**Civil Procedure Outline**

*Should I File a Lawsuit?*

- Ask Rule 11.

**Rule 11**:

Anything you present to the court, must to the best of your knowledge (attorney or client):

(1) it is not being presented for any **improper purpose** (harass, delay, raise costs)

(2) **warranted by existing law**

(3**) the factual contentions have evidentiary support**

(4) the **denials of factual contentions are warranted**

- Can be subjected to rule 11 by signing, later advocating, filing, submitting any paper in court – pleading, brief, etc.

- If you run afoul of rule 11 then you get sanctioned

- Should you in your role as lawyer present a piece of paper?

- Should a judge sanction a lawyer?

- PLE – purpose, law, evidence

*Where do I file suit? In state or federal court?*

**Jurisdiction**

 Federal v State

* + State Court Jurisdiction is presumed
	+ Federal court is of limited jurisdiction

**Article III, Section 2 of the Constitution:**

*“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority…”*

* Created the Supreme Court
* Gave Congress power to create lower federal courts
* Congress created lower federal courts under §1331(SMJ) & §1332(PJ)

**S U B J E C T M A T T E R J U R I S D I C T I O N**

General Notes

- SMJ is whether a court has the power to hear the subject matter of the case

- State courts have general jurisdiction – over most kinds of claims

  Unless a court has exclusive jurisdiction (such as probate, bankruptcy or small claims)

- Federal courts are courts of limited jurisdiction and need jurisdictional hook or basis for EVERY claim

  Federal courts also have exclusive jurisdiction over certain cases like maritime and patents

Does the plaintiff sue in **federal** or **state** court?

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

**§1331 - Arising Under (AU)**

Claims AU if on the face of the **WELL PLEAD COMPLAINT** there is a claim that is either

 1) created by federal law through **EXPRESS** language, or

 2) **UNIMISTAKABLE INFERENCE** (ex. statute of limitations), or

 3) created by state law but **NECESSARILY depends on a SUBSTANTIAL federal question.**

- “Depends” means that some court will have to interpret federal law AND turns on a Constitutional question

**Constitutional v. Statutory Questions** – Federal jurisdiction is more broadly interpreted for Constitutional questions than Statutory Questions (Osborn & Merrell Dow)

**\*Policy Consideration**: §1331 serves three purposes. 1) Promote uniformity of federal law; 2) encourage judicial expertise in interpreting federal law; 3) protect against possible state court hostility to claims arising under federal law

**\*Note**: If Mottley had been decided the other way it would be way too easy to claim federal jurisdiction. Could lead to mere speculating of defense’s in complaint to create FJ needlessly.

**Supplemental Jurisdiction** – Federal court can hear both claims in a CASE where only one case has AU as long as the claims operate from a “Common Nucleus of Operative Fact.”

 - This federal “power” is at ***judge’s discretion***. It is not a party’s right.

 - If state claim is novel or complex its best to send it to state court.

 - Jury confusion and other considerations by the judge can send cases back to state court

 - If a state law claim substantially predominates the case may be remanded

**§1332 - Diversity of Citizenship**

District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 and is between

 (a) citizens of **different states**

 (b) citizens of a **State** and citizens or subjects of a **foreign state**

 (c) citizens of different States and in which citizens or subjects of a foreign state are additional parties

 (d) a **foreign state as plaintiff** and citizens of a State or of different States

**\*Policy Consideration**: “Home-Field Advantage” – §1332 is to eliminate a home-field advantage. When law is unclear, always consider this factor.

**Domiciles** – Citizenship is FEDERALLY determined by a person’s **DOMICILE** not their place of residence.

**DOMICILE** **is a person’s “true, fixed and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom.”**

Corporations **-** Domiciled in two states – 1) State in which they are incorporated and 2) state where your principal place of business is located.

Limited Partnerships - are a citizen of the states where each partner is domiciled.

Pure Aliens - has not been granted citizenship and can not sue another pure alien in federal court.

Permanent Resident Aliens - are not deemed aliens at all and are treated as American citizens.

American Citizen Living Abroad - who is domiciled outside of America can never sue or be sued based on diversity.

- Need **“complete diversity”** – no single plaintiff may be a citizen of the same state as any single defendant

- domicile is considered at the **time of filing** not of the court proceedings

- need **affirmative evidence of change** of domicile

- a **woman is presumed to take on a man’s domicile upon marriage** and until divorce unless the woman marries an alien

- an American citizen domiciled abroad – if you’re not an American citizen then you’re not from a state

**Amount in Controversy, $75,000** – 1) It has to EXCEED $75,000 (75,000.01); 2) Single plaintiffs can add claims up to $75,000 but multiple plaintiffs can **not**; 3) Measuered in “value” not just cash.

