CHAPTER VII

CIVIL PROCEDURE

Part I of this chapter will trace the course of a typical civil lawsuit. Trial procedure was discussed extensively in Chapter III, so the emphasis here will be on pretrial procedures, relief available after trial and the effect of judgments. In Part II of this chapter, we will consider some of the complexities that a federal system creates for litigation of civil claims as a result of multiple overlapping laws and court systems. Under this heading, we will consider the question of the proper court in which suit may be filed and what law must be applied.

PART I: The Course of a Civil Lawsuit

As noted in Chapter III, procedure during trial is quite similar in civil and criminal cases. There are substantial differences in pretrial procedure, however.[1]

The rules of civil procedure vary among the states, but most state rules are similar to the Federal Rules of Civil Procedure (FRCP). Passed in 1938, the FRCP have been adopted virtually unchanged by half of the states and states that have not adopted them unchanged have borrowed significantly from them. Consequently, in the material below, procedure will be explained by reference to the FRCP.[2]

A. The Pleading Stage of the Case

1. Plaintiff's Complaint

A civil action begins when the plaintiff files a "complaint" with the clerk of the court's office. The FRCP requires that the complaint contain (1) a statement of the grounds upon which subject matter jurisdiction of the court is based, (2) "a short and plain statement of the claim showing that the pleader is entitled to relief" and (3) a demand for the relief that the pleader seeks.[3]

At common law, one wrong step in pleading meant that the litigant's case was dismissed or a defense was lost. This has given way to a more liberal view that facilitates getting to the merits of the dispute — what has been called "notice pleading." Notice pleading, as the term implies, requires only enough facts, in the words of a leading case, "to give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests."[4]

The appendix of forms of the FRCP sets out the following example of such "notice pleading" with a complaint for negligence arising out of an automobile accident:

> 1. Allegation of jurisdiction.
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> 2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against

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1 For more detail on civil procedure *see* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, HORNBOOK ON CIVIL PROCEDURE, 4TH ED. (West 2005). A student text is JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS, 5TH ED. (Aspen 2006). *See* also CHARLES ALAN WRIGHT, HORNBOOK ON THE LAW OF FEDERAL COURTS, 5TH ED. (West 1994) and ERWIN CHEMERINSKY, FEDERAL JURISDICTION, 4TH ED. (Aspen 2003). An incisive volume providing a perspective on civil litigation in the United States is STEPHEN N. SUBRIN & MARGARET Y.K. WOO, LITIGATING IN AMERICA; CIVIL PROCEDURE IN CONTEXT (Aspen 2006).

2 The Federal Rules of Civil Procedure, other rules and selected federal statutes related to federal courts are collected in FEDERAL RULES OF CIVIL PROCEDURE - 2006-2007, EDUCATIONAL EDITION (West 2006).

3 FRCP 8(a).

4 *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgement against defendant in the sum of _____ dollars and costs.

Since complaints are written by lawyers, few are quite this succinct and to the point, but there is no requirement that the complaint go much beyond these conclusionary allegations. Pleadings of this sort are of limited use in determining what the facts of the claim are. This purpose is instead accomplished directly through the device of "discovery." An exchange of "notice" pleadings also does little to distill out the issues to be tried or to screen out insufficient claims. Instead, these functions are performed by pretrial conferences and summary judgment procedures, discussed below.[5]

Service of Process When the plaintiff files the complaint with the court clerk, the clerk issues a "summons." This is an order of the court directing the defendant to respond to the complaint or suffer a "default judgment."[6] The plaintiff must arrange to have the summons and complaint "served" on the defendant by physically handing them to the defendant or leaving them at his or her home or office with an adult residing or working there with instructions to give it to the defendant. Many jurisdictions allow mailing of the summons and complaint to the defendant with a request that the defendant waive the necessity of in-hand service. When the defendant resides out of state, service by mail is permitted.[7] A court may order that other means be used.[8] By whatever means accomplished, service of the summons and complaint is necessary to establish "personal jurisdiction" of the court over the defendant, which is necessary if a binding judgment is to be issued against the defendant.[9]

2. The Defendant's Response to the Complaint

The defendant responding to the complaint has two options. The first is to raise one or more procedural defenses that are allowed to be raised by a "motion to dismiss." The second option is to contest the complaint on its merits by filing an "answer."[10] Whichever of the two alternatives is chosen, the defendant's response

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5 Some states, among them California, require "fact" pleading. While fact pleading is somewhat more demanding of the pleader than "notice" pleading, these systems also provide all the modern advantages of liberal discovery and pretrial procedures. In addition, even the FRCP require that some matters be pleaded "with particularity," such as fraud, mistake and special damages. *See* FRCP 9(b), (g). Despite the U.S. Supreme Court's steadfast that general allegations are sufficient except as otherwise provided in FRCP 9 or by statute, the lower federal courts have persisted in their attempts to impose heightened pleading requirements, mainly in civil rights cases. See *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993) (pleading liability of cities) and *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002) (pleading employment discrimination).

6 FRCP 55. A default judgment is a judgment entered against a defendant for failure to contest a case. The amount of the judgment is determined by the clerk of the court when it is for a liquidated sum (such as for a loan plus interest) and is determined by the judge or jury in a summary trial if it is for an unliquidated amount (such as for personal injuries in a tort case).

7 *See* FRCP 4.

8 One federal court permitted service of process by e-mail for an international defendant. *See Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007 (9th Cir. 2002).

9 Personal jurisdiction was introduced in Chapter I, p. 28, and is discussed in its interstate context *infra* pp. 250-255.

10 *See* FRCP 8 and 9.

must be filed with the court within 20 days after service of the complaint unless an extension of time is obtained from the plaintiff or the court.[11]

Motion to Dismiss The defendant has the option of asserting certain procedural defenses in a motion to dismiss. Those grounds are challenges to the court's jurisdiction (personal or subject-matter), improper venue (place the case was filed), improper service of process, failure of the plaintiff to join an indispensable party, or failure of the plaintiff to state a legal claim.[12] Asserting these grounds by motion is not required and the defendant could just as well include them in the answer. However, proceeding by motion allows the defendant to adopt a more aggressive posture by forcing the plaintiff to respond to the motions immediately. In addition, the court must dispose of these procedural objections before the defendant will be required to file an answer responding to the plaintiff's complaint on its merits. If the motion to dismiss is granted, of course, the defendant may never have to file an answer.

The ground of "failure to state a claim upon which relief can be granted"[13] deserves some further discussion. It is the only ground relating to the merits of the case that is allowed to be raised by motion this early in the suit. A motion made on this ground is an important early screening device for claims. It tests whether, assuming hypothetically that all the facts alleged in the complaint are true, the plaintiff would be able to recover.

Complaints dismissed for failure to state a claim generally fall into two categories. The plaintiff may have alleged facts sufficient to make out a claim if such a claim existed in the law, but the law does not provide for claims of this type. For example, a complaint alleging all the elements of intentional infliction of emotional distress would be dismissed on this basis in a state that does not recognize that particular tort.[14] Or the plaintiff may have failed to allege sufficient facts to make out all the essential elements of a claim that *is* authorized by the law. For example, the plaintiff's complaint may assert facts that otherwise sound like a case calling for the application of the well-established tort of negligence, but the acts or omissions of the defendant that are alleged do not amount to negligence.

Answer The defendant's answer contests the plaintiff's claim on the merits. The main parts of the answer are the responses to the allegations in the plaintiff's complaint and "affirmative defenses." In the responses to the allegations, the defendant is required to admit, deny or state lack of knowledge as to each allegation in the complaint (lack of knowledge is treated as a denial). Affirmative defenses stated in the answer may include such grounds as contributory negligence, satisfaction of the claim, estoppel or fraud,[15] or they may be one or more of the procedural defenses mentioned above. Affirmative defenses are so called because alleging them usually requires that the defendant go beyond simply denying the plaintiff's allegations and set out additional affirmative facts that avoid the claim.

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11 FRCP 12(a). Sixty days is allowed for response if the defendant agrees to waive service of process. FRCP 4(d)(3) and 12(a)(1)(B).

12 *See* FRCP 12(b).

13 FRCP 12(b)(6).

14 Thus, many appellate cases that make new law are appeals from grants or denials of a motion to dismiss for failure to state a claim. Similarly, a plaintiff can challenge a legally insufficient defense by filing a "motion to strike." FRCP 12(f).

15 FRCP 8(c).

In a third part of the answer, the defendant may include any "counterclaims" against the plaintiff.[16] The federal courts, as well as most state courts, make counterclaims compulsory if they arise out of the same transaction or occurrence as the plaintiff's claim. Thus, failure to assert related counterclaims will bar their later assertion in a separate suit. All other counterclaims are merely "permissive counterclaims," meaning that the defendant may choose to bring them in response to the plaintiff's claim or bring them later in a separate action. Also possible are "cross-claims," claims that are filed by one co-party against another co-party, usually co-defendants. For example, assume in a three-car collision between A, B, and C, that A sues B and C. If B has injuries and thinks the accident was C's fault, B may file a cross-claim against co-defendant C. If B thinks the accident was A's fault, B may counterclaim against the plaintiff A.[17]

A final method of defense applies if a defendant in a suit believes that someone not joined as a party to the lawsuit has a duty to indemnify the defendant for all or part of what the defendant may have to pay the plaintiff. In such a situation, a "third-party claim" may be asserted by way of "impleading" the responsible party into the lawsuit. For example, if P sues D because D's truck hit P and the accident happened because the brakes on the truck failed, D may implead the company that repaired the brakes on that truck as a third party defendant.[18]

Amendment of Pleadings If a motion to dismiss for failure to state a claim is granted for failure to allege sufficient facts, the plaintiff will usually be allowed to "amend" the complaint if there is reason to believe the facts exist, but were simply left out of the complaint. The defendant has a similar opportunity to amend if the defendant has omitted or has inadequately set out a defense in the answer. The rules also provide generally that permission to amend pleadings "shall be granted freely when justice so requires."[19]

"Rule 11" Duties and Sanctions Under FRCP 11, lawyers and parties who file pleadings, motions or other papers, or otherwise assert a position in court thereby certify that they have investigated the grounds for the relief requested and that the request is well-grounded in law and fact or is supported by non-frivolous arguments for a change in law. If documents filed or positions asserted in court do not live up to this standard, the judge may award "sanctions" against the attorney or party, including the full amount of the opposing party's attorney fees that were made necessary by the groundless lawsuit or defense.[20]

These provisions of FRCP 11, first approved in 1983, have been the source of some controversy. Critics have charged that the rule as applied discriminates against plaintiffs, particularly those who assert novel constitutional and other claims or those

16 *See* FRCP 13(a) and (b). For simplicity's sake, the discussion in the text refers to a defendant's counterclaiming against the plaintiff in response to the plaintiff's claim. However counterclaims may be filed against *any* opposing parties.

17 *See* FRCP 13(g).

18 *See* FRCP 14(a). Impleader enforces only an indemnity relationship between the existing defendant and the third party defendant. Thus, an existing defendant cannot implead a third-party defendant on the ground that the third party is liable to the plaintiff directly, not to the existing defendant.

19 FRCP 15(a). A plaintiff can also amend a complaint without court permission before an answer is filed and a defendant can similarly amended an answer as of right within 20 days after it is filed. New claims added through amendment "relate back" to the date the original complaint was filed when they arise out of the same transaction or occurrence as the original claim, thus avoiding any problems with statutes of limitations. FRCP 15(c).

20 This is an exception to the usual rule in the U.S. that each side has to bear its own legal costs regardless of outcome. *See infra* p. 244.

who face uncooperative defendants from whom they need information to substantiate their claim. Other criticism has been over the vast amount of "satellite litigation" it has spawned over whether and to what extent sanctions should have been imposed. As a result, amendments have softened the rule's impact somewhat. Sanctions have been made optional with the judge and any monetary sanctions will usually be paid to the court rather than the other party, thus reducing the incentive to pursue them. There is also set a 21-day "grace period" within which a party can withdraw the offending paper and avoid sanctions. Further, unsupported factual allegations are allowed to be made if they "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[21]

3. Joinder of Claims and Parties

Joinder of Claims Joinder of multiple claims is very liberal. At the plaintiff's option, a complaint may combine all the claims the plaintiff has against the defendant even if they are unrelated. Thus, claims for negligence, breach of contract and slander, all arising from different events occurring at different times, may all be joined in one suit against a single defendant or they may be sued upon separately.[22] However, if multiple theories of recovery or forms of relief arise from the *same* transaction or occurrence, the plaintiff must combine them in the same complaint or be barred from raising them later in a separate suit. For example, claims for strict liability, negligence and breach of a warranty, as redress for a single injury from a defective product, must be asserted in the same lawsuit.[23]

Joinder of Parties Joinder of parties is somewhat more limited, but still liberal. Plaintiffs may join together or may join multiple defendants on their claims if all the claims arise out of the same transaction or occurrence and have an issue of law or fact in common. If the case becomes too complex to try in one proceeding, the court has the discretion to order separate trials.[24] Similarly, if there are separate actions pending with overlapping facts could beneficially be tried together, those cases can be consolidated or, in some circumstances, can be consolidated for pretrial proceedings.[25]

Interpleader "Interpleader" allows a party holding a disputed sum of money to deposit that money in court and join all the claimants to it as defendants. The court will determine who is entitled to the money and has the power to enjoin all other litigation involving that particular money. The advantage of interpleader is that it forces the claimants to litigate their claims in a single suit, thus saving the stakeholder from having to defend multiple litigation in multiple forums. An example is an insurance company that is uncertain which of several beneficiaries to pay.[26]

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21 FRCP 11(b)(4). Discovery is discussed *infra* pp. 232-236.

22 FRCP 18(a).

23 This mandatory joinder result is not required by the FRCP, but by the doctrine of claim preclusion or *res judicata*, discussed below in the section on the effect of judgments, which prohibits "claim splitting." *See infra* p. 245.

24 FRCP 20(a) and (b), and FRCP 42(b).

25 *See* FRCP 42(a) and 28 U.S.C.A. §1407. In complex cases, consolidations for pretrial proceedings under the cited statute are administered by the Judicial Panel on Multi-District Litigation. Mass disaster cases typically are processed by the Panel. *See, e.g., In re Air Disaster at Lockerbie, Scotland*, 709 F.Supp. 231 (Jud.Pan.Mult. Lit. 1989). *See also* Multiparty, Multiforum Trial Jurisdiction Act of 2002, 28 U.S.C.A. §1369, which provides for federal jurisdiction over "accidents" in which over 74 people are killed at a single "discrete location."

26 Congress has passed the Federal Interpleader Act liberalizing subject-matter and personal jurisdiction for many interpleader cases. *See* 28 U.S.C.A. §1335 (minimal diversity among claimants and $500 in controversy); §2361 (nationwide service of process).

