Using nonmutual issue preclusion could be unfair here because every P down the line will be able to use these results
    - What if the first P was particularly sympathetic?
  - The requirement that an issue be necessary to the first judgment in order for it to be precluded is rationalized because there should be no preclusive effect unless the parties had reason to focus careful attention on the issue in the first case
  - The inconsistent verdict exception prevents Ps from selectively taking the findings from favorable judgments. Inconsistent verdicts may also show that the judgment is not accurate enough to apply to later trials.
  - The amount in controversy affects the incentives of parties to litigate to their full capacity
  - The exceptions to issue preclusion are not actual guidelines and so would not actually be considered until after the first case
- **R2J §29** – Additional criteria to determine whether or not there was a full and fair opportunity to litigate in the first action:

- (1) treating the issue as determined would be incompatible with a scheme of remedy administration
- (2) F2 offers procedural opportunities not available in F1
- (3) the person seeking to invoke favorable preclusion, or avoid unfavorable preclusion, could have effected joinder in F1
- (4) determination relied as preclusive is inconsistent with other determinations
- (5) prior determination affected by other relationships, or the result of a compromise verdict
- (6) giving preclusion would complicate other issues or create prejudice
- (7) issue is one of law and treating as precluded would inappropriately foreclose reconsideration
- (8) other compelling circumstances

## **6. Who is Bound by a Judgment: Doctrines of Privity and Mutuality**

- The party bound by a judgment must be the same party in F1, “in *privity*” with said party, or part of a class action
- *Mutuality* – two parties must be identical in order for issue preclusion to operate
  - This gives the P an incentive to file successive actions against different Ds instead of binding them all at once
  - Nonparty Ps have no reason to stay out of the first suit because they cannot benefit from the ruling

### **General Foods Corp. v. Massachusetts Dept. of Public Health** – vicarious representation

*Issue:*

- Can parties be held to a prior judgment in which they were not part of through vicarious representation?

*Holding:*

- A person who expressly or impliedly gives a party authority to represent him may be bound by res judicata as if he were a party

*Facts:*

- D seeks to preclude claims of P (members of trade association) because Ps were vicariously represented in previous trial by the trade association and D won

*Discussion:*

- What persons are bound by a prior judgment is determined by the state in which the judgment was rendered
- Under MA law, a member of a trade association who finances an action brought on behalf of its members impliedly consents to representation and is therefore bound to the judgment, unless representation was inadequate
  - The failure to use all possible legal theories does not constitute inadequate representation
- If a non-party controlled a quasi-party in a litigation, then the judgment would bind the non-party

*Notes:*

- Privity can extend to parties that were represented by an agent, to situations of secondary entitlement (where a non-party’s rights are wholly dependent upon the party’s), or if there is a certain legal relationship
- Sometimes the same party will not be precluded by a prior judgment because she appeared in a different capacity

**Bernhard v. Bank of America Nat'l Trust & Savings Assoc.** – nonmutual defensive issue preclusion

*Issue:*

- Can a party use issue preclusion as a defense when a factual matter has been determined in another case from the same P and a different D?

*Holding:*

- Collateral estoppel requires that 1) the issue be identical to the issue decided in the previous judgment, 2) there was a final judgment on the merits, and 3) the party against who collateral estoppel is asserted is a party or in privity with a party to the prior adjudication

*Facts:*

- Trial 1: Bernhard brings lawsuit against Cook and loses.
- Trial 2: Bernhard, as administrator, initiates second action against the Bank.

