

**Introduction:** Here is your basic structure for this course. Always analyze your problems in the order suggested by the Buttons. Take a few moments to study the Buttons below, then run your cursor over each one for pre-game Mini-Review:

HEAR SPIEL

STAGE I - SUBJECT MATTER JURISDICTION

STAGE II - TERRITORIAL JURISDICTION

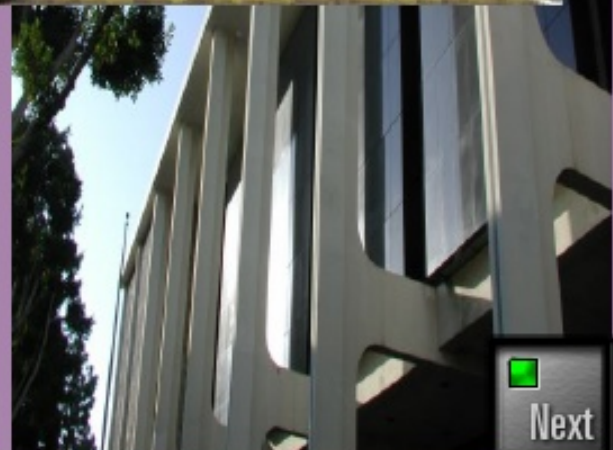
STAGE III - VENUE

STAGE IV - CHOICE OF SUBSTANTIVE LAW

STAGE V - RULES OF COURT

SUBJECT MATTER JURISDICTION is fundamental. It is the *POWER* of a court to hear and determine a particular type of case. Such power can be conferred only by a state or federal statute.

As a rule, an order or judgment from a court without such Jurisdiction would be unenforceable. An order of divorce issued by the U.S. Tax Court, would, for example, be meaningless.



Next

**Introduction:** Here is your basic structure for this course. Always analyze your problems in the order suggested by the Buttons. Take a few moments to study the Buttons below, then run your cursor over each one for pre-game Mini-Review:

HEAR SPIEL

STAGE I -

SUBJECT MATTER JURISDICTION

STAGE II -

TERRITORIAL JURISDICTION

STAGE III -

VENUE

STAGE IV -

CHOICE OF SUBSTANTIVE LAW

STAGE V -

RULES OF COURT



Defined and shaped by *International Shoe v. Washington*, 326 U.S. 310 and its progeny, TERRITORIAL JURISDICTION is simply the court's power to subject specific individuals, companies and properties (i.e., PARTIES) to its orders and judgments. It comes in three flavors:

- [1] **In personam** - Jurisdiction over particular persons and corporations.
- [2] **In rem** - Jurisdiction over a particular piece of property.
- [3] **Quasi in rem** - Jurisdiction over a piece of property to enforce a judgment against a person or corporation.



**Introduction:** Here is your basic structure for this course. Always analyze your problems in the order suggested by the Buttons. Take a few moments to study the Buttons below, then run your cursor over each one for pre-game Mini-Review:

HEAR SPIEL

STAGE I -

SUBJECT MATTER JURISDICTION



STAGE II -

TERRITORIAL JURISDICTION

STAGE III -

VENUE

STAGE IV -

CHOICE OF SUBSTANTIVE LAW

STAGE V -

RULES OF COURT

VENUE involves "Geography." It is simply the place or *location* (i.e., the county or parish) of the court that will hear and decide the case. The federal landscape is divided into "districts."

There are many bases for venue; the most common is the county, parish or district where the defendant resides.



Next

**Introduction:** Here is your basic structure for this course. Always analyze your problems in the order suggested by the Buttons. Take a few moments to study the Buttons below, then run your cursor over each one for pre-game Mini-Review:

HEAR SPIEL

STAGE I - SUBJECT MATTER JURISDICTION

STAGE II - TERRITORIAL JURISDICTION

STAGE III - VENUE

STAGE IV - CHOICE OF SUBSTANTIVE LAW

STAGE V - RULES OF COURT



[1] Federal Law v. State Law :

For issues involving federal statutes or where a "uniform national rule" is required, the CHOICE is federal law, regardless of the forum. A federal court hearing a diversity case, however, will apply state substantive law. *Erie v. Tompkins*, 304 U.S. 64 (1938).

[2] State Law v. State Law :

Where a case "touches" two or more states AND there is a CONFLICT between their substantive laws (i.e., where the outcome is affected), we examine a separate CHOICE OF LAW set of rules to answer a single question: "Which state's law should apply to this particular case?"



**Introduction:** Here is your basic structure for this course. Always analyze your problems in the order suggested by the Buttons. Take a few moments to study the Buttons below, then run your cursor over each one for pre-game Mini-Review:

HEAR SPIEL

STAGE I -

SUBJECT MATTER JURISDICTION

STAGE II

TERRITORIAL JURISDICTION

STAGE III -

VENUE

STAGE IV -

CHOICE OF SUBSTANTIVE LAW

STAGE V -

RULES OF COURT

WHAT RULES GOVERN FROM HERE ON?

This is the easiest question of all to answer - With respect to procedure (as opposed to substantive law), the rules of the **FORUM COURT** will always apply and govern the remainder of the case. For example, we can expect the Federal Rules of Civil Procedure to be applied in every United States District Court.

The court rules of the forum will be used to govern and determine: Motions, Continuances & Adjournments, Pre-trial Proceedings, The Conduct of Discovery, Sanctions, Etc.



Next



## STAGE I SUBJECT MATTER JURISDICTION

There are two court systems in the U.S. :

### Federal System:

Federal courts are limited; their Subject Matter Jurisdiction must be granted by a federal statute. Federal Subject Matter Jurisdiction exists ONLY where:

[A] (28 USC 1331) There is a Federal Question  
OR

[B] (28 USC 1332) There is:  
[i] Complete Diversity between Plaintiffs & Defendants  
+ [ii] An amount in controversy that exceeds \$75,000

ALSO

[C] (28 USC 1367) If [a] or [b] is established, there is Supplemental Jurisdiction for other claims that are so related (to [a] or [b]) that they form part of the same case or controversy.

