Personal Jurisdiction

- **In personam** - suit against a person based on presence in jurisdiction
- **In rem** – suit based on the presence of property in the jurisdiction (quiet title etc.)
- **In quasi-in rem** – judgment for/against a person but recovery is limited to the value of property in the jurisdiction
- The basis for jurisdiction can be 1. Consent, 2. Citizenship/Domicile 3. Presence of Person/Property in the Forum (also transient and temporary jurisdiction) and 4 acts that are within the Long Arm Statute of the state.
- The “presence” basis for jurisdiction has been limited so that service by fraud or force is invalid and people traveling through a state to take part in a court proceeding are usually granted immunity.
- Domicile is determined when intention to settle is combined with presence. US citizenship can allow federal service overseas for a federal suit; just like state domicile can allow service out of state for an in state action
- When a P brings suit in a forum, he submits to the forum for cross claims by the D.
- Out of state parties can appoint agents for service that will allow a suit to proceed in a forum. States can also declare an in state party as an agent for out of staters based on implied consent if the state has regulated the activity and the agent does its duty.
- A D can challenge jurisdiction by making a special appearance to contest that alone. If D does anything but contest personal jurisdiction first, then D has submitted to the suit.
- Some state long arm statutes will reach as far as Due Process allows while others are more limited. These limited statutes most often cause problems in product liability suits when the word “tortious act” is used. Some courts read this narrowly and say that the act occurred during manufacture and jurisdiction is proper there – others say that this means where the injury was suffered. For breach of K cases presence in the forum is not always required – telephone contact might be enough. Also jurisdiction is allowed if property is the center.
- Some states will allow “but for” logic to allow suits to proceed “but for the K being signed in Illinois, the ship would not have sunk off the coast of France” so the suit can
proceed in Illinois. These problems represent a tension between due process and sovereignty of states.

- Int’l Shoe required that a suit must not offend “traditional notions of fair play and substantial justice” (Int’l Shoe). This standard requires two hurdles to be cleared: (a) minimum contacts with the forum and (b) reasonableness.

- **Minimum Contacts** look at (a) the quantity and nature of D’s contacts with the forum (b) their connection with the cause of action and (c) the interest of the forum in protecting its citizens. The contacts of D must be purposeful – he must have availed himself of the benefits of the forum state. Vicarious benefits are not enough for minimum contacts – direct benefits/protection of forum are needed.

- **General Jurisdiction** – continuos and systematic contacts with a forum can expose a D to suit based on the benefits and protections of the forum.

- **Specific Jurisdiction** – an isolated act that exposes a company to a P’s suit on the act. (Ex: Insurance Co sued by its only policyholder in a state. Jurisdiction is upheld b/c the forum has an interest in protecting citizens from out of state parties.) If a suit is not based on D’s systematic or continuous contacts, then it must be based on specific jurisdiction.

- Even if D’s activities are performed outside the state, the D could still be subject to personal jurisdiction for consequences in the state if he knows or reasonably anticipates that his activities might give rise to a suit that would hale him into court in the forum. The key is foreseeability. (Ex: For example, a suit for slander in a magazine can proceeded in any forum where the magazine was published – D availed itself of some benefit/convenience of the forum. Ex: Jurisdiction over a car dealership that was aware that its product could wind up in other states did not create jurisdiction because they never expected to be subject to another state’s power.)

- **Reasonable** Exercise of jurisdiction must meet more than minimum contacts – it must also be reasonable considering the interests of the parties and forum. (Ex: A state court cannot exercise jurisdiction over a foreign company that had some knowledge that its product might wind up in the forum when it lacked any other contact with the forum. Also, a franchiser’s home state can exercise jurisdiction over an out of state franchisee b/c of the underlying realities of the relationship.)
• The Court has held that in rem and quasi-in-rem actions are now subject to Int’l Shoe tests. “Property which is not itself the subject matter of the litigation does not alone provide the basis for jurisdiction.” And “all state court jurisdictions must be evaluated according to Int’l Shoe to not violate Due Process.”

• Most courts still allow in rem/quasi-in-rem actions when tangible property is at issue or no other forum is open. Tag jurisdiction is acceptable with Int’l Shoe.

• Consent to being sued in a forum is determined by D actions before suit – even claims that D is operating within the state as a licensed business can force jurisdiction

• When a P sues an alien D, a fed court can exercise jurisdiction based on D’s contacts with the US, if P sues using a state long arm, the court is limited by the D’s contacts with the state.