*Discussion:*

- Even if a party appears in two different capacities in different suits, if she is litigating the same right she can still be held to res judicata
- Due process prevents the assertion of res judicata against a party unless he was, or was in privity with, the party that was bound by the earlier litigation
- But the party asserting res judicata does not have to had been a party or in privity with a party of the prior suit

*Notes:*

- Why mutuality was done away with: Indemnity context, where you get inconsistent results. Eg,
  - #1: P v. Contractor. P loses. #2: P v. City. P wins.
  - #3: city v. contractor. City has arrangement with the contract – if I'm liable, then you are (indemnification clause), and the contractor pays
  - Creates an inconsistency, unfairness to the party that won in #1. One solution: preclude P in the second action. (Defensive use of non-mutual preclusion)
- **Blonder-Tongue** – no more mutuality requirement
  - Supreme Ct. recognizes nonmutual defensive issue preclusion.
  - #1: A v. B (A loses, ruling that A has no valid patent).
  - #2: A v. C (C seeks to use #1 to stop suit)
  - A argues lack of mutuality
  - C argues:
    - Efficiency, A could have joined C in the first suit, A had his day in court, second case was not a surprise – A could see the consequences of an adverse determination.
    - Defensive use – which means that A chose the time and place of litigation.
    - Creates incentive for joinder to increase efficiency in the future.
- Why offensive nonmutual issue preclusion is less favorably viewed:
  - Defensive use encourages joinder, but offensive doesn't encourage such efficiency. It works in the opposite way, encouraging plaintiffs to take a "wait and see" attitude → encourages multiple litigations
  - Also may be unfair to defendant if first suit is for small of nominal damages

**Parklane Hosiery Co. v. Shore** – nonmutual offensive issue preclusion

*Issue:*

- Can a party who has had issues of fact decided against him in a first suit be collaterally estopped by a different P in a subsequent suit?

*Holding:*

- Offensive nonmutual issue preclusion should be allowed except when the P could have easily been joined in the first suit or when it would be unfair to the D

*Facts:*

- First trial: The Securities and Exchange Commission won issue against Parklane
- Second trial: Stockholder's class action seeks to use issue preclusion from 1<sup>st</sup> case against Parklane

*Discussion:*

- The effect of defensive collateral estoppel is to encourage Ps to join all potential Ds at once
- The effect of offensive collateral estoppel is to encourage Ps to adopt a "wait and see" attitude in the hopes that the 1<sup>st</sup> P will have a favorable outcome
- Situations where offensive collateral estoppel would be unfair:
  - D in the 1<sup>st</sup> action was sued for small damages, so did not have incentive to defend vigorously
  - Future suits were unforeseeable
  - The judgment relied upon is inconsistent with one or more previous judgments
  - The 2<sup>nd</sup> action affords the D procedural advantages that were not available in the 1<sup>st</sup> action
- Offensive issue preclusion does not offend the 7<sup>th</sup> amendment right to a jury trial because the D already received a jury trial in the first proceeding
- Mass Tort Hypo: 1<sup>st</sup> P loses, 2<sup>nd</sup> wins. should the next 1000 Ps get to exploit the judgment?
  - No, R2J has exception for when there is inconsistent rulings.
  - even if first had won, there is substantial unfairness in universalizing the first jury verdict

## **7. Interjurisdictional Preclusion**

- Inter-jurisdictionally, claim preclusion operates through: 1) full faith and credit (between states), 2) § 1738 – (full faith and credit by federal ct.s to states), 3) unwritten traditions - full faith and credit from state to federal, and intrafederally.
- Standard rule is to look to the preclusive effect of the state where the first judgment was given
- A state court adjudicating a matter related to a subsequent federal suit may defeat a substantive federal goal by denying the right to be heard in the federal forum

**Allen v. McCurry** – barred from federal court

*Issue:*

- Can a party be barred from federal court because of claim preclusion from a state court?

*Holding:*

- The preclusive effect must be taken from the rendering state, even if the 2<sup>nd</sup> trial is in a federal court
  - Unless the federal statutory scheme suggests that an exception should be given

*Facts:*

- First trial: criminal suit in which McCurry loses
- Second trial: McCurry sues officers for unconstitutional search and seizure in fed. ct.