### State System:

All states have statutes creating courts of limited SMJ (i.e., Divorce Court, Parking Ticket Court, etc.) and *general* SMJ (i.e., California's "Superior," Michigan's "Circuit"); the latter are normally "catchalls" provided that the amount-in-controversy minimums are satisfied.

Appealing SMJ is relatively straightforward; collateral attacks are very tricky.



SPIEL



STAGE I  
**COLLATERAL ATTACK ON SUBJECT MATTER JURISDICTION**

**Federal v. State:**

For some matters, both state and federal courts may exercise SMJ; For other issues, federal statutes may preempt a state court's exercise of SMJ. To determine, initially, whether or not a federal action even exists, *Merrill Dow v. Thompson*, 478 U.S. 804 (1986), provides this test for a given federal statute:

1. Was it intended to provide a special benefit for plaintiffs as a class?
2. Was it intended to create a private cause of action?
3. Would a private action further its underlying purpose?
4. Was the matter traditionally not regulated by the states?

The greater the number of affirmative answers, the greater likelihood that the statute may be used as the basis for a private cause of action. It is notable that some statutes spell out their own pre-requisites for a cause of action.

Once it's determined that a federal cause of action exists, the next step may involve addressing pre-emption issues.



HEAR SPIEL



STAGE I  
COLLATERAL ATTACK ON SUBJECT MATTER JURISDICTION



HEAR SPIEL

**State v. State:**

This is tricky. *Full Faith and Credit* says State B must honor judgments from State A. But what if State B must first determine whether State A lacked SMJ? Here are factors to help State B decide [Restatement of judgments, §10]:

1. Was "A's" lack of SMJ clear (i.e., a manifest abuse of authority)?
2. Did the SMJ issue depend on a question of law (as opposed to fact)?
3. Was "A" a court of limited as opposed to general SMJ.
4. Did "A" actually litigate the issue of SMJ or not?
5. Is the policy against "A" acting beyond its SMJ strong?
6. Would the "A" judgment infringe on another tribunal's SMJ?
7. Was "A" incapable of adequately determining its own SMJ?

In the Restatement of Judgments Second (1982), §12 takes the position that a judgment in a contested action is *beyond* collateral attack unless:

- A. There is no justifiable reliance on the judgment to be protected, and
- B. One of the following factors are present:
  1. The lack of SMJ was so clear that its exercise constituted a manifest abuse of authority, or
  2. The judgment infringes on another tribunal or agency, or
  3. The issuing court lacked the ability to determine its own SMJ + as a matter of procedural fairness, the attack should be allowed.





## STAGE II TERRITORIAL JURISDICTION

Recall that there are 3 basic types of Territorial Jurisdiction:

- [1] **In personam** - Jurisdiction over particular persons and corporations.
- [2] **In rem** - Jurisdiction over a particular piece of property.
- [3] **Quasi in rem** - Jurisdiction over a piece of property to enforce a judgment against a person or corporation.
  - I. **Type I** - Attached property is subject of litigation
  - II. **Type II** - Attached property is unrelated to litigation



SPEL

\* \* \* \* \*

The exercise of Territorial Jurisdiction by a court requires:

[A] Some conduct or act by Defendant related to the subject state  
("Substantive Due Process")

+

[B] Proper Notice & An Opportunity To Be Heard ("Procedural Due Process").

### [A]. Acts of Defendant Within State: [Click Each Pink Hypertext Link]

- [1] **Property Ownership** within the state. *Shaffer v. Heitner*
- [2] **Residence [Domicile]** within the state. *Milliken v. Meyer*
- [3] **Presence** within the state. *Pennoyer v. Neff*
- [4] **Consent by Waiver or Appearance** in court within the state. *Adam v. Saenger*
- [5] **Consent by Contract** to litigate in the state. *Carnival Cruise Lines v. Shute*
- [6] **Systematic and Continuous Activity** within the state. *International Shoe*
- [7] **Specific Transaction** connected to the state. *Magee v. International Life*
- [8] **Tortious Act** within the state. *Hess v. Pawloski*
- [9] **Stream Of Commerce** for product in state. *Gray v. American Radiator*
- [10] **Effects Doctrine** for act targeted at state. *Calder v. Shirley Jones*



## 1. Property Ownership Within the State:

A person can live or dwell within a state and own nothing. Conversely, one can own both personal property and realty within a state that he or she has never been in.

An Illinois long arm statute provides that the "ownership, use or possession of any real property" within the state is enough for in personam jurisdiction [Emphasis Supplied].



The above statute is of very doubtful validity. The landmark **Shaffer v. Heitner, 433 U.S. 186 (1977)** made it clear that property alone will NOT sustain in personam jurisdiction. Rather, the *Shoe* principle of "Fair play and substantial justice" applies to all cases involving attempts to secure in personam jurisdiction and quasi in rem (type II) jurisdiction.

**NOTE:** Unlike the other items on the list (which only concern in personam jurisdiction), THIS ONE can be used to bolster all 3 types (**In Personam, In Rem and Quasi In Rem**). Where the property alone is the subject matter of the litigation and is located in the state, those facts alone should be enough to assert pure in rem, or quasi in rem, type I jurisdiction, per **Shaffer**.



## 2. Domicile/Residence:

Traditionally, states have had statutes conferring in personam jurisdiction over persons domiciled in the state even if they were out of state when served.

### Definition:

**DOMICILE =**

Current Dwelling Place + Intent To Remain There Indefinitely.

### **Milliken v. Meyer, 311 U.S. 457 (1940):**

“A state which accords privileges and affords protection to a person and his property by virtue of his domicile may also exact reciprocal duties.”

Today, **Milliken** (Still valid) supports the proposition that domicile alone is sufficient to confer territorial jurisdiction.



