**Civ Pro Outline**

**Let’s blow this thing and go home!**

**Personal Jurisdiction**

**Fed limited to State reach under 4(k)(1)(a), likened to service of process**

**General Personal Jurisdiction Test**

**Individual**

- Domicile (status/territorial)

- place of residence with intent to return/remain (*Pennoyer)*

- Personally served process in the state (*Burnham)*

**Corporation**

State of incorporation or principal place of business or possible another state in which the corporation is “at home” (*Daimler*)

- subsidiaries different from parent (*Daimler, Goodyear*)

- purchases in a forum not enough to make the corporation “at home” (*Helicopteros*)

**Specific Personal Jurisdiction Test**

D has minimum contacts with the forum state that the cause of action arises from and jurisdiction wouldn’t offend fair play and substantial justice (*International Shoe)*

**1. Minimum Contacts conventionally**

- The D has “purposefully availed” themselves of the forum state’s law (*Hanson*)

- This purposeful availment makes it foreseeable to D they might be haled into court (*WWVW)*

- An ongoing commercial contact is sufficient (*Burger King*)

- Even just a single one (*McGee)*

- Minimum contacts are especially clear if D’s activity is “systematic and continuous” (*Shoe*)

- Might be okay if the claim doesn’t arise from D’s minimum contact in the forum state, but does

relate to it—but probably not (Brennan dissent, *Helicopteros*)

- Forum selection clause is fine unless flagrantly unfair/unreasonable (*Carnival Cruises)*

**2. Minimum contacts through “aiming” activity at the forum state**

- D’s activity was “aimed at” the forum state even without physical presence (*Calder)*

- Requires consideration of the extent to which the activity as genuinely “aimed at” the state or if

the contact was just with the other party rather than true “purposeful availment” (*Walden*)

- No good if the “aimed” activity is buying ticket to send kid to live in the state (*Kulko*)

**3. Minimum contacts through stream of commerce**

- Stream of commerce is insufficient for minimum contacts if the product only ended up in the

forum state through the unilateral act of a consumer (*WWVW*)

- Stream of commerce may be sufficient if:

- The manufacturer/seller also advertised in the forum, designed the product

specifically for the forum, or something else to purposefully avail themselves

(O’Connor, *Asahi*)

- The manufacturer/seller sells a substantial volume of the product in the forum state

(Stevens, *Asahi*)

- The manufacturer/seller could reasonably foresee the product ending up in the forum

state (Brennan, *Asahi*)—similar to *Grey*

- Stream of commerce may (Kennedy, *McIntyre*) or may not be (Ginsburg, *McIntyre*) sufficient

if there was substantial purposeful availment of the US as a whole, including the forum state,

but not specifically the forum state

**Fair play and substantial justice considerations**

- Burden on D *(Burger King)*

- Forum state interest (*Asahi*)

- P’s interest in forum

- Judicial efficiency e.g. location of witnesses, evidence (*Gray*)

**Subject Matter Jurisdiction**

**28 U.S.C. § 1332 – Diversity Jurisdiction**

**Diversity of Citizenship**

- (1) Citizens of different states, perfect diversity (*Strawbridge*)

- (2) Domestic citizens v. foreign citizens with permanent residency in a different state than

opposing party

- (3) Alienage Jurisdiction: citizen of US vs citizen of foreign state   
 - (4) Foreign State, including instrumentalities v. domestic citizens

**-Corporate citizenship**: incorporation state or principal place of business per 1332(c)(1))

- PPoB is nerve center/executive office (*Hertz*)

- LLC/Partnership citizenship: citizenship of the members/partners (*Carden*)

- unless in class action, then go to *Hertz*

**Amount in controversy**

- Must exceed $75,000

- Includes values of damages, injunctive relief, attorney fees

- D has to prove with legal certainty that the claimed AiC is wrong to successfully

challenge

- An individual P can aggregate value of all claims against an individual D

**Courts don’t like Ps trying to “collusively join” parties to establish phony diversity**

**Class Actions**

- AiC must exceed $5 million considering total claims (CAFA)

