Lee Burgess: Welcome to the Law School Toolbox podcast. Today, we have another in our "Listen and Learn" series – this one is on Civil Procedure. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you'll be the best law student and lawyer you can be. 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 or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hi, and welcome back to the "Listen and Learn" series. Today, we are continuing with Joinder, a Civil Procedure hot topic. 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: This is the second installment of the Joinder episodes, where we'll cover intervention; impleader, or third-party actions; and class actions. In the first episode, we covered permissive and required joinder, so if you haven't heard that one yet, go back and take a listen. And, just as a reminder, all of this will make a lot more sense if you've refreshed your memory on subject matter and personal jurisdiction. If you need to review those topics, take some time to do that now. We have several Civ Pro episodes to help you out!

Lee Burgess: Alright, let's get going on joinder. As a reminder, there are five types of joinder that you should master: one, permissive joinder; two, required joinder; three, intervention; four, impleader, or third-party actions; and five, class actions. We've covered permissive and required joinder, so today we'll wrap up by covering impleader, intervention, and class actions.

Lee Burgess: Let's start with intervention. There are two types of intervention: intervention as a right, and permissive intervention. We're dealing with intervention when a third party who isn't in the lawsuit tries to insert themselves into the suit. Basically, the first type – intervention as a right – is when the court has to allow someone to join an action; and the second – permissive intervention – is when a court may allow someone to join an action. Makes sense, right? But how do we know which applies?

Lee Burgess: The rule to know for intervention as of right is this: A court must permit a non-party to intervene in an action if it demonstrates, one, that the application to intervene is timely; two, an interest in the subject matter of the action; three, that protection of this interest would be impaired; and four, such interest is not adequately represented by existing parties in the action. What does this look like? Let's jump into an example:

Lee Burgess: "The City of Townsville is looking to rehabilitate their downtown, which has few attractive businesses and sees little foot traffic for over a decade. Townsville City Council decided to find a plot of land to repurpose and turn into a modern town square with public art shops and restaurants. After consulting an urban planner but without consulting community members or the shop owners renting space at the mall, Townsville decided to exercise their option to buy a small, older strip mall from its current landlord. That strip mall, though old and unattractive, houses the few thriving businesses in town, including a minority-owned grocer, bakery, laundromat, and two restaurants. Townsville solicited bids from developers to raze and develop the plot of land where the strip mall currently sits, and ultimately gave the bid to the developer with the lowest bid. Townsville has not yet closed on the land. Once it does so, the developer intends to begin demolition immediately. In all, from eviction to ribbon cutting, the project is estimated to take 18 months.

Lee Burgess: The grocery store, an out-of-state chain who is the only grocer within 20 miles to sell the ingredients necessary to make traditional dishes for the community it serves, has filed suit in federal district court against Townsville. The store alleges that Townsville violated state law by failing to conduct a community impact study before choosing a property and exercising its option to purchase that property for state possession. Among other remedies, the store seeks a permanent injunction barring Townsville from closing on the property until an adequate study and community survey have been completed. The store argues that renting in the new space is not feasible, because it would be forced to close its business for 18 months before it could reopen in the new space. Further, the developer has not guaranteed it will include space for a small grocery in its plan.

Lee Burgess: Assume that federal subject matter jurisdiction is available, that the store has standing to bring this action, that venue is proper, and that the intervention is timely. If the developer seeks to intervene in the litigation as a party, must the federal district court allow it to do so as a matter of right?"

Lee Burgess: What do you think? Let's run through the four requirements together. First, we're told to assume the intervention is timely, so we can check that one off. Second, does the developer have an interest in the subject matter of the litigation? I'd say definitely. The developer has a strong interest in whether Townsville can buy and then resell the property to them for development. Townsville has already accepted their bid, they're just waiting on the sale to go through before they start demolition, and the store is seeking to prevent the sale entirely. The developer therefore has a strong, direct interest in the subject matter of the lawsuit, and having its winning bid honored and contract fulfilled.