### 3. Presence Within the State:

This has been a very traditional, respected predicate for exercising in personam jurisdiction. It was once referred to as the best method. **Pennoyer v. Neff, 95 U.S. 714 (1878)**. It didn't matter why the defendant was in the state, as long as he was served within its borders. He could even be served while flying over the state. **Grace v. MacArthur, 170 F.Supp. 442 (E.D.Ark. 1959)**.

#### LIMITATIONS:

If defendant is tricked or physically forced into the state solely to be served, service may be quashed. See **Wyman v. Newhouse, 93 F.2d 313 (2nd Cir. 1937)**. See also **Copas v. Anglo-American Provision Co., 73 Mich. 541 (1889)**.

#### CHANGING TIDE:

**Burnham v. Superior Court, 495 U.S. 604 (1990)** re-affirmed the notion that service within the state *alone* is enough, even though **Shaffer v. Heitner, 433 U.S. 186 (1977)** cast suspicion on all of the bases by laying down a general test for in personam jurisdiction, which measures:

- (i) The quantity and nature of the defendant's contacts with the state,
- (ii) their connection with the cause of action, and
- (iii) the interest of the forum in protecting its citizens.



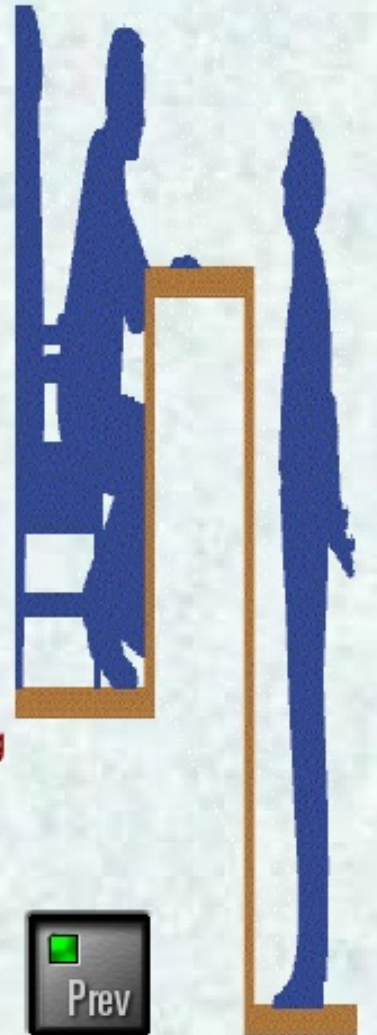
#### 4. Consent by Waiver or Appearance:

Unlike defects in subject matter jurisdiction (which can't be waived), defects concerning in personam jurisdiction can, and will be, waived unless they are asserted. Appearing in court or filing any pleadings will constitute a waiver. In fact, filing a complaint will also constitute a waiver *even if* it is withdrawn.

**Adam v. Saenger, 303 U.S. 59 (1938).**

Most states allow "**Special Appearances**" whereby you may come to court to challenge the exercise of that court's jurisdiction without waiving that challenge. See, for example New York's: **CPLR §3211(a)**.

Some states do not permit special appearances, thus making it impossible to come into court without waiving your right to challenge in personam jurisdiction.



## 5. Consent by Contract:

Buried deep within the bowels of those 50 page contracts are the boilerplate paragraphs that no one ever reads; and buried deep within those paragraphs are sentences that may require you to litigate all disputes on the other side of the country. Generally, if the provisions are not unconscionable, they will be enforced. See **Bremen v. Zapata Off-Shore, 407 U.S. 1 (1972)** and **Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991)**.

### **LIMITATION:**

Unconscionable boilerplate will not be enforced. A standard form lease covering farm equipment which caused a Michigan resident to appoint as his agent (for receiving of service of process) a person who worked for the Plaintiff, would not be enforced.

**National Equipment Rental v. Szukent 375 U.S. 311 (1964).**



## 6. Systematic and Continuous Activity:

This broad based, non-traditional predicate for conferring in personam jurisdiction resulted from the landmark case of **International Shoe v. Washington, 326 U.S. 310 (1945)**, which simultaneously **created** and set **limits** for this new basis by requiring that:

"Defendant must have such minimal contacts with the state so as not to offend traditional notions of fair play and substantial justice."



Systematic & Continuous activity confers general in personam jurisdiction; but where such activity is unrelated to the basis for the lawsuit the activity must be VERY systematic and continuous. **Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437 (1952)**. Purchases and related trips alone won't establish jurisdiction. **Helicopteros Nacionales de Colombia v. Hall (1984)**; see also **Shaffer v. Heitner, 433 U.S. 186 (1977)**.

### WEB SITES:

An inactive information-only site doesn't constitute systematic and continuous activity in any state. **Cybersell v. Cybersell, 130 F.3d 414 (9th Cir. 1997)**. But a site that takes orders *does*. **Compuserve v. Patterson, 89 F.3d 1257 (6th Cir. 1996)**. **Zippo v. Zippo, 952 F.Supp. 1119 (1997)** gave us this "Sliding Scale" test:

"The personal jurisdiction to be exercised is directly proportional to the nature and quality of the commercial activity conducted over the Internet."

### DIRECTOR LIABILITY:

A director of a foreign corporation can be expected to be subject to in personam jurisdiction in a state where the corporation is subject to in personam jurisdiction. **Armstrong v. Pomerance, 423 A.2d 174 (Del. 1980)**.

## 7. Specific Transaction Connected to the State:

A defendant who has *not* engaged in systematic or continuous conduct in the state may, nevertheless, be subject to in personam jurisdiction based on a specific in-state activity or transaction that gave rise to the litigation. See **McGee v. International Life, 355 U.S. 220 (1957)**. See also **Burger King v. Rudzewicz, 471 U.S. 462 (1985)**.



