

Civil Procedure Outline

Fall Semester 2017
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Exam Answer Format:

1. The Facts
2. The Rules and/or Tests
3. Application
4. Counterargument
5. Conclusion

The Complaint & Answer

FRCP 8 | Pleading a Complaint

A pleading that states a claim for relief must contain;

- (1) A short and plain statement of the grounds for the court's jurisdiction;
- (2) A short and plain statement of the claim showing that the pleader is entitled to relief;
AND
- (3) A demand for relief sought, which may include relief in the alternative or different types of relief.

FRCP 8(d): Internal inconsistencies in a complaint are acceptable in the pleading.

FRCP 8(c): Affirmative defenses.

FRCP 12(b)(6) | Failure to State a Claim

The Twiqbal Standard: On a 12(b)(6) motion to dismiss, a court must (1) accept as true all of the allegations contained in a complaint (pleading FRCP8), excluding its legal conclusions and (2) only accept a complaint that states a plausible claim for relief.

The Haddle Rule: When reviewing a 12(b)(6) motion, the court must assume that the facts as alleged by plaintiff or petitioner are true AND inquire whether there is a substantive violation of law.

The Twombly Rule: 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.

The Iqbal Rule: A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The **plausibility standard** is not akin to a *probability requirement*, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

FRCP 7 | Pleadings

Pleadings are;

- | | |
|--|--|
| (1) a complaint; | (4) an answer to a crossclaim; |
| (2) an answer to a complaint; | (5) a third-party complaint; |
| (3) an answer to a counterclaim
designated as a counterclaim; | (6) an answer to a third-party
complaint; and |

(7) if the court orders one, a reply to an answer.

FRCP 9 | Specificity in Pleading

Rule 9: Fraud and Mistake Claims: Plead with particularity the time, place, and manner of the fraud (identify the lie).

FRCP 11 | Ethical Pleading & Sanctions

Signed documents filed with the court, separate motion, safe harbor, strategic considerations. Courts can sanction sua sponte.

Christensen: While FRCP 11 permits the court to sanction an attorney for conduct regarding pleadings, written motions, and other papers that have been signed and filed in a given case, FRCP 11(a), it does not authorize sanctions for, among other things, discovery abuses or misstatements made to the court during an oral presentation.

The Christensen Rule: To impose sanctions under a court's inherent authority, the district court must make an explicit finding that counsel's conduct constituted or was tantamount to bad faith.

Responding to a Complaint

A response is usually required within 21 days unless ∂ waives service, then 60 days, or is granted an extension by the judge.

- (1) Pre-Answer Motions | **FRCP 12**
- (2) Answer | **FRCP 8**
- (3) Default | **FRCP 55**
 - a. Court clerk enters a default entry
 - b. Plaintiff must get default judgement from judge
 - i. Court can set aside the entry of default for good cause **FRCP 55(c)**
 - ii. Court can set aside default judgement under **FRCP 60(b)**
 - c. Collection

Seven Responses to Plaintiff's Claim by Motion or in Answer

1. "Not here" (jurisdiction) Rule 12(b)(1)-(3)
 2. "So what?" 12(b)(6)
 3. "What are you saying?" 12(e)
 4. "It's not true" 8(b)
 5. "Yes, but..." 8(c)
6. "If anyone did anything wrong, it was X" Rule 7

7. “Now that you mention it, I have a gripe of my own.” **FRCP 13**

FRCP 12 | The Hierarchy of Defenses

1. The “Use Its or Lose Its” of Pre-Answer Motions – *If one or more pre-answer motions are made, the following motions are permanently waived unless included in the pre-answer. See Rule 12(h)(1). However, if none are made, none are waived. Rules 12(c), 12(b)(6) and 19 are all waived if not included in a pre-answer.*
 - a. 12(b)(2): Lack of Personal Jurisdiction
 - b. 12(b)(3): Improper Venue
 - c. 12(b)(4): Insufficient Process
 - d. 12(b)(5): Insufficient Service of Process

*The 12(b)(2) - (5) motions can be made **in the answer** without a pre-answer being submitted, including 12(h)(2) and 12(b)(1). Rule 12(h)(2) and 12(h)(3) motions can be made **EVEN IF** a pre-answer is made and lost.*
2. Pre-Answer Motions
 - a. 12(e): Motion for a More Definite Statement
 - i. Lost after answering complaint
 - b. 12(f): Motion to Strike
 - i. Lost after answering complaint
3. In the Answer, By Motion Under 12(c) for Judgement on Pleadings, or At Trial

What is waived by answering and not including: 12(b)(2)-(5), 12(e) & 12(f) [(e) & (f) must be in pre-answer].

 - a. 12(b)(6): Failure to State a Claim
 - b. 12(h)(2): Failure to State a Defense
 - c. 12(b)(7): Failure to Join a Party (under FRCP 19)

If no defenses are raised in the answer, the options remaining are 12(c) [the three] and 12(h)(3). These can be raised at trial but if the three 12(c)s are not, they are lost at the end of trial and the only remaining option is;
4. Always Available
 - a. 12(h)(3): Lack of Subject Matter Jurisdiction

FRCP 15 | Amendments of Pleadings

The Beeck Rule: In ruling on a motion for leave to amend, the court must inquire into the issue of prejudice to the opposing party, in light of the particular facts of the case. The burden is on the party opposing the amendment to show prejudice. After the 21 day free to amend rule under 15.

Stradford: When there is no prior opportunity to re-plead, a court may grant a litigant who has suffered a dismissal under Rule 9(b) leave to amend so that they may conform their pleadings to the rule. **FRCP 15(a).**

Discovery

FRCP 26(a)(1) | Initial Disclosures

Initial disclosure requires that (1) witnesses and (2) evidence that each party (3) may use to support their claims and defenses be disclosed to the other.

Tier One: Required materials in initial disclosure become a turn it over or lose it – not admissible if it is not turned over in initial disclosures.

Tier Two: Relevant to a claim or defense that is not privileged must be requested by opposing counsel with specificity before being required to be turned over.

Issues of Discovery

1. Relevance
 - a. For a piece of information to be relevant to a legal proposition, that information must tend to prove or disprove something the governing substantive law says matters.
2. Proportionality
 - a. Burdensomeness
 - i. *Price*: The court may limit discovery when “the burden or expense of the proposed discovery outweighs its likely benefit.” **FRCP 26(b)(2)(C)(i)-(iii)**.
 - b. Relative access to information
 - c. Amount in controversy
 - d. Parties resources
3. Experts

Privilege

Privilege hides sources and not facts.

Any privilege may be waived. Production of a privileged document – even if inadvertent – or testimony about a privileged conversation will operate as a waiver, and prevent a party from asserting the privilege as to any other privileged communications on the same subject matter, with subject matter interpreted very broadly.

A party is privileged from disclosing information regarding:

1. Self-incrimination
2. Attorney-client privilege
3. Doctor-patient
4. Psychotherapist-patient
5. Spousal privilege

Waivers may occur from:

1. Express
 - a. Oral or written
2. Emotional Distress Claims
 - a. Parties can waive privileges by taking certain stances in litigation.
3. Inadvertent Waiver
 - a. **Third Party Rule:** Waiver can result from taking some action inconsistent with claiming the privilege – such as disclosing the privileged material to a third party.
4. **FRCP 26(b)(5)(B):** The Claw-Back Provision

FRCP 26(b)(3) | Work Product

The Hickman Rule: Mental impressions, thoughts, and strategies of the other party or their representatives are not discoverable.

Hickman: The protective cloak of attorney-client privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does it concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client’s case; and it is equally unrelated to writings which reflect an attorney’s mental impressions, conclusions, opinions or legal theories.

FRCP 26(a)(2) | Witnesses and Expert Witnesses

Witnesses	Discovery
Ordinary fact witness	1. Initial disclosure; name & identifying information – FRCP 26(a)(2)
Ordinary fact witness with expertise	1. Initial disclosure; name & identifying information – FRCP 26(a)(2) 2. Summary of testimony later on – FRCP ? 3. May testify to both facts and expertise
Expert witness retained to testify	1. 90 days before trial; name & identifying information – FRCP 26(a)(2)(D) 2. 90 days before trial; written report of (i) all the opinions they will express and the basis and reasoning for them, and (ii) the expert’s qualifications (10 years of their publications), and (iii) their compensation for being an expert witness in the case – FRCP 26(a)(2)(A) & (B) 3. Deposition permitted FRCP 26(b)(4) with exception of Oregon disallowing this from common law of <i>Stevens v. Czerniak</i> , 336 Or 392.
Expert witness retained but not to testify	1. No disclosure or discovery on them according to FRCP 26(b)(4)(D) unless an exception applies under FRCP 26(b)(4)(D).

Expert witness not retained	1. Identity & summary of facts & opinions FRCP 26(a)(2)(C)
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FRCP 26(b)(4) protects drafts between expert witnesses and attorneys.

FRCP 26 | Abuse of Discovery

Sanctions may be available for parties that abuse discovery under **FRCP 37**.

1. Stonewalling | **FRCP 26(g)**: Too little discovery turned over.
2. Document Dumping | **FRCP 26(g)**: Too much discovery turned over.
3. Mismatched discovery – Unequal litigation resources.
4. Failure to Disclose – Compelling discovery under **FRCP 37(a)(3)(B)**
5. Spoliation of Evidence – Electronically Stored Info: **FRCP 37(e)**

Limits to Discovery

A court can limit discovery if (1) it is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity to obtain the information by discovery; or (3) it is outside the scope permitted by **FRCP 26(b)(1)**, which limits discovery that is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

FRCP 26(c): Boundary limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry.

1. 25 Interrogatories
2. Depositions of only 7 hours per day: **FRCP 30(d)**
3. Protective Orders
 - a. *Rengifo*: **FRCP 26(c)**: “The burden is upon the party seeking nondisclosure or a protective order to show good cause.”

Compelling Discovery | **FRCP 37(a)(3)(B)**

The Sequence of Events

1. Jury Selection
2. Opening Statements
3. Plaintiff's Case-in-Chief
 - a. Defendant may move for JMOL
4. Defendant's Case-in-Chief
 - a. Plaintiff may move for JMOL
5. Plaintiff's Rebuttal
6. Defendant's Rebuttal
7. Both Parties Rest
 - a. Either party may move for JMOL
8. Closing Arguments
9. Judge gives jury instructions
10. Parties' objections to jury instructions
11. Verdict
12. Loser can move for JMOL or JNOV
13. Appeal

FRCP 56 | Summary Judgment

Summary judgement differs from 12(b)(6) and Directed Verdict because it looks at the evidence.

Burden Shifting | FRCP 56

1. Moving Party
 - a. *Celotex*: Motion either has to
 - i. **Negate an element** of the other party's claim(s); OR
 - ii. Show that there is **no evidence for at least one element** of the claim(s); BY
 - iii. Informing the court of the basis for its motion and identifying those portions of the record which it believes demonstrates the absence of a **genuine issue of material fact**.
 1. Summary judgement should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will **bear the burden of proof at trial**.
 2. **DO NOT APPLY CELOTEX IF PLAINTIFF BRINGS THE MOTION.**
 - b. MP bears the burden of proof on SJ until they prove the above; THEN
2. Nonmoving Party
 - a. Carries the burden to rebut the moving parties motion for summary judgement.
 - i. *Matsuushita*: A court cannot base the denial of a SJ motion on something that is merely in our minds;
 1. Specific facts are necessary.
 - b. The party asserting that a fact is genuinely disputed must support the assertion by:
 - i. Citing to particular parts of materials in the record; OR
 - ii. Showing that the materials cited do not establish the absence of a genuine dispute.
3. The Test

- a. *Anderson*: Must draw all justifiable inferences in favor of the nonmovant.
- b. *Matsuushita*: Must do more than simply show that there is some metaphysical doubt as to the material facts.

Affidavits | FRCP 56(c)(4)

- 1. A SJM supporting or opposing affidavit or declaration must:
 - a. Be made on personal knowledge; AND
 - b. Set out the facts that would be admissible in evidence; AND
 - c. Show that the affiant or declarant is competent to testify on the matters stated.

FRCP 50 | Post-Trial Judgement as a Matter of Law

Directed Verdict & Judgement Notwithstanding the Verdict

Lind: The motion for judgement as a matter of law must have been made **BEFORE** the case went to trial in order to make that motion after the jury renders a verdict; otherwise, the right is waived. If a judge grants a JNOV motion, they must also rule on granting a new trial.

Standard: A reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.

The Reid Rule: When two inferences are in equipoise, the party carrying the burden fails on the issue as a matter of law.

The losing party has 28 days after the jury verdict is rendered to file “renewed” motions for JMOL under **FRCP 50(b)** and/or motions for new trial under **FRCP 59**.

Grant when there is **no evidentiary support for at least one element of the other party’s case**.

FRCP 59 | Motion for a New Trial

Motions for a new trial may be granted on motion or sua sponte when: **Miscarriage of Justice STD**. *Lind*: More complex cases are more likely to get new trial.

- 1. Flawed Procedures
 - a. Erroneous evidentiary ruling; OR
 - b. Jury instruction on the law; OR
 - c. Juror misbehavior; OR
 - d. Etc.
- 2. Flawed Verdicts
 - a. Error in verdict
 - i. Splitting the difference when no legal theory would permit that
 - 1. E.g., bad check
 - b. **Verdict is against the great weight of the evidence**

Respect for Judgements

28 USC § 1738 | Claim Preclusion

Res Judicata

Mutuality Necessary or Parties In Privity

Precludes relitigating a claim between the same parties after a final judgement on the merits when there was a full and fair opportunity to litigate the claim in the previous suit.

Restatement (Second) of Judgements § 24 | Dimensions of Claim for Purposes of Merger or Bar – General Rule Concerning Splitting

(1) When a valid and final judgement rendered in an action extinguishes a plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the claim arose.

(2) What factual grouping constitutes a “transaction,” and what groupings constitute a “series,” are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgements § 25 | Exemplifications of General Rule Concerning Splitting

The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action

- (1) To present evidence or grounds or theories of the case not presented in the first action, or
- (2) To seek remedies or forms of relief not demanded in the first action.

The Same Transaction Test: Precludes all transactions or series of connected transactions out of which the action arose. Transaction: Preclude all legal theories and claims arising out of *a common core of operative facts*.

The Same Evidence Test: Focuses on whether the same evidence would be used in the two actions. *The minority rule*.

Frier: “One suit precludes a second ‘where the parties and the cause of action are identical.’ ‘Causes of action are identical where the **evidence** necessary to sustain a second verdict would sustain the first, i.e., where the causes of action are based upon a **common core of operative facts**.’ Two suits may entail the same cause of action even though they present different legal

theories, and the first suit ‘operates as an absolute bar to a subsequent action... ‘not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.’”

Frier: “The defendant may invoke claim preclusion when the plaintiff litigated in the first suit a subset of all available disputes between the parties.”

Frier: “In determining whether the disposition of a claim in State court precludes a subsequent suit on the same claim in federal court, the federal court must apply the State’s law of res judicata.”

Semtek: The preclusive effect of a federal judgement rendered in a diversity action should be the same as would be attached to that judgement if a state court in the forum state had rendered it.

FRCP 13: If a counterclaim arises out of the same transaction or occurrence, the party with the counterclaim must raise it in the initial claim or waive their right to it.

A judgement is final EVEN IF it is being appealed for the purposes of preclusion.

28 U.S.C. § 1738: Federal courts must use state laws on res judicata.

Applies to successive owners of land and heirs, etc.

FRCP 41 | Issue Preclusion

Collateral Estoppel

Mutuality or Non-Mutuality

Restatement (First) of Judgement precludes more.

Restatement (Second) of Judgement precludes less.

When (1) an issue of (a) *fact* or (b) *law* is (2) actually litigated and determined by (3) a valid and final judgement, and (4) the determination is essential to the judgement, (5) the determination is conclusive in a subsequent action *between the parties*, whether on the same or a different claim.

1. Victim have full and fair opportunity to litigate
2. Does it promote judicial economy?
 - a. Wait and see plaintiff
3. Is it fair to the D?
 - a. Sufficient stakes in first suit and later suit is foreseeable
 - b. No prior inconsistent judgements
 - c. Adequate procedural opportunities in the first suit.

Restatement (First) of Judgements § 88 | Actions by and Against Bailor or Bailee

- (1) Where a bailee has brought an action against a third person for the conversion of or for harm to a chattel, if
 - (a) he obtains a valid judgement for the value of the chattel or for the full amount of harm done, the rendition of the judgement does not merge the claim of the bailor;
 - (b) a valid judgement is given for the defendant, the bailor is barred from a subsequent action to the same extent that the bailee would be barred, except where the judgement is based on a defense which would not be available in an action by the bailor.
- (2) Where a bailor at will has brought an action against a third person for the conversion of or for harm to a chattel, a valid judgement for him merges, and a valid judgement against him on the merits bars, a subsequent action by the bailee against the third person to the same extent as if the first action had been by the bailee.
- (3) Where a bailor for a term has brought an action against a third person for the conversion of or for harm to a chattel, judgement for or against him does not bar or otherwise affect the right of action by the bailee against a third person.
- (4) Where successive actions are brought by a third person first against a bailor and then against a bailee, or vice versa, the mere rendition of judgement in the first action does not in the second action merge or bar the claim against the one not sued in the first action or conclude by way of collateral estoppel any matter decided in the first action.

Restatement (Second) of Judgements § 27 | Issue Preclusion – General Rule

When an issue of **fact** or law is actually litigated and determined by a valid judgement, and the determination is essential to the judgement, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.

The Parks Rule: When there are two independent grounds for the verdict and it is ambiguous as to which ground the jury verdict was rendered, issue preclusion does not apply.

In order for a loser to win on **appeal**, they must convince the appellate court to reverse *two issues on independent grounds*. Appellate courts can affirm lower rulings against a plaintiff on issue preclusion based on either of the restatements.

- Affirmed both issues: Preclude both
- Affirmed issue X, reversed issue Y: Preclude X, don't preclude Y.
- Reverse both issues: Preclude neither.

The victim of preclusion **has to** have a full and fair opportunity to litigate the issue.

Defensive Non-Mutual Collateral Estoppel: Same P, different D.

Offensive Non-Mutual Collateral Estoppel: Different P, same D.

Defensive Mutual Collateral Estoppel: Same parties for P and D.

Offensive Mutual Collateral Estoppel: Same parties for P and D.

Personal Jurisdiction

Specific Personal Jurisdiction

Specific Personal Jurisdiction

Specific personal jurisdiction requires (1) that the defendant purposefully avail themselves, (2) that the summons of a nonresident be reasonable, and/or (3) that there exists a relatedness between the cause of action arising out of the defendant's contacts with the forum state.

Purposeful Availment: Minimum Contacts: *Hanson & WWVW*

Reasonableness: *Burger King*

Relatedness: Minimum Contacts & Cause of Action

Not all three are necessary, it is a sliding scale.

Pennoyer v. Neff

1. Presence in the forum state
 - a. Overturned by *International Shoe* and changed to minimum contacts test
2. Defendant consents to suit
3. Attachment of defendant's property in forum state
 - a. Overturned by *Shaffer*

International Shoe Co. v. Washington

The Minimal Contacts Test: Does the defendant have contacts with the forum state and does the cause of action arise out of those contacts?

World-Wide Volkswagen Corp. v. Woodson, U.S. Supremes, 1980

The Due Process Clause 'does not contemplate that a state may make binding a final judgement in personam against an individual or corporate defendant with which the state has no contacts. EVEN IF;

- (1) The defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state,
- (2) The forum state has a strong interest in applying its law to the controversy, and
- (3) the forum state is the most convenient location for litigation.

The Stream of Commerce: The *foreseeability* factor is not the mere likelihood that a product will find its way into the forum state. The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers within the forum state.

The *Hanson* Rule: The mere ‘unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.’

Financial benefits accruing to the defendant from a collateral relation to the forum state *will not* support jurisdiction *if* they do not stem from a constitutionally cognizable contact with that state.

Exception: Products liability cases but ends at the unilateral activity of plaintiff, third party or at the distribution chain.

Modern Specific Personal Jurisdiction:

1. Is the defendant:
 - a. Domicile, OR
 - b. State of incorporation or principal place of business?
2. Has the defendant consented to personal jurisdiction?
3. If neither, the minimum contacts test.

If no specific jurisdiction, maybe...

General Personal Jurisdiction

General personal jurisdiction requires there be continuous and systematic contacts between the defendant and the forum state.

The *Daimler* Rule: The forum state may exercise general personal jurisdiction if the forum state is (1) the state of incorporation or principal place of business OR (2) the corporation has continuous and systematic contacts as to render them “at home” in the forum state.

Goodyear: The stream of commerce is not applicable to general personal jurisdiction, only specific personal jurisdiction.

Goodyear: A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so “continuous and systematic” as to render them essentially *at home* in the forum state.

Burnham: The plurality opinion.

1. Scalia: Use *Pennoyer*.
2. Brennan: Purposeful availment via the states benefits & protections and reasonableness.

The cause of action does not need to happen in the state where litigation occurs. A plaintiff may sue the defendant in their home state.

Article III | Subject Matter Jurisdiction

Federal courts require (1) personal jurisdiction, (2) constitutionally adequate notice, and (3) subject matter jurisdiction.

Original Jurisdiction: Federal courts may hear at trial level (FQ or Diversity).

Appellate Jurisdiction: Only the US Supremes can hear cases of appellate jurisdiction.

Federal courts may review and decide their jurisdiction over a case sua sponte at any point.

Parties cannot waive subject matter jurisdiction.

28 USC § 1331 | Federal Question SMJ

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

The Mottley Rule: A suit arises under the constitution and laws of the U.S. only when the plaintiff's statement of their own cause of action shows that it is based upon those laws or the constitution. It is not enough that the plaintiff alleges some anticipated defense to the cause of action that is invalidated by some provision of the constitution.

1. **The Creation Test:** Is the claim created by federal law?
 - a. If not;
2. **Essential Federal Ingredient:** The creation test with the addition of "...created by *and arises from*" federal law OR a state law claim with an essential federal ingredient.
 - a. **The Well-Pleaded Complaint Rule:** The claim itself must contain a federal question that must be raised in the complaint. NOT the defendant's response.

28 USC § 1332 | Diversity SMJ

Diversity jurisdiction requires that (1) there must be complete diversity between the parties and (2) the complaint must allege an amount in controversy that exceeds \$75,000.

1. Complete Diversity
 - a. Diversity of State "Citizenship" | **28 USC § 1332(a)(1) & 28 USC § 1332 (c)(1)**
 - i. If there is one non-diverse party on either side, there is no diversity SMJ.
 - ii. Bare diversity is acceptable for class actions.
 - b. Diversity of Citizenship **28 USC § 1332 (a)(2) - (3)**
 - i. US citizen and foreign national.
2. Citizenship
 - a. Individual: Place of domicile and intent to remain.
 - b. Corporation: Place of incorporation and/or principle place of business.

3. Amount in Controversy of \$75,000
 - a. It must appear to a legal certainty that the claim is less in order to dismiss.
 - i. Plaintiff gets the benefit of the doubt.

28 USC § 1367 | Supplemental Jurisdiction

Pendant Party Jurisdiction, Pendant Claim Jurisdiction or Ancillary Claim Jurisdiction

The claim seeking supplemental jurisdiction must (1) be related to the anchor claim, (2) not destroy diversity in diversity jurisdiction cases, and (3) the court retains discretion.

1. Relatedness | **28 USC § 1367(a)**
 - a. Same nucleus of operative facts.
 - b. The resolution of state claims effect federal claims.
2. Destroy Diversity | **28 USC § 1367(b)**
 - a. Only applies to diversity jurisdiction
 - b. No need to do analysis if anchor claim is a federal question
3. Court's Discretion | **28 USC § 1367(c)**
 - a. Elements are in the statute section listed above.
 - b. *Ameriquist* and *Szendrev*

Anchor Claim: A claim in a complaint that is a federal question or diversity claim to which the other claims may attach.

Check for original jurisdiction before looking for supplemental jurisdiction, claim by claim.

FRCP 4 | The Rules of Notice

The Mullane Rule: Notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

The main rule from Mullane was broad but then Justice Jackson gave many sub-rules to guide courts on how to determine constitutional notice depending on the facts of a given case.

Ancillary Mullane Rules: The Due Process Clause requires, at a minimum, that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside the State can somehow be determined.

Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents.

The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

In the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

The Results:

Known Beneficiaries: Mail notice was constitutionally adequate given the facts.

Unknown Beneficiaries: *Publication* + was constitutionally adequate given the facts because their interests would be adjudicated by the known beneficiaries of the fund.

Final Thoughts

1. Due Process after *Mullane* requires notice that is reasonably calculated under the circumstances; notice becomes relative rather than absolute. 2. The unknown can be cut off by notice to the known parties. 3. FRCP 4 answers the concern of Due Process by providing specific ways of getting notice while reducing costs by permitting mail notice; the carrot and the stick analogy from the book.

28 USC §§ 1441 – 1447 | Removal

Once in federal court, the defendant can transfer to another federal court anywhere in the U.S.

Elements:

1. Is there subject matter jurisdiction under a federal question?
 - a. If plaintiff raises any federal question claim, removal is permitted.
2. Is there diversity jurisdiction?
 - a. If diversity jurisdiction **ONLY**:
 - i. Does the home state defendant rule (is any defendant a citizen of the state where the plaintiff filed the case) apply?
 1. If yes, not removable.
 2. Under 28 USC 1441(b)
3. Is there supplemental jurisdiction?
 - a. Not removable if there is no original jurisdiction under subject matter jurisdiction for the anchor claim.
4. The amount in controversy **MUST** exceed \$75,000.

Notice of removal MUST be within 30 days of service of the complaint, or amended pleadings, or when diversity was thought not to exist but actually does.

28 USC § 1441(c)(1): In diversity ONLY cases, defendant MUST remove within 1 year of the commencement of the suit, even if it becomes removable after.

28 USC § 1652 | Choice of Law

Diversity Jurisdiction Cases with Supplemental Jurisdiction ONLY

1. Erie conflict? (state v fed)
2. Diversity case w/ supplemental?
3. Clearly substantive or arguably procedural?
 - a. If arguably procedural:
 - i. Source of authority;
 - ii. Is it within the scope of the authoritative source (statute or constitution);
 - iii. Does it **modify, abridge or enlarge** a substantive right.
 - b. If substantive:
 - i. Apply the state rule.

The *Erie* doctrine stands for the general principle that federal courts sitting in diversity apply state substantive law and federal procedural law. Why? Because neither Congress nor the federal judiciary has the constitutional power to declare substantive state law. So how does one determine whether to apply state law?

1. Ask whether a competing FRCP directly covers the question in dispute.
 - a. If YES, apply that rule, even in the face of a countervailing state rule, so long as the FRCP falls within the scope of the REA AND is constitutional.
 - i. Validity under the REA requires that the rule not **abridge, enlarge, or modify** any substantive right.
 - ii. It is constitutional to apply the federal rule if the rule is fairly classifiable as procedural. Even if the rule falls within the uncertain area between substance and procedure, it is constitutional so long as it is rationally classifiable as either.
2. If there is no competing FRCP, ask whether a competing federal statute directly governs the question in dispute.
 - a. If YES, apply that federal statute, even in the face of a countervailing state rule, so long as the federal statute is constitutional.
3. If there is no competing FRCP or federal statute, or there is a competing one but it is defective, then proceed to the “relatively unguided” *Erie* analysis. This is where you have to determine whether the rules at issue are **substantive or procedural**.
 - a. **York/Byrd Test**:
 - i. A state rule is substantive and must be applied if it:
 1. Creates rights or obligations (e.g., the elements of a claim or defense); OR
 2. Is bound up with state-created rights and obligation; i.e., it is closely related to matters of pure substance (e.g., choice-of-law rules, burdens of proof).
 - ii. A state rule is procedural and need not be applied if it defines a form and mode of enforcing the substantive right or obligation. Be sure to **balance**:
 1. **Outcome Determinative Test**: Whether the rule may bear substantially on the question whether the litigation would come out

one way in the federal court and another way in the state court, in which case use the state rule instead of the federal rule; AND

2. Whether there may be countervailing federal interests that nonetheless suggest applying federal law.

b. ***Erie/Hana* Test:**

- i. Consider whether application of the state law would implicate the twin aims of *Erie* (this is a modified outcome determinative test). In other words, would the difference between the state and federal rules:
 1. Encourage forum shopping;
 - a. Diversity jurisdiction is not intended to give litigants the opportunity to shop for a forum that will apply a more favorable body of law; AND
 2. Lead to inequitable administration of law.
 - a. The concern here is about affording certain litigants (who can make out diversity jurisdiction) access to a distinct, more favorable body of law, that other litigants (who cannot make out diversity jurisdiction) cannot access.
- ii. If so, then consider whether there are any countervailing federal interests that would nonetheless suggest applying federal law.

28 USC § 1652: Provides for federal courts to consider the common law rules of other states even if the rule in the forum state contradict those external common laws.

FRCP trumps state procedure so long as it does not modify substantive rights; even if it changes the outcome.

Choice of law is a balancing test that depends on the facts; equitable solutions are sometimes more than just application of the black letter rule of law.

Jurisprudence

Swift to *Erie* represented a shift in jurisprudence from legal naturalism to legal realism.

1. **Legal Naturalism:** Laws exist outside of human thought – an omnipresent entity – that judges could pull with reasoning and logic through analogy and deduction.
2. **Legal Realism:** Law exists only when it is created by humans; law is whatever the authority says it is.

Erie is about structural constitution and federalism.

Intrastate commerce versus interstate commerce; federal judicial overreach when determining laws on intrastate commerce and other internal state substantive law. Congressional legislation on regulating intrastate commerce – federal judicial overreaching – restricted by the US Constitution and was clarified by *Eerie*.

Temporary Remedies

1. Substitutionary Remedies
 - a. Economic
 - i. Based on market value
 - b. Non-Economic
 - i. P&S
 - ii. Emotional Distress
 1. Juries value the non-economic damages.
 - c. Punitive Damages
 - i. All about punishment and deterrence
2. Specific Remedies
 - a. Replevin
 - b. Injunction**
 - i. Permanent, OR
 - ii. Preliminary, (RBG in dissent says not all must be met but instead a sliding scale or balance, majority says all elements must be met):
 1. How likely is plaintiff to succeed on the merits?
 2. How likely is plaintiff to suffer irreparable harm in the absence of preliminary relief?
 3. How likely is it that the balance of equities tips in plaintiff's favor?
 - a. Positive for plaintiff if it does.
 4. Is an injunction in the public interest?
 - a. Public interest outweighs everything else when national security is in play.
 - i. Provisional Remedy (Pre-Judgement)
 1. Implicates due process rights because it forces the court to rule on a provisional remedy on the merits with incomplete information pre-trial.
 - c. Attachment
 - d. Ejectment of sellers or tenants
 - e. Specific performance for breach of k.
 - f. Self-help repossession.
 - i. UCC § 9-503
 - ii. CB338 N5

Due Process

Due process applies when (1) there is a deprivation of one's life, liberty, or property and (2) a state actor is carrying out the action.

Fuentes Rule: In most circumstances, notice and a hearing is required before a court may order a prejudgment remedy.

Fuentes Exception: Notice and a hearing prior to the seizure is not required when there are *exceptional circumstances*.

1. The asset is likely to be disbursed or diminished in value.

Fuentes Three Prong Test:

1. The seizure has been directly necessary to secure an important *governmental interest* or *general public interest*;
2. There has been a special need for very *prompt action*; OR
3. The state has kept strict control over its monopoly of legitimate force.
 - a. State actor must do the seizing.

After *Fuentes*:

1. Judge, not clerk, decides request for prejudgment remedy
2. Plaintiff MUST submit a sworn affidavit
3. Plaintiff MUST post bail
4. Immediate post deprivation hearing

Fuentes is now only used when there is a case that has similar facts.

The more modern approach to due process on prejudgment remedies comes from *Mathews*.

The *Mathews* balance:

1. The private interests of the defendant
2. The risk of erroneous deprivation of defendant's interest
 - a. And the value of additional procedural safeguards
3. The government's interests
 - a. May overlap with plaintiff's

The prejudgment remedy is allowed when the scale tips closer towards #3 or it falls mostly in the middle.

FRCP 13, 18, 20 & 21

The policy reasons for joinder of claims and parties is that it promotes greater efficiency when suits are consolidated where they reasonably can be.

FRCP 18 | Joining Claims

A Piggy-Back Rule

Test:

1. Do the rules permit combining the claims?
2. If so, does the federal court have jurisdiction over the joined claim?
 - a. Original jurisdiction
 - b. Supplemental
 - i. Cannot destroy diversity.
 - c. Personal

Mosely Rule: Claims may be joined when they arise from the same transaction or occurrence.

Mosely Test:

1. Are the claims *logically related*?
2. Do the claims stem from the same nucleus of operative facts?

FRCP 20 | Joining Parties

See rule.

FRCP 13 | Joining Counterclaims

The *Plant* Rule: Supplemental jurisdiction on counterclaims that lack subject matter jurisdiction have the same rules and tests applied to them as the original claim.

Compulsory Counterclaims: Arises out of the same transaction or occurrence that is the subject matter of the opposing party's claims. Counterclaims can utilize supplemental jurisdiction anchored on the plaintiff's claim(s).

Permissive Counterclaims: All other counterclaims being joined. Cannot utilize supplemental jurisdiction anchored to the plaintiff's claim(s).

FRCP 21 | Misjoinder

Misjoinder occurs when the claims and/or parties are not transactionally related.