Lee Burgess: Third, would the protection of the developer's interest be impaired by the outcome of the suit? I'd say "Yes" again. If Townsville loses the suit, they will

have to complete a community impact study before closing on the property. Ultimately, the developer will either be substantially delayed or may not be able to complete the project and develop the land at all. The developer would have no power or ability to affect the outcome of its proposed development without joining the suit.

Lee Burgess: Fourth, is the developer's interest adequately represented by the existing parties? I think you could argue that Townsville adequately represents Developer's interest, since both parties have the same interest – they want the deal to go through without completing a community impact study. However, I think there's an even better argument here. If you dig deeper, the ultimate interests of the two parties are not identical. Townsville wants to rehabilitate the downtown; Developer's interest is in making a profit from the development of the strip mall property. Townsville is likely weighing various policy concerns, including their public image in their community, that have nothing to do with Developer's economic interest. So, since Developer has met all four prongs of the test, they've cleared the bar for intervention as of right.

Lee Burgess: But what if the party seeking to join does not clear the bar for intervention as of right? In that case, the court may still allow permissive intervention upon a timely motion. Here's the rule for permissive intervention: A court may allow a non-party to intervene when the non-party: one, files a timely motion; and two, either, a) has a claim or defense that shares a common question of law or fact with the main action; or b) is given a conditional right to intervene by federal statute. In weighing whether to allow permissive intervention, the court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. Meaning, the court always keeps first in mind the rights and consideration of the parties already in the action. In the example we just discussed, we might be thinking of one of the other tenants of the strip mall seeking to intervene. Arguably, their interest in the suit is adequately represented by the grocery store, since their claims and interests are virtually identical. But the court may still allow them to intervene, given the common question of law and fact.

Lee Burgess: Okay, let's move on to impleader, or third-party actions. Impleader comes up when a defendant seeks to bring another person into the action to help with their defense or demonstrate that the new party actually bears some liability in the case. When can a defendant do that? A defendant may bring a third party into an action only if, one, the third party is or may be liable to that defendant; and two, for all or part of the claim against Defendant in the action. So, the third party has to be liable to Defendant in this particular suit. Obviously, the point of a lawsuit is to prove who is liable to who and for what, so the defendant isn't required to prove any of that before impleading a third party. They just need to convince the court that the third party is or may be liable to them in this action.

Lee Burgess: It's important to note that the "same transaction or occurrence" test is not enough here. Claims merely arising out of the same transaction or occurrence are insufficient for impleader, unless derivative liability exists. Derivative liability will be something like indemnification or contribution, which is a deeper dive than we're going to take today. Basically, remember that for impleader to work, the defendant will need to show that the third party is liable for the action Plaintiff has already brought into the case. If they're bringing in a related but different action, your red flags should go up. So, let's see how this plays out in another example:

Lee Burgess: "Philip and Caroline were driving in opposite directions on a two-lane highway at dusk during a thunderstorm when their cars collided head-on in the middle of the road. At the moment of impact, the airbags in Caroline's car, a 2020 Fianta, malfunctioned, and she was seriously injured from the impact. Philip's airbags properly deployed and he only suffered minor injuries. Caroline filed a tort action in federal district court against Philip and Fianta, the manufacturer of her car. The complaint alleges that both Philip and Fianta are liable for all or part of Caroline's injuries. In particular, the complaint alleges that Philip caused the original accident by swerving into her lane and driving in excess of the speed limit given the storm, and that Fianta is liable because the airbags in her car were defectively manufactured, tested, and installed.

Lee Burgess: Assume jurisdiction and service are proper and all actions taken are timely. Fianta now seeks to implead AirGuys, the company that manufactured and tested the airbags in all 2020 Fiantas. Fianta seeks to join AirGuys as a party to the action, alleging that AirGuys must indemnify Fianta if Caroline's airbags are found to have been defectively manufactured and tested, and Fianta is held liable for Caroline's injuries. Here's the question: Did Fianta properly join AirGuys as a party to Caroline's action?"

