

NINTH EDITION

Civil Procedure

Kevin M. Clermont

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B L A C K L E T T E R O U T L I N E S

Civil Procedure

by **Kevin M. Clermont**

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N I N T H E D I T I O N

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610 Opperman Drive

St. Paul, MN 55123

1-800-313-9378

ISBN: 978-0-314-27657-5

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Capsule Summary of Civil Procedure

■ PART ONE: GENERAL CONSIDERATIONS

I. CIVIL PROCEDURE ANALYZED

Most courses, and this outline, approach the seamless web of civil procedure by (1) presenting in survey fashion the whole subject of the conduct of litigation and then (2) studying a series of fundamental problems inherent therein.

II. CIVIL PROCEDURE SYNTHESIZED

A. Nature of Civil Procedure

Civil procedure concerns the society's noncriminal process for submitting and resolving factual and legal disputes over the rights and duties recognized by substantive law, which rights and duties concern primary conduct in the private and public life that transpires essentially outside the courthouse or other forum. In shaping this law of civil procedure, the shapers—constitutions, legislatures, courts, and litigants—observe both outcome and process values.

B. Content of Civil Procedure

Turbulent policies and misleadingly concrete rules constitute the law of civil procedure. One underlying theme is that our society has generally opted to dispense justice by *adjudication* involving an *adversary system* wherein the parties are represented by *advocates*.

C. History of Civil Procedure**1. English Roots**

The old English system had two distinct sets of courts, procedure, remedies, and substantive law.

a. Common Law**b. Equity****2. State Developments**

The American states basically followed the English model until the code reforms of the 19th century, beginning with the Field Code in 1848.

3. Federal Developments

The federal legal system followed traditional ways from 1789 until well into the 20th century, which saw the Rules Enabling Act of 1934 and the Federal Rules of Civil Procedure in 1938.

■ PART TWO: LITIGATING STEP-BY-STEP**III. PRELIMINARY CONSIDERATIONS**

A. Federal Focus

This capsule summary of Part Two focuses on federal practice.

B. Selecting a Court with Authority to Adjudicate

First, plaintiff must select a court with *subject-matter jurisdiction* and *territorial authority to adjudicate*. He commences a federal lawsuit by filing a complaint with the selected federal district court. Rule 3. Second, the

persons whose interests are to be affected must receive adequate *notice*. This usually is achieved by service of process. Rule 4.

IV. PRETRIAL

A. Pleading Stage

This stage has been usually short in duration and seldom determinative in effect.

1. General Rules

a. Purposes of Pleadings

Federal pleading has been primarily notice pleading, but seems to be moving to nonconclusory-and-plausible pleading.

b. Form of Pleadings

The formal requirements—from caption to signing—are quite lenient.

c. Contents of Pleadings

Pleadings should be simple, direct, and brief. The pleader should carry his burden of allegation, without pleading irrelevancies or detail.

d. Flexibility of Pleadings

Alternative and inconsistent pleading is permissible, and there is liberal joinder of claims and parties.

e. Governing Law

In any federal action, federal law governs the mechanics of pleadings, as well as most of the other mechanics of civil procedure.

2. Steps in Pleading Stage

a. Complaint

Rule 8(a) requires (1) a jurisdictional allegation, (2) “a short and plain statement of the claim,” and (3) a demand for judgment.

b. Motion and/or Answer

To avoid default, defendant must under Rule 12(a) make a timely response, such as (1) pre-answer objections by motion

for a more definite statement and by motion to strike, (2) disfavored defenses under Rule 12(b)(2)–(5) by pre-answer motion or answer, (3) defenses on the merits by including denials and affirmative defenses in the answer, (4) favored defenses under Rule 12(b)(6) and (7) by motion and answer, and (5) the subject-matter jurisdiction defense under Rule 12(b)(1) by raising it in any fashion. This scheme leaves considerable room for tactics; but Rule 12(g) and (h) imposes complicated consolidation and waiver prescriptions.

c. Motion, Reply, and/or Answer

Usually plaintiff does not respond to an answer. However, there is the significant requirement that plaintiff make a timely response to any counterclaim denominated as such in the defendant's answer.

3. Amendments

There are liberal provisions for amending the pleadings, either by amendment as a matter of course within certain time limits or by amendment later with written consent of the adversary or with leave of court. Rule 15(a). The court freely gives leave "when justice so requires," and amendments are possible at or after trial. Rule 15(c) provides that the effective date of a nondrastic amendment is the date of the original pleading.

B. Disclosure

In 1993, amid much controversy, the rulemakers introduced a new stage called disclosure.

1. Purposes

Disclosure aims at achieving some savings in time and expense by automatically getting certain core information on the table, and also at moderating litigants' adversary behavior in the pretrial phase.

2. Scope

Parties must disclose (1) at the outset, favorable occurrence witnesses and documents, as well as insurance coverage, (2) at a specified time, identity of any expert who may be called at trial, along with a detailed expert report, and (3) shortly before trial, trial witness lists and the like regarding nonimpeachment evidence.

3. Mechanics

Disclosure is meant to proceed in an atmosphere of cooperation. A key feature is the requirement in Rule 26(f) that the litigants confer early, before discovery proceeds, to consider the case, the disclosures, and a discovery plan.

4. Problems

The swirling controversy arises from doubts that the benefits of overlaying a system of disclosure can match its costs.