Class Actions A "class action" is a suit in which one or more representatives of a group of people with similar claims file suit on behalf of the entire group.[27] These individuals representing the class, called the "named plaintiffs," then request "class certification," which allows the action to proceed on behalf of the entire class. To order certification, the judge must find that the class is so large that joinder is not practicable, that the claims of class members have common legal or factual issues and are similar in nature, and that the named plaintiffs will adequately represent the interests of the unnamed class members.[28] Adequate representation is essential for the judgment to be binding on the unnamed class members as a matter of due process.[29] When money damages are sought, notice to absent class members must be provided to allow class members to "opt out" of the class and file their own suit if they choose. In the event of a settlement, the judge must determine that the settlement is fair to the class.[30]

Most class actions fall into two categories. The first comprises actions for injunctive relief against a defendant who has acted or will act in a manner that affects an entire class of people in pretty much the same way. This form of class action is often used in suits against government officials challenging the constitutionality of laws, though it is also used against private defendants, such as an employer with an alleged discriminatory employment policy or practice. Two of the most important constitutional cases decided by the Supreme Court, the *Roe v. Wade*, the abortion case, and *Brown v. Bd. of Education*, the school desegregation case, were class actions of this type.[31] The second type of class action is a suit seeking redress for a large number of monetary losses that are so small that individual pursuit of the claims would be impractical. An example is a consumer class action against a drug company for small overcharges on it medicines that it has made over the years.[32]

Consumer class actions to redress large numbers of small losses hold the promise of bringing unscrupulous businesses to justice when they would otherwise avoid liability. However, they have come in for criticism in recent years. When small claims are aggregated, the potentially ruinous exposure risk for defendants means there is great pressure on them to settle even doubtful claims. And even when the claim is meritorious — and also when it is not — the defendant and the plaintiffs' lawyers will often collude in a settlement that leaves class members with token relief, usually in the form of coupons for future discounts on the defendant's products, but awards massive

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27 *See* FRCP 23 and FRIEDENTHAL, KANE & MILLER, *supra* note 1, §§16.1-16-8.

28 *See Amchem Products v. Windsor*, 521 U.S. 591 (1997) (in class action against former asbestos makers filed solely for settlement purposes, class was too broad where it included currently injured class members seeking immediate payment and exposure-only members seeking ample, inflation-protected fund for the future).

29 *Hansberry v. Lee*, 311 U.S. 32 (1940) (black residents of neighborhood not bound by prior judgment upholding racially discriminatory deed restrictions on residential property because representation of their interests was inadequate and violated their due process rights).

30 When notice of pendency and opt-out rights is required to be sent, the named plaintiff must pay for it. *See Eisen v. Carlisle & Jacqueline*, *infra* note 32.

31 *Roe v. Wade*, 410 U.S. 113 (1973) and *Brown v. Board of Education*, 349 U.S. 294 (1955). If a class action is filed, the case will continue even if the named plaintiffs' individual claim are moot — a useful feature for the pregnant plaintiff in *Roe* and the public school student plaintiffs in *Brown*. *See Sosna v. Iowa*, 419 U.S. 393, 397-403 (1974) (class action case challenging the constitutionality of a waiting period for divorce was not moot despite the fact that the original plaintiff had obtained a divorce elsewhere) and Chapter IX, p. 321. This type of injunctive class action is provided for in FRCP 23(b)(2).

32 *See Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974) (suit by class of 2.25 million odd-lot traders against brokerage firm for overcharging). This type of class action is provided for in FRCP 23(b)(3). While usually it is small losses that are involved, this type of class action has increasingly been used in mass tort cases involving significant personal injuries, mainly to protect the defendant from future liability. *See Amchem v. Windsor*, *supra* note 28. *See also* the "mass action" statute *supra* note 25.

amounts of cash in attorney fees to the plaintiff class's lawyers.[33] In part in reaction to such "coupon" class actions, Congress recently passed legislation addressing this and other perceived problems with class actions.[34]

B. The Discovery Stage

After all matters of preliminary defenses and pleading are resolved, the facts of the case are investigated and developed through a pretrial process called "discovery."[35] In discovery, the parties have the power to require anyone who has knowledge relevant to the case, including the opposing party, to come forward and divulge that knowledge under oath. Discovery is largely conducted by the lawyers themselves independently of the court or a judge.[36] Any necessary discovery meetings, including the taking of testimony, are generally held in the office of one of the discovering party's attorneys. It is routine for a lawyer *via* the discovery process and long before trial to interrogate virtually every witness the other side expects to call at trial and to obtain copies of every document and to examine all other tangible evidence the other side expects to offer as proof at trial.

The need for pretrial discovery grows out of the fact that the adversary system in the United States uses a single, concentrated, continuous trial. It is undoubtedly useful in any system for the lawyers to know as much about a case as possible early in the proceedings. But the typical civil law system's discontinuous hearing process, which spreads the "trial" over several hearings over a period of time, makes it easier to react to surprise facts introduced by an opposing party. There is time to find rebuttal evidence and present it at a later hearing. In the United States, the single concentrated trial is the only opportunity the parties will have to prove their case and rebut the opposing party's evidence. Discovery allows the party to be completely prepared on all aspects of the case by the time the trial starts.

Though discovery aids trial preparation, it has other purposes. First, it promotes settlement. Pretrial knowledge of all the facts compels the parties to undertake a more realistic evaluation of the strengths and weaknesses of their cases. Second, discovery can disclose where there is agreement on the facts, if not on their legal meaning in terms of liability. This can form the basis for resolving the case without trial by way of summary judgment, discussed below. Third, if trial is ultimately necessary, the trial will be simpler and fairer. It will be simpler because undisputed issues will not have to be tried. And trial of disputed issues will be fairer because the lawyers will be better prepared to address them. Thus, resolution of the case will depend less on the relative strength of the trial skills of the parties' lawyers.[37]

1. Discovery Methods

There are five discovery devices that the parties may use. All these devices may be used against parties to the case (plaintiff or defendant), while a few may be used

33 In a suit against Blockbuster Video challenging the amount it charged in late fees for returned movies, the settlement provided class members with coupons for discounts and free rentals, but no change in the late fee policy. However, the plaintiff class's counsel were to receive $9.25 million in fees.

34 Class Action Fairness Act of 2005, 28 U.S.C.A. §1332(d) and other parts of Title 28. The basic technique used by the Act is to make many such actions removable to federal court, where there will be greater scrutiny of claims and class action certification and greater oversight of settlements. *See also* Chapter XV, p. 583, where shareholder class actions for securities fraud are discussed.

35 FRCP 26-37 regulate discovery. Discovery in state systems may differ slightly from state to state, but the differences are minor.

36 *See* Chapter III, pp. 84-85.

37 Discovery may also be used to preserve testimony for later use at trial if the witness will not be available to testify. *See* FRCP 27.

against a non-party witness.

Depositions The first and most widely used discovery device is the oral "deposition."[38] Any person who has information relevant to the case, can be compelled to undergo a deposition, or be "deposed." Parties to the case can be deposed without a court subpoena so long as "reasonable notice" is given. People who are not parties must be served with a "subpoena" (a court order to appear), but lawyers may obtain subpoenas from the court clerk easily or, in some jurisdictions, may issue subpoenas themselves.[39] Depositions usually take place in the office of one of the attorneys in the case. A notary is present to swear the deponent (the person being deposed) and most commonly a court reporter makes a verbatim record of the examination as in court. The deponents are interrogated by the lawyers just as they would be in court. Any objections to testimony will be on the record for later ruling by the judge should a party seek to use the deposition at trial.

Answers given in depositions are inadmissible hearsay if they are later sought to be offered in evidence at trial. However, at trial a deposition of a *party* may be used for any purpose by the adverse party since all the statements therein are party admissions. The deposition of a non-party witness may be used at trial if it is inconsistent with the witness's trial testimony.[40] In addition, the deposition of any witness may be used as a substitute for live testimony if the witness is unavailable, defined as when the witness is dead or too ill to testify, cannot remember what happened, cannot be subpoenaed or persists in refusing to testify even though ordered to do so by the court.[41]

Depositions are useful tools for preparing for trial. They allow the lawyers to directly question the opposing witnesses and party well before trial, the better to evaluate how they will perform at trial. The oral format facilitates finding out information, since the witness's answers are uncoached and the questioner can immediately follow up on the answers given with further questions. However, depositions tend to be expensive.[42]

Interrogatories Written "interrogatories" sent to the opposing party are the second most common discovery device.[43] Interrogatories must be answered under oath in writing. They may be addressed only to a party, and parties usually respond only after consultation with their attorney. At the later trial, an interrogatory can be used for any purpose, whether as substantive evidence or as a means of impeaching a party's testimony. The advantage of interrogatories is that they are cheap and easy to use. All one needs is a word processor and an imagination. On the other hand, written interrogatories are a much more cumbersome way to obtain information than depositions, where the questioner can immediately follow up on any unclear answers. Moreover, interrogatory answers are filtered through the opposing party's attorney, who can assure that the answers impart as little useful information as possible.

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38 *See* FRCP 30. Written depositions are possible as well, but are rarely used.

39 *See* FRCP 45(a)(3) ("attorney as officer of the court may . . . issue and sign a subpoena").

40 FRCP 32, referencing the Federal Rules of Evidence (FRE). Hearsay and other limitations on evidence as set out in the FRE were discussed in Chapter III, pp. 109-115. Unlike unsworn prior statements of witnesses that were not given at a prior hearing or deposition, inconsistent deposition testimony can be used as substantive evidence, not just to impeach the witness. *See* FRE 801(d)(1)(A).

41 FRE 804(a)(1). Most often, the witness's refusal to testify or exemption from testifying at trial is motivated by a claim of privilege, such as the privilege against self-incrimination.

42 This largely results from the need for the presence of all the lawyers and the inefficiencies of oral interrogation. FRCP amendments in 1993 made depositions less expense by permitting non-stenographic means (audio or video taping), thus eliminating the need for a court reporter. FRCP 30(b)(7); FRCP 32(c).

43 FRCP 33.

Requests to Produce Documents and Things Like interrogatories, "requests for production of documents" can be sent only to an opposing party.[44] This device is often used in conjunction with interrogatories, thus allowing a party to ask about documents and then require that appropriate copies be attached. To get documents from a *non-party*, a subpoena must be issued, either in conjunction with a deposition or separately. This device is also the method by which a party can inspect land or real evidence in the possession of the opposing party. A subpoena for documents is called a subpoena *duces tecum*.[45]

Order for Physical or Mental Examination An order of this type is used to verify a party's physical condition by requiring that the party be examined by a doctor chosen by the opposing party. Because such examinations are very invasive, they are permitted only with special court permission and only if the court finds that the mental or physical condition of the party is truly "in controversy" and there is "good cause" for the examination.[46] These requirements effectively require that the issue of the party's health be essential to proper resolution of the lawsuit. They are easily satisfied in the most common situation where such orders are granted — examinations of plaintiffs by defendants' doctors in personal injury cases to verify the extent of the plaintiffs' claimed injuries. It bears emphasizing that an order for physical or mental examination applies only to parties and cannot be used to determine the physical or mental condition of a non-party witness, no matter how useful such information might be.

Requests for Admissions The final form of discovery discussed here is final in another sense, because it is generally used after all the other discovery devices have uncovered the facts of the case. "Requests for admissions" are written requests asking that the opposing party admit the truth of certain facts which discovery shows are essentially undisputed.[47] While a party may refuse to admit a fact, an unreasonable refusal will be grounds for reimbursing the requesting party for the costs of proving that fact at trial. Failure to respond to a request for admissions is taken as an admission of the matters sought to be admitted. An admission is viewed as conclusively establishing the matter admitted, though only for the purposes of that particular case.

2. Scope of Discovery

Relevance and Privilege The scope of discovery is very broad: the parties "may obtain discovery regarding any matter, not privileged, which is relevant to the claim or defense of any party" in the pending action." Even if the information or material being sought would not be admissible in evidence at trial, discovery may still be had if the information is "reasonably calculated to lead to admissible evidence."[48] The reference to "privileged" matter is to information protected by a "privilege" — information given in confidence in the course of a special relationship, such as doctor-patient, lawyer-client, priest-penitent or spousal relationships, or others established by law.[49]

Protection of Confidential Commercial Information A "trade secrets or other confidential research, development or commercial information," though not privileged,

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44 FRCP 34.

45 FRCP 45(a)(1).

46 FRCP 35(a). *See Schlagenhauf v. Holder*, 379 U.S. 104 (1964)(insufficient grounds for battery of mental and physical exams of bus driver defendant whose bus collided with a truck).

47 FRCP 36.

48 FRCP 26(b)(1). With court permission, discovery of "any matter relevant to the subject matter involved in the action" may be obtained.

49 Issues of federalism complicate privilege in federal courts. Privilege is determined according to state law for state-law claims and according to federal common law for federal claims. *See* FRE 501.

may be protected from discovery through by means of a "protective order." Such information is not completely exempt from discovery if it is directly relevant to the lawsuit, but even if it is required to be disclosed to the opposing party, a protective order can be used to prevent disclosure outside the lawsuit.[50]

Attorney Work Product Potentially exempt from discovery is "attorney work product" material.[51] This includes much of the material that lawyers generate when they prepare a case for trial, such as witness interviews, analyses of the facts and law applicable to the case, witness and trial preparation notes, and observations and impressions of the strengths and weaknesses of the case. Allowing discovery of such materials is thought to be unfair and disruptive of the trial preparation process. The attorney's mental impressions, conclusions, and legal theories can never be discovered. However, the lawyer may be required to share some factual work product material with the other side if the other side cannot, without "undue hardship," acquire the materials from another source. For example, if the defendant's lawyer finds and interviews an eyewitness right after an accident, that witness's statement is generally not discoverable by the plaintiff since it is work product and the plaintiff can simply obtain the same information from the witness by way of a deposition. However, if the plaintiff's lawyer got involved in the case late and the witness, on being deposed by the plaintiff, cannot recall the details of the incident because of the passage of time, the defense would probably have to give the witness's written statement to the plaintiff.

The work product exception does not exempt a party from disclosing all relevant *information* that party may have found if it is requested by the opposing party. If requested, parties and their lawyers are always required to reveal the names and location of anyone they know about who has information relevant to the lawsuit so that the opposing party can depose the person if they want. This is so even if finding the witness involved major expense and investigative efforts. They must also disclose what *information* they have as a result of interviewing that witness since that is information about the subject of the lawsuit that is within the knowledge of the party. What is protected is the very document that the lawyer produced in working with the witness.

Expert Witnesses Expert witnesses present a special problem for the lawyer who must cross-examine them since their testimony deals with specialized knowledge and complex concepts. This is particularly true of medical experts. To aid in cross-examination by the other side, a party is required to disclose the name of any expert witness it plans to use at trial and provide a report describing the expert's probable testimony at trial. After receiving the report, the opposing party is permitted to depose the expert. However, disclosures and depositions are allowed only for experts whom the party has decided to call to testify at trial. Discovery is generally not allowed with respect to experts whom the party has decided not to call to testify at trial.[52]

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50 FRCP 26(c)(7). *See Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 110 F.R.D. 363, 366 (D.Del. 1986) (secret formula for Coca-Cola ordered to be revealed because essential to determining lawsuit; when Coca-Cola Co. refused to comply, all inferences from the formula would be assumed to be in plaintiff's favor at trial).

51 FRCP 26(b)(3) and (4). *See also Hickman v. Taylor*, 329 U.S. 495 (1947) (discussing the basis for the work product exception).

52 FRCP 26(b)(4). A party may be especially interested in finding out about experts that the other side has consulted, but has decided not to call as witnesses. This is because the party probably decided not to call them because they gave an opinion that undercut that party's case. Prohibiting discovery from non-testifying experts is based on the ideas that (1) one side should not be able to "freeload" off work done by the other side and (2) parties should be encouraged to consult a wide variety of experts without fear that the other side will be able to have access to their opinions. The non-discovery rule is relaxed in "exceptional circumstances," such as where one party has hired all the experts in a given field.

