

## CIVIL PROCEDURE SHORT OUTLINE

### I. WHY PROCEDURE MATTERS: AN INTRO TO DUE PROCESS

**Fuentes – Procedural due process requires that parties whose rights are to be affected are entitled to be heard at a meaningful time, and in order that they may enjoy that right, they must be notified.**

The court hold the statute invalid b/c:

- A. D owns property despite lacking title since she made payments on it and is thus entitled to due process protections.
- B. Notice and Hearing before a judge should be provided before seizure of property to prevent unjust deprivation. Also consider safeguards against error – bond.
- C. Unimportance of Cost of Hearing – Not important compared to denial of persons’ constitutional rights.
- D. Exceptions for Extraordinary Circumstances  
Must meet three criteria:
  - i) Must be necessary to secure an important governmental or public interest
  - ii) Special need for prompt and immediate action
  - iii) Government officer controls the initiation of the proceedings.

**Connecticut v. Doe**: **Prejudgment attachment of real estate without affording prior notice or the opportunity for a prior hearing to the individual whose property is subject to attachment does NOT satisfy due process requirements**, especially in a case like this. The three-step analysis based on *Matthews v. Eldridge* considers:

- 1. Private interest that would be affected by official action.
- 2. Risk of Erroneous Deprivation. (Consider safeguards – affidavits and bonds)
- 3. Governmental interest, including function involved and fiscal and administrative burdens that the additional requirements would entail.

In addition to the application of *Matthew, Doe* had the following effects:

- 1. Exigent Circumstances. Proof of EC may be constitutionally necessary to permit seizure w/o notice.
- 2. Pre-Existing Interest in Property. Does the P have any interest in the property?
- 3. Type of Claim. Is there documentary proof or is it a subjective argument?
- 4. Due process limitations if hearing is held before seizure.

Mitchell v. WT Grant & Co – Allows seizure b/c of nature of claim (creditor) and immediate hearing.

FRCP - 64 – Federal courts must apply state law concerning the availability of prejudgment remedies, unless a federal statute provides a prejudgment remedy. Basically, whatever seizure is allowed in state court is allowed in federal court.

FRCP – 65 – Setting the amount of a security bond to be required of a party seeking a preliminary injunction is a matter of discretion.

Wrap up of Due Process: Balancing Test

**Harm to D + Risk of Error** v. **Benefit to P and Society**

**Consider:**

1. **Irreparable Injury**
2. **Weight of the Equation (What is D being deprived of, how prompt would hearing be)**
3. **Any procedural safeguards, such as bonds or affidavits**

## II. PLEADINGS AND AMENDMENTS

Purpose of pleadings:

1. Gatekeeper function (very important in common law, where P chose one offense & D one defense)
2. Provide a guideline for discovery and help narrow the issue
3. Notice to other side

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THE COMPLAINT - SPECIFICITY

1. Rule 8(a) – a complaint need only have:
  - a. Statement of jurisdiction
  - b. Short and plain statement of the claim and why P is entitled to relief
  - c. A demand for judgment of some kind
2. Notice Pleading
  - a. A complaint need not allege any specific wrong; rather it must merely notify the opposing party of the nature of the claim against it.
  - b. Rule 12(e) allows for a motion for a more definite statement but it is generally used only to decipher unintelligible motions, or those that are so vague the D couldn't reasonably be required to frame a responsive pleading, not just want of more detail.

U.S. v. Board of Harbor Commissioners – **If a complaint plainly and fairly notifies D of the nature of the claim, then greater details are not required.** FRCP 12(e) is restricted to situations where a pleading suffers from unintelligibility rather than want of detail.

8(a)(2) – The Federal Rules eliminated the code requirement of pleading “facts constituting a cause of action.” Instead, the Rules simply require a “*short and plain statement of the claim showing the pleader is entitled to relief.*” This has been called “notice pleading.” Discovery and other pretrial procedures are relied on for full development of the facts.

FRCP 9 - When claims are based on fraud or mistake the FRCP require the P to plead “*with particularity.*”

**FRCP 12(e) - Plaintiff is not required to plead specific facts at the outset unless such facts are needed for the D to frame his answer.** This is to prevent the D from going through time and effort if P never even has a claim.

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#### INCONSISTENT ALLEGATIONS

McCormick v. Kopman - **A complaint may contain inconsistent allegations, even though the proof of one negates any fault on the basis of the other.** [Since the trial is supposed to be a fact-determining event, it would not be logical to require a P to choose which set of facts is “true” before trial when different possibilities exist. Pure heart, empty head.] We allow this for consistent outcomes, so both Ds couldn’t point fingers at the other, to settle controversy in one action, and strategic advantage.

Church v. Adler – However, if the P has reason to know which allegation is true, they may not be able to plead contradictory allegations.

Rule 8(e): Pleading is to be Concise and Direct; Consistency

1. Each averment of a pleading shall be simple, concise, and direct
2. A party may set forth 2 or more statements of a claim or defense alternatively. All statements are subject to the obligations of Rule 11.

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#### RULE 11

A. Rule 11 requires honesty in all pleadings, as per 11(b), including:

1. The pleading is not for an improper purpose (delay or needless increase in cost of litigation)
2. Pleading is warranted by existing law or a nonfrivolous argument to extend existing law
3. Allegations and toher factual contentions have evidentiary support or if so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery
4. Denials of factual contentions are warranted on the evidence, or if so identified, are reasonably based on a lack of information or belief.

B. Rule 11 requires the party to make a *reasonable inquiry* into the factual allegations before filing the pleading.

C. Ex: Business Guides, Inc. v. Chromatic Communications Enterprises (1991)

BG sued CCE for copyright infringement, but failed to check on the 10 listings they accused CCE for copying. BG was held to violate Rule 11 b/c the attorneys and party have “an affirmative duty to conduct a reasonable inquiry into the facts and law before filing suit.”

A 1983 Amendment made sanctions mandatory, but this changed in 1993!