C. Discovery

The pivotal feature of the federal procedural system is the availability of a significant discovery stage.

1. General Rules

a. Purposes of Discovery

Discovery allows a party to expand on the notice given by the pleadings and any disclosures and to prepare for disposition of the case.

b. Scope of Discovery

The scope is very wide, extending to any matter that is "relevant" and that is "nonprivileged." Rule 26(b)(1). Additional provisions restrict discovery of work product, treat discovery of expert information and electronically stored information, and permit control of discovery on a case-by-case basis.

c. Mechanics of Discovery

Discovery is meant to work almost wholly by action of the parties, without intervention by the court. Nevertheless, to remedy abuse, the respondent or any party may seek a protective order. Rule 26(c). Alternatively, to remedy recalcitrance, the discovering party may go to court to obtain an order compelling discovery and then a sanction. Rule 37.

d. Problems of Discovery

Serious questions persist on whether the benefits of discovery outweigh its costs, and on how to control those costs.

2. Specific Devices

There are six major types of discovery devices:

(1) oral depositions;

- (2) written depositions;
- (3) interrogatories;
- (4) production of documents and such;
- (5) physical and mental examination; and
- (6) requests for admission.

D. Pretrial Conference

Judicially supervised conferences (1) help move the case through the pretrial process and toward trial and (2) focus the case after the skeletal pleading stage and the dispersive effects of disclosure and discovery. The pretrial procedure of Rule 16 was traditionally rather loose, but recent amendments have embraced the notion of judicial case management.

1. Purposes

A pretrial conference allows the court and the litigants to confer generally about the case, so moving it along to disposition and molding it for trial.

2. Procedural Incidents

The court may direct the attorneys and unrepresented parties to appear before it for one or more pretrial conferences. There is no uniform practice, but pretrial conferences should usually be voluntary in tone and relatively simple, flexible, and informal in format.

3. Order

After a pretrial conference, the court must enter a binding but amendable order reciting the action taken.

E. Other Steps

Other procedural steps can be taken in the pretrial period, and not necessarily in any fixed order.

1. Provisional Remedies

The claimant may seek temporary relief to protect himself from loss or injury while his action is pending.

a. Seizure of Property

Rule 64 incorporates state law on seizure of property, which law typically provides such remedies as *attachment* and *garnishment* to ensure that assets will still be there to satisfy any eventual judgment.

b. Injunctive Relief

Rule 65 governs the stopgap *temporary restraining order*, which can be granted without a hearing and sometimes even without notice, and the *preliminary injunction*, which can be granted only after notice and hearing.

2. Summary Judgment and Other Steps That Avoid Trial

Most often trial is ultimately avoided, either by a motion attacking the pleadings or more likely by one of the following steps.

a. Summary Judgment

Rule 56 is an important and broadly available device by which any party may without trial obtain a summary judgment on all or part of any claim, if he is “entitled to judgment as a matter of law” and if “there is no genuine issue as to any material fact.” The party may move on the pleadings alone, or use other factual materials to pierce the pleadings. In determining whether there is a genuine issue as to any fact, the court construes all factual matters in the light reasonably most favorable to the party opposing the motion and then asks whether reasonable minds could differ.

b. Other Steps That Avoid Trial

There are four other steps that may avoid trial:

- (1) voluntary dismissal;
- (2) involuntary dismissal;
- (3) default; and
- (4) settlement.

3. Masters and Magistrate Judges

Another possible step involves referring the case to one of these “parajudges.”

V. TRIAL**A. Scenario**

Trial follows a relatively settled order, although trial practice is largely confided to the trial judge’s discretion. Assume for the following that there is a federal jury trial, although a nonjury trial has a basically similar scenario.

1. Plaintiff's Case

Ordinarily, plaintiff and then defendant make *opening statements*. Plaintiff then presents his evidence on all elements with respect to which he bears the initial burden of production.

2. Motions

When plaintiff rests, defendant may move for *judgment as a matter of law* under Rule 50(a).

3. Defendant's Case

If the trial has not been short-circuited by the granting of judgment as a matter of law, defendant may present her evidence.

4. Motions

When defendant rests, plaintiff may move for judgment as a matter of law. There can be further stages of rebuttal, rejoinder, and so on. When both sides finally rest at the close of all the evidence, either side may move for judgment as a matter of law. As usual, this can be granted if, looking only at all the evidence that is favorable to the opponent of the motion but not incredible and also the unquestionable evidence that is favorable to the movant, the judge believes that a reasonable jury could not find for the opponent.

5. Submission of Case

If the trial still has not been short-circuited by judgment as a matter of law, the parties usually make *closing arguments*, with plaintiff ordinarily speaking first and last. After and/or before closing arguments, the judge gives oral *instructions* to the jury. Then, the jury retires to reach a *verdict*.

6. Motions

Two motions are available to change the outcome of the trial, but these motions must be filed no later than 28 days after entry of judgment. First, a *renewed motion for judgment as a matter of law* under Rule 50(b) asks to have the adverse verdict and any judgment thereon set aside and to have judgment entered in the movant's favor. The movant must have earlier moved for judgment as a matter of law under Rule 50(a). The standard for the renewed motion is the same as that for the original motion. Second, a *motion for a new trial* under Rule 59(a) asks to have the adverse verdict and any judgment thereon set aside and to hold a new trial to prevent

injustice. This can be granted if, looking at all the evidence, the judge is clearly convinced that the jury was in error. It can also be granted on such grounds as error by the judge or misconduct by the participants in the course of the trial or on the ground of newly discovered evidence.