- Previously each member claim was required to exceed $75,000 (*Zahn)*

- Diversity is satisfied if any P is diverse from any D (CAFA)

- Previously diversity was judged by citizenship of rep. P (*Ben-Hur)*

**Minimal diversity also sufficient for interpleader, Multiform Trial Jurisdiction Act**

**28 U.S.C. § 1331 – Federal Question Jurisdiction**

**Constitutional requirement**

- Federal question is an ingredient of the action (Osborn)

**Statutory requirement**

**-** Fed question outright forms a part of a well-pleaded complaint (*Mottley*)

**OR**

**-** Fed question forms a component of the state law claim in a well-pleaded complaint (*Smith)*

**AND**

- The federal question is a necessary part of the case, is actually disputed, is substantial, and

federal jurisdiction will not disturb the balance of power between federal and state courts

*(Grable)*

**Non-Article III courts (e.g. bankruptcy courts) can’t issue final judgment on matters not assigned to them** (*Stern v. Marshall*)

Policy Concerns:

*-* state court hostility (*Osborn*)

- level of federal interest in the suit (*Osborn, Grable*)   
- crafty pleadings (*Kansas City Title*)  
- floodgates/federalism concern (*Merrell Dow*)

**Supplemental Jurisdiction**

**28 U.S.C. § 1367**

(a) the district courts shall have supplemental jurisdiction over all other **claims** that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy

- Common Nucleus of Operative Fact is constitutional requirement(*Gibbs*)

(b) In diversity cases **ONLY**, supplemental jurisdiction does not apply to**:**

- Claims by P against Ds brought in under Rules 14, 19, 20, 24

- Claims by Ps joined under Rule 24

- Claims by Ps joined under Rule 19

- Only over claims by Ps joined under Rule 20 if there’s diverse citizenship

- Not specified in the statute, established in *Exxon Mobil*

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

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

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

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

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

**Venue**

**U.S.C. § 1391: Venue**

(a) Venue is proper in a diversity case in

(1) District where any D resides, **if** all Ds reside in the same state

(2) District where substantial part of events giving rise to claim occurred

(3) If no other district is a possible venue, then a district where any D is subject to PJ

(b) Venue is proper in a non-diversity case in

(1) District where any D resides, **if** all Ds reside in the same state

(2) District where substantial part of events giving rise to claim occurred

(3) If no other district is a possible venue, then a district in which any D can be found

**U.S.C. § 1404: Proper venue can be transferred for convenience/interest of justice**

**U.S.C. § 1406: Improper venue can be transferred to proper venue**

- When venue is transferred, law as would be applied in original venue is also transferred, including SoL

(*Ferens*)

**Forum Non Conveniens—very high bar to meet!**

Court dismisses the case because there’s a more appropriate venue but transfer’s not possible

- e.g. better venue is in another country

- P cannot defeat a motion for FNC on the basis that the new venue is less friendly to P than the

law of the current venue, unless the law of the new venue would be so unfriendly that legal relief

would be basically impossible (*Piper Aircraft*)

**Removal Jurisdiction**

**28 USC §1441(a)**

- If original federal jurisdiction would exist over the case, it can be removed by D to the district court in

same district—in diversity case, this must be within 1 year of filing unless P’s bad faith  
- Decision must be unanimous among all Ds served process

**(b)(2)** – if original jurisdiction based on diversity, cannot remove if a D is citizen of state where action brought—this does **not** apply to class actions per USC 1453(b)

**(c)(2)** – If some claims in the case have federal subject matter jurisdiction, all will be removed and then

the ones lacking proper subject matter jurisdiction will be remanded

**1446(a)** – Ds must file a certified notice of removal containing short and plain statement of grounds for

removal and copy of all process, pleadings, and orders served upon Ds in the action

**Time restrictions**

- D has 30 days after being served process to file removal

- Alternatively, 30 days after learning that case is removable

- P has 30 days after being removal to move to remand, usually based on some procedural error by

unless the objection to removal is based on lack proper SMJ, which is always grounds for remand

