

**CIVIL PROCEDURE**  
**CASES, PROBLEMS, AND EXERCISES**  
**Fourth Edition**

**ALTERNATIVE CHAPTER 3/4/5**

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# ALTERNATIVE CHAPTER 3/4/5

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## CONSIDERATIONS IN CHOOSING A COURT

[This Chapter is a condensed version of Chapters 3, 4, and 5.]



### A. FACTORS AFFECTING THE CHOICE

The United States legal system comprises numerous different courts. Every state, as well as several of the Indian Tribes, the District of Columbia, and Puerto Rico, operates its own court system. Each of these court systems is almost completely independent of the other. In addition, the federal government runs its own court system, which can hear many of the same types of cases as the state and other courts. There is at least one federal district court in every state, as well as in the District of Columbia, Puerto Rico, and federal territories. Moreover, the state and federal systems each include multiple trial courts, a high or “supreme” court, and in most cases one or more appellate courts. Taken as a whole, this collection of courts carries out the judicial business of the United States, deciding disputes both civil and criminal, as well as challenges to government authority and appeals of earlier decisions.

A plaintiff bringing a civil action gets the initial choice of which court will hear her case. At first glance, it might seem plaintiff would simply choose the most convenient court—either the one closest to plaintiff’s home or place of business, or near where the evidence is located. However, convenience is only one factor to consider. There are also legal rules, as well as other legal and practical considerations, that may dictate plaintiff’s choice of forum. This brief discussion will focus on the two most important considerations. The first is *authority*. Plaintiff must ensure the selected court has authority both over her particular dispute, as well as all parties to the case. Second, plaintiff will consider the *governing law*. Different courts may decide a particular case using different legal rules, some of which may be more favorable to one side or the other.

#### 1. AUTHORITY: JURISDICTION AND VENUE

A number of different rules and principles divide judicial authority among courts in the United States. This condensed Chapter does not cover the details of these rules. It is nevertheless important to understand the basic structure and main concepts. First, that knowledge will help you better understand the procedural posture of the cases you read in both this course and others. For example, it may explain why a dispute between a

North Carolina plaintiff and a Pennsylvania defendant is being heard in a federal court in Florida. Second, issues concerning a court's authority are often a key part of a case. The rules defining that allocation of authority contain a number of "terms of art" that regularly appear in judicial opinions. And third, those same terms of art are also incorporated into rules and statutes dealing with other procedural issues. Parts B, C, and D of this Chapter accordingly provide an overview of the basic concepts and key terms of art.

A mind-boggling array of statutes, rules, court-created principles, and even the U.S. Constitution affect how judicial authority is divided among U.S. courts. These rules deal with three different restrictions: subject-matter jurisdiction, personal jurisdiction, and venue. To understand the different ways these rules work, it may help to picture the division of judicial authority at three basic levels. Judicial authority can be divided horizontally, vertically, and by subject matter.

*Horizontal Division: Between the States and Other Regions.* Divisions at the "horizontal" level reflect that government authority ("sovereignty") in the United States is allocated in part along geographic lines. Determining which of these many courts has the authority to hear a particular dispute involves several factors. Not all courts can exercise authority over everyone in the United States. For example, it probably will not surprise you to learn that a court in Ohio has no authority over a dispute between two Maine residents over a contract made and to be performed in Maine, at least if the defendant to the action has no connection to Ohio.

The primary rules dividing authority horizontally are *personal jurisdiction* and *venue*. While the two are similar, there are several important differences. Often, the important considerations in determining personal jurisdiction and venue are geographic in nature: where the dispute arose, or where the parties to the case acted or reside.

Every individual state also has its own regional divisions of authority. Most states have a separate court system for every county or parish. Because the rules governing allocation of authority among these subdivisions differ from state to state, this discussion will focus only at the state level, not at the local.

*Vertical Division: Between the State and Federal Courts.* The second line of demarcation is often called "vertical" (although that adjective is misleading, as it implies a hierarchy). Overlying the system of state, tribal, and other regional courts is a separate and independent system of federal courts. There is at least one federal court in every state. Some of the larger states are divided into two or more federal "districts," each of which has a federal court. In many respects, this federal court system operates like an additional local system. Like the state and other courts, the federal system operates largely independently of the other systems. Moreover, federal

courts generally do not sit in review of the state courts,<sup>1</sup> but instead hear cases brought to them by the same sorts of plaintiffs who file in the other courts. However, because they sit alongside state and other local courts, the allocation of business to the federal courts does not focus as heavily on issues of geography. Congress instead allocated business to these courts based on considerations of importance to the federal government, and fairness. The rules of *subject-matter jurisdiction* determine whether federal or state courts can hear an action.

*Distinctions Based on the Particular Dispute.* The third division of authority is based on the nature of the underlying dispute itself. For example, all federal and state systems include both trial courts and at least one level of appellate courts. Trial courts generally deal with the matter first, and make important factual determinations. Appellate courts generally review the trial courts (and lower-level appellate courts) to determine if they committed significant errors. Because a party selecting a court to file an action will need to file in a trial court, we can put to one side the various appellate courts, including the United States Supreme Court.<sup>2</sup> We will return to appellate jurisdiction in Chapter 14.

But a complex allocation of authority even exists among trial courts. In many systems, for example, a party who wants to sue the government must bring the case in a special court. Similarly, many states have created probate courts to handle the administration of wills, family courts to deal with child custody, divorce, and other family matters, and/or small claims courts to deal with disputes involving relatively small damages. If the party bringing suit files an ordinary contract action in a probate court, the action will be dismissed (although depending on the statute of limitations the party may still be able to file in the proper court). Subject-matter jurisdiction also deals with these sorts of allocations, although this brief discussion will not focus as greatly on these matters.

## 2. GOVERNING LAW

The second primary factor a plaintiff will consider in choosing a forum is the substantive law the chosen court will apply. Every state has its own substantive law. While there has been a push for greater uniformity in state laws, there remain considerable differences; differences that can directly affect the outcome of a civil case.

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<sup>1</sup> There are of course exceptions to this principle. You may already be aware that the United States Supreme Court can review certain decisions of a state's highest court. In addition, parties may be able to obtain indirect review of state court decisions in the federal courts by the use of extraordinary writs such as *habeas corpus*, *mandamus*, and *prohibition*. While you will probably not encounter *habeas corpus* again unless you take an upper-level course in Criminal Procedure or Federal Jurisdiction, *mandamus* and *prohibition* are covered in greater depth in Chapter 14.

<sup>2</sup> Technically, the United States Supreme Court is not purely an appellate court. It also can act as a trial court in certain types of cases, such as cases filed by one state against another. While you will see an example of Supreme Court "original jurisdiction" in Chapter 13, Part G, this book does not cover this form of jurisdiction in depth.

Plaintiff's choice of forum does not necessarily dictate what law will govern the case. Many non-lawyers assume the courts of state X will always apply the law of that state to decide a dispute. However, the truth is more complex and nuanced. When the case has connections with other states (or with foreign nations), courts commonly apply some other body of law to determine the rights and liabilities of the parties. Similarly, federal courts do not always apply federal law. In many cases, they will—indeed must—use state law to decide the case.

This feature of the U.S. federal system is commonly referred to as “choice of law.” For our purposes, it is important to distinguish between two different types of choice of law. “Horizontal” choice of law involves a decision by a court to apply the law of a co-equal sovereign, such as one state applying the law of another. “Vertical” choice of law, by contrast, arises in a federal system. Under vertical choice of law rules, a state court may be required to apply federal law, or a federal court required to apply state law. Part E of this Chapter briefly deals with both horizontal and vertical choice of law.

## **B. FEDERAL SUBJECT-MATTER JURISDICTION**

*[This section is a condensed alternative to Chapter 4.]*

Subject-matter jurisdiction is a court's authority to decide a particular dispute. The concept exists because of the multi-tiered United States court system described above. As noted in that section, different courts are assigned different parts of the judicial business. The rules governing subject-matter jurisdiction dictate which of two or more courts, located in the same geographic area, has the authority to hear a case.

Subject-matter jurisdiction questions arise both within a particular court system, and between the state and federal courts. Each court system will have rules that determine what cases go to which court. For example, a state system may require suits involving probate of a will to go to probate court, and suits against the state as a sovereign entity to go to a “claims” or other specialized court. Every state, however, has one court of “general jurisdiction”: the authority to hear all cases, except for those specifically allocated by state or federal law to some other court. Depending on the state, this court may be called a “district” or “circuit” court, or may have some other name.

This book does not deal with the allocation of subject-matter jurisdiction among the various courts within a state. Rather, it deals with the second broad question: the allocation of subject-matter jurisdiction between the state and federal courts. The United States is somewhat unique among even federal nations insofar as it operates separate state and federal court systems. The federal courts hear not only matters involving the federal government, but also some ordinary civil disputes

involving private parties. Of course, allowing cases to be litigated in federal court diminishes the influence of the state courts. Therefore, to help preserve the role of the state systems, certain rules limit the types of cases a federal court may hear. The basic rules are set out in the U.S. Constitution, and implemented by federal statutes.

The main constitutional provision is Article III.<sup>3</sup> Article III confines federal subject matter jurisdiction to nine categories of cases. For our purposes, the most important three are:

- “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;”
- “Controversies . . . between Citizens of different States;” and
- “Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.”

Taken together, the nine constitutional categories of Article III cover a wide range of cases. However, two types of cases are notably missing. Unless the case involves claims under federal law, the Constitution, or a treaty, a federal court cannot hear a case where all the parties are either citizens of the same state, or are not citizens of the United States. These cases must be heard in the state courts.

Article III establishes the basic paradigm: federal courts are courts of *limited jurisdiction*, with the authority to hear only those categories of cases specifically allocated to them. Unlike the states, there is no federal court of general jurisdiction.

Article III does not itself either create lower federal courts or give them subject-matter jurisdiction. While the provision creates the U.S. Supreme Court, it leaves the decision whether to create lower federal courts (both trial and appellate), and their subject-matter jurisdiction, to Congress. Congress may regulate the jurisdiction of the federal courts, although it cannot exceed the outer limits established by Article III.

This section discusses the subject matter jurisdiction of the United States District Courts, the trial courts in the federal system.<sup>4</sup> There are many statutes allocating subject matter jurisdiction to these courts. *See, e.g.*, [28 U.S.C. §§ 1330](#) (actions against foreign nations), 1343 (civil rights cases), and 1344 (election disputes). However, this discussion will concentrate on the four most important provisions. First, it discusses the District Courts’ **federal question** and **diversity** jurisdiction, the two primary means by which a party may file a case in federal rather than state

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<sup>3</sup> The eleventh amendment, enacted in 1793, also places an important limit on federal court jurisdiction. However, that amendment is beyond the scope of this course. It is usually covered in a course called Federal Courts or Federal Jurisdiction.

<sup>4</sup> Chapter 14 covers the appellate jurisdiction of the federal courts of appeal and U.S. Supreme Court in Chapter 14.

court. After that, it briefly discusses **supplemental jurisdiction**, pursuant to which a party may include in a case certain claims that by themselves could not otherwise be brought in federal court. Finally, it discusses **removal**, by which defendant may move a case originally filed in state court to federal court. Removal gives defendant some say in which court will ultimately hear the case.

Before embarking on this brief overview, it is important to correct one commonly-held misperception about subject-matter jurisdiction. *Federal subject-matter jurisdiction is not necessarily mutually exclusive of state-court jurisdiction.* In other words, it will often be possible to bring a particular case in either state or federal court. The vast majority of claims qualifying for federal diversity jurisdiction can also be brought in state court. While certain claims arising under federal law, such as antitrust claims and suits for patent and copyright infringement, may only be heard in the federal courts, state courts have subject-matter jurisdiction over most claims arising under other federal laws. State courts may also adjudicate claims arising under the U.S. Constitution. The choice whether to use federal or state court in these cases falls on the parties. Although there may be practical and tactical reasons to prefer federal court, many cases that could be heard in federal court are actually litigated in the state systems.

## 1. FEDERAL QUESTION JURISDICTION

Federal question jurisdiction refers to cases falling in the first Article III category quoted above: “Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” Congress implemented this Constitutional authority in several statutes. The most important statute, and the main one discussed here, is **28 U.S.C. § 1331**, which is often called the “general” federal question statute. This section grants federal courts subject-matter jurisdiction over all matters arising under any federal law,<sup>5</sup> as well as claims arising under the U.S. Constitution and federal treaties.

The rationale for federal question jurisdiction is clear and relatively non-controversial. Such jurisdiction allows the federal courts to interpret federal statutes and other laws. If federal courts routinely hear these cases, over time federal judges could acquire greater expertise in the nuances of federal law. In addition, in some cases one might suspect that state-judges,

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<sup>5</sup> Many other statutes deal with cases arising under specific federal laws. See **28 U.S.C. § 1333** (admiralty), 1334 (bankruptcy), 1337 (commerce and antitrust), 1338 (patents, copyrights, and trademarks), 1339 (postal matters), 1343 (civil rights), and 1355 (fines and penalties under federal laws). If **§ 1331** affords jurisdiction over all cases arising under all federal laws, why do these specific provisions exist? First, some of these statutes make federal jurisdiction *exclusive*, which means state courts cannot hear the matter. Second, for many years **§ 1331** only allowed federal courts to hear cases that involved a minimum amount in controversy. Many of the specific statutes contained a lower threshold, or no threshold at all. Now that **§ 1331** no longer contains an amount in controversy requirement, these special statutes are largely redundant.

who are often elected by voters in that state, might be reluctant to enforce certain laws imposed by Washington. While federal judges are not free from politics, they are probably less subject to these distorting influences.

Issues involving the scope of federal question jurisdiction can be among the most difficult in all of Civil Procedure. Luckily, most of these issues are on the “fringe,” arising only in unusual cases or those involving special considerations. The discussion here will focus on the basic analysis under § 1331, which is relatively straightforward. The basic analysis involves two main considerations: determining when a case “arises under” federal law or the Constitution, and determining whether federal jurisdiction is “exclusive” (where only federal courts may hear the claim) or “concurrent” (in which case either state or federal court may hear it).

### a. When a Case “Arises Under” Federal Law

Both Article III of the Constitution and 28 U.S.C. § 1331 allow federal courts to hear cases “arising under” federal law. But what does it mean for a case to “arise under” federal law?

The Supreme Court resolved this issue in *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908), establishing a basic rule that has remained in force for over a century. Under this rule, a case arises under federal law only if plaintiff raises an issue of federal law in its complaint, and relies on that federal law as a basis for recovery. Plaintiffs in *Mottley* had sued defendant for breach of a contract. Anticipating that defendants would assert the contract was invalid under federal law, plaintiffs also stated in their complaint that federal law did not render the contract invalid. Even though plaintiffs did mention a federal “question” in their complaint, they did not need to assert the federal law in order to recover. Rather, plaintiff’s recovery turned entirely on state contract law. The Court held the case did not arise under federal law, and accordingly was not a federal question.

To illustrate the rule in *Mottley*, consider a hypothetical federal statute setting a maximum interest rate of 15% on loans. If a lender charges a higher rate, borrower no longer has to pay the loan amount, and in addition can recover a penalty of \$500 from lender. Lender has loaned \$20,000 to Borrower at an interest rate of 21% to help Borrower pay his law school tuition. When Borrower learns of the statute, he “defaults” (refuses to make payments). Now consider four possible procedural postures in which this federal statute could arise in litigation:

- a. Lender sues Borrower for the outstanding balance on the loan. In his counterclaim, Borrower both asserts the statute as a defense and files a counterclaim for the \$500 penalty.

b. Lender sues Borrower for the outstanding balance of the loan. In her complaint, Lender claims the federal statute does not apply to student loans of this sort.

c. Before Lender sues Borrower, Borrower sues Lender for the \$500 penalty. Lender counterclaims for the balance of the loan.

d. Borrower sues Lender for the remedy of “rescission”, asking the court to declare the loan invalid because it violates the federal statute.

Be prepared to explain why only c and d could be brought in federal court as a federal question.

## b. Types of Federal Questions

The other primary question arising under § 1331 is what types of claims qualify as “federal questions.” The statute itself mentions three: claims arising under the U.S. Constitution, “laws of the United States”, and treaties made under the authority of the Constitution and federal law. Constitutional claims are fairly obvious, although there is a complicated set of principles determining when a party may sue directly under the Constitution, as opposed to civil rights statutes.<sup>6</sup> Because most treaties are not enforceable on their face, but only with implementing federal legislation, relatively few claims actually arise under treaties.

“Laws of the United States” is a more amorphous category. It clearly includes federal statutes. There is in addition a body of “federal common law,” although it is severely limited in scope by the *Erie* doctrine discussed later in this Chapter. Cases arising under international law also involve federal questions, even though Congress did not create the law in question. (Note that international law is different than the law of a particular foreign nation.)

## 2. DIVERSITY JURISDICTION

Diversity jurisdiction is the second main branch of federal subject-matter jurisdiction. It is an alternative to federal question: a party may sue in federal court if it qualifies for *either* form of jurisdiction. Unlike federal question jurisdiction, which looks to the nature of the claims presented by the plaintiff, diversity jurisdiction is based on the citizenship of the parties to the lawsuit. If the parties are of sufficiently diverse citizenship (as explained momentarily), the federal courts can hear the case. Because it turns on the parties, not the claim, diversity jurisdiction can exist even when the case involves a federal question. Like federal question

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<sup>6</sup> Although as a matter of convenience courts and commentators call all of the bodies of law listed in § 1331 as federal questions, it is technically inaccurate to refer to the Constitution as “federal” law. It is instead a national law, created originally by the states and the people.

jurisdiction, state courts can also hear the overwhelming majority of cases that would qualify for diversity jurisdiction.

The roots of diversity also lie in Article III of the U.S. Constitution, in this case the above-quoted language dealing with citizens of states and foreign nations. Federal statutes implement this jurisdiction. This discussion will focus mainly on § 1332, the primary diversity statute. That statute has two basic requirements. First, the parties must be of diverse citizenship. Second, the case must involve an “amount in controversy” exceeding the statutory floor (currently \$75,000). Federal question jurisdiction has no such amount in controversy requirement.

Although both forms of jurisdiction stem from the same Constitutional provision, the justifications for diversity differ significantly from those for federal question jurisdiction. Diversity jurisdiction reflects a historical fear of state-court bias against nonresident litigants, at least when they are embroiled in litigation with residents. However, whether diversity really mitigates state-court bias remains subject to some debate. First, it is unclear whether state judges today really have much home-state bias. Second, even if bias does exist, federal judges, who preside over diversity cases, are generally elected from the bar of the state in which they will serve. Most federal judges were once state-court judges. And third, diversity jurisdiction does not require that any litigants be from the state in which the case is tried. In other words, a federal judge in Delaware can hear a case between a California plaintiff and a Montana defendant (subject to venue limitations, discussed later in this Chapter).

Diversity cases constitute a significant portion of a federal district court’s caseload, comprising almost 30% of all federal civil cases filed in 2016, the last year for which statistics are available.<sup>7</sup> The vast majority of these actions are based on state-law claims, matters where the state courts are at least as competent as the federal courts. Because of the lingering doubts concerning bias, there have been repeated efforts to limit diversity jurisdiction or even abolish it entirely. While Congress has occasionally increased the amount in controversy, it does not currently seem inclined to abolish diversity. Nevertheless, throughout this course you will encounter several special rules applicable only to diversity cases. Would the simplification resulting from getting rid of all these special rules justify abolishing diversity?

### **a. Determining Citizenship**

Diversity jurisdiction under § 1332 exists only if the suit is between either “citizens of different States” (§ 1332(a)(1)) or “citizens of a State and citizens or subjects of a foreign state” (§ 1332(a)(2)). But what does the statute mean by a citizen of a state? In the United States, we generally

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<sup>7</sup> As reported on [uscourts.gov](http://uscourts.gov), the official website of the federal court system. Note that diversity filings have fluctuated quite a bit during the last few years.

measure citizenship on a national basis, not a state-by-state basis. Courts have therefore had to determine how to apply the language of the statute. In some cases, the clue lies in § 1332 itself; in others, the courts have borrowed principles from other areas of the law. Determining citizenship differs for natural persons and for “legal persons” such as corporations.