D. Changes to Rule 11 in 1993

1. Well grounded in fact became evidentiary support, requiring a lesser burden on the pleading party.
2. Sanctions are no longer mandatory. A court “may” rather than “shall” impose sanctions. 11(c)
3. The Safe Harbor provision – **The motion is not to be filed with the court until 21 days after it is served on the opposing party, and then only if the challenged paper is not withdrawn or corrected.** This provides a safe harbor for parties to reassess their filings without suffering sanctions for realizing that an earlier paper was not supported. (11(c)(1)(A)).
4. Under a strict reading of the 1993 amendments, only an attorney or unrepresented party can violate the rule. However, lower courts have held that represented parties themselves can indeed be liable for sanctions.

#### D. Other Notes

5. The Rule 11 standard with regard to the factual and legal basis for the claim is objective, and the actual state of mind of the lawyer is not important. *An empty head but a pure heart is no defense.*
6. §1988 – Allows sanctions against a party.
7. If the complaint is general, the Rule 11 inquiry must be broad, but the chance of dismissal is lessened.
8. If the complaint is specific, the Rule 11 inquiry is more narrow, but the chance of dismissal is greater.

#### SANCTIONS:

11(c)(2)- The court has substantial latitude in selecting the sanction, which may include directives of a monetary or non-monetary nature.

- The sanction is to be limited to that which is “*sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.*”
- Ordinarily paid into court. If the sanction is to pay money, that money ordinarily is to be paid into court and not to the opposing party. Thus, Rule 11 sanctions are not a fee shifting device to make the violator pay the victim’s attorney fees or other legal costs.

11(c)(1)(A)- The court may, however, award the moving party the costs of making the Rule 11 motion. Also, this section addresses sanctions on a law firm. Ordinarily, a law firm should be held jointly responsible with its partners, associates, or employees for violations of Rule 11. Under the 1983 version, it was held that only the lawyer who signed a paper, and not the law firm, could be sanctioned.

11(c)(2)(A) – Only non-monetary sanctions against represented party regarding legal basis. Monetary sanctions cannot be imposed on a represented party for violation of the requirement that contentions made be warranted by law.

Ridder v. City of Springfield - Rule 11 charges were dropped against Ridder’s attorney because Springfield failed to comply with the rule’s explicit procedural prerequisite. (They filed for Rule 11 w/o first serving the motion on Ps counsel for a safe harbor period.) However, Springfield is entitled to attorney’s fees b/c Ridder’s counsel unreasonably and vexaciously multiplied the proceedings. (28 USC §1927)

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## LEGAL SUFFICIENCY OF Ps CLAIM – RULE 12(b)6

Mitchell v. Archibald & Kendall, Inc. - In deciding if a motion to dismiss was properly granted, the court is required to accept only well-pleaded facts as true w/o considering any new legal theory asserted by the P.

FRCP 12(b) – Authorizes a motion to dismiss for “failure to state a claim upon which relief can be granted.”

1. Less detail and specificity are required;
2. **Omission of allegations is never fatal** – they can be supplied by amendment under Rule 15(a);
3. Only where the allegations positively indicate that the P cannot recover as a matter of law is the action subject to dismissal for failure to state a claim.

12(b)(6) - Assuming the facts pleaded are true, do they constitute a legal claim upon which the P is entitled to judicial relief?

- A. The motion is evaluated on the face of the complaint, not the evidence.
- B. The court must accept the facts in the complaint; it evaluates the legal theory to see if a claim can be granted (or the frivolousness of an argument to extend the law).
- C. If the motion is granted, the P has 2 options.
  1. Amend his complaint w/o prejudice; or
  2. Appeal. If he appeals, he’s taking a serious risk b/c usually a court won’t permit an amendment after an unsuccessful appeal.

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## DEFENDANT’S RESPONSE

### A. Pre-Answer Motions (PAMs)

1. The D has 20 days after service of summons to file either a PAM (either before or w/his answer), or the answer itself.
  - a. If the PAM is granted, the suit is dismissed (except for 12(e) motion for a more definite statement; then an answer must be filed w/in 10 days of the amended complaint being filed)
  - b. If the PAM is denied, the D has 10 additional days to file the answer.
  - c. If the D never answers, the P gets a default judgment. (Rule 55(c)).
2. Disfavored Defenses – These can only be brought in a PAM or in the answer; if not, they are forever waived. They are (all in Rule 12B):
  - a. 2- No PJ
  - b. 3- Court is the improper location (Improper venue)
  - c. 4- Insufficient process
  - d. 5- Insufficient service of process
3. Favored Defenses – These can be brought up at any time until the end of the trial. They’re in 12B, too.
  - a. 6- Failure to state a claim (this is the only non-procedural defense in Rule 12B)
  - b. 7- Failure to join a necessary party under Rule 19

4. Most Favored Defense – SMJ!! This can be brought up at any time, even on appeal, whether either party raises it or not.
5. An answer must contain: 1) Procedural Defenses; 2) Admissions and Denials; and 3) Affirmative defenses

B. ADMISSIONS AND DENIALS IN THE ANSWER - (Rule 8(b))

1. Rule 8(b) – A party shall affirm or deny and state defenses to each of the claims in the complaint.
2. Failure to deny constitutes an admission. (Rule 8(d))
3. An answer claiming lack of knowledge to affirm or deny is a denial
  - a. The doctrine of equitable estoppel may be applied to prevent a party from taking advantage of the SoL where the P has been misled by conduct of another party. (Zelenski v. Philadelphia Piers)
4. Denials may be ineffective. A D must be careful to specifically deny or affirm where a portion of the complaint contains a mix of averments that are true and false. Where only a part of a paragraph or allegation is true, the D should admit that which is true and deny the balance. (FRCP 8(b)). Zelenski.
5. Denial on ground that Δ has insufficient knowledge to form a belief
  - a. Must be used in good faith.
  - b. Issue must be outside Δ’s knowledge and one which Δ could not have easily informed himself.