### LIMITATION:

The activity must be more than a non-commercial, isolated act. In ***Kulko v. Superior Court, 436 U.S. 84 (1978)***, a father DID commit a "purposeful act" by placing his daughter on a plane bound for the forum state; but that act DIDN'T equal "purposeful availment" because there was no "corresponding benefit." Thus, there was no in personam jurisdiction. The purposeful availment standard came from ***Hanson v. Denkla, 357 U.S. 235 (1958)***, which stated:

**"It is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state thus invoking the benefits and protections of its laws."**





## 8. Commission of a Tortious Act:

If you roll into a state, commit a tortious act and then high tail it across the state line, you will certainly be subject to in personam jurisdiction via the state's **Long Arm Statute**. Some statutes are broad (California) and some are very restrictive (New York).

As long as the tort is committed *within* the state, it is clear that the state's courts have the ability to exercise in personam jurisdiction. **Hess v. Pawloski, 274 U.S. 352 (1927)**.

However, problems and issues arise when a tort involves more than one state or when negligent or intentional acts occur *outside* the state, but cause injury within. In such instances, there are **limits** to the exercise of in personam jurisdiction over the foreign tortfeasor:

1. For negligent acts from afar, see Predicate # 9
2. For intentional acts from afar, see Predicate # 10



## 9. Stream of Commerce (Tort):

Defective products sent into commerce could cause injury or damage anywhere. **Gray v. American Radiator**, 176 N.E.2d 761 (1961) started this theme flowing when a defective valve (made in Ohio) caused an injury in Illinois; upholding Illinois' jurisdiction, its high court said:

"As a general proposition, if a corporation elects to sell its products for ultimate use in another state, it is not unjust to hold it answerable there for any damage caused by defects in those products."

**World Wide Volkswagen v. Woodson**, 444 U.S. 286 (1980) hit the brakes on this theory by ruling in favor of a defendant who didn't sell or market to the forum state. In its dicta, the court coined the new term AND limited its use:

"Jurisdiction may be exercised over a corporation that delivers its products into the **stream of commerce** with the expectation that they will be *purchased* by consumers in the forum state."

Then came **Asahi Metal Industries Co., v. Superior Court**, 480 U.S. 102 (1987), to again dam the *stream of commerce* mania. Referring to *Woodson*, *Asahi* said that defendant's activities:

"Must be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce."



## 10. Effects Doctrine:

If someone commits an intentional tort within a state, there is little doubt about a long arm statute's ability to subject that person to in personam jurisdiction [See Predicate #8].

Also, where someone outside the state voluntarily engages in an activity whereby he or she knows or reasonably anticipates that the activity could give rise to an action in the forum, in personam jurisdiction may be exercised even though the defendant never actually entered the forum state. **Calder v. Jones, 465 U.S. 783 (1984)** gave birth to this so called "effects doctrine." Jurisdiction resulted from the effects of the foreign conduct. See also **Keeton v. Hustler, 465 U.S. 770 (1984)**.



## Stage II TERRITORIAL JURISDICTION

HEAR SPIEL



### [B]. Notice & Opportunity To Be Heard:

**1. In personam actions:** Full personal liability.

SERVICE OF PROCESS

**2. In rem:** These are actions that bind a “property” as opposed to a person. Theoretically, they adjudicate the rights of everyone in the world [or as it is said: “Against everyone in the world”] with respect to the property. Examples: Actions to quiet title to real estate or settle a decedent’s estate.

SERVICE OF PROCESS

**3. Quasi in rem:** These are also actions that bind property as opposed to persons. But unlike true “in rem” actions, quasi in rem suits settle the property rights of specific, named individuals in the specific property.

SERVICE OF PROCESS

**TYPE 1:** Resolves disputes relating to the property itself. Example: A lawsuit to quiet title to land that doesn’t effect persons outside the jurisdiction of the court. See *Restatement of Judgments* §32 (1942).

**TYPE 2:** Involves an attachment of property to secure assets to satisfy claims that are unrelated to the seized property. In other words, this mechanism is used to obtain jurisdiction over a person’s assets [located within the state] where in personam jurisdiction cannot be obtained. See *Restatement 2<sup>nd</sup> of judgments* §8.

**Caution:** Because *Shaffer v. Heitner* requires minimal contacts per *International Shoe*, “Type 2” is primarily useful for seizing property; otherwise, you may as well go for full in personam.



## STAGE 2 IN PERSONAM SERVICE OF PROCESS

The requirements of service vary depending upon the type of territorial jurisdiction sought. Pure in rem matters, for example, do not mandate personal service on everyone in the world in order to settle rights in a piece of property. Nevertheless, professors seem enamored with the *due process* aspects, which always involve two issues:

### [i] NOTICE:

#### 1. Physical Personal Service:

This "in hand" service is the best type. *Pennoyer v. Neff*, 95 U.S. 714 (1878).

#### 2. Substituted Service:

Delivery to a person of suitable age and discretion residing at the dwelling of the defendant, or to defendant's appointed agent. *FRCP* 4(c)(2). Infants and incompetents don't count. *FRCP* 4(e).

#### 3. Service by Mail:

This form of service is permitted. *FRCP* 4(d). See also *Hess v. Pawloski*, 274 U.S. 352. First Class mail is adequate; of course, certified or registered mail is better. Must satisfy *Mullane v. Hanover Bank*, 339 U.S. 306 (1950) which applied a balancing test and declared that service must be:

"Reasonably calculated, under the circumstances to apprise interested parties."

#### 4. Posting to Door:

This may or may not be adequate; it may violate the constitutional right to due process. Must satisfy *Mullane v. Hanover Bank*.

#### 5. Notice by Publication:

This is a last resort. This method will not work if defendant's name and address are known. *Walker v. City of Hutchinson*, 352 U.S. 112(1956). See also *Eisen v. Carlisle*, 417 U.S. 156 (1956) a class action involving an extreme mailing requirement.

### [ii] OPPORTUNITY TO BE HEARD:

Not an "in personam" issue assuming that service is proper.