Lee Burgess: Remember, for impleader to be proper, there are two requirements. First, Fianta must allege that AirGuys "is or may be liable" to Fianta. Second, AirGuys' liability to Fianta must be "for all or part of the claim against" Fianta. This case is a really good example of when a defendant may properly implead a third party. Caroline has sued Fianta, saying they're liable for damages, based on a claim that the airbags in her 2020 Fianta were defective. Fianta then alleges that AirGuys are actually primarily responsible, because they manufacture and test the allegedly defective airbags. Thus, Fianta claims that AirGuys must indemnify them for any damages they may owe to Caroline as a result of defective airbags. Using the words of the rule, Fianta alleges that AirGuys is or may be liable to Fianta for all or part of the claim against Fianta. In this case, impleader is proper.

Lee Burgess: Finally, let's turn to class actions. Class actions is a huge topic and could definitely take up at least another entire podcast. We're not going to try to cover all of it today! Since this is a podcast on Joinder, what we care about

covering today is the joinder of parties to a class action. To understand that, though, we do need to briefly cover what a class action is, so you have some context. Basically, a class action is a large lawsuit with many plaintiffs against one or more defendants for the same or substantially similar claim. You've probably encountered this in your everyday life.

Lee Burgess: I recently got a letter in the mail saying I might be part of a class action because I had a particular insurance company 10 years ago. Someone had filed a lawsuit based on that company's billing practices from 2010 to 2011, and since I had that same insurance at the same time, I was contacted to see if I might be an eligible plaintiff in the class action. Class action lawsuits are more efficient for everyone than it would be for each and every person injured by the company bringing their own suit, especially when the damages might be pretty low. Feel free to do an online search for class actions and see what comes up. There are some pretty interesting claims, and it might give you a bit of real-world context for how they work in practice.

Lee Burgess: In the meantime, let's cover the rule for class actions. Not everyone can file a class action, and not every case is appropriate for a class action lawsuit. Who qualifies? A person is allowed to sue on behalf of a class when there is, one, numerosity – class is so numerous that individual joinder is impracticable; two, commonality – questions of law or fact are common to the class; three, typicality – the claims and defenses of representative parties are typical of the class; and four, adequacy of representation – the representative parties, including counsel, will fairly and adequately protect the interests of the class. You'll commonly hear these referred to as numerosity, commonality, typicality, and adequacy of representation.

Lee Burgess: So, let's use the real-life example I mentioned above, straight from my mailbox. What makes this lawsuit against an insurance company a proper class action? First, we have numerosity. This is a large insurance company we're talking about here, so they had tens of thousands of customers from 2010 to 2011 that may have been affected by the claim in this suit. Second, the claim is about the company's billing practices, which is likely to be substantially similar for many, if not all of the customers in that date range. Third, typicality. The named plaintiff has to show that their claim is typical to the party. That is, it isn't an extreme example that most others in the party didn't experience. I honestly don't know the experience of the named plaintiff in the case, but the court clearly found the improper billing practices that plaintiff experienced were typical of the class they presented. And finally, the court clearly found that the plaintiff and their counsel would adequately and fairly protect the interests of the class. I'm glad the court thinks the attorney will do a good job!

Lee Burgess: If a plaintiff's case fits the four requirements, like in the case we just discussed, and they want to file a class action lawsuit, they must go through the process of

getting their group of plaintiffs certified as a class. The class will be certified if, a) separate actions would, one, create a risk of inconsistent adjudications, or two, harm the interests of other class members; b) the party opposing the class has acted or refused to act on grounds that apply generally to the class, and the grounds for relief are appropriate; or c) common questions of law or fact are predominant, and a class action is superior to other methods.

Lee Burgess: If there are tens of thousands of potential plaintiffs, like in the insurance case, the court is not going to want to, one, deal with tens of thousands of individual cases; or two, risk inconsistent judgments between the cases. Another important tool of the class action is fairness. They prevent one or two plaintiffs from draining the entire pot of money, leaving the rest of the affected parties without any remedy or ability to receive damages for their claims. The court, in certifying the class, is basically comparing what the suit (or suits) would look like with or without class certification and how that would impact the court, the defendants, and the plaintiffs.

Lee Burgess: And with that, we're out of time! If you enjoyed this episode of the Law School 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 Lee or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website contact form at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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