Zielinski v. Philadelphia Piers - **Any allegation not denied will be deemed as true.** Once you admit to an allegation, that stands true forever, without discovery. **Any unfavored defense not in the pretrial motion is forever waived.**

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RULE 8(C) - AFFIRMATIVE DEFENSES IN THE ANSWER

1. Definition of Affirmative Defense: Any defense that seeks to avoid Π’s allegations by introducing new facts, rather than attempting to destroy the allegations, may be deemed an affirmative defense.
2. A D must plead anything constituting an affirmative defense in his answer.
  - a. Ex: Res judicata, contributory negligence, no consideration, SOL, SOF, estoppel, fraud, etc.
  - b. List of 19 affirmative defenses in 8(c) is not comprehensive but they must be set forth in the answer, and any other “matter constituting an avoidance or defense” must be set forth affirmatively.
3. If an affirmative D is admitted, a Motion to Dismiss under Rule 12(f) can be made.
4. “Unless” and “Except” usually precede affirmative defenses.
5. A P does not have to anticipate a Ds defenses in his complaint. Gomez v. Toledo

Gomez v. Toledo – Π brought action under **42 USC 1983** on grounds that his wrongful discharge by Δ violated due process. Δ filed motion to dismiss for failure to state a claim of

action. Dist.ct. granted, stating that b/c Δ was entitled to qualified immunity for acts done in good faith, Π had to plead Δ was motivated by bad faith.

USCt reversed, holding that where a public official may be entitled to qualified immunity, Π does not have to allege bad faith & **Δ must answer w/ good faith defense**. Δ's burden of pleading is supported by nature of qualified immunity defense, where facts rest within knowledge and control of Δ.

POINT: A D must bring up the defenses – whoever says it has to prove it.

12(c) – Motion for judgment on the pleadings

The P is actually fighting 3 battles:

1. Burden of Pleading
2. Required to Plead more Specific Facts
3. Burden of Production/Burden of Persuasion

Affirmative Defenses – In civil cases, you need a preponderance of the evidence – more likely than not. Burden of Persuasion = Preponderance of Evidence. You want to shift burden to the D.

Factors in allocating the burden of pleading an affirmative defense:

1. Access to information
2. **8c** list
3. Statute (words “except” and “unless” may indicate an affirmative defense)
4. Confession of avoidance
5. Probabilities: Burden to volunteer something unlikely
6. Policy: Purposes of some statutes (42 U.S.C. 1983) is to make it easier for Π

Ds Strategy: If in doubt as to whether Δ has burden of pleading a defense, he should plead anyway.

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RULE 13 – COUNTERCLAIMS

A. COMPULSORY 13(a)

- a. Pleading shall state as a counterclaim any claim against any opposing party if it arises out of the same transaction or occurrence that is the subject matter of the opposing parties claim.
- b. Bose Test for deciding if a counter claim is compulsory:
  1. Whether the same evidence would support or refute the opposing party's claims. If the same evidence would substantially dispose of the issue raised by the opposing claims, then counterclaims are compulsory; if not, they are permissive.
  2. Four other tests:
    - a. Are the issues of fact and law raised by the claim and counterclaim largely the same?
    - b. Would res judicata bar a subsequent suit on Δ's claim absent the compulsory counterclaim rule?

- c. Will the same evidence support or refute  $\Pi$ 's claim as well as  $\Delta$ 's counterclaim?
- d. Is there any logical relation between the claim and the counterclaim?
- 3. If  $\Delta$  fails to bring a compulsory counterclaim, it is forever barred!!! (Res judicata!)
- 4. **Exceptions** to compulsory counterclaim rule:
  - a. Party need not assert a claim that has not developed at the time the responsive pleading is served. **13c**
  - b. Exempt from a counterclaim for a c/a that is the subject of another pending action. **13a**
  - c. Party need not raise a counterclaim if its adjudication would require a third party over whom personal jurisdiction cannot be obtained. **13a**
- 5. Purposes of compulsory counterclaims:
  - A. Efficiency: settle all related disputes in one trial
  - B. Avoiding inconsistent outcomes

#### B. PERMISSIVE – 13(B)

- a. If the counterclaim does not arise out of the same transaction or occurrence as the opposing party's claim, it is permissive.
- c. Failure by a party to raise a permissive counterclaim does not preclude the party from bringing the claim in a later suit.
- d. Distinguishing between compulsory and permissive counterclaims is important to SMJ. Often permissive counterclaims run into problems w/ SMJ when the primary claim is federal and the counterclaim is state, since there is no supplemental/ancillary/pendant jurisdiction.
- e. **Wigglesworth v. Teamster's Local Union**
  - 1.  $\Pi$  filed suit in federal court alleging that  $\Delta$ -union violated his right to free speech.  $\Delta$  denied, and filed counterclaim alleging that  $\Pi$  violated state law by committing libel and slander against the union at a press conference on the same day  $\Pi$  filed his complaint.
  - 2. U.S. Dist. Ct. held that  $\Delta$ 's counterclaim was permissive under BOSE test b/c evidence necessary for the union to prevail on its libel and slander claims is not relevant to  $\Pi$ 's case. Because  $\Delta$ 's counterclaim is permissive, it doesn't belong in federal court.
  - 3. If the D is in doubt as to whether it's compulsory or permissive, he may want to file it anyway hoping it will affect a settlement.