B. Jury and Judge

Many of the complications of trial practice result from the presence of a jury and its interaction with the judge.

1. Trial by Jury

a. Formal Characteristics of a Jury

A federal civil jury normally has 6 to 12 members acting unanimously.

b. Selection of a Jury

By an elaborate process including the judge's voir dire examination and the parties' challenges, an impartial and qualified trial jury is selected.

c. Right to Trial by Jury

Upon timely written demand of any party, there will be trial by jury on those contested factual issues:

- (1) that are triable of right by a jury under the *Seventh Amendment* to the Federal Constitution, which is read expansively and includes at least any issue arising in a case such that the issue would have been triable of right to a common-law jury in 1791; or
- (2) that are triable of right by a jury under some federal *statute*.

Also, the court, in its discretion with the *consent* of both parties, can order a trial by jury under Rule 39(c)(2).

d. State Practice

State jury practice is widely similar to federal. However, the Seventh Amendment and its expansive reading do not apply to the states.

2. Judicial Controls

Federal practice, unlike that of some states, leans toward maximizing judicial control of the jury.

VI. JUDGMENT

A. Entry of Judgment

Rule 58 requires prompt entry of a judgment as the formal expression of the outcome of federal litigation.

B. Kinds of Relief

1. Coercive Relief

Courts in their judgments generally can give active relief that the government will enforce.

a. Legal Relief

There can be an award to the prevailing party of damages, restoration of property, and costs.

b. Equitable Relief

There can be an order to defendant to do or not to do something, as by an injunction or an order of specific performance.

2. Declaratory Relief

Courts generally can give passive relief that declares legal relationships, as in an action for declaratory judgment.

C. Enforcement of Judgment

1. Legal Coercive Relief

The usual tool for enforcing a legal-type judgment is a *writ of execution*.

2. Equitable Coercive Relief

The usual tool for enforcing an equitable-type judgment is the court's *contempt* power.

D. Relief from Judgment

Relief from judgment, other than in the ordinary course of review in the trial and appellate courts, is available in narrow circumstances of extraordinary harm.

VII. APPEAL

A. Appealability

1. Routes to Court of Appeals

The basic jurisdictional rule is that only *final* decisions of a district court are appealable to the appropriate court of appeals, but the courts and Congress have created a series of exceptions.

a. Final Decisions

This final decision rule appears in 28 U.S.C.A. § 1291. However, there are masked exceptions in (1) such judge-made doctrines as the collateral order doctrine of the *Cohen* case, (2) the ad hoc approach of the *Gillespie* case, and (3) the treatment of complex litigation in Rule 54(b).

b. Interlocutory Decisions

There are also explicit exceptions that directly allow immediate review of avowedly interlocutory decisions in (1) 28 U.S.C.A. § 1292(a), which allows appeal of decisions concerning preliminary injunctions and of other specified decisions, (2) 28 U.S.C.A. § 1651(a), which allows review by mandamus, (3) 28 U.S.C.A. § 1292(b), which allows appeal if the district court and the court of appeals so agree, and (4) 28 U.S.C.A. § 1292(e), which authorizes Federal Rule 23(f) on appeal from class-action certification orders.

2. Routes to Supreme Court

Under 28 U.S.C.A. § 1254, there are two routes from the court of appeals to the Supreme Court. The usual route is by certiorari, which is a matter of the Court's discretion and not of right; but there is also the slim possibility of certification.

B. Reviewability

1. Standards of Review

The appellate court applies one of three degrees of scrutiny to reviewable issues.

a. Nondeferential Review

The appellate court makes a virtually fresh determination of questions of law.

b. Middle-Tier Review

The appellate court shows deference to fact-findings by a judge in a nonjury trial and to discretionary rulings, affirming unless it is clearly convinced there was error.

c. Highly Restricted Review

The appellate court will overturn only in the most extreme situations a decision denying a new trial motion based on the weight of the evidence.

2. Appellate Procedure

Appeal does not entail a retrial of the case, but a rather academic reconsideration of the reviewable issues in search of prejudicial error.

■ PART THREE: AUTHORITY TO ADJUDICATE

VIII. SUBJECT-MATTER JURISDICTION

A. Introduction to Subject-Matter Jurisdiction

For a court properly to undertake a civil adjudication, the court must have, under applicable constitutional and statutory provisions, *authority to adjudicate the type of controversy before the court*—that is, it must have jurisdiction over the subject matter.

B. State Courts

A state may organize its judicial branch as it wishes. A state has considerable freedom in allocating jurisdiction to its courts of *original* and *appellate* jurisdiction, subject to occasional federal statutes excluding state courts from certain subject areas.

1. General Versus Limited Jurisdiction

Typically, a state's courts of original jurisdiction include one set of courts of *general* jurisdiction, which can hear any type of action not specifically prohibited to them, and several sets of courts of *limited* jurisdiction, which can hear only those types of actions specifically consigned to them.

2. Exclusive Versus Concurrent Jurisdiction

A great number of cases can be heard only in state courts. For some other cases, the federal and state courts have *concurrent* jurisdiction. A few types of cases are restricted by federal statute to the *exclusive* jurisdiction of the federal courts.