*Discussion:*

- McCurry's arguments:
  - Congress meant to make an exception to full faith and credit, allowing P to get into federal court for a determination of the civil rights issue.
  - He didn't choose the first forum – not fair that he had to litigate the claim once and for all there – he was entitled to get into federal court



- He couldn't have "saved" the claim – he needs to bring everything up to preserve his freedom in the criminal trial
- There was no Congressional intent to create an exception to claim preclusion in this situation

*Dissent:*

- Congressional intent was to take this issue out of the state
- McCurry did not voluntarily litigate his claim in the state court because it was a criminal suit

*Notes:*

- McCurry would have not been able to defend fully in the criminal suit if he wanted to preserve the constitutional claim for a federal court
- Hypo: obviously no claim preclusion in McCurry as there's no mutuality. If there was mutuality, would there be claim preclusion under R2J?
  - No. Civil Rights claim couldn't have been brought in F1
  - However, there would be issue preclusion under R2J – same issue, litigated and determined, essential to judgment.
    - Burden of proof different, but was more favorable to party being bound
- **Migra v. Warren City School District**
  - Trial #1: P v. D – breach of contract in Ohio state court, P wins. #2: P v. D – federal claim under same facts §1938 (civil rights).
  - Held: federal court needs to look to how Ohio would treat the judgment, which merged the two claims
  - What P should have done
    - Joined the claims in state court
    - Or, brought 1938 claim in federal court, and join claims under supp juris.

**Marrese v. American Academy of Orthopaedic Surgeons** – look to the state court

*Issue:*

- Can the federal courts determine the preclusive effect of a state court judgment when they should have exclusive jurisdiction over the suit?

*Holding:*

- Under §1738, a federal court must look to the state court's preclusive effect of a judgment – no exceptions

*Facts:*

- First trial: P v. D – state claim, P loses. Federal antitrust claim not brought up
- Second trial: P v. D – federal court, antitrust claim (exclusive federal jurisdiction)

*Discussion:*

- State preclusive effect will not extend to suits within exclusive federal jurisdiction if the state does not have jurisdictional competency to hear the suit

## 8. Litigating Against the Government

- Claim preclusion can function against the government
- Offensive nonmutual issue preclusion cannot be asserted against the government. (*Mendoza*)
  - Since it is so often a party, would be unfair and freeze development of certain areas of law
  - Government has limited resources → would have to litigate every case to the fullest on pain of preclusion, which would be inefficient

- Government also does not appeal every case, waits for cases to be decided in other circuits

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## Joinder and Multiparty Litigations

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### 1. Review of Joinder of Claims and Parties

**Rule 17** - lawsuit must be brought in the name of “real party in interest”

- Citizenship of this real party is used for purposes of diversity – not that of administrator, representative, etc.

**Rule 18** – *can* join any claim between same parties, whether related or no

- But court has discretion under Rule 21 to sever claims
- What *must* you join? Technically, nothing. But rules of preclusion operate effectively as compulsory joinder rules for the plaintiff
- If there are two similar claims proceeding, whichever one reaches judgment first will have preclusive effect on the other suit

- Joinder rules do not provide a basis for jurisdiction
  - Eg 1: in federal court, no diversity. P joins 1) federal arising under claim, and then 2) state law claim under Rule 18
    - Court will dismiss unless related enough for supp. juris.
  - Exception: P joins two claims, one for 40,000, the other for 70,000. Diversity case.
    - A single P can aggregate claims, so here joinder does serve to create jurisdiction

**Grumman Systems Support Corp. v. Data General Corp.** – compulsory counterclaim

*Issue:*

- Must compulsory counterclaims be brought to the initial suit or else be waived?