3. Enforcement of Discovery

Discovery is generally conducted without court supervision and relies heavily on voluntary compliance with the discovery rules. When problems arise, they may be taken up with the court. The purpose of having discovery take place without involving the judge is to avoid wasting court time. Consequently, judges will often be impatient with recalcitrant parties who are not cooperating in divulging information or who are overreaching by seeking to gain information to which they are not entitled under the rules.

Discovery Disputes Discovery disputes come before the court in two ways. The first is by means of a "motion to compel discovery" filed by the party *seeking discovery* when that party receives objections or inadequate responses to its discovery requests.[53] The second way is when the party *against whom* discovery is sought raises the issue by seeking a "protective order" prohibiting or limiting the discovery sought.[54] In both situations, any court order resolving the dispute is enforceable by contempt of court.[55] In addition to ordering that particular questions be answered or documents produced, a court in extreme cases of resistance can order that the facts sought to be established by discovery are deemed admitted, that recalcitrant plaintiffs' claims be dismissed or that recalcitrant defendants defenses be stricken.[56] Another encouragement to informal discovery compliance is that, unlike the general "American rule" under which each side absorbs its own litigation costs, the party that loses a discovery dispute before the court must pay the attorney fees incurred by the winner unless the loser's position was "substantially justified."[57]

Abuse of Discovery Because discovery is conducted mostly without court supervision, it can be misused to harass the opposing party or to drive up the opposing party's costs of litigating. Perceived problems with abuse of discovery has been foremost in the minds of the Supreme Court and the Advisory Committee on the Federal Rules. Amendments in 1993 addressed discovery abuse specifically. Parties are now required to meet early in the case and disclose to each other, without the need for any request, all the principal evidence they have to support their claims or defenses.[58] The rules also now limit the total number of interrogatories in a given case to 25 and the depositions to 10. These changes have been severely criticized by many as contrary to adversary principles and as imposing impossible burdens.[59] However, some limits may be overridden by agreement of the parties or court order.[60] Perhaps as important as rule changes in avoiding discovery abuse has been the growth in the number and powers of magistrate judges. Virtually all discovery matters are now handled by magistrate judges in the first instance, since they have more time to devote to supervision of the discovery process than do district judges.[61]

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53 FRCP 37(a).

54 FRCP 26(c).

55 Contempt is discussed *infra* p. 243.

56 FRCP 37(b) and (d).

57 FRCP 37(a)(4). Attorneys fees as part of the costs are discussed *infra* p. 244.

58 *See* FRCP 26(a)(1).

59 Three justices dissented from promulgation of the federal automatic disclosure requirements on the ground the such rules do not "fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts." *See* dissenting statement of Scalia, J., with whom Justices Thomas and Souter concurred. *See* 146 F.R.D. 401, 507 (1993).

60 For a different view, *see* Linda S. Mullinex, *The Persuasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STANFORD L. REV. 1393 (1994).

61 Federal magistrate judges are described in Chapter V, p. 183.

C. Motion for Summary Judgment and the Final Pretrial Conference

1. Summary Judgment

Earlier we discussed the motion to dismiss for "failure to state a claim on which relief can be granted" as a rough screening device on the merits of the plaintiff's claim. This dismissal motion tests only the sufficiency of the complaint, however. All the facts alleged there are assumed to be true. A second screening device, the "motion for summary judgment," tests whether the plaintiff, after a sufficient opportunity for discovery, has sufficient evidence to support the claims stated. Summary judgment will thus be granted against a party if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[62]

The relevant facts for purposes of the motion are those revealed in the discovery process, plus any affidavits — written statements of witnesses sworn to under oath — that the parties might submit. The defendant seeking summary judgment must point out how the facts negate or fail to support the plaintiff's claims. Then the plaintiff must respond by showing, through counter-affidavits or discovery, what facts support the claims made.[63] Summary judgment must be denied if there is sufficient evidence for a rational jury to decide the case in favor of the plaintiff.[64] This is the same standard that is used for a directed verdict at trial. The difference between the two is that the summary judgment decision is made on the basis of *written versions* of the evidence set out in the affidavits and discovery materials, while the directed verdict motion is decided based on the judge's evaluation of *actual trial testimony and evidence*. If after considering the affidavits and discovery, the judge is convinced that, if such evidence were presented at trial, no rational jury could decide for the plaintiff, then the judge should enter summary judgment for the defendant. On the other hand, if there is substantial evidence that would support a rational verdict in the plaintiff's favor, the judge must deny summary judgment and order a trial.

For example, assume that P sues D in an automobile accident case, claiming that D ran a red light. D denies this in an answer. D moves for summary judgment, attaching affidavits or depositions of three witnesses who state, contrary to what P has alleged, that they saw the accident and that D had a *green* light at the time. If P files a counter-affidavit or a deposition from another witness who saw the accident or his own affidavit stating that the light was *red* for D, then the judge should deny summary judgment. There is conflicting evidence that must be resolved at trial. But if P is not able to produce any proof to support his allegation that D ran the red light, then the judge should grant summary judgment to D. In looking at the proof on both sides, the judge must give the benefit of the doubt to the party defending against the motion, in this example, to P. This is essential to preserve the constitutional right to a trial by jury.

The most common summary judgment situation is where the defendant seeks to test the plaintiff's claim. The examples above reflect this. However, a *plaintiff* may also win summary judgment on a claim if facts are overwhelmingly in the plaintiff's favor.[65]

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62 FRCP 56(c). The rule allows summary judgment to be entered if liability is clear even if the amount of damages is still in dispute. This simply means that there will be a later trial, but it will be limited to the issue of damages.

63 *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (discussing the parties's responsibilities on summary judgment).

64 The standard for a directed verdict is discussed in more detail in Chapter III, pp. 102, 107.

65 *American Airlines v. Ulen*, 186 F.2d 529 (DC Cir. 1949) (summary judgment properly granted to plaintiff passengers when facts showed airline's flight plan effectively called for plane to fly through a mountain).

But summary judgment is less likely to be granted to a plaintiff where the state of mind of the defendant is an element of the plaintiff's claim and is denied, such in discrimination cases.[66]

2. Pretrial Conferences

Though not required, almost all judges hold pretrial conferences and the lawyers are required to attend. The purpose of pretrial conferences is to manage the case so as to assure that all settlement opportunities are explored, that wasteful pretrial activities are avoided, and that the quality of the trial is improved through more open discovery and better case preparation.[67]

Issues Raised There is no limit on the number of pretrial conferences that a judge may require. Pretrial conferences held early in a case will tend to focus on settlement and discovery, including setting "discovery cut-off" dates. Later pretrial conferences and particularly the final pretrial conference are devoted to expediting and simplifying the trial of the case, including the possibility of obtaining stipulations (agreements) regarding uncontested facts to avoid wasting time on unnecessary presentations of evidence. The parties are typically required to exchange lists of all the witnesses they will call at trial and copies of all the documents they will present at trial. They will also be required to agree on as many issues of admissibility of evidence as possible. The judge will then decide as many remaining evidence issues as possible before the trial begins so that the trial is not unnecessarily interrupted by objections.

Role of the Judge How active a judge is in pretrial conferences varies from judge to judge. Some judges will "push" the parties to settle or to agree on limiting the issues to be tried, while others are content to accept at face value the parties' assertions that further settlement negotiations or stipulating to particular facts would be fruitless. In general, federal judges are quite active and state judges are moving in the direction.[68] This has been fueled by complaints about the slow pace and inefficiency of civil litigation caused by insufficient attention to case management on the part of the lawyers. This trend toward a more active judge departs from the classic adversarial view of judges as passive referees.[69]

Final Pretrial Order After the final pretrial conference, the judge enters a "final pretrial order." Again, styles vary from judge to judge, but this order is usually comprehensive. It will recite all the facts and law applicable to the case that are not in dispute (including matters settled by stipulation or by pretrial rulings of the court), set out the remaining issues to be tried, and list the witnesses to be called and exhibits to be presented at trial. No witnesses may be called except those listed in the pretrial order. No exhibits may be offered except those ruled admissible or designated as eligible to be offered at trial in the pretrial order. No legal or factual issues and theories may be

66 See Hunt v. Cromartie, 526 U.S. 541, 119 S.Ct. 1545, 143 L.Ed.2d 731(1999) (summary judgment improperly granted based on determination that race was a motivation in legislative redistricting). See also *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (JNOV in age discrimination case).

67 *See* FRCP 16(a).

68 For an example of an active "settling" judge, *see Lockhart v. Patel*, 115 F.R.D. 44 (ED Ky. 1987). The legal issue in the case — whether the court can order the parties to attend a settlement conference — has was resolved in favor of that power in 1993 amendments. *See* FRCP 16(c)(last sentence) and (f).

69 *See* Chapter III, p. 81. This more active function of judges has been dubbed "managerial." *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

gone into at trial beyond those set out in the order. The order may be changed only as necessary to "prevent manifest injustice."[70]

D. Trial Procedure

Chapter III provided a full description of the procedures involved in an adversary jury trial as well as a discussion of various trial techniques used by lawyers in such trials.[71] Most of the examples given there were from a criminal trial, but civil trials are virtually identical in their overall form and structure. However, two matters should be discussed here in addition to what was said in Chapter III: the impact of civil pretrial procedures on civil trials and the scope of the right to a jury trial in civil cases.

1. Impact of Civil Pretrial Procedures on Trials

Despite the similarities between civil and criminal trials, discovery and the other extensive pretrial procedures available in civil cases alter some aspects of the trial. First, these procedures, and particularly the final pretrial conference before an active judge, can focus the civil trial more specifically on the issues that are disputed. Often it is possible to submit much of the case to the jury on stipulated facts, reserving testimony and other evidence only for disputed issues. At the very least, it is possible to shorten or eliminate laying foundations for many exhibits, since most judges will have required that the parties agree on the admissibility or at least the authenticity of all exhibits at the pretrial conference. Second, witness examinations, even as to disputed issues, should go much more smoothly since the lawyers will have already questioned the witness once in deposition. Copies of depositions are available to be used to impeach the witness, should the witness contradict or "improve upon" what was said in the deposition. Third, as discussed earlier, if a witness is not available, a deposition may be used in place of live testimony and a deposition of a party may be used for any purpose by an opposing party.[72] Answers to interrogatories or responses to requests for admissions operate as party admissions and may completely remove the need for proof on some issues. In keeping with the oral tradition of the adversary trial, if these written substitutes for testimony form a part of the proofs in the trial, they are usually read to the jury rather than being given to them to read.

2. Scope of the Right to a Jury Trial in Civil Cases

Law vs. Equity Distinction The 7th Amendment to the Constitution "preserves" the right to a trial by jury for civil cases only"[i]n Suits *at common law*." This makes all-important a distinction that would otherwise be largely of historical interest only: the distinction between "law" and "equity." Law and equity at one time defined two separate court systems in England and in some of the United States. There were the common law courts staffed by common law judges and equity or chancery courts staffed by "chancellors." The procedures followed in law and equity were quite different. Among the various differences, common law courts used juries to decide contested fact issues, while equity chancellors decided the case alone without a jury.[73]

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70 FRCP 16(e). Modern pretrial practice renders unlikely a favorite dramatic technique in some movies about trials in the United States — the "surprise witness" who appears at the last moment in a trial and saves what seems to be a hopeless trial. While this might happen in a criminal case, the modern pretrial order makes it virtually impossible in federal and most state civil cases in the United States.

71 *See* Chapter III, p. 91-109.

72 *See supra* p. 233.

73 The 7th Amendment applies only to civil cases in *federal* court, as it has not been "incorporated" against the states *via* the due process clause of the 14th Amendment. Incorporation is discussed in Chapter VIII, p. 280. However, state constitutional provisions, the source of the right to a jury trial in state courts, almost uniformly make the same distinction between law and equity. In the federal system, 6th

Consequently, to determine whether the right to a jury trial exists in a given civil case, a court must refer to the division between law and equity as it existed in 1791 — the year the 7th Amendment was ratified. This was not difficult when law and equity were administered by two different courts. But the dual court systems of law and equity were merged into one in modern system, typically into one unified "civil action."[74] Moreover, legislatures and courts have been active in creating new claims beyond those authorized by the common law and equity in 1791. For these new claims, a historical approach is employed by which courts determine what 1791 common law or equitable cause of action is most directly *analogous* to the new claim before them.[75]

A general rule of thumb that will work in most situations is that an action will be classified as "legal" if money damages are sought and will be classified as "equitable" if some other form of relief is sought.[76] The rule works in most cases because money damages were the traditional form of relief offered in the courts of law. However, there are exceptions going both ways. Money can be awarded in an action for breach of fiduciary duty, but the action is historically equitable, so no jury is possible.[77] And actions for replevin (return of personal property wrongfully taken) and suits to evict a tenant from property are "legal" even though they entail court orders for specific non-monetary relief, so a jury is available as of right.

Civil Jury Size Juries of less than 12 and non-unanimous verdicts are permitted under the Seventh Amendment and are common in civil cases in both federal and state court.[78] A variety of winning verdict votes exist in the states, from unanimous 12-person jury verdicts (9 states) to 5 members of a 6-person jury (6 states) and even 6 members of an 8-person jury (5 states).[79]

E. Judgments in Civil Cases: Money Damages, Equitable Relief and Costs

After the trial, a "judgment" is entered on the jury verdict, subject to any post trial motions.[80] In a bench trial, the judge must deliver an opinion or findings of fact and conclusions of law on the basis of which a judgment is entered.[81] There are several kinds of relief that may be granted in a judgment.[82]

1. Money Judgments

Types of Damages Money judgments may reflect damages of three types: compensatory, punitive and nominal. Compensatory damages are designed to

Amendment's guarantee of a jury trial in *criminal* cases has been incorporated against the states, though not in all its particulars. A distinction between the criminal and civil jury trial rights in both state and federal systems is that in criminal cases, trial by jury is assumed unless the defendant affirmatively waives the right to a jury, while in civil cases, the party must make a timely demand for jury trial. FRCP 38.

74 *See* FRCP 1 and 2. In some states, a vestige of separate systems or law and equity is preserved by having the same judges sit as "chancellors" or "judges" depending on the claim they are hearing.

75 The analysis demanded sometimes borders on the absurd as the sides trade abstruse historical references. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990) (suit against union for breach of duty of fair representation required jury trial even though unions did not exist in 1791).

76 *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) ("in suits sounding in tort for money damages, questions of liability were decided by the jury, rather than the judge"; holding right to jury trial in suit against city for violation of constitutional rights).

77 *See also Curtis v. Loether*, 415 U.S. 189, 196 (1974) (claim for back pay in employment discrimination case was "equitable restitution," though damages for housing discrimination was "legal").

78 *Colgrove v. Battin*, 413 U.S. 149 (1973) (federal court). *See supra* note 65.

79 Source: Center for Jury Studies, National Center for State Courts. *See also* Chapter III, p. 92.

80 *See* Chapter III, pp. 107-109.