*i. Natural Persons*

In the case of a natural person, the answer to the riddle lies in the concept of *domicile*. A person is a citizen of State *X* if (a) she is a United States citizen, and (b) has her domicile in State *X*. Note that § 1332(e) defines “States” to include not only the 50 actual U.S. states, but also U.S. territories, the District of Columbia, and Puerto Rico.

While the term also has a lay meaning, “domicile” is a legal term of art. It is a judge-made doctrine employed in several areas of the law, especially in the rules governing wills. Basically, a person’s domicile is her current “true home”, the place where she plans to return whenever she is away. Domicile turns on a person’s state of mind. While a party may testify concerning her domicile, courts place considerable weight on objective factors, out of fear a party may lie about her intent in order to invoke or avoid diversity jurisdiction. Among the more important objective factors are:

- Where the person lives for most of the year;
- Where the person is registered to vote;
- Where the person maintains bank accounts;
- Where the person has licensed his automobiles and other items;
- Where the person has a driver’s license; and
- Where the person pays state income taxes (and the state of residence listed on federal tax returns).

No single item is controlling.

Domicile is a legal fiction, and several basic principles control:

1. A person always has one—and only one—domicile.
2. A person acquires a domicile at birth, which in most cases is the domicile of her parents. Thus a person born in State *X* to parents domiciled in State *Y* is a domiciliary of State *Y* even if she has never been to State *Y*.
3. A person retains her domicile until she voluntarily changes it. While a person is a minor, her domicile changes as her parents change their domicile. On reaching majority, a party can change her domicile only by (a) physically moving to a new state, and (b) while in the state, forming the intent to

make that state her “true home”. Physical presence and intent must exist at the same time, if only for a moment.

The foregoing discussion applies to people who have a domicile somewhere in the United States. Some U.S. citizens live abroad (recall that U.S. territories and Puerto Rico are considered “states”). A U.S. citizen who has a domicile in another nation cannot qualify for diversity jurisdiction. While he is a U.S. citizen, he is not a citizen of any state because he is not domiciled in a state. Nor is he a citizen or subject of a foreign nation.

### *ii. Corporations and Other Legal “Persons”*

A corporation is a “legal person” that cannot form the intent necessary to establish domicile. Because it only acts through its officers and directors, the concept of domicile is useless in determining the citizenship of a corporation. § 1332(c)(3) recognizes this problem, and defines the citizenship of a corporation using other factors. This provision deems a corporation to be a citizen of (a) the state in which it is incorporated and (b) the state in which it has its principal place of business. Note that under this provision, a corporation that was incorporated in one state but has its principal place of business in another will be treated as a citizen of *two* states (unlike natural persons, which have only one citizenship.) If an opposing party is a citizen of either of these states, diversity does not exist.

Determining state of incorporation is usually quite easy. In almost all cases a party forms the corporation by filing papers with one state.

Determining principal place of business can be much trickier. It is not uncommon for a medium or large corporation to do business in several states. Since the Supreme Court’s decision in [Hertz v. Friend, 559 U.S. 77, 130 S.Ct. 1181, 175 L.Ed.2d 102 \(2010\)](#), courts determine a corporation’s principal place of business by locating its “nerve center”: “the center of overall direction, control, and coordination” of the corporation’s activities. A corporation will have only one nerve center, which is typically the corporate headquarters. Moreover, this nerve center is the principal place of business even if the corporation does not actually manufacture or operate retail operations in that state.

§ 1332(c) only explicitly applies to corporations. General partnerships and unincorporated associations (such as unions and clubs) are subject to a very different rule. These entities are treated as citizens of all states in which any of their members is a citizen. Under this analysis, a national union may be treated as a citizen of all 50 states. Courts differ in how they deal with LLCs and other corporate-like entities, with some treating them like partnerships, others treating them like corporations.

### *iii. Alienage Jurisdiction*

Part (i) demonstrated that a person is a citizen of a state only if she is a U.S. citizen. On the other hand, a person who is not a U.S. citizen may qualify for a form of diversity called “alienage” jurisdiction, covered by § 1332(a)(2) and (a)(3). In most cases, the non-citizen’s domicile is irrelevant, even if he is domiciled in the United States. However, if a person is granted permanent resident alien status by the U.S. government (commonly called a “green card”), the last clause of § 1332(a)(2) treats that person as a citizen of the state in which he is domiciled. This means diversity will not exist in a case involving that person if any opposing party is a U.S. citizen domiciled in the same state.

Note that alienage jurisdiction only exists if U.S. citizens are also parties to the action. An action involving only non-citizens cannot be heard in the federal courts, even if all the non-citizens are from different nations. However, state courts may hear such an action (subject to personal jurisdiction limits, discussed later in this Chapter).

Alienage jurisdiction presents one twist involving the complete diversity requirement, discussed below.

### **b. The Complete Diversity Requirement**

Diversity jurisdiction under § 1332 is also subject to one important limitation called the “complete diversity” rule. This rule, established by the Supreme Court in 1806, provides that diversity exists only if no defendant is a party from the same state as any plaintiff. If any plaintiff and defendant are from the same state, diversity cannot exist, even if the overall degree of diversity is overwhelming.

To illustrate the rule, suppose 45 plaintiffs sue 8 defendants. Forty-four plaintiffs are from Maine, and one is from Oregon. Seven defendants are from New Mexico, and one is from Oregon. As long as both the Oregon plaintiff and defendant remain in the case, diversity jurisdiction will not exist. Note too that it does not matter whether the Oregon plaintiff has filed a claim against the Oregon defendant. The mere presence of both parties in the case destroys diversity.

§ 1332(d)(2) sets out special complex rules governing large class actions. While class actions are beyond the scope of this introduction, the basic rule is that complete diversity is not required. If you study interpleader, you will also see that § 1335 does not require complete diversity for certain actions of interpleader.

The complete diversity rule only applies to U.S. citizens. In cases involving aliens, the nationality of the alien parties is not considered in determining whether complete diversity is present. In fact, under § 1332(3) it is possible for citizens of the same foreign nation to be both plaintiffs and defendants in a case. To illustrate, that section would allow diversity if two

plaintiffs, one from Utah and the other from Ukraine, sued three defendants, one from Nevada, one from Nepal, and the third from Ukraine. As long as there is complete diversity among the U.S. citizens, the nationality of the foreign citizens is ignored.

### c. The Amount in Controversy

Complete diversity of citizenship is the first main requirement of § 1332. The second is that the dispute must involve an amount in controversy in excess of \$75,000. Cases that fall below this amount must be heard in the state courts (unless, of course, they involve a federal question or qualify under some other federal jurisdiction statute).

Determining the amount in controversy is quite easy in a case where a single plaintiff seeks money damages. Provided the total amount of damages sought by plaintiff exceeds \$75,000, the requirement is met. A single plaintiff may combine, or “aggregate,” the amounts sought on multiple claims against a single defendant to reach this \$75,000 threshold. Courts look to the face of plaintiff’s complaint to determine whether the requirement is met. Unless it appears to a legal certainty that plaintiff cannot recover more than \$75,000, a court will accept the amount claimed by plaintiff. (An example where legal certainty would exist is a case where plaintiff’s only claim seeks to recover on a personal check in the amount of \$10,000.) Moreover, the amount plaintiff actually recovers does not matter. Provided plaintiff asks for more than \$75,000 the court does not lose jurisdiction if it eventually determines plaintiff can recover only \$15 . . . or even if plaintiff loses and recovers nothing.

Not all amounts are included. The statute specifically provides that “interest and costs” are not included in calculating the amount in controversy. However, these terms are not as broad as they might seem. Some interest *is* included in the calculation. Provided the interest is an essential part of the claim, as opposed to a penalty for delaying payment, it is included. Thus, a claim for \$200,000 in unpaid interest coupons on a note would meet the amount in controversy requirement, even though the entire claim comprises interest. By contrast, a party who delays bringing a tort suit so she can collect additional prejudgment interest would not be allowed to include the interest in her claim.

Costs are also excluded from the amount. However, the term “costs” refers only to court costs. A party who seeks to recover attorneys’ fees may include that amount to meet the amount in controversy, unless it is clear to a legal certainty the party cannot recover attorneys’ fees on the claim (as you should learn in your other courses, a party cannot recover attorneys’ fees on many types of claims).

Cases involving nonmonetary relief, or multiple parties, present additional difficulties. For the former, courts attempt to ascribe a monetary value to the relief sought. Consider an injunction, in which an individual

who owns an idyllic unimproved lakeside lot seeks an injunction to prevent construction of a large tannery on an adjacent lot. Courts have different tests for valuing injunctions, including (i) the value to the plaintiff (which is likely to be relatively low in this example), (ii) the cost to the defendant (which is likely to be relatively high, at least if defendant has already purchased the lot), or (iii) the value or cost to the party invoking federal court jurisdiction (usually the plaintiff, but possibly the defendant in a case involving removal, which is discussed later in this section). Still others will treat the amount satisfied provided *either* the value to the plaintiff or the cost to the defendant exceeds \$75,000.

Cases involving multiple plaintiffs and/or defendants also involve their own issues. If every plaintiff asserts a separate claim exceeding \$75,000 against every defendant, the amount in controversy is met. But what if a plaintiff sues two defendants and asks for a total of \$100,000? Conversely, what if two plaintiffs sue for a combined total of \$100,000? In these sorts of situations, the rules of aggregation come into play. Unfortunately, these rules turn on concepts from Property and Tort law to which you may not yet have been exposed. Basically, in a case involving multiple defendants, plaintiff may meet the amount in controversy as long as all defendants could be held *jointly and severally liable* for an amount in excess of \$75,000, even if each defendant may ultimately pay less than that amount. In cases involving multiple plaintiffs, aggregation is allowed provided plaintiffs assert some sort of joint claim to a single injury, as would be the case when two plaintiffs who co-own an airplane worth \$90,000 sue for destruction of the airplane. Other than these cases, aggregation is not allowed.

§ 1332(d) sets out special rules for the amount in controversy in certain large class actions, which are beyond the scope of this introductory text. You may encounter those rules in Chapter 8 of this book or in a Complex Litigation or Mass Torts course.

#### **d. Time for Determining Diversity**

Diversity must exist at the moment the case is filed. Events that occur either before or after that moment generally do not affect diversity. Therefore, if a plaintiff who was from State X at the time of the injury established a new domicile in State Y one day before filing a case against a defendant from State X, diversity will exist. Similarly, the federal court does not lose jurisdiction if a plaintiff from State Y who sues a defendant from State X establishes a new domicile in State X one day *after* filing the action. While a change in domicile so close to the filing date will undoubtedly cause a court to question whether plaintiff had a good-faith intent to relocate, as long as plaintiff truly intended to change her domicile, the change will not affect jurisdiction.

There are several exceptions to this timing rule. First, it is sometimes possible for a party to “cure” a jurisdictional defect by dismissing non-diverse defendants before the court considers the jurisdictional issue. *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996). Domicile changes by an existing party do not count. Second, in a case involving *removal*, discussed in Part D below, diversity must exist both at the time the case is filed in state court and at the moment it is removed to federal court.

#### e. Additional Issues

The diversity statutes and case law are riddled with exceptions and special rules. Most of these are beyond this basic introduction, but three warrant brief mention. First, § 1332(c)(1) sets out a special rule for determining the citizenship of corporations that provide liability insurance coverage. These rules apply only in “direct actions” brought *against* these corporations. Second, § 1332(c)(2) sets out special rules for determining the citizenship of the legal representative of an estate (commonly called an “executor”) and of an infant or incompetent (often called a “guardian”). § 1359 also prevents a party from “improperly or collusively” joining a party to invoke federal jurisdiction. This provision only applies when the improper joinder would create diversity, not when it would destroy it.

#### f. Some Exceptions

Finally, there are several court-created exceptions to diversity. The ones you are most likely to encounter are the “domestic relations” and “probate” exceptions, in which federal courts will not exercise diversity jurisdiction over certain matters involving family law and wills. The former is limited to claims of divorce, alimony, and child custody, and does not prevent a federal court from hearing tort or contract claims between family members. The latter is limited to matters directly involving the administration of a will or intestate succession. You may learn of other exceptions, such as the doctrine of abstention, in upper-level courses.

### 3. SUPPLEMENTAL JURISDICTION

A court has authority to decide a civil case only if it has subject-matter jurisdiction over every claim in the case. A court needs subject-matter jurisdiction not only over original claims brought by the plaintiff, but also over counterclaims and cross-claims. A court lacking subject-matter jurisdiction over a claim must dismiss that claim from the case. If that claim is the only one alleged against a particular party, a decision to dismiss the claim may result in dismissal of that party.

In many instances, federal question and diversity jurisdiction will not exist for every claim. For example, suppose a plaintiff brings both a federal question and a state-law claim against a defendant. While federal question

jurisdiction allows the federal court to hear the federal claim, it does not give the court authority over the state claim. If the defendant is diverse and the state claim exceeds \$75,000, plaintiff may be able to get the entire case into federal court by relying on both federal question and diversity. (Even if the state claim is less than \$75,000, if the two claims together involve an amount in controversy in excess of \$75,000, the diverse plaintiff can use aggregation.) However, if defendant is not diverse, and/or the sum of the claims is not greater than \$75,000, neither form of jurisdiction we have studied so far will allow the court to hear the state-law claim.

As a slightly more complicated example, suppose plaintiff invokes diversity jurisdiction to bring a state-law claim against two defendants who happen to be citizens of the same state. One defendant wants to file a cross-claim against the other. Because the defendants are not themselves diverse, diversity jurisdiction will not cover the cross-claim. Unless the cross-claim happens to be a federal question, defendant will not be able to bring the claim in this case using either federal question or diversity.<sup>8</sup>

Supplemental jurisdiction can solve these problems. If a court can exercise federal question or diversity jurisdiction over at least one claim by the plaintiff in the case, it may in some cases be able to exercise supplemental jurisdiction over other claims that do not themselves qualify for federal question or diversity.

### a. The Supplemental Jurisdiction Statute

While supplemental jurisdiction originated in the courts, it has been codified in [28 U.S.C. § 1367](#). The statute mandates a three part analysis, reflected in subsections (a), (b), and (c). Subsection (a) requires a sufficient *nexus* between plaintiff's "independent" claim(s) (those that qualify for either federal question or diversity jurisdiction on their own) and the "dependent" claim(s) (those that do not qualify on their own). Subsection (b) contains an important *exception* for certain dependent claims by plaintiffs in cases where jurisdiction over the independent claims is based solely on diversity jurisdiction under § 1332. Finally, subsection (c) gives a court *discretion* to refuse to exercise jurisdiction over the dependent claims based on certain criteria.

#### i. *Nexus: The "Common Nucleus of Operative Fact" Test*

[§ 1367\(a\)](#) allows a federal court to exercise supplemental jurisdiction over dependent claims that "form part of the same case or controversy under Article III of the United States Constitution" as an independent claim. The independent claim must be brought by plaintiff. The dependent

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<sup>8</sup> Note that the rules of subject-matter jurisdiction "trump" the joinder rules discussed in Chapter 2. In other words, even if the cross-claim satisfies Federal Rule 13(g), the federal court cannot hear it if it lacks subject-matter jurisdiction. Similarly, we will see below that the limitations imposed by personal jurisdiction and venue trump the joinder rules.

claim(s) can be brought by any party, including plaintiff. Thus, in the examples set out above, supplemental jurisdiction could apply to the additional plaintiff claim and the cross-claim, provided each had a sufficient nexus to the plaintiff's independent claim.

The reference to Article III in the § 1367(a) language reflects the Constitutional origins of the doctrine of supplemental jurisdiction. While our discussion in this section has focused on individual claims, Article III gives federal courts jurisdiction over “cases” and “controversies.” A case or controversy is broader than a single claim. As interpreted in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), two claims form part of the same “Article III case or controversy” whenever they derive from a “common nucleus of operative fact.” This requirement is a *sine qua non* of supplemental jurisdiction . . . unless it is satisfied, the analysis goes no further.

The common nucleus test is highly similar (although technically not identical) to the “same transaction or occurrence” analysis used in the Federal Rules of Civil Procedure governing joinder (covered in Chapter 2). The key term is the word “operative”. This term requires the court to determine the basic events that gave rise to the claims in question. As long as the claims arise out of the same basic event or circumstance—the “same transaction” or “occurrence” in Federal Rules-speak—the common nucleus test will be satisfied. This similarity between the joinder rules and the § 1367(a) common nucleus test can prove quite handy in analyzing jurisdiction and joinder, as will be briefly addressed below.

### *ii. The Diversity Exception*

§ 1367(b) contains an important exception applicable to diversity cases. Unfortunately, the exception is poorly worded, and often proves quite difficult for the newcomer. Note that because this provision is an exception, it only comes into play if the nexus requirements of § 1367(a) have been satisfied.

Careful parsing of the § 1367(b) exception reveals that it has three elements. The exception applies only if *all* three elements are met. The elements are:

*A. Jurisdiction over the independent claims must be based solely on diversity.* If any of the plaintiff's fact-related independent claims qualify for federal question jurisdiction (or for jurisdiction under any provision other than § 1332, for that matter), the § 1367(b) exception simply does not apply.

*B. The dependent claim must be brought by the original plaintiff.* If the claim is brought by a party other than plaintiff, the exception does not apply. Consider the cross-claim example set out above (where a plaintiff sues two defendants from the same state, and one defendant wants to

cross-claim against the other). While the first element is met (jurisdiction over plaintiff's claim is based solely on diversity), the second element is not, because a defendant is filing the cross-claim. The § 1367(b) exception accordingly would not bar the claim.

*C. The dependent claim must be against a person “made a party” under one of the listed rules.* § 1367(b) only applies when the dependent claim is filed against a person made a party under Federal Rule 14, 19, 20, or 24.<sup>9</sup> Admittedly, this list exhausts most of the ways a person can be made a party to a case. Federal Rule 20, for example, deals with when a plaintiff may join two defendants. Note that the important consideration is the Federal Rule under which the person was joined to the case, not the Rule authorizing the particular claim at issue. Therefore, again referring to the defendant cross-claim example set out above, the party against whom the claim is asserted (the second defendant) was joined under Federal Rule 20, even though Federal Rule 13(g) governs when the cross-claim is proper. (However, because that claim was not by a plaintiff, it fails to meet the second element, as discussed in the prior paragraph.)

While the § 1367(b) language includes most of the joinder rules, it does not include all. In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005), the Court dealt with two of the most conspicuous omissions: claims by multiple plaintiffs (who technically “join” the case under Federal Rule 20, and may accordingly not be someone “made” a party under that Rule), and members of a class in a class action (who are made parties under Federal Rule 23). With respect to the class action question, the Court held that the omission of Federal Rule 23 from the exclusion was clear, and that accordingly a class could sue in federal court even if some of the members had claims less than \$75,000. The Court's analysis of the multiple plaintiff question was more nuanced. That analysis focuses on the reason why the dependent claim would not qualify for diversity jurisdiction. If the problem was a lack of complete diversity (i.e., diverse and non-diverse plaintiffs joining in the action), supplemental jurisdiction would not be available for claims brought by the non-diverse plaintiffs. However, if the problem (as in the case itself) was that all plaintiffs were diverse from all defendants, but that not all had claims meeting the amount in controversy, supplemental jurisdiction would be available. The Court based its reasoning on the different policies underlying the complete diversity and amount in controversy requirements.

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<sup>9</sup> The exception also applies to claims by a plaintiff who intervened under Rule 24, or who was made an involuntary plaintiff under Rule 19. These more advanced forms of joinder are discussed in Chapter 8.