**Conflict of Law Approaches**

**State courts apply their own state’s procedural law but may or may not apply their own state’s substantive law**

- States each have their own conflict-of-laws rule for deciding what state’s substantive law will be applied

-E.g. a state may want to apply its own substantive law or it it might want to apply the substantive

law of the state where the tort etc. occurred

- For the substantive law of a particular state to be applied, the litigants must have significant contact with that state, creating state interests such that due process is not violated (*Allstate*)

- In a class action, this “significant contact” test applies to each class member (*Philips Petroleum)*

- SoL are considered procedural rather than substantive for conflict-of-law purposes (*Sun Oil)*

**State’s conflict-of-law practice also applies to federal court in that state in diversity case (*Klaxon*)**

**Choice of Law/*Erie***

**Choice of Law Test for federal diversity cases**

**State law vs. US Constitution**

- If conflict can’t be avoided, always apply US Constitution

**State law vs. federal statute**

**-** Is the federal statute constitutional?

- If yes and conflict can’t be avoided, apply federal statute (Supremacy Clause)

- If there’s no direct collision but the federal statute “occupies the field”, apply federal law (*Burlington*

*Northern)*

**State law vs. FRCP**

- Is the federal rule valid under the REA? To be so, it must

- Be arguably procedural

- Not alter any substantive rights i.e. affect ex ante conduct

- Altering state substantive rights can also invalidate a federal rule (Ginsburg + Stevens, *Shady*

*Grove*)

- If rule is valid and conflict can’t be avoided, apply the federal rule (*Hana)*

**But remember!**

- Federal rules can be interpreted broadly and “occupy the field” (Scalia, *Shady Grove*) or be interpreted

narrowly and be reconciled with state law (Ginsburg, *Shady Grove*)

- Sensitivity to state law and policy concerns should be considered (Ginsburg*, Shady Grove*)

**State law vs. procedural federal common law**

- Would failing to apply the state law be outcome determinative (*Guaranty Trust*) in that it

would encourage the “twin evils” of forum shopping and inequitable administration of justice (*Hanna*)—considered in terms of behavior at the outset of the case? Alternatively, does it govern “primary decisions respecting human conduct” (Harlan, *Hanna*)?

- If yes, the state law is substantive and should be applied per the Rules of Decision Act

- If not, the state law might be procedural and maybe doesn’t have to be applied 🡪

- Are there strong state/federal interest in seeing a particular law applied? And is

whatever’s applied likely to determine the outcome (more minor concern)? (*Byrd*)

- Use this to decide which to apply

**Substantive federal common law can override state law if there’s a uniquely federal interest in this, regardless of RoD Act** *(Boyle)*

**Certain settled issues**

- Apply state law with statute of limitations (*Ragan*)

- Forum selection clause should be given significant weight in deciding venue transfer, regardless of whether state law recognizes forum selection clauses (*Stewart Organization*)

**Deciding what the state law actually is**

- Federal court should treat state SC’s interpretation as definitive

- Fed courts can get a state law question “certified” and decided by state SC if they want clear interpretation

- If state SC hasn’t given an interpretation, fed court doesn’t need to defer to lower state courts

- Fed courts also don’t have to defer to lower fed judges who might have expertise in state law (*Salve Regina*)

**General Rules of Pleading**

**Complaint must be served within 90 days after filing complaint – Rule 4(m)**

**Rule 11 –** Ever pleading and other non-discovery document must be signed by attorney certifying that document is non-frivolous, not just for harassment, and has or will likely have evidentiary support

**Rule 7 –** allowed pleadings

**Rule 8(a)** – General Rules of Pleading (called notice pleading)

- Claim for Relief must contain – “short and plain statement” re:

- (1) jurisdiction / *Why are you before this court?*

- (2) entitled to relief / *What bothered you?*

- (3) demand for the relief sought / *What do you want?*  
**Old Standard**: “A complaint should not be dismissed for failure to state a claim unless plaintiff can prove no set of facts in support of this claim which would entitle him to relief” (*Conley*)