## In Rem Service of Process

### [i] NOTICE:

If the seizure action relates to a dispute involving the subject property (i.e., Pure in Rem, or Quasi In Rem - Type I), personal service may not be required. In a Pure In Rem action, for example, involving the clearing of title to real estate (wherein the world is to be given notice), publication and/or posting the property may suffice. On the other hand, specific individuals known to have an interest in the property should be given something more. Whether or not mail or personal service is required will depend upon the circumstances. **Mullane v. Hanover Bank**, 339 U.S. 306 (1950) summed it up best by declaring that service must be:

**“Reasonably calculated, under the circumstances to apprise interested parties.”**

### [ii] OPPORTUNITY TO BE HEARD:

Not an “in rem” issue assuming that service is proper.



## Quasi in Rem Service of Process

### [i] NOTICE:

This discussion presumes that there is no personal service (If there were, we would probably be dealing with in personam jurisdiction). Substituted service must satisfy *Mullane v. Hanover Bank*. Service must be:

"Reasonably calculated, under the circumstances to apprise interested parties."

### [ii] OPPORTUNITY TO BE HEARD:

Post judgment seizures rarely create "*Due process*." (But don't garnish a widow's S.S. money on a default judgment. *Finberg v. Sullivan*, 634 F.2d 50, 1980). The hot due process issues arise where property unrelated to the action is garnished or seized prior to judgment. *Connecticut v. Doehr*, 501 U.S. 1 (1991) applies a three-part balancing test:

1. The interest of the party harmed or subject to the procedure,
2. The interest of the party seeking the remedy, and
3. The risk of erroneous deprivation.

The constitutionality of procedures that permit seizures will depend upon the existence of a number of safeguards in the procedure that permits the seizure:

0. Is prior notice required; if so, there is no problem. If not:
1. Must there be a hearing first? With respect to garnishments, see *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).
2. Is there a right to an immediate hearing, if not a pre-seizure hearing? See *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).
3. Must the judge (as opposed to a clerk) issue the writ? See *Fuentes v. Shevin*, 407 U.S. 67 (1972). See also *Mitchell (Supra)*.
4. Must the Plaintiff post a bond? *Doehr (Supra)*.
5. May Plaintiff face sanctions upon losing? *Cal. Code §483* and *N.Y. CPLR §6201*.
6. Must supporting affidavits be based on personal knowledge as opposed to mere conclusions? *Fuentes v. Shevin*, 407 U.S. 67 (1972).
7. Does Plaintiff have an interest in the seized property *Doehr (Supra)*?
8. Must Plaintiff show special circumstances? See *Boddie v. Conn.*, 401 U.S. 371 (1970).



### STAGE 3

## VENUE IN A NUTSHELL

### FEDERAL (28 USC §1391): Venue is proper

1. In the district where any defendant resides if all defendants reside in the same state,
2. In the district where a substantial part of the events, omissions or property is located, or
3. In the district where any defendant is subject to in personam JD if there is no district where the action might otherwise be brought. [For cases **not** based solely on diversity, change this to "Any district in which any defendant may be found."]

For improper venue, the action may be transferred to any district where action might have been brought. The case can also be dismissed or transferred based on forum non conveniens [Case cannot, however, be dismissed unless there is an alternative forum]:

**FACTORS:** 1. Convenience of parties 2. Convenience of witnesses 3. Interest of justice

### STATE:

A. Local Action - County where property is located

B. Transitory Action - Summary of Significant Factors:

- |                                 |  |
|---------------------------------|--|
| 1. Defendant's residence,       | 7. Place where cause of action or claim arose,     |
| 2. Plaintiff's residence        | 8. Contract setting venue                          |
| 3. Plaintiff's business         | 9. Economic burden on the parties                  |
| 4. Defendant's business         | 10. Access to evidence                             |
| 5. Subject matter of litigation | 11. Public policy such as congestion of the courts |
| 6. Where Defendant is found     | 12. Location of the seat of government.            |

Transfers within a state from one court to another are freely granted depending upon statutes. The state's choices are:

- a. Retain Venue or/
- b. Change Venue or/
- c. Dismiss For Improper Venue.





## STAGE 4 CHOICE OF SUBSTANTIVE LAW

Conventional wisdom brings two concepts together under this single heading to guarantee confusion. The Erie Doctrine leads the charge to determine the extent to which state law applies in a federal diversity case. A totally separate problem arises when a single case involves two states with conflicting substantive laws.

### A. FEDERAL DISTRICT COURT FORUM

1. Federal Question Case - Cases involving federal questions or issues that require a "Uniform national rule" to further the interests of the federal government [Clearfield Trust Doctrine, *Clearfield v. U.S.*, 318 U.S. 363 (1943)] - Apply Federal Law regardless of forum. Where state and fed issues are mixed, see *Merrell Dow v. Thompson*, 478 U.S. 804 (1986).



SPIEL 1



SPIEL 2

2. Diversity Case [2 or more states will always be involved]

- A. The *Erie* Doctrine - Will be used to distinguish "procedural" rules & "substantive" law for purposes of applying state law. The federal court must apply state substantive law.
- B. If there is a "conflict of law," the forum state's "Choice of Law" rules tell us which state's substantive law applies. [*Klaxon v. Stentor*] unless there has been a change of venue, in which case, the Transferor state's rules apply [*Van Dusen v. Barrack*]. Note that the "Choice of Law" rules, which determine the substantive law, are themselves, substantive under Erie!

### B. STATE COURT FORUM

1. Federal Question Case: Apply the rules expressed in A[1] above.
2. State Issues, With No Conflict: Where only one state is involved or when more states are involved but there is no conflict between the laws that might otherwise change the outcome of the case, simply apply the law of the forum.
3. State Issues, With Conflict: Apply the forum state "Conflict of Law Rules." These rules will vary from state to state, with factors such as the: [a] Place of the subject event [b] Domicile of the parties [c] Center of Gravity [d] Forum state or [e] Other significant factors.

Push the "Next" button to review Erie.



