

## CIVIL PROCEDURE OUTLINE FALL 2015

I. **SUBJECT MATTER JURISDICTION** – Power of court to hear a case given the nature of the dispute

- State Courts – General Jurisdiction
- Federal Courts – Specific Jurisdiction
- Must have for Fed SMJ:
  - 1. Constitutional Authority – Article III. Sec. 2 (extends judicial power to claims arising out of two states, state and citizen, or citizens of different states)
  - 2. Statutory Authority – 1331 or 1332
- A. **DIVERSITY JURISDICTION** – 1332 - Fed can hear claims that arise from state claim
- Section 1332(a) requires that (A) amount in controversy exceed 75,000 and that the (B) claim is between either between

(1) citizens of different States

(2) citizens and foreigners (except those lawfully admitted for residence and living in the United States).

- **Rule of Complete diversity** - EVERY plaintiff must be diverse from EVERY defendant

### 1. **Domicile for Diversity**

- **Citizenship** – Citizen or permanent Resident of US AND domiciliary of a state
- **Domicile – Person**
  - 1. *Fixed and permanent home, principal establishment*
  - 2. *Intention of returning when he is absent*
  - To change domicile, must establish residency and intent to remain indefinitely
- **Dual National** – citizen of the US as well as a citizen of a foreign country.

If domiciled in outside of country, cannot be sued.

- 
- **A Corporation (1332C)** is deemed a citizen of state(s) in which it Incorporated
- Any state where it is incorporated
- where its **Principle place of business** PPB is. Hertz held that a corp's PPB is the corp's nerve center or the location where the corp's offices direct and controls the company's day to day activities. (1332c)
- **Unincorporated associations (partnerships)** are domiciled according to the domiciles of its association members (Sullivan)

### 2. **Amount-in-Controversy**

- Damages alleged by plaintiff *in good faith* not the amount awarded

- *Good faith* – subjectively sincere and objectively reasonable
- **Aggregation:**
- **Rule 18:** allows a single P to combine into one suit all claims against a single D to satisfy the threshold.
- **Rule 20:** (Multiparty litigation): except where the claim is common and undivided, aggregation is NOT permitted.
- **Counter Claims:** does not affect the amount in controversy and cannot be added to satisfy the threshold.
- **-Not aggregated:** where a single plaintiff seeks below minimum requirement from different defendants.
- **-Plaintiff MUST** meet the amount requirement against **each** defendant individually. (So even if one defendant meets the minimum, if the other does not, P cannot bootstrap the other if it does not satisfy the minimum amount)
- **-Where there is more than one P and one lacks the requisite minimum, as long as one P’s individual claim satisfies it, then the others can join under supplemental jurisdiction IF the claims are against a single D and are related.**

## B. FEDERAL QUESTION 1331

- **28 USC § 1331 (FQ):** the district courts have original JXN of all civil actions “arising under the Constitution, laws, or treaties of the U.S.”
- Federal question must appear in P *well pleaded complaint* (i.e. met all conditions to move forward) – MOTTLEY
- When the face of the **plaintiff’s complaint** seeks a relief for a cause of action available under Federal Law (*Mottley*). **The federal issue must be necessary to the proof of the plaintiff’s claim.**
- **Rule:** for a plaintiff to sue in a federal court under the statutory test for arising under jurisdiction, he MUST assert a claim that arises under federal law. The court assesses jurisdiction based solely on the claim asserted by the plaintiff. (The *Mottley’s* case **did not**: they sued for a breach of contract, a state law cause of action that did not require them to prove any proposition under federal law. They could establish their right to relief simply by proving that the railroad had agreed to renew the passes and then refused to do so. Even though the railroad was anticipatory going to assert the federal statute in its defense, the statute was not an element of the *Mottley’s* case in chief.
- **ii.** A case does not arise under Fed Law if the P’s complaint merely anticipates a defense or counterclaim that may be available to D under Fed Law.

## II. SUPPLEMENTAL JURISDICTION 1367

- Supplemental jurisdiction is the authority of United States federal courts to hear additional claims substantially related to the original claim even though the court would lack the subject-matter jurisdiction to hear the additional claims independently
- **§ 1367(a):** Except as provided in (b) and (c) or otherwise by the Statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have **supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction** that they form **part of the same case or controversy** under Article III of the U.S. Constitution.
- Influence of *Gibbs* – asserting two claims, first the fed law claim for secondary boycott and the second under state law for interference with contract

◦ **Common nucleus of operative facts standard**

• **§ 1367(b):** If original JXN is based solely on 1332 (diversity), then supplemental JXN is NOT available to claims by plaintiffs against persons made parties under **Rules 14, 19, 20, 24**, or over claims by persons proposed to be joined as plaintiffs under Rule 19, or seeking to intervene as plaintiffs under Rule 24, *if it will destroy diversity or amount in controversy*.

-**Rule 14 (impleaders)**: gives a defendant the limited right to bring into the suit new parties against whom the defendant has claims related to the main action.

-**Rule 19 (required joinders)**: parties may be ordered joined if they are required to fairly adjudicate the case (applies to P and D)

-**Rule 20 (permissive joinders)**: (a) multiple plaintiffs can sue together; and (b) one P can sue multiple defendants if they assert claims arising out of the same transaction or occurrence (or series of transactions or occurrences) and their claims against the defendant(s) will involve a common question of law or fact

-**Rule 24 (intervention, if permitted by DC)**: where a party may come on either on the plaintiff's side or the defendant's

• **§ 1367(c)**: the court has discretion to **decline** to hear the supplemental claim if

a. the claim raises a novel state claim

b. the claim predominates over the claims over which the court has original jurisdiction

c. the court has dismissed all the claims over which it has original jurisdiction

d. exceptional circumstances create "other compelling reasons."

• **EXXON MOBILE** - Where other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement, a court may exercise supplemental jurisdiction over the claims of other plaintiffs in the same case or controversy, even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction

1. **REMOVAL 1441 – 30 days after receipt of service**

1. **§ 1441(a)**: a **defendant** can remove to a federal court if the P could have originally filed the claim in Fed Court – all defendants must agree to the removal as long as they've been actually served

a. The district court must have original jurisdiction over the claim

b. The district court must cover the state in which the case was originally brought.

2. **§ 1441(b)**: if the claim is based on **1332 (diversity)**, a defendant **cannot** remove to federal court **if** he is a **domiciliary** of the forum state.

3. **§ 1441(c)**: **if the claim is based on 1331(FQ) and there are other supplemental state law claims, the judge can decide to remand the claims where state law predominates except for non-divisible actions**

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

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

**3) § 1441(c): Separate and Independent Federal Claim**: If the plaintiff brings a separate and independent federal claim, along with a state claim(s), the defendant can remove all of them, thus

the plaintiff will not join unrelated state claims to federal claim to prevent removal or “trap” federal claim. Federal Court would have discretion to dismiss, remand nonfederal claims.

### III. **PERSONAL JURISDICTION**

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

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

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

business there consents to be sued there). Jurisdiction when domiciled.

ii) **Presence:** Presence means the defendant need be present in the state for the court to have jurisdiction. Jurisdiction when served. The length of time spend in the state is

irrelevant, anyone traveling in the state should expect to be sued there.

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

**2) Quasi in Rem Jurisdiction:** Quasi in Rem Jurisdiction is jurisdiction over the **value** of property; plaintiff must attach (seize) defendant’s property before court can have jurisdiction. Jurisdiction over a person but based on that person’s interest in property located within the court’s territory.

**3) In Rem Jurisdiction:** In Rem Jurisdiction is jurisdiction over the property itself within the state’s limits. In Rem Jurisdiction is jurisdiction over the land, but not the person. A court’s power to adjudicate the rights to a given piece of property, including the power to seize and hold it.

### **EXPANSTION OF PERSONAL JURISDICTION (CURRENT)**

- MUST BE CONSISTENT WITH DUE PROCESS I.E. does not offend traditional notions of fair play and substantial justice. (*International Shoe*) This can be established through

#### A. **Voluntary Appearance**

- ***Insurance Corp of Ireland v Compagne Des Bauxites De Guinee***

- Party appeared in court for purpose of challenging jurisdiction is bound by their decision. Did not comply with discovery orders to demonstrate the court did not have jurisdiction and therefore waived their right to defense of lack of jurisdiction

#### B. **Personal Service of Process in the forum state**

- ***Burnham v Superior Court***

- Divorce case where he was served while in Cali.
- state and federal court systems that jurisdiction over one who is physically present in

the forum state is proper

C. **Domiciled in forum state and process in another state**

D. **Waiver/Consent** – Forum Selection Clause/Long Arm Statute

- Calder effects – intentional tort -
  - the proposed forum may exercise personal jurisdiction over a nonresident defendant when their conduct knowingly effects individuals in the forum
  - **Long arm statute** - statutes authorizing state courts to exert jurisdiction over nonresidents engaging in certain types of conduct. Has contacts
    - **McGee v International Life Insurance Co.**
      - Cali had a statute stating any foreign corp entering into a contract with Cali resident is subject to the courts jurisdiction. This is consistent with due process because the one contact gave rise to the claim.
      - INSURANCE CO. REACHED OUT TO MCGEE AFTER THEY BOUGHT EMPIRE. PURPOSEFUL AVAILMENT WAS PRESENT
  - **Forum Selection clause** - establish the jurisdiction will take place. Parties can agree in advance how to handle future disputes

E. **Minimum Contacts** (Continuous and Systematic; Single and Isolated)

**MINIMUM CONTACTS – WHEN DEFENDANT IS NOT A RESIDENT OF THE STATE (INTERNATIONAL SHOE)**

1. **Purposeful Availment**- of privilege of conducting activities in forum state .Look at contacts + reasonableness factors

A. If contacts are **continuous and systematic** – are the contacts so continuous and systematic that they are at home in the forum state, does not need to be related to the cause of action – general jurisdiction. assert jurisdiction over foreign corporations to hear any and all claims against their affiliations with the state are so “*continuous and systematic*” to render them essentially “**at home**” in the forum state – International

- **Goodyear Dunlop Tires Operators v Brown**
  - They could not claim specific jurisdiction bc the tires said to be distributed were not the ones that caused the accident

- Mere purchases, even those occurring at regular intervals, are not sufficient contacts to confer general jurisdiction over a non-resident defendant in a cause of action unrelated to those purchases. No continuous and systematic business contacts
- **Community Trust Bancorp Inc v Community Trust Financial Corp**
  - Zippo Test -
  - One end of scale – website that enters into contracts with residents of a forum state involved in “the knowing and repeated transmission of computer files over the internet” - Subject to personal jurisdiction
  - Passive website – defendant has simply posted info on an internet website which is accessible to users in foreign jurisdiction
  - Middle ground – interactive website where a user can exchange info with host computer. LOOK AT level of interactivity and commercial nature of the exchange of information that occurs on the website
  - The court looked at the reasonableness factors

B. If the **claim arises out of the contacts**, specific jurisdiction, does not matter if the contact is isolated and sporadic – Specific Jurisdiction

- **McGee v International Life Insurance Co.**
  - The one contact gave rise to the claim and INSURANCE CO. REACHED OUT TO MCGEE AFTER THEY BOUGHT EMPIRE. PURPOSEFUL AVAILMENT WAS PRESENT
- **Hanson v Denckla**
  - Case with will and trust in FL. No jurisdiction in FL bc trustee never contacted them. Everything was said and done before she moved to FL.
  - Unilateral activity of those who claim some relationship with a non resident defendant cannot satisfy the requirement of contact with the forum state
- **World Wide Volkswagen**
  - World-Wide Volkswagen (P) and its wholesaler conducted no business targeted at Oklahoma, directly or indirectly, and did not avail themselves of the privileges of Oklahoma law. The good sold is inherently mobile. Foreseeability is not enough, there must be purposeful availment

- *Burger King Corp*
  - If a defendant deliberately engages in significant activities in the state and creates continuing obligations between himself and residents of the forum state, he is subject to jurisdiction in that state even if he has never been physically present in the state
  - Weighed out the interest factors
- *Walden v. Fiore*
  - Connection must arise from the contacts the defendant himself creates. The only thing linking the defendant to Nevada here is the plaintiff.
  - Minimum-contacts analysis looks to the defendant's contacts with the forum state itself, not the defendant's contacts with persons who reside there

2. **Reasonableness Factors** - can only take away personal jurisdiction. If contacts are established, look at these.

A. Burden on  $\Delta$  in litigating in the forum state

B. State's interest – protect citizens?

C.  $\pi$  interest in convenient and effective relief in forum state (these three would all need to be present to defeat personal jurisdiction )

D. interstate judicial system's interest in obtaining the most efficient resolution of controversies

E. shared interest of the several states in furthering fundamental substantive social policies

### **QUASI IN REM AND PERSONAL JURISDICTION**

- *SHAFFER V HEITNER* – Non residents absent from the state (overruled Pennoyer) Quasi in rem not enough to exercise personal jx
  - The Delaware court found jurisdiction solely on a state statute allowing jurisdiction based on a defendant's property located in the state, although the lawsuit is entirely unrelated to that property interest. Because **there is no nexus between the property and the substance of the action, there must be another basis for determining the defendants' minimum contacts.**

- In order to establish jurisdiction on value of property, quasi in rem, then the claim must be related to the property to establish personal jurisdiction, if it is not, you must have minimum-contacts
- **Standard:** fair and reasonable (through traditional notions of fairplay and justice) by defendant's contacts through purposeful availment of the privilege of conducting activity in the forum state
- if you own land in that state, you are purposefully availing yourself in that land IF IT HAS TO DO WITH THAT SUIT
- Stream-of-commerce establishes purposeful availment when there isn't the usual basis to consider the purposeful availment

### **STREAM OF COMMERCE**

#### **ASAHI**

- stream of commerce – disbursement of goods - could the person selling it, were they aware of where it was going? Did they place it in the stream knowing it would end up there. Way of establishing purposeful availment – no contacts at all
- *Awareness that a product may end up in the forum state is not enough.* Rather, fairness requires that there **must be some purposeful action by the defendant to infuse its products into the forum state market.** Examples include designing a product for the *forum market, advertising in the forum market, or marketing a product* in the forum state through a distributor.
- Connor – says stream of commerce does not work. Says you need something more like a product direct towards the forum state or advertisements there
- Brennan – says if you are aware that product is going somewhere, that is knowledge and that you deposit your good in the stream of commerce knowing it will reach a forum state, that is acting purposefully

#### **J.MCINTYRE MACHINERY LTD V NICASTRO**

- *The intent of the corporation or individual to submit to and avail themselves of the state's laws, protection and benefits is sufficiently shown by their placing their goods into the stream of commerce, expecting these products to be purchased by consumers from this state as well.*

But for this to hold good, it must be proved that the business activities amount to a purposeful intention to be under the state's sovereignty

- In this case, all the marketing was targeted at the US in general, not a particular state

#### Minimum Contacts - The Four Principles of International Shoe

- 1) Jurisdiction is permissible when the defendant's activity in the forum is *continuous and systematic* and *the cause of action is related to that activity*.
- 2) Sporadic or casual activity of the defendant in the forum does not justify assertion of jurisdiction on a cause of action unrelated to that forum activity.
- 3) A court may assert jurisdiction over a defendant whose continuous activities in the forum are unrelated to the cause of action sued upon when the defendant's contacts are sufficiently substantial and of such a nature as to make the state's assertion of jurisdiction reasonable. ("general jurisdiction")
- 4) Even a defendant whose activity in the forum is sporadic, or consists only of a single act, may be subject to the jurisdiction of the forum's courts when the cause of action arises out of that activity or act. ["specific jurisdiction"]

#### IV. VENUE (STATUTORY)

##### Residency

1. Individual – domiciled
2. Business – where subject to personal jurisdiction (pob and state of incorporation)
3. Alien – Any judicial district

1. Determines what district in the state– like PJ it determines where litigation will take place
2. Solely based on statutory sources rather than constitutional sources (unlike PJ which also has const)
  - a. Because it is statutory, Congress could take it away trmw – and all we would have is PJ
  - b. Law typically tries to place suits in areas that are connected either to the parties or to the events that gave rise to the action
3. Venue isn't meant to hinder litigants, which is why 1391(a)(3) is so broad – you can always probably find a venue in the U.S.
  - a. 1391(a) applies to diversity only cases
  - b. 1391(b) applies to cases not based solely on diversity (e.g., federal question cases)
4. **State Court** – look to state venue statute
5. **Federal Court** – look to 28 U.S.C. § 1391
  - a. *Diversity jurisdiction* – An action may be brought only in:
    - i. a district where any defendant resides, if all defendants reside in the same state; or
    - ii. a district in which a substantial part of the events giving rise to the claim occurred; or

iii. Last resort: If there is no district in which the action may otherwise be brought, any district in which any defendant is subject to PJ at the time the action is commenced

b. *Non-diversity jurisdiction* – An action may be brought in:

i. a district where any defendant resides, if all defendants reside in the same state; or

ii. a district in which a substantial part of the events giving rise to the claim occurred; or

iii. Last resort: If there is no district in which the action may otherwise be brought, a district in which any defendant may be found

1. “Found” – similar to minimum contacts, but less stringent. Most significant contracts

c. *Corporate D* deemed to reside in any judicial district in which subject to PJ -

1391(c)

d. *Alien* sued in any district - 1391

**TRANSFER AND FORUM NON-CONVENIENS** – more convenient forum somewhere else?

a. State/fed courts possess the power to decline to exercise jurisdiction even though they possess if it would be more convenient for the case to be heard elsewhere– or for reasons of justice or efficiency

• Used when there is proper PJ and venue – but for convenience forum should change

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

**b. Transfer – 28 U.S.C. § 1404 (One System to Same System)**

i. EITHER PARTY CAN MOVE FOR A TRANSFER

1. It is assumed P brought case where she wanted to – but things might have come to light later in the suit making either side wanting the case to be transferred

ii. Transfers gives the federal courts the ability to move cases within the system without the necessity for dismissal and refiling (like forum non conveniens)

1. When venue is improper the court may dismiss or transfer

iii. Although similar to FNC there is a *lesser of a showing required*, courts look at:

1. Convenience of the parties and witnesses

2. Interests of justice

3. If the transfer is to a district where case might have been brought

4. Law of transferor court governs - changing court not the law

a. The new court sits as if “they were the old court.”

5. Forum selection clause significant, but not controlling

iv. If the first court lacks personal jurisdiction, the transferee’s court’s law will cover

1. Changing courts not law – benefit of convinces, but no benefit of different law

v. **State court** – transfer to another county within the same state

vi. **Federal court** – transfer to another judicial district

### 1. § 1404

a. Either party may seek transfer

b. Factors (Lesser showing on inconvenience than forum non conveniens)

1. Convenience of parties

2. Place where operative facts occurred

3. Access to sources of proof, evidence, and ability to compel witnesses

4. Convenience of witnesses

5. Plaintiff’s choice of forum

6. Forum familiarity with governing law

7. Trial efficiency (docket congestion)

8. Interests of justice

9. In a case involving a contract, any forum selection clause in the contract will be considered as evidence of what the parties thought would be a convenient forum.

C. Must transfer to district where case could have orig. been brought - § 1404(a)

### C. Forum Non Conveniens

I. ONLY D CAN MOVE FOR A FORUM NON CONVENIEN

ii. Forum non convenience is a dismissal – the case ends in one court and then it has to be moved to a different court and started over

iii. Applies when:

1. Federal court – Most convenient forum is a foreign country/Foreign plaintiffs
2. State court – Most convenient forum is another country or another state
3. Typically used when leaving 1 court for a federal court, or moving to a diff. state ct

**iv.** Court has discretion to dismiss the action (Piper)

**v.** Start with presumption in favor of plaintiff's choice of forum, but lesser presumption if plaintiff has not chosen its home forum. Then consider the interest factors:

1. Less favorable law in alt forum is relevant only if it provides no remedy at all
2. Ps choice of forum should (and rarely is) not be disturbed
3. If P files in home ct and many of the factors point to that court – very hard to switch

**vi.** Consider private and public interests – no guidance if the interests point different directions

1. Private interests

1. Plaintiff's interest in choosing forum (Less deference given to P if not plaintiff's home forum)
2. Defendant's preferred forum
3. Location where claim arose
4. Convenience of parties (more convenient or no less convenient?)
5. Convenience of witnesses if they cannot testify at transfer
6. Ease of access to sources of proof

2. Public interests

7. Transferees familiarity with governing law
8. Congestion of courts
9. Local interest in decision

3. Less favorable law in alternative forum is relevant only if the alternative forum provides not remedy at all

**Spaeth v MSU College of Law** 7 of 9 factors weighed in favor of defendants to sever the case and move for transfer under 1404

**Piper Aircraft Co. v Reno** - forum non conveniens doctrine applies only when venue is proper in the initial forum and there is an alternate forum available.

- Choice of law – whose law applies

- Think about defendants wanting to impede and whether that court has personal jurisdiction over impleading parties
- If you do not have both valid personal jurisdiction and proper venue (1404) then you would move for a 1406 transfer instead

## V. PLEADING

### Conley v Gibson (Previous Law)

- Standard of **possibility**. States it should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief

### Bell Atlantic Corp v Twombly (Overruled Conley and changed the law)

- requires that the *factual allegations must suggest more than parallel behavior*; they must suggest that an actual agreement was made.
  - We do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from **conceivable to plausible**, their complaint must be dismissed

### Ashcraft v Iqball

- facial plausibility requires the plaintiff to **plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged**.
- The facts cannot be conclusory, they must factual allegations assumed to be plausible
- Assumption of truth does not apply to legal conclusions, only to factual allegations

## A. Rule 8

### ▪ **Rule 8 - 8A – FEDERAL RULES- Must contain:**

1. Short and plain statement of grounds for the courts jurisdiction unless court has jurisdiction and claim needs new jurisdictional support (some indication of why the court has jurisdiction)
2. short and plain statement of the claim showing that the pleaders are entitled to relief – Twombly and Iqball
3. a demand for the relief sought, which may include relief in the alternative or different types of relief
  - Rule 8b – Admit or deny allegations asserted by opposing party
  - Rule 8c – Must assert affirmative defenses including: assumption of risk, fraud, statute of frauds, statute of limitations, waiver, etc.

## B. Rule 12

- **Rule 12b – may assert certain defenses by motion:**

(1) **lack of subject-matter jurisdiction;**Rule

- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under **Rule 19**.

- **Rule 12** – Defenses and Objections: when and how presented; motion for judgment on the pleadings, consolidating motions, waiving defenses, pretrial hearing
  - 21 days to file an answer
  - If you waive service, then you get 60 days to respond
  - If you bring a motion, you bring all the defenses that would apply
  - 12c – motion for judgment on the pleadings – a party may move for judgment on the pleadings
  - 12e – you do not get what the plaintiff is saying
  - 12f – motion to strike – something like asking to strike punitive damages because they do not apply in that state
  - 12h – waiving and preserving certain defenses
    - **if you fail to raise a motion under 12b, you better put that defense in the answer, if you do not, you waive it. 12b2-12b5**

### C. **Rule 15**

#### **RULE 15 – AMENDED AND SUPPLEMENTAL PLEADINGS**

##### (a) AMENDMENTS BEFORE TRIAL.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

##### a. Amending Pleadings with (or without) the Court's Permission

**15A - i. FRCP Rule 15(a)** imposes a threshold requirement that can be satisfied through any of the following three methods:

1. a pleading may be amended once without leave of court (as a matter of course) at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, within twenty days after the pleading to be amended is served.
2. A pleading may be amended at any time with the consent of the adverse party.
3. An amended pleading may be allowed by leave of the court- and that leave is to be “freely give when justice so requires.” Dependent upon two factors:
  - a. Length and reason for delay in asserting this claim
  - b. Prejudice to the party opposing the new claim as a result.

**15B Amendments to Add Issues at Trial**

- i. Rule 15(b) provides for amendments necessary to cause the pleadings to conform to the evidence.
- ii. The Rule provides that if issues not raised by the pleadings are tried by express or implied consent, they are treated as if they had been raised.

**15C . Amendments Filed after the Limitations Period has Expired**

- i. If an amendment can be said to “relate back,” it is treated as if it were filed along with the original pleading even though it was actually filed after the limitations period.
- ii. **Rule 15(c)(1)(a)**: provides that if the statute of limitations governing a claim for relief allow relation back of amended pleadings, relation back is permitted.
- iii. The point of Rule 15(c)(1)(a) is to ensure that Rule 15 cannot be used to contravene statutes of limitations specifically allowing relation back.

**Beeck v Aquaslide Corp**

B. If you sue defendant and you go through discovery and you realize you have another claim but statute of limitations has run, B lets you amend as if it were part of original complaint if you already named the party

C. if you have not already named the party – can add if b is satisfied and if 1. there was notice of some kind and 2. knew or should have known the action would have been brought against it, but for a mistake concerning the proper party's identity

- Formal notice is not required

**RULE 11**

**Veracity Standards for Filed Documents**

- a. Rule 11 requires that a document be signed by an attorney or by the party, if there is

no attorney.

- i. If the document is not signed, by Rule 11(a) the court must strike the paper unless the paper is signed promptly after the attorney or party becomes aware of the problem.
- b. The duty of Candor:
  - i. Litigants are subject to sanctions for advocating a position after it is no longer tenable.
  - ii. The rule protects litigants against sanctions if they withdraw or correct contentions after being notified about potential violation.
- c. Are sanctions mandatory?
  - i. Under Rule 11, the trial court has discretion to determine whether to apply sanctions.
  - ii. The rule states that the sanctions should be no more severe than reasonably necessary to deter repetition of the conduct by the offending attorney or party or comparable conduct by similarly situated persons.
- d. Are sanctions imposed automatically?
  - i. Before sanctions are imposed, litigants must receive notice about an alleged violation and a chance to respond.
- e. “Safe Harbor” provision and how it is expressed in Rule 11.
  - i. A motion for sanctions is not to be filed until at least 21 days after the motion is served on the offending person.
  - ii. During that period, if the violation is corrected withdrawing an allegation, the motion should not be filed with the court.
- f. Writings exempt from Rule 11’s coverage?
  - i. Rule 11 explicitly is inapplicable to discovery and disclosures requests, responses, objections and motions under the discovery provision in Rules 26-37.

## **RULE 41 – DISMISSAL OF ACTIONS**

### **I. Rule 41a (1) – By Plaintiff**

1A. Plaintiff can dismiss without court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment OR a stipulation of dismissal signed by all parties who have appeared

1B. Unless stated otherwise, dismissal is without prejudice

### **II. Rule 41a(2) – By Court Order; Effect**

2. On court's terms. May only dismiss once then refile

## **RULE 55 – Default; Default Judgment**

**A. Default** - Failed to plead or defend, clerk must enter party's default

**B1. Default Judgment by Clerk** – If for some certain, then by plaintiff request and affidavit, clerk may enter a default judgment against defendant

**B2. Default Judgment by Court** – In all other cases, you must apply to court for default judgment. If party has appeared, must be served with written notice 7 days prior to the hearing

**C. Set Aside Default Judgment** – for lack of subject matter jurisdiction or personal jurisdiction

## **VI. PRECLUSION –**

**- The party must have their day in court**

## **A. CLAIM PRECLUSION – RES JUDICATA**

1. Same parties
2. Final judgment on the merits
3. Same “claim” (transaction/occurrence)

### **Rush v City of Maple Heights**

- Her injuries could have been brought in first

### **Matthews V. New York Racing Association**

- The previous judge had found that upon the facts and law the Plaintiff had shown no right to relief.

## **B. ISSUE PRECLUSION - COLLATERAL ESTOPPEL**

1. Same issue- risen in action 1 and risen in action 2
2. Issue is actually litigated and decided – CRUCIAL
3. Issue was necessary to the judgment (if there are two issue sufficient for dismissal then neither would be necessary for the judgment because either one would work)
4. Asserted against a party in the prior action

### TYPES OF ISSUE PRECLUSION:

1. Defensive Mutual Collateral Estoppel
2. Defensive Non-Mutual Collateral Estoppel
3. Offensive Mutual (Issues with this bc what if D did not really try to defend themselves?)
4. Offensive Non Mutual Collateral Estoppel

**There is no requirement that the party asserting res judicata had to be a party or in privity with a party to the earlier litigation.**

Estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.

### **Rios v Davis – Attempt at Defensive Mutual Estoppel**

- Decision of Rios' negligence was not necessary to the judgment. Contributory negligence of PDG was all the court needed to dismiss the first action
  - Same issue would be rios' negligence. – it was actually litigated, it is being applied to someone in former party BUT it was not necessary to the judgment
  - The finding that davis was negligent is the only thing necessary for the prior judgment, it wouldn't have mattered if rios was negligent or not
  - Rios could assert offensive mutual collateral estoppel

### **Bernhard v Bank of America Trust**

- Defensive Mutual Collateral Estoppel
- She represented the estate so there is privity

### **PARKLANE – Offensive Nonmutual Collateral Estoppel**

- “The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.” -
- SEC had filed suit and won against parklane so shore wanted to enforce offensive nonmutual collateral estoppel
- If plaintiff could have joined first or if defendant did not fully defend themselves or different procedural mechanisms available
- Say SEC lost in the first action then parklane rose defensive non mutual then shore would still win bc issue preclusion cannot be applied to a party to the prior action
- **1. Wait and see plaintiff?**
- **2. Fairness?**
  - Defendant did not have an incentive to litigate vigorously
  - inconsistent with prior judgments
  - procedural opportunities that were not available in the first action

### Demonstrations

1. Eric v other driver – negligent – judgment for eric
  2. The rest of us don't really get offensive non mutual bc we were all wait and see
- Eric v other driver – judgment for other driver
  - Nathan – same thing ....and so on.
  - 25. Max v other driver – max wins.
  - The rest of us go to court and try to show offensive non mutual
    - We would be rejected bc the judgment in prior action is inconsistent with earlier judgments because the defendant won 24/25

### NONPARTY PRECLUSION

#### Taylor v Sturgell

- Airplane case where his friend Herrick had filed suit before
  - **The rule against nonparty preclusion is subject only to certain recognized exceptions:**
1. a nonparty may agree to be bound by a judgment, “test case”
  2. certain substantive relationships may justify preclusion (e.g., privity),
  3. a nonparty’s interests may have been **adequately represented** in the prior litigation (e.g., class actions and suits by trustees or guardians), LOOK BELOW TO SEE
  - 4 a nonparty may have assumed control over the earlier lawsuit,
  5. a nonparty may have colluded to avoid the preclusive effect of an earlier judgment by litigating through a proxy, or

6. special statutory schemes (such as bankruptcy) may apply

“adequate representation,” to suffice as “virtual representation,” requires that

(1) the interests of the nonparty and her representative are aligned; and

(2) either the party understood herself to be acting in a representative capacity, or the original court took care to special procedures of protection of interest of the nonparty.

3. Notification of Adequate representation

## VII. JOINDER

### RULE 18 – JOINDER OF CLAIMS

**IN GENERAL.** A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party

- Once a claimant has a single claim, it can give them all claims there
- impleading, if I am liable, this third party defendant is liable as well. Then it determines, how much liability?
- May bring in third party for indemnification – rule 18 says you can also do a negligence claim
- ^^ this claims do not have to be related to the same transaction
- Just because allowed by rule 18 does not mean it will be admitted, there are many obstacles such as jurisdiction and venue
- Res judicata often prohibits splitting of single cause of action into two or more suits if related claim

### RULE 42b- CONSOLIDATION; SEPARATE TRIALS

- Court has discretion to split the issues into separate trials even if they are part of the same claim

### RULE 20 – PERMISSIVE JOINDER OF PARTIES

(a) *PERSONS WHO MAY JOIN OR BE JOINED.*

(1) **Plaintiffs.** Persons may join in one action as plaintiffs if:

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

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

(2) **Defendants.** Persons—as well as a vessel, cargo, or other property subject to admiralty process in rem—may be joined in one action as defendants if:

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

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

(3) Extent of Relief. Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

- A1. Plaintiffs - if they assert right to relief out of same transaction, AND any question of law or fact common to all plaintiffs will arise in the action
- **A2 – Defendants – if right to relief is asserted against them of same transaction AND question of law or fact common to all defendants will arise in the action**

### **RULE 21 – MISJOINDER AND NONJOINDER OF PARTIES**

- **Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.**
- *You cannot move for dismissal on the basis of misjoinder, the remedy is to just add or drop a party, the action proceeds but the question is with whom*

### **RULE 13 – COUNTERCLAIM AND CROSS CLAIM**

#### **(a) COMPULSORY COUNTERCLAIM.**

(1) In General. A pleading **must state (only consequence of not doing so is preclusion)** as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

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

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

**(b) PERMISSIVE COUNTERCLAIM. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory. (Does not arise out of same transaction or occurrence)**

- **You must still have subject matter jurisdiction for counterclaim**
  - *ancillary jurisdiction/supplemental jurisdiction works here*
    - *1. must be original jurisdiction*

- 2. *must be same case or controversy aka common nucleus of operative facts*
- *which would then make it a **compulsory counter claim**, not a permissive counter claim*

**(g) Crossclaim Against a Coparty.** *A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.*

- *1. no such thing as a permissive cross claim. Def 1 cannot bring against def 2 that is unrelated to the claim the plaintiff is bringing against defendant 1*
- *2. a cross claim need not be asserted in the action*
- *Cross claims need not bring even a related cross claim – preclusion does not apply*

## **RULE 14 – THIRD PARTY PRACTICE**

### **Rule 14. Third-Party Practice**

(a) When a Defending Party May Bring in a Third Party.

(1) **Timing of the Summons and Complaint.** A **defending party may**, as *third-party plaintiff*, serve a summons and complaint on **a nonparty who is or may be liable to it for all or part of the claim against it**. But the third-party plaintiff must, by motion, obtain the court's permission if it files the third-party complaint more than 14 days after serving its original answer.

(2) **Third-Party Defendant's Claims and Defenses.** The person served with the summons and third-party complaint--the "third-party defendant":

(A) **must** assert any defense against the third-party plaintiff's claim under Rule 12;

(B) **must** assert any counterclaim against the third-party plaintiff under Rule 13(a), and **may** assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) **may** assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) **may** also assert *against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff*.

(3) **Plaintiff's Claims Against a Third-Party Defendant.** The **plaintiff may** assert against the *third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff*. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) **Motion to Strike, Sever, or Try Separately.** Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) **Third-Party Defendant's Claim Against a Nonparty.** A **third-party defendant** may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(6) **Third-Party Complaint In Rem.** If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) in the property arrested.

(b) **When a Plaintiff May Bring in a Third Party.** When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

- *A1 – defendant 1 is saying the 3PD is liable for all or portion – indemnification if all/ contribution in torts if apportionment*
- *A2 – Must assert defenses under Rule 12. Must bring action under 13a and may bring 13b or 13g. 3PD may assert claim against plaintiff as long as it is same transaction of plaintiff against third party plaintiff (the original defendant) – this would just be considered a claim.*
- *A3 – Plaintiff may assert claim against 3PD if it relates to same subject matter of plaintiff's claim against the original defendant. The 3PD must assert defenses under rule 12 and any counterclaim under 13a and may bring 13b or 13g*
- *A5 - 3PD may bring in nonparty who is or may be liable for 3PD for all or part of claim against it*
- *B – A plaintiff can bring in a third party when a claim is asserted against a plaintiff and this rule would allow a defendant to do it*

## **RULE 19 – REQUIRED JOINDER OF PARTIES**

(a) **Persons Required to Be Joined if Feasible.**

(1) **Required Party.** A person who is *subject to service of process (personal jurisdiction)* and whose joinder will not deprive the court of subject-matter jurisdiction **must be joined as a party if:**

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

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

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

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

(b) **When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be

joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which **a judgment rendered in the person's absence might prejudice that person or the existing parties**;

(2) the **extent to which any prejudice could be lessened or avoided** by:

(A) protective provisions in the judgment; (contingency provisions)

(B) shaping the relief; or (damages instead of injunctive relief)

(C) other measures;

(3) **whether a judgment** rendered in the person's absence would be **adequate**; and

(4) whether the **plaintiff would have an adequate remedy if the action were dismissed for nonjoinder**. (going to state court)

If a party is indispensable---> Dismissal under 19b

### **Provident Tradesmen Bank v Patterson**

- Dutcher could have used the 100k to cover HIMSELF not for the insurance company.
- They were able to go to state court and Dutcher would not have destroyed diversity

First look at Rule 19 – required party, but if joinder is not feasible, bc no jurisdiction or they will destroy diversity, look at rule 19b and do the factors – what is the prejudice, can it be minimized, is there alternative

### **RULE 24 – INTERVENTION**

(a) **Intervention of Right. On timely motion, the court must permit anyone to intervene who:**

(1) is given an unconditional right to intervene by a federal statute; or – RARE

(2) **claims an interest** relating to the property or **transaction that is the subject of the action**, and is **so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest**, unless *existing parties adequately represent that interest*.

(b) Permissive Intervention.

(1) ***In General*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

**B) has a claim or defense that shares with the main action a common question of law or fact.**

B. Permissive – b. - Plaintiff 2 must prove **common question of law**, which is less than rule 20

- If another plaintiff wanted to get in without using 24, you can just ask the org. plaintiff to agree to that.
  - The court would first have to determine that it is arising out of the same transaction and etc. 20A1
  - If the plaintiff does not agree, will revert to rule 24
- Rule 19 – join a defendant or plaintiff bc it is **required by rule 19**
- Rule 12b7 – failure to join a party under rule 19 is basis to dismiss a complaint
- A defendant can force another defendant to join by these steps ^^