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 RULE 15 – AMENDMENTS TO PLEADINGS

- A. In general, allows a pleader to correct any defect that in good faith can be corrected.
- B. A pleading can be amended once before a response is filed, or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time w/in 20 days after it is served. 15(a)
- C. After a response has been filed, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires*. 15(a)

D. Denial – If the amendment will result in undue prejudice to the other party or it has been unduly delayed.

E. Relation Back of Amendments – Rule 15(c)

- a. An amendment of a pleading relates back to the date of the original pleading when:
  1. Relation back is permitted by the law that provides the SoL applicable to the action. 15(c)(1)
  2. The claim or defense asserted in the amendment arose out of the same t/o as that set forth in the original pleading. 15(c)(2); or
  3. The amendment changes the party or the naming of the party against whom a claim is asserted if 15(c)(2) is satisfied **and**
    - a. The party being brought in has had notice of the action and will not be prejudiced in maintaining a defense on the merits, and
    - b. Knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against the party. (15(c)(3))
  4. 15(c) refers to changing parties, but the courts have interpreted it to permit addition of parties.
  5. An amendment of the complaint can't avoid the SoL w/ respect to a totally new party, P or D.
  6. For relation back to apply to a new D, the new D must have been on notice of the suit w/in the period allowed by Rule 4(m) for service of the complaint – 120 days after the filing of the complaint. (Must be w/in the SoL **or** added per 15(c)(3)) Basically, you don't get the bonus days if you file early.
  7. Some states permit the filing of a complaint against fictitious Ds (Does) where the true name of the D is not known at the time the action is filed. In such states, the complaint can be amended to name the D when her true identity is discovered, even if the SoL has run. Swartz v. Gold Dust Casino, Inc. HOWEVER, now most courts are NOT allowing this in federal court. Jacobsen v. Osborne. Most courts now say that the Rule 15(c)(3) only applies when there is a MISTAKE in identifying the D, not when the P is unable to identify the D sought to be added.
  8. **28 U.S.C.A. 1441(a)**: For purposes of removal on grounds of diversity of a case originally filed in state court, Δ's sued under fictitious names shall be disregarded.

F. Policy reasons for amendments:

- a. Protects parties from surprises
- b. Allows pleader to correct defects that in good faith can be corrected
- c. Allows a party to get around the statute of limitations

**RES JUDICATA AND COLLATERAL ESTOPPEL**

A. Res Judicata – “Claim Preclusion”

1. Res Judicata Defined – A final judgment on the merits precludes relitigation of the same claim b/t parties.
  - a. Final Judgment
    - i. Not a motion to dismiss (12B6) –but, if no amendment is allowed, a 12B6 may become final.

- ii. SJ is a judgment on the merits
  - b. On the Merits – Res Judicata doesn't apply when a case is dismissed for a procedural (PJ) reason.
  - c. Same Claim – This means the claim must arise from the same t/a or occurrence.
  - d. B/t Parties – Third parties to the t/o are NOT barred, but compulsory counterclaims are barred.
2. Res Judicata bars relitigating in every state (full faith and credit)

#### B. Collateral Estoppel – “Issue Preclusion”

- 1. Defined – Collateral Estoppel means a party cannot relitigate issues previously actually litigated and decided.
- 2. Actually Litigated – Default Judgment doesn't count – there must have been actual litigation
- 3. Decided – The specific issue must have been actually decided (a problem if judgment doesn't include a decision on each issue)

#### C. Res Judicata and Collateral Estoppel Compared

- 1. Res judicata applies to the entire claim where CE applies only to a given issue.
- 2. RJ applies whether or not there has been litigation, while CE only applies to issues actually litigated.
- 3. RJ applies only to the original parties, where CE may apply to new parties.

### JOINDER OF PARTIES AND CLAIMS

#### Ways to join parties:

Rule 13: Counterclaim and Cross Claims.

Rule 14: Third Party Practice

Rule 18: Joinder of Claims (Person alleging claim may join as many claims as he wants against an opposing party.)

Rule 19 – Compulsory Joinder: P may be dismissed for failing to join a party that is both necessary and either feasible to be joined or indispensable.

Rule 20: P may join same if arise out of same t/a or occurrence, gives P a lot of leeway. In response, D may move to dismiss if a necessary party hasn't been joined, D may join through impleader a third party who they feel may be responsible.

**\*\*\*Rule 24:** 24(a) covers intervention of right, and FR 24(b) sets forth for permissive intervention. Intervention is permissive if there is a common question of law or fact or if a statute gives a conditional right to intervene. Absentees can file a motion to intervene and become parties, even if neither P or D wants them to, if, absentee has:

- 1. *A significantly protectable interest*
- 2. *That may be impaired*
- 3. *If they are not adequately represented.*

The court determines what is significantly protectable and what is not.

#### Who can the D introduce into the lawsuit?

Rule 14 is much narrower than Rule 20, joinder for the plaintiffs. Rule 14 is NOT a same t/a or occurrence test, but rather allows D to implead a 3<sup>rd</sup> party that may be liable for all or part of the Ps claims against the D. We allow this to protect from inconsistent outcomes and b/c passage of time poses a risk to the D.

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RULES 17 (Real Party in Interest Must Sue) AND 19 (Necessary and Indispensible Joinder)

Rule 19 – Compulsory Joinder – Always be skeptical, very few are required to join!!!!

1. When **MUST** a party be brought in? Analysis takes place in 2 parts:
  - a. **Is the absent party necessary?** If so, they must be joined if feasible; if they are necessary and both PJ and SMJ are satisfied, they are automatically required to be joined. This is not a balancing test, it is a must.
    - i. A person is necessary if
      1. Complete relief cannot be accorded among the current parties w/o the party in question. (19A1)
      2. The person claims an interest relating to the subject that may be impaired by the action OR their absence may subject existing parties to a risk of inconsistent obligations. (19A2).
  - b. **Is the absent party indispensable?** (If either PJ or SMJ is violated, the court balances the below equation in determining whether to proceed w/o the party or dismiss the case.)
  - c. The court reads this rule narrowly b/c it doesn't want to change the Ps choice unless it has to.