### *iii. Discretion*

Even if the § 1367(b) exception does not apply, § 1367(c) gives a court some discretion to refuse to hear the dependent claim. Note that like the diversity exception, the discretion factors apply only to dependent claims. A court must exercise jurisdiction over the *independent* claim even if one of the factors listed in § 1367(c) pervades the dispute.

The first three listed factors revolve around a basic theme, which is mentioned in the second. If the dependent state-law claim dominates the case, either in terms of the percentage of time the court must devote to it or in terms of its relative importance, the federal court should defer to the state courts and dismiss the state claim. While it is a relevant consideration, the amount of damages sought under the two claims is not necessarily controlling. Thus, a federal court could decide not to dismiss a state-law claim even though plaintiff sought five times the amount of damages under that claim as it sought for the independent claim. Conversely, a novel or complex state law claim could predominate the case even if the damages sought are far less than for the independent claim.

## **b. Supplemental Jurisdiction and Joinder of Claims and Parties**

Supplemental jurisdiction is obviously a benefit to a plaintiff who wants to join both a federal and state-law claim against a non-diverse defendant. However, as hinted at above, it can also allow a court to exercise jurisdiction over other claims such as counterclaims and cross-claims (as well as third-party claims and other claims discussed in Chapter 8). One benefit of the statutory approach set out above is that the first step closely resembles the “same transaction or occurrence” test often used under the Federal Rules to determine if joinder is proper in the first case. As a result, if joinder of a particular claim is proper under one of those rules, it is quite likely also to satisfy the “common nucleus” test in the first part of the § 1367 analysis.

To illustrate, consider a case where plaintiff sues two defendants in federal court based on diversity. Defendant One has a \$50,000 state-law claim it would like to file against Defendant Two. Defendants One and Two are citizens of the same state. The first step in the analysis is to determine whether the Federal Rules allow the claim as a matter of procedure. The answer lies in Federal Rule 13(g): if the cross-claim arises from the same transaction or occurrence as plaintiff’s claim, it is allowed under Rule 13(g). The second step is subject-matter jurisdiction. Because the cross-claim is not a federal question, and both defendants are from the same state, there is no independent basis for jurisdiction. However, our earlier determination that the two claims arise from the same transaction or occurrence means they also derive from a common nucleus of operative fact, and therefore satisfy § 1367(a).

Be careful not to make this analysis too mechanical. First, never forget that § 1367(a) is merely the first of three steps. It is also important to consider subsections (b) (the diversity exception) and (c) (the discretion provision). Applying § 1367(b) to our cross-claim example, the exception does not destroy jurisdiction. While jurisdiction over the independent claim (plaintiff's original claim) *is* based solely on diversity, the dependent claim (the cross-claim) is not one made *by a plaintiff*. In addition, depending on the circumstances, the court could refuse to exercise jurisdiction under one or more of the discretionary factors listed in § 1367(c).

A second reason to avoid a purely mechanical analysis is that the joinder rules and § 1367(a) do not always coincide. Consider compulsory counterclaims. A counterclaim is usually compulsory if it arises from the same transaction or occurrence as plaintiff's original claim. But Federal Rule 13(a) exempts some claims. For example, a claim that is already pending in another action is not a compulsory counterclaim even if it does arise from the same transaction or occurrence as one of plaintiff's claims. Although that pending claim is a permissive counterclaim, it still arises from a common nucleus of operative fact, and accordingly would satisfy § 1367(a). In short, be careful of relying on "rules of thumb" such as "compulsory counterclaims qualify for supplemental jurisdiction, but permissive counterclaims do not." For the two reasons just discussed, *both* aspects of this proposition are incorrect in some cases!

#### 4. REMOVAL

Federal courts usually share subject-matter jurisdiction with the state courts. Many cases could be brought in either system. Because she commences the action, plaintiff has the luxury of making the initial choice whether to sue in state or federal court. However, this initial choice is not absolute. The removal statutes level the playing field by giving defendant the opportunity to move a case initially filed in state court to the federal system.

As with other aspects of federal subject-matter jurisdiction, there are several federal statutes allowing removal. However, we will focus only on the "general" federal removal statute, 28 U.S.C. § 1441. The basic test under § 1441 is quite simple: an action may ordinarily be removed by defendant to federal court if plaintiff could have filed it originally in federal court. Therefore, analysis of removal involves the same issues of federal question, diversity, and supplemental jurisdiction discussed above.

Section 1441(b)(2) contains an important exception to this basic principle, an exception that applies only in diversity cases. If the sole basis for subject-matter jurisdiction is diversity, and any of the defendants is a citizen of the state in which the state-court action is brought, removal is not allowed. The rationale for this exception is that any bias the state court

might exhibit would only favor the in-state defendant, obviating the need to allow defendant to remove.

Removal is effected by filing a “notice” of removal. In cases involving multiple defendants, all defendants who have been served with process must join in the notice, or it is ineffective. Removal is a right, not a request. Therefore, once the notice of removal is filed and served on the other parties, the state court automatically loses subject-matter jurisdiction over the action, and any rulings or orders it makes from that point forward have no effect.

Sections 1446 and 1447 set out additional procedural rules governing removal. The notice of removal must be filed within 30 days after defendant is served with the pleading demonstrating the case is removable. This pleading need not be the initial complaint. For example, if plaintiff initially sues a non-diverse defendant only under state law, but months later files an amended complaint adding a factually-related federal question, defendant would have 30 days following service of the *amended* complaint to file the notice of removal. (The case would be removable by a combination of federal question and supplemental jurisdiction.) This 30-day rule is subject to another “diversity exception.” Under [28 U.S.C. § 1447\(c\)\(1\)](#), the right to remove a case based solely on diversity expires one year after the case is first commenced. Thus, if plaintiff brings state-law claims against both a diverse and a non-diverse defendant, and sixteen months later files an amended complaint dropping the non-diverse defendant, removal is impossible.<sup>10</sup>

Note there is no counterpart to removal if plaintiff originally selects federal court. Unless defendant can convince the federal court either to dismiss the action or abstain from hearing it, an action filed in federal court must remain there.

## C. PERSONAL JURISDICTION

*[This section is a condensed alternative to Chapter 3, Part A.]*

Personal jurisdiction is a court’s power to issue a judgment or order binding the parties to the case. It is separate and distinct from subject-matter jurisdiction. In order to hear a case, a court must have *both* subject-matter and personal jurisdiction (as well as venue, discussed in Part D of this Chapter). Therefore, a party selecting a forum must ensure that forum can exercise personal jurisdiction, or her efforts may prove for naught.

As with subject-matter jurisdiction, there are constitutional limits on a court’s power to exercise jurisdiction over a party. But the source of these limits is different. Instead of Article III, the main limits on a court’s

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<sup>10</sup> For a quick review of the other facets of jurisdiction, explain why defendants cannot remove the initial action, even if filed in a state other than the states where defendants are citizens. *Hint:* The answer lies in § 1367(b).

personal jurisdiction stem from the Constitution's "due process" clause in the fourteenth amendment. A series of U.S. Supreme Court decisions has analyzed how this limit applies.

Personal jurisdiction is primarily (although not exclusively) concerned with protecting defendants. Courts rarely deal with personal jurisdiction over plaintiffs. Because plaintiff gets to select the forum in which the suit is filed, plaintiff will ordinarily be deemed to have waived any personal jurisdiction objection.

The rules of personal jurisdiction protect defendants in two ways. First, they try to ensure defendant has adequate notice of the action. Second, they attempt to prevent defendants from being forced to litigate a case in a forum that lacks a meaningful connection with the defendant or the dispute, or is unduly unfair to defendant. Because personal jurisdiction mainly protects litigants rather than the court system, it is a defense that defendant must explicitly invoke. Unlike subject-matter jurisdiction, courts will rarely raise the issue of personal jurisdiction *sua sponte*. Moreover, as will be discussed in Chapter 7, Part B, the defense must be raised very early in the suit or it is lost.

## 1. BASIC REQUIREMENTS

### a. Nexus and Notice Both Required

Any attempt to exercise personal jurisdiction must satisfy two separate elements. First, as indicated above, there must be a meaningful connection, or "nexus", between defendant and the forum. Part 2 below discusses this element. As the discussion in that section will show, what sort of nexus suffices differs in certain situations.

Second, plaintiff must afford defendant adequate notice of the action. Plaintiff ordinarily provides this notice by serving defendant with both a copy of the complaint (the pleading setting out plaintiff's claims), and a brief summons from the court directing defendant to appear in the action. There are explicit rules governing the way in which the summons and complaint are served, as well as constitutional limits.

The rules governing service are set out in Chapter 6, Part C, in the materials discussing the complaint. However, while the following discussion concentrates on nexus, never forget that notice is also required. No matter how compelling the nexus between defendant and the forum, if there is no rule authorizing service of process, or if plaintiff does not follow the rule, the court has no personal jurisdiction over defendant (unless defendant has consented to jurisdiction and/or waived lack of service).

### b. *In Personam* and *In Rem* Jurisdiction

Conceptually, courts recognize two different types of personal jurisdiction. *In personam* jurisdiction is power over the defendant herself. *In rem* jurisdiction is power over some property interest that defendant owns or claims to own. A court exercising *in rem* jurisdiction determines who owns the property. *In rem* jurisdiction is especially useful in title disputes, mortgage or lien foreclosure actions, and cases attempting to disburse someone's estate. However, it is not confined to these types of cases.

There are important differences between *in personam* and *in rem* jurisdiction, as summarized in the following table:

	<i>In personam</i>	<i>In rem</i>
<b>What court may exercise</b>	Any court with a sufficient nexus (multiple states may each be able to exercise)	<i>Only</i> the court in which the property is situated
<b>Method of service</b>	Personal service on defendant	Property must be seized at outset of litigation, and personal service on defendant <sup>11</sup>
<b>Limits on judgment</b>	None	Because judgment is against the property, not the owner, limited to value of property
<b>Effect of judgment in later litigation</b>	Defendant precluded from relitigating the merits	Because judgment is against the property, not the owner, defendant may be able to relitigate the merits

As will be shown below, the Supreme Court cases dealing with nexus have erased some of the historical distinctions between *in personam* and *in rem* jurisdiction. Nevertheless, the differences set out in the table above remain in force. The limits on *in rem* jurisdiction mean that in most cases, *in personam* jurisdiction will be a far more attractive option for defendant. However, *in rem* jurisdiction remains important. First, it is the only way a plaintiff who wants to foreclose on property or obtain a quiet title judgment can litigate rights to the property. Second, in some cases (such as where defendant cannot be found), *in rem* jurisdiction may be the only option.

<sup>11</sup> Personal service on the defendant was historically not required in *in rem* cases. However, in its 1950 *Mullane* decision, the Court held that service in *in rem* cases was subject to the same notice requirements applicable to *in personam* service. *Mullane* is set out in Chapter 6, Part C.

## 2. CONSTITUTIONAL RESTRICTIONS ON EXERCISING JURISDICTION

The Due Process clause of the fourteenth amendment is the primary constitutional restriction on a court's ability to exercise personal jurisdiction. That provision prevents government from depriving "any person of life, liberty, or property, without due process of law." A judgment rendered by the court involves just such a deprivation, for depending on the nature of the judgment, defendant may be deprived of liberty (by a court order requiring it to do something or to refrain from doing something) or property (by a judgment that may result in defendant paying money or seizure of defendant's assets). For such a judgment to survive constitutional scrutiny, the court must afford defendant due process. Since the Court's 1877 decision in *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 24 L.Ed. 565 (1877), a judgment rendered without personal jurisdiction is unenforceable both in the state where rendered and in other states.

Notwithstanding the terminology, due process requires more than just fair process or procedure. It also operates as a fundamental limit on a court's basic power to render binding judgments. As the Supreme Court explained in a seminal 1980 case, the due process personal jurisdiction analysis:

... can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burden of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). These two functions are sometimes referred to as the "fairness" and "sovereignty" components of the due process analysis. While some later opinions have questioned whether sovereignty is really a separate and distinct component, the portion of the test used to measure sovereignty remains an essential part of the analysis.

### a. The Constitutional Test

The *Pennoyer* case cited in the prior section held that a state's jurisdiction was in most cases limited to *in personam* jurisdiction over defendants actually found and served in the forum, and *in rem* jurisdiction over property located and seized in the forum. As society became increasingly mobile, however, this rule proved too restrictive. The Court revisited the due process question almost 70 years after *Pennoyer* in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). *International Shoe* adopted the "minimum contacts" test, which remains in force to this day. Indeed, all post-*International Shoe* personal

jurisdiction decisions either flesh out the test or show how it applies in a particular context.

Under the minimum contacts test, a court's jurisdiction is no longer strictly territorially limited to people or property within its borders. Instead, a court can exercise jurisdiction over a defendant outside the state as long as there are "minimum contacts with [the state] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316. As this quote demonstrates, the minimum contacts test involves two separate considerations: "contacts" and "fairness."

### *i. Contacts*

The contacts portion of the analysis reflects the sovereignty concerns cited by the *World-Wide Volkswagen* Court. In essence, it would violate "principles of interstate federalism" for a court to exercise jurisdiction over a defendant who has no connection with that state. The existence of contacts is a necessary condition to jurisdiction. If there are no contacts between the defendant and the forum, a court cannot exercise personal jurisdiction over that defendant no matter how fair the exercise of jurisdiction might be under the second part of the test (unless, of course, defendant waives the objection).

Several decisions over the past forty years have fleshed out the meaning of "contacts" and how many are needed to establish "minimum contacts." The most important limit comes from *World-Wide Volkswagen* itself. In that case, the Court held that not all connections count as contacts. Instead, a connection is a contact only if it involves "purposeful availment of the benefits and protections of forum law." In other words, a contact exists only when there is a purposeful act by defendant to take advantage of the forum's laws and legal system.

*World-Wide Volkswagen* also illustrates how this concept applies. In that case, a car dealer sold a car to plaintiff in New York. Plaintiff then drove the car to Oklahoma, where he was injured in a wreck. Plaintiff attempted to sue the dealer in Oklahoma. The Supreme Court held the dealer had no contacts with Oklahoma. Although it was certainly foreseeable that a buyer might drive a car to Oklahoma, the dealer had done nothing to purposefully avail itself of the benefits and protections of Oklahoma law. Foreseeability is certainly relevant. But, the Court held, the foreseeability that matters is the foreseeability of being haled before the courts of the forum. That foreseeability exists only when the defendant purposefully directs activity at the forum in a way that affords defendant the benefits and protection of the forum's laws.

*ii. Nature and Number of Contacts: “General” and “Specific” Jurisdiction*

When setting out the basic minimum contacts test in its *International Shoe* opinion, the Court made it clear not all contacts carry equal weight. A key consideration is whether the case being heard arises out of those contacts. When a case directly arises out of defendant’s purposeful contact with the forum, even a single contact can be enough to allow the exercise of jurisdiction. By contrast, in many cases defendant will have one or more contacts with the forum that have nothing to do with the case—perhaps unrelated sales or shipments or maintenance of an office or staff in the state. However, the Court in *International Shoe* suggested that when defendant had “systematic and continuous” contact with the state, the state might be justified in exercising jurisdiction even if the dispute did not arise out of those contacts.

This passage in *International Shoe* has been construed as recognizing two different categories of personal jurisdiction, which are commonly called “specific” and “general.” The difference between the two is whether the claim arises out of the contacts. Specific jurisdiction applies when the claim arises out of the contacts, while general jurisdiction applies when the claim does not arise out of the contacts. While specific jurisdiction can exist with even a single contact, general jurisdiction requires much more, both in sheer number of contacts and in the period over which the contacts occur.

Unfortunately, the concept of general jurisdiction based on “systematic and continuous” contacts led to some confusion. All courts agreed that a party could always be sued in its home state, even if not currently in the state. Similarly, a corporation with its headquarters and main operations in a state could be sued there even if the claim arose out of activities in other states. But courts disagreed as to whether a state other than the “home” state could also exercise general jurisdiction. Some claimed a large company like General Motors might be subject to jurisdiction in every state, regardless of where the claim arose.

Early Supreme Court decisions dealing with general jurisdiction did little to clarify the issue. Finally, in [Daimler AG v. Bauman, 517 U.S. 117 \(2014\)](#), the Court held the scope of general jurisdiction was narrower than many had thought. In that case, the Court held general jurisdiction would exist only in the state where defendant is “essentially at home”. No matter how many contacts defendant might have with other states, general jurisdiction exists only in the state where defendant has the most significant contacts.

*Daimler* also clarified another outstanding issue in general jurisdiction. Before that decision, some courts applied the “fairness factors” (discussed below) both in specific and general jurisdiction cases. *Daimler* made it clear the fairness factors do not apply in cases of general

jurisdiction. Once a court determines defendant is essentially at home in the chosen forum, jurisdiction exists without regard to the “fairness factors.”

### *iii. Fairness*

The second part of the minimum contacts analysis—which applies only to specific jurisdiction, not general—considers how fair it would be for a court to compel defendant to litigate in the forum. Although *International Shoe* also established this part of the test, the case itself did not specify how fairness affected the contacts portion of the analysis. More recent cases make it clear that this second factor only serves to *defeat* jurisdiction. As demonstrated above, there must at a minimum be some contacts for personal jurisdiction to exist. Even when there are contacts with the forum, the fairness side of the analysis might defeat jurisdiction if it would be particularly unfair to defendant.

Fairness involves more than the distance defendant must travel. The *World-Wide Volkswagen* Court identified five fairness factors:

1. The burden on the defendant, which the Court indicated is the primary concern;
2. The forum’s interest in adjudicating the case;
3. Plaintiff’s interest in obtaining “convenient and effective relief”;
4. The interest of the interstate judicial system in efficient resolution of controversies; and
5. The shared interest of the states in furthering fundamental social policies.

At first glance, it might seem these factors give a court considerable discretion to refuse to exercise jurisdiction. In fact, once purposeful contacts are shown, a party must make an exceptionally strong case of unfairness to defeat jurisdiction. The Supreme Court’s decision in [Asahi Metal Industry Co. v. Superior Court](#), 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) demonstrates how strictly courts apply the fairness factors. Indeed, *Asahi* is the only Supreme Court case to hold that the fairness factors prevented a forum from exercising jurisdiction over a defendant who otherwise had sufficient contacts with that forum.

*Asahi* involved a motorcycle accident that occurred in California. Plaintiff sued several defendants, including the manufacturers of the motorcycle and the tire installed on the motorcycle, in a California court. The tire manufacturer, a Taiwanese company, joined the manufacturer of the valve used in the tire, a Japanese company, into the action. All parties settled save the manufacturers of the tire and valve. The valve manufacturer then asserted lack of personal jurisdiction. In a fractured

opinion, a majority of the Court agreed there were contacts between the valve manufacturer and California. However, eight Justices agreed the fairness factors made it unconstitutional for California to exercise jurisdiction.

*Asahi* prevents a fairly compelling case of unfairness. Indeed, three of the factors made exercise of jurisdiction patently unfair. These include:

- *Burden on the defendant.* The burden on the Japanese company was quite significant. This burden included not only the international travel involved, but also the fact the company would be forced to defend itself in a foreign legal system, which used a different language.
- *Interest of the forum.* California had no real interest in the dispute. All other parties, including the California plaintiff, had settled. Therefore, California's interest in ensuring compensation for its citizen was no longer an issue. All the case would determine is whether the Taiwanese company had to absorb its full share of the damages, or whether the Japanese company would have to reimburse it in whole or in part. California really had no interest in that issue.
- *Interest of the plaintiff.* The original plaintiff (the California victim) was no longer in the case. Even if one were to treat the Taiwanese claimant as a "plaintiff", that company had no real interest in having the dispute heard in California. The original plaintiff, not the Taiwanese tire manufacturer, had selected California. It would be more convenient for the Taiwanese company to litigate in its own system or in Japan.