*Holding:*

- The test to determine whether or not a claim is compulsory is whether the essential facts are so logically connected that considerations of judicial economy and fairness dictate that the issues be resolved in one lawsuit

*Facts:*

- First trial: DG v. Grumman in MA (copyright) federal arising under juris.
- Second trial: G v. DG antitrust – monopolization of the copyright in CA and joins two additional Ds over whom jurisdiction cannot be had in MA
- DG makes Rule 12 motion to dismiss as claims in #2 were compulsory counterclaims in #1

*Discussion:*

- Logical relationship refers to similarities among the transactions that make up the factual bases of the lawsuits, no concern about legal issues
- Judicial efficiency is important in determining whether a counterclaim is compulsory
- The existence of the additional joined Ds does not ruin the compulsory counterclaim because of the forum ct.’s lack of personal jurisdiction because they are not indispensable parties to the action

*Notes:*

### **Rule 13** - counterclaims

- (a) compulsory counterclaims – D *must* assert counterclaims arising out of same transaction or occurrence. unless: third party D needed and jurisdiction over him can't be had, claim is already pending in another case, or if attachment case, and personal jurisdiction not had
  - (b) permissive counterclaims – D *can* assert any other claims not arising out of transactions
  - glitch: what about exceptions in 13a? Not covered in either rule
  - Rules of compulsory claim joinder for D put him on notice that claims need to be asserted on pain of preclusion
  - Rule 13 has no sanction – rulemakers were concerned about abridging substantive rights – but preclusion is the de facto sanction
  - (f) allows a counterclaim to be brought to the court of the original claim after the suit has already started
- Not all states have compulsory counterclaim rules (like NY), believing D should get to choose time and place to bring action.
    - But rules of preclusion may effectively compel joinder
  - Both supp jur and compulsory joinder have “same transaction” test, but tests are not necessarily identical
    - Makes sense for supp jur to be broader, as party there *wants* to consolidate claims. Judicial economy is only consideration, so extend to limit of constitution.
    - Test should be narrower for compulsory joinder as here there is a countervailing consideration against judicial efficiency: the right of a P to structure his claims as he likes
  - Hypo: Ill. v. NY in NY. NY D asserts a counterclaim, and Ill. claims lack of personal jurisdiction.
    - As in *Saenger* case, personal jurisdiction waived even if claim unrelated
    - NY's counterclaim would receive supplemental jurisdiction if it did not meet the amount in controversy and they were part of the same nucleus of operative fact

### Cross-Claims

- Cross-claims are asserted between non-adverse parties (between Ps or between Ds)

### **Rule 13(g)** – cross-claim against co-party

- All cross-claims are permissive (though issue preclusion can effectively make them compulsory)
- Cross-claims must be transactionally related. Rationale: P is the architect of lawsuit, non-related cross-claims would mess it up
- Court has discretion to sever under 13(i) and 42(b)

### **Guedry v. Marino** – joinder of 7 Ps

#### *Holding:*

- Rule 20(a) requires that 1) a right to relief must be asserted by each P or D arising out of the same transaction or series of transactions, and 2) some question of law or fact common to all parties must arise from the action

#### *Facts:*

- 7 deputies join to sue former boss for firing them, boss moves to sever the trials
- Ps share some common questions of laws and facts

#### *Discussion:*

- Rule 20(a) permits joinder whenever there is at least one common question of law or fact
- One of the P's issues is different, but is still allowed to be joined because her other claim is shared by the other Ps

- Courts have broad discretion in interpreting Rule 20 in an effort to reduce inconvenience, delay, and added expense to the parties and to the court and to promote judicial economy
- Rule 42(b) severance of claims is proper when it will further convenience because the transaction is so different from the others or avoid prejudice (i.e. by an unreasonable delay)

Notes:

**Rule 20** – permissive joinder of parties

- 2 part test: P allowed to join if: 1) claim arising of out same transaction or series of transactions, and 2) common question of law of fact
- Once parties are properly joined under Rule 20(a), Rule 18(a) permits any additional claims between the parties to be joined
- Parties still need to meet personal or subject matter jurisdiction independently
- However, if Rule 20 is satisfied, probably qualify for supplemental juris. if applicable. Both use “same transaction” test.
- The list of exceptions under 1367 (b) does not mention Ps joined under Rule 20, but does list claims against Ds joined under Rule 20
- Therefore Ps who do not meet requisite amount in controversy can be granted supplemental jurisdiction by joining with a P who does as long as there is still complete diversity (*Ortega*)
- **Rule 42(a)** – the court can consolidate claims that involve a common question of law or fact, no requirement for the same transaction
- Misjoinder: common question satisfied, but not same transaction