• Parties can contractually agree to a forum or set of laws, even if they are foreign/lack contacts.

• If a D appears in a quasi-in-rem action, then personal jurisdiction is created; if default, then recovery is limited to property.

• If a D puts in a special appearance and asks for relief, then he has converted it into a general appearance.

Notice

• Notice is vital to prevent violations of due process. 1st class mail is preferred over postings when the information is known. When the group is large/partially unknown, we assume that those represented members of the group will represent the interests of the absent class members.

• Due Process requires notice and opportunity to be heard

• The Fed Rules encourage D to waive service and 1st class mail means 1st class mail.

• Service to agent of family member of D is usually ok. There is a difference between “choice of law” and jurisdiction – 2 Mo residents can agree to be bound by Ky law but a Mo resident can not get jurisdiction over the other Mo resident in Ky.

• Cognovit Note – debtor plays dead and default is entered against them

• The rule for accepting service is if the person has the authority to or normally does accept service of process.
• There is a split on when a suit begins – some say when D is served other say when the complaint is filed. This is important for Statute of Limitations purposes. SOL is always tolled if a party goes into the military or P is in a coma.

• A D can only contest personal jurisdiction once and it must be brought first – if a P tries to enforce a default judgment from another state the D can only contest jurisdiction.

**Diversity**

• Federal courts have jurisdiction of a civil action when the amount in controversy is more than $75K and it is between (a) citizens of different states (b) citizens of a state and a foreign nation (c) citizens of different states and foreign nations or (d) a foreign state as P involving citizens of different States. Diversity must be total and complete – if one P and D are from the same state – no suit. Diversity is determined when the suit is filed.

• Fed Rules require $75,000 amount in controversy for diversity claims. Ps cannot aggregate claims – each must have a 75K claim. All that a P needs is a good faith allegation that the amount of damages or injuries (not counting costs or interest) is above $75,000. When injunctive or declaratory judgment is sought, then the court must estimate the value of the relief sought, not damages.

• To meet the $75,000 threshold, one P can aggregate all claims against one D. One P suing several Ds can aggregate her claims against them only if they are jointly liable to the P – no aggregating on separate liabilities. Several P can only aggregate their claims if they are seeking to enforce a single right or title and they share a common interest.

• Diversity can not be created improperly or collusively. USC 1359

• A D’s compulsory counterclaim will be allowed no matter what amount it is. A permissive counterclaim (from another transaction) will be allowed in diversity cases only if it meets amount in controversy requirements.

• No matter how much a D files a counterclaim for, if the Ps claim does not meet amount in controversy, then D can not remove from state court to federal although this is changing.

• Fed Court takes no action in probate or domestic matters even if diversity exists – federalism.

• 1332(c)(1) Companies are citizens of their state of incorporation and their principal place of business. Three ways to find out what the principal place of business is.
1. Nerve Center – where are decisions made?
2. Corporate activities – where things are made
3. Total activities – looks at headquarters and production

- To simplify litigation: 1. Executors have the same citizenship as the deceased 2. Limited Partnerships are citizens of the majority of the partners 3. Citizenship of unions is determined by the membership rosters

**1331 – Federal Question**

- A federal question must appear in P’s well-pleaded complaint – therefore, it can be necessary to investigate P’s claims to determine if a federal question does exist. A defense or anticipation of one can not create a federal question – it must be based on Ps claim, but P can not hide a federal action in state court.
- A case arises under federal law if the P is alleging a right or interest that is substantially founded on federal law (common law, constitutional law, statutory law, treaty law or administrative regulations.)
- If a P tries to harass a D with federal suits, then D can seek a declaratory judgment to stop P’s suits/threats of suits – Ps suit must be in federal court. **28 USC 2201.**
- The language “arising under” encompasses all cases that include a federal ingredient that is essential to the Ps case. The federal element must also be non-frivolous. What constitutes a federal action is confusing – a state claim that requires an interpretation of a federal law went into state court while a state claim that used a federal statute as a standard stayed in state court.
- When a federal statute gives no right of action then courts have used a 4-part test to decide if one exists – 1. Is P member of a class that the statute was meant to protect against? 2. Does the legislation intend to make a remedy? 3. Is a remedy consistent with a legislative scheme? 4. Is the cause of action traditionally found at state law? (Look at Congressional Intent to see if there was an intent to create a private right of action)
- If a state lawsuit involves a Constitutional question, then federal court should hear the case. Anything less makes the issue too subjective to be heard.
- Also there are some matters where federal courts have exclusive jurisdiction see the rules.