The other two factors, while not pointing strongly to dismissal, were essentially a wash. The interest of the interstate judicial system in efficient resolution of controversies was not an important factor. The primary concern of this factor is avoiding piecemeal litigation, which might occur in a multiparty case where the court dismissed claims against some defendants but not others. In *Asahi*, all that remained was the Taiwanese company's claim against the Japanese company. A dismissal would accordingly not split up parts of a case to be resolved in different U.S. courts. In fact, the Court suggested dismissal would actually be more efficient because it would place the burden of hearing the case on the Japanese or Taiwanese courts rather than U.S. courts. Finally, the interest of the several states in furthering fundamental social policies was not a factor. There was no reason to think the law that a Taiwanese or Japanese court might apply would be significantly less favorable to either party.

After *Asahi*, it will be difficult for a defendant to prevail on the fairness factors. As long as defendant is from the United States, the burden of traveling even cross-country is not likely to be sufficient. The most likely

case in which the fairness factors could apply is one where plaintiff sues in a forum with no real connection to either the dispute or plaintiff, and where dismissal would not break up a multiparty case.

## **b. Particular Applications of the Analysis**

The contacts and fairness analysis discussed in the prior section remains the standard analysis used in all constitutional challenges to specific personal jurisdiction. However, how that analysis applies in particular circumstances is not always obvious. This section discusses how the courts apply the minimum contacts analysis in certain commonly-occurring situations.

### *i. Defendants Served in the Forum*

*Pennoyer v. Neff*, the 1877 Supreme Court decision holding that the Constitution limited personal jurisdiction, applied a strictly territorial approach. Under this approach, states had unquestioned power to exercise jurisdiction over defendants served in the forum, even if the presence was involuntary, transitory, and/or unrelated to the case. This strict rule is not necessarily compatible with the *International Shoe* minimum contacts test, under which contacts are evaluated based on their relationship to the claim. However, in *Burnham v. Superior Court*, 495 U.S. 604 (1990), the Court reaffirmed that service on an individual defendant who is voluntarily present in the forum is always constitutionally acceptable, even if defendant's presence is unrelated to the case.

### *ii. Service on an Agent*

Generally, the law allows a party to act either by itself or through an agent. The same principle applies in personal jurisdiction. If a party appoints an agent for service of process in a state, service on the agent is the equivalent to service on the party itself—and thus enough for jurisdiction.

Note that the agent must have the authority to accept service. To some extent, every employee of a firm is an agent. However, most employees are not agents for purpose of service. To qualify as an agent for service of process, the party must have explicitly granted the agent that authority, or permitted conditions to exist under which that agent appears to have authority. An example of the latter situation, called “apparent authority”, would be a store manager who, when presented with process, declares he has the authority to accept documents of that sort.

### *iii. Residents of the Forum Served out of State*

In *Milliken v. Meyer*, 311 U.S. 457 (1940), the Supreme Court held that a resident of a state could always be sued in the state, even if not currently there. While *Milliken* predates *International Shoe*, that rule has never been

questioned, and remains applicable today. Conceptually, jurisdiction over residents is best thought of as an example of general jurisdiction (discussed in section a.ii above), especially given the “essentially at home” analysis now used in general jurisdiction cases.

#### ***iv. Corporations***

Although they are legal fictions, corporations have due process rights. In most cases, courts use the minimum contacts test discussed in the prior section to deal with corporate challenges to personal jurisdiction. However, there are also two situations in which a corporation can be sued in a forum without need to apply minimum contacts analysis. First, as noted above, corporations can be subjected to general jurisdiction in the state or states where they are “essentially at home.” Courts usually find that a corporation is essentially at home in the state where it has its primary headquarters, even if its main physical operations are located elsewhere. Second, a corporation can also be sued in the state in which it was incorporated, even if it has no operations at all in that state. The justification for this latter rule is that because the laws of the state of incorporation essentially created the corporation, the corporation should be subject to the authority of that state’s judicial system.

Several states require a corporation to appoint an agent for service of process as a condition to doing business in the state. In many cases, this agent is the secretary of state or similar official. Service on such an agent subjects the corporation to personal jurisdiction under the agency theory discussed in subsection ii above.

#### ***v. Contract Cases***

Courts also apply the minimum contacts analysis in suits for breach of contract. For specific jurisdiction, the contract itself is an important contact. Courts look to the specific features of the contract, including where it is made, where it is to be performed, and where any harm stemming from a breach is likely to be felt. No single factor is determinative. Rather, courts weight all the factors. In some cases, several different states could hear a particular breach of contract action.

Many multistate contracts contain a “choice of law” clause, under which the parties select what law will govern their rights and obligations under the contract. Courts will also consider these clauses in the personal jurisdiction analysis. While not controlling in and of itself, a choice of law clause is relevant because the contracting parties have purposefully sought out the benefits and protections of that state’s laws.

#### ***vi. Stream of Commerce Cases***

The “stream of commerce” situation has proven extremely difficult. In these cases, defendant does not sell its product directly to the buyer, but

rather distributes it through another party. The key to these cases is that defendant *knows* some of its product ends up in the forum, but neither directs the downstream party to sell it there nor plays a role in the decision. The product may be an end product, or a component incorporated into an end product. The *Asahi* case discussed in Section 2(a)(iii) above (in connection with fairness) is a good example of a stream of commerce case.

The stream of commerce situation arises quite often. For many years, courts struggled with determining whether a party who purposefully injects its product into the stream of commerce, and knows some of its product ends up in forum X, has purposefully availed itself of the benefits and protections of forum X's law. *Asahi* was the first Supreme Court decision directly to address the issue. However, the result in *Asahi* was a plurality opinion, where the Justices could not agree on the test to apply. Some of the Justices indicated that intentionally placing a product into the stream of commerce, with knowledge it would end up in the forum, was sufficient. Others held that some additional activities specifically directed at the forum were required. Examples of such activities might include advertising in the forum, maintaining repair or service facilities in the forum, or specifically designing the product to address special considerations in the forum.

The Court may have resolved the question in *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873 (2011). In this decision, a majority of the Justices suggested that merely placing a product into the stream of commerce was not enough to satisfy due process, even if the party realized some of the product would end up in the forum. Rather, jurisdiction would exist only if defendant engaged in activities specifically directed at the forum. Absent these additional forum-directed activities, jurisdiction may not be constitutional. However, the Court has yet to rule definitively on the issue.

### ***vii. Intentionally Causing Harm to a Resident of the State***

In certain situations, activity that occurs in one state has an effect in another. The *World-Wide Volkswagen* decision makes it clear that the possibility of harm in another state is not enough to allow the state where the harm occurs to exercise jurisdiction. Instead, jurisdiction exists only if the party engages in activities purposefully directed at the forum.

But what about intentional tort cases where the actor intends harm in another state? For example, a party that publishes a defamatory article about a resident of another state should understand that the harm will be felt in the state where the subject resides. If the party itself actually distributes the publication in the state, there are likely to be minimum contacts. However, if the party does not distribute in the state, the issue is more difficult. This situation arises with increasing frequency today because of the internet. The internet makes it easy for a party to cause

harm in another state without ever setting foot or engaging in other activity in that state.

The Court resolved this issue in *Walden v. Fiore*, 571 U.S. 277 (2014). *Walden* holds that purposefully causing harm that will be felt in another state is not, standing by itself, enough to satisfy the minimum contacts test. Instead, jurisdiction will exist only if defendant engages in other acts from which it derives some benefits and protections of forum law. These will usually be acts committed in the forum.

In *Walden* itself, plaintiffs, residents of Nevada, were searched by defendants, officers of the Drug Enforcement Agency, at an airport in Georgia. Defendants seized \$97,000 in cash from plaintiffs. Defendants knew plaintiffs were from Nevada, and that they were about to take a flight to Las Vegas. Plaintiffs sued in Nevada, claiming defendants' purposeful seizure harmed them in Nevada by preventing them from putting the money in their Nevada bank accounts. The Court held the Nevada courts could not exercise jurisdiction over defendants. Defendants had engaged in no acts from which they derived any benefit or protection of Nevada law. Absent this purposeful availment, it was unconstitutional for Nevada to exercise jurisdiction, even though defendants realized their acts would cause harm in Nevada.

### *viii. Internet Cases*

Courts have struggled to apply the minimum contacts test to the internet. At first, many courts applied the *Zippo* test, which requires the court to classify the particular website as passive, active, or interactive. A *passive* site is essentially a "read-only" site, where the viewer cannot enter information. Under the *Zippo* test, personal jurisdiction does not exist if the only contact with the state was operation of a passive site that could be viewed in the forum. (If the party also physically operates the site from a location in the forum, that activity would usually be a sufficient contact.) An *active* site allows the viewer both to enter information and enter into transactions with the person operating the site. In case of suits arising out of the internet transaction, the *Zippo* test allows the viewer to sue the site operator in the viewer's state.

An *interactive* site conceptually lies between the active and passive sites. A site is classified as interactive if the viewer can enter information, but no transaction is consummated. In these cases *Zippo* calls for the court to consider all the circumstances, including whether the site is commercial in nature and the level of activity on the site.

Courts increasingly reject the *Zippo* test, reasoning that it does not reflect the reality of the internet. For example, the test would treat a "slam site"—one where the site owner intentionally makes derogatory comments about a person located in the forum—the same as a blog where a person discusses only herself. The Supreme Court's *Walden* decision, discussed in

the prior subsection, provides a better way of dealing with these cases. Similarly, as the Court resolves other issues under the minimum contacts test, courts increasingly try to adapt these principles to the internet context.

### *ix. In Rem Jurisdiction*

As discussed in Part 1(b) of this discussion, courts distinguish between *in personam* and *in rem* jurisdiction. The discussion of the constitutional test to this point has focused only on *in personam*. Under the Supreme Court's decision in *Pennoyer*, a court could always exercise *in rem* jurisdiction by seizing property of the defendant located in the forum. Whether the claim had anything to do with the property was irrelevant. Conceptually, courts viewed these cases as suits against the property, not against the person owning the property.

This simple approach changed in *Shaffer v. Heitner*, 433 U.S. 186 (1977). In *Shaffer*, the Court held the minimum contacts test also applies to *in rem* cases. The Court rejected the fiction that an *in rem* suit is against the property. Because the effect of the suit is to deprive the defendant of its interest in the property, exercise of *in rem* jurisdiction also implicates the due process rights of the defendant. Therefore, the same constitutional test applies.

When applying the minimum contacts analysis to *in rem* cases, it is important to consider whether the underlying claim arises out of the property seized. If the property is defendant's only connection with the forum, and the claim does not arise out of the property, the forum cannot exercise jurisdiction over the property. Conversely, when the claim arises directly out of the property—such as a mortgage foreclosure or a suit arising out of injury suffered on defendant's land—the court may exercise jurisdiction even if the property is the only contact. Note that in these cases the court might also be able to exercise *in personam* jurisdiction over defendant. In fact, *Shaffer* essentially equates *in personam* and *in rem*, at least from a constitutional perspective. *In rem* jurisdiction is possible only if there are enough contacts between the defendant/owner and the forum that the court could also exercise *in personam* over that defendant/owner.<sup>12</sup>

It is important not to read too much into the *Shaffer* opinion. Courts and attorneys sometime overlook the following key points:

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<sup>12</sup> Although the contacts analysis is the same, it is not always true that a court will be able to exercise *in personam* whenever it can exercise *in rem*. As discussed in the Introduction to this section, and explored further in Chapter 6, jurisdiction also turns on the ability to serve process. If no statute or rule allows for service, personal jurisdiction will not exist, even if contacts are clearly constitutionally sufficient. There may be situations in which the only possible method of service is *in rem*. Although courts in these cases could *constitutionally* exercise either form of jurisdiction, because of the service provisions only *in rem* may be available. The converse is also true—in some cases, restrictions in the service provisions may mean only *in personam* is available.

- *Shaffer* does not destroy *in rem* jurisdiction. As long as there are minimum contacts between defendant/owner and the forum, *in rem* is constitutionally permissible.
- Property is a contact between defendant/owner and the forum, at least where defendant/owner purposefully keeps the property in the forum. By keeping property in the forum, defendant/owner derives the benefits and protections of the forum, including not only laws protecting ownership, but also the benefits of police and fire protection. Because property is a contact, it counts in the minimum contacts analysis.
- Jurisdiction is sometimes possible even when the property is the only contact between defendant/owner and the forum. As discussed above, when the claim arises out of the property, the property alone is usually enough.
- In some cases, the forum where the property is located is the *only* forum with authority to hear the case. Some types of cases must be brought using *in rem* jurisdiction. Only the state in which property is located has the authority to issue a ruling affecting the title to property. Therefore, suits to quiet title, remove a cloud on title, or foreclose a mortgage or other security interest *must* be brought in the state where the property is situate.
- Although *Shaffer* equates the constitutional test used in both *in personam* and *in rem* cases, it does not change the basic limitations on *in rem* jurisdiction. These limits are set out in the chart in Part 1(b). Even though there are minimum contacts between defendant/owner and the forum, if plaintiff uses *in rem* the judgment is limited to the value of the property, and may not be enforceable against defendant/owner personally in later litigation.

### c. Waiver and Consent

Unlike subject-matter jurisdiction, personal jurisdiction is mainly a personal, not a systemic, concern. Litigants may freely waive their constitutional right to due process. They may also consent to jurisdiction. If a party waives or consents to jurisdiction in a forum, it is irrelevant whether there are minimum contacts between that party and the forum. Plaintiffs ordinarily consent to jurisdiction simply by bringing suit in the forum. The only exceptions are cases where plaintiff did not select the forum, which are discussed in Chapter 8.

*i. Waiver by Failure to Object in Timely Fashion*

Defendant must explicitly raise the defense of personal jurisdiction. If defendant fails to bring the issue to the court's attention, she ordinarily loses the defense. In fact, most courts require the defense to be raised very early in the case. The rules governing timeliness of the personal jurisdiction defense are discussed in Chapter 7, Part B.1. Courts rarely raise personal jurisdiction *sua sponte*, although they may be more likely to do so in cases where defendant is not represented by counsel.

*ii. Consent*

Parties may consent to personal jurisdiction. It is very common for contracts to contain clauses in which the contracting parties consent to jurisdiction in a particular forum. Although these clauses are subject to abuse, especially when they select a forum that favors one side, courts rarely refuse to enforce them when both parties are engaged in business.

Courts are somewhat more leery of consent to jurisdiction clauses in consumer contracts. Even here, however, it is difficult for a defendant to convince a court not to honor such a clause. Courts will refuse to apply the clause only where it is fundamentally unfair. That the clause is non-negotiable does not by itself render the clause fundamentally unfair.

A variation on the theme is the "forum selection clause", in which the parties agree that disputes under the contract may be heard *only* in a particular forum. Some states do not honor these clauses, under the rationale that the parties do not have the authority to deny the court's authority to decide a dispute. Most courts, however, will honor a forum selection clause. Note that a forum selection clause is treated as consent to jurisdiction in the chosen forum, even if the contract contains no consent to jurisdiction language.

Service on a corporate agent, discussed in subsection iv above, also operates as a form of consent. By appointing an agent for service in a state, the corporation consents to service on the agent, and hence to jurisdiction in the forum.

**d. Personal Jurisdiction in the Federal Courts**

The previous discussion focused on the state courts. The minimum contacts analysis looks to the contacts between defendant and the state hearing the case. Conceptually, personal jurisdiction in the federal courts should be treated differently. Because the sovereignty of the federal government extends to the entire nation, in principle the analysis should look to contacts between defendant and the United States as a whole.

In most cases, however, a federal court will only be able to exercise personal jurisdiction over a defendant if the courts in the state where that federal court sits could exercise jurisdiction. This rule does not come from

the Constitution. Rather, it stems from the Federal Rule governing service of process. Federal Rule 4(k)(1)(A), discussed in Chapter 6, provides that service of process on a defendant establishes personal jurisdiction only to the extent defendant “is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.” Thus, even in federal court the analysis will usually turn on minimum contacts with a state. This limit applies even in cases arising under federal law.

Rule 4(k)(1) also has exceptions. First, a special rule applies to service on third party defendants joined under Rule 14 and involuntary plaintiffs joined under Rule 19. In these cases, personal jurisdiction exists as long as the party is served in the United States at a location within 100 miles of the court issuing the summons. If the court is located near a state border, this “100-mile bulge” may extend into another state. Nevertheless, service within the 100 miles creates personal jurisdiction in federal court regardless of whether the party served has minimum contacts with the state in which the action is being litigated.

Second, in certain cases arising under federal law a federal court will have nationwide jurisdiction. Some federal statutes explicitly allow for nationwide service. Rule 4(k)(1)(C) allows a federal court to exercise jurisdiction over defendants sued under one of these federal statutes regardless of whether a state court hearing the same claim would have personal jurisdiction. In addition, even if the governing statute does not explicitly allow for nationwide service, Federal Rule 4(k)(2) allows a federal court to exercise jurisdiction over a federal claim if no state court could exercise personal jurisdiction. Rule 4(k)(2) comes into play only in unusual cases. It applies in the rare case where defendant has minimum contacts with the United States as a whole, but not with any particular state. The defendant in such a case invariably lives outside the United States, but does some business with various parties in the United States.

## D. VENUE AND TRANSFERS

*[This section is a condensed alternative to Chapter 3, Part B.]*

Venue is the third of the three main limitations on a plaintiff’s choice of forum. In many respects, venue resembles personal jurisdiction. However, there are important differences. First, venue is not a constitutional issue. It is governed by statute or court rule, not by notions of due process. Second, while it often involves the same considerations as personal jurisdiction, the test is different. It is common for a court to have personal jurisdiction but not venue, or vice-versa. However, the net result is the same: a court that lacks either personal jurisdiction or venue cannot hear the case.

## 1. THE FEDERAL VENUE PROVISION

Venue is an issue regardless of whether the case is in state or federal court. However, state venue rules vary considerably. Accordingly, the discussion of venue rules in this book will, like other Procedure books, focus only on the *federal* venue statutes.

Personal jurisdiction operates at a state level. The constitutional analysis asks whether there are minimum contacts between defendant and the state as a whole. Generally speaking, if there are minimum contacts, all courts in the state could exercise personal jurisdiction.<sup>13</sup> Federal venue, by contrast, speaks in terms of districts. Some states contain only a single district. Others are divided into two or more districts. In multi-district states, venue is often proper in only one district.

The basic federal venue statute is [28 U.S.C. § 1391](#). There are also special venue rules applicable to particular federal statutes, but with one exception—venue in interpleader cases, discussed in Chapter 8—these rules are beyond the scope of a first-year Procedure course. Venue is also not an issue in cases properly removed from the state courts (removal is discussed in connection with subject-matter jurisdiction).

[§ 1391\(b\)](#) provides that venue is property in the following locations:

- [§ 1391\(b\)\(1\)](#): a district in which any defendant resides, provided all defendants reside in the same state;
- [§ 1391\(b\)\(2\)](#): a district in which a “substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is located”; and
- [§ 1391\(b\)\(3\)](#): *if no venue is available under either (1) or (2)*, any district in which any defendant is subject to personal jurisdiction.

While prior to 2011 there were separate provisions applicable to diversity and federal question cases, the current rule applies equally to both (unless, of course, a special venue provision applies to a certain federal question). If venue is proper under more than one of these provisions, plaintiff may bring the action in any proper venue.

These provisions may appear straightforward. However, they are more nuanced than may appear, and difficult issues arise. Taking [§ 1391\(b\)\(3\)](#) first, note that it applies only when there is no proper venue under either subsections b(1) or b(2). This part is essentially a “fallback” provision. It usually comes into play only where the claim arises outside the United

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<sup>13</sup> The same principle does not apply to personal jurisdiction based on consent. It is common for the parties to limit the consent to courts located in a particular city or county.

States (otherwise some United States venue would be proper under part (2)).