Compulsory Joinder

- Normally, plaintiff architect of the suit. Exceptions where P’s design can be altered:
  - Choice of court - removal, transfer and forum non conveniens
  - What claims are heard - counterclaims, cross-claims, third party claims, and compulsory joinder of parties
- **Rule 19** – Joinder of Persons Needed for Just Adjudication
  - 4(k)(1)(b) creates 100 mile extended jurisdictional radius for Rule 19 parties
  - Rule 19(a) – parties to be joined “if you can”
    - Those parties whose absence might lead to inconsistent obligations, or result in incomplete relief, etc.
  - Rule 19(b) – “if you can’t join these, you have to dismiss the suit”. Factors:
    - Absence is prejudicial to the other parties
    - Absence will make judgment inadequate
    - Alternate forum will allow for jurisdiction over all parties
- Goal: all claims should be heard in single suit, if possible
  - Reflect the concerns that absentees may have their rights affected, the court will not be able to structure the appropriate relief, and there may be duplicative litigation
- Joint tortfeasors are not considered necessary or indispensable under Rule 19
- Difficulties with rule 19 could be amended by allowing minimal diversity of nationwide jurisdiction
- Unlike preclusion, operates in the first forum to require the joinder of necessary or indispensable parties

**Broussard v. Columbia Gulf Transmission Co.** – compulsory joinder of persons

Issue:

- Can a compulsory joinder of a party nullify diversity jurisdiction and therefore have a case dismissed from federal ct.?

*Holding:*

- The mandatory joinder of a party must consider 1) the indispensability of the party in terms of determining the rights of the other parties, and 2) whether or not there is adequate relief available in another forum

*Facts:*

- Ps with undivided interest in property sue D in federal court, but one of the Ps ruins diversity with the D, so she moves to dismiss herself as a party
- The court says that she is an indispensable party so cannot be dismissed and therefore the suit is dismissed for lack of complete diversity

*Notes:*

- The consideration of an alternative forum is like a built-in forum non conveniens consideration
- 1367(b) excepts supplemental juris. from parties seeking to intervene as Ps under Rule 24 and claims of Ps against Rule 24 intervenors, but does not prohibit supplemental juris. over claims by a person trying to intervene as a D

**Rule 14** – Third Party Practice (Impleader)

- D allowed to bring in third party who “is or may be” liable to D for all or part of P’s claim
  - Extends to any kind of indemnification or contributory relationship
- Allows impleaded D to assert transactionally related claims against original D or original P
- There must of course be personal juris. and subject matter juris. over the impleaded D
  - 4(k)(1)(b) allows 100 mile extended radius of jurisdiction for Rule 14
- Persons impleaded under Rule 14 are eligible for supplemental jurisdiction

**Rule 24** - Intervention

- Allows method for which party can be joined into suit on his own initiative
- 24(a) – intervention as of right
  - When party has interest in property or transaction of suit , and judgment may affect his ability to protect his interest, or when federal statute confers a right
  - Intervenor as of right given the same rights as the other parties
- 24(b) – permissive intervention
  - Allows intervention when conferred by a statute or when there is a common question of law or fact (no need for same transaction)
  - Choice is at discretion of the court, normally not allowed when it would unduly delay or prejudice the rights of the original parties

**Rule 22**, and §§ 1335, 2361 - Interpleader

- Used for situations in which a single obligation can give rise to multiple, inconsistent liabilities, potential Ds need to be sure that adjudication is binding on all persons having claims against it
  - Permits someone in possession of a piece of property to join all potential claimants to the property to ensure finality of the judgment
- Federal courts given subject matter juris. over any interpleader claim over \$500 or minimal diversity
- Interpleader court has nationwide personal jurisdiction