**New Standard***:* Complaint must nudge allegations across line from conceivable to plausible (*Twombly*)

- Judges engage in “context-specific inquiry” using “judicial experience and common sense” to

weigh plausibility (*Iqbal)*  
 - Must give more than conclusory allegations, need to contextualize allegations such that claim is plausible (*Twombly, Iqbal*)

**Rule 8(b)(1) –** Answer to complaint must admit or deny each allegation asserted against it by opposing party; can also say knowledge is insufficient to admit or deny, which counts as a denial

**Rule 12(a)(1)(A)(i) –** D must respond within 21 days after being served

**Rule 12(b) motions**

(1) Lack of SMJ; (2) lack of PJ; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a complaint upon which relief can be granted; (7) failure to join a Rule 19 party

**D’s answer must raise affirmative defenses or they risk losing them**

**Rule 15 - Amending Pleadings**

Parties can amend pleading unilaterally **once**

**(a)(1)(A)** - Within 21 days after serving it

**(a)(1)(B)** - If the pleading requires a response, then 21 days after service of responsive pleading or 21 days after service of a motion under 12(b), 12(e), or 12(f), whichever is earlier

**(a)(2) –** Otherwise permission of other party or of course is required

**(a)(3) –** Any required response to amended pleading must be made within 14 days or within time remaining to respond to original pleading, whichever is longer

**For SoL concerns, the amendment will “relate back” to the date of the original complaint if**

**(c)(1)(A) –** Statute provides for it

**(c)(1)(B) –** The claim arises from the same occurrence dealt with in the original complaint

**(c)(1)(C) –** If a new party is being added, then the claim arises from the same occurrence dealt with in the original complaint and (i)the new party learned about the lawsuit within 90 days after the complaint was filed and (ii)the new party knew they would have been sued were it not for an identity mistake by P

**Voluntary Dismissal**

**Rule 41**

Plaintiff can dismiss their complaint

(a)(1)(A)(i) – Unilaterally if the D hasn’t yet served an answer or motion for summary judgment

(a)(1)(A)(ii) – With stipulation signed by all parties

(a)(2) – With a court order

**Voluntary dismissal is without prejudice the first time, but is with prejudice if done without a court order in a second case (a)(1)(B)**

**Default Judgment**

**Rule 55. Default; Default Judgment**

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

*Considerations*:

1. Prejudice to P?

2. Does D have meritorious defense?

3. Did D engage in culpable conduct?

**Counterclaims/Crossclaims (Rule 13)**

- **Rule 13**(a) Compulsory Counterclaim: “a rule must state as a counterclaim any claim that…

- arises out of the **same transaction or occurrence** that is the subject matter of the opposing party’s claim; and

- does not require adding another party over whom the court cannot acquire jurisdiction

- (b) Permissive Counterclaim: any other claim against the P

- (g) Crossclaim: any claim against a co-party arising out of the same occurrence that’s the subject matter of original action or of a counterclaim

**Once a crossclaim arising from the same occurrence has been asserted, any further unrelated crossclaims against the party can be made and joined per Rule 18**

**Required Joinder (Rule 19)**

**Fed court can use “bulge rule” to assert PJ over a Rule 19 party within 100 miles of the fed court house, even if that’s outside the forum state – Rule 4(k)(1)(b)**

**Do 19(a) first, then move to 19(b):**

**Rule 19 Required Joinder – tool for D to get final adjudication**

**19(a):** **Persons required to be joined if feasible** (courts invent this stage to get to 19(b))

1. in absence, cannot afford **complete relief**

2. person **claims an interest** in the subject matter and disposing of action may:

- practically impair of **impede ability** to protect interest

- leave existing party subject to subst. risk of **inconsistent obligations/double liability**

note: parties only really necessary under 19(a) when there is **Injunction** or **Limited Funds**

**19(b): When Joinder is not feasible** (better **operational balancing test** that courts are used to)

Joinder may not be feasible due to lack of PJ, lack of SMJ, or if Rule 19 party objects to venue **and** venue would be improper for them