C. Federal Courts

Article III of the Federal Constitution establishes the Supreme Court, and Articles I and III give Congress the power to establish lower federal

courts as it sees fit. The result is a number of federal courts, including the basic pyramid of 91 district courts, 13 courts of appeals, and the Supreme Court. These federal courts are courts of limited jurisdiction. Accordingly, for a case to come within the jurisdiction of a federal court, the case normally must fall (1) within a federal statute bestowing jurisdiction on the court and (2) within the outer bounds of federal jurisdiction marked by Article III and the Eleventh Amendment.

1. Federal Questions

As the most important example of federal subject-matter jurisdiction, the district courts have original jurisdiction over cases arising under the Constitution, federal statutory or common law, or treaties.

a. Constitutional Provision

Article III extends the federal judicial power to such “arising under” cases, and it has been broadly read to embrace all cases that include a federal “ingredient.”

b. Statutory Provisions

Congress has acted under the constitutional provision to vest federal question jurisdiction in the district courts:

- (1) the general provision in 28 U.S.C.A. § 1331 uses the key constitutional words, but it has been narrowly read to require an *adequate federal element* that would appear on the face of a *well-pleaded complaint* stating a federal claim that is *not insubstantial*; and
- (2) there is a string of special federal question statutes, applicable to special subject areas, that might avoid some of the restrictions read into § 1331, might impose other restrictions, or might make the jurisdiction exclusive.

2. Diversity of Citizenship

For another example, the district courts have original jurisdiction over cases that are between parties of diverse citizenship, usually provided that they satisfy a jurisdictional amount requirement.

a. Constitutional Provision

Article III extends the federal judicial power to such diversity cases, and it has been broadly read to require only “partial diversity.”

b. Statutory Provisions

Congress has acted under the constitutional provision to vest diversity jurisdiction in the district courts:

- (1) the general provision in 28 U.S.C.A. § 1332(a) bestows jurisdiction only in certain cases of “complete diversity” where the matter in controversy exceeds \$75,000; and
- (2) there are a few special statutes such as 28 U.S.C.A. § 1335 bestowing jurisdiction for interpleader actions involving partial diversity where the amount in controversy equals or exceeds \$500.

c. Jurisdictional Amount

Jurisdictional amount requirements, intended to keep petty controversies out of the federal courts but very complicated to apply, are of statutory origin.

3. Removal

Congress has provided for removal of specified cases within the federal judicial power from a state trial court to the local federal district court. The basic statute is 28 U.S.C.A. § 1441, which most importantly allows all defendants together promptly to remove any civil action against them that is within the district courts’ original jurisdiction—subject to certain exceptions, such as the prohibition of removal of a case not founded on a federal question if any served defendant is a citizen of the forum state.

4. Supplemental Jurisdiction

The courts generally read the Constitution and the jurisdictional statutes to permit the district courts when desirable to hear state claims that were related to pending federal claims. Now Congress has codified this doctrine in 28 U.S.C.A. § 1367.

IX. TERRITORIAL AUTHORITY TO ADJUDICATE

A. Introduction to Territorial Authority to Adjudicate

For a court properly to undertake a civil adjudication, the court must have *authority to hear the case despite any nonlocal elements in the case*—that is, it must have territorial authority to adjudicate.

1. Territorial Jurisdiction and Venue

These two types of restrictions on the place of litigation together constitute the concept of territorial authority to adjudicate.

2. Current Due Process Doctrine

The principal limitation on territorial authority to adjudicate is the federal due process provision, which under the *World-Wide Volkswagen* case now requires the categorization of the action and then the application of both the power and the unreasonableness tests.

a. Categorization

First the action must be categorized in terms of the target of the action, be it a person or some kind of thing.

b. Jurisdictional Tests

Then it must be determined whether (1) the forum has *power* over the target (“minimum contacts”) and (2) litigating the action there would be *unreasonable* in light of all interests (“fair play and substantial justice”).

3. Future Due Process Doctrine

Several commentators argue that the due process doctrine should evolve toward directly applying only a reasonableness test, as was done in the *Mullane* case.

B. Application of Current Due Process Doctrine

First categorize the action.

1. In Personam

For personal jurisdiction, there must be power over the individual or corporate defendant, and the exercise of jurisdiction must not be unreasonable. There are several recognized bases of power:

- (1) *General Jurisdiction*. Both *presence* and *domicile* of defendant give power to adjudicate any personal claim.
- (2) *Specific Jurisdiction*. The lesser contacts of *consent* and certain *forum-directed acts* (such as sufficiently substantial tortious acts, business activity, acts related to property, and litigating acts) by defendant give power to adjudicate only those personal claims related to the contacts.

2. In Rem

a. Pure In Rem

Jurisdiction in rem can result in a judgment affecting the interests of *all* persons in a designated thing. To satisfy the

power test, such an action normally must be brought where the thing is. Unreasonableness will then be the key test.

b. Jurisdiction over Status

This subtype of jurisdiction can result in a judgment establishing or terminating a status. To satisfy the power test, such an action must be brought in a place to which one party in the relationship has a significant connection. The exercise of jurisdiction must not be unreasonable.

3. Quasi In Rem

a. Subtype One

This variety of jurisdiction quasi in rem can result in a judgment affecting only the interests of *particular* persons in a designated thing, and may be invoked by a plaintiff seeking to establish a *pre-existing interest* in the thing as against the defendant's interest. To satisfy the power test, such an action normally must be brought where the thing is. Unreasonableness will then be the key test.

b. Subtype Two

This variety of jurisdiction quasi in rem can result in a judgment affecting only the interests of *particular* persons in a designated thing, and may be invoked by a plaintiff seeking to apply the defendant's property to the satisfaction of a claim against defendant that is *unrelated* to the property. To satisfy the power test, such an action normally must be brought where the thing is. Unreasonableness will then be the key test, but is here so difficult to satisfy that such jurisdiction is available only in rather special situations.

C. Other Limitations on Territorial Authority to Adjudicate

1. Limits on State Trial Courts

a. Federal Law

The principal federal limitation on state-court territorial authority to adjudicate is the already described Due Process Clause of the Fourteenth Amendment.

b. International Law

International law imposes no significant direct restrictions on state-court territorial authority to adjudicate.

c. State Law

First, state constitution, statute, or decision may further limit state-court territorial jurisdiction, such as by a restricted long-arm statute or the doctrine of forum non conveniens. *Second*, related to these limits are state venue restrictions, which most often are defined as those requirements of territorial authority to adjudicate that specify as proper fora only certain courts within a state having territorial jurisdiction, but which would be better defined as those requirements of territorial authority to adjudicate that are not founded on the Federal Constitution.

d. Agreements Among Parties

The parties generally may, by agreement, restrict any potential litigation to one or more courts.

2. Limits on Federal District Courts

a. Federal Law

First, the principal constitutional limitation on a federal court's territorial jurisdiction is the Due Process Clause of the Fifth Amendment. The variety of federal statutes and Rules treating service of process further limits federal-court territorial jurisdiction. The federal courts have also developed a number of limiting doctrines, such as immunity from service of process. *Second*, related to all these limits are federal venue restrictions, which most often are defined as those requirements of territorial authority to adjudicate that are not linked to service provisions, but which would be better defined as those requirements of territorial authority to adjudicate that are not founded on the Federal Constitution.

b. International Law

International law imposes no significant direct restrictions on federal-court territorial authority to adjudicate.

c. State Law

State jurisdictional limits frequently apply in federal court through the federal service provisions, most often because the applicable federal provision incorporates that state law.

d. Agreements Among Parties

The parties generally may, by agreement, restrict any potential litigation to one or more courts.

X. NOTICE

A. Introduction to Notice

For a court properly to undertake a civil adjudication, the persons whose property or liberty interests are to be significantly affected must receive *adequate notice*.

B. Constitutional Requirement**1. General Rule**

For any adjudication, due process requires fair notice of the pendency of the action to the affected person or her representative. Most importantly, fair notice must be either (1) actual notice or (2) notice that is reasonably calculated to result in actual notice.

2. Notice Before Seizing Property

Due process also requires certain procedural protections before governmental action may unduly impair a person's property interest.

C. Nonconstitutional Requirements

The provisions for service of process further specify the manner of giving notice. Local law may strictly enforce some of these nonconstitutional requirements for giving notice, but today the trend is toward ignoring irregularities (1) where there was actual notice received or (2) where the form of the notice and the manner of transmitting it substantially complied with the prescribed procedure.

D. Contractual Waiver of Protections

By voluntary, intelligent, and knowing act, a person may waive in advance all these procedural protections.

XI. PROCEDURAL INCIDENTS OF FORUM-AUTHORITY DOCTRINES

A. Procedure for Raising**1. Subject-Matter Jurisdiction**

Satisfaction of this requirement is open to challenge throughout the ordinary course of the initial action.

2. Territorial Authority to Adjudicate and Notice

In the initial action the key for defendant is to raise these personal defenses in a way that avoids waiving them.

a. Special Appearance

This is the procedural technique by which defendant can effectively raise these defenses. Defendant must be very careful to follow precisely the required procedural steps of a special appearance. In federal court, a “special appearance” comes in the form of a Rule 12(b)(2)–(5) defense.

b. Limited Appearance

To be sharply distinguished from a special appearance is this procedural technique by which defendant restricts her appearance to defending a nonpersonal action on the merits, without submitting to personal jurisdiction.

B. Consequences of Raising

1. Subject–Matter Jurisdiction

A finding in the ordinary course of the initial action of the existence of subject-matter jurisdiction is *res judicata*, precluding the parties from attacking the resultant judgment on that ground in subsequent litigation—except in special circumstances.

2. Territorial Authority to Adjudicate and Notice

A finding in the ordinary course of the initial action of the existence of territorial authority to adjudicate or adequate notice is *res judicata*, precluding the appearing parties from attacking the resultant judgment on either ground in subsequent litigation.

C. Consequences of Not Raising

1. Litigated Action

a. Subject–Matter Jurisdiction

Unraised subject-matter jurisdiction in a litigated action is later treated as *res judicata*.

b. Territorial Authority to Adjudicate and Notice

By failing properly to raise any such threshold defense, an appearing defendant *waives* it.

2. Complete Default

a. Subject–Matter Jurisdiction

In case of complete default, a party usually may later obtain *relief from judgment* on the ground of lack of subject-matter jurisdiction.

b. Territorial Authority to Adjudicate and Notice

A defaulting party usually may later obtain *relief from judgment* on the ground of an important defect in territorial authority to adjudicate or notice.

■ PART FOUR: COMPLEX LITIGATION**XII. PRELIMINARY CONSIDERATIONS**

A. Historical Note

Historically, there has been a general movement in our legal systems toward more broadly requiring joinder of multiple claims and parties and toward permitting even more extensive joinder.

B. Federal Focus

This capsule summary of Part Four focuses on federal practice.

1. Governing Law

In any federal action, federal law governs joinder.

2. Federal Joinder Rules

The critical provisions are Rules 13–14, 17–24, and 42.

3. Jurisdiction and Venue

Each claim against a particular party must satisfy the federal requirements of subject-matter jurisdiction, territorial jurisdiction, and venue. Especially relevant here, however, are the ameliorating doctrines of supplemental jurisdiction and ancillary venue.

C. Abuses

Efficiency and fairness demand that there be techniques to compel joinder, as well as means to simplify the structure of a case.

1. Defenses of Nonjoinder and Misjoinder

A party can raise by the defense of *nonjoinder* the opposing pleader's violation of the minimal rules of compulsory joinder, and can raise by the defense of *misjoinder* the opposing pleader's violation of the very liberal bounds on permissive joinder.

2. **Judicial Power to Combine and Divide**

Even where the pleaders have initially formulated a proper case in that wide area between the limits of compulsory and permissive joinder, the court may reshape the litigation for efficient and fair disposition. The court may expand the case by ordering either a *joint trial* or *consolidation* of separate actions pending before it and involving a common question of law or fact, or may contract the case by ordering either a *separate trial* or *severance* of individual claims against particular parties.

XIII. MULTICLAIM LITIGATION

A. **Compulsory Joinder**

Requirements are quite limited concerning what additional claims *must* be joined in the parties' pleadings.

1. **Claim Preclusion**

Res judicata does not require a party to join separate claims against his opponent, but it generally does in effect require him to put any asserted claim entirely before the court. This requirement follows from the rule that the eventual judgment will preclude later suit on any part of that whole claim, which is defined in transactional terms.

2. **Compulsory Counterclaims**

Analogously, Rule 13(a) generally requires a defending party to put forward any claim that she has against any opposing party, if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Failure to assert such a counterclaim will preclude subsequently suing thereon.

B. **Permissive Joinder**

Permissiveness is almost unbounded concerning what additional claims *may* be joined in the parties' pleadings.

1. **Parallel Claims**

Rule 18(a) says that any party "asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party."

2. **Permissive Counterclaims**

Analogously, Rule 13(b) permits a defending party to assert any claim that she has against an opposing party.

3. Crossclaims

Rule 13(g) permits, but does not compel, a party to assert a transactionally related claim against another party who is not yet in an opposing posture.

XIV. MULTIPARTY LITIGATION

A. General Joinder Provisions

1. Compulsory Joinder

Rule 19 governs what persons *must* be joined when any party pleads a claim other than a class action.

a. Necessary Parties

Rule 19(a) specifies those persons who are so closely connected to an action that they must be joined, unless joinder is not feasible under the requirements of jurisdiction and venue.

b. Indispensable Parties

Rule 19(b) guides the court in deciding whether to dismiss an action on the ground of the absence of a necessary party who cannot be joined because of the restrictions of jurisdiction and venue.

c. Procedure

All persons joined pursuant to Rule 19 are normally brought in as defendants.

2. Permissive Joinder

The subject of “proper parties” controls what persons *may* be joined when any party pleads a claim, and that subject entails three relevant limitations.

a. Rule 20

This Rule permits certain related plaintiffs to join together to sue, and also permits plaintiff to join certain related defendants.

b. Real Party in Interest

Rule 17(a) requires every claim to be prosecuted only in the name of “real parties in interest,” who are the persons entitled under applicable substantive law to enforce the right sued upon.

c. Capacity

Rule 17(b) and (c) imposes the further and separate limitation of “capacity” to sue or be sued, which comprises the personal qualifications legally needed by a person to litigate.

B. Special Joinder Devices

Five major devices expand the scope of permissive joinder beyond Rule 20.

1. Impleader

Impleader allows a *defending party* (as third-party plaintiff) to assert a claim against a *nonparty* (as third-party defendant) who is or may contingently be liable to that party for all or part of a claim already made against that party. Rule 14.

2. Interpleader

Interpleader allows a person (as stakeholder) to avoid the risk of *multiple liability* by requiring two or more persons with actual or prospective claims against him to assert their respective *adverse* claims in a single action.

a. Procedure

The stakeholder can invoke interpleader by an original action or by counterclaim, whether or not the stakeholder claims part or all of the stake.

b. Kinds of Interpleader

There are two kinds:

- (1) *Rule Interpleader*. Rule 22(a) governs this kind, subject to the normal restrictions of jurisdiction and venue.
- (2) *Statutory Interpleader*. An alternative lies in 28 U.S.C.A. §§ 1335, 2361, and 1397, which provide specially permissive limits on jurisdiction and venue.

3. Class Action

A class action allows one or more members of a class of similarly situated persons to sue, or be sued, as representative parties litigating on behalf of the other class members without actually bringing them into court. Rule 23. However, to justify such efficiency and substantive goals, the essential due process requirement of adequate representation must be met.

a. Requirements

The proposed class action must (1) meet the four initial requirements that Rule 23(a) imposes, (2) fall into one of the three situations specified in Rule 23(b), and (3) satisfy the requirements of jurisdiction and venue.

b. Mechanics

Class actions pose major management problems for the courts, accounting for the special management provisions in Rule 23(c)–(h).

c. Termination

Class actions also pose major settlement problems, accounting for the special notice and court approval provisions in Rule 23(e).

d. State Practice

States have their own class-action provisions, of lesser or greater scope and detail.

4. Shareholders' Derivative Action

A derivative action allows one or more persons to sue for the benefit of similarly situated persons on a claim that their common fiduciary refuses to assert. Rule 23.1 deals specifically with derivative actions by shareholders of a corporation *or* by members of an unincorporated association.

5. Intervention

Intervention allows a person not named as a party to enter an existing lawsuit, coming in on the appropriate side of the litigation. Rule 24(a) governs *intervention of right* by closely connected persons, and Rule 24(b) governs *permissive intervention* by other persons.

■ PART FIVE: GOVERNING LAW

XV. CHOICE OF LAW

A pervasive problem in litigation that involves nonlocal elements is choosing which sovereign's law to apply.

A. Techniques

Generally, it is the forum court's task to choose the governing law for each issue by using some technique for choice of law, such as interest analysis.

B. Constitutional Limits

Constitutionally, courts have a very free hand in choosing the governing law.

XVI. CHOICE BETWEEN STATE AND FEDERAL LAW

A special choice-of-law problem frequently encountered in our federal system is the choice between state and federal law.

A. State Law in Federal Court: *Erie***1. Constitutional Limits**

The Federal Constitution can dictate a choice in favor of federal law applicable in federal court, as it has done in the Seventh Amendment's guarantee of trial by jury. Conversely, the Constitution requires the application of state law in areas of extremely high state interest, such as title to real estate. However, these relatively rare and easy cases of constitutionally mandated choice of law are of limited practical significance. Usually, the Constitution does not directly enter into solving a state-federal choice-of-law problem.

2. Legislative Limits

Within constitutional limits, Congress can make the choice between state and federal law, and its choice will bind the federal courts. Indeed, the Rules of Decision Act of 1789 looks as if Congress has broadly made a choice in favor of state law, but that statute is generally read to preserve judicial choice-of-law power.

3. Choice-of-Law Technique

In the absence of constitutional and congressional directive, how then should a federal court choose between state and federal law for application to a particular issue in a case before it?

a. Competing Methodologies

Since 1938 the Supreme Court has progressed through a sequence of choice-of-law techniques for the federal courts to use in handling that problem:

- (1) *Erie Decision*. The fountainhead vaguely offered a discussion of relevant policies.
- (2) *Substance/Procedure Test*. Next came this crude and mechanical technique.
- (3) *Outcome-determinative Test*. The *Guaranty Trust* case eventually led to this other crude and mechanical technique.
- (4) *Interest Analysis*. The *Byrd* case developed this sensitive and flexible, but obviously uncertain, approach.
- (5) *Hanna Formulas*. This case both requires the application of valid Federal Rules in all federal actions and also establishes a refined outcome-determinative test for use outside the realm of the Federal Rules.

Thus, the Court has not yet arrived at any truly clear or optimal solution. In its latest attempt in *Gasperini*, it seems to have rejected certainty in favor of ad hoc balancing of state and federal interests.

b. Erie Precepts

Regardless of the choice-of-law technique adopted, the federal courts observe three precepts:

- (1) the choice-of-law technique applies issue-by-issue in each case, so the type of subject-matter jurisdiction does not fix state or federal law as applicable to all issues in the case;
- (2) the *Klaxon* rule says that for matters governed by state law under *Erie*, the forum state's conflicts law tells which state's law governs; and
- (3) to determine the content of state law where it is unclear, the federal court should enunciate state law as if it were then sitting as the forum state's highest court.

c. Federal Law in Federal Court

Under this whole scheme, federal law frequently applies in federal court. When it is left to the federal courts to formulate the content of that federal law, the result is called federal

common law. Often the federal courts perform this task by adopting state law as the federal common law.

B. Federal Law in State Court: Reverse–*Erie*

1. Constitutional Limits

As in the *Erie* setting, the Federal Constitution can dictate a choice in favor of federal law applicable in state court. Conversely, the Constitution requires the application of state law in areas of high state interest.

2. Legislative Limits

Within constitutional limits, Congress can make the choice between state and federal law, and its choice will bind the courts.

3. Choice–of–Law Technique

In the absence of constitutional and congressional directive, the state courts and ultimately the Supreme Court must decide whether state or federal law applies in state court by employing a federally mandated choice-of-law technique similar to the *Erie* technique.

C. Summary

In areas of clear state “substantive” concern, state law governs in both state and federal courts. As one moves into “procedural” areas, state law *tends* to govern in state court and federal law *tends* to govern in federal court. Finally, as one moves into areas of clear federal “substantive” concern, federal law governs in both state and federal courts.

■ PART SIX: FORMER ADJUDICATION

XVII. PRELIMINARY CONSIDERATIONS

A. Introduction to Former Adjudication

The subject here is the impact of a previously rendered judgment in subsequent civil litigation.

1. Modern Focus

This capsule summary of Part Six focuses on the modern approach to *res judicata*.

2. Rules

The centrally important doctrine of *res judicata* has two main branches:

- (1) *Claim Preclusion*. Outside the context of the initial action, a party generally may not relitigate a claim decided therein by a valid and final judgment. If that judgment was for plaintiff, *merger* applies. If instead that judgment was for defendant, *bar* applies.
- (2) *Issue Preclusion*. Outside the context of the initial action, a party generally may not relitigate any issue actually litigated and determined therein if the determination was essential to a valid and final judgment. If the two actions were on the same claim, *direct estoppel* applies. If the two actions were on different claims, *collateral estoppel* applies.