81 FRCP 52.

82 *See generally* DAN B. DOBBS, HORNBOOK ON THE LAW OF REMEDIES, 2D ED. (West 1993).

compensate — to place the party in the position the party would have been in but for the actions of the defendant. Compensatory damages are available in all kinds of cases. The question of what elements are included in compensatory damages varies with the type of claim and is discussed in the appropriate substantive law chapters.[83]

Punitive damages may sometimes be awarded to punish the defendant beyond the requirement of paying compensation. They may be awarded only in tort cases involving either intentional or reckless harm. Mere negligence is not sufficient. Of course, if the same act that constitutes a breach of contract constitutes an intentional tort, punitive damages may be awarded. In addition, a breach of the implied covenant of good faith and fair dealing established in a contract relationship is considered an intentional tort and is thus remediable by punitive damages.[84]

A judge or jury may award a plaintiff nominal damages in the amount of one dollar. Nominal damages are not often awarded, but are possible in cases where the jury determines that the plaintiff has made out a claim and proved the defendant violated the plaintiff's rights, but there was no real harm suffered. Some jurisdictions (including federal law) allow punitive damages to be awarded even when there are no compensatory damages. Other jurisdictions require some compensatory damages before any award for punitive damages can be made.

Enforcement of Money Judgments If a defendant fails to pay a judgment, the plaintiff may have to take action to enforce it. One common way to enforce a judgment against an employed person is to use a writ of a garnishment — an order to the defendant's employer to pay a percentage of the defendant's wages to the plaintiff until the judgment is satisfied.[85] If liquid assets are not available, but the defendant has property, a "writ of execution" must be obtained from the court authorizing a sheriff to seize the defendant's nonexempt property and sell that property in order to satisfy the judgment. Any proceeds in excess of the judgment are then returned to the defendant.[86]

The plaintiff can use discovery or other supplemental procedures to require that the defendant disclose where assets are located or to turn over certain property for execution. Failure to comply with such an order can could result in imprisonment for contempt of court.[87]

2. Equitable Relief

Forms of Equitable Relief Damages are "substitutionary relief" as they provide a money substitute compensative for the harm suffered. But sometimes a court can provide "specific relief" — relief that actually prevents harm from taking place or undoes harm that was suffered by restoring the rights violated or by requiring the defendant to restore or turn over the very thing the plaintiff is entitled to. Such specific relief is most often equitable in nature.[88]

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83 *See* Chapter X, pp. 402-403 (contract breaches) and Chapter XI, pp. 450-456 (torts).

84 *See* Chapter X, p. 406; Chapter XI, p. 452 (torts) and pp. 453-454 (constitutional limits).

85 Federal law limits the weekly amount to 25% of wages. 15 U.S.C.A. §1673(a).

86 Each state has laws which identify property that is exempt from execution. Most provide that clothing and other personal items and tools of the defendant's trade are exempt, as well as a portion of the value of the defendant's home, if the defendant owns a home. Exemptions vary widely from state to state.

87 Contempt of court to enforce court orders is discussed *infra* p. 243. In this instance, the resulting imprisonment is not for debt, but for violating the court order to disclose or turn over assets.

88 *See supra* p. 239 (distinction between law and equity).

The most common form of equitable relief is the injunction. An injunction can be simple, such as one ordering a defendant to stay off the plaintiff's property or a city official to stop enforcing an ordinance. Other forms of equitable relief include "reformation" or "rescission" of a contract, and "specific performance" — an order requiring the breaching party in a contract case to perform obligations required under the contract.[89] Historically, since equity courts were developed to avoid the rigid strictures on relief imposed on common law courts, equity's hallmark is its flexibility and the forms of equitable relief possible are as varied as the wrongs it remedies.[90] If necessary, equitable relief can be very complex, such as an order completely restructuring a company or reorganizing a school system to stop racial discrimination and to eradicate its continued effects.[91]

Grounds for Equitable Relief Traditionally, to obtain equitable relief, a plaintiff must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."[92]

The first two requirements shade into each other in that an "irreparable" injury is one that no "remedy at law" in the form of money damages will redress adequately. This prerequisite for equitable relief is inherited from a compromise worked out between the common law courts and the chancery courts in 17th century England to avoid conflicts — chancery would not step into a dispute unless the common law courts could not afford adequate relief.[93] Today, the same court and judge consider what relief is appropriate, so conflicting jurisdiction is no problem. Instead, the requirement today serves to impose a hierarchy of relief in which damages is "ordinary" relief, while equitable relief is the "extraordinary" relief.[94] Especially given that specific relief can be intrusive and disruptive in some cases, courts will often emphasize that an injunction is not a step to be taken lightly and that one should be ordered only if it is necessary and will truly afford an appropriate resolution of the dispute. The third "balance of hardships" requires balancing the burdens on the plaintiff if the relief is denied against the hardship on the defendant if relief is granted.[95] The fourth "public interest" requirement is rather open-ended and can include all manner of considerations.

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89 *See* Chapter X, p. 403. Perhaps the most numerous invocations of equitable powers are in divorce cases, from the decree itself to orders for child support, restraining orders and other ancillary relief.

90 For a history of the development of equity, *see* ALFRED H. MARSH, HISTORY OF THE COURT OF CHANCERY AND OF THE RISE AND DEVELOPMENT OF THE DOCTRINES OF EQUITY (Carswell, Toronto 1890, reprinted 1985).

91 For an example of such a detailed "structural" injunction in a school desegregation case, *see Carr v. Montgomery County Bd. of Education*, 289 F.Supp. 647 (M.D.Ala. 1968), *aff'd* 395 U.S. 225 (1969). *See generally* OWEN FISS, INJUNCTIONS (Foundation 1972).

92 *eBay Inc. v. MercExchange, L.L.C.*, ___ U.S. ___, 126 S.Ct. 1837 (2006).

93 This was the solution of the "Coke-Ellesmere" dispute, named for the common-law judge and equity chancellor involved in it. *See* J.H. Baker, An Introduction to English Legal History 92-93 (2d ed. 1979).

94 This notion of a remedial hierarchy has been challenged in view of the ease with which courts give injunctions in certain kinds of cases without much inquiry into the actual effectiveness of substitutionary relief. *See* and *compare* Douglass Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688 (1990) *and* Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 FLA. L. REV. 346 (1981).

95 *See, e.g., Sigma Chemical Co. v. Harris*, 605 F.Supp. 1253 (E.D.Mo. 1985) (entering injunction enforcing agreement not to compete), *injunction modified on appeal* 794 F.2d 371 (8th Cir. 1986).

Consistent with the flexibility of equity, equitable decrees are generally modifiable at a later time if circumstances change. Thus, an order granting equitable relief in cases involving prospective and ongoing judicial supervision of the defendant's conduct may be modified as necessary to assure that it is still fair and is accomplishing what it was intended to accomplish. In once case, the Supreme Court allowed a sheriff to seek a modification of the order pertaining to jail several years after it was entered on the ground that interim changes in the factual circumstances and law made it inequitable to continue the decree.[96] If the purposes of the decree have been carried out, the defendant may even have the decree rescinded.[97]

There are inherited verbal nuances used in suits for equitable relief that should be mentioned. How often they appear in a case varies from jurisdiction to jurisdiction. There has been a marked decrease in their use in recent years. The initial pleading in a suit in equity is often called a "petition" instead of a complaint. The judgment rendered is often called a "decree" rather than a judgment. Judges discussing what relief to order will sometimes refer to their powers "as chancellor." Finally, ancient equity "maxims" may sometimes appear in opinions. For example, a judge may deny relief under the "clean hands" doctrine, under which a petitioner "who seeks equity, must do equity," meaning that the petitioner will not get any relief from the court if his own conduct in the controversy has been improper. Today judges will most likely simply "balance the equities" of the case without any felt need to invoke equity maxims.

Provisional Relief The flexible nature of equity allows for certain kinds of provisional relief to be entered, mainly relief aimed at preserving the *status quo* until a final trial of the dispute can be held. Thus, a "preliminary injunction" preventing a defendant from taking certain action may be entered. Generally the plaintiff must show a reasonable likelihood of success on the merits of the claim and a clear need for protection pending a decision on the merits.[98] A "temporary restraining order" is also possible to avoid immediate serious irreparable harm to the plaintiff until a hearing can be held on a motion for a preliminary injunction.[99] For example, a temporary restraining order would be appropriate in a divorce case to keep a husband who has threatened physical violence away from the wife.[100]

Enforcement of Equitable Decrees If the losing party in a suit for equitable relief refuses to comply with an order, that party is said to be "in contempt of court" and can be fined or imprisoned. It is important to note that imprisonment for civil contempt is not a means of punishment; it is a coercive measure. Thus, the imprisoned party "carries the keys to the prison in his own pocket," meaning that his compliance will "purge" his contempt and result in immediate release.[101]

3. Declaratory Relief

Another form of relief similar to an injunction and often awarded along with it is

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96 *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992).

97 *Board of Education v. Dowell*, 498 U.S. 237 (1991) (court-ordered remedy to end *de jure* racial segregation of schools should be terminated when the effects of *de jure* discrimination have ended).

98 *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 526 F.2d 86 (9th Cir. 1975) (discussing alternative formulations of the preliminary injunction test).

99 *See* FRCP 65.

100 Much to the chagrin of creditors, federal courts do not have the power to preliminarily enjoin a debtor from disposing of assets until a judgment can be obtained and executed. *See Grupo Mexicano De Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

101 *See* RONALD L. GOLDFARB, THE CONTEMPT POWER (Anchor Books, Garden City, N.J. 1971).

"declaratory relief." A declaratory judgment establishes the rights of the parties based on the facts and law, but does not require either party to do anything.[102] Perhaps the most common declaratory judgment actions are actions filed by insurance companies seeking a determination that an insured who suffered a loss arguably covered in an insurance policy has no claim under the policy. This issue would normally be determined in a suit by the insured against the company for money, but if the insured does not sue and the company wants the matter settled, a declaratory judgment is the appropriate way to get a definitive ruling. Declaratory judgments are also used when laws or practices are sought to be declared unconstitutional and there is no need for injunctive relief. Thus, if there is an ordinance of a city that the plaintiff contends violates the Constitution and there is no indication of any immediate harm to the plaintiff that requires injunctive relief, the court may simply enter a judgment declaring that the ordinance is unconstitutional and declaring what conduct the plaintiff has a right to engage in.

The Supreme Court has been less than clear as to the precise effect of a declaratory judgment:

> [E]ven though a declaratory judgment has the "force and effect of a final judgment," it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt [of court].[103]

Whatever the effectiveness of declaratory relief by itself, it can form the basis for an injunction should the trial court deem that necessary.[104]

4. Awards of Costs

Costs Recoverable Most judgments award "court costs" to the prevailing party. In the U.S. legal system, these costs include fees of the clerks and marshals, witness fees and docket fees.[105] Unlike the "English rule" on fees and costs and the prevailing rule in many civil law countries, the "American rule" on costs recoverable by a prevailing party is that attorney fees are not normally included in the absence of some specific statutory authorization. Thus, both parties must normally pay their own attorney fees, which will usually represent the largest portion of litigation expenses.[106] However, the FRCP and analogous state court rules have "offer of judgment" rules. If a party offers to settle a suit by entry of judgment in a particular amount, the offeree fails to accept the offer and the result at trial is at least as favorable as the offer, the offeree is liable for the actual costs incurred by the offeror after the date of the offer. Thus, if a prompt, realistic offer is made early in a suit and is not accepted, successful parties may be able to recover most of their attorney fees.[107]

Attorney Fees Award Statutes There are several special statutory authorizations for attorney fee awards in both state and federal law. These statutes generally relate to

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102 The federal Declaratory Judgment Act is found at 28 U.S.C.A. §§2201-2202.

103 *Steffel v. Thompson*, 415 U.S. 452, 471 (1974), quoting from *Perez v. Ledesma*, 401 U.S. 82, 126 (1971) (separate opinion of Brennan, J.). In *Steffel*, the Court approved entry of a declaratory judgment that held that a state statute against hand-billing could not be constitutionally enforced against an anti-Vietnam War protester.

104 28 U.S.C.A. §2202.

105 28 U.S.C.A. §1920 (allowable costs in federal court).

106 *See Alyeska Pipeline Service v. Wilderness Society*, 421 U.S. 240 (1975) (reaffirming "American Rule" against attorney fee awards in the absence of statute).

107 *See* FRCP 68. However, the rule does not apply if the defendant offeror prevails. *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981) (defendant offered $450 and plaintiff lost; plaintiff is not liable for costs).

claims that the government wants to encourage people to bring because successful individual suits benefit society in general. Common among these are civil rights claims, suits to protect consumer rights, actions to gain redress for stock market manipulation, antitrust suits, and suits to protect the environment.[108]

F. Effect of Judgments

Judgments not only award relief. They also settle claims, defenses and issues that were in dispute between the parties. The system needs to avoid litigating these claims and issues a second time, both because doing so is unfair to the defending parties and because it would be a waste of valuable judicial resources. The law that defines the effect that final judgments will have on any subsequent litigation is the common law doctrine of "*res judicata*." *Res judicata* is divided into two separate doctrines, claim preclusion and issue preclusion.[109] The traditional name for claim preclusion is "*res judicata*" and the traditional name for issue preclusion is "collateral estoppel."

1. Claim Preclusion (*Res Judicata*)

Claim preclusion means that the plaintiff gets only one chance to sue the defendant based on a single transaction or occurrence.[110] This means that in a case where there could be several legal theories upon which to base a claim, all such theories must be included in one lawsuit. For example, assume the plaintiff is injured when hit by the defendant's truck and sues based on *negligence*. Once that suit is over, that plaintiff cannot sue the defendant again based on the same accident even if a new theory of recovery is alleged, such as *strict liability* (liability without fault) based on the fact that the defendant's truck was overloaded. The plaintiff is barred by the first judgment whether he or she won or lost the first suit. This application of *res judicata* is called the rule against "claim splitting." Similarly, a plaintiff may not "split" damages. This means that the plaintiff must assert a claim for the entire loss in one suit and may not generally claim property damage in one suit and personal injuries in another. *Res judicata* also operates against defendants. Compulsory counterclaims — counterclaims that arise out of the same transaction or occurrence — are barred if not asserted by the defendant in response to a claim.[111]

2. Issue Preclusion (Collateral Estoppel)

Defensive and Offensive Uses of Issue Preclusion Issue preclusion does not bar relitigation of entire claims. It bars relitigation of certain *issues* that have already been litigated in an earlier lawsuit. If an issue of fact or law has been (1) actually litigated and determined (2) by a final and valid judgment and (3) the determination was essential to the judgment, then that determination binds the parties in any later proceeding (4) as to the same issue, whether it arises on the same or a different claim.[112] For example, assume that P holds a patent and sues D Co. for infringement. The court finds that P's patent is invalid and enters judgment for D Co. P then files suit for infringement of the same patent against X Co. X Co. can use the doctrine of issue preclusion to have the second suit dismissed. The issue of the validity of P's patent has already been determined against P, so P is precluded from re-litigating that issue. This

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108 *See, e.g.*, 42 U.S.C.A. §1988 (civil rights suits) and the numerous consumer protection statutes discussed in Chapter X, pp. 416-423.

109 *See generally* RESTATEMENT OF JUDGMENTS, 2D (American Law Institute 1982-1988) [hereafter "RESTATEMENT"].

110 *See* RESTATEMENT §§18-20.

111 *See* RESTATEMENT §22.