**§ 1391(b)(1): Residence of any defendant.** Note this provision allows venue only when *all* defendants reside in the same state. If even one defendant resides in some other state, it will be impossible to obtain venue under this provision. In such cases, plaintiff must use subsections (b)(2) or (b)(3) to select a venue.

Although § (b)(1) uses the term “resides”, in the case of individuals the analysis actually turns on domicile, a concept discussed earlier in this Chapter in connection with diversity jurisdiction. **§ 1391(c)(1)** makes this clear, as it provides, “a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled.” Therefore, a defendant who is domiciled in Idaho, but currently living in California, would be deemed to reside in Idaho for purposes of § (b)(1).

The statute also deals with the residence of corporations and other legal entities. Under **§ 1391(c)(2)**, such an entity is deemed to reside in any judicial district in which it is subject to personal jurisdiction. Therefore, in a state with only one federal district, the personal jurisdiction and venue analyses merge. In multi-district states, by contrast, there is a potential ambiguity, because personal jurisdiction is determined on a statewide, not district-by-district, basis. The answer to the puzzle lies in **§ 1391(d)**. This provision essentially requires the court to treat each district as if it were a separate state, and analyze the contacts with each district. The corporation is deemed to reside in all districts in which it has sufficient contacts. If no such district exists, but the corporation has minimum contacts with the state as a whole, the corporation is deemed to reside only in the district with which it has the most significant contacts.

**§ 1391(d)** does not explicitly deal with the special case of a corporation’s state of incorporation. Most courts hold that a corporation may be sued in *any* district in that state, even if it does no business in the district. In essence, the act of incorporation by itself serves as minimum contacts with the entire state, and accordingly every district in that state.

Finally, **§ 1391(c)(3)** deals with defendants who do not reside in the United States (both citizens and non-citizens). § (c)(3) provides these defendants may be sued “in any district.” While that provision may at first glance appear surprisingly broad, in truth the non-resident party cannot be sued anywhere. Only a very few states will be able to exercise personal jurisdiction over a non-resident. Practically speaking, **§ 1391(c)(3)** takes venue out of the equation, and allows the non-resident to be sued wherever personal jurisdiction is proper (or in cases involving multiple defendants, wherever venue over those other defendants exists).

*§ 1392(b)(2): Substantial portion of events or omissions.* This provision considers where the facts giving rise to the claim occurred. Only events or omissions relevant to the claim are taken into account. In many cases, the underlying facts will have occurred in multiple districts. As long as a substantial part of the events or omissions occurred within a given district, that district is a proper venue. Accordingly, it is common for venue to be proper under [§ 1391\(b\)\(2\)](#) in multiple districts located in different states. Plaintiff in such a case may select any of these districts.

## 2. TRANSFER

While plaintiff may initially select the venue, that court may not end up hearing the case. In some cases, the chosen district may transfer the action to another district. Both plaintiffs and defendants may avail themselves of the transfer rules.

As with the venue statutes, this section discusses only the federal transfer provisions. State systems also allow for transfers to other courts with the state. However, both the federal transfer rules and the state rules have one common theme; namely, transfer is available only to other courts *in the same system*. Federal courts cannot transfer to state courts, and state courts cannot transfer to federal. Nor can one state transfer a case to another state. The only way to change systems is through removal (discussed in connection with subject-matter jurisdiction) and *forum non conveniens*, discussed in the next section.

Federal law contains two main transfer provisions: 28 U.S.C. §§ 1404 and 1406. The difference turns on whether the transferring court (that in which the action is currently situated) itself has venue. [§ 1404](#) applies when the transferring court has venue; [§ 1406](#) applies when it does not.

### a. [§ 1404: Transfer from Proper Venue](#)

This section allows a federal court that has venue over a case to transfer a case to another federal district court “[f]or the convenience of the parties and witnesses, in the interest of justice.” As this language suggests, the primary consideration under [§ 1404](#) is convenience. The court considers convenience to all the parties, not only the moving party. It also considers convenience to the witnesses. If it would be considerably more convenient to litigate the dispute in a different federal district, the court may be able to send the case to that district. However, transfer under [§ 1404](#) is possible only when the transferee court has personal jurisdiction and is a proper venue, unless all parties consent to the new forum.

Either plaintiff or defendant may ask for transfer under [§ 1404](#). Although plaintiff makes the initial choice of forum, as the case unfolds it may discover its choice of forum is inconvenient. However, when defendant moves to transfer, and plaintiff objects, courts place considerable weight on plaintiff’s initial choice. Defendant’s motion to transfer will be granted only

when the transferee court is considerably more convenient to either the parties or the witnesses.

**b. § 1406: Transfer from Improper Venue**

28 U.S.C. § 1406 allows a court that lacks venue to transfer a case to a different federal district. In fact, although the statute does not explicitly say this, transfer under § 1406 is even available when the transferor court lacks both personal jurisdiction and venue. However, although the transferor court need not have personal jurisdiction or venue, the *transferee* court must have both. While § 1404 allows the parties to consent to a new court that lacks venue, § 1406 has no language allowing the parties to consent. Therefore, a party may transfer under § 1406 only to a federal district in which the action could originally have been filed.

While the standard for transfer under § 1406 at first glance seems similar to § 1404, there are important differences between the two provisions. § 1404 speaks in terms of convenience. § 1406, by contrast, provides that when venue is improper, the court “shall dismiss”, unless it would be “in the interest of justice” to transfer. Therefore, when venue is improper, the “default” action is to dismiss, and let plaintiff refile if it so chooses. The court will transfer rather than dismiss only if the movant demonstrates that the interests of justice—not mere convenience—make transfer preferable to outright dismissal. One situation where transfer may be preferable is when a new action would be barred by the statute of limitations. Provided plaintiff made its initial choice of forum in good faith, a transfer will allow the action to continue.

Like § 1404, either party may move for transfer under § 1406. In practice, however, § 1406 motions are almost always brought by plaintiffs. Defendant would ordinarily prefer that the court dismiss the action, and force plaintiff to refile.

### 3. *FORUM NON CONVENIENS*

The transfer rules discussed in the prior section apply only within a given jurisdiction’s courts. In some cases, however, a court located in a different system may be a more convenient alternative. For example, in a case arising in another country, a foreign court may be a better forum. However, because a federal court cannot transfer a case to a foreign court, transfer under §§ 1404 or 1406 is not an option.

In these cases, the doctrine of *forum non conveniens* may come into play. It is important to note that *forum non conveniens* is not a “transfer”. It is a *dismissal*. The court dismisses the action and leaves it to plaintiff to file again in the more convenient forum.

Unlike transfer, *forum non conveniens* is a court-created, not statutory, doctrine. It applies both in the state and the federal courts,

although the standards may differ from system to system. In the federal courts it applies mainly when the more convenient forum is a foreign court (if a court in another state would be more convenient, the federal court will use § 1404). In the state courts, it applies when the more convenient forum is either a foreign court or the courts of a different state.

Courts considering a *forum non conveniens* motion will typically consider a variety of factors, which are often grouped into “private” and “public” factors. The private factors focus on convenience, and consider where the underlying events occurred, the location of the witnesses and physical evidence, the ability to compel witnesses to testify, language issues, and the like. The public factors consider systemic concerns, including the burden on the respective court systems, the policy implications of the dispute, and the relative ease of applying the governing law (especially when the case is governed by foreign law). Courts have considerable discretion in applying both the private and public factors.

One practical problem with the *forum non conveniens* process is that it results in a dismissal. Therefore, a defendant might succeed on a *forum non conveniens* motion, only to escape liability by raising a statute of limitations or jurisdiction defense after plaintiff refiles in the new court. To prevent this, courts often condition dismissal on defendant agreeing not to raise these challenges in the new action. If defendant challenges jurisdiction or venue in the new action, or asserts a statute of limitations defense, the court that granted the dismissal may take the case back and allow plaintiff to litigate the choice in the originally-chosen forum.

#### 4. JURISDICTION AND VENUE: AN ILLUSTRATIVE CASE

##### KEEFE V. SIMONS

[2013 WL 3243110 \(N.D. IL\)](#)

JOHN W. DARRAH, DISTRICT JUDGE.

Plaintiff, Richard Keefe, filed a multi-count Complaint against Defendants, James Simons and Quilter’s Rule International, LLC (“Quilter’s Rule”), on February 5, 2013, alleging breach of contract, unjust enrichment, conversion, fraud, and financial exploitation and elder abuse under state law, and violations of the federal Racketeer Influenced and Corrupt Organizations (“RICO”) Act. Defendants filed a Motion to Dismiss for Lack of Personal Jurisdiction or, in the alternative, to Dismiss for Improper Venue or, in the alternative, to Transfer Venue to the United States District Court for the Eastern District of Wisconsin. The Motion has been fully briefed.

## BACKGROUND

A reading of the Complaint supports the following summary of the alleged conduct of the parties.<sup>1</sup> Fifteen years ago, Plaintiff met Defendant James Simons in Wilmette, Illinois, at a St. Patrick's Day Party. At this party, Plaintiff and Simons entered into an oral contract whereby Plaintiff would invest \$150,000.00 in a start-up company that would later become Quilter's Rule, a limited liability company located in Waterford, Wisconsin. Simons is the majority shareholder of Quilter's Rule, owning 62.9% of the company. Plaintiff has requested some return on investment over the past fifteen years, including a request in a letter dated October 7, 2012, but no money has been paid to Plaintiff to date.

## LEGAL STANDARD

In order for a federal court to have subject-matter jurisdiction, there must either be a federal question or diversity of citizenship. For subject-matter jurisdiction to exist because of a federal question, a claim arising under federal law "must be determined by reference to the 'well-pleaded complaint.'" *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). For a federal court to have subject-matter jurisdiction on the basis of diversity of citizenship, the parties must be diverse, and the amount in controversy must exceed \$75,000.00. 28 U.S.C. § 1332. Diversity is determined by considering the domicile of the parties in the suit, and domicile is defined as "the place one intends to remain" for individual persons. For limited liability companies, citizenship is determined by looking at the owners of the LLC; an LLC is a citizen of every state where one of its owners is a citizen.

A district court may have supplemental jurisdiction "over all other claims that are so related to claims in the cause of action within such original jurisdiction that they form part of the same case or controversy. . . ." 28 U.S.C. § 1367(a). District courts assess whether supplemental jurisdiction exists by considering whether:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

A defendant may move to dismiss a claim for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). The plaintiff bears the burden of demonstrating the existence of jurisdiction over the

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<sup>1</sup> Defendants did not file a formal answer to Plaintiff's Complaint, choosing instead to file the motion at issue on March 20, 2013.

defendant once jurisdiction has been challenged. In Illinois, a federal district court has personal jurisdiction over a nonresident party only if an Illinois state court would have jurisdiction over that party. In order for an out-of-state defendant to be sued in Illinois, two criteria must be met: (1) jurisdiction must be authorized by the Illinois long-arm statute, and (2) the defendant must have minimum contacts with Illinois significant enough that personal jurisdiction does not violate due process.

In this instance, the Illinois long-arm statute extends to this case;<sup>2</sup> thus, the pertinent question is whether personal jurisdiction violates the Due Process Clause of the United States Constitution.

The Due Process Clause of the United States Constitution requires that an out-of-state defendant “have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 315, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In order to establish specific jurisdiction, courts determine whether it is “fair and reasonable to call the defendant into the state’s courts to answer the plaintiff’s claim.” *uBid, Inc. v. The GoDaddy Group, Inc.*, 623 F.3d 421, 426 (7th Cir.2010).

Venue must also be proper in order for a case to proceed. Proper venue is dictated by 28 U.S.C. § 1391, which provides: “A civil action may be brought in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. . . .” Even if venue is proper, “[f]or the convenience of parties and the witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. . . .” 28 U.S.C. § 1404(a). The movant for transfer of venue bears the burden of establishing the transferee forum as clearly more convenient. Determining whether a motion to transfer venue is proper is left to the discretion of the trial court.

## ANALYSIS

### *Subject-Matter Jurisdiction*

District courts may only hear cases where jurisdiction exists; cases not properly in federal court are dismissed *sua sponte*. In this case, subject-matter jurisdiction exists because of the alleged violation of the RICO Act, a federal claim.<sup>3</sup> Plaintiff did not explicitly state this jurisdictional basis in the Complaint. However, alleging a RICO violation is sufficient to establish federal jurisdiction, as “the usual rule is that if a court has jurisdiction it must retain a case even if the parties have failed to identify the correct

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<sup>2</sup> The Illinois long-arm statute allows for jurisdiction over out-of-state defendants who transact any business in Illinois, or who form a contract or promise that is substantially connected with Illinois. 735 ILCS 5/2–209(a).

<sup>3</sup> Defendants’ reply raises for the first time that subject-matter jurisdiction does not exist for Quilter’s Rule, as it is an LLC, which means it is a citizen of the same state as the plaintiff. (Defs.’ Reply at 2.) However, this argument is moot, as there is subject-matter jurisdiction due to the RICO claim.

basis of the court's jurisdiction," which is precisely what happened here. *Glisson v. U.S. Forest Serv.*, 55 F.3d 1325, 1328 (7th Cir.1995). In this case, there is subject-matter jurisdiction under Section 1331 because there is a federal question.

### ***Supplemental Jurisdiction***

Having found subject-matter jurisdiction to be proper under Section 1331, supplemental jurisdiction is exercised over the five remaining state law claims. None of the state law claims "raises a novel or complex issue of State law." Furthermore, none of the state law claims substantially predominates over the RICO claim. Additionally, the federal claim has not been dismissed in this case. Finally, there are no additional "compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c)(4). For these reasons, supplemental jurisdiction exists over the state law claims, as it is in the interest of justice to hear all six claims together.

### ***Motion to Dismiss for Lack of Personal Jurisdiction***

In order to grant a motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2), there must clearly not be either general or specific personal jurisdiction.

### ***General Personal Jurisdiction***

General jurisdiction does not exist in this case, because neither Defendants have [*sic*] the necessary minimum contacts to support general jurisdiction in Illinois. Defendants are engaged in the sale of quilting and sewing supplies, among other things, over the Internet. It is possible that some sales occur in Illinois. However, this contact is insufficient to establish general personal jurisdiction, as there is no indication Defendants targeted Illinois to the point that their activities . . . [render Defendants "essentially at home" in the forum State.] In this case, the only contact Defendants have with Illinois is their sales in the state, and their interactions with the shareholders who live in the state, and those contacts are insufficient to establish general personal jurisdiction.

### ***Specific Personal Jurisdiction***

Defendants argue the case should be dismissed for lack of specific personal jurisdiction. Plaintiff asserts specific personal jurisdiction exists because the agreement between the parties occurred in the State of Illinois, and Illinois law allows for personal jurisdiction under such circumstances. Plaintiff also relies on the Supreme Court's decision in *International Shoe* for the proposition that personal jurisdiction in this district does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co.*, 326 U.S. at 316. The standard for specific personal jurisdiction is whether it is fair and reasonable for the defendant to be called into court in the jurisdiction chosen.

In this case, there is personal jurisdiction over Defendants. The underlying event that supported the cause of action in this case was the agreement between Simons and Plaintiff, and that agreement took place in Wilmette, Illinois, in 1997. This agreement led to Plaintiff investing \$150,000.00 in Quilter's Rule. The initial agreement and negotiation is sufficient action in Illinois to subject Defendants to jurisdiction in Illinois.

Under the Illinois Long Arm Statute, 735 ILCS 5/2–209, Illinois courts may properly have jurisdiction over an out-of-state defendant, even if there is only a single act of contact between the out-of-state defendant's agent and the resident plaintiff. Here, the negotiation was between Plaintiff and Simons himself, and not an agent of his or of Quilter's Rule, making the connection even more significant. Under the Illinois Long Arm Statute, Defendants have sufficient contacts with the State of Illinois for the exercise of personal jurisdiction not to "offend traditional notions of fair play and substantial justice," as the formation of the purported agreement between the parties occurred in Wilmette, Illinois. . . . The actions of Defendants in negotiating the investment by Plaintiff in Illinois are sufficient to subject Defendants to jurisdiction in the State of Illinois and, thereby, in this Court.

Plaintiff has established the existence of personal jurisdiction over Defendants. Thus, Defendants' Motion to Dismiss for Lack of Personal Jurisdiction is denied.

#### ***Motion to Dismiss for Improper Venue***

Defendants also filed a Motion to Dismiss under 28 U.S.C. § 1391. Under Section 1391, venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. . . ." Defendants argue venue is improper because neither Defendant resides in Illinois, as Simons is a Wisconsin resident, and his business, Quilter's Rule, is a Wisconsin company. Defendants further assert that a substantial part of the events giving rise to the cause of action occurred in Wisconsin.

As previously discussed, specific personal jurisdiction has been established over Defendants, due to the fact that the contract negotiation between Simons and Keefe occurred in Wilmette, Illinois. The same analysis supporting that conclusion applies to venue. . . . In this instance, Simons himself negotiated the investment from Keefe in Wilmette, Illinois, which is a "substantial part of the events . . . giving rise to the claim." 28 U.S.C. § 1391. Accordingly, venue is proper in the Northern District of Illinois, and the Motion to Dismiss for Improper Venue under 28 U.S.C. § 1391 is also denied.

#### ***Motion to Transfer Venue***

Defendants finally argue, in the alternative to their Motion to Dismiss for Lack of Personal Jurisdiction and their Motion to Dismiss for Improper

Venue, that even if venue is proper, the case should be transferred to the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1404. A party seeking to transfer venue must show the following: (1) venue is proper in the alternative forum, (2) the alternative forum is more convenient for the parties and witnesses, and (3) the interest of justice is served by the transfer. The party seeking the transfer has the burden of proving that the transfer of venue is more convenient for the parties and in the interest of justice.

### *Venue in the Transferor and Transferee Courts*

As previously discussed, venue is proper in the Northern District of Illinois. Defendants argue venue should be transferred to the Eastern District of Wisconsin. Venue must also be proper in the transferee venue, as 28 U.S.C. § 1404(a) provides a case can only be transferred to “any other district or division where [the suit] might have been brought or to any district or division to which all parties have consented.” Plaintiff has not consented to the transfer of venue. However, the Eastern District of Wisconsin is also a proper venue, as 28 U.S.C. § 1391(b)(1) allows for venue in “a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located,” and both Defendants are residents of the State of Wisconsin. Simons is domiciled in Wisconsin, as his permanent residence is in Burlington, Wisconsin. Quilter’s Rule is a resident of Wisconsin, because, as a limited liability company, it is a resident of the states of its owners, and Simons owns 62.9% of the company. As both Defendants are Wisconsin residents, the Eastern District of Wisconsin is a proper venue under 28 U.S.C. § 1391(b)(1).

### *Convenience of the Parties and Witnesses*

Determining which venue is more convenient is at the discretion of the district court. make this determination, courts consider five factors: “(1) the plaintiff’s choice of forum, (2) the situs of the material events, (3) the relative ease of access to sources of proof, (4) the convenience of the parties, and (5) the convenience of the witnesses.” [\*Amoco Oil Co. v. Mobil Oil Corp.\*, 90 F.Supp.2d 958, 960 \(N.D.Ill.2000\)](#).

Typically, courts give significant weight to the plaintiff’s choice of forum, “particularly when it is also plaintiff’s home forum,” unless the choice lacks any significant connection to the cause of action. In this case, Plaintiff chose the Northern District of Illinois, which has a significant connection to the cause of action, as it arises out of the agreement that occurred in Wilmette, Illinois. The situs of material events certainly occurred in Illinois, as the agreement that led to the cause of action occurred in Wilmette, Illinois. The relative ease of access to sources of proof is not a dispositive factor, as the sources of proof are likely to be Simons, Keefe, and documents proffered by the parties.

Defendants summarily argue that the convenience of the parties weighs in favor of transferring venue, as most witnesses can be found in Wisconsin, including both individuals and companies. Defendants also argue Plaintiff can easily attend proceedings in the Eastern District of Wisconsin. Finally, Defendants argue the claims somehow arise under Wisconsin law, as Quilter's Rule is a Wisconsin company, and that, therefore, the case should be heard in Wisconsin.

Plaintiff contends that the convenience of the parties and witnesses weighs in favor of denying the transfer, as Plaintiff is eighty-two years old, and additional travel would be inconvenient for him, while Simons is a middle-aged man, who has not expressed any health issues involved with traveling to Chicago, Illinois. Plaintiff also states the Eastern District of Wisconsin would not be significantly more convenient for witnesses, as Defendants contend, because the difference between coming to the Northern District of Illinois and the Eastern District of Wisconsin, traveling from Burlington, Wisconsin, where Quilter's Rule is located, is negligible, and that, therefore, witnesses would not be overly inconvenienced by being required to travel to the current venue.

Considering each of these factors, Defendants have not demonstrated that the convenience of the parties would not be better served by a transfer to the Eastern District of Wisconsin.

### *The Interest of Justice*

When considering whether to transfer a case, the interest of justice may be determinative, even if the convenience of the parties and witnesses does not indicate transfer is appropriate. The interest of justice encompasses several factors: (1) whether a speedy trial is more likely in the transferee forum, (2) whether the current action could be consolidated with other actions in the transferee forum, (3) whether jurors in a particular forum have a financial interest in the case, and (4) where a jury could best apply community standards. The focus of the district court when assessing these factors is the efficient functioning of the courts.

Defendants do not assert that consolidation of other actions pending in the Eastern District of Wisconsin would be achieved through the transfer of venue. Additionally, there is no showing by either party, or any indication that a jury in either district would have a financial interest in the case, or could better apply community standards. This leaves only the speedy trial factor, which does not weigh more heavily in favor of one district over the other. On a whole, the interest of justice would not be better served by granting Defendants' Motion to Transfer Venue. Hence, the Motion for Transfer of Venue is denied.

### **CONCLUSION**

For the reasons discussed above, Defendants' Motion to Dismiss for Lack of Personal Jurisdiction pursuant to Fed.R.Civ.P. 12(b) (2) is denied.

Additionally, Defendants' Motion to Dismiss for Improper Venue under 28 U.S.C. § 1391 is denied. Finally, Defendants' Motion to Transfer Venue pursuant to 28 U.S.C. § 1404 is denied.

## E. CHOICE OF LAW

The previous sections of this Chapter deal with the rules governing choice of a forum for a civil case. Depending on the circumstances, a party may be able to bring an action in several different states. Moreover, within each possible state, the party may be able to choose between state or federal court.

The consequences of a plaintiff's choice of forum may not be as great as it might seem. Of course, that choice determines *where* the case is likely to be heard (subject to removal, transfer, and *forum non conveniens*). But it does not necessarily dictate what substantive law the court will apply to decide the case. The United States is a federal nation. Unlike most nations, there is usually not a single unitary "law" on a given subject, but at least fifty different laws. In many cases differences between the rules can significantly affect the outcome of a given case. Further complicating the situation is the possibility a fifty-first law may apply—namely federal law.

Two key features of the United States federal system can affect which of these laws will apply. First, a court of a particular sovereign (that is, a particular state, or the federal government) has the authority to apply the laws of another sovereign. Thus, for example, a state court situated in Colorado can—and often will—apply the laws of another state, federal laws, or even the laws of another nation. This first principle is often misunderstood by first-year law students, some of whom assume a Colorado court can only apply Colorado law.

Second, sometimes a court is *required* to apply the laws of a different sovereign. Because under the United States Constitution federal law reigns supreme, in some situations a court will be required to apply federal law in lieu of state law. Conversely, there are also cases where a federal court will be required to defer to state law, especially in cases involving diversity and supplemental jurisdiction. Finally, mandatory rules can even apply to a court's decision between two states' laws. Depending on the respective connections each state has with the underlying dispute, a state court may be required to apply some other state's law.

These two principles give rise to the two foundational concepts discussed in this section. The first principle underlies what this book (like many others) calls "horizontal" choice of law, those rules that determine which of various competing rules of equal stature will be applied to determine a case. While choice of law rules generally deal with competing state laws, foreign laws may also come into play. The second principle, which this book calls "vertical" choice of law, deals specifically with choice

of law decisions between state and federal law. Vertical choice of law, in turn, can be divided into two subparts. The first, preemption, deals with a court's obligation to apply supreme federal law. This book does not deal with preemption, a doctrine usually covered in the course in Constitutional Law. The second subpart commonly goes under the moniker "the *Erie* doctrine," after the case which gave rise to the principle. *Erie* deals with a federal court's obligation to apply state laws as rules of decision.

These materials provide only a skeletal overview of horizontal choice of law and the *Erie* doctrine. If your professor has assigned these electronic materials, you can learn more about these doctrines in Chapter 5 of the printed casebook.

## 1. HORIZONTAL CHOICE OF LAW: SELECTING AMONG DIFFERENT STATES

*[This section is a condensed alternative to Chapter 5, Part A.]*

Imagine a dispute between a plaintiff from state A, a defendant from state B, involving an event that occurred in a foreign nation, and which is being litigated in the courts of state C. How does a court determine whether the law of state A, B, C, or the foreign nation, applies? The easiest solution would be for every state simply to apply its own law to all cases in its courts. However, defendant may not have foreseen it would be sued in state C. Plaintiff may have "forum shopped"; that is, chosen state C because its law is more favorable. In order to ensure potential litigants some predictability in how they organize their daily activities, and limit forum-shopping, no United States court automatically applies forum law to every issue in every case that comes before it. Indeed, the Supreme Court has held it would violate the United States Constitution for a state to apply its own law to a dispute that has no significant connection with the state. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985).

Because a court does not always apply its own law to multistate disputes, states have been forced to develop rules to deal with selecting a governing law. In the vast majority of states this task of developing rules has fallen on the courts rather than the legislatures. A body of case law called "Conflicts of Law" has developed, which provides rules and considerations for courts to use in determining which law applies.

In many cases the choice is obvious. If plaintiff, defendant, and all significant events giving rise to the claim are situated in the same state, the law of that state will usually govern, regardless of where the case is litigated. But in many other cases, the choice is not immediately clear. For example, good arguments can be made for applying different states' laws in the fact situation set out in the first paragraph above.

Choice of law is a complicated field that in many law schools is the subject of an entire upper level course. The case in this section provides a brief overview of this area of the law, and provides a flavor of how choice of law considerations must enter into an attorney's planning process as she selects a forum and frames the complaint. As you will see in *Paul*, different states use different rules to deal with choice of law problems.

### PAUL V. NATIONAL LIFE

177 W.Va. 427 (1986)

NEELY, J.

In September of 1977 Eliza Vickers and Aloha Jane Paul, both West Virginia residents, took a weekend trip to Indiana. The two women were involved in a one-car collision on Interstate 65 in Indiana when Mrs. Vickers lost control of the car. That collision took both women's lives. The administrator of Mrs. Paul's estate brought a wrongful death action against Ms. Vickers' estate and the National Life Accident Company in the Circuit Court of Kanawha County. Upon completion of discovery, the defendants below moved for summary judgment. Defendants' motion contended that: (1) the Indiana guest statute, which grants to a gratuitous host immunity from liability for the injury or death of a passenger unless that host was guilty of willful and wanton misconduct at the time of the accident, was applicable; and (2) that the record was devoid of any evidence of willful or wanton misconduct on the part of Ms. Vickers. By order dated 29 October 1984, the Circuit Court of Kanawha County entered summary judgment for the defendants below. The order of the circuit court held that our conflicts doctrine of *lex loci delicti* required that the law of the place of the injury, namely, Indiana, apply to the case, and that the record contained no evidence of willful or wanton misconduct on the part of Ms. Vickers. It is from this order that the plaintiffs below appeal.

The sole question presented in this case is whether the law of Indiana or of West Virginia shall apply. The appellees urge us to adhere to our traditional conflicts doctrine of *lex loci delicti*, while the appellants urge us to reject our traditional doctrine and to adopt one of the "modern" approaches to conflicts questions. Although we stand by *lex loci delicti* as our general conflicts rule, we nevertheless reverse the judgment of the court below.

#### I

Unlike other areas of the law, such as contracts, torts and property, "conflicts of law" as a body of common law is of relatively recent origin. Professor Dicey has written that he knew of no decisions in England considering conflicts of law points before the accession of James I, and it is generally acknowledged that the first authoritative work on conflicts did not appear until the publication of Joseph Story's *Conflict of Laws* in 1834.

Accordingly, no conflicts of law doctrine has ever had any credible pretense to being “natural law” emergent from the murky mists of medieval mysticism. Indeed, the mention of conflicts of law and the *jus naturale* in the same breath would evoke a power guffaw in even the sternest scholastic. In our post-Realist legal world, it is the received wisdom that judges, like their counterparts in the legislative branch, are political agents embodying social policy in law. Nowhere is the received wisdom more accurate than in the domain of conflict of laws.

Conflicts of law has become a veritable playpen for judicial policymakers. The last twenty years have seen a remarkable shift from the doctrine of *lex loci delicti* to more “modern” doctrines . . . . Of the twenty-five landmark cases cited by appellants in which a state supreme court rejected *lex loci delicti* and adopted one of the modern approaches, the great majority of them involved the application to an automobile accident case of a foreign state’s guest statute, doctrine of interspousal or intrafamily immunity, or doctrine of contributory negligence. All but one of these landmark cases was decided in the decade between 1963 and 1973, when many jurisdictions still retained guest statutes, the doctrine of interspousal immunity, and the doctrine of contributory negligence. However, in the years since 1970, these statutes and doctrines have all but disappeared from the American legal landscape. . . .

Thus nearly half of the state supreme courts of this country have wrought a radical transformation of their procedural law of conflicts in order to sidestep perceived substantive evils, only to discover later that those evils had been exorcised from American law by other means. Now these courts are saddled with a cumbersome and unwieldy body of conflicts law that creates confusion, uncertainty and inconsistency, as well as complication of the judicial task. This approach has been like that of the misguided physician who treated a case of dandruff with nitric acid, only to discover later that the malady could have been remedied with medicated shampoo. Neither the doctor nor the patient need have lost his head.

The *Restatement* approach has been criticized for its indeterminate language and lack of concrete guidelines. *Restatement (Second) of Conflicts of Law*, Sec. 145–146 (1971)\* provides:

**§ 145. *The General Principle***

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principle stated in § 6.

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- (2) Contacts being taken into account in applying the principle of § 6 to determine the law applicable to an issue include:
- (a) the place where the injury occurred,
  - (b) the place where the conduct causing injury occurred,
  - (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties, and
  - (d) the place where the relationship, if any, between the parties, is centered.

These contacts should be evaluated according to their relative importance with respect to the particular issues.

**§ 146. *Personal Injuries***

In an action for a personal injury, the local law of the state where the injury occurred determines the *rights and liabilities* of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Section 6 of the *Restatement* lists the following factors as important choice of law considerations in all areas of law.

- (a) The needs of the interstate and international systems;
- (b) The relevant policies of the forum;
- (c) The relevant policies of other interested states and relative interest of those states in the determination of the particular issue;
- (d) The protection of justified expectations;
- (e) The basic policies underlying the particular field of law;
- (f) Certainty, predictability, and uniformity of results; and
- (g) Ease in the determination and application of the law to be applied.

As Javolenus once said to Julian, *res ipsa loquitur*. The appellant cites with approval the description of the *Restatement* approach set forth in [Conklin v. Horner](#), 38 Wis.2d 468, 473, 157 N.W.2d 579, 581 (1968):

We emphasized that what we adopted was not a rule, but a method of analysis that permitted dissection of the jural bundle constituting a tort and its environment to determine what elements therein were relevant to a reasonable choice of law.

That sounds pretty intellectual, but we still prefer a rule. The lesson of history is that methods of analysis that permit dissection of the jural

bundle constituting a tort and its environment produce protracted litigation and voluminous, inscrutable appellate opinions, while rules get cases settled quickly and cheaply.

The manipulability inherent in the *Restatement* approach is nicely illustrated by two cases from New York, the first jurisdiction to make a clean break with *lex loci delicti*. The cases of *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963), and *Kell v. Henderson*, 47 Misc.2d 992, 263 N.Y.S.2d 647 (1965), *aff'd*, 26 App. Div.2d 595, 270 N.Y.S.2d 552 (1966), are aptly discussed by the Supreme Court of Virginia:

In *Babcock*, an automobile guest sued her host in New York for injuries sustained in Ontario caused by the defendant's ordinary negligence. Under New York law, the guest could recover for injuries caused by the host's lack of ordinary care, but the Ontario guest statute barred such a recovery. The court abandoned its adherence to the place-of-the-wrong rule and permitted recovery. It decided that, on the guest-host issue, New York had the "dominant contacts" because the parties were domiciled in New York, were on a trip which began in New York, and were traveling in a vehicle registered and regularly garaged in New York. The court noted that Ontario had no connection with the cause of action except that the accident happened to take place there.

*Kell* presented the converse of *Babcock*. There, the question was also whether the New York ordinary negligence rule applied or whether the Ontario guest statute controlled. The guest was injured by the host's ordinary negligence while the parties, both residents of Ontario, were on a trip in New York which was to begin and end in Ontario. The New York court purported to follow *Babcock* but held that Ontario law would not apply.

*McMillan v. McMillan*, 219 Va. 1127, 253 S.E.2d 662, 664 (1979). It was perhaps recognition of just such gross disparities in result that prompted the Court of Appeals of New York to remark, in a towering achievement in the art of understatement, "candor requires the admission that our past decisions have lacked a precise consistency." *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 879, 290 N.Y.S.2d 734 (1968).

## II

The appellant urges us in the alternative to adopt the "choice-influencing considerations approach" set forth by Professor Leflar in "Choice-Influencing Considerations and Conflicts of Law", 41 N.Y.U.L. Rev. 267 (1966). Professor Leflar has narrowed the list of considerations in conflicts cases to five:

- (1) Predictability of results;
- (2) Maintenance of interstate or international order;

- (3) Simplification of the judicial task;
- (4) Advancement of the forum's governmental interests;
- (5) Application of the better rule of law.

Professor Leflar's approach has been adopted in the guest statute context in the landmark cases of *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); and *Conklin v. Horner*, 38 Wis.2d 468, 157 N.W.2d 579 (1968). In practice the cases tend to focus more on the fourth and fifth considerations than the first three, and the upshot is that the courts of New Hampshire, Minnesota and Wisconsin simply will not apply guest statutes. This seems to us a perfectly intelligible and sensible bright-line rule. However, it seems unnecessary to scrap an entire body of law and dress this rule up in a newfangled five-factor costume when the same concerns can be addressed and the same result achieved through judicious employment of the traditional public policy exception to *lex loci delicti*.

### III

*Lex loci delicti* has long been the cornerstone of our conflict of laws doctrine. The consistency, predictability, and ease of application provided by the traditional doctrine are not to be discarded lightly, and we are not persuaded that we should discard them today. The appellant contends that the various exceptions that have been engrafted onto the traditional rule have made it manipulable and have undermined the predictability and uniformity that were considered its primary virtues. There is certainly some truth in this, and we generally eschew the more strained escape devices employed to avoid the sometimes harsh effects of the traditional rule. Nevertheless, we remain convinced that the traditional rule, for all of its faults, remains superior to any of its modern competitors. Moreover, if we are going to manipulate conflicts doctrine in order to achieve substantive results, we might as well manipulate something we understand. Having mastered marble, we decline an apprenticeship in bronze. We therefore reaffirm our adherence to the doctrine of *lex loci delicti* today.

However, we have long recognized that comity does not require the application of the substantive law of a foreign state when that law contravenes the public policy of this State. West Virginia has never had an automobile guest passenger statute. It is the strong public policy of this State that persons injured by the negligence of another should be able to recover in tort. . . . Today we declare that automobile guest passenger statutes violate the strong public policy of this State in favor of compensating persons injured by the negligence of others. Accordingly, we

will no longer enforce the automobile guest passenger statutes of foreign jurisdictions in our courts.<sup>14</sup>

For the foregoing reasons, the order of the circuit granting summary judgment in favor of the appellees is hereby vacated, and the cause remanded for further proceedings not inconsistent with this opinion. . . .

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The *Paul* decision discusses several different choice of law “regimes.” One of the problems in discussing choice of law rules is that it is not entirely clear how many different “choice of law regimes” exist. Even when a court calls an approach by a particular name, it may not apply that approach the same way other courts apply it.

For purposes of this brief overview, we can identify four basic choice of law regimes in the United States. In chronological order of their development, these include:

1. The “traditional” rules that the *Paul* court eventually decides to apply;
2. “Pure” interest analysis, which is the approach used in the *Babcock* and *Kell* cases discussed in *Paul* (although the *Paul* court labels them cases using the *Restatement*);
3. The *Restatement (Second) of Choice of Law*, which evolved in an attempt to codify and provide some rules for the otherwise free-wheeling pure interest analysis; and
4. The Leflar approach, also discussed in *Paul*.

The last three of these approaches all share basic themes, and accordingly can be discussed together.

As indicated above, courts often mislabel the approach they actually are applying. Compounding the problem is that courts do not apply the same approach for all issues. For example, a state may apply one approach in tort cases, and another in contract cases. Because of these ambiguities, it can prove a daunting task to determine exactly what approach a court will apply to a given case. Some treatises on U.S. conflicts law contain tables, although these can quickly become out of date.

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<sup>14</sup> Although we intended this to be a rule of general application, we do not intend it as an invitation to flagrant forum shopping. For example, were a resident of a guest statute jurisdiction to sue another resident of a guest statute jurisdiction over an accident occurring in a guest statute jurisdiction, the simple fact that the plaintiff was able to serve process on the defendant within our State borders would not compel us to resist application of any relevant guest statute. This State must have some connection with the controversy above and beyond mere service of process before the rule we announce today will be applied. . . .

### a. The Traditional Approach

The so-called “traditional” rules were set out in the *Restatement (First) of Conflicts of Law*, often referred to merely as the “First Restatement.” The rules evolved during the late nineteenth century, and were codified in the First Restatement in 1934. Although the date and the use of the label “traditional” suggests the rules have been relegated to history, that is not the case. Several states continue to use some of the rules of the First Restatement, especially in areas such as property law where they have proven quite successful.

The system set out in the First Restatement was a tremendous accomplishment, even if the results are far from perfect. The traditional rules involve a (usually) logically consistent system of hard-and-fast rules. This system exhibits three defining features. The first, and perhaps most important, is that its choice of law rule are almost entirely strictly *territorial*. They focus on determining where one particular event crucial to the claim or issue occurred. If that crucial event occurred in State X, a court will apply the laws of State X to that claim or issue. The *lex loci delicti* rule discussed in *Paul* is the First Restatement rule applicable to tort. Translating to “the law of the place of the wrong,” the *lex loci delicti* rule requires courts to determine the outcome of a negligence case by applying the law of the place where the injury occurred. The law of the place of injury governs even if the conduct causing that injury occurs in another state.

The second defining feature of the traditional rules is the importance of *characterization*. The territorial approach uses different controlling events depending on the type of dispute in question. For many questions of property law, for example, the rules dictate use of the law of the state where the property is located. Therefore, to ascertain which event to use, a court must label the issue a tort, contract, property, procedural, or some other type of issue. While in some cases this characterization is obvious, in others it is not so clear. Is the validity of a contract term waiving liability for intentional harms a question of tort or contract law? Is the statute of limitations for trespass a question of property or procedural law? (After all, the property law doctrine of adverse possession is at its core a statute of limitations issue.)

To the newcomer, the magic event dictating what law governs a particular question may seem purely arbitrary. However, the choice is based on one pervasive norm: the principle of “vested rights.” Choice of law under the First Restatement is an attempt to determine where the right in question vests. In tort cases, for example, the rationale is that a party cannot sue for tort until the point she suffers injury. Accordingly, because there is no tort until there is an injury, the law of the place of injury controls.