**1367-Supplemental Jurisdiction**
In addition to diversity and federal questions, federal courts can hear cases that come their way on pendent or ancillary jurisdiction. **Pendent** - P attaches a non-federal matter to a federal one. **Ancillary** – P or D injects a counterclaim, cross-claim, or 3rd party complaint w/o federal jurisdiction into a federal case. This is allowed as long as the claims are based on the same “common nucleus of operative fact.”

This was replaced with 1367 Supplemental Jurisdiction. 1367 allows federal courts to hear all claims that are part of the same case or controversy/ “common nucleus of operative fact” that is the federal question. 1367 does not allow the destruction of diversity by the P by using particular rules. The court has discretion over the supplemental claim if (1) the claim raises a complex issue of state law (2) the supplemental claim dominates the federal claim (3) the federal issues have already been dismissed or (4) other compelling reasons to dismiss.

Some flexibility exists in 1367 for the federal court to keep the joined claims when the amount in dispute falls below the threshold or the federal question disappears. Some feel that 1367 will allow attachment of claims that should not be in court by traditional means.

**Removal**

**USC 1445-1447** P having selected the jurisdiction can not opt out. D can move P’s state claim to federal court if there is diversity or a federal question. However, if P sues in D’s home state then he can not remove. Foreign states can also remove to federal court. All Ds must approve a removal before it can happen.

If a suit has federal and state issues, then the whole thing will be sent to federal court. Although federal subject matter jurisdiction can be questioned at any time and can not be created by the parties.

If a party waives jurisdiction or gets an injunction, then they must abide by the court’s decision. A later attack on a valid judgment is very difficult – it must be a severe abuse of authority (allowing it to stand would limit another court’s authority or the court creating judgment never had the authority). **Ex:** A state court takes a bankrupt person’s property in violation of federal law.

A party can attack a judgment based on (a) abuse of authority (b) the judgment infringes on another government’s authority or (c) the court lacked the capability to resolve the issue. The 1st Restatement allows it when (a) no subject matter jurisdiction (b) jurisdiction
depended on law and not fact (c) the court had a limited jurisdiction (d) jurisdiction was never litigated (e) court should not have acted beyond its jurisdiction.

- **1391** – allows diversity suits to be brought where D lives, where the event happened, or wherever P can get jurisdiction, if no other forum will work.
- **1441** – allows civil actions that should be in federal court to be transferred from state court
- Aliens can be sued anywhere but foreign companies must be sued where the event happened. Domestic D companies are sued in their home forum or where the event happened.
- You focus on the most substantial events when determining the appropriate venue, companies become citizens of any district where they are subject to personal jurisdiction when the action is commenced.
- In diversity cases, the law of the transferring forum follows the case, regardless of who causes the transfer. A suit can only be transferred to a forum that it could have been brought in when the suit was filed.
- 1406 allows a court to transfer a case to the appropriate forum even if the transferring court lacks personal jurisdiction –it forces people to stay in federal court and serves justice.
- The court can pick which question to resolve first: subject matter or personal jurisdiction.

**Forum Non Conveniens**

- The principle of FNC is that a court that could hear a case declines to do so because a better forum exists. A balancing of the interests of the P vs. the public and private factors for the D’s transfer to a better forum is how the court makes its decision.
  - **Public factors** - desire for the dispute to be heard locally, administrative difficulties etc.
  - **Private Factors** – availability of proof, witnesses, possibility of viewing evidence/premises etc., P should not be allowed to vex/harass a D with a choice of forum.
- “A finding that P’s choice of forum is enough to burden D is enough for FNC.”
- Personal and subject matter jurisdiction must be decided before FNC because for a FNC ruling the P must have a forum open to it.
- If you want a dismissal then use FNC, if you want a transfer then you should use 1404.
**Erie Law**

- **Erie** overrules **Swift v. Tyson** which sought to encourage the development of federal common law. Erie compels federal courts in state actions to use state law and precedent decisions when deciding diversity actions.

- A state law is substantive if it will result in a different result (outcome determinative test of **York**) than the application of another law – this is consistent with Erie’s desire to create another forum, not another body of law, and discourage forum shopping.

- But if there is a strong federal interest that outweighs a state one in a balancing and will be outcome determinative, then the federal interest will be followed. (Ex: jury trial.)