**In looking at 19(b), balance:**

COST OF PROCEEDING W/O THE PARTY

- A. Prejudice to the Absentee
- B. Prejudice to the Existing Party
- C. Ps interest in proceeding in the forum it chose
- D. Public Interest in Efficient Final Judgment

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COST OF DISMISSING

- A. Adequacy of alternative remedy
- B. Public Interest in Efficient Final Judgment

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RULE 20 – PERMISSIVE JOINDER OF PARTIES

RULE 18 – JOINDER OF CLAIMS

Rule 18 – A party asserting a claim to relief as an original claim, counterclaim, cross claim, or 3P claim may join, either as independent or alternate claims, as many claims as the party has against an opposing party.

Rule 20a authorizes PIs to sue together if:

- a) They assert claims **arising out of the same transaction or occurrence**, and
- b) Their claims against  $\Delta$ (s) will involve **a common question of law or fact**.
- c) Similarly, this rule allows PIs to sue multiple  $\Delta$ s in a single action if the same criteria are met.

Kedra v. City of Philadelphia: Claims are easier to join than parties.

Rule 20 – Pretty generous to the P. Easy when you have the same event, but more difficult when you have different events. The courts interpret rule and consider, “Is the overlap sufficient to outweigh the prejudice to the Ds?”

If events appear to be part of a pattern or plan, the court allows joinder. Kind of a preliminary merits joinder, because the P is only alleging they are part of a pattern or plan. If during discovery, the judge gets suspicious, he can order separate trials under Rule 42(b).

Cohen v. District of Columbia National Bank - A party may not join as a D a party who hasn't had an effect on him. Permissive joinder is dealt with in FRCP 20. The Rule permits joinder of all parties involved in a transaction or series of transactions. Although the Rule is liberal, the Cohen case illustrates it has limits.

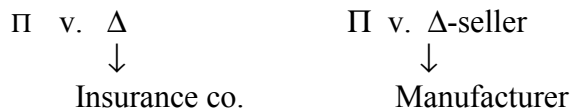
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#### IMPLEADER – FRCP 14

Clark v. Associates Commercial Corp.- Under FRCP 14, impleader is proper only if the 3PD is or may be liable to the 3P for all or part of the Ps claims against the 3PP. If there is no right to relief under the law, the 3PD cannot be impleaded.

A. **Rule:** A defendant alleging that a 3<sup>rd</sup> person (not a party to the lawsuit) is **liable to him** “for all or part of Π’s claim against him” may implead such a person as a 3<sup>rd</sup>-party Δ.

1. Common situations: Joint tortfeasor, insurance company, etc...



2. Rationale for impleader:
- a. Collateral estoppel or res judicata could preclude a separate claim.
  - b. Risk of inconsistent judgments.
  - c. You want contribution while the 3<sup>rd</sup>-party Δ can still pay.

C. Court has the discretion to deny the impleader or to sever the suits into 2 proceedings (anyone can challenge impleader). Factors weighed include:

- 1. Pro Impleader:
    - a. Efficiency of hearing all related claims in 1 hearing
    - b. avoid repeated suits/inconsistent judgment;
  - 2. Anti-Impleader
    - a. Undue delay
    - b. Unnecessary complexity for the lawsuit
    - c. Potential prejudice to the P (sympathetic 3P, etc.)
- VERSUS

D. If the D wins, that relieves the impleaded party of any responsibility

E. Claim must be derivative: For a 3<sup>rd</sup>-party claim to be valid, the 3<sup>rd</sup>-party Π may not claim that the 3<sup>rd</sup>-party Δ is the *only* one liable to Π, and that he himself is not liable at all. Thus, in cases like mistaken identity, the D cannot implead his twin. D can't implead someone he feels is fully and totally responsible for the claim.

1. **Alternative pleading:** However, the 3<sup>rd</sup>-party Π is not precluded from claiming in an **alternative** pleading that neither he nor the 3<sup>rd</sup>-party Δ is liable. Can use all 3<sup>rd</sup> party Π's defenses.

2. **Substantive law:** Impleader is restricted by the substantive law. If the substantive law recognizes joint and several liability, a 3<sup>rd</sup>-party Π may invoke an indemnity claim. If you're in a comparative fault system, the 3<sup>rd</sup>-party Π may not be entitled to contribution, and would have to find some other theory to support impleader and may not get it at all.

b. **Limits to indemnity** (Examples from Notes on pg. 248)

Capellini v. Unification Church

This impleader was not allowed b/c there is no *causal connection*, and the Church would not be responsible for any of the Deprogrammer's liability.

F. **When leave of court not needed:** If an original Δ serves a 3P summons and complaint upon the 3PΔ within 10 days of the time the original Δ served his answer to Π's claim, no leave of the court is necessary for the impleader.

1. **Leave necessary:** After this 10-day period, however, the court's permission to implead is necessary. Such permission is usually given liberally considering the court's power to order separate trials under Rule 42b to eliminate any confusion which might result from impleader.

G. Jurisdictional requirements relaxed: Both PJ and SMJ requirements are relaxed w/ respect to the 3<sup>rd</sup>-party claim. Citizenship for diversity of an impleaded party is irrelevant, as supplemental jurisdiction takes care of it. Venue is ignored as well.

1. Supplemental jurisdiction: A 3<sup>rd</sup>-party claim falls within the court's supplemental jurisdiction. Thus, there need be no independent jurisdictional grounds for such claims if there was diversity between the original parties, or if Π's claim against the original Δ raised a federal question.

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RULE 24 – INTERVENTION – (A party may intervene even if neither the D nor the P want them to.)

A judge has the power to limit the intervening party, even under 24(a).

24(A) – Intervention of Right

24(b) – Permissive Intervention

A. Intervention of Right (24(a)(2)): A person has a right to intervention if he has:

1. *A significantly protectable interest*

2. *That may be impaired* (This rule is more flexible than 19)

3. *W/o adequate representation.* (Minimal burden – must just show you *may* be inadequately represented)

1. Interest in the subject matter: He must “claim an interest relating to the property or transaction which is the subject of the action.”

a. What kind of interest?: The interest sufficient under 24a usually depends on the nature of the lawsuit. In a *public lawsuit* (ex: antitrust, environmental), more

people are affected and intervention is more freely granted. There are broad public issues before the court and the judges want the participation of all credible witnesses and parties, and don't want one party in control. In a sense, the court becomes a marketplace of ideas. However, in a *private lawsuit* (ex: breach of contract), there is no broad public policy issue at stake. While parties seeking to intervene may have an economic interest, something more is needed. Courts will usually not allow intervention in a private lawsuit unless the party seeking to intervene has a legally protectable interest.