The basic “single event” approach of the First Restatement, coupled with the approach’s dominance in all states until the 1960s, resulted in the

third feature of the traditional approach: *uniformity*. For a while, all states applied the same approach. Moreover, as all states would be considering the same event, the choice of law question on issues of substantive law would come out the same way *regardless of the state in which the case was filed*. This feature helped reduce the importance of the choice of forum and in theory reduced forum shopping.

However, the extent of this uniformity should not be overstated. First, as will be discussed below, courts applying the traditional rules typically apply their own laws on questions of procedure, even with respect to procedural rules that could affect the ultimate outcome of the case. Second, courts do not always agree on how a particular issue should be characterized, resulting in state-to-state differences even on matters of substantive law. And third, also discussed below, some courts use “escape devices” to avoid the strict First Restatement rules.

### *i. Contract Issues*

The traditional rules governing contract actions are more nuanced than the single *lex loci delicti* rule used in tort. Questions of contract law are considered either issues of validity (e.g. rules such as statute of frauds and illegality) or issues of performance (e.g., whether the goods sold complied with the terms of the contract). An issue of validity is determined by the law of the place where the contract was consummated. An issue of performance is determined by the law of the place where the performance in question was supposed to occur. Some courts also apply a “validation exception”: if a contract is not valid in the place where made, but would be valid in the place of performance, courts will apply the law of the place of performance even to questions of validity.

### *ii. Property Issues*

The traditional rules governing property look almost exclusively to the place where the property is situated. In the case of tangible property, this rule is easy to apply. Determining the situs of intangibles like stock, however, can prove more difficult. The one significant exception to the situs rule involves disposition of personal property by will or intestate succession, where courts apply the domicile of the owner at the time of death. While many states have replaced the traditional rules with one or more of the more modern approaches, it is worthwhile to note that situs remains a crucial factor for questions of property law even today. Using the law of the situs provides a degree of certainty that may be especially important in determining interests in property.

### *iii. Procedural Rules*

The First Restatement also draws a clear line between rules of substance and rules of procedure. A decision to apply the law of another

state does not mean the other state's law governs every aspect of the case. Instead, a court only borrows the other state's substantive law. Under the First Restatement, a forum will almost always apply its own procedural law to a case. Although it is difficult to draw a bright line between substance and procedure, procedural rules, generally speaking, are those rules that deal with the steps a party must take to litigate his claims or defenses in court. Rules governing pleading, joinder, costs, and the like are clearly procedural. Other issues, however, are less obvious. One particular issue that falls on the line between substance and procedure is the statute of limitations. For purposes of traditional choice of law analysis, however, most states consider statutes of limitations procedural. As a result, State X will apply the State X limitations period even when it hears a tort or contract claim governed by the law of State Y.

*iv. Dissatisfaction with the Traditional Rules; “Escape Devices”*

The strict single-event approach of the traditional rules sometimes produced results that for one reason or another did not sit well with courts and commentators. As just one example, consider the situation in *Alabama Great Southern R.R. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892) (a case included in many Conflicts casebooks). Plaintiff in *Carroll* was a citizen of Alabama who worked as a brakeman for Defendant railroad. Defendant was incorporated in Alabama, and ran its trains primarily in that state, but also to a limited extent in Mississippi. Plaintiff was injured when a link between two of the cars broke. The injury happened in Meridian, Mississippi. However, the evidence showed that the link failed because it had been bent by negligent conduct that occurred in Alabama. Applying the place of the injury rule, the court applied Mississippi law to decide the case. Mississippi law at the time recognized the “fellow servant” doctrine, under which an employee injured by the negligence of a fellow employee was not entitled to recover against the employer. Even though Alabama would have allowed recovery by statute, the court held Mississippi law was the only possible choice:

It was in that state [Mississippi], therefore, necessarily that the cause of action, if any, arose; and whether a cause of action arose and existed at all, or not, must in all reason be determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired. Section 2590 of the Code of Alabama had no efficacy beyond the lines of Alabama. It cannot be allowed to operate upon facts occurring in another state, so as to evolve out of them rights and liabilities which do not exist under the law of that state, which is of course paramount in the premises.

The result in a case like *Carroll* bothered courts because of the seemingly fortuitous fact the injury happened in Mississippi. The real dispute, after all, is what law should govern whether an Alabama employee can recover against his Alabama employer for an injury caused by negligent conduct of an Alabama co-employee that occurred in Alabama. The link could have failed anywhere along the train's journey from Birmingham, Alabama to Meridian. In fact, most of the journey occurred in Alabama (Meridian is just across the Alabama-Mississippi line).

Courts sometimes avoid the strict rules of the First Restatement by employing *escape devices*. One of the most common of these devices is "recharacterization". If an issue can be characterized differently, it would result in a different choice of law rule, and quite possibly a different outcome. In a case like *Carroll*, for example, the court could end up applying Alabama law if it treated the question as one of procedural law or contract law. Other escape devices, best left to an upper-level course in Conflicts, also come into play.

Ultimately, however, the use of escape devices helped undermine the uniformity of the First Restatement. It also led to a discussion of exactly *why* the results of the First Restatement did not always comport with a sense of what is fair. Ultimately, that discussion led to the development of an alternate way of thinking about choice of law, which in turn led to development of the more modern rules.

Again, however, do not assume that the traditional rules are relegated to history. As noted above, they continue to exist in several states, especially in subject areas such as property and family law. In addition, as the modern rules prove increasingly problematic, some courts, like *Paul*, have actually expressed a desire to go back to territorial rules, although not always the particular rules of the First Restatement. Finally, looking beyond the borders of the United States, it is worth noting that most of the rest of the world uses largely territorial choice of law regimes. The modern approaches have made the United States somewhat of an outlier.

## **b. The Modern Approaches**

The introductory discussion identified three "modern" approaches: pure interest analysis, the *Restatement (Second) of Conflicts of Law*, and the Leflar approach. It is an oversimplification to suggest there are three discrete approaches. Some courts adopt hybrid approaches, blending elements of the three. Even when applying the same basic approach (especially the Second Restatement) courts differ significantly in *how* they resolve conflicts cases. Nevertheless, the three listed approaches represent the three main threads in modern choice of law theory.

The key to the modern approaches is that they seek to move away from the strict territoriality of the traditional rules. Rather than focusing only on a single factor, the modern approaches consider a greater number of

relevant factors, especially the residence of the parties. Look again at the provisions of the Second Restatement quoted in *Paul*. In addition to considering a number of different states based on their connections with the dispute (§ 145), § 6 provides considerations for how a court is to determine which of those connections is the most important.

*i. State “Interest”*

While the modern approaches differ in many respects, all include some analysis of “state interest.” At the risk of oversimplification, this factor attempts to ascertain whether a state, if asked, would want its law to be applied to the case at hand. The basic assumption underlying interest analysis is that a state would want its law applied only if applying state law would further some state policy underlying the law in question.

Of course, determining the policy behind a state law can be difficult. Many of the rules are judge-made laws rather than statutes. Even when a statute is involved, determining legislative history is an inexact science. Unlike Congress, most state legislatures do not publish significant legislative history. And what legislative history does exist can be cursory and incomplete. To get around these problems, courts use *hindsight* (or in the language of logic, a teleological approach) to determine the policy underlying a law. They attempt to determine the purpose of a law from the language and context of the law, as well as the circumstances under which it was adopted.

To illustrate how the analysis proceeds, consider the facts of the *Babcock* case discussed in *Paul*. Plaintiff and defendant in that case were both citizens of New York. Plaintiff was a passenger in defendant’s car. The two drove into Ontario, where the car was involved in an accident that injured plaintiff. Under Ontario law (the place of the injury), plaintiff could not recover because Ontario had a guest statute limiting a guest’s ability to recover from her host in cases of ordinary negligence. New York had no such law, and would allow full recovery. The *Babcock* court determined only New York had an interest in having its law applied, and accordingly applied that state’s full recovery rule.

New York’s interest was clear. The state had an interest in allowing its citizen, plaintiff, to recover for injuries even when the injury occurred elsewhere. That interest was reflected in the New York full recovery rule. Even though the New York rule imposed liability on a New York defendant, a person with whom the state was also interested, New York had made the choice to make negligent drivers responsible.

Ontario, by contrast, had no such interest. The law in question was not one that regulated conduct, like a speed limit or seat belt law. Instead, the Ontario law was meant to allocate the loss caused by the accident. The court then determined Ontario’s policy behind its guest statute was to prevent collusion by passengers and hosts that would result in fraudulent

claims against insurance companies. Although that was a legitimate policy, the court held it would not be furthered by applying Ontario law in the case. Because neither party was from Ontario, and because defendant's insurance company was not based there, Ontario had no interest in preventing any fraudulent claim that might occur by New York parties in New York.

The *Babcock* court did not consider other possible policies that might underlie the Ontario law. Suppose, for example, Ontario wanted to encourage guests to be polite to hosts who provide them a free ride. Such a policy is a plausible reason underlying a guest statute. However, even if that was the policy, the result in the case would be the same. The "rude" act regulated by the guest statute is the lawsuit filed by the guest against the host. However, in *Babcock* itself that suit was filed in New York. While Ontario might have an interest in preventing New Yorkers from rude acts in Ontario, it had no interest in regulating such acts outside the province.

That basic concept of state interest is an element of all three modern approaches. Where the approaches differ is in the extent to which they introduce additional factors for a court to consider. Both the Second Restatement and the Leflar approach require a court to consider other factors, such as ease of the judicial task and the expectations of the parties.

### *ii. Ties and Tiebreakers*

Cases like *Babcock* are in one sense easy. When only one state has an interest in having its rule applied, that state is the only logical choice. In many cases, however, more than one state can have an interest in having its law applied. Conversely, it is also possible that no state will have an interest.

To illustrate an example of a situation where more than one state has an interest, take a variation on the facts of *Babcock*. Assume now defendant is from Ontario. New York would still have an interest in allowing its plaintiff to recover. However, Ontario would also have an interest in protecting its defendant from the claim. (The Ontario guest statute furthers this purpose by limiting liability.) Courts applying interest analysis are ordinarily not supposed to "weigh" the interests to determine whether one is more important or better furthered by application in the particular case. Although some courts developed doctrines allowing them to choose in such cases, all the doctrines involve their own serious problems.

One of the most important ways in which the Second Restatement and the Leflar approach differ from interest analysis is in the way they deal with such ties. The Leflar approach includes a set of "choice influencing considerations", which includes the often criticized concept of determining which of the competing laws is "better." The Second Restatement also includes a list of factors, most notably in § 6. Many of the Second

Restatement provisions also call for the court to apply the law of the state with the “most significant relationship,” a standard that invites the court to balance interests. However, the Second Restatement also includes a number of more mechanical “tie breakers” in the form of default rules. For example, § 188(3) establishes a default rule for contracts cases, under which if the place of negotiation and performance are in the same state, the law of that state will ordinarily be applied.

### *iii. Additional Features of the Second Restatement*

The Second Restatement stands apart from the other modern approaches in several distinct respects. First, as noted just above, it contains certain default rules meant to make the court’s job easier, especially in cases involving “ties” where multiple states have (or no state has) an interest. Second, the Second Restatement, like the First, also relies heavily on characterization. The other approaches try to treat all issues the same way, regardless of the area of law. While the basic “most significant relationship” approach of the Second Restatement is also subject-area neutral, many of the default rules turn on whether the case involves tort, contract, property, or some other area of the law.

### *iv. Conduct Regulating Rules*

Most of the discussion of the modern rules to this point has focused on so-called “loss-allocating rules.” These rules take the underlying harm as a given, and attempt to allocate responsibility for that harm. Rules such as caps on damages, guest statutes, differences between standards of care, and immunities are usually treated as loss-allocating.

Many state laws, however, directly regulate conduct. For example, a rule that requires a driver to operate her headlights while driving in the rain establishes a standard of care that driver must follow while driving in that state. Similar rules regulate a wide variety of activities. Violation of the standard of conduct may result in liability, either directly or under a negligence per se rationale.

The modern interest-based approaches tend to place greater weight on the citizenship and residence of the parties than on the place of the accident. But it would be odd indeed if a court always evaluated a party’s conduct by the law of her domicile. For example, if Montana defines driving while intoxicated using a .3% blood alcohol content standard (far higher than that in any other state), certainly courts should not apply that standard when determining whether a Montana resident was intoxicated when she caused an accident while driving in some other state. Most courts accordingly do not apply the interest-based approaches to questions involving conduct-regulating rules. Instead, they invariably apply the law of the state of the place of conduct. There is surprisingly little discussion of this unstated exception in the case law, perhaps because it is so widely

accepted that parties do not bother arguing for the application of some other state's standard. See [John T. Cross, \*The Conduct-Regulating Exception in Modern United States Choice of Law\*, 36 CREIGHTON L. REV. 425 \(2003\)](#).

*v. Procedural Rules*

As noted above, courts applying the traditional rules usually applied the law of the forum to matters of procedure. Courts applying the modern approaches often reach the same conclusion. However, many attempt to employ interest-based thinking in choosing among procedural rules. After all, if the modern approaches (other than the Second Restatement) generally eschew characterization—including characterizing the rule as substantive or procedural—a court applying those approaches should not take the easy way out and simply label the rule procedural.

Rules that regulate what happens in court present one additional wrinkle in interest-based analysis. Like all rules, they may be designed to benefit plaintiffs or defendants. However, they may also be designed to protect courts themselves. A rule barring a party from introducing certain types of evidence, for example, may be designed not only to protect one or more of the parties, but also protect the court from having to deal with unreliable evidence. To the extent a rule protects the court system itself, there will always be a “thumb on the scale” tilting the decision towards forum law. In many cases, this is enough to convince the forum to apply its own rule.

**NOTES AND QUESTIONS**

1. The modern approaches to choice of law bear some similarity to the analysis used in the constitutional part of personal jurisdiction analysis, insofar as both consider the connections a given state has with the case. But closer analysis reveals crucial differences. For example, modern choice of law doctrines consider all parties' connections, while personal jurisdiction focuses primarily on the defendant. In addition, a contact need not be purposeful to count in choice of law analysis. Because of these differences and others, it is often true that a forum has jurisdiction, but will not apply its own law. Conversely, a state's law may govern a case even though that state's courts would not have jurisdiction over the defendant.

2. As the text points out, choice of law rules differ tremendously between states. Does a forum making a choice of law decision consider the choice of law rules in force in other states when making its decision? In other words, should the court in *Paul* have considered not only Indiana tort law, but also Indiana choice of law rules? If your head is spinning at this point, you will be glad to hear that the answer is no. Choice of law rules are “procedural.” A court selecting a governing law almost always applies its own choice of law rules, and considers only other states' substantive rules.

3. *Choice of law and settlement.* One of the drawbacks to the modern approaches of the Second Restatement or “choice-influencing considerations” is that their multi-factor analysis makes it more difficult to predict what law a court will choose to apply in a particular case. As illustrated by *Paul*, there can also be some uncertainty even under the traditional *lex loci delicti* rule. As also illustrated by *Paul*, a decision on applicable law can be crucial to the outcome of a case when the law differs among the possible choices. If the parties are uncertain about what state’s law will apply, this can block settlement because the parties are unable to estimate what the outcome would be if the case proceeds to trial. The effect can be the same if the parties have reached different predictions for the applicable law and thus value the case very differently. It may be that the parties need a judicial decision to resolve the legal issue of applicable law before they can agree on how to resolve the underlying dispute, illustrating how proceeding with litigation in a case can be a strategic way to “set the table” for settlement.

## 2. VERTICAL CHOICE OF LAW: THE *ERIE* DOCTRINE AND STATE LAW IN FEDERAL COURTS

*[This section is a condensed alternative to Chapter 5, Part B.]*

As indicated in the text that led off this Chapter, the federal nature of the United States system creates several problems for a court attempting to determine what law governs a case. The first, discussed in the prior section, applies in all courts. Whenever a claim has connections with more than one forum, a court must determine which of those forum’s laws will be used to decide the case.

The second broad issue is the relationship between state and federal law. This second issue has two basic components, only one of which will be dealt with here. First, because federal law is supreme in the United States federal system, a court may have to apply federal law instead of state in situations where there is a conflict between the standards of, or policies behind, the two. The notion of federal “preemption” is ordinarily covered in Constitutional Law, and thus will not be addressed here.

This section deals with the other issue arising in connection with federal and state law. The subject of this section—the *Erie* doctrine—is mainly a concern only when a case is heard in federal court. The basic issue is whether the federal court will use state or federal law to decide the case. As you will see, in many cases a federal court will be required to apply state law.

*Erie* is rarely much of an issue when there is federal statute law on point. If the federal statute truly covers the situation, the federal court will apply it either along with or in lieu of state law. But not all federal law is statutory. You have already encountered the Federal Rules of Civil Procedure, a body of law promulgated by the United States Supreme Court. Similarly, federal courts, like their state counterparts, have authority to

create rules to govern certain procedural issues that arise in cases before them. Because the authority of the federal government in the United States federal system is limited, however, there are significant constraints on federal judge-made law. The *Erie* doctrine is the set of rules that define the limits on this “federal common law.”

At first glance, this “choice” between federal and state judge-made law may seem like little more than a variation on the choice of law question addressed just above, the only difference being that in *Erie* one of the candidates is federal law. But that analogy proves overly simplistic. The choice of law involved in *Erie* cases is different than that in state/state choice of law cases. In the latter, the court assumes all of the candidate laws are valid, and determines which of the states has a greater “stake” in the dispute. In *Erie*, by contrast, the core issue is determining whether the federal law is (a) valid, and (b) truly governs the dispute at hand. Unlike in horizontal choice of law cases, if the federal law is valid and governs the issue in question, the court must automatically apply it. Because *Erie* deals with one particularly vexing branch of federal law—federal judge-made law—it offers a unique insight into some of the basic principles of federal-state relations. Indeed, a study of *Erie* will allow you better to appreciate why some consider the doctrine to be one of the cornerstones of United States federalism.

Determining whether a federal law is “valid” is a complicated issue. A full discussion of the question requires considerable knowledge of constitutional law. In the case of judge-made law, it also requires some knowledge of basic concepts of separation of powers. Because most students who take Civil Procedure do not yet have that in-depth knowledge of constitutional doctrine, the ensuing analysis deals mainly with one particular category of valid federal law; namely, laws that regulate the practice and procedure in federal courts.

#### a. Overview of the Doctrine

### HOUBEN V. TELULAR CORPORATION

309 F.3d 1028 (7th Cir. 2002)

WOOD, CIRCUIT JUDGE.

. . . Although the *Erie* doctrine is a familiar one, it is notorious for the subtle distinctions it requires courts to draw between matters that are “substantive” (a conclusory term that means that state law will be used in cases where the rule of decision is derived from state law) and matters that are “procedural” (a similarly conclusory term that means the law of the forum will apply, and thus the same case will be handled differently depending on whether it is being pursued in a state court or a federal court). It is therefore useful to take a quick look at the development of the

doctrine and the approach the current Supreme Court appears to be taking to this central issue of judicial federalism.

*Erie* itself [304 U.S. 64 (1938)] presented a very broad question: whether, for purposes of the Rules of Decision Act, which was part of the First Judiciary Act and is now codified at 28 U.S.C. § 1652, federal courts sitting in diversity or otherwise applying state law as the rule of decision are obliged to follow only positive laws of the state as announced in statutes, or if the idea of “state law” also encompassed state decisional law. . . . *Erie* established the rule that the federal courts were obliged to follow state decisional law, as well as all other state law, in cases governed by the Rules of Decision Act. (While *Erie* questions arise most frequently in diversity cases, the Supreme Court has made clear that the doctrine applies equally to state law claims like Houben’s that are brought to the federal courts through supplemental jurisdiction under 28 U.S.C. § 1367.)

Questions soon arose over the full reach of the *Erie* ruling, however, because in the very same year that *Erie* was decided, 1938, the Supreme Court promulgated the Federal Rules of Civil Procedure. . . . Congress had passed the Rules Enabling Act, the successor to which can be found at 28 U.S.C. § 2072, in 1934. That Act empowered the Supreme Court to unify the systems of law and equity and to issue a single set of civil procedure rules to be used in the federal district courts. The rules that were developed under the authority of the Enabling Act were adopted by the Supreme Court on December 20, 1937, and took effect on September 1, 1938, less than five months after *Erie* was handed down.

*Erie* may have solved one problem, and the Rules Enabling Act may have solved another one, but in a small but significant set of cases they combined to create a new one. For cases involving obvious rules of substance . . . , it was easy for the federal courts to conclude that they were now to apply state law. . . . For cases involving obvious rules of procedure federal courts knew that they were required to follow the Federal Rules, even if those rules were different from the rules applicable in state court. But there was a middle ground for rules that might be seen as “substantive,” or might be seen as “procedural,” and it was difficult both to define what those terms might mean, and to decide the box in which to put different rules.

The Court’s first effort to grapple with the middle ground came in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), in which it had to decide whether a state statute of limitations barred a claim brought . . . [in] federal court . . . . After commenting on the slippery nature of the distinction between substance and procedure, the Court reformulated the question as:

Whether [the statute under review] concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter

of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

*Id.* at 109. Applying this test, which came to be known as the “outcome-determinative” test, the Court concluded that the state statute of limitations was one of those laws that the federal court was obliged to apply, even if a different rule would have prevailed in a claim arising under federal law.

Not long after *York* was decided, however, the Court came to realize that the outcome-determinative test swept too much under state law. As it observed in *Hanna v. Plumer*, 380 U.S. 460 (1965), in a certain sense

*every* procedural variation is “outcome-determinative.” For example, having brought suit in a federal court, a plaintiff cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in state courts, even though enforcement of the federal timetable will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him.

*Id.* at 468–69 (emphasis in original). Instead, it began to look at the issue in a broader way. . . . As the *Hanna* Court put it, the “‘outcome-determination’ test . . . cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.” 380 U.S. at 468.

*Hanna* went further than this, however. It held that *Erie* was never intended to cover cases where a federal rule of procedure covers the point at issue. In those cases, the proper questions are only (1) whether the rule clearly applies, (2) whether the rule falls within the scope of the Rules Enabling Act, and (3) whether the application of the rule would be constitutional. If the rule applies and is “rationally capable of classification” as procedural, then (in the absence of other constitutional problems, of course) the federal court must apply it.

The Supreme Court has revisited the *Erie* issue many times since those early years, but it [has not altered the basic two-part approach set out in *Hanna*.] . . .

### NOTES AND QUESTIONS

1. As the opinion indicates, the *Erie* doctrine applies primarily in diversity cases and the state-law claims in a supplemental jurisdiction case. Can you see why *Erie* is less of a factor in a federal question case? What is the source of the substantive law in a federal question case?

2. Although *Erie* is mainly a judge-made doctrine, two statutes play a significant role in the analysis. The Rules of Decision Act, 28 U.S.C. § 1652 [“RODA”], requires federal courts to follow state law “except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide.” The second influential statute is the Rules Enabling Act, 28 U.S.C. § 2072, [“REA”] which gives the Supreme Court the authority to enact rules of procedure and evidence. The Federal Rules of Civil Procedure are one example of a set of rules created by the Court under the REA.

3. *Houben* indicates there are actually two separate analyses used to determine if a judge-made rule is “procedural”—one (the REA test) for the Federal Rules of Civil Procedure and similar written rules, and another (the RODA test) for all other judge-made law. Restate the tests that courts use in each of these two situations. Under which of the tests is a given federal judge-made rule more likely to be applied?

4. Why should there be two separate tests? Regardless of whether the rule is a Federal Rule or ordinary judge-made law, the question is the same: is the rule “procedural?” Why should the analysis differ? The Supreme Court’s analysis in *Hanna*, which created the two tests, relied on the fact that the Federal Rules were created pursuant to the REA. To understand why that matters, consider who enacted the REA. Does Congress have the authority to enact substantive law? On the other hand, doesn’t the REA explicitly provide that the Supreme Court may enact only rules of “procedure and evidence?”

5. *Statutes of limitation*. Suppose the federal courts decide to adopt a uniform limitations period of one year for all claims filed in federal court. Is that statute of limitations a valid procedural rule under *Erie*? Would it matter whether the rule was created by precedent or pursuant to the REA? Under either analysis, would it matter what the limitations period would otherwise be under state law?

Recall that in horizontal choice of law, statutes of limitation are deemed procedural. A forum usually applies its own limitations period even when it borrows another state’s law to decide the merits. However, in *Guaranty Trust*, the Supreme Court held that statutes of limitations were substantive for purposes of *Erie*, which meant that state law must be applied. Although *Guaranty Trust* did not deal with a Federal Rule of Civil Procedure, most courts have assumed the same result would obtain even if the Federal Rules were amended to impose some sort of limitations period on state-law claims.

How can statutes of limitations be both procedural (for choice of law purposes) and substantive (for *Erie* purposes)? To resolve this seeming paradox, consider the underlying goals of choice of law and *Erie*. Although the two areas use the same basic terms, do they really deal with the same sort of issue?

**b. An Illustrative Case****BURKE V. SMITH**

252 F.3d 1260 (11th Cir. 2001)

KRAVITCH, CIRCUIT JUDGE:

John Smith and Heyl Truck Lines, Inc. (collectively, the “Defendants”) appeal the district court’s order setting aside the dismissal of a wrongful death action filed against them by four plaintiffs. The district court initially dismissed the action pursuant to a voluntary settlement agreement and release. Subsequently, Tammy Burke (“Tammy”), one of the plaintiffs in the action, filed a motion for relief from judgment of dismissal, which the court granted pursuant to Fed.R.Civ.P. 60(b)(4). For reasons expressed below, we affirm in part and vacate in part, holding that the district court properly found the judgment void, but that it should have set aside the dismissal as to all parties, not merely as to Tammy.

**I. BACKGROUND**

On May 25, 1995, four plaintiffs commenced an action against the Defendants for the wrongful death of Dennis Burke, who was killed in a trucking accident on April 17, 1995. The plaintiffs named in the complaint are (1) Linda Burke, individually as the wife of Dennis Burke; (2) Linda Burke, as administratrix of Dennis Burke’s estate; (3) Tammy Burke, Dennis Burke’s daughter, by and through her mother and next friend, Linda Burke; and (4) Royal Insurance Company. Tammy was seventeen years old at the time of her father’s death and a minor under Alabama law.

Less than two months after the filing of the complaint, the Defendants settled the case for \$987,500. In accordance with the settlement, Linda Burke (“Linda”) released the Defendants from all claims brought by, inter alia, “the dependents of Dennis Robert Burke.” The release, however, was signed solely by “Linda S. Burke, as Administratrix of the Estate of Dennis Burke” and by “Linda S. Burke, individually.” Tammy did not sign the release, nor did Linda execute her signature in her capacity as “Next Friend” of Tammy. Pursuant to the settlement and a stipulation of dismissal, the district court dismissed the complaint with prejudice. It is undisputed that the district court neither appointed a guardian ad litem to represent Tammy nor conducted a fairness hearing with respect to the settlement agreement.

After reaching the age of majority, Tammy filed a motion in the original lawsuit pursuant to Fed.R.Civ.P. 60(b)(4), claiming the judgment of dismissal was void because no guardian ad litem had been appointed on her behalf and no hearing was held to determine the fairness of the settlement. The district court granted the motion and reinstated the case. . . .

## III. DISCUSSION

## A.

. . . In the present case, the district court set aside the judgment of dismissal because (1) the court failed to appoint or consider the necessity of appointing a guardian ad litem to represent Tammy and (2) the court failed to hold a fairness hearing before dismissing Tammy's claims pursuant to the settlement agreement. Defendants contend on appeal that federal law does not entitle Tammy to either protection. In response, Tammy argues that a conflict of interest between her mother and herself necessitated the appointment of a guardian ad litem under federal law and that she was entitled to a fairness hearing under Alabama state law.

*1. Guardian ad litem*

It is well established that "[t]he appointment of a guardian ad litem is a procedural question controlled by Rule 17(c) of the Federal Rules of Civil Procedure." *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 38 (5th Cir.1958). Rule 17(c) provides in part:

The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.\*

Rule 17(c) does not require that a district court appoint a guardian ad litem in all cases. Rather, "Rule 17(c) authorizes the district court to appoint a guardian ad litem 'for an infant . . . not otherwise represented in an action. . . .'" *Croce v. Bromley Corp.*, 623 F.2d 1084, 1093 (5th Cir.1980). In the present case, Tammy was "otherwise represented" by her mother who brought this action on her behalf. Thus, Rule 17(c) did not require the court to appoint a guardian ad litem. . . .

[The court then found no conflict of interest between Tammy and her mother.] Accordingly, we hold that the district court was not required to consider whether or not the appointment of a guardian ad litem was necessary.

*2. Settlement Hearing*

Notwithstanding our holding on the issue of guardianship, we agree with the district court that it should have conducted a fairness hearing before dismissing Tammy's claims pursuant to the settlement agreement. Under Alabama law, a hearing to determine the fairness of a settlement must be held in order for that settlement to be binding on a minor party, even where the minor is represented by a next friend or other guardian. Defendants do not dispute that Alabama law requires a hearing, nor that the district court failed to conduct one in this case. Rather, they argue that

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\* The language of the Federal Rule quoted in the text differs from the current version. The new rule is the Supplement. The change in wording would not affect the court's analysis. [Eds.]

Alabama law is not controlling on this issue because the capacity of a minor to enter settlements is governed by federal procedural law, in particular Fed.R.Civ.P. 17(c). We disagree.

A federal court sitting in diversity is required to apply state substantive law and federal procedural law. As recognized by the Supreme Court, however, “[c]lassification of a law as ‘substantive’ or ‘procedural’ for Erie purposes is sometimes a challenging endeavor.” *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 416, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996). To aid courts in this “challenging endeavor” the Supreme Court developed a two-part test in *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). Under the *Hanna* test, “when the federal law sought to be applied is a congressional statute or Federal Rule of Civil Procedure, the district court must first decide whether the statute is ‘sufficiently broad to control the issue before the court.’” *Alexander Proudfoot Co. World Headquarters L.P. v. Thayer*, 877 F.2d 912, 917 (11th Cir.1989). If the federal procedural rule is “sufficiently broad to control the issue” and conflicts with the state law, the federal procedural rule applies instead of the state law.<sup>7</sup> See *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1296 (11th Cir.1999) (explaining that “if the state law conflicts with a federal procedural rule, then the state law is procedural for *Erie/Hanna* purposes regardless of how it may be characterized for other purposes”). If the federal rule does not directly conflict with the state law, then the second prong of the *Hanna* test requires the district court to evaluate “whether failure to apply the state law would lead to different outcomes in state and federal court and result in inequitable administration of the laws or forum shopping.” *Cohen*, 184 F.3d at 1297 (citing *Hanna*, 380 U.S. at 468, 85 S.Ct. 1136).

Applying the principles from *Hanna* and its progeny to this case, we first note that Rule 17(c) does not conflict with Alabama’s law concerning the settlement of a minor’s claims. Unlike Alabama law, Rule 17(c) does not address the conditions under which a minor’s claims may be contractually settled or released. Instead, it simply deals with the court’s obligation to protect the interests of a minor party through the appointment of a guardian ad litem or other representative. In contrast, Alabama law imposes the additional requirement of a fairness hearing when a representative seeks to settle the claim of a minor. Because Rule 17(c) is not sufficiently broad to cover the disputed issue, it does not directly conflict with the Alabama rule. Accordingly, we proceed to the second prong of the *Hanna* analysis.

Although failure to apply Alabama law regarding settlement of minors’ claims might not induce forum shopping, it would result in an “inequitable

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<sup>7</sup> The only rare exception to this rule “is where the advisory committee, the Supreme Court, and Congress have collectively erred and adopted a federal procedural rule that is either unconstitutional or should not have been adopted under the Rules Enabling Act process because it is a matter of substantive law.” *Cohen*, 184 F.3d at 1296–97.

administration” of the laws. Minors whose claims are settled in state court without a hearing could reassert their claims if later they realize that the settlement was not in their best interests, yet minors settling in federal court would have no such recourse. Therefore, the claim of a minor in federal court could be contracted away by an unscrupulous guardian without that minor receiving the same protections afforded to a minor in state court. Such a result would discriminate against the minor whose state law claim is settled in federal court “solely because of the fortuity that there is diversity of citizenship between the litigants.” *Walker*, 446 U.S. at 753, 100 S.Ct. 1978. In addition, failure to apply Alabama’s law on the settlement of a minor’s claim runs contrary to the established principle that “the construction and enforcement of settlement agreements [are] governed by principles of state law applicable to contracts generally.” *Lee v. Hunt*, 631 F.2d 1171, 1174 (5th Cir.1980).

Therefore, we hold that Alabama law requiring a fairness hearing in order to bind a minor to a settlement agreement is a matter of state substantive law and was correctly applied in deciding the Rule 60(b)(4) motion. Accordingly, we affirm the district court’s finding that the judgment of dismissal was void under Rule 60(b)(4) due to the court’s failure to conduct a hearing in the underlying action.

#### B.

[The court went on to hold that Federal Rule 60 required the trial court to set aside the judgment as to all plaintiffs, not only Tammy.] . . .

Therefore, although we affirm the district court’s finding that the judgment of dismissal was void, we vacate and remand its order setting aside the judgment only as to Tammy. On remand, we instruct the district court to set aside the judgment of dismissal as to all parties.

### NOTES AND QUESTIONS

1. The court in *Burke* concludes federal law applies to the issue of appointment of a guardian, but state law applies on the issue of the fairness hearing. Why the difference? Is there a different test involved, or a difference in how the test applies to the two issues?

2. On the guardianship issue, the court concludes Federal Rule 17 applies. However, as it recognizes in footnote 7, a Federal Rule is not necessarily valid. Instead, it is valid only if it is both constitutional and complies with the limits set out by the Rules Enabling Act. The court seems to assume Federal Rule 17 is valid. Do you agree?

3. Even if Federal Rule 17 is a valid rule under the Rules Enabling Act, doesn’t the court need to consider the competing *state* rule? Would the result in the case be different if the Alabama Constitution contained a right to have someone other than a family member appointed as a guardian ad litem in all

cases involving children? If the question is covered by a Federal Rule, does it matter that the *state* rule is “substantive?”

4. The court concludes Federal Rule 17 is valid. But when it turns to the fairness hearing issue, the court holds that state law, not Rule 17 should apply. Do you see why? Do you agree with the court’s conclusion in this regard?

5. The court applies state law rather than federal law on the fairness hearing issue because it determines that applying different rules would result in “inequitable administration of the laws.” But won’t *any* difference between state and federal law produce different outcomes? Is the court saying that any difference in state and federal procedural laws is enough to make the federal court follow state law, or is there something special about the issue in this case?

6. *Burke* is unusual in one regard. When applying the “non-federal rule” portion of the *Erie/Hanna* test, most courts that conclude state law should apply rely on the “forum shopping” language rather than the “inequitable administration” language. What exactly does the test mean by “forum shopping?” Why did the court conclude that refusing to apply the fairness hearing rule would not result in forum shopping?

7. As discussed earlier in this Chapter, “horizontal” choice of law rules often produce a situation where one state will apply a different rule than another. This in turn may cause parties to engage in forum shopping between states. Does forum shopping between different state courts raise an *Erie* issue?

### c. Special Situations Under the *Erie* Doctrine

Development of the *Erie* doctrine did not end with the Supreme Court’s 1965 decision in *Hanna v. Plumer*. In addition to numerous lower court decisions, the Supreme Court has itself weighed in on *Erie* issues a number of times during the past 50 years. While it has not changed the basic *Hanna* analysis, it applies that analysis differently in some special situations. This section briefly mentions some of the more important special rules.

#### i. Federal Statutes

In some cases, a federal statute may determine one or more important issues in a case. If there is a clash between the federal statute and state law, the court will apply a simple, two-step analysis. First, it asks whether the federal statute really applies to the situation at hand (an analysis similar to that in *Burke* above). If so, the court then asks whether the federal statute is constitutional.

Note the difference between this analysis and that which applies to Federal Rules of Procedure. Both statutes and the Federal Rules are examples of federal positive law. However, when a statute is involved, the court will *not* ask whether the statute really regulates procedure, or whether it “abridges, enlarges, or modifies” substantive rights. The reason for this difference is simple. Congress has the authority to enact any law

within its legislative authority, including both procedural and substantive laws. The Supreme Court, by contrast, was delegated the authority to enact the Federal Rules by the Rules Enabling Act. The Rules Enabling Act limits the Court's lawmaking powers to rules that are both "procedural" and do not "abridge, enlarge, or modify" substantive rights.

### *ii. State Laws Affecting Judges and Juries*

In some situations, state and federal courts will have different rules dictating the role of a jury in litigation. The Supreme Court has dealt with this issue twice, in *Byrd v. Blue Ridge Electric Cooperative*, 356 U.S. 525 (1958) and in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). In both cases the Court held that the federal practice should apply in federal courts. While recognizing that the difference between state and federal law could result in some forum-shopping, the Court held that the strong federal policy favoring juries reflected in the Seventh Amendment to the U.S. Constitution (the provision requiring trial by jury in many federal court civil actions) tipped the scales in favor of deferring to the jury. Note that the Court in neither case found that the Seventh Amendment *required* a jury determination. If it had, the constitutional command would have applied notwithstanding *Erie*. Rather, the Court held the Amendment created a sort of preference for jury determination.

### *iii. State Choice of Law Rules*

Suppose that a court applies the *Erie* analysis and concludes it must apply state law on a particular issue. *Which* state's law will it use? We already saw that *Erie* issues arise predominantly in diversity cases, where by definition two or more states have a connection with the parties. Does a federal court decide for itself which of the connected states' laws apply, or does it look to state choice of law rules? But if it looks to state choice of law rules, which state?

The Supreme Court answered this question in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). It held that state choice of law rules are substantive, so that they must be applied in federal court. The Court also indicated that the federal court should apply the choice of law rules of the state in which the federal court sits. Therefore, a federal court in Iowa will apply Iowa choice of law rules to determine what state's laws govern the case. Although *Klaxon* predates *Hanna*, the rule still applies today.

### *iv. Federal Rule 3*

In a federal question case, Rule 3 dictates when a case commences for purposes of the statute of limitations. In cases governed by state law, however, the federal court borrows state law. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). The Court held that Rule 3 was not meant to

determine when a case is sufficiently underway to satisfy a state statute of limitations. The difference is important in those states that require a plaintiff to serve the defendant, not merely file the complaint, in order to beat out the statute of limitations.

If Rule 3 does not apply to the statute of limitations in cases where the state limitations period governs, what purpose does it serve? Why else do we care when a case “commences?” Are there any other Federal Rules that turn on when a case commences?

*v. Federal Common Law*

*Erie* mandates the use of state substantive law. The rationale for the rule is that federal courts, unlike their state counterparts, do not have general lawmaking authority. However, the *Erie* command is not absolute. In certain narrow categories of cases, federal courts do have the authority to enact rules, even though those rules clearly govern substantive rights. For example, in cases against the United States, federal courts will apply their own rules of law, even if those rules may differ from those in the state court. Similarly, cases brought *by* the United States are governed by federal substantive common law. Other examples of situations governed by federal judge-made law are admiralty, suits directly affecting the foreign relations of the United States, suits between states affecting interstate relations, and cases involving an “overwhelming federal interest.” You will learn more about this federal common law if you take an upper-level course in Federal Courts. For now it is sufficient simply to recognize that some substantive federal judge-made law exists.