Aggregation of Separate Claims – When a **single** plaintiff asserts two or more claims against **one** defendant, the amounts may be added together to reach the required amount.

- **Plaintiff’s Viewpoint Rule** – if the value of the relief sought fully exceeds $75000 then that is enough – value *accounts for injunction*

- **Two or more plaintiffs cannot aggregate** to exceed $75,000. One plaintiff alone must exceed.

- At least one plaintiff – **additional plaintiffs can ride coattails.**

- It’s the **amount alleged** that governs, not the settlement or amount at trial

**Exceptions to diversity** – ***core domestic relation*** – divorce, alimony, probate (matter involving interpretation of death documents)

**SUPPLEMENTAL JURISDICTION**

**Adding Claims** - If you have at least 2 claims pending in federal court and you find a primary jurisdictional basis for one (AU or diversity), the federal court has **DISCRETION** to assert supplemental jurisdiction over both claims – the good and bad – IF they arrive from **a common nucleus of operative fact.**

**Adding Parties** - If the sole hook for jurisdiction is diversity then the plaintiff can not add parties that do not have diversity.

***4 Factors Judges use to weigh whether to exercise Supplemental Jurisdiction…***

1. Does state law claim require a **novel or complex state law issue?** Then federal judge will likely remand that to state court.

2. If state law claim **substantially predominates.** (Look at $$$).

3. If the **federal claim has been dismissed** then almost for sure the federal judge should remand the state law claims to state court.

4. **Catch-all** – any other exceptional circumstance or compelling reason can weigh as part of judge’s discretion.

- very narrow nuance – if however, the only primary jurisdictional basis is diversity then watch out! Then there can never be supplemental jurisdiction over additional claims brought by the Plaintiff’s against non-diverse parties. – defendants can always use supplemental jurisdiction.

- Watch for jury confusion as well – distinguishing between state and federal law concurrently

**REMOVAL –** *of state court claim to federal court by DEFENDANTS…*

The act of the defendants moving a state court claim to a federal court that geographically embraces state court.

Defendants have 30 days from service of process of state court claim to file notice of removal – If they file for removal it gets automatically beamed up to federal court – it then waits there for a federal judge to make decision to keep the claim or remand it back to state court.

- Removal will be proper if there was **federal jurisdiction** over the claims – look then for **AU, diversity, and supplemental**.

***If however, the only primary jurisdictional basis is diversity…***

WATCH OUT! – There can be no removal to federal court if any single defendant was a citizen of the state in which the lawsuit is filed. This is the **HOME STATE EXCEPTION!** So for removal you need the same analysis – **arising under or diversity + supplemental + home state exception.**

**ERIE DOCTRINE** - *So you’re in federal court…Which law applies? Federal? Or State?*

Follow these steps:

1. Does the clash involve a federal rule of civil procedure? If yes, apply it, if no…

2. Is the State Law bound up or bearing upon the rights of the citizen? (Statutes of Limitations – bound up. Defenses – bound up. Tort damages – bound up. Can I sue and for how much – (usually and mostly) bound up! THINK Procedure v. Substance) If yes, apply state law. If not…

3. Would the difference between state/federal law alter the outcome of the case and cause forum shopping? If no, then federal law applies. If yes, apply state law.

4. Is there a countervailing policy consideration that countervails other considerations? (usually right to trial by jury)

***In sum, state law governs unless federal rule (of civil procedure) or trial by jury.***

- A federal rule of civil procedure are the ones in the supplement book. Rules 1-86. If it is not one of those rules, it is not a “federal rule of civil procedure.

- What is “bound up?” If it comes from property/contract/torts then it is bound up! Does the state law involve rights and obligations of people in the real world on the street – as in thou shalt not batter thy neighbor!

  Service of Process is not “bound up.” People on the street do not think about it.

Consider:

**\* Be Aware of rules that don’t really conflict with each other.** This can be argued and interpreted by YOU!

\* In Diversity Cases, ***federal courts are merely a stand in*** for State Court

\* Federal Courts should ***not get creative in interpreting State Law*** (bound by precedent).

\* Sometimes federal courts have to make their best guess at a state’s law. (Ex: If there is no case law from State Supreme Court interpreting a statute)

\* Certification – federal courts can ask a supreme court to review a case in order to ascertain how they would interpret a statute. Expensive and Lengthy.

\* State trial and appellate courts are bound by precedent. By taking claim to federal court, you could get a slightly different interpretation coming straight from Supreme Court – Narrow!

**P E R S O N A L J U R I S D I C T I O N**

**What is it?** – Personal Jurisdiction is the power of the court over the DEFENDANT’S person or property.

*General Notes:*

- A forum court has PJ if two things are true – 1. The forum’s own law must itself grant PJ. 2. Forum’s own law must be Constitutional.

- A ***federal court applies the same exact PJ test as the forum state in which it sits*** unless there is a federal statute that creates a cause of action also creates federal PJ.