**2. Class Actions**

- Before the 1966 rule:

- Historical origins were for large groups of people who had the same rights such as members of a union, people with undivided interest in land
- The exception to the rule in *Pennoyer* was when a party could be bound to a previous judgment even though they did not actually litigate because a party in that suit adequately represent their interests, such as the situation in the *Hansberry* case
- Under the “spurious” class action, only named parties were formally bound, but absent members could take advantage of a favorable outcome through “one-way intervention”, but were not held to a negative outcome

### **Rule 23** – Class Actions

**(a)** Sets out the requirements for all class actions:

- 1) Numerosity – class must be so large so that simple joinder is impracticable
- 2) Commonality – at least one common question of law or fact. Lacking if factual circumstances require individual determinations
- 3) Typicality – claims and defenses of named parties must be “typical” of the class, not so strong or weak as to advantage one side
- 4) Adequacy of representation. Includes representation by the class and by the attorney.

**(b)** Sets out 3 types of class actions:

- **(1)** Inconsistent determinations or individual determinations would affect interests of absent parties – “true” class action
- **(2)** Seeking injunctive or declaratory relief. Used often in civil rights cases
- **(3)** Relationship between parties is attenuated, grouped because they were treated the same (common question of law and fact). Most common type. Requires that a class action be a superior means of bringing the case. Also requires opt-out notice.

More on Rule 23

- Imposes critical feature of binding the entire class, win or lose
- Functions of opt out in (b)(3)
  - Allows parties not to participate
  - Prevents them from later using the judgment for offensive issue preclusion if they opt out
  - Reflects that this is not really a class with joint interests, just people similarly situated
- Can a party immediately appeal a denial of certification?
  - Not technically a final judgment, but sounds a “death knell” for the suit
    - But suit is not completely dismissed because there is still the individual action
  - Courts often allowed interlocutory appeals under writ of mandamus
  - now, Rule 23(f) gives appellate courts discretion to hear an immediate appeal of a grant or denial of certification

### **Hansberry v. Lee** - unrepresentative class

- In the first action, Mrs. Burke represented the home owners and the court found that the restrictive covenant was valid
- In the second action, Mr. Burke, the D here, claims the first decision does not apply to him because the class was not representative because the home owners had different interests
  - He was not a party to the first suit (*Pennoyer*)
- The Supreme Ct. acknowledges that people not formally parties can be represented in a previous proceeding if their interests were represented by the class, but the class here was found to have conflicting interests so Mr. Burke could not be held to the previous judgment
- It is not clear if unanimity can ever be achieved in a class

### **Eisen v. Carlisle v. Jacqueline** – individual notice for b(3)

- Ps try to claim they are not a b(3) class because they do not want to give individual notice to so many people (6 million) or at least those who can be identified
- Court rules that publication is inadequate notice for b(3), and 2 million people are identified to give individual notice, the others must be given notice some other way
  - Court says that publication may be ok for b(1) and b(2) cases
- Individual notice is not necessarily required by due process (as in *Mullane*, which required reasonable notice), but that's what rule 23(b)(3) requires
- The Ds argue that even if Ps win, the judgment will not be binding because there are so many absent Ps that they could bring later suits
  - Court says that these members will also be bound because with reasonable notice given to them, they also had the ability to opt out (as in *Shutts* case)

### Role of Attorney's Fees

- Contingency fee comes out of pot of money recovered in judgment of settlement
- Lawyers have incentive to settle early for less – saves them work
- Rule 23(e) requires court to approve the settlement and counsel's payment
  - Partially solves "principal agent" problem, where attorneys "sell out" and settle early or otherwise screw over the class and "coupon settlements" (the GM case)
- Ds can exploit the lawyers' contrary interests, get a cheap early settlement and litigational peace
- Ds can often "reverse auction" seeking the lowest bidder among the plaintiff attorneys
- Absent class members often get the short stick in all of this
- Concern about coupon rewards because they sometimes serve only to advertise for the D and before the Class Action Fairness Act, the lawyer could take his fees out of the total value of the coupons
- If the D can settle the case, it can have peace of mind through claim preclusion
  - Therefore, the larger the class, the more preclusion they buy