## **ERIE v. TOMPKINS 304 U.S. 64 (1938)**

This case presents the famous *Erie* Doctrine: "There is no general federal common law. In a diversity case, a federal court must apply the substantive law of the state." The federal courts need not apply the state's "procedural" rules.

Case books delight in presenting a rambling list of seemingly misnamed matters that pretend to distinguish "procedural" and "substantive." In fact, there is a *simple* TRUTH that draws a nice distinction between so-called substantive and procedural matters:

The laws that create the cause of action, and thereby allow it into civil court and later bring it to an end - are substantive.

Justice Douglas said it best: "It [i.e., the action] accrues and comes to an end when local law so declares." Such matters are substantive. *Ragan v. Merchants Transfer*, 337 U.S. 530 (1949). Here is a summary:

### **Procedural [FRCP Applies]:**

1. Service of Process; *Hanna v. Plumer*, 380 U.S. 460 (1965) declares that the *Erie*'s goals were to: [a] Discourage forum shopping and [b] Avoid the inequitable administration of the laws.
2. Trial by Judge or Jury. *Byrd v. Blue Ridge*, 356 U.S. 525 (1958).
3. Federal Rules of Civil Procedure, in general (But see *Cohen* below).
4. Physical exam per FRCP 35. *Sibbach v. Wilson*, 312 U.S. 1 (1941).

### **Substantive [State Law Applies]:**

1. Statute of limitations, *Guaranty Trust v. York*, 326 U.S. 99 (1945).
2. Tolling of St.L. *Ragan v. Merchants Transfer*, 337 U.S. 530 (1949).
3. Choice of law rules, *Klaxon v. Stentor*, 313 U.S. 487 (1941).
4. Posting bond in a Shareholders Derivative Suit, *Cohen v. Beneficial*, 337 U.S. 541 (1949). See also FRCP 23.1.
5. Right by a state appellate court to control the size of an award, *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996).
6. Agreement to arbitrate. *Bernhardt v. Polygraphic*, 350 U.S. 198 (1956).



# STAGE V TOPICS

1. PLEADINGS
2. JOINDER
3. DISCOVERY
4. TRIAL PROCEDURE
5. MOTIONS
6. APPEALS
7. PRIOR ADJUDICATION



Stage I

Stage II

Stage III

Stage IV

## STAGE V 1. PLEADINGS

### A. Complaint:

[a] Construction: Per *FRCP* 8(a), all claims must contain a basis for jurisdiction, a "short plain statement of the claim showing that the pleader is entitled to relief," and a demand for judgment. A Good claim will state these elements:

- [1] Jurisdiction & Venue,
- [2] Party Identification,
- [3] Duty,
- [4] Breach of Duty,
- [5] Proximately Caused Damages,
- [6] Demand For Relief

[b] Characterization: The federal rules theoretically use "Notice" pleading as opposed to fact or code pleading.

[c] Verification: Not required except: [1] Shareholder Derivative Suite (*FRCP* 23.1) and [2] Complaint seeking a TRO (*FRCP* 65(b)). All complaints must comply with *FRCP* 11.

[d] Special Matters: Certain matters must be pleaded "with particularity" (See *FRCP* 9), most notably complaints alleging fraud.

### B. Answer and Affirmative Defenses:

[a] Answers and affirmative defenses (must comply with *FRCP* 11):

- [1] General Denial.
- [2] Specific Denial.
- [3] Qualified Denial.
- [4] Denial of Knowledge or Information.
- [5] Denial Based on Information and Belief.

[b] Motion To Dismiss (*FRCP* 12(b)) for:

- [1] Lack of Subject Matter JD, [2] Lack of Personal JD,
- [3] Defect in Venue, [4] Defect in Process,
- [5] Defect in Service of Process, [6] Failure to state a claim,
- [7] Misjoinder or Nonjoinder (*FRCP* 19)



SPEEL A



SPEEL B



STAGE V  
1. PLEADINGS [Continued]

**C. Pleading Additional Claims:**

Any party joined may assert (or be required to defend) any claim by any other party [FRCP 18(a)]. Joining claims is not mandatory [Excepting compulsory claims].

**[I] Counterclaim [Against party on opposing side]:**

- [a] Permissive: Unrelated claims may be asserted at will [FRCP 13(b)].
- [b] Compulsory: Failure to assert a counterclaim arising from the transaction or occurrence of the opposing claim will result on a waiver [FRCP 13(a)].

**[II] Cross-claim [Against party on same side]:**

- [a] Must arise out of same transaction or occurrence as the original action or a counterclaim [FRCP 13(g)].
- [b] Must demand actual relief against cross-defendant (Not a shift of liability).

**[III] Impleader:**

Derivative claim shifting liability to 3rd party defendant (Ex.: Indemnity, Subrogation, Contribution) [FRCP 14(a)].

**[IV] Intervention [Outsider wants to be a plaintiff]:**

- [a] Permissive [FRCP 24(b)] : Unrelated claims may be asserted at will.
- [b] As a Matter of Right [FRCP 24(a)]: Need: [i] Interest in the subject property or transaction + [ii] Potential Impairment or Impeadment + [iii] Inadequate Representation.

**[V] Interpleader [Action by stakeholder against "would-be" plaintiffs]:**

- [a] Statutory Interpleader [28 USC §2361]: Nationwide Service & \$500 in controversy
- [b] Rule Interpleader [FRCP 22]: No jurisdictional exemptions.



## STAGE V 2. JOINDER

For joinder issues, multiple litigants (Both Plaintiffs & Defendants) can be placed into one of four pigeonholes, depending upon their relationship to the litigation:

**[A] Permissive Parties [Subject to Permissive Joinder]:**

Plaintiffs MAY voluntarily join together (& Defendants may be joined) per [FRCP 20]:

- [a] Their claims arise from a single (or series of) transactions or occurrences +
- [b] There are common questions of law or fact.