**Types of Personal Jurisdiction**:

**Specific In Personam** – Arises out of a minimum contact and is limited to claims related to that contact.

**General In Personam** – Arises from more substantial contacts where a defendant could reasonably foresee defending any claim, even one completely unrelated to its in-state activities.

**Constitutional Grants to a State’s Right to Personal Jurisdiction**

**Article IV – Full Faith and Credit Clause** – Says that each state will recognize and enforce judgments of other states

**XIV Amendment** – Due Process No states shall make or enforce any law which shall abridge the privileges or immunities of citizens of U.S. without due process

**Steps to Personal Jurisdiction**

**OVERVIEW**

**Step I. Consent?**

**Step II. Is it covered by state’s Long-Arm Statute?**

**Step III. Is that Long-Arm Statute Constitutional?**

**I. Consent** –

Defendant can consent to a state court’s jurisdiction but this is rare.

However, Defendant can “imply” consent by…

 **1. “Dancing”** – actual physical presence – Living in the State or just visiting. Defendant must be there **voluntarily and process must be served** while he is “dancing.”

*\*Owning Property in the state is not “presence.” It is merely good evidence of a “minimum contact.”*

 **2. “Domicile”** – If defendant is domiciled in the forum state but not living there, the state has PJ.

 **3. “Doing Business”** – Regular, Systematic, Ongoing, In-State Business or MINIMUM CONTACTS

- Implied consent **can be a failure to object in a timely manner** – must make objection to PJ in its first response which must be filed within 21 days of service of process or within 60 days if the defendant waives service of process.

- If defendant consents to a state’s jurisdiction then a court has Personal Jurisdiction.

*However, if the defendant doesn’t consent the story isn’t over…*

**II. Long-Arm Statute** – Next, the state has to have a “long-arm” statute granting its own courts power over the defendant.

**What is a Long-Arm Statute?** – Contacts that a State decides are so important, that, committing any of those acts in the state will subject you to state jurisdiction

* **IL’s long-arm statute – L**and, **I**njury, **M**atrimony, **I**nsurance, **T**ransaction **(L.I.M.I.T.)**
* **IL’s Catch-All Clause** – if you take advantage of IL laws and consumers you can expect to be sued there

General Notes on IL Long-Arm Statute…

Land - defendant has owned used or possessed land from which the lawsuit arises.

Injury - injury occurs in IL from D’s tort

Matrimony - an action for separation of divorce or annulment from an acton that took place in IL

Insurance - defendant enters an insurance contract for something insured in IL.

Transaction - of business in IL – can be a single transaction so long as the lawsuit arises from that transaction

**III. Constitutional** – A state’s Personal Jurisdiction has to be Constitutional

**MINIMUM CONTACTS** – Could you expect to be sued in the state?

Has the defendant ***“Purposefully Availed”*** himself of the benefits and protections of the forum state’s law and/or consumers – if yes, then minimum contact.

**Purposeful Availment Test**

 **1st** – Is Defendant ***aware*** that he has contacted the state? – **A unilateral action by the plaintiff** that the defendant cannot possibly be aware of is not enough for Personal Jurisdiction.

 **2nd** – Has the defendant entered products into that state’s **“Stream of Commerce?”**

 ***Questions to Ask (Did Defendant…):***

 A. Intend to serve the market?

 B. Design product for the market?

 C. Establish channels for the market?

 D. Advertise in the market?

 E. Market the product through a distributor?

 F. Also, evaluate Volume, Value and Hazard (Stevens).

**Fair Play and Substantial Justice Test** – After determining if the defendant has purposefully availed himself, evaluate the forum’s fairness.

 ***Considerations****:*

A. Protects **Defendant** against **burdens** of litigating in distant or inconvenient forum.

B. Acts to ensure states do not reach out beyond their limits as co-equal sovereigns.

C. **Forum state’s interest** in adjudicating the case.

D. **Plaintiff’s interest in obtaining convenient and effective relief.**

E. Interstate judicial system’s interest in obtaining the **most efficient resolution of disputes**.

F. Shared interest of the several states in furthering **fundamental substantive social policies**.

- look for negotiations, terms, course of dealing – remember BK case, the terms said “we’re using FL law”

- tort dispute – was def. aware that its product was entering into commerce and ending up in the forum state? If no – no purposeful availment. Customer service? Distribution network in forum state? Volume? Value? Hazard?

- if not min. contacts analyze fairness. 5 factors, 3 count, 2 don’t.

- the most important is burden. Weigh it against the plaintiff’s interest – how strong is the P’s interest in having the lawsuit litigated where it is filed? Use relative net wealth to weigh this process.

- how strong is the state’s interest to have the lawsuit in its own court? Using that state’s law?

**D U E P R O C E S S**

**NOTICE**

Notice is proper if it conform’s to the state’s rules and it must be Constitutional.

**Notice (Constitutional Standard)**

Notice must be reasonably calculated to inform known or interested parties affected by the proceedings.

**To Serve Process**

Process must be served by a Sheriff, Coroner or non-party. Process server must be 18yrs of age.

 - A party is limited to parties of suit and their attorneys

**To Accept Process**

Person must be **of age** (13) **and discretion** (can’t be a pot head) to accept process at person’s abode and must reside therein.

**Federal Rule of Civil Procedure 4(e) Provides 5 Methods for Service of Process**

1. **Personal Delivery** of summons and complaint **(wingspan).**

2. Leaving Copies **at “last and usual”** abode with a personal of suitable age (13) and discretion (not a pot head) residing therein.

3. Delivering summons and complaint to agent appointed by defendant.

4. Serve individual defendants under the provisions governing service on individuals in the courts of the state where the federal court sits.

 - Usually a last resort, and is usually service by publication

5. Service pursuant to the law of the state where the defendant is actually being served.

**For short, AWASP:**

**A**bode

**W**aiver

**A**gent

**S**tate Method (last, resort, publication)

**P**ersonal Service

* **Corporations**Personal process to **process agent**

 -OR-

* Any **managing agent** of the defendant

**When to Publish (Last Resort)**

- if a lawsuit involving property seized then you publish but only if due inquiry

- then you must also mail summons to last known address.

**IL has 4 requirements for Publication** – 1. Real property, the lawsuit must involve land in IL. 2. PL must file an affidavit swearing that defendant has left the state or after due inquiry could not otherwise be served. 3. Mail. The Pl must also mail a copy of the service of process to last know address if known. 4. Publish 1 a week for 3 weeks in a row in a newspaper circulating where the action is pending. (RAMP).

**Waiver Process**

Plaintiff can solicit a waiver by sending the defendant the complaint, two copies of the notice of action, and a request that the defendant waive formal service of the summons. Defendant need only return the request.

**Benefits to defendant:**

- Court impose service of process costs on defendants unless they waive

- Waiver gets 60 days to answer while regular process only gets 20

**Considerations**

- Courts usually take process servers word that process was served.

- Personal in-hand delivery is preferred

- some states say notice must touch defendant, fed. rule is lighter (wingspan).

**OPPORTUNITY TO BE HEARD**

Due Process gives us the right to be heard before our property is taken UNLESS there is a governmental exception that needs prompt attention or a clear, knowing, intelligent waiver.

- A lawsuit that has a judgment without due process **does not have the full faith and credit** of the court

\*You have to have **notice, OTBH, SMJ and PJ.**

- In other words, before taking your property, whether its worth $1 or $10,000, we have a right to be heard before the state takes away our property.

- For courts to be neutral arbitor, both sides need to be heard. When one side is passionately argue their side, they may lose sight of reality, so both sides need to be heard.

 Governmental Exception

 - War Effort (steel and other goods)

 - Collect Internal Revenue

 - Contaminated or Misbranded Food (Egg Scare)

 - Prevent a Bank Run

**VENUE**

§1391 – Venue is proper in…

A(1) – A judicial district **where any defendant resides**, **if all defendants reside in the same state,**

(2) A judicial district in which a **substantial part of the events or omissions** giving rise to the claim occurred, or a **substantial part of property** that is the subject of the action is situated or,

(3) A judicial district in which any defendant is **subject to personal jurisdiction at the time the action** is commenced, if there there is no district in which the action may otherwise be brought.

- Venue is almost always proper where the injury occurred.

- Venue is proper where the claim arose.

- Venue is proper where the defendants reside.

- Venue is proper in county where any defendant resides.

- Venue issues don’t usually concern the plaintiff’s residence.

§1404 (a), For the convenience of parties and witnesses, and in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

- “Where it might have been brought,” – courts that have PJ.

- Courts have discretion to transfer venue – account for convenience, fairness and witnesses.

- Courts have read venue to say if “any” part of the claim arose somewhere, then venue is proper.

Other Venue Notes:

- Make sure the brand **new forum has SMJ, PJ and venue**

- **Assume no consent for PJ** – so go through other PJ tests than consent.

- The federal court has **discretion to transfer** the lawsuit to the forum.

- Can have **equally proper forums** – when should a court transfer?

- Court has **discretion to transfer for the convenience of the parties and witnesses** and in the interest of justice.

- Usually hiding in a transfer analysis is a PJ analysis – only have to do it for new forum.

**P L E A D I N G S**

**The Complaint**

**Rule 8A – To state a claim for relief:**

(1) Need a short and plain statement of the grounds of court’s jurisdiction.

(2) Need a short and plain statement showing that the pleader is entitled to relief.

 - EX: Tort claim could just state the date, location and injury.

(3) A demand for the relief sought.

**Two Schools of Thought Regarding Pleadings…**

*Notice Pleading Regimes*

- Only require sufficient information to put adversary on notice of the claims that are being asserted against him.

*Fact Pleading Regimes*

- Require to know that who, what, where, when, and how. Require the historic operative facts – tedious facts in order to state a claim.

In the past, federal courts, being of limited jurisdiction, were a Notice Pleading Regime. That has since changed in actual application…

**Rule 9(b) – In alleging fraud or mistake**, a party must state with **particularity** the circumstances constituting fraud or mistake.

- Particularity means facts.

- Rule was created because allegations of fraud can damage reputation.

- 9(b) was used in Twombley and is now the standard to hear a claim in federal court.

**Since Twombley…**

Party cannot state a claim in federal court **without direct evidence.** Circumstantial evidence is not good enough. There needs to be **documents, witnesses, etc, something concrete.**

- If there is more than one inference that can be made, then facts are not direct enough (EX: Iqbal – could have been for discrimination or security, discrimination is illogical, so it was security).

**The Answer**

Defendants have 21 days to file response.

**Before The Answer: (If there is a motion to make – make it! Do anything but answer complaint.)**

**Motions to Dismiss** – Complaint is lacking proper venue, jurisdiction (SMJ or PJ) or notice, or the complaint failed to join a necessary party. All fall under Rule 12(b).

**Motion for Failure to State a Claim (also under 12(b))** - Since Twombley, there must be sufficient facts to put the other side on notice of plausible claims. Pure conclusions of law are to be disregarded now. “I was torted” is not good enough anymore. “The defendant intended…” not good enough. Facts alleged must be plausible – so if you’re alleging facts that are irrational under an economic point of view mere circumstantial evidence is no longer good enough. Complaints need to assert direct evidence that defendant has acted economically irrational.

- **Assumes the complaint is true**, prima facie.

- Then assesses, if these claims are **true is there a legal basis upon which relief can be granted?**

- **Twombley** says watch out for **wealth maximizers**.

**Motion for Enlargement** – Or to extend time. If defendants needs more than 21 days to file a response. To make this happen, call plaintiff’s lawyer and request, judges prefer you grant the request.

**Motion for More Definite Statement** – Clarify the complaint, Rule 12(e).

- If the complaint itself is so vague and ambiguous that the defendant cannot prepare a response – a court will grant the motion.

**Motion to Strike** – Strike away something scandalous or irrelevant (can do one word at a time), Rule 12(f).

- can strike if redundant, impertinent or scandalous.

**Actual Answer:**

- Must admit what is true.

- May deny what you think is not true.

- Or, claim you don’t know, insufficient information to admit or deny.

- Also, must submit affirmative defenses, which assumes complaint is true but still asserts there is some affirmative matter under which, I win. If affirmative defenses are not asserted they are waived.

**Amendments – *(Adding/Amendment Claims)***

**Rule 15(a)(1)** – party may amend its pleading once any time before being served with responsive pleading (answer) and this can be done without the judge’s permission w/in 21 days.

- This can be done “as a matter of course” – you have a right to do it, don’t need a judge.

- 15(a)(1)(B) – Defendants can do the same to their answer.

After 21 Days…

**Rule 15(a)(2)** – Provides that the court “should freely give leave when justice so requires.”

- liberal standard – reflects courts desire for facts and not procedure to determine a case.

**Rule 15(b)** – Even in middle of trial leave should be granted “where the merits are served by.”

- Another liberal standard.

- Does not say “freely,” but it is still pretty welcoming.

*When should amendments to add a claim be granted?*

- Almost always. Strong presumption to grant. The claims should almost definitely be added if it occurs from the same occurrence or transaction as the main claim.

*When should amendments be denied?*

- Add claims sooner than later – Especially if they create burden for defense. Waiting until the last minute smacks of manipulation.

- other reasons to dismiss – delay, loss of evidence, clear prejudice to opposing party, **made in bad faith**, could have made earlier and missed multiple opportunities.

*Can a claim be amended after the statute of limitations has run?*

- An amendment will relate back to add new claims if they arise from the same transaction or occurrence as the original claim.

- A brand new party may be added if they would have been added if it were not but for a mistake of identity – Plaintiff has 120 days to do this – this is talking about if the statute of limitations has been passed.

**J O I N D E R**

**Rule 18(a)** – Allows a party to join any claims as he has against a party, related or not.

- 18a authorizes a pleader to assert as many claims a he has against a party regardless of commonality.

**Rule 20(a)(1)** – **Plaintiffs can sue together** if their claims **arise from the same transaction or occurence** and their claims offer a common question of law or fact.

 - OR, at least the same “series” of transactions or occurrences.

**Rule 13 – Counterclaims:**

**13(a) Compulsory** – if it **arises from same transaction or occurrence** – you **MUST file** or it disappears “like so much mist.”

 - If not filed, then claim can never be tried, will be dismissed.

**13(b) Permissive** – will involve different events than main claim, will usually be settled in a different trial.

 - Can be filed, but it **does not have to be.**

**13(g) Cross-claims** – Parties on the same side of the “v” can sue each other.

 - **must still apply 13a and 13b** – must decide if its compulsory or permissive

**Impleaders**

**Rule 14 – Permissive Joinders**

**Rule 14(a)(1)** – Defendant can implead another party **for all or part of the damages** being claimed against them – if impleading for all of damages it is known as indemnification.

- A proper impleader claim is a claim for indemnity against an insurer.

- Indemnity is for 3rd parties liable for all of defendant’s damages.

- Impleaders are treated like any other lawsuit, basically service, venue and pleading must be proper.

- Rule 14(a)(2)(B) – **3rd party defendant** (impleaded defendant) may also file **counterclaims**.

- 3rd Party defendant **may implead further parties** under Rule 14(a)(5)

- Rule 14(a)(2)(D) – **Plaintiff and 3rd party defendant** can also assert claims against each other if they arise out of the **same occurrence or transaction** as the main claim.

*Factors Favoring Impleader* – efficiency in hearing related claims, avoid repeated suits or inconsistent judgments

*Factors for Denial of Impleader* – complication of issues in main action, potential prejudice to plaintiff from sympathetic 3rd party

SMJ & PJ – Must still be proper.

 - Courts will likely exercise supplemental jurisdiction for SMJ.

**Rule 19 – Compulsory Joinders**

Certain persons not sued by the plaintiff may be ordered joined in the suit if they need to be made parties to fairly adjudicate the case.

**A Court Should Compel Implede if:**

**19(a)(1)(A)** – the court **cannot accord complete relief** among existing parties.

- (EX: A enters into contract with X & Y. A later decides to sue X to rescind, Y is impleded so entire interest of contract can be rescinded)

**19(a)(1)(B)(i)** – **Absentee has an interest** in the subject matter of the action and her ability to protect that interest will be impaired if she does not participate in the litigation.

- (EX: A & B buy 100 shares of stock. A is being sought by creditors. Creditors want the 100 shares. B needs to be impleded to protect his interest.)

**19(a)(1)(B)(ii)** – if the absentee has an interest in the subject matter of the suit and adjudicating the case without her might leave one of the existing parties **exposed to multiple or inconsistent obligations**.

 - (EX: pg. 286 of the E&E).

**What if party can not be impleded?**

1. Proceed anyway.

2. Dismiss.

In these cases judge should consider:

 - Extent a judgment rendered would be **prejudicial to existing** parties.

 - Extent a judgment rendered would be **prejudicial to absent** party.

 - Whether a **judgment** without the absent person will be **adequate.**

 - Whether **another court** may be better suited to render a judgment.

**Rule 24 – Intervention**

**Intervention as of Right –** Often the right is created by statute, however, if it is not, a judge may allow intervention if:

1. Person **claims an interest relating to property or transaction** that is the subject matter of the action. (Common question of law or fact).

2. That **interest may be impaired** if person is not allowed to participate.

3. Absentee’s interest is **not adequately represented** by existing parties to the action.

- Motion to intervene must be timely.

- Also, motion will be denied if existing parties adequately represent absentee’s interests

- If you’re gonna make the same argument.

- Represent same interest.

- Must show that they will bring something that otherwise would be overlooked or ignored if the matter were only left to already existing parties.

**Permissive Intervention** – **Authorizes intervention** of any person who **has a claim or defense** “that shares with the main action **a common question of law or fact.”**

 - Courts have broad discretion – need a commonality of issues.

 - Must be timely – not right before trial, can’t sit on claim for year

 - Cannot unduly delay or prejudice the adjudication of the original parties rights

*Who can intervene?* – Intervenor must have “an interest that is specific to them and will be directly affected in a substantial concrete fashion by the relief sought. The interest may not be remote or attenuated.”

**Rule 22 – Interpleder**

Holder of common fund (Insurance Company) may be a plaintiff in a lawsuit and interplede every rival claimant as defendants.

- **$500** is enough for amount in controversy.

- **Minimal Diversity** – If any of the two rival claimants are diverse there is diversity (EX: IL v. IL, WI). Statutory interpleder diversity.

- Federal judge can stop other parallel litigations in other states and bring them to common forum.

- Interpleder is rare.

**What if you can’t join? Implede? Or Intervene? – “Indispensable Parties”**

**Dismissal for Failure to Name a Party (Can’t Be Joined, Impleded, Or Intervene)**

**Step 1** – Is there prejudice from the absence of that party – will it keep the case from being “fairly and fully” litigated? If no, then proceed with case. If yes…

**Step 2** – Join the party (make sure they have SMJ and PJ). But, what if party cannot be joined? (lacking SMJ or PJ). Court has no good option.

**Step 3** – Does court go on and risk prejudice? Or does court dismiss for failure to join essential parties? And get rid of entire lawsuit and tell plaintiff to file elsewhere?

**C L A S S A C T I O N S** – The other kind of joinder!

**Jurisdiction for C-A’s (2 Options):**

**The main Plaintiff will represent the group.**

**1. Traditional Federal Jurisdiction:**

- if AU, then you’re golden

- if diversity, the named plaintiff alone needs to be diverse

**2. CAFA – Class Action Fairness Act**

Class Actions will have Subject Matter Jurisdiction if:

1. Any class member (named or otherwise) is diverse of any defendant;

2. The amount in controversy in the aggregate exceeds $5,000,000;

3. There are at least 100 members in the proposed class.

- there is no home state exception for removal

- congress wants to give class action one free shot to remove to federal court

**C** ommonality

**A** dequacy

**N** umerosity

**T** ypicality

**Should Judge Authorize Class?**

**Class Actions –** Named representatives will be permitted to sue on behalf of a class if:

**A.** The class is **so numerous** that joinder of all members is **impracticable; (more than 40)**

**B.** There are **questions of law or fact common** to the class;

**C.** The **named parties’ interests are typical** of the class;

**D.** The named representatives will ensure the **fair and adequate representation** of the interests of absent members of the class

**E.** The action meets **any** of the following requirements of **Rule 23(b):**

**(1)** Separate actions by class members would create a **risk of inconsistent results** or, as a practical matter, **would impair the interests of others members of the class (also known as Prejudice cases)**;

**(2)** Defendant has acted or refused to act on grounds applicable to the class and **injunctive or declaratory relief is appropriate** for the class as a whole (for most civil rights actions)**(Injunctive Relief);**

**(3)** There are **questions of law or fact common to the members** of the class that **predominate** over the individual issues and a **class action is superior** to the alternative methods of adjudication **(usually for monetary relief)**.

3 Kinds of Class-Actions

1. Prejudice – Rule 23(b)(1) – there is harm caused by separate 1 at a time lawsuits…the only way to fix this is by making it a class-action

2. Injunctive Relief – Rule 23(b)(2) – can show CANT – then good shape.

3. Monetary Relief – 2 additional requirements – predominance or superiority – common issues must predominate over the individual issues, there is more common issues than not. Class action device must be a superior method of adjudicating claims.

- This comes down to management – can the judge manage this process? Or is a different method more adequate?

**Due Process & Effects of Judgment – *Res Judicata***

4 Requirements for due process and to make class action judgment binding on a class member:

1. Notice – Notice is required for class-actions of monetary relief. It is discretionary for equitable relief.

2. Opt-Out – Class members must be allowed to opt out to pursue relief on their own.

3. Opt-In – Class members must have the right to join the class (if they fit).

4. Adequate Representation – Attorney must fairly and adequately represent the interests of the class.

**Class Action Considerations:**

- **Diversity Action** – Only named parties need to be diverse in diversity actions. Amount in Controversey will also only apply to named parties.

- Judge has to approve class-action settlement in a **“fairness hearing.”** Judge will consider if settlement is **fair, reasonable and adequate.**

- **Opt Out, again.** Court may not approve **a settlement** if members are not given another chance to opt-out. (This would not apply to a verdict! – only a settlement).

**D I S C O V E R Y**

*For something to be discoverable METHOD and SCOPE must be proper…*

**Scope**

- Relevant to the litigation – usually a no-brainer.

**Base of Discovery Pyramid – Documents and Interrogatories**

**Rule 34** – Request for production of designate documents or electronically stored information (every state has a version of this rule).

What is designated? Or, **what is discoverable?**

Step 1 – Make sure method of discovery is proper. (Method)

Step 2 – Material sought must not be privileged. (Scope)

**Privileges**

**Attorney-Client Privilege:**

- Bars inquiry into this communications between a client and her counsel during the course of legal representation. Courts have decided attorney and client need “full and frank communication.”

**Attorney** – a **member of the bar** or one of their **subordinates** or agents.

**Client** – A person who **consults with** an attorney **for the purpose** of seeking legal advice.

- Independent contractor who works at law firm (independent custodian service) is not privileged.

- If you are talking to a lawyer not seeking legal advice, then that conversation is not privileged.

- The communication is privileged, not the facts.

**What if Client is a thing? A Corporation?**

Lawyers do not just give advice, they gather information and they need full disclosure of lower members of corporation. Therefore, Attorney-Client Privilege **should extend to every employee who acquires information within the scope of their employment** and **communicates it to a lawyer** for the purpose of securing legal advice.

- If you have control of organization, then you are protected by attorney-client privilege.

- Middle-Management is likely protected.

**Work Product** – A **pure mental impression is never discoverable.** However, everything else is discoverable upon a showing of a **substantial need or other undue hardship** (EX: Witness dies). Any material prepared for litigation and not in the ordinary course of business

**Rule 33** – Allows you to serve interrogatories to the party. No more than 25 but that can be waived.

**Rule 45** – Subpoena for **documents to non-parties**. Not so much a method of discovery but a separate lawsuit.

**Rule 35** – Allows party to take a **mental or physical examination** of other party.

- **Judge** has to give court order.

- Have to have “good cause.” It must be **at issue and only way** to get the information sought.

**Rule 26(a)** – Automatic Prompt Disclosure – Must disclose **all witnesses that may support** your claim and defense.

- Must disclose all **relevant documents**.

- Must disclose **damages computations**.

- Must disclose **relevant insurance coverage**.

- May not engage in any other method of discovery until automatic prompt disclosure exchange fest.

- **Ongoing duty** to supplement.

**Rule 30** – Deposing a witness – One 7hr day, 10 per side, must give notice and notice of recording method.

- No judge in the room.

- No matter how objectionable, witness has to answer.

- Can be a non-party.

- If it invades privilege, you have to object AND instruct not to answer.

**Summary Judgment**

A motion may be filed for summary judgment on the eve of trial within 30 days and will be granted if the judge find there is no genuine issue of material fact.

* If Summary Judgment is filed, the **burden of proof will shift** to the other side to submit affirmative evidence that there is genuine issue of material fact for the jury to decide.
* In demonstrating **a genuine issue of material fact** for trial they must now submit a **legally sufficient evidentiary basis** so that a reasonable jury could find in its favor by the relevant burden of proof in a trial – **the preponderance of the evidence.**
	+ Remember, mere circumstantial evidence is not a legally sufficient evidence from which a jury could find irrationally economic behavior.

*Juries are supposedly good for 3 Things – 1. Credibility Determination, 2. Weighing Evidence and 3. Drawing Legitimate Inferences.*

**Trial By Jury**

* + - If you want trial by jury you must demand it in a proper and timely manner – within 14 days of service or in the complaint – defendant must do this in the answer or do it within 14 days of answering.
		- Then you must have the right to it which ould be granted by a statute. Or the constitution.
		- If you seek money then you probably have the right unless the money you seek is D’s gains and not your losses or if congress has delegted fact finding to an administrative law judge.

**Interlocutory Appeals (For Appeals in the Middle of Trial)**

**1. There is some doubt**

**2. Controlling Issue of Law**

**3. Appellate Review would materially advance litigation**

**Finality and Review**

* JML(Judgment as a Matter of Law ) (aka directed verdict) – when evidence is too weak.
	+ After the other side has presented opening statement, this motion may be made and will be granted if there is an insufficient evidentiary basis from which **any reasonable jury could find** for the non-moving party. (usually denied)
	+ If party loses verdict from jury, then losing party can make 2 post-verdict motions**:**
* 2 Post-Verdict Motions:
	+ **Renewed JML**
		- You must have first made an original motion for JML that was denied
		- If you failed to make an original JML motion, you’ve waived your right to file a renewed judgment for JML.
		- There was an insufficient evidentiary basis from which any reasonable jury could have found in the way they just did
	+ Motion for a New Trial
		- For errors at trial that affected the party’s rights
			* Ex. - if the judge told jury that tort claim required only 3 elements; duty, breach, cause. Judge could realize he forgot injury
		- Judge believes the verdict was against the manifest weight of the evidence.
* **RES JUDICATA**
	+ A CLAIM which has already been adjudicated on the merits cannot be re- litigated.
* **COLLATERAL ESTOPPEL**
	+ An ISSUE (D,B,C,I) which has been adjudicated as part of the final judgment on the merits cannot be re-adjudicated by the parties.
* THEREFORE, PARTIES AND ABSENT CLASS MEMBERS WHO RECEIVED DUE PROCESS ARE BARRED FROM RE-LITIGATING CLAIMS OR ISSUES WHICH THEY HAVE ALREADY ADJUDICATED TO A FINAL JUDGMENT ON THE MERITS
* **APPELLATE COURTS**
	+ Courts of appellate jurisdiction and have jurisdiction only over appeals:
	+ As a rule, only final orders may be appealed to the federal courts
		- Final order: an order that leaves nothing left to be done in the lower court.
		- EXCEPTION:
			* Interlocutory (in the middle of litigation) orders may be appealed if:
				+ There is doubt(judge is not sure he was correct) on:
				+ A **controlling question of law** (a law issue upon which the entire law suit may change) such that:
				+ Appellate review would **materially advance litigation**