112 RESTATEMENT §27.

is *defensive* use of issue preclusion, *i.e.*, its use by the defendant in the second suit to defeat a claim.[113]

In some jurisdictions, issue preclusion can be used *offensively*, *i.e.*, by the plaintiff to establish a claim. Assume that there is a plane crash and 100 passengers are injured. If a passenger, P1, sues Airline Co. and wins, the judge or jury necessarily determined that the Airline Co. was negligent and that the negligence led to the plane crash. P2, P3, P4 and all the rest of the passengers through P100 can now sue Airline Co. and use issue preclusion offensively against it on the issues of negligence and causation. Effectively this means that the only thing remaining for P2 through P100 to prove at trial is the amount of their damages.[114]

Mutuality of Estoppel A common limitation on the application of issue preclusion is the requirement of "mutuality of estoppel." Mutuality requires that the parties in the first and any later suits be identical before the losing party in the first suit will be bound in the later lawsuit. Thus, if a jurisdiction follows mutuality, in neither of the examples given above (the patent infringement or the plane crash cases) would issue preclusion be allowed to be used. The second patent case involved a different defendant company and the later plane crash cases involved different plaintiffs. It would violate due process if a person not a party to a case could be bound by the judgment in that case.[115]

Mutuality is based on the principle that it is unfair for a person to *take advantage* of a ruling *in favor* of his or her position in a case if that person would not have been *bound* had the ruling gone *against* his or her position. For example, supporters of mutuality would argue that, since X Co., sued by P in the second patent case, would not have been *bound* by a judgment in the first case *in favor of P* that the *patent was valid*, it should not be allowed to *take advantage of* the determination *in favor of D Co.* that the *patent was invalid*. Similarly, since passengers P2 through P100 would not have been *bound* by a determination against P1 that Airline Co. was *not negligent* — since P2 through P100 were not parties to the suit — they should not be able to *take advantage* of a determination in P1's favor that Airline Co. *was negligent*. Opponents of mutuality argue that it is a waste of judicial resources to require the very same issue to be tried over again when it has already been determined once against someone who *was* a party. Stated otherwise, the parties who lost in the first case have had their "day in court" and it is unfair to allow them a second opportunity to prove differently just because the current plaintiff is new. Persuaded by this logic, the mutuality has been abolished for federal court judgments and for many state judgments, and it is the position of second Restatement of Judgments.[116] However, several states still require mutuality in some form or another.[117]

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113 *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

114 *See In re Air Crash at Detroit Metropolitan Airport*, 776 F.Supp. 316 (E.D.Mich. 1991).

115 *Richards v. Jefferson County*, 517 U.S. 793, 801-802 (1996); *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999) (so holding even though the same lawyer represented one of the parties in both cases). It does not violate due process to bind non-parties in a class action or if they are "in privity" with a party, if their interests were adequately represented in the litigation. Class actions were discussed *supra* pp. 231-232. A non-party is in privity with a party if the two are closely related legally, such as where one is the successor in interest, assignee, insurer, surety or agent of the other, unless their interests are conflicting.

116 *See Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313 (1971) (defensive use) and *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979) (offensive use) and RESTATEMENT, *supra* note 109, §27.

117 *See Howell v. Vito's and Trucking and Excavating Co.*, 191 N.W.2d 313 (Mich. 1971) (criticizing and rejecting offensive non-mutual issue preclusion). Typically, states that have relaxed the mutuality requirement have done so first for defensive use.

Exceptions to Issue Preclusion Whatever the scope of basic issue preclusion, there are exceptions to it. For issue preclusion to apply to a litigated issue, it must have been "fully and fairly litigated."[118] This means that if the procedural protections available in the first court were not very good or for some other reason the party was limited in its ability to fully litigate the issue, then re-litigation may be allowed. For example, the determination of a small claims court where no lawyers are permitted and no appeal is allowed would not be given issue preclusion effect. Also, application of issue preclusion will not be allowed if the issue comes up again in an unusual and unanticipated context, if its application would have an adverse impact on the public interest, if the standard of proof in the first action was lower (as where the first case is civil and the second criminal), or if prior determinations of the issue are conflicting.[119]

G. Resolving Cases Without Litigation

Litigation according to the procedures outlined above can take a great deal of public and private time and money, and each year approximately 18 million civil cases are filed. The judicial system could not long survive if even a substantial minority of these cases went to trial. A major study of the state courts of the 75 most populous counties in the U.S. in 1992 showed that about 75% of civil cases were disposed of by agreed settlements or dismissals, while only 3% went to trial.[120] With increasing numbers of cases and increasing costs of litigating, the need for alternative dispute resolution (ADR) has been emphasized. And courts and legislatures have gone beyond merely encouraging ADR methods. In some cases, they have required that those methods be pursued.[121]

1. Voluntary Settlements

Private Negotiation and Settlement Parties can reach negotiated settlements at any time in the litigation process, including during trial or appellate review. Unless a minor child or other dependent person is a party or the case is a class action, there is no need for the judge to scrutinize the settlement.

Lawyers representing clients in negotiation must evaluate their clients' legal position and advise them of the probable trial outcome. Though it is sometimes difficult to shake clients from an overly optimistic view of their chances of success, ultimately the decision is the client's to make after considering the advice of the lawyer. Lawyers are ethically bound to communicate all offers to their clients for their consideration.[122] It is some measure of the importance that negotiation and settlement have attained that there are now courses at some law schools and many continuing legal education programs for lawyers that focus on negotiating skills.[123]

Mini-Trials A twist on voluntary settlement procedure is the "mini-trial." This process follows a trial-like procedure and is often used in disputes involving highly

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118 RESTATEMENT §28.

119 *See* RESTATEMENT §§28 and 29 (setting out these and other exceptions). Section 29 exceptions only apply if the person seeking to use issue preclusion was not a party to the first action, as was the case in both the examples above of the patent infringement and the plane crash.

120 Source: Bureau of Judicial Statistics, U.S. Dept. of Justice (web address in Appendix B). Of those that went to trial, 2% were tried before a jury and 1% were tried to a judge.

121 For more, *see* STEVEN J. WARE, HORNBOOK ON ALTERNATIVE DISPUTE RESOLUTION (West 2001); JACQUELINE NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL, 2D ED. (West 2002).

122 ABA Model Rules of Professional Conduct, MR 1.4(a) and (b) and comments.

123 Two texts are DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND PRACTICE (West 1989) and MARK SCHOENFIELD & MICK SCHOENFIELD, THE MCGRAW-HILL 36-HOUR NEGOTIATION COURSE (McGraw-Hill, N.Y. 1991). For an interesting book on negotiation not limited to the legal context, *see* ROGER FISHER, GETTING TO YES (Penguin Books, New York, N.Y. 1991).

technical or complex matters that are otherwise hard to evaluate. During a mini-trial, counsel for both parties present a shortened version of their client's case before their clients and a "jury" hired for the occasion, which then "deliberates" to a "verdict." What happens next can vary. In some instances, the lawyers simply continue to negotiate, having been informed of what at least one jury would determine were the case to come to trial. In other instances, and especially where the clients are resistant to settlement, the lawyers may leave and allow their clients and a neutral advisor to discuss the possibility of a settlement. The mini-trial is beneficial because it gives the parties and the lawyers a realistic view of the strength of their case and makes them more aware of the risks involved in going to trial. As with informal negotiations, the mini-trial is usually a private affair and does not involve the court system.

Mediation Mediation is similar to private negotiation except that the settlement is facilitated by an impartial third party, or mediator. The mediator does not decide the dispute for the parties; the mediator simply acts as a supervisor of the negotiation between the parties by convening the negotiations and helping to find common ground. The fact that parties maintain control over the process means that mediation, like negotiation, has no rules except those that the parties decide to set up for themselves in the process. Mediation is a popular method of resolving disputes between parties who have an ongoing relationship and want to maintain that relationship, whether it is husband and wife, management and labor, or manufacturer and supplier. Once the parties reach a settlement, it is incorporated into a written agreement that has the same effect as a contract between two parties.[124]

Arbitration Unlike a mediator, an arbitrator decides the dispute between the parties. The arbitration hearing is generally conducted like a trial. Attorneys for both sides present their evidence and arguments to the arbitrator and the arbitrator renders a decision, usually in written form. Many arbitration agreements incorporate the rules of the American Arbitration Association, a private organization that serves as a clearing-house for arbitration. Though arbitration is similar to judicial resolution of the case, it can have the advantage of being less formal, less expensive, and less time-consuming. A major advantage of arbitration is that the parties can design their own procedure and choose decision-makers who have specialized knowledge useful in deciding their dispute.[125] If the parties have agreed that the arbitration decision is to be binding, both federal and state courts will honor that agreement and will refuse to review a dispute that has been settled by arbitration.[126]

Arbitration was first used only to resolve commercial contract disputes and labor-management disputes, since it was usually only in those contexts that the parties agreed beforehand to arbitrate. Arbitration has since expanded to include all manner of legal claims, including rights under employment discrimination and other statutes that implicate important public interests. Objections to this use have been rejected by

124 The ABA has approved a Model Standards of Conduct for Mediators (ABA 2005). The standards and the Reporter's Notes on them can be found at www.abanet.org/dispute.

125 *See, e.g., Ferguson v. Writers Guild of America, West, Inc.*, 277 Cal. Rptr. 450 (Cal.App. 1991) (in dispute over screen-writing credits for film, *Beverly Hills Cop II*, parties filed written submissions to expert arbitrators whose identities were unknown both to the litigants and to each other).

126 This is required by the Federal Arbitration Act, 9 U.S.C.A. §§2 *et seq.* *See Shearson-American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (federal courts); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (state courts).

the Supreme Court so long the claimant "effectively may vindicate [his or her] statutory cause of action in the arbitral forum."[127]

Nonetheless, the validity of arbitration agreements entered into by consumers or employees can be challenged as amounting to an "unconscionable" or "adhesion" contract.[128] A major issue is the substantial cost of arbitration. Low-income consumers can obtain the right to litigate in court *in forma pauperis* — without prepayment of court filing fees — but there is no similar solution in arbitration. Arbitration fees are based on the size of a claim, unlike court filing fees, which are modest set amounts that do not vary with the size of the claim. State and federal judges are paid by the government and do not charge for their services, while experienced arbitrators can charge hundreds and even thousands of dollars a day. Prohibitively high costs of arbitration may relieve consumers of their contractual duty to arbitrate.[129]

2. Court Sponsored Settlement Procedures

Because of the increase in litigation and the resulting docket backlog, many states have developed ADR programs sponsored by the courts and to some extent requires their use.[130] All federal courts must provide litigants with at least one ADR process including, but not limited to, mediation, early neutral evaluation, mini-trials, and arbitration. In addition, all federal courts may require pursuit of mediation or neutral case evaluation and 20 districts can require arbitration.[131]

Typically court required arbitration or case evaluation programs require a summary submission of cases — sometime with key witnesses and sometimes not — to a panel of lawyer-evaluators. The panel renders a decision. If both parties accept the decision, the case is settled. If either side rejects, the case will go to trial. If one side accepts and the other rejects the panel's decision, and the rejecting side does not win at least as much as the amount the panel recommended, the rejecting side must pay the attorney fees and costs the accepting side incurred at the trial. This attorney fee-shifting is significant in a system in which attorney fees at trial represent the largest part of the costs in the case and the normal rule is that each side absorbs its own attorney fees.[132]

PART II: The Complicating Effects of Federalism on Civil Procedure

The concepts discussed so far have considered court systems in isolation. However, as noted in Chapter I, federalism complicates the legal system. Two coordinate *judicial systems* with substantial overlapping jurisdiction — state and federal — coexist on the same territory in each state. Furthermore, *50 state lawmaking and judicial* systems exist side by side in the country. In cases involving parties, transactions

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127 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (age discrimination). *See Floss v. Ryan's Steakhouses, Inc.*, 211 F.3d 306 (6th Cir. 2000)(recounting the expansion).

128 *Compare* the *Floss v. Ryan's Steakhouses, Inc.*, *id.* (arbitration agreement invalid as unfair) *with Lyster v. Ryan's Steakhouses, Inc.*, 239 F.3d 943 (8th Cir. 2001) (arbitration agreement not invalid). *See* Chapter X, p. 401 (adhesion contracts and unconscionability). The validity of an arbitration clause may be litigated in court, but challenges to the entire contract must be decided by the arbitrator. *Buckeye Check Cashing, Inc.,v. Cardegna*, ___ U.S. ___, 126 S.Ct. 1204 (2006) (claim that usury voided entire contract).

129 *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000) (so stating, but finding insufficient proof of prohibitive costs in that case). *Compare Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594 (Wash.App. 2002) (finding arbitration prohibitively expensive). A partial solution for some disputes may be found in the American Arbitration Association's Consumer Arbitration Rules, under which consumers in small-claims arbitration incur no filing fee and pay only $125 of the fees charged by the arbitrator.

130 For further information, *see* www.ncsconline.org, the National Center for State Courts website.

131 *See* 28 U.S.C.A. §§651-658 and 28 U.S.C.A. §§ 471-482.

132 For an example of such a fee-shifting case evaluation program, *see* Michigan Court Rule 2.403-.404.

or occurrences that concern more than one state, the reach of these laws and court power often overlaps. This can make litigation in some cases very complex.[133]

There are four areas of the law that deal with these problems of conflicts of laws and court power. The first is the law of personal jurisdiction. It defines which courts have the power to adjudicate the liability of a given defendant. Personal jurisdiction is usually based on the defendant's connection to the territory of the state where the action is filed. The second area is the law of *forum non conveniens*. Under this doctrine, a court may decline to exercise jurisdiction it otherwise has, because a court in another judicial system (another state or country) is much more convenient and has a greater interest in handling the case. The third is the law of interstate recognition of judgments. This is sometimes called "full faith and credit" after the choice of words used in the constitutional provision that sets the general rule of recognition. The fourth area is "choice of law." Choice-of-law rules determine what law a court will apply to resolve a particular case on the merits when the law of more than one jurisdiction has been identified as potentially applicable.

A. Personal Jurisdiction in State and Federal Courts

1. Personal Jurisdiction in State Courts

One example given in Chapter I of the legal blurring of state boundaries that has occurred in the 20th century has been the growth of state courts' powers of "personal jurisdiction" over out-of-state defendants. Personal jurisdiction is a court's authority "to determine the personal rights and obligations of the defendant."[134]

Personal Jurisdiction and Territoriality At its most basic level, personal jurisdiction is founded on the concept of territoriality. It starts with the proposition that a state or country has power to adjudicate only matters that concern persons and property within its borders. The concept of territorial limits on a court's jurisdiction is most often associated with *international* states, but the same concept applies to the states within the United States.[135] Under a strict view of territoriality, personal jurisdiction can exist only if (1) the defendant is physically located in the state where suit it filed and is appropriately served with process in the state (*in personam* jurisdiction) or (2) any property in dispute is physically located in the state where suit it filed and the property is properly seized by means of attachment (*in rem* jurisdiction).

The "Contacts" Test The Supreme Court, in its seminal 1945 decision in *International Shoe Co. v. Washington*,[136] departed from this strict territorial view of personal jurisdiction. It formulated a test that focused instead upon the *fairness* of the particular state court's exercise of jurisdiction over the defendant in light of the defendant's connection with the state. For personal jurisdiction to exist over an out-of-state defendant, the *International Shoe* test required only that there be "certain minimum contacts" with the forum state such that exercising jurisdiction over the defendant would "not offend traditional notions of fair play and substantial justice" embodied in the 14th Amendment due process clause. Under this rubric, the Court has approved exercises of personal jurisdiction pursuant to state statutes establishing "long-arm"

133 Some of these problems were introduced briefly in Chapter I, pp. 32-36.

134 *Pennoyer v. Neff*, 95 U.S. 714, 727 (1877). The term "jurisdiction," then, can be used in different ways. Subject matter jurisdiction (discussed in Chapter V, pp. 185-188) differs from personal jurisdiction in that subject matter jurisdiction grants power to hear a particular *type of case*. For more detail on personal jurisdiction, *see* FRIEDENTHAL, KANE & MILLER, *supra* note 1, §§3.1-3.28. For the special personal jurisdiction aspects when non-U.S. defendants are sued, *see* Chapter XVII, pp. 695-696.

135 *See* Chapter XVII, pp. 685-694 (international extraterritorial reach of U.S. law).

136 326 U.S. 310, 316 (1945).

jurisdiction over out-of-state defendants based on certain kinds of past actions taken by them or effects caused by them in the forum state.

How many contacts are sufficient to constitute the requisite "minimum contacts" clearly depends on the circumstances. One contact will do if it is direct and the claim is related to that contact, such as driving into a state and hitting a state resident with one's car.[137] Or, if a person owns land in a state and the dispute relates to that land, the presence of that land in a state is a sufficient single contact with the state that permits its courts to adjudicate that claim.[138]

"General" and "Specific" Jurisdiction Later refinements of the doctrine have divided personal jurisdiction into "general" and "specific" jurisdiction. If there is general jurisdiction over the defendant, then the defendant may be sued on any claim — even claims unrelated to the defendant's contacts with the state. For an individual, general jurisdiction exists if the person is served with process while physically in the state or if the person is domiciled in the state.[139] For corporations, general jurisdiction exists if the defendant has its principal place of business in the state, is incorporated there or carries on "a continuous and systematic . . . part of its general business" in the state.[140] Thus, if a person slips and falls in the hotel of a national hotel chain that has hotels in every state, general jurisdiction over the hotel exists in the courts of every state.[141]

"Specific" jurisdiction exists when the defendant's contacts with the forum state are more limited, but the claim involved *arises out of or relates to* those contacts. An example of this is the one given above of a person hitting a state resident while driving.

The Requirement of "Directed" Contacts Specific jurisdiction cases are by far the most numerous ones in which personal jurisdiction is contested. The most important requirement for the relevant contacts is that they must be directed toward the forum state by the defendant. In the words of an often-cited case, a state cannot force a nonresident to litigate in its courts unless there is "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[142]

Product Liability Cases Cases involving manufactured goods that travel across state lines and injure consumers are among the most difficult. The Court has emphasized that a defendant's contacts must be truly "voluntary" and "purposefully directed"

137 *Hess v. Pawloski*, 274 U.S. 352 (1927) (using a consent theory of jurisdiction based on road use).

138 *Shaffer v. Heitner*, 433 U.S. 186 (1977).

139 *Burnham v. Superior Court*, 495 U.S. 604 (1990) (upholding constitutionality of "transient jurisdiction," service on defendant who is only temporarily in the state); *Milliken v. Myer*, 311 U.S. 457 (1940) (domiciliary of state is subject to personal jurisdiction even if living out of state); *Blackmer v. United States*, 284 U.S. 421 (1932) (U.S. citizen domiciled abroad is subject to subpoena power of U.S. federal court).

140 *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984), quoting *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 438 (1952). *Hall* held that the mere purchase of helicopters in Texas for use in Peru and Colombia and a trip to Texas by a manager was not sufficient for general jurisdiction over a Colombia company sued for crash in one of those helicopters. *Perkins* involved Philippine company that maintained its main, if temporary, office in Ohio during the Japanese occupation of the Philippine Islands during World War II. This was deemed sufficient for general jurisdiction in Ohio.

141 Venue or *forum non conveniens* requirements may limit suit to a particular state, however. *See infra* pp. 256-257.

142 *Hansen v. Denckla*, 357 U.S. 235, 253 (1958) (Delaware trustee's passive receipt of orders from settlor in Florida is insufficient basis for Florida to exercise jurisdiction over trust). *See also McGee v. International Life*, 355 U.S. 220 (1957) (facts that Texas insurance company sent policy to California resident and received premiums from him is sufficient basis for jurisdiction over suit to recover under the policy).

toward the forum state. Thus, a state may "assert[ ] personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[143]

The problem is that Supreme Court is not of one mind as to what this "stream of commerce" idea means. In *Asahi Metal Industry Co., Ltd. v. Superior Court*,[144] there was a 4-4 split of the justices on this point. In *Asahi Metal*, suit was brought by a California motorcyclist for injuries sustained when he lost control of his motorcycle after a sudden loss of air and an explosion of its rear tire. He alleged that the motorcycle tire and tube were defective. He sued Cheng Shin, the Taiwanese manufacturer of the motorcycle tire's inner tube, which promptly joined a claim against Asahi Metal Co., the Japanese manufacturer of the valve stem used in the tube. The plaintiff's claims against Cheng Shin were eventually settled and dismissed, leaving only Cheng Shin's indemnity action against Asahi. The Japanese defendant contested jurisdiction. Asahi certainly knew that its valve stems, while sold to a Taiwanese company and incorporated into tire tubes in Taiwan, were being installed on motorcycles sold in the United States. For four justices, this was enough — that if a corporation "is *aware* that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." A different four justices believed that "placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State," even if the defendant is aware that the "stream of commerce may or will sweep the product into the forum." There must, in addition, be "an *intent or purpose to serve the market* in the forum State," such as designing products for its market, advertising there or marketing products through an agent.[145] The case was decided on another basis, as discussed below, but the split of opinion on the Court has not been resolved.

Those who would require voluntary and purposeful direction of contacts toward the forum state argue that potential defendants should be able to structure their conduct in such a way as to know where they will be subject to suit and where they will not. Those who would require simple awareness argue that it is unfair that a corporation is making money from a distant market, but can avoid the risks of suit there if their products injure people, simply by refraining from sending personnel, licensing distributors or advertising there.

One variant of the problem of the above is where the product is in the forum state only because the *consumer-plaintiff brought* it there. The Court has held that such a contact with the forum state cannot be considered a "voluntary" one that is "purposefully directed" by the defendant toward the forum state. In *Worldwide Volkswagen Corp. v. Woodson*,[146] a couple bought a car from a seller in New York and a design defect in the car caused serious injury in an accident in Oklahoma. The Supreme Court held that there was no personal jurisdiction over the New York seller except in New York and neighboring states. The contacts with Oklahoma were the product of the buyer's voluntary action and the seller could not have reasonably foreseen that it would be subjected to suit in Oklahoma. Clearly, if a seller or manufacturer has service facilities or other agents in the forum state, the foreseeability requirement is satisfied — even under the more restricted view stated in *Asahi Metal*. For that reason, the

143 *Wordwide Volkswagen*, *infra* note 146, 444 U.S. at 297.

144 480 U.S. 102 (1987).

145 *Asahi Metal*, 480 U.S. at 111 (emphasis added).

146 444 U.S. 286 (1980).

Oklahoma court clearly had jurisdiction over Audi, the *manufacturer* of the car, even though it did not have jurisdiction over the seller.[147]

Intentional Torts When an intentional tort is committed by a defendant and the defendant should know that its effects will be on the plaintiff in the plaintiff's home state, then jurisdiction usually will exist in the courts of that state. Thus, in *Calder v. Jones*,[148] the Supreme Court approved jurisdiction in California — where the plaintiff lived and worked — based on the effects that a defamatory article written in Florida had on the plaintiff there. The "effects test," as it has been called, permits jurisdiction even when the defendant has had no physical contact with the forum state.

Contracts Cases In contract cases, the contacts and overall reasonableness and fairness test is applied in a similar manner. If the contract has connections with more than one state, the course of negotiation and performance of the contract are considered, along with any other indications of reasonable expectations of the parties about where suit might be filed. Thus, in *Burger King Corp. v. Rudzewicz*,[149] Michigan franchisees were subject to personal jurisdiction in Florida because they voluntarily entered into long-term contractual relationship with a Florida corporation and received benefits from it. But in contract cases, the parties often agree on personal jurisdiction by means of a "forum selection clause" in the contract and there is a "strong presumption" in favor of such provisions.[150] Forum selection clauses in consumer contracts may be invalid if found to be unconscionable.[151]

The Overall Reasonableness Factor Even if a court finds the requisite contacts for personal jurisdiction, that court must also test the exercise of such jurisdiction on the facts of that case against an overall reasonableness standard to see if it comports with "traditional notions of fair play and substantial justice." The additional factors generally considered are (1) the actual burden on the defendant of defending in the forum, (2) the interests of the forum state in the case, (3) the plaintiff's interest in getting relief, and (4) systemic interests in "efficient resolution of controversies" and "fundamental substantive social policies."[152] It was the application of these overall reasonableness factors that was the only point on which a majority of the Supreme Court could agree in *Asahi Metal Industry Co. v. Superior Court*. While split 4-4 on whether the sufficient "minimum contacts" existed, eight justices agreed that assertion of jurisdiction by the California courts would be "unreasonable and unfair" in an overall sense because the only claim left in the case was a claim by a Taiwanese company against a Japanese company. The Court emphasized that the Taiwanese tube manufacturer had settled by paying the plaintiff, who was then dismissed from the suit, and that the only claim

147 *Compare Gray v. American Radiator & Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961) (Illinois courts had jurisdiction over manufacturer of defective valve, installed by water heater manufacturer, that caused injury to consumer in Illinois).

148 *Calder v. Jones*, 465 U.S. 783 (1984) (article written in Florida about entertainer Shirley Jones and distributed in National Enquirer magazine, which had its largest circulation in California).

149 471 U.S. 462 (1985).

150 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (arbitration clause). *See also The Breman v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)(dismissing action in Florida federal court in favor of U.K. jurisdiction as specific in maritime contract); *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964) (appointment of agent in New York for service of New York court process on Michigan defendants with no New York contacts upheld against constitutional attack).

151 *See* Chapter X, p. 401. *But see Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (in admiralty suit against cruise ship company for injury sustained on ship, consumer-passenger was held bound by forum selection clause printed on back of her ticket) *superceded by* 46 U.S.C.App. §183c (permitting passengers in maritime cases to sue in any court of competent jurisdiction).

152 *Asahi Metal*, 480 U.S. at 113.

left in the California court was the Taiwanese company's claim against the Japanese defendant for indemnification of what it had paid the plaintiff.[153]

State "Long-Arm" Statutes Due process is a limit on state court assertions of personal jurisdiction, an issue of federal constitutional law. However, for jurisdiction to be sustained, states must also authorize their courts as a matter of state law to assert jurisdiction over out-of-state defendants. This is done by way of state "long-arm" statutes that specify what power state courts have. Some state long-arm statutes define state-law authority to be the same as the due process limits.[154] If so, there is no separate issue of whether the assertion of jurisdiction is authorized as a matter of state law. However, a state might choose to limit the powers of its courts for its own reasons.[155]

Internet Contacts The problem with applying the above law to operators of websites on the Internet is that it is difficult to satisfy the requirement that the defendant have purposely directed its contacts toward any particular state, given that a website can be accessed by anyone in any state. But some Internet cases are easier to resolve than others. First, if the Internet is used as a means for the defendant to enter into contracts with the residents of the forum state, then contract negotiation, formation and performance that take place over the Internet are treated the same as if mail or telephone communications were used, and *Rudzewicz v. Burger King*, discussed above, is applied[156] Second, purely "passive" websites that do nothing more than advertise are controlled by the earlier print advertising cases that hold that mere advertising is not sufficient purposeful direction of contacts to any particular state.[157] Third, intentional torts committed on the Internet can usually be resolved by applying the "effects test" of *Calder v. Jones*, discussed above.[158] Cases involving interactive web sites have proven more difficult. In these, courts have tried to determine whether there is "something more" beyond simply maintaining a web site that shows that the defendant purposefully directed his or her activities toward the forum state. In doing so, courts look at the "nature and quality of commercial activity that an entity conducts over the Internet" to see if forum state contacts figure prominently.[159]

A difficult case is one where people respond to a website's invitation to subscribe and receive an electronic publication. Analogy to non-Internet cases is difficult

153 *Asahi Metal*, 480 U.S. at 115.

154 *See, e.g.*, Cal. Code of Civ. Pro. §410.0 ("A Court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.")

155 For example, New York gives personal jurisdiction to its courts over cases where there is misconduct outside the state causing "injury to person or property within the state," but only if the defendant (1) "regularly does or solicits business, or engages sin any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered *in the state*" or (2) "expects or should expect the act of have consequences in the state and derives substantial revenue from interstate or international commerce." N.Y.Civ.Prac.Law & Rules §302(a)(3). *See Ingraham v. Carroll*, 687 N.E.2d 1293 (N.Y. 1997).

156 *See CompuServe, Inc., v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (jurisdiction existed over Texas resident who contracted with Ohio company to distribute its software and electronically uploaded files to company's computer in Ohio).

157 *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997) (web advertising); *Witbeck v. Bill Cody's Ranch Inn*, 411 N.W.2d 439 (Mich. 1987) (tour book advertising).

158 *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998) (Toeppen registered Panavision's trademarks as his domain names on the Internet to force Panavision, located in California, to pay him money for them). *Compare* Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002) (Texas plaintiff could not sue New York university's interactive website or Massachusetts contributor to that site in Texas courts, since alleged defamatory contribution did not the focus on Texas or any of plaintiff's activities in Texas).

159 *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (use of same registered service mark of Arizona company not sufficient to show purposeful direction and collecting cases).

because, in *Keeton v. Hustler Magazine*,[160] a print-medium defamation case, the Supreme Court, noting that the effects of defamation are felt in every state where it is circulated, not just the state where the plaintiff lives, permitted jurisdiction over a magazine that sold 10,000 to 15,000 copies in the forum state, which had no other relationship to the plaintiff or the subject matter of the defamation. Courts have focused in such cases on the "level of interactivity and commercial nature of the exchange of information that occurs on the Web site." Thus, if the only interactivity is providing an e-mail address and the number of subscribers from the forum state is minimal, there is less likely to be jurisdiction. But if there is greater depth of interactive activity with those who respond to invitations to subscribe and substantial numbers of contracts to supply information, services or goods to forum state residents, a finding of jurisdiction is more likely.[161]

2. Personal Jurisdiction Powers of Federal Courts

In contrast to the state courts, the "territory" of federal courts is the entire country. Consequently, one might think that federal courts would have nationwide personal jurisdiction powers and that barriers posed by state borders would be inapplicable to suits in federal court. However, Congress and the Supreme Court in the Federal Rules of Civil Procedure have chosen a more limited view that draws a distinction between diversity cases and federal question cases.[162]

State-Law Diversity Claims In diversity cases, state-law claims are being asserted and a federal court may, in general, exercise no more power of personal jurisdiction than may a *state court* of general jurisdiction of the state where the federal court is located.[163] Thus, a plaintiff would gain no advantage in terms of personal jurisdiction by filing a diversity suit in the New York federal court rather than in the New York state court. Keeping federal courts on a par with state courts when they handle state-law claims discourages forum-shopping — turning to federal courts solely to extend the reach of personal jurisdiction on a state claim.