### **In the Matter of Bridgestone/Firestone** – mass torts

- There is no rule that single incident mass accidents cannot be brought as a class action, but class actions were not designed for these mass torts because Ps have more individual interests
  - Now, the Multiparty, Multiforum Act provides a different model for mass accidents

### **Amchem Products, Inc. v. Windsor** – settlement class

- This asbestos suit was negotiated as a settlement and the absent class members are told that they are members of a class that has already been settled for them
- Supreme Ct. says all of the requirements in 23(a) apply, even though this is a settling class instead of an adversarial class, but the concerns of manageability do not apply
  - The adequacy of representation is especially important here to get a fair settlement

### Class Action Fairness Act 1332(d)

- Federal courts are relatively more strict for certifying nationwide class actions under Rule 23 than state courts
  - The Class Action Fairness Act tries to take cases which it regards as more nationwide and make it easier to bring and remove them to federal court
- Deals with classes with an aggregate claim of \$5 million or above
- Targets certain problematic settlement classes
- For classes beneath this amount, they fall under the old rule:

- In which the named party determines citizenship
- Multiple Ps can only aggregate claims to reach the requisite amount in controversy for diversity if they have a joint right, such as jointly owning a piece of property. This could possibly happen under a b(2) class action
- If one named member meets the requisite amount in controversy for diversity, other members who do not meet that amount can be joined through supplemental jurisdiction (*Exxon*) because 1367 does not give an exception for Rule 23
- Requires minimal diversity for federal jurisdiction
- Removal for minimal diversity, even if D is in her home state
- (d)(4) gives exceptions in which a state court must decline to exercise jurisdiction
  
- Multidistrict – 1407 – court can order transfer of multiple cases to single forum when there are common questions of fact, and convenience will be furthered

#### Other Issues in Class Actions

- Subject matter jurisdiction in class actions
  - *Ben Hur* – only named parties considered for diversity
  - *Synder* – can't aggregate to meet jurisdictional amount (unless undivided interest)
  - *Exxon* – overruled *Zahn*, only named parties need meet jurisdictional amount, others can get supplemental juris.
- Personal juris. in class actions
  - *Shutts* – must give best practicable notice, opt out in b(3)
  - Not opting out functions as waiver to personal juris.
- What can an absent class plaintiff do to challenge a settlement?
  - In the first action
    - 1) Can opt out, either at beginning or at settlement stage
    - 2) Can make an appearance and intervene
  - Ex post
    - 1) Collateral attack?
      - Personal juris. waived by failure to opt out
      - Could raise adequacy of representation as in *Hansberry*
    - 2) Direct attack - Rule 60b – relief from judgment- must be made in same court
      - Grounds: 1) mistake/ inexcusable neglect, 2) new evidence, 3) fraud, 4) the judgment is void, or 5) any other reason justifying relief
- Original point of class actions was to be able to seek a remedy by joining Ps who might not have a great enough damage to seek a remedy on their own
  - However, this system is also subject to abuse
- Would it be better to leave these matters to governmental agencies, like in other countries?
- At the moment, the merits of the case do not affect the question of certification
  - The merits should be taken into account to separate between good and bad class actions
  
- New Amendments to Rule 23
  - new 23(c)
    - specifies that requirements of notice in more detail, what must be said in clear and plain language in opt out
  - new 23(e)
    - court must review settlement and ensure it is “fair, reasonable, and adequate”
    - absents parties given second opt out opportunity



- “side agreements” must be disclosed
- new 23(g) and (h)
  - provides procedures for appointment of class counsel, must inquire into their experience, knowledge of the law, resources, etc.
  - more transparency to calculation of fees