- b. Impaired interest: He must be "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest."  
i. *This has been stretched to include an adverse precedent whose stare decisis effect may later happen to the party.*

B. Permissive intervention (24(b)): A person who has a "claim or defense" involving a "**question of law or fact in common**" w/ a pending action may be allowed to intervene *at the discretion of the court* if the intervention will not unduly delay or prejudice the rights of the existing parties.

Natural Resources Defense Council Inc. v. US Nuclear Regulatory Commission

RULE: Allowed to Intervene under 24(a)(2) b/c they had an interest in obtaining licenses in the future, and the judgment may have an effect on the ease of getting the licenses.

NOTES:

If parties have a personal interest based on stare decisis but don't have a legal interest (standing to sue), they are NOT indispensable parties. Interest in precedent does not have enough value to deem a party a necessary party under Rule 19(a). But, the court finds they do have an interest under Rule 24.

Why would a court let a group intervene in public policy cases if the court doesn't have to?

1. Fairness Concern
2. Efficiency
3. "Get it Right the First Time" – Hear as many ideas as possible (bonus efficiency)

Donald – He wanted to intervene to prevent IRS from getting his tax records. Interest, but not necessary.

## CLASS ACTIONS

### Rule 23(a)

Class Actions Require:

1. Numerosity (joinder of all class members is impractical)
2. Commonality (is there a common question of law or fact)  
\*These go with efficiency and fairness considerations.
3. Typicality (is representative typical –and a member-of the class?)
4. Adequate Representation for class (will he/she adequately represent the class?)

THEN, YOU MUST FIT INTO ONE OF THE 23(B) CATEGORIES.

Rule 23(b)

1. Different/unfair actions (Ex: Ltd. Fund, 1<sup>st</sup> would get all \$, like a mass production of Rule 19) **NO OPT OUT!**
2. Injunctive class action when Ps seek Injunctive or Declaratory Relief (Holland case)
3. Common issues dominate and class action is a superior (most commonly used)

Look at Rule 23(b)(3), and the rule that if (a) is satisfied, they must look at the 2 other prerequisites:

1. Common issues predominate (state of art defense, product identification, punitive damages)
2. Superior method for adjudicating rights (assist in preventing backlog of cases in court)

Real controversy in class actions is with Rule 23(b)(3).

Public Interest	Risk of Error	>	D's interest	Missing Plaintiffs
Collective Action Problem	Automatic Damages Formula		Legalized Blackmail	Prejudice to absent members of class
Efficiency	Single Law			But, have fairness hearing ***Opt out provision

Numerosity – Considers:

1. Effectiveness of the alternatives (joinder, etc.)
2. Size of each claim
3. Practical likelihood of individual suits being brought
4. Public importance of the right

Commonality – They don't have to be identical questions. Similar types of questions will do, and if the court later finds them to be inadequate, it can either decertify the class or create subclasses. (Holland)

Typicality – This goes hand in hand w/ adequate representation. Typicality is usually met if:

1. The representative is part of the class
2. Possesses the same interest and suffers the same injury as the rest of the class
3. EX: A black being denied a promotion isn't a typical black being denied a job. Different injuries.

Adequate representation – The class members must have their interests fairly and adequately protected.

1. There can be no conflict of interest.
  - a. Hansberry v. Lee – Original class of neighborhood homeowners was certified to keep blacks out. Hansberry, a black, buys a house seeking to be let in. Although otherwise he would be a class member, his interests were not adequately represented.
  - b. Note, however, that if the restriction were not on blacks, but was on commercial development, and Hansberry bought his land to build a McDonalds, there would be no real reason to treat him differently (he should know about restriction when he buys the land.)

2. Sometimes the lack of competent legal counsel will be considered enough to find inadequate rep.
3. 4 key points to adequate representation:
  - a. Class members are entitled to AR as a matter of due process (at least notice and right to be heard)
  - b. If they are AR, absent class members may be bound even if they didn't participate.
  - c. If there is no AR, a party may challenge the result, but *must first attack the adequacy of the rep.*
  - d. When a conflict of interest b/t class members goes to the core of the litigation, there is no AR.

Collective Action Problem – It's not always easy to get people to cooperate, even if it's in their best interest

- Free Rider Problem – When people will not join into a lawsuit that they may benefit from because they don't want to cough up the money for the lawyer.
- Insufficient value of Damages – Company can screw people for very small amounts, make millions, and get away w/ it b/c it would be uneconomical for the customers to sue individually. CA solves this problem.
- Limited fund (why share the fund with other people?)
- Inability to Identify all Parties

Rule 23(c)(3)- Requires a court describe those whom the court finds to be members of the class. The court is to note those to whom notice was provided and also those who had not requested exclusion. These members are considered members of the class and are bound by the decision of the court whether it is in their favor or not. The Federal Rules allow a member of the class to request exclusion from the class, and that party will not be bound by the decision of the court. Since a party must receive notice of the class action before he can request exclusion, the court must determine if sufficient notice of the action was made to notify him. The rules state that if the court finds that the party did have sufficient notice and was considered a member of the class, he is bound by the decision.

Rule 23(f) – Allows you to appeal from an order of a district court granting or denying CA certification if application is made w/in 10 days after entry of the order.

Holland v. Steele – When both damages and an injunction are sought, it is usually brought as a B2 CA, then the damages may be done separately under B3.