If the required party cannot be feasibly joined, the court **must** determine, in **equity and good conscience**, whether the action should proceed among existing parties or be dismissed

1. Judgment rendered in absence might **prejudice** parties

2. If prejudice can be **lessened by court measures**

3. If judgment in absence would be “**adequate**”

4. Would P have **adequate remedy** if case is dismissed?

Really about balancing:

1. P’s interest – adequate forum elsewhere/prejudice?

2. D’s interest – prejudice/double liability/inconsistent obligations?

3. Absentee’s interest – prejudice if not joined?

4. Public’s interest – efficiency

**Impleading (Rule 14)**

**Fed court can use “bulge rule” to assert PJ over a Rule 14 party within 100 miles of the fed court house, even if that’s outside the forum state – Rule 4(k)(1)(b)**

**Rule 14: Impleader: D may serve party who is/may be liable to for all or part of the claim against it.**

- all about **derivative liability**: “to the extent that I’m liable to P, you are in part or entirely liable to me”

- **P v. D 🡪 P v. [3rd party P v. 3rd party D]**

- Suit 2 **entirely derivative** of Suit 1, **without P success in Suit 1, suit 2 moot**

- 3rd party P and 3rd party D must lie in privity = **derivative liability**

- 3rd party D now may assert all counterclaims and defenses of 3rd party P

**Intervention (Rule 24)**

**Rule 24(a) – Intervention of Right, must permit intervention if (matter of law)**

1. sufficient interest in the property/transaction that is subject matter of litigation

2. disposing of claim may practically impede/impair ability to protect interest

3. Party seeking to intervene in inadequately represented

**Rule 24(b) – Permissive Intervention (discretionary)**

1. Claim/defense that shares common question of law or fact

- must show “clear error” to overturn 24(b) finding

**Operative Question: will intervention facilitate efficiency/equity?**

- Rule 21: may eject parties after intervention granted

**Consolidation (Rule 42)**

**Rule 42 Consolidation; Separate Trials**

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

- **allows court to join claims for a particular hearing or an entire trial with regard to any or all issues involved in particular cases for efficiency gains**

**- only pending cases in same venue can be consolidated, no future res judicata effect, minima efficiency gains**

**28 U.S.C. § 1404 – may order transfer from one federal district to other federal district**

**28 U.S.C. § 1407 – Multi-District Litigation, consolidation of federal proceedings from around country, only cases pending at same time**

***Lexecon* – limited to pretrial period.**

**Discovery**

**Rule 26: Required Disclosures**

- Scheduling order laying out litigation schedule must be made within 90 days of serving D or within 60 days after any D has appeared, whichever is soon

- 26(f) conference between parties to plan discovery must be at least 21 days before scheduling order

**Initial disclosure: within 14 days of 26(f) conference**

- Identify witnesses with discoverable info that will be used to support case, unless that info is soley for impeachment

- Provide copy or location info of docs used to support case, unless it’ll be solely for impeachment

- P must provide computation of damages

- D must provide info about any insurance that might cover part of all of claim

**Expert disclosure: at least 90 days before trial**

Identify experts who will provide expert testimony and provide report containing

**(i)** a complete statement of all opinions the witness will express and the basis and reasons for them;

**(ii)** the facts or data considered by the witness in forming them

**(iii)** any exhibits that will be used to summarize or support them

**(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years

**(v)** a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition

**(vi)** a statement of the compensation to be paid for the study and testimony in the case.

- If expert evidence will be used solely to rebut expert witness, then disclosure will be within 30 days after opposing party’s disclosure

- Experts retained for consultation: work product limitations apply

- Experts informally consulted: no discovery

**Pre-trial disclosure: at least 30 days before trial**

- Names and contact info of witnessed

- Relevant parts of depositions if that will be the form of testimony for a witness

- Identification of exhibits

**Scope of discovery**

- Parties can use interrogatories, depositions, requests for admission, requests for production, medical examinations