Federal Claims When a claim is based on federal law, federal courts are not so confined. If there are sufficient contacts with any one state for personal jurisdiction, the federal court in that state will have jurisdiction. If there are insufficient contacts for the general jurisdiction courts of any one state to have jurisdiction, then the federal court may exercise jurisdiction in any manner "consistent with the Constitution and laws of the United States."[164] A federal court handling a federal law claim, then, will have personal jurisdiction over all defendants residing in the United States and all foreign defendants who have the appropriate minimum contacts with the United States as a whole.[165] When both state and federal claims are asserted, personal jurisdiction

160 *Keeton v. Hustler Magazine*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984).

161 *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997) (finding purposeful direction toward Pennsylvania on interactive site that resulted in contracts with 3000 individuals and 7 Internet access providers). The *Zippo* case has been influential in Internet jurisdiction law.

162 *See* Chapter V, pp. 186-188 (discussion of diversity and federal question jurisdiction).

163 FRCP 4(k)(1).

164 FRCP 4(k)(2). The provision has been referred to as a federal long-arm statute, since it serves as an affirmative authorization for asserting personal jurisdiction.

165 The relevant Court of Appeals cases are discussed in Chapter XVII, p. 696. Congress has provided for nationwide service of process in certain special kinds of cases. *See, e.g.*, 28 U.S.C.A. §1391 (suits against officials and agents of the U.S. government); 28 U.S.C.A. §2361 (interpleader cases, where there are several claimants to a single fund of money). The Court has upheld interpleader jurisdiction provision as constitutional. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967). The applicable due process limitation would be the due process clause of the *5th* Amendment rather than the due process clause of the 14th Amendment, since the 14th Amendment applies only to state courts. *See* Chapter VIII, p. 285.

acquired based on contacts with the entire United States for federal claims permits the court to proceed with the state claims as well.[166]

B. *Forum Non Conveniens*

The common law doctrine of *forum non conveniens* allows a court to decline to exercise jurisdiction if that court "is a seriously inconvenient forum for the trial of the action" and "a more appropriate forum is available to the plaintiff."[167] The question of convenience is committed to the discretion of the trial court, which is to apply a wide variety of "public" and "private" factors. These are summarized and discussed in the seminal case of *Gulf Oil Corp. v. Gilbert*.[168]

Forum Non Conveniens in Context Personal jurisdiction is somewhat like *forum non conveniens* in that it deals with where a suit can handled and with convenience. In addition, both state and federal judicial systems have "venue" requirements that assure that trial in the case is held at a place *within that system* that is convenient for parties and witnesses. The state and federal court systems allow for free venue transfer within them for convenience.[169] Thus, personal jurisdiction and venue together have a "funneling" effect: personal jurisdiction determines which state suit can be filed in and venue then narrows it down further, typically to a particular county in a state system or to a particular district in the federal system. Where *forum non conveniens* comes in is when the *most convenient* place within a given judicial system has been found, but that place is *still* inconvenient as compared to a place *outside that judicial system* (another state or another country). In such an event, *forum non conveniens* permits the court to dismiss the lawsuit so that it can be brought in that more convenient judicial system.[170]

In the United States, *forum non conveniens* issues can arise in both interstate and international contexts and in both federal and state courts. However, because federal courts have the power to transfer a case between districts throughout the country,[171] *forum non conveniens* dismissal issues arise in federal court only where the competing, more convenient jurisdiction is a foreign country.

An interstate example of *forum non conveniens* would be as follows. P, from the state of Ohio, is driving his car in Michigan when his brakes fail and he is seriously injured. P sues the manufacturer, one of the "Big Three" auto companies in Michigan, in his own Ohio state court. The reason P does so is that Ohio holds defendants strictly liability in product liability cases, while Michigan that requires that fault be proven.[172] Since all the witnesses, the hospital personnel who treated P, the wrecked vehicles and

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166 *ESAB Group, Inc. v. Centricut Inc.*, 126 F.3d 617, 628-629 (4th Cir. 1997). For an Internet case aggregating contacts with the entire United States, *see Quokka Sports, Inc. v. Cup Int'l Ltd.*, 99 F.Supp.2d 1105 (N.D. Cal. 1999) (site using .com domain name from U.S. registrar rather than .nz domain, banners with advertising from U.S. companies, quoting advertising rates in U.S. dollars, offering travel packages in U.S. dollars, and offering books in affiliation with Amazon.com showed intent to target U.S. markets).

167 RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §84 (1969). The origin of the doctrine is obscure, but it appears to have originated in Scotland. *See* Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIFORNIA LAW REV. 380 (1947) and *Zurick v. Inman*, 426 S.W.2d 767, 769 (Tenn. 1968).

168 330 U.S. 501 (1947). They include both "public" administrative difficulties the court would have and general appropriateness of handling the case and "private" factors related to the effect difficulties with access to evidence and other practical problems.

169 *See* 28 U.S.C.A. §1391 (venue rules) and 28 U.S.C.A. §1404 (transfers among permissive venues).

170 Dismissal rather than transfer is the appropriate remedy for *forum non conveniens*, since one sovereign cannot transfer its cases to another in the absence of some special agreement to that effect.

171 *See supra* note 169.

172 Personal jurisdiction exists in Ohio because the defendant is a national manufacturer and there is general personal jurisdiction. Plaintiff residence venue is allowed in many state courts.

the accident scene are all in Michigan, it is likely that the Ohio courts will consider dismissing the case so that it can be filed in Michigan. An international example is the case involving the Union Carbide chemical disaster in Bhopal, India, that killed and injured thousands. Instead of suing in the courts of India, the plaintiffs sued in the U.S. federal court in New York City. The main reason was the more advantageous procedural and substantive law that would be applied in the New York federal court, particularly liberal discovery rights and the right to a jury trial. The federal appeals court ordered the action dismissed so that it could be refiled in India. Among other things, it considered the fact that virtually all the witnesses were in India, all the plant records were in Hindi and Indian law would undoubtedly govern liability in the case.[173]

Forum-Shopping and Forum Non Conveniens As these examples indicate, in most *forum non conveniens* cases the plaintiffs involved have chosen to file their case in an inconvenient place in order to avoid unfavorable substantive or procedural law. The incentives to "shop" for better law have increased as the revolution in choice-of-law rules has increased the number of instances when a forum court will apply its own law to a dispute.[174] However, the Supreme Court has ruled that the possible loss of advantageous procedural or substantive law if a *forum non conveniens* dismissal is granted "should ordinarily not be given conclusive or even substantial weight."[175] A negative change in law matters only if the more convenient forum does not provide any realistic possibility of recovery.[176] While courts at one point maintained that, if at least one party to the lawsuit is from the forum state, that was sufficient to defeat a *forum non conveniens* dismissal, this view is generally not followed anymore.[177]

Conditional *forum non conveniens* dismissals are possible to deal with possible barriers to suit in the more convenient forum, particularly personal jurisdiction or statutes of limitations problems. Thus, the federal court in the Union Carbide Bhopal disaster case made its dismissal conditional upon Union Carbide consenting to the jurisdiction of the Indian courts and waiving any applicable statute of limitations.[178]

C. Recognition of Judgments: The "Full Faith and Credit" Requirement

1. Enforcement and Effect of Out-of-State Judgments

The "full faith and credit" clause of the Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings

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173 *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987). One might add that juries in large cities, such as New York, tend to be more sympathetic to plaintiffs in personal injury cases than are juries from suburban or rural areas. Perhaps part of the reason for the result in the case was that the Indian government, which had argued in the trial court that the case should stay in the U.S. courts because Indian courts could not handle such a large, complex case, changed its position and argued for dismissal in the court of appeals after negative political reaction at home to its implied criticism of Indian courts.

174 *See infra*, pp. 261-265 (trends in choice-of-law doctrine).

175 *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981) (in suit arising out of a plane crash in Scotland, the absence of strict liability under Scottish law and lower damage awards in its courts afford no basis to keep case in Pennsylvania federal court). This decision affects only federal courts, as state courts can have their own standards. *See* FRIEDENTHAL, KANE & MILLER, *supra* note 1, §§2.15-2.17 (venue and *forum non conveniens*).

176 Some courts even disagree with this exception and have prohibited permitting the plaintiff to proceed even if suit would be impossible in the more convenient forum. *See Shiley, Inc. v. Superior Court*, 6 Cal.Rptr.2d 38 (Cal.App. 1992) (claim would have been barred by statute of limitations).

177 *See, e.g., Silver v. Great American Ins. Co.*, 278 N.E.2d 619 (N.Y. 1972) (residence of defendant only one factor to consider); *Russell v. Chrysler Corp.*, 505 N.W.2d 263 (Mich. 1993) (same). *See also Gulf Oil Corp. v. Gilbert*, *supra* (New York is inconvenient forum even though defendant was licensed to do business there).

178 Statutes of limitations provide time periods within which a person with a claim must bring that claim or be barred.

of every other State."[179] This requires states to enforce judgments rendered in other states.[180] *Federal* courts must also recognize *state* court judgments, though this results not from constitutional requirements, but from a statute.[181] Federal courts in one part of the country give preclusive effect to judgments of federal courts in other parts of the country because they are all part of the same court system.[182]

Traditionally and still in some states, a plaintiff who wins a judgment and finds that the defendant has property in another state can enforce that judgment by filing a "suit on the judgment" in that other state. This suit converts the judgment of the first state into a judgment of the second and the plaintiff can proceed to enforce it against the defendant's property. However, 39 states have adopted the Uniform Enforcement of Foreign Judgments Act, which provides that, upon completing certain filing and notice requirements in the second state, the judgment will have "the same effect" as a judgment of that second state. This eliminates the need for filing a suit on the judgment.[183]

A second function of "full faith and credit" is that it serves as an interstate preclusion device. Thus, an out-of-state judgment has the same claim and issue preclusion effects discussed earlier that it does in the state that rendered it.[184]

2. Exceptions to Full Faith and Credit

Direct and Collateral Attacks The grounds for avoiding the effects of the rendering state's judgment in the courts of the enforcing state are few and narrow. No defenses to liability under the law of the rendering state that could have been raised in the proceedings in the rendering state can be raised. And it is no ground for challenge that the rendering state's laws that permitted recovery violate the public policy or laws of the enforcing state. For example, in *Fauntleroy v. Lum*,[185] the Supreme Court required Mississippi courts to enforce a Missouri judgment based on a gambling debt incurred in Mississippi — a debt that would was illegal and unenforceable under Mississippi law. The Court noted that, "as the jurisdiction of the Missouri court is not open to dispute, the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of Mississippi law."

The reason for the Court's last statement is that the law makes a distinction between "direct" attacks on judgments and "collateral" attacks. A direct attack is a challenge to a judgment that is mounted in that very lawsuit. An example is a timely appeal, which is a continuation of the same lawsuit in the appeals court. A collateral attack is any challenge to the validity of a judgment that is mounted in a different case after the judgment in the first case is final. Usually collateral challenges are barred by

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179 Article IV §1. *See also* 28 U.S.C.A. §1738 (judgements "shall have the same full faith and credit in every court within the United States . . . as they have by law and usage in the courts of such State.")

180 The procedure for enforcing judgments within a state was discussed *supra* p. 241.

181 28 U.S.C.A. §1738.

182 For recognition of judgments from foreign countries, *see* Chapter XVII, pp. 707-709.

183 *See* www.nccusl.org/Update/. *See also* Chapter I, p. 34, note 154 (Uniform Law Commissioners). *See generally* EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON SYMEONIDES, HORNBOOK ON CONFLICT OF LAWS, 4TH ED. §§24.8-24.32 (West 2004).

184 *See supra*, pp. 245-247, and RESTATEMENT OF JUDGMENTS, 2D, *supra* note 109, §86 (effect of state court judgment in another state) and §87 (effect of federal court judgment in state court) and RESTATEMENT OF CONFLICTS, 2D §103 (American Law Institute 1969) (effect of judgment of one state in another state). However, when a federal court decides a state law claim, usually in a diversity case, it is federal common law of judgments that applies, but federal common law adopts the law of the *state where the federal court is located. Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

185 210 U.S. 230 (1908).

res judicata and allied finality doctrines. A defendant's opposition to proceedings to enforce a judgment based on its invalidity is considered a collateral attack. If a collateral attack would not be permitted in the *rendering* state's courts, then full faith and credit would prohibit the *enforcing* state from permitting one.

The Jurisdiction Exception A major exception to the rule against collateral attacks is a challenge to the judgment based on absence of personal jurisdiction. The enforcing state is required by the Constitution to entertain arguments that the rendering court did not have personal jurisdiction. However, this is permitted only if the defendant did not appear in the original action, since this would have afforded the defendant an opportunity to mount a direct attack on jurisdiction.[186] A challenge based on the allegation that the judgment was procured by fraud is possible as well.[187]

D. Choice-of-Law Rules

In Chapter I, we observed how the existence of 50 coordinate state lawmaking jurisdictions side-by-side can complicate litigation that involves people, transactions or occurrences connected with more than one state. A major complication is the question of which state's law will be applied in such a case — the question of choice of law. It would be useful if this issue were governed by *federal* law instead of the law of each individual state. Federal law would better mediate between the competing interests of the states involved and would provide a single consistent body of choice-of-law doctrine to apply ultimately resolvable by the U.S. Supreme Court. However, Congress has enacted no federal conflicts statute. Each state court in which a case is filed applies its own choice-of-law rules. And, as discussed in Chapter V, even *federal* courts adjudicating state-law claims apply the choice-of-law rules of the state where it sits.[188]

There are a few modest federal constitutional limitations on choice of law, which are discussed next. After that, we will consider the variety of state conflicts rules that can be applied.[189]

1. Constitutional Limitations on State Choice-of-Law Rules

Choice-of-law decisions implicate state sovereignty since a forum state may is often "reaching out" to apply its law to a dispute having a substantial connection with another state. Choice of law also concerns fairness since substantial connections with one state may well create reliance interests that can be violated when the law from a different state is suddenly applied. Given these considerations, one might expect that constitutional limitations related to interstate federalism or due process would limit state choice-of-law rules in a major way. In fact, their limitations are modest.

The due process clause of the 14th Amendment will prevent application of the law of a state when a dispute has *no connection at all* to that state (other than the fact suit

186 *See Pennoyer v. Neff*, 95 U.S. 714 (1877). Collateral challenges to *subject-matter* jurisdiction are also possible, but only if the rendering jurisdiction permits them to be raised collaterally after judgment. *Aldrich v. Aldrich*, 378 U.S. 540 (1964). However, this sort of challenge is rarely provided for under state law. Federal subject-matter jurisdiction is generally not subject to collateral challenge. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) and WRIGHT, *supra* note 1, at 84-85.

187 *See* SCOLES ET AL., *supra* note 183, §24.17.

188 *See* Chapter V, p. 190 and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

189 A standard treatise on choice of law discussing in depth many of the issues covered in this section is SCOLES ET AL., *supra* note 183. A previous edition of an introductory chapter of this book, written for a European audience, appeared as PETER HAY & RONALD ROTUNDA, THE AMERICAN FEDERAL SYSTEM (Giuffrè, Milan, Italy and Oceana Press, Dobbs Ferry, N.Y. 1982). For a more succinct summary *see* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS (Matthew Bender 1993).

was filed there).[190] In *Allstate Ins. Co. v. Hague*,[191] the Supreme Court held that "that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[192] However, the facts of *Hague* demonstrate how minimal those contacts can be and how it does not matter that there is another state with comparatively greater contacts. *Hague* permitted Minnesota to apply its own law to a claim against an insurance company arising out of a motorcycle accident that caused the death of the insured. The contract of insurance was taken out in Wisconsin, the accident was in Wisconsin and both people involved in the accident were residents of Wisconsin. However, the Supreme Court found three sufficient "contacts" between the suit and Minnesota: the insured victim had worked in Minnesota for years before his death, the plaintiff widow had moved to Minnesota *after* his death, and the defendant insurance company did business (unrelated to the suit) in Minnesota.

2. The Variety of State Choice-of-Law Rules

Freed from significant constitutional or federal statutory restraints, states have taken three basic approaches to choice of law: the traditional "vested rights" doctrine, the various "interest" and "policy" analysis approaches, and the "most significant relationship" theory of the Second Restatement.

Vested Rights Approach to Conflicts The traditional "vested rights" view dominated the view of courts in the United States during the period 1900-1950 and was the approach taken by the 1934 First Restatement of the Conflict of Laws. It was based on the notion of "legislative jurisdiction" of a particular sovereign — the idea that a state has the power to prescribe rules of conduct for transactions or occurrences taking place on its own territory. Once the "last event" of the transaction or occurrence takes place on the territory of that state, the parties to it acquire vested rights under the law of that jurisdiction that cannot be taken away. For instance, in the case of an airplane crash, if the crash occurred in California and the plaintiff sued claiming that the pilot was negligent, the law of California would govern because that was where all the acts or omissions constituting the tort took place (*lex loci delicti*). In contract cases, the place the offer was accepted and, therefore, where the contract was formed, would govern. Similarly, the law of the jurisdiction where a marriage was performed determined its validity, and the law of the place where land was located determined title.[193]

One problem with the vested rights approach is its malleability. What law applies depends on how the claim is characterized and different characterizations are often possible. For example, a suit by the passenger-survivor of an airplane crash could be

190 *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930) (Texas could not apply its own law to a dispute over an insurance policy where nothing in any way relating to the policy sued on was done or required to be done in Texas). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (Kansas could not constitutionally apply its own law to claims of class members in class action who had no connection with Kansas). The Court at one time held that the full faith and credit clause of Article IV provided an independent and stricter limitation on a state's refusal to apply the law of another state, but in it has since abandoned the idea, essentially merging it into the due process test. *See* SCOLES ET AL., *supra* note 183, §3.24.

191 449 U.S. 302 (1981). *See also Franchise Tax Bd. v. Hyatt*, 538 U.S. 488 (2003) (*Hague* contacts test applied to approve application of Nevada law in suit against California tax agency in Nevada courts).

192 449 U.S. at 313. While this "contacts" test sounds similar to the test for personal jurisdiction over out-of-state defendants, the contacts needed are much less, as the facts of the *Hague* case make clear. *Compare* discussion, *supra* pp. 250-254.

193 *See generally* SCOLES ET AL., *supra* note 183, pp. 557-1256 (applying of the "vested rights" and other choice-of-law theories over a wide spectrum of subject-matter areas). *See also* RESTATEMENT OF CONFLICTS (American Law Institute 1934) §377 (torts), §311 (contracts), §§215, 255 (property).

characterized as a *tort* claim, pointing to the law of the place of crash. But it might also be characterized as a suit for *breach of contract* for transportation, pointing to the law of the place the ticket was purchased — often and not coincidentally the forum state and the state where the plaintiff resides.[194] By approaching choice-of-law issues by *issue*, called "*dépeçage*," even more manipulation was possible. Thus, in one case, the court avoided a defense of interspousal immunity to a tort claim by characterizing the issue as one of *family* law calling for application of law of place of marriage, while applying a different body of *tort* law to remaining aspects of the claim.[195] Vested rights can thus be manipulated to provide "escape devices" to allow application of the forum state's law or some other law favorable to one or the other party.

A more fundamental criticism of the "vested rights" theory is that it focuses on a territorial connection to some state that is artificial and often coincidental. Too often it points the forum court away from its own law, despite the existence of strong forum state interests in having its law applied. In tort cases, victims and survivors of torts suffered in other states often seek to sue in the courts of their own state. Since the forum state will be responsible for supporting those victims should they be unable to obtain adequate compensation, it has a strong interest in having its law applied. In light of this interest, many would argue that, in the case of an interstate airplane flight that crashed in California, it is a mere fortuity that the crash took place in California, or in any other state the plane might have flown over on its way to California.

Interest Analysis and Policy Approaches to Choice of Law Dissatisfaction with the vested rights approach led to the formulation of several different theories by academic commentators, some of which or some parts of which have been adopted by some state courts. There are many varied descriptions of these approaches, but most of them require the judge to resolve choice-of-law questions by (1) determining the policies behind the laws involved and (2) deciding the extent to which the states involved have an interest in applying law reflecting those policies to the issue presented in the suit.[196]

Primary among the interests asserted in many of these theories are the interests of the forum state. Thus, the net result of most such analyses is to increase the number of occasions when a *forum* court will apply its *own* law. Setting the tone for many of these interest-oriented reactions to vested rights is Professor Currie's "nihilist" statement: "We would be better off without choice-of-law rules. Normally, even in cases involving foreign elements, the court should be expected as a matter of course to apply the rules of the forum."[197]

One contribution to interest analysis, provided by Professor Currie, is the concept of "false conflict," which has become "an integral part of all modern policy-based analyses."[198] A "false conflict" describes the situation when an analysis of the *policies* underlying apparently conflicting laws discloses that those *policies* do not conflict. For example, assume that in the California airplane crash hypothetical posited earlier a wrongful death suit is brought in New York against a Minnesota-based airline company. Assume further that New York law allows recovery by the surviving children of the

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194 This characterization was attempted, but rejected by the court in *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526 (N.Y. 1961), which reached the same result by characterizing the foreign jurisdiction's limitation on suit as "procedural." *See also Levy v. Daniels' U-Drive Auto Renting Co.*, 143 A. 163 (Conn. 1928) (tort claim re-characterized as contract claim).

195 *See Haumschild v. Continental Cas. Co.*, 95 N.W.2d 814 (Wis.1959).

196 For an overview of these various theories, *see* SCOLES ET AL., *supra* note 183, at 25-68.

197 Brainerd Currie, *Notes on Methods and Objective in the Conflict of Laws*, 1959 DUKE L.J. 171, 177.

198 SCOLES ET AL., *supra* note 183, at 29.

present value of the decedent's future earnings, while California, the place of the crash, does not allow recovery of that element of damages.[199] A court could well decide that the two different rules present a false conflict. If the purpose of California's damages limitation is to protect *California courts* from speculative computations of future damages and to protect *California defendants* from excessive verdicts, then that purpose is inapplicable where suit is brought outside of California and against a non-California corporation. Since there is no "true" conflict, the forum state (New York) should apply its own law.[200]

The false conflict idea does not invariably point to the forum state's law, however. This is illustrated by a New York case in which a Boy Scout was sexually assaulted by a supervisor on an outing. The suit against the Boy Scout organization alleged that it was negligent in selecting the offending supervisor. The issue was whether New Jersey's charitable immunity would bar suit. The defendant organization and the plaintiffs were from New Jersey and the negligent selection of the supervisor took place in New Jersey. However, the incident and the outing were in New York, and the plaintiffs brought suit in New York, probably in an attempt to avoid New Jersey law. The New York court determined that the policy underlying immunity — regulating or encouraging charities — was solely an interest of New Jersey. Since the apparent conflict with New York's abolition of charitable immunity was a false one, New Jersey law applied and the suit was dismissed.[201]

In the case of a "true conflict," an interest analysis approach attempts to weigh the interests of the various states involved.[202] These interests may reflect such policies as protecting local victims, protecting local defendants, or other more specific interests arising from the particular wrong involved. One method of weighing competing states' interests is California's "comparative impairment" test. Under this test, a court will compare the extent of damage that application of one or the other legal rule to the case would inflict on the competing states' interests. The court should choose the rule that causes the *lesser* degree of impairment. A leading case involved liability of a bar for injuries caused by drunk customers (referred to as "dram shop" liability). California plaintiffs were injured in California by a drunk California patron of a Nevada bar who was driving home. Plaintiffs sued the bar in the California courts. The bar claimed that Nevada law, which did not provide for liability in such a case, applied. The California Supreme Court first identified the respective interests: California's interest was in protecting its residents from the acts of intoxicated individuals while Nevada's policy was to protect its bar owners from ruinous liability. The court concluded that California's interests would suffer greater impairment from *not* imposing liability than Nevada's interest would suffer from *imposing* liability. California's interest was greater, the court said, because its interest extended to harm caused by persons who became intoxicated *both in California and out of state*. It seemed to the court that Nevada's attempt to protect *local* businesses was much less seriously impaired since the defendant Nevada bar in that case had advertised in California to attract California

199 These assumptions should not be taken as representing the true state of the law in any of the states mentioned.

200 *See Griffith v. United Airlines*, 203 A.2d 796 (Pa. 1964).

201 *Schultz v. Boy Scouts of America*, 480 N.E. 2d 679 (N.Y. 1985). The other situation where a "false conflict" exists is where the non-forum state explicitly disclaims an interest in applying its own law outside its borders by providing for a *renvoi* to the forum state's law or an *envoi* to the law of a third jurisdiction. There is substantial overlap in the functions performed by these two doctrines and the "false conflict" idea.

202 Professor Currie's approach would refuse to resolve "true" conflicts since it assumes that it is a legislative rather than judicial function to weigh truly conflicting interests.

residents. The court noted that there might be more serious impairment of Nevada's local interests if the case involved a truly "local" bar that did no advertising and did not otherwise seek to attract California residents.[203]

When freely evaluating competing states' interests, there is clearly the tendency of a forum court to prefer its own state's interests. An even stronger "homing tendency" is provided by theories that state a preference for the "better rule of law," associated with Professor Leflar.[204] In the absence of objective criteria for determining when one legal rule is "better" than another, the chances are great that the forum state, which has chosen to adopt the legal rule it has over all other choices, will modestly find its own law to be "better" than others. It is true that there are often other "choice-influencing considerations" that might counterbalance any "homing tendency," but these factors tend to be vague and contradictory. Professor Leflar's factors would take into account predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests, as well as the application of the better rule of law.

Second Restatement Approach to Conflicts The most recent approach to choice of law is the Second Restatement of Conflicts, promulgated in 1971, which seeks to determine which state has the "most significant relationship" to the case. It provides specific presumptive rules for types of cases that are applied in the absence of strong countervailing indications pointing in a different direction. Clearly, the Second Restatement edges away from the overwhelming tendency of the forum court to favor application of its own law and seeks to provide more stability to choice of law than existed with pure interest analysis.

For example, §146 on torts states that "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 of §6 to the occurrence and the parties." Section 6 significantly leaves out any "better rule of law" factor and includes a "protection of justified expectations" factor.[205] What contacts are counted to determine a "more significant relationship" are set out in a non-exhaustive list in §145(2): place of the injury, place of the conduct causing the injury, residence or place of business or incorporation of the parties, and the place where any relationship between the parties is centered. Regarding contracts, §188 lists as appropriate contacts generating interests the place of negotiation, formation or performance of the contract, the place where the object of the contract is located, and the parties' domicile, nationality, residence place of business or incorporation — all to be considered in light of the §6 factors. Similar to torts, it provides a presumptive rule that, whenever the place of negotiation and performance are in the same state, that state "will *usually* be the state that has the greatest interest in the determination of issues arising under the contract."[206]

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203 *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal.1976).

204 *See* SCOLES ET AL., *supra* note 183, §2.13.

205 The factors which the Second Restatement requires to be considered are the needs of the interstate and international system, the relevant policies of the forum, the relevant policies of the other interested states and their interests in the determination of a particular issue, the protection of justified expectations, the basic policies underlying the particular field of law, and the certainty, predictability and uniformity of result.

206 §188(3) (emphasis added). Other sections provide presumptive rules for different kinds of contracts. The 1980 Convention on the Law Applicable to Contractual Obligations of the European Communities adopts a test similar to the Second Restatement, providing that the law of the "most closely connected" country should apply and setting out rebuttably presumptive rules. *See* SCOLES ET AL., *supra* note 183, §18.40.

If the forum state's choice-of-law rules point to the law of another state, that other state's choice-of-law rules may sometimes point back to the forum state's law, "returning" the case or issue back to the forum state. For example, State A's choice-of-law rules may indicate that State B's standard of liability (strict liability) should apply, but State B's choice-of-law rules, if applicable, would apply State A's standard of liability (negligence). This "return" of the case to State A, called *"renvoi,"* is generally not applicable in the United States.[207] However, some of the purposes of *renvoi* are accomplished through the device of the "false conflict": if State B's law points back to State A's law, that could be seen as a disclaimer by State A of any interest in applying its own law. In addition, §8 of the Second Restatement of Conflicts, allows for *renvoi* when "the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would the courts of another state" or "when the state of the forum has no substantial relationship to the particular issue or the parties."

3. Trends in Conflicts Law in the Courts

Lack of Clarity in the Courts Some states still apply some version of "vested rights," some use a pure interest analysis approach, while yet others have adopted the Second Restatement. In many states, it is not clear what the state of the choice-of-law approach is. Confusion is increased by the fact that academic commentators advocating conflicting theories lay claim to the same judicial decisions as representing their favorite approach. New York has employed an approach that combines elements of straight policy choices, interest balancing and the notion of a "center of gravity" of the lawsuit.[208] But later New York cases demonstrate more certainty through use of specific rules distilled from policy analysis.[209]

While the vested rights theory had its faults, many are coming to realize that even more damage is done by the trend toward applying the forum state's law. When the result in litigation depends on the place suit is filed, plaintiffs will do their best to forum-shop for favorable law. Since the Supreme Court has effectively abdicated any constitutional control over choice of law and has abandoned choice of law to state prerogatives, the answer to this problem will come slowly, if at all.[210]

Some Stability for Contracts and Property The problem of unpredictability of choice of law is less in contracts situations, since the parties can and often do agree on what law will apply in the event of a breach. For example, §1-105 of the Uniform Commercial Code provides that "when a transaction bears a reasonable relationship to this state and also to another state or nation the parties may agree that the law of either this state or of such other state or nation shall govern their rights and duties." Similar party autonomy is recognized in §187 of the Second Restatement. Choice of law is also more predictable in property cases, since the rule that the law of the place where the property is located will govern, is well established.[211]

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207 This has been criticized. *See* SCOLES ET AL., *supra* note 183, §3.13. Similarly, there can be an *envoi*, a direction by a non-forum state to follow the law of a third state.

208 *See Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

209 See *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1973) (rules for liability of car drivers to passengers) and *Cooney v. Osgood Machinery, Inc.*, 612 N.E.2d 277 (N.Y. 1993) (law governing contribution between joint tortfeasors is the law of the state where the insurance to cover the loss was taken out). *See* Symposium on *Cooney v. Osgood Machinery, Inc.*, 59 BROOKLYN L. REV. 1323 (1994).

210 *See* discussion *supra* p. 259 (*Hague*).

211 *See* SCOLES ET AL., *supra* note 183, §19.2.

Other Mitigating Factors It should also be pointed out that the problem of over-application of the forum's law is somewhat ameliorated by "minimum contact" requirement of personal jurisdiction, which limits the number of states in which a plaintiff may sue.[212] The doctrine of *forum non conveniens* provides some protection as well.[213] However, for companies whose products or services bring them into contact with residents of every state in the United States, it is possible that the law of any of the fifty states could be applied to judge their conduct.

212 *See supra* pp. 250-255.

213 *See supra* pp. 256-257.