Jenkins – Allowed just one issue on a mass tort class action to be settled. Problems D had w/ it was the reps had the strongest cases, and the juries were going to be more sympathetic, awarding higher damages than they otherwise would have for individual average members of the class.

Evans v. Jeff D. - §1988 says that in civil rights cases, if the D loses, he pays attorney's fees, to encourage lawyers to take pro bono cases when civil rights were violated. This case was brought b/c the D offered to give the P everything they wanted on the condition that they wouldn't pay Ps attorneys' fees. The SCT said this was okay.

1. If this sort of settlement is accepted, it favors the current client b/c they get what they want
2. If this is rejected, it favors future clients b/c more cases can be brought if lawyers are actually paid.

### PERSONAL JURISDICTION

DOES THE COURT P CHOOSES HAVE PERSONAL JURISDICTION OVER THE D?

Ways of PJ: Implied consent, minimum contacts, balance of convenience, purposeful availment, the effects test, stream of commerce, stream of commerce plus, service in the state, in rem, quasi-in rem.

### METHODS OF EXERCISING PERSONAL JURISDICTION

#### A. PERSONAL SERVICE IN STATE

1. Pennoyer v. Neff – Cts. didn't have power over people who weren't w/in territorial borders of the state.

For personal jurisdiction, the court may show the person was:

1. Present within the state borders.
2. Then, Exercise its power and give *service of process* (in personam jurisdiction)
  - Attachment of property* that's w/in the state (in rem jurisdiction) [ie, juris over the thing.]
    - Or, Quasi In Rem → you owe me money on a completely unrelated claim. Criticized as too narrow, so now International Shoe minimum contact test is used. Courts said no more quasi-in rem jurisdiction. Balancing test must apply. Must be related to that property.

3. Exceptions
  - a. D consents, or
  - b. It involves status of a resident (usually marital status)

These are requirements of DUE PROCESS under US Constitution!!!!

Full Faith and Credit Clause – Provision in the US Constitution that provides that states shall enforce the judgments from other states unless the first court *did not have personal jurisdiction*.

2. *PJ via in-state personal service was most recently upheld in Burnham v. Superior Court (1990).*

- a. So long as Δ voluntarily travels to the forum state, and is served while present there, that state will have PJ in virtually all instances, even if the suit does not arise from Δ's contacts w/ the state.
- b. Key reason seems to be tradition – Scalia says it's part of "traditional notions of fair play and substantial justice." He thinks Int'l. Shoe doesn't even matter here - Pennoyer lives on!
- c. Some people feel service in a state for an unrelated claim may be constitutional, but Scalia says it's up to the legislature to change it if they feel that way.

- d. Brennan says waiting for the legislature will take too long – judges ought to uphold fair play/substantial justice today by making new law. Further, legislatures are not going to say “we limit our power to protect the out-of-state Ds.”
  - i. But, Brennan still thinks in-state service is good b/c the D by being in the state avails himself of that state’s services, and should be liable in the state
- e. You may get out of jurisdiction if you don’t know you are in the space b/c you are in the air. Also may get out of it for fraudulent inducement.

## B. IMPLIED CONSENT TO PJ

1. A person is said to have given implied consent to jurisdiction by carrying on certain activities within the forum state. This was traditionally for such “dangerous” activities like driving.
  - a. Non-resident motorist statutes: Many states have statutes allowing courts to exercise jurisdiction over non-resident motorists involved in accidents in the forum state. HESS v. PAWLOSKI (person impliedly consents to jurisdiction by act of driving motor vehicle within the state).
  - b. Rationale: The state has a right to require entering non-resident motorists to appoint an in-state agent to receive process served against them.

Corporations are not protected by the Privileges and Immunities clause. Corporations are present wherever they conduct business.

## C. CONSENT TO SERVICE

1. A person can consent to a state’s PJ
2. The biggest problems arise when the consent is via a small clause in a contract, for example, forum selection clauses on backs of tickets. The clauses are *presumed valid and almost always will be enforced*. The SCT has upheld their constitutionality, provided they are fundamentally fair. Factors to consider:
  1. Good faith
  2. Reasonableness of the place chosen to litigate by the form
  3. Whether party is a citizen or a remote alien
  4. Dispute should be essentially local (not in a foreign country, unrelated to place)
  5. Negotiations b/t parties in drafting the contract
  6. When was notice given, before or after signing the contract?
3. A person challenging form clauses has a very heavy burden of proof to show the forum is unreasonable.
4. Stewart Organization, Inc. v. Ricoh - SCt held that even if you bring a state law claim in federal court and there is a forum selection clause, the court can consider the clause a “significant factor” in determining if the claim should be transferred to the forum designated.
5. Choice of law clause – Where consumer can bring case where ever they find PJ, but a certain state’s law applies. (Legal)
6. Arbitration clause – Bring whatever you want, but any litigation will be done before a litigator. (Legal)

#### D. GENERAL JURISDICTION

1. A court has general jurisdiction (may be liable for any and all claims) over a Defendant for:
  - a. Individuals – state where a person is domiciled
  - b. Corporations – primary state of business AND state of incorporation.