3. Comparisons and Contrasts

Res judicata should be distinguished from:

- (1) *stare decisis*;
- (2) law of the case;
- (3) former recovery;
- (4) estoppel; and
- (5) election of remedies.

B. Rationale of *Res Judicata*

Efficiency and fairness demand that there be an end to litigation.

C. Application of *Res Judicata*

1. Raising the Doctrine

The person wishing to rely on *res judicata* must affirmatively raise it. It can be so raised only after the prior judgment was rendered, and outside the context of the initial action (and any appeal).

2. Conditions for Application: Validity and Finality

For a judgment to have *res judicata* effects, it must be “valid” and “final.”

a. Validity

To be treated as valid, the judgment must withstand any attack in the form of a request for relief from judgment.

b. Finality

An adjudication can be treated as a final judgment for issue preclusion at an earlier stage than for claim preclusion.

XVIII. CLAIM PRECLUSION

A. Requirements of Claim Preclusion

Claim preclusion prohibits repetitive litigation of the same claim. The modern view is that a “claim” includes all rights of plaintiff to remedies against defendant with respect to the transaction from which the action arose.

B. Exceptions to Claim Preclusion

Predictably, this broad conception of claim preclusion has generated several significant exceptions, such as where there was:

- (1) a jurisdictional or procedural impediment to presenting the entire claim;
- (2) a party agreement to claim-splitting;
- (3) judicial permission to split a claim; or
- (4) an adjudication on one of those grounds labeled “not on the merits.”

C. Counterclaims

1. Interposition of Counterclaim

A defendant who asserts a counterclaim is generally treated, with respect to that claim, as a plaintiff under the normal rules of claim preclusion.

2. Failure to Interpose Counterclaim

A defendant who does not assert a counterclaim is unaffected by claim preclusion with respect to that claim, unless that claim (1) falls within a compulsory counterclaim statute or rule or (2) constitutes a common-law compulsory counterclaim.

XIX. ISSUE PRECLUSION

A. Requirements of Issue Preclusion

Where claim preclusion does not apply, issue preclusion acts to prevent relitigation of essential issues. There are three requirements.

1. **Same Issue**
2. **Actually Litigated and Determined**
3. **Essential to Judgment**

B. Exceptions to Issue Preclusion

Courts apply issue preclusion quite flexibly by invoking many exceptions, such as where, *in certain circumstances*:

- (1) an issue of law is involved;
- (2) the initial court was an inferior court;
- (3) there is a change in the burden of persuasion;
- (4) there was an inability to appeal in the initial action; or
- (5) the application of issue preclusion was unforeseeable.

C. Multiple Issues

1. Cumulative Determinations

If several issues in a case were litigated and determined, each is precluded provided that its determination was essential to judgment.

2. Ambiguous Determinations

If one cannot tell which of several possible issues was determined in a case, then none is precluded.

3. Alternative Determinations

If the adjudicator determined several issues in a case and each of those determinations without the others sufficed to support the judgment, then some authorities say that none by itself is precluded unless it was affirmed on appeal.

XX. NONORDINARY JUDGMENTS

Special attention must be given to the res judicata effects of special kinds of judgment when used in subsequent civil litigation.

A. Nonpersonal Judgments

1. Pure In Rem
2. Jurisdiction over Status
3. Quasi In Rem—Subtype One
4. Quasi In Rem—Subtype Two

B. Noncoercive Judgments

The subject here is declaratory judgment, which has limited claim-preclusion effects but normal issue-preclusion effects.

C. Nonjudicial or Noncivil Proceedings

1. Administrative Adjudication
2. Arbitration Award
3. Criminal Judgment

XXI. NONPARTY EFFECTS**A. Privies**

Certain nonparties to an action are in certain circumstances subjected to generally the same rules of *res judicata* as are the former parties, the basis for this treatment being some sort of representational relationship between former party and nonparty. These nonparties are then labeled “privies.”

B. Strangers

A person who had nothing to do with a judgment *might benefit* from its *res judicata* effects, but good policy dictates that the judgment *cannot bind* such a person who is neither party nor privy. The most important example of the possible benefits is that, mutuality of estoppel having been rejected, the stranger may sometimes use the prior judgment for collateral estoppel against a former party.

XXII. NONDOMESTIC JUDGMENTS**A. General Rules**

Special attention must be given to the treatment a judgment should receive in subsequent civil litigation in another judicial system.

1. Recognition

A court will “recognize,” or give effect under the doctrine of res judicata to, a nondomestic judgment that is valid and final. The applicable law on recognition generally is the law of the judgment-rendering sovereign.

2. Enforcement

The second court will enforce a judgment entitled to recognition. The applicable law on method of enforcement generally is the law of the enforcing court’s sovereign, which might provide for an action upon the judgment or registration of the judgment.

B. Judgments of American Courts

The Federal Constitution and federal legislation make these rules for handling a nondomestic judgment in large part obligatory on American courts when that judgment comes from another American court.

C. Judgments of Foreign Nations

American courts treat judgments of foreign nations pretty much like American judgments, although their approach to such foreign judgments is more flexible because their respect generally flows from comity rather than from legal obligation.