- Information does not have to be admissible to be discoverable

**26(b)(2)(C)** Court can bar discovery request if it’s unreasonably duplicative, discovery info can be found through less burdensome means, party seeking discovery has had ample time to discover it, discovery sought is irrelevant

**26(c)** Court can issue protective order to bar or restrict discovery request if discovery sought would lead to annoyance, embarrassment, oppression, or undue expense or burden if movant has tried and failed in good faith to resolve the issue with affected parties

**30(c)(2)** Counsel can raise objection at deposition and it will be noted, but deposition will continue; deponent may only refuse to answer to protected privileged information or enforce court-ordered limit

**Party must issue correction in a timely manner if they learn that disclosed info is incorrect**

***Privilege and protection info on next page 🡪***

**Privilege and protection**

- Communications between company attorney and lower level employee are privileged if the communication concerned matters within employee’s scope of duty and employee knew that the communication was so that the corporation could get better legal advice (*Upjohn*)

- Attorney’s work product is only discoverable opposing party shows it has substantial need of them and can’t obtain the info by other means without undue hardship (*Taylor*)

- Attorney’s opinions, theories, etc. are always protected no matter what

**Preliminary Relief**

**Rule 64: Seizure of person or property**

- Seizure of property is based on weighing probability of erroneous deprivation, cost of deprivation to D, probability of erroneous failure to deprive, cost of non-deprivation to P, cost of procedure (*Doehr*)

**Rule 65: Order to prevent irreparable harm**

**(a) preliminary injunction** – based on weighing likelihood of claim succeeding on merits, harm to movant if PI is denied, harm to nonmovant if PI is granted, harm to public if PI is denied, harm to public if PI is granted

**(b) temporary restraining order** – Irreparable harm will come to movant if before adverse party can be heard in opposition

**Summary Judgment**

- **Rule 56(a): Standard**

- must demonstrate that there is “no genuine dispute as to any material fact” and that “entitled to judgment as a matter of law”

- Summary judgment takes place after discovery typically, “out of box” motions are disfavored

- **But under 12(d), if materials outside the pleadings are presented, then may make motion for summary judgment, which first requires that parties have opportunity to present all pertinent materials**

**Rule 56(c): Procedure**

- must cite to particular parts of materials in the record, depos, docs, etc.

**- Evidentiary dispositions replace trials, like a mini-trial**

**- If you survive motion to dismiss, in great shape for settlement or trial.**

Trilogy: whether or not a reasonable jury would find, by a preponderance of the evidence, that the plaintiff is entitled to a verdict (*Anderson*)

- a defendant bears a limited initial burden of **pointing out the absence of evidence** supporting the plaintiff’s claims (*Celotex*).

- the plaintiff then bears the burden of establishing the existence of a genuine issue of fact by providing **specific, affirmative, and probative** evidence through the presentation of the factual record (*Anderson*, R. 56(c)(1)(A)).

- A genuine issue demands more than assertions of “doubt [regarding] the material facts,” and must give rise to a **sensible** claim (*Matsishita*).

**Jury Trial (Seventh Amendment)**

**Seventh Amendment applies ONLY to cases in fed courts**

Is there a right to a jury trial? Consider

- Whether the type of claim existed in UK common law pre-1791

- Sufficient is there was an analogous common law claim, even if it’s a stretch (*Curtis*)

- If the claim is legal (seeking damages) or equitable (seeking injunction)

- Jury decides legal relief first then judge decides equitable relief second (*Beacon Theaters)*

**Pro-jury policy rationale**

- Juries bring valuable lay perspective

- Juries protect citizens against state

- Juries serve justice by ruling on basis of common fairness

- Juries educate jurors in citizenship

- Juries bring diversity into legal process

**Anti-jury policy rationale**

- Juries make erroneous judgements

- Juries disregard the law

- Juries are arbitrary and unpredictable

- Juries are biased against business interests

**Judgement as a Matter of Law**

**Rule 50**

**(a) A reasonable jury would not have legally sufficient evidentiary basis for find for a party**

- Moved for by a party after the other party has finished presenting their case

- The party being moved against has failed to meet the “burden of production” i.e. even when solely considering that party’s evidence, a reasonable jury couldn’t find for them

**(b) If a party made a motion for JML after both parties presented case, they can renew the motion after the jury gives a verdict**

**Preclusion: Res Judicata/Claim Preclusion**

**4** **Requirements of Res Judicata**:

1. Final Judgment, summary judgment, includes binding settlement

2. On merits

3. Claim must be same at T1 and T2

4. Parties must be same, or in privity (must have your day in court, look to *Taylor* exceptions)

- Look to **transactionally related language** when deciding if claim in T2 is comparable to T1

- **Exam Procedure**:

1. Same parties?

- if not, was the different party in privity with the other? (*Taylor)*

2. Same claim?

- If not, did it arise from the same occurrence? (*Rush,* contra *Herendeen)*

3. Final judgment on the merits? (*Moitie*)

**Rule 60(b) exceptions**

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief

**2 More Possible Exceptions**—***Moitie* makes clear these rarely if ever suffice!**

1. Intervening change in facts (patent pending at T1 but now granted at T2)

2. Intervening change in law (patent law not available at T1 but available at T2)

**Rule 41 (b) - Dismissals count as adjudication on the merits if they are *with* prejudice**

- Dismissal due to P failing to prosecute or complying with courts order is *with* prejudice

- Dismissal for lack of jurisdiction, improper venue, or failure to join Rule 19 part is *without* prejudice

- All other dismissals are *with* prejudice unless specified otherwise

**Might be an exception if the 12(b)(6) dismissal was due to failure to file a required affidavit, but maybe only if the court has a strong interest in avoiding preclusion** (*Costello,* where the justification was that the lack of an affidavit really resulted in a dismissal for lack of personal jurisdiction)

**Preclusion: Issue Preclusion/Collateral Estoppel**

**4 requirements for Issue Preclusion**:

1. Party lost at T1

2. Party lost **on the merits**

3. Party had **full and fair opportunity** to assert claim

4. Deciding the issue was **necessary for judgment**

**Summary Judgment** and **Settlements** **do not produce** Issue Preclusion (not matters of fact)

**Nonmutual defensive issue preclusion**

D who *was not* party to a prior suit can issue preclude a P who *was* party to a prior suit

**Nonmutual offensive issue preclusion**

P who *was not* party to a prior suit can issue preclude a D who *was* party to a prior suit **unless**

- P could have easily joined the prior suit *(Parklane)* **or**

- Issue precluding the D would be unfair (*Parklane)*

- First case only involved small amount of money and D lacked incentive to vigorously

defend

- There have been multiple judgments with mixed results on the issue e.g. D has been

ruled to be non-negligent in 9 cases and ruled negligent in 1

- D lacked full and fair opportunity to litigate the issue in first case

**US government cannot be nonmutual offensive issue precluded**

**Unlikely Internet Question**

**Internet as “minimum contacts”**

For minimum contacts purposes, websites fall into three categories (*Zippo*):

1. Merely passive—only allows visitors to passively view and doesn’t provide services

- Does not provide grounds for PJ

2. Midground

- Should be assessed on an individual basis for PJ

3. Actively reaches out to customers and maintains relationships with them

- Probably provides grounds for PJ

**Class Actions**

**Absentee class members are only bound if they were adequately represented by the class (Hansberry)**

**Only minimal diversity is required.**

**Most important factor is legitimacy, as class actions deviate from the typical principle that nonparties may not be bound. Rule 23 serves as the procedural safeguard which establishes this legitimacy, creating a “structural assurance of fair and adequate representation” (*AmChem*).**

**Rule 23(a) – Class Action pre-reqs, plaintiff’s burden to prove all four** (*Wal-Mart Stores v. Dukes*)

- These reqs are about: why representative litigation is being sought, and why it will be efficient

- “if as to one, then as to all”

- looking for a common core of the dispute, upstream or downstream content of the dispute?

**(1) Numerosity:** Joinder of the class members is impracticable

- size/ease of identifying and finding individual class members

- future/unknown members make joinder impracticable

- geographical separation/fluid composition of class population

- Sequential trials present asymmetrical problems in public law disputes

- size/value of individual claims/individual ability and motivation to bring separate actions

**(2) Commonality:** Questions of law or fact are common to class members

- Must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. (*Wal-Mart*)

- are there different practices affecting the members?   
 - really about achieving economies of scale

- policy, or different policies, general or specific

**(3) Typicality:** Named plaintiff’s claims/characteristics are typical of the class

- good rep., same interest, same injury, live claim

- injuries similar or dissimilar (*Amchem*)

- arise from similar conduct, similar legal theory

- unique defense against this particular rep. may kill typicality

**(4) Adequacy of Rep.:** Rep. will fairly and adequately protect interests of class members

- Competent counsel necessary

- Conflicting interests may kill adequacy (*Hansberry)*

- **23 (g)(1)(a):** Zeal, ability, pre-filing investigation, experience, knowledge of law, and resources that counsel will commit to representing the class.

- 1 lawyer, multiple lawyers?

**Rule 23(b) – Class types, must fulfill one**

**- (b)(1): Limited Fund Class** (sometimes)

- Prosecuting separate actions would create risk of:

- Inconsistent or varying adjudications

- Adjudications to individuals would be dispositive of other’s interests or substantially impair their ability to protect their interests

- typically a fixed pot or preexisting remedy, rare

**- (b)(2): Injunctive/Declaratory Class** (often civil rights cases)

- Party opposing class has acted/refused to act in a way that applies generally to the whole class so that final injunctive/declaratory relief is appropriate w/r to class as a whole

- indivisible remedy, cannot disaggregate remedy

- May seek damages if they are uniform/equal and incidental to above relief (*Wal-Mart*)

- may not if $ damages predominate (23(b)(2) notes)

- civil rights cases, if as to one so as to all

**- (b)(3): Damages Class** (*Wal-Mart*)

**- Predominance:** Common questions predominate over individual matters

**- Superiority:** Class is superior to all other methods in resolving matter fairly/efficiently **- Manageability:**

**- interest in individual control**

**- extent and nature of any preexisting litigation**

**- desirability of concentrating claims**

**- difficulty of managing a class**

- efficiency, mass torts with negative value claims

- require greater protection w/ notice/opt-out

**23(c)(2) – Notice Requirements**

-(b)(1) & (b)(2) classes: Court has discretion about whether or class rep has to give notice to class

members—class members will be bound regardless

-(b)(3) class: Notice required

- must be “best notice that is practicable under the circumstances”

- required to be given to all members who can be identified through reasonable effort at cost to P

(*Eisen*)

- (**c)(2)(b)** Notice must state in plain language

**(i)** the nature of the action

**(ii)** definition of the class certified

**(iii)** class claims, issues, or defenses

**(iv)** that class member has option to enter an appearance through attorney

**(v)** that class member can request and receive exclusion

**(vi)** time and manner for requesting exclusion

**(vii)** binding effect of class judgment

**(c)(4) – Action can be treated as class action with regard to particular issues**

**(c)(5) – Class may be divided into subclasses**

**(e) Settlement for a certified class requires court’s approval**

**(1)** Notice must be given to all parties bound by proposed settlement

**(2)** Court must approve settlement as fair, reasonable, and adequate if it will bind class members

**(3)** Parties seeking approval of settlement must identify any related agreements

**(4)** If it’s a 23(b)(3) class, class members must be given option to be excluded from settlement

**(5)** Any class member can object, and the court will consider their objection in deciding approval

- If settlement is decided before class certification notice has been sent out, the two notices can be

combined into one

**If class action is filed but fails certification, SoL tolls for class members at time of filing and starts ticking again when certification is rejected**

**Preclusion in Class Actions:**

**-** Unknown preclusive effects on non-parties does not destroy class certification alone

- what matters is rigor and legitimacy

- Judicial estoppel: cannot switch sides after being bound by class judgment (*Hansberry)*

- Burden on parties to establish preclusive effects