SPEL

**[B] Members of a Class Action [Rule 23 Requirements]:**

- [a] Numerosity [b] Commonality [c] Typicality [d] Fair Representation.

**[C] Necessary Parties [Subject to Compulsive Joinder]:**

MUST be joined (if jurisdictionally possible) where [FRCP 19(a)]:

- [a] Complete relief can't be granted without them OR
- [b] Absentee's interest would be impaired OR
- [c] Existing parties might be subject to multiple or inconsistent obligations.

**[D] Indispensable Parties [Subject to Compulsive Joinder]:**

MUST be joined or the action dismissed. [FRCP 19(b)] Indispensability factors:

- [a] Will there be prejudice to the absentee?
- [b] Can a judgment be framed mitigating the prejudice?
- [c] Is an adequate remedy fashionable despite the absentee?
- [d] If the case is dismissed, does Plaintiff have another remedy?



STAGE V  
3. PRETRIAL DISCOVERY



SPEL

**A. What Is Discoverable:**

Any matter, not privileged, relevant to the claim or defense of any party [FRCP 26(b)].  
There are basically 6 Degrees of Discoverability:

**[Degree 1] Immediately Discoverable:**

- [a] Covers: Real Evidence and Rule 26(a) Initial Disclosures.
- [b] Standard: Must be disclosed as soon as reasonably possible.

**[Degree 2] Discoverable:**

- [a] Covers: Details of all witnesses (Lay & expert) who may testify.
- [b] Standard: Must be disclosed no later than Pretrial Conference.

**[Degree 3] Conditionally Discoverable:**

- [a] Covers: Ordinary Work Product: Witness Statements, Investigation.
- [b] Standard: NOT discoverable absent a showing of [FRCP 26(b)(3)]:
  - [i] Substantial Need + [ii] Undue Hardship.

**[Degree 4] Not Discoverable:**

- [a] Covers: Advisory Assistance; non-testifying experts and lay assistants.
- [b] Standard: NO Discovery absent Exceptional Circumstances [FRCP 26(b)(4)(B)].

**[Degree 5] Not Discoverable and/or Privileged:**

- [a] Covers: Attorney's research, opinions, notes, memos & client communications.
- [b] Standard: NO Discovery [FRCP 26(b)(3)] absent Extraordinary Circumstances or a Crime Fraud Exception.

**[Degree 6] Never Discoverable:**

- [a] Covers: Attorney's thought processes.
- [b] Standard: NO Discovery Period [Hickman v. Taylor, 329 U.S. 495 (1947)].



Topic 1



Topic 2



STAGE V  
**3. PRETRIAL DISCOVERY [Continued]**

**B. Weapons of Discovery:**

Sanctions for failure to comply [FRCP 37] range from fines to default & Dismissal.

**[1] Request For Admissions [FRCP 36]:**

- [a] Use Against Parties only.
- [b] Timing: Any time after complaint is filed; but need court order or stip before Rule 26(f) conference.
- [c] Plus & Minus: +Inexpensive, +Narrows issues, +Self-executing sanctions, - Inflexible.

**[2] Interrogatories [FRCP 33]:**

- [a] Use Against Parties only.
- [b] Timing: Any time after complaint is filed; but need court order or stip if before Rule 26(f) conference.
- [c] Plus & Minus: +Permits thoughtful strategy, +Inexpensive; -Permits attorney coaching, -Limit 25.

**[3] Request For Production of Documents [FRCP 34]:**

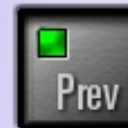
- [a] Use Against Any Party & Non-Party via FRCP 45 [Subpoenas].
- [b] Timing: Any time after complaint is filed; but need court order or stip before Rule 26(f) conference.
- [c] Plus & Minus: +Permits you to specify documents to be produced; - Potential burial by response.

**[4] Demand For Inspection of Premises or Objects [FRCP 34]:**

- [a] Use Against Same as [3]
- [b] Timing: Same as [3].
- [c] Plus & Minus: +Permits you to specify property.



Topic 1



Topic 2



SPEEL

**[5] Notice For Physical or Mental Examination [FRCP 35]:**

- [a] Use Against Any Party & Non-Party via FRCP 45 [Subpoenas].
- [b] Timing: Court order required.
- [c] Plus & Minus: +Let's you torment the enemy, -Expensive.

**[6] Depositions [FRCP 26 & 27]:**

- [a] Use Against Any Party & Non-Party via Subpoena [FRCP 45].
- [b] Timing: Any time; but court order required before filing complaint & during appeal.
- [c] Plus & Minus: +Flexible, +Good for surprising enemy; -Expensive, -Time consuming.





STAGE V  
4. TRIAL PROCEDURE

**A. Jury Selection:**

- [1] Right: Federal Courts prefer bench trials, but, unless waived, jury is required:
  - [a] By the 7th Amendment, in suits at "common law" for more than \$20.
    - [i] Action at *Law* is entitled to a jury.
    - [ii] Action for *Equitable Relief* generally - NO jury.
  - [b] By consent of both parties, subject to FRCP 39(c).
  - [c] If a federal statute permits or requires a jury.
- [2] Composure: Historically, 12 jurors, but can have as few as 6 per *Colgrove v. Battin*, 413 U.S. 149 (1973). Must be jury of "peers."
- [3] Verdict: Constitution does not require unanimous verdict.



Topic 1

**B. Opening Statements:**

Plaintiff opens by outlining the basic elements of the case. Defendant then can opt to waive, reserve or open. Argument is not permitted.



Topic 2

**C. Examination of Witnesses:**

The examination of witnesses generally follows the this pattern:

- [1] Plaintiff presents case in chief, then rests :
  - [a] Plaintiff examines his or her witness own witness.
  - [b] Defendant may cross - examine Plaintiff's witness.
- [2] Defendant may present witnesses:
  - [a] Defendant examines his or her witness own witness.
  - [b] Plaintiff may cross - examine Defendant's witness.
- [3] Rebuttal and sur-rebuttal witnesses may be presented if allowed.