- If a federal procedural rule is in conflict with state law then the federal procedural rule get applied b/c they have been validly enacted. (Hannah v. Plummer) When no conflicts between federal rules of civil procedure and state substantive law, then we look at the outcome determinative test which can not be read without Erie’s aims of discouraging forum shopping and ending inequitable administration.

- “Rules that regulate procedure can not change substantive rights by changing procedure” to void a federal rule you must show it is unconstitutional or not procedural – this is almost impossible.

- While the court reads the rules plainly, a state provision governing when service ended the statute of limitations took precedence over the federal rules b/c it could affect the outcome.

- A federal court sitting in diversity must be flexible when it comes to state laws that would alter the federal court system – Ex: a state law that forces caps on damages from appellate review in the federal court system will allow the federal trial court to use the state standard for a judgment review.

- It is unclear how to determine the applicable law in diversity cases that do not involve FRCP or federal law. **Use Outcome Determinative Test for Gray Areas**

- When there is a possible federal v. state rule conflict 1st – look for a federal Rule 2nd – look for an Erie conflict.

- When federal courts apply state law, they can use their interpretation of the applicable law or what the law would be. They look to state supreme court decisions – lower court decisions can supply guidance but are not controlling. The federal court makes its best guess based on current trends and patterns and can ignore outdated but valid decisions.
- In a confusing area, the federal court can ask for certification by a state court but this is rare.

**Pleadings**

- Pleadings are to give a “short and plain statement of the claim showing P is entitled to relief.” D must have enough info to start a defense – if D is unclear then he can ask for clarification under 12(e).
- Pleadings are supposed to (a) give notice of the claim (b) ID baseless claims (c) set out each parties’ view of the facts and (d) narrow the issue. D must respond to Ps complaint with its defenses or a statement that P fails to state a claim for relief.
- P has the burden to prove its case and refute D defenses – although sometimes P must disprove defenses for D (P must show D did not make loan payments).
- When it appears P has failed to state a claim for relief, then it is better for clarification of the complaint rather than a 12(b)(6) dismissal – a 12(b)(6) dismissal is one on the merits. Summary Judgments diminish the effectiveness of 12(b)(6) – a test for pure questions of law.
- Rule 8 requires D to (a) admit (b) deny or (c) lack information to answer Ps specific complaints – general denials can result in an admission of everything not specifically denied. D who knowingly makes false statements will be estopped from denying the prior statements.
- Rule 8(a) lists 19 affirmative defenses that D must plead – this allows P to prepare his case.
- A statutory limitation on damages sometimes is considered an affirmative defense, while others say it is a limitation of liability. Usually, D will be allowed to state its affirmative defenses as long as it does not create unfair surprise.
- A P does not get thrown out of court as long as he meets the burdens of notice pleading this allows for amendments.
- Defense of the statute of limitations at common law is procedural.
- A party can amend its pleadings and try things different than the original complaint only by express consent. Implied consent only stretches to matters connected to the original dispute. A court will allow a pleading to be amended unless a party can show that it would be prejudiced.
- Pleadings date back to the date of the original complaint so long as the pleadings concern the same matter and a new party brought into the suit is not harmed b/c they knew or should have
known about the suit. P can not file against unknown Ds and then amend once they discover the names.

- Rule 11 establishes penalties for not complying with the rules after 1983 the court applies an objective standard with a time frame for withdrawing the offending pleading to be modified or withdrawn. Rule 11 creates an affirmative duty to make a reasonable inquiry into the facts of the pleading.

- A P can bring as many claims as they have against an opposing party in one action – these can be split to avoid confusion.

- While you can (sometimes) split suits for different types of injuries, you can not use a claim as a defense in one action and then as a claim in another suit – bring everything together. Res Judicata creates common law compulsory counterclaims.

### Counterclaims

- Since counterclaims are compulsory if they arise out of the same case or transaction that is the basis of P’s suit – this can force D to air claims that independently would not have federal jurisdiction but 1367 allows them to be heard with the main transaction.

- This compulsory counterclaim is limited in diversity by 1367(b) and by the refusal of courts to include related but different claims in the case. **Ex:** a D credit card company must file separately to collect a debt that P owes when P has sued D for violations of federal lending statutes.

- Compulsory counterclaims are allowed after SOL runs out b/c the original complaint stops SOL.

- When dealing with crossclaims and counter claims we should give transaction/occurrence a broad interpretation, this allows a unified airing of grievances. It is not the type of claim (tort, K) but anything stemming from the same transaction or occurrence.