#### E. MINIMUM CONTACTS

1. A state may exercise jurisdiction over a D if the D has “minimum contacts w/in that state.
2. **International Shoe v. Washington** - Minimum contacts with the forum must be such that traditional notions of fair play and substantial justice are met.  
In considering minimum contacts, look at:
  1. Did the D benefit?
  2. Relationship between contact and claim
  3. Volume of contacts
  4. Systematic and Continuous
  5. Balance of conveniences
  6. Location of witnesses and evidence
3. WWVW gave us this important 2 prong test: 1) Purposeful Availment and 2) Fairness and Reasonableness
4. **Has the D purposefully availed himself of the court’s jurisdiction?**
  - a. *Does he have systematic and continuous activity in the state, or is contact isolated and casual?*
    - i. (As in Int’l. Shoe, where the D had employees operating regularly in the state.
  - b. *Does the cause arise from a contact with the state? (Does D gain the benefit of the state’s services?)*
    - i. Soliciting a contract (as in McGee) with a substantial connection to the state.
    - ii. A retail sale outside the state that happens to end up in-state isn’t necessarily PA, as in WWV.
  - c. *Could the D have reasonably anticipated his activities could give rise to the c/a in the state?*
    - i. Foreseeability is not a criterion b/c of the undue burden it would place on businesses, BUT it isn’t irrelevant, either. “Reasonably anticipate being haled into court” is a happy medium.
    - ii. A magazine publisher is subject to libel anywhere the magazine is sold, since it could reasonably anticipate suits there.
      - a. Hansen thinks this should be read narrowly, focusing on the targeted nature of the publication. Since the article in Calder was about a person in CA, the magazine should foresee being sued in CA. (Where was the story focused? Where will its effects be felt?)
    - iii. Injecting goods into the stream of commerce *may* meet this requirement (e.g., selling or advertising in the forum state; possibly if the D has reason to believe the goods will end up in a specific state.) Asahi
      - a. Brennan says this is enough

- b. O'Connor thinks the activity must be *directed* at the state. (advertise, office there, etc.)
- c. Stevens says consider volume, value, and hazardous character. (I think Hansen likes.)

5. **Would the exercise of jurisdiction comport with *fair play and substantial justice*? Also known as fairness and reasonableness.**

- a. Once a court decides it would be fair and reasonable, it is highly unlikely a higher court will overturn this prong. Only if it shocks the conscience of the higher court will this be overturned.
- b. This is the big balancing test:

Does the D have minimum contacts for the state to have personal jurisdiction over it?

Private Interest

- 1. Look at the balance of conveniences! How inconvenient would it be for D to come to the state, and how inconvenient would it be for P to go to state to sue D?
- 2. Even if it's inconvenient, there is the reciprocity notion that the D benefits from the contact with the state
- 3. What is the nature and extent of the Ds contacts?
  - a. Volume
  - b. Systematic and continuous or a casual, isolated event?
- 4. Could the D reasonably foresee being subject to suit?

State's Interest

- 5. Opening court to its own citizens
- 6. Regulating Ds conduct and how dangerous is it?
- 7. Fair and orderly administration of the law.
  - a. Where are the witnesses and the evidence?

Either Category, and Perhaps the Most Important

- 8. Are the contacts related to the claim?

RULE 4 – PERMITTED METHODS OF PERSONAL SERVICE

- 1. For a corporation, serve an officer or managing agent
- 2. Leave service at place of abode with a person of reasonable ability
- 3. Via mail w/ a request to waive personal service
  - a. Incentive for waiving personal service – D gets 60 days to respond as opposed to 20
- 4. Notice by publication requires you use the method of service that is most reasonable. The court balances efficiency against fairness.
- 5. Rule 4(k)(1)(B): The bulge is for persons who are joined under Rule 14 or Rule 19. This allows state lines to be disregarded as long as persons are within 100 miles of the courthouse. There also has to be personal jurisdiction over the parties you are trying to bring in.

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CHOICE OF LAW – CB, P. 767

State courts are afforded substantial latitude in selecting the law to be applied. 2 further points to be made:

1. After all the analysis, the reality is that courts have a strong tendency to apply their own law.
2. These rules are said to apply only to matters of “substance,” leaving matters of “procedure” to local law in the court in which the case is pending.

Why Might the P want to Bring the Claim in Another State?

1. Choice of Law (Statute of Limitations, most favorable, etc..)
2. Geographical Convenience
3. State Biases (sympathetic juries)

**VENUE, TRANSFER OF VENUE, AND FORUM NON-CONVENIENS**

1. Venue deals w/ insuring that the forum has some logical bearing on either the claims or the parties.
  - a. Note that venue in all cases deals w/ in which federal district to bring suit in, and is thus more narrow than the previous issues which only had which state as its limiting factor.
2. WHAT FACTORS SHOULD YOU CONSIDER IN DETERMINING THE STATE IN WHICH YOU SUE?
  - a. Does it have personal jurisdiction over the D? Normally imply the balancing test.
  - b. Is the court the proper venue for the lawsuit? Which Dist Court? Which State?-**Venue is 28 USC §1391.**
  - c. **Diversity cases:** 28 U.S.C. 1391(a) provides that a diversity case may be brought in:
    1. A judicial district where any Δ resides, if all Δs reside in the same state,
    2. A judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or
    3. A judicial district in which Δs are subject to PJ at the time the action is commenced.
 (fallback)
  - d. **All other cases:** In cases where jurisdiction is *not* founded solely on diversity, 28 U.S.C. 1391(b) says
    1. (same as above)
    2. (same as above)
    3. A judicial district in which any Δ may be found, if there is no district in which the action may otherwise be brought (fallback provision).
  - e. What if the D you are suing is a corporation?
 

§1391 (c) erases the distinction for corps. Anywhere PJ is proper, then venue will be proper.

Now what if P is suing D<sub>SDNY</sub> and D<sub>EDNY</sub> and the mfg is in Japan? Could sue in either SD or ED.

If Ds are from different states, then you can't use part one.

Can use part 2 if you have something significant happening in one of the states, but what if you don't?

Used to be a big gap, now covered by §1391(a)(3).

3. 28 USC §1404 – Transfer of venue only applies to the federal system. It doesn't apply to state courts. Change of venue is proper when it is anywhere it could have been filed in the first place, but *it has to be significantly more convenient for the parties*.
  - A. What is the test under §1404, if the D wants to change venue? It allows transfer under §1404 “In the interest of justice and for the convenience of parties.”

Requirements:

1. It must be done in the interest of convenience and justice.
2. Does the court you are transferring to have personal jurisdiction?
3. PJ involves much discretion with balancing test. The SCt may reverse. **For transfer of venue, it is only if it shocks the conscience of the appellate court.**

Weapons for Defendant:

- