



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're talking about joinder as part of our "Listen and Learn" series. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast. Today, we are continuing on with another civil procedure hot topic, joinder. Joinder basically deals with who can and who must be party to a civil lawsuit. Essentially, it covers the act of "joining" or bringing other parties into the lawsuit.

Lee Burgess: Now, before we dive into joinder, I want to mention that all of this will make a lot more sense if your memory is fresh on some of the building block Civ Pro topics, like [subject matter jurisdiction](#) (federal question jurisdiction and diversity), and personal jurisdiction. If that rings a bell but the bell's a little rusty, I recommend reviewing that material and listening to some of our previous podcasts on the topic before continuing here. We'll link to those other podcasts in the show notes.

Lee Burgess: So now that that's out of the way, let's get on to the reason we're all here today, joinder. There are five types of joinder that you should be aware of: one, permissive joinder; two, required joinder; three, intervention; four, impleader, or third party actions; and five, class actions. That's too much to cover in one episode, so we're going to focus today on the first two, permissive joinder and required joinder. Stay tuned for future episodes covering impleader, intervention, and class actions. I know you're super excited for those!

Lee Burgess: So, let's start with permissive joinder, since it tends to be the most heavily-tested. Keep in mind, though, that all five do appear on the bar exam, so you should be familiar with all of them.

Lee Burgess: So, what is permissive joinder? That should be pretty easy to figure out from the name itself. Permissive joinder deals with who has permission to be part of a lawsuit. That is, who may be added, or "joined", to an action. The rule of permissive joinder states that multiple plaintiffs or defendants *may* be joined in



one action if *all* of the following three things are true: one, the parties assert joint and several relief or the claim arises out of same transaction or occurrence; two, a common question of law or fact exists; and three, subject matter jurisdiction is present for each claim.

Lee Burgess: Let's break that down, starting with the final requirement: When joining a new party, subject matter jurisdiction must still be present for each claim. When dealing with a Civ Pro question, you should always be thinking "jurisdiction, jurisdiction, jurisdiction." The court must always maintain jurisdiction, or the suit cannot continue in that court. So, if adding a party to the lawsuit will defeat subject matter jurisdiction – remember, all plaintiffs must be diverse from all defendants – then the party cannot be added. Joinder is not permitted.

Lee Burgess: Here's an example. Let's say we have two plaintiffs already in the case – both from Massachusetts, and one defendant from Louisiana. Would the court permit adding a third plaintiff from Texas? So far, yes! Since we only have one defendant and they aren't a Texan, we have complete diversity. But what if the new plaintiff was from Louisiana? Now we have a problem. Remember, since our defendant is from Louisiana, adding a plaintiff from Louisiana would defeat complete diversity. Since that would divest the court of subject matter jurisdiction, adding this plaintiff would not be a permissive joinder.

Lee Burgess: For the sake of this case, however, let's assume the new party is from Texas and doesn't defeat complete diversity, and let's also assume that the court otherwise maintains subject matter jurisdiction. We also have to meet the second requirement: Make sure that the cause of action brought by this new plaintiff presents a common question of law or fact. This is relatively straightforward. Basically, are we talking about the same thing, factually or legally in this new claim? If so, we're on our way to permissive joinder.

Lee Burgess: Okay, I'm holding my breath for New Plaintiff now. We have #3 – subject matter jurisdiction, and we have #2 – common question of law or fact. They just have one more hurdle: #1 – that the parties assert joint and several relief, *or* that the claim arises out of the same transaction or occurrence. Basically, is New Plaintiff bringing the same claim against the defendants and seeking the same relief as the other plaintiffs?

Lee Burgess: Or, if not, does New Plaintiff's claim arise out of the same transaction or occurrence – that is, is the event in the new plaintiff's claim logically related to at least one other event giving rise to a claim in this case? All logically related events are considered part of the same transaction or occurrence. That could be the same accident, or another accident that stems from or is connected to the



first accident. Just use your common sense and figure out whether the events are logically related. If so, we're good! New Plaintiff is permitted to join the suit. Yay!

Lee Burgess: That's a little hard to picture, so let's keep working with the previous example. The Massachusetts plaintiffs are suing Louisiana defendant, an oil company. Defendant oil company was drilling offshore in Massachusetts and unfortunately, had an accident resulting in an oil spill that made much of the local plant and animal life sick. Plaintiffs are lobstermen whose income that year was completely destroyed by the spill, since they could not sell the oil-affected lobsters. Plaintiffs are suing defendants for \$200,000 in damages, including their lost income.

Lee Burgess: So, let's say that New Plaintiff is a lobsterman in Texas. In a series of unfortunate events, New Plaintiff lost his income due to another oil spill by the same company a year earlier offshore in Texas. It sounds like Company has some real environmental issues on their hands.

Lee Burgess: Anyway, looking back on the second requirement, we have a common question of law amongst old and new plaintiffs, because in both cases the court will be deciding what duty the oil company owes to local lobsterman injured by their spills. Remember, though, that the federal court will be applying state law when figuring out what duty the oil company owed the lobstermen. It is worth noting in your essay that New Plaintiff is from a different state than the old plaintiffs, so though the claims may be substantially similar, we're dealing with one question of law from Massachusetts and one from Texas. Defendants will likely argue it isn't a common question of law. If New Plaintiff was from Massachusetts, however, I think we could easily argue this is the same question of law or fact.

Lee Burgess: However, we're probably going to come up short on #1. Since this is a completely separate oil spill in a completely separate state, we're not dealing with the same transaction or occurrence. Plaintiffs might argue the spills are related because they're both due to the same company policies: negligence or failure to maintain equipment. Defendants, on the other hand, may argue that the two spills, a year apart, are two completely separate issues and are not related. We don't have enough facts to know for sure, and remember, the examiners do not want you to assume facts not in the question, so just be ready to argue both sides if you don't have sufficient facts to make a determination. For the second half of #1, it would be hard to argue that the plaintiffs are asserting joint and several relief as the plaintiffs are not related in any way except for sustaining similar injuries.



Lee Burgess: Phew, that's a long test. Just to recap, our new plaintiff may have a hard time arguing permissive joinder. They will only be permitted to join the suit if, one, they are completely diverse from the defendants and the court maintains subject matter jurisdiction – check! Two, they are bringing a common question of law or fact – maybe? Kind of depends; got a little messy in there with Texas law and Massachusetts law. And three, their claim arises out of the same transaction or occurrence – probably not.

Lee Burgess: I just want to note that the test for permissive joinder is essentially the same for defendants as it is for plaintiffs. Just make sure to talk about the parties, the cause of action, and relief sought in the appropriate way when writing essay answers on this topic.

Lee Burgess: Alright, with that covered, let's move on to the second type of joinder, required joinder. Now that we know that permissive joinder deals with who has permission or who may be added to a lawsuit, what do you think required joinder deals with? I'm sure you guessed it! Required joinder deals with who is required to or must join a lawsuit. The rule of required joinder states that a party *must* be joined if, one, the party is necessary; and two, joinder is feasible. So, does the party need to be in the suit, and is it feasible for them to be there? If so, the court must order that that party be joined in the action.

Lee Burgess: So, how do we know if a party is necessary to the suit, and what does it mean for joinder to be feasible? Let's start with whether a party is necessary. A party is necessary if: a) the court cannot grant complete relief without the party; b) the absent party claims an interest in the action that would be impaired or impeded; or c) the party's absence creates a substantial risk of multiple liability or inconsistent obligations.

Lee Burgess: Think about it this way: Can the case come to a complete conclusion without that party? If not, the court will consider that party to be necessary. Second, does the party say there is some reason they should be involved in the suit? If so, will a right or interest they have be harmed if they aren't joined? If so, the court will consider that party to be necessary.

Lee Burgess: Third, remember that courts typically care a lot about what lawyers like to call "judicial economy – basically, efficiency. They do not want to have two separate lawsuits that could have been resolved in one. That's wasteful. They also care about consistency. If keeping this party out of the suit means there's likely to be a second similar lawsuit, that's going to be a no-go for the court, because, one, it's a waste of time and money; and two, there's a chance that the outcome of the second case will be inconsistent with the outcome of the first case. The



court doesn't want that, because inconsistent verdicts create confusion for future parties who may look at the court's decision to decide how to interpret a similar law or situation. So, if there is a substantial risk that leaving a party out of the suit will lead to multiple litigation, the court will likely order that party to join the suit.

Lee Burgess: Okay, so now we know what it means for a party to be necessary to a lawsuit. But remember, the rule states that it also must be feasible for the party to join the lawsuit. So, what does that mean? For that, we have another two-part test. This rule is: Joinder is feasible if, one, joinder will not remove subject matter jurisdiction; and two, court has personal jurisdiction over the party. So, when we say feasibility, we're not really talking about whether joining the lawsuit is convenient for the party, or whether it fits into the party's schedule. We're talking about Civ Pro feasibility. Will the federal court still have subject matter jurisdiction if this party is added, or will adding this party defeat diversity or ruin subject matter jurisdiction in another way? And does the court have personal jurisdiction, or the right to add this person to the case? You will need to go through both the subject matter jurisdiction analysis and the personal jurisdiction analysis for this new party and their claim to figure out whether joinder is feasible.

Lee Burgess: So, what happens if we decide joinder is necessary but not feasible? Well, that puts the court in a bind, because they need the party to continue with the lawsuit, but they can't actually join them. The court has two options: They can either proceed without the party, or they can dismiss the case so it can be brought in a different, more appropriate venue. Luckily, the court has some factors to consider if they end up in this pickle. The factors the court will consider are: whether the party's absence might prejudice any other party; whether prejudice can be lessened or avoided; whether an adequate judgment can be rendered; and if a plaintiff would have an adequate remedy if the case is dismissed. Basically, in the face of an imperfect situation, the court is weighing the pros and cons to the current parties to the suit and deciding if it would be a more just outcome to continue without this other party, or to dismiss the case and allow the plaintiff to bring the case in another court. It's a balancing test.

Lee Burgess: Alright, let's work through a hypo together so we can see how this rule works in practice. This hypo is adapted from the [February 2004 California bar exam](#):

Lee Burgess: "Paul and Tom, both State X residents, were involved in an auto accident in State X. At the time of the accident, Tom, who was working as a delivery truck driver for Danco, was driving through State X to make a delivery to a customer located in State Y. Danco is incorporated in State Y and has its principal place of



business in State Z. State Z is located adjacent to State X. Danco does no business in State X. Paul filed a complaint against Danco in federal court in State X on the basis of diversity jurisdiction. Appearing specially in State X federal district court, Danco filed a motion to dismiss the complaint on the grounds that the district court lacked both subject matter and personal jurisdiction, and that Paul's action could not proceed without joining Tom. The district court denied Danco's motion. State X law provides that its courts may exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of the United States". Did the district court rule correctly on Danco's motion to dismiss Paul's complaint?

Lee Burgess: In this hypo, Danco is basically arguing that Tom is a required joinder, but since his joinder is not feasible, the case should be dismissed. What do you think? Do you think Tom's joinder is required? Let's look back on the rule. Can the court grant complete relief without Tom? Or, does Tom claim an interest in the action that would be impaired or impeded? Or, finally, does Tom's absence create a substantial risk of multiple liability or inconsistent obligations?

Lee Burgess: Here, Tom may not in fact be a necessary party, because although he may be liable to Danco – his employer, for the accident, Dan may get a judgment solely against Danco for the accident because Tom was an agent of Danco when the accident occurred. And, because the accident was within the scope of Tom's employment, Danco will be liable for Tom's negligence.

Lee Burgess: Even though we don't think Tom is a necessary party, it's best to complete the entire analysis and show the examiners you know the second half of the test. So, let's discuss whether Tom's joinder is feasible. Remember, this is where we focus on both subject matter and personal jurisdiction. Here, Tom's joinder will destroy diversity because Tom and Dan are both residents of State X. Since that would kill subject matter jurisdiction, joinder isn't feasible, and the court needs to decide what to do next – dismiss the case or proceed without the party.

Lee Burgess: The factors the court will use to determine that are the following: one, likelihood of prejudice; two, ability to lessen or avoid prejudice; and three, chance of inconsistent judgment. Here, the court could dismiss the suit and let it continue in State X since all parties could join. However, letting the suit continue in federal court in State X appears to be the best option. As discussed, Tom has not requested to be in the suit, so there is no prejudice to him. Dan didn't ask Tom to join, and he has the right to sue Danco alone for damages, so there is no prejudice to Dan. Finally, Danco can sue Tom separately for his liability without risking inconsistent judgements. Therefore, the court may continue the case without joining Tom.



Lee Burgess: I know it's a lot, but try not to get overwhelmed by all the tests and factors for each type of joinder. Just take each test a step at a time and see if the case survives. Basically, you need to know your jurisdictional rules and you need to be able to apply common sense. And of course, as always, be sure to practice writing your way through lots of essays so you can get comfortable applying these rules before exam day. You got this!

Lee Burgess: And with that, we're out of time. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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