SPIEL



Topic 3

**D. Closing Arguments:**

Plaintiff begins, then Defendant argues, then Plaintiff has the "last word."



**E. Judge Charges the Jury / Jurors Retire to Deliberate**

## STAGE V 5. MOTIONS



Topic 1



Topic 2



Topic 3



Topic 4

### **A. Motions In General:**

A motion is an application to the court for an order; except during trial, motions must be in writing [FRCP 7(b)], and signed in accordance with FRCP 11.

### **B. Dispositive Motions:**

Motions designed to terminate the action can be filed at various stages:

**[1] Voluntary Dismissal by Plaintiff [FRCP 41(a)]:**

[a] **Basis:** Unilateral action by Plaintiff at any time; no basis required.

[b] **Timing:** Without prejudice if executed prior a Motion For Summary judgment.

**[2] Motion to Dismiss by Defendant [FRCP 12(b)]:**

[a] **Basis:** [1] Lack of SMJ, [2] Lack of Personal JD, [3] Defect in Venue, [4] Defect in Process, [5] Service Defect, [6] Failure to state claim, [7] Nonjoinder (FRCP 19)

[b] **Timing:** [1] Anytime; [2-5] No later than Answer; [6,7] Anytime before end of trial.

**[3] Motion For Judgment on Pleadings by Either Party [FRCP 12(c)]:**

[a] **Basis:** Based on pleadings, there is no genuine issue of a material fact.

[b] **Timing:** After pleadings are closed, but not so as to delay trial.



SPEAKER

**[4] Motion For Summary Judgment by Either Party [FRCP 56]:**

[a] **Basis:** There is no genuine issue of a material fact.

[b] **Timing:** Anytime after 20 days following commencement of action.

**[5] Motion For Judgment As A Matter of Law [Nonsuit] by Either Party [FRCP 50(a)]:**

[a] **Basis:** No legally sufficient evidentiary basis to find in favor of the opposition.

[b] **Timing:** After opponent's case but before submission to jury.

**[6] Motion For Judgment NOV by Either Party [FRCP 41(b)]:**

[a] **Basis:** Verdict could not be reached by a reasonable person.

[b] **Timing:** Within 10 days after entry of judgment.



## STAGE V 6. APPEALS



SPEL



Topic 1

### A. Appellate Court:

#### [1] U.S. Court of Appeals:

- [a] Final Judgment Rule: 28 USCA 1291 requires a final decision, except:
  - [i] Rule 54(b) for multi-party case & "no reason for delay."
  - [ii] Collateral Order Doctrine: *Cohen v. Beneficial*, 337 U.S. 541 (1949).
  - [iii] Immediate Review Needed: *Gillespie v. U.S. Steel*, 379 U.S. 148 (1964).
- [b] Interlocutory Appeal: Immediate appeal allowed where:
  - [i] There is Specific Statutory Permission per 28 USCA 1292(a).
  - [ii] For Injunctions per 28 USCA 1292(a)(1).
  - [iii] Consent by both District Court & CA under 28 USCA 1292(b) that:
    - (1) Certified decision involves "controlling question of law" +
    - (2) There is a "substantial ground for a difference of opinion" +
    - (3) Immediate appeal will help end litigation.
  - [iv] USSC creates additional grounds per 28 USCA 1292(b).
  - [v] FRCP 23(f) applies, granting or denying certification of class action.
  - [vi] Mandamus: There is a clear abuse of discretion: 28 USCA 1651(a).



Topic 2



Topic 3



Topic 4

#### [2] State Courts of Appeals:

States use of *Final Judgment Rule* varies. NYCPLR 5701, for example, favors rapid appellate resolution of interlocutory orders.



Topic 5

### B. Courts of Last Resort:

#### [1] United States Supreme Court:

- [a] Certiorari: 28 USCA 1254(1). Petition is discretionary [4 votes needed]
  - [i] From U.S. District Court: Rare cases. *U.S. v. Nixon*, 418 U.S. 683 (1974).
  - [ii] From U.S. Court of Appeal: Most common means.
  - [iii] From Highest State court: Where federal issue is involved.
- [b] Certification: 28 USCA 1254(2). Questions of law certified to the High Court; certification is rarely granted.

#### [2] State Supreme Court

Rules concerning review will vary.



STAGE V  
7. PRIOR ADJUDICATION



SPEL A



SPEL B

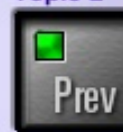
First Suit	$\Pi \rightarrow \Delta$	$\Delta$ wins	$\Delta$ loses
Suit 2 [a]	$\Pi \rightarrow \Delta$	$\Pi$ Opposes Plea $\Delta$ Pleads Res Judicata ✓	$\Pi$ Ignores Suit 1 $\Delta$ Pleads Res Judicata or Claim Splitting ✓
Suit 2 [b]	$\Pi \rightarrow \Delta$	$\Pi$ is silent $\Delta$ Pleads Defensive Collateral Estoppel ✓	$\Pi$ Pleads Offensive Collateral Estoppel $\Delta$ Opposes Plea ✓
Suit 2 [c]	$\pi \rightarrow \Delta$	$\pi$ Opposes Plea ✓ $\Delta$ Pleads Defensive Collateral Estoppel	$\pi$ Pleads Offensive Collateral Estoppel ✓ $\Delta$ Opposes Plea
Suit 2 [d]	$\pi \rightarrow \Delta$	$\pi$ Contests Precedent $\Delta$ Argues Stare Decisis	$\pi$ Argues Stare Decisis $\Delta$ Challenges Precedent



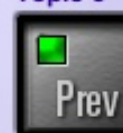
Topic 1



Topic 2



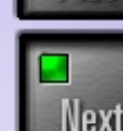
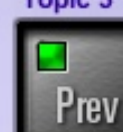
Topic 3



Topic 4



Topic 5



Next