- Those who have claims asserted against them can only assert Crossclaims.

- Rule 13 allows for (a) compulsory counterclaims (b) permissive counterclaims (g) cross-claim against co-party (h) joinder of additional parties consistent with R 19 and 20.

- Joinder must come from the rules b/c there is no common law joinder.

- Rule 14 allows for indemnity.
• Sometimes R14 3rd party Ds can seek independent but related claims – depends on 1367 and the court.
• But a P can use indemnity against another party in response to a counterclaim when that would destroy diversity. 1367 does not consider that P as a D – diversity is too important.
• **Rule 19** will allow the joinder of “necessary” or “indispensable” parties if complete relief can not be generated in their absence. If the party can not be joined then the court can shape the suit so some relief can be awarded. There is no standard to weigh the factors in 19 – a good example of 19 being used is the inclusion of a landlord in a suit between a tenant and an oil company. The case will likely be dismisses if a state court could hear all parties.
• Rule 20 – **Permissive Joinder** – parties can join as P or D if (a) some claim is made each P against every D stemming from the same series of occurrences or transactions and (b) there is a common question of law/fact. This does not end diversity jurisdiction.
• Rule 18 is a joinder of claims arising from the same transaction
• **Intervention** allows parties that are not part of the suit to join in either as a matter of right (24(a)) or permissive intervention (24(b)). Intervention is usually allowed if (a) there is collusion (b) the involved party is not that interested in the suit (c) the applicant and party currently involved is antagonistic. You need to consider the effect that a decision and the denial to a party’s intervention could have on the issue of the suit.
• R24 and R19 are mirror images allowing for needed parties and parties that want to join to get into the suit.

**Class Actions**

• You need seven things for a class action. The two things that are court developed are there must be an ascertainable group that is a class and the class representative must be a member of a class. Rule 23(a)(1) requires…
  o Joinder of all members must be impracticable
  o Commonality of class claims
  o Claims of representative is similar to the class
  o Representative party must be adequate, have good counsel, and the class must be free of internal conflict.
If the above six are met, then the class has to be determined where it falls in 23(b). 23 states the test as numerosity, commonality, typicality, and fair and adequate representation. 23(b) give the three types of class action

- The first type is acceptable when separate actions could create inconsistent results for Ps or Ds, or it might impair the interests of absent class members
- The second type is appropriate when D has refused to act appropriately and injunctive relief is sought.
- The third type is a catch all when common questions of law or fact exist for all Ps.

P must certify the class that is often difficult as D can object to certification, venue, or jurisdiction. During certification, the P can create sub-classes so that no one’s recovery is prejudiced.

The rules of class action were not designed for mass disasters/torts and courts have shown a dislike for them. There are problems with choice of law rules and the recognition that people should be able to pursue such large judgments in court.

Class actions create a problem with due process – thus the judgment in a (b)(3) class action will not be held against parties that opted out or against a party that never had its interests represented in a (b)(2) or (b)(3) action. The parties in a (b)(2 or 3) action should make sure that all possible parties are represented that could possibly be affected by a judgment. This prevents a later attack on the judgment by disgruntled parties.

Although (b)(2) certification is easier for courts than a (b)(3), it does create more problems with a court entering judgment on people who are unaware that a suit is in progress. Some say the court and parties will represent allow a lack of notice – others say that we should look at the relief sought if it is only an injunction then a lack of notice is no problem, if money damages then there is a greater problem. We should be on notice for possible interclass conflicts that would cause problems later.

In a (b)(1) or (b)(2) suit a P whose rights were determined in a prior suit and who had similar interests as the class representative can only attack the adequacy of representation to try to undo the verdict.

In a class action based on diversity (a) citizenship is based on the named parties (b) separate and distinct claims in a class action can not be aggregated to meet jurisdictional amounts and (c) every member of a 23(b)(3) class must satisfy the jurisdictional amount.
There is some debate to if one P that meets 1332 requirements can bring P who do not meet 1332 requirements into federal court with him under the sweep of 1367. Some courts say no, some say yes. This is a conflict over citizenship vs. amount in controversy as to which is more important.

Despite the fact that a forum of a class action (b)(3) lacks personal jurisdiction over members of the P class, the action can go forward as the court, class representative, and notice protect the class members. Personal jurisdiction has no basis in due process as personal jurisdiction is waivable – due process is not.

This “fictitious consent” to (b)(3) actions does not apply to (b)(1) or (b)(2) class actions – no judgment on these. A D class action must have minimum contacts with the forum.

While a P can be a part of a class suit he could also be allowed to bring an independent suit after the class suit finishes for his independent damages. This is not barred by claim preclusion. Ex: a P is a member of a class claiming system wide discrimination. The suit is for D. Later, P brings a suit for damages suffered when he was individually discriminated against. This suit is allowed – P could not inject his independent claims in the first suit because it would destroy the class’s homogeneity.

Due process is divided into substantive and procedural due process – personal jurisdiction stretches across both categories. If personal jurisdiction is procedural then there is no problem with a court deciding claims that it has not jurisdiction over the P in a (b)(1) or (b)(2). If it is substantive, then there are real problems with (b)(1) and (b)(2) class actions determining P’s claims w/o jurisdiction.

Class actions have a difficult time resolving mass torts b/c the rules were never designed to handle that amount of cases. Variations in state law are often enough to decertify a class and once a class is certified it is harsh on Ds b/c it strengthens spurious claims. There are also some questions on “immature” torts where the damages are unknown as opposed to air accidents. In mass tort class actions, the rules still control – you can not bend them or continually subdivide classes to get around their burdens.

Ds are big fans of class actions b/c they can settle and resolve all present and future claims at once.
Summary Judgments

- The party opposing a motion for summary judgment must assume some initiative in showing a factual issue exists. If all the evidence for one side is the P’s own statement or the only possible witnesses are Ds, then the summary judgment will be entered.
- Still there are some instances where P must confront D b/c credibility to uncover issues of material fact.
- D must deny the facts underlying the allegation – not just the allegation.
- The party moving for summary judgment has the burden of showing there is no issue. This is a two-part test 1. initial burden of production and 2. the ultimate burden of persuasion.
- When a party bears the burden of proving an element of its case at trial and can not prove it through discovery, then summary judgment is appropriate. The burden at summary judgment is the same as at trial.

Default Judgment

- If a party stops litigation, then default can be entered against them, then they have three days notice to prevent P from seeking a default judgment.
- If D makes any kind of appearance in the record then you do not get the three days notice.
- The provisions for good cause to void a default do not include N of attorney or party. Although a party can raise a 12(b)(6) “failure to state a claim” defense at a default hearing.
- Rule 60 give the limited ways to attack a judgment based on clerical error, mistakes, inadvertence, excusable N, new evidence, and fraud. All motions must be made within a year.

Jury Trials

- Although law and equity are merged, judges should use discretion in allowing juries to keep issues meant to be heard by a jury.
- P can not use its complaint to change a law claim into one at equity to avoid a jury.
- The power of a jury trial is so strong that a law element embedded in an equity suit forces a jury trial on that claim.
• B/c the 7th Amendment preserves jury trial rights as they existed in 1791, we have to find parallel suits at common law to determine what goes to a jury. You look at the cause of action and the remedy sought to determine if the action is equitable or not.
• Traditionally, juror affidavits could not be used to attack the judgment but this is under attack.
• While the law tries to prevent the case from depending on evidence never brought into the courtroom – is the misconduct so great as to overturn the verdict.

**JNOV and Directed Verdict**

• Held to the same standard because they are the same thing. Now called judgments as a matter of law, but a JNOV is a motion for a directed verdict resurrected after the jury returns an impossible verdict.
• When no real evidence can be entered, a JNOV is appropriate – an auto crash with no survivors.
• The test for a JNOV is – does substantial evidence exist to support the verdict?
• It is best to give the case to the jury and then enter a JNOV after the verdict – saves time if it is appealed.
• A refusal to enter a JNOV or grant a new trial is held to the highest standards on appeal.
• A judge can order a new trial to prevent a miscarriage of justice although there are limits.

**Claim Preclusion**

• Res judicata or claim preclusion – prevents multiple suits on identical entitlements/obligation between the same parties. You need (a) valid judgments (b) identical parties (c) a 2nd suit dealing with matters dealt with in a prior suit.
• Collateral estoppel or issue preclusion – prevents the relitigation of issues actually adjudicated and essential to the judgment in prior litigation – no requirement of mutuality.
• Claim preclusion is not flexible – no breaks for P who try different venues/theories later – P must bring its best case. Ex: A bank fails to sue for the full amount due on a loan – it is precluded from getting that money later.
• A default judgment can carry claim preclusion effects but not issue preclusion b/c nothing was litigated.
• R41(b) states that any dismissal without prejudice acts as adjudication on the merits although it exempts dismissals for lack of jurisdiction, improper venue, or failure to join a party under R19.
• The “defective” or useless nature of a prior suit that had been dismissed w/o prejudice can allow a 2nd suit if it does not cause problems for D b/c there was never a hearing on the issue. In this case, a threshold defect implies a lack of jurisdiction and does not bar a second suit.
• Federal courts are barred by other federal court adjudication on diversity cases, but state courts are not barred by the prior federal suit – it depends on the state law.

**Issue Preclusion**

• While claim preclusion prevents parties from bringing claims that should have been brought earlier, Issue Preclusion only applies to matters argued and decided in an earlier lawsuit.
• For issue preclusion, you need (a) a valid finding (b) actual litigation on the issue and (c) the determination of the issue was necessary to the judgment.
• Issue Preclusion can be used by a P offensively to get to damages without litigating an issue that was already decided against the D or a D can use it defensively to preclude relitigation of an already decided issue.
• A matter must have been fully litigated and necessarily decided before issue preclusion can be used – even when a jury enters a special verdict on a claim, the P may get to sue D again with the same claim if the court can not tell if the original finding was essential to the overall finding. **Ex:** P sues D for interest on bonds, D claims fraud and a release from interest, jury for D on both counts, P sues again for later interest and principal. P can litigate again b/c we do not know which finding is crucial to the 1st verdict.
• When a party is brought into a lawsuit but its claims are not the basis of the suit, the party will be allowed to litigate its claims in another suit even when the 1st lawsuit enters a finding on their conduct. This is allowed b/c the party is involved in the 1st lawsuit but lacks the control of a regular P or D on appeal and direction of the suit. **Ex:** A person is brought in for indemnity and is found not to be liable. Later that person wants to get
compensated for his injuries – the question of his liability will be opened up again to
determine his damages.

- When a jury enters two findings that are consistent with the verdict and the P brings a
  later suit on related issues – the 1st Restatement says both findings are estopped while the
  2nd Restatement says neither is estopped. We do not know if both findings were essential
to the jury’s findings, so this explains the split.
- If you fail to prove your case at trial, then D will use it against you in later suits “one
  bite”
- A party can use issue preclusion even if it was not a party to the original suit – this is
  offensive issue preclusion.
- Courts can bar offensive issue preclusion if (a) the first suit did not give D the ability or
  incentive to represent his interests (b) drastically different forums (c) if P in 2nd suit was a
  sideline sitter (d) the approach taken by D in the 1st suit is opposed to the direction of the
  2nd suit (e) differences in rules might create a bias for the D in the 2nd trial.
- Due process gives people a day in court but subject matter jurisdiction can affect the split
  of state and federal claims – use state res judicata laws for guidance.

**Road Map**

**A. A road map:** Here is a "road map" for analyzing a Civil Procedure problem:

1. **Personal jurisdiction:** First, make sure that the court has "personal jurisdiction"
or "jurisdiction over the parties." You must check to make sure that: (1) D had
   minimum contacts with the forum state (whether the court is a state or federal court);
   and (2) D received such notice and opportunity to be heard as to satisfy the
   constitutional requirement of due process. [7 - 85]

2. **Venue:** Then, check whether venue was correct. In federal court suits, the venue
   requirement describes what judicial district the case may be heard in. Essentially, the
   case must be heard either: (1) in any district where the defendant resides (with
   special rules for multi-defendant cases; or (2) in any district in which a substantial
   part of the events giving rise to the claim occurred. See 28 U.S.C. §1391. [86 - 97]
3. **Subject matter jurisdiction:** If the case is a federal case, you must then ask whether the court has *subject matter* jurisdiction. Essentially, this means that one of the following two things must be true:

   **a. Diversity:** Either the case is between *citizens of different states* (with "complete diversity" required, so that no plaintiff is a citizen of the same state as any defendant) and at least $75,000 is at stake; or

   **b. Federal question:** The case raises a "federal question." Essentially, this means that plaintiff’s right to recover stems from the U.S. Constitution, a federal treaty, or an act of Congress. (There is no minimum amount required to be at stake in federal question cases.)

4. **Pleading:** Next, you must examine whether the *pleadings* are proper.

5. **Discovery:** Next, you may have a complex of issues relating to pre-trial *discovery*.

6. **Ascertaining applicable law:** Now, figure out what *jurisdiction’s law* should be used in the case. The most important problem of this type is: In a diversity case, may the federal court apply its own concepts of "federal common law", or must the court apply the law of the state where the federal court sits? If the state has a *substantive law* (whether a statute or a judge-made principle) that is on point, *the federal court sitting in diversity must apply that law*. This is the "rule" of *Erie v. Tompkins*. (Example: In a diversity case concerning negligence, the federal court must normally apply the negligence law of the state where the court sits.)

7. **Multi-party and multi-claim litigation:** If there is more than one claim in the case, or more than the basic two parties (a single plaintiff and a single defendant), you will face a whole host of issues related to the *multi-party* or *multi-claim* nature of the litigation. You must be prepared to deal with the various methods of bringing multiple parties and multiple claims into a case. In federal courts:

   **a. Counterclaim:** D may make a claim against P, by use of the *counterclaim*. See *FRCP 13*. Check whether the counterclaim is "*permissive*" or
"compulsory." (Also, remember that third parties, who are neither the original plaintiff nor the original defendant, may make a counterclaim.) [309]

b. Joinder of claims: Once a party has made a claim against some other party, she may then make any other claim she wishes against that party. This is "joinder of claims." See Rule 18(a). [315]

c. Joinder of parties: Multiple parties may join their actions together. Check to see whether either "permissive joinder" or "compulsory joinder" is applicable. Also, remember that each of these two types of joinder can apply to either multiple plaintiffs or multiple defendants. See FRCP 19 and 20. [316]

d. Class actions: Check whether a class action is available as a device to handle the claims of many similarly situated plaintiffs, or claims against many similarly-situated defendants. See FRCP 23. Look for the possibility of a class action wherever there are 25 or more similarly situated plaintiffs or similarly situated defendants. [330]

e. Intervention: A person who is not initially part of a lawsuit may be able to enter the suit on his own initiative, under the doctrine of intervention. See FRCP 24. Check whether the intervention is "of right" or "permissive." [356]

f. Third-party practice (impleader): Anytime D has a potential claim against some third person who is not already in the lawsuit, by which that third person will be liable to D for some or all of P’s recovery against D, D should be able to "implead" the third person. (Example: Employee, while working for Employer, hits Victim with a company car. Victim sues Employer in diversity, under the doctrine of respondeat superior. Under traditional concepts of indemnity, Employer will be able to recover from Employee for any amount that Employer is forced to pay Victim. Therefore, Employer should "implead" Employee as a "third party defendant" to the Victim-Employer action.) See FRCP 14(a). Once a third-party defendant is brought into the case, consider what other claims might now be available (e.g., a counterclaim by the third-party defendant against the third-party plaintiff, a
cross-claim against some other third-party defendant, a counterclaim against the original plaintiff, etc.). [368]

**h. Cross-claims:** Check to see whether any party has made, or should make, a claim against a *co-party*. This is a *cross-claim*. See FRCP 13(g). [374]

**i. Jurisdiction:** For any of these multi-party or multi-claim devices, check to see whether the requirements of *personal jurisdiction* and *subject matter jurisdiction* have been satisfied. To do this, you will need to know whether the doctrine of "*supplemental*" jurisdiction applies to the particular device in question. If it does not, the new claim, or the new party, will typically have to independently meet the requirements of federal subject matter jurisdiction.

*(Example: P, from Massachusetts, sues D, from Connecticut, in diversity. X, from Massachusetts, wants to intervene in the case on the side of D. Because supplemental jurisdiction does not apply to intervention, X must independently satisfy the requirement of diversity, which he cannot do because he is a citizen of the same state as P. Therefore, X cannot intervene.)*

**8. Former adjudication:** Lastly, check whether the results in some *prior litigation* are *binding* in the current suit. Distinguish between situations in which the *judgment* in the prior suit is binding on an entire cause of action in the present suit (under the doctrines of *merger* and *bar*), and the situation where a *finding of fact* is binding on the current suit, even though the judgment itself is not binding (the "*collateral estoppel*" situation).

**a. Non-mutual collateral estoppel:** Where a "*stranger*" to the first action (one not a party to that first action) now seeks to take advantage of a finding of fact in that first suit, consider whether this "*non-mutual*" collateral estoppel should be allowed. [392]

**b. Full Faith and Credit:** Lastly, if the two suits have taken place in *different jurisdictions*, consider to what extent the principles of *Full Faith and Credit* limit the second court’s freedom to ignore what happened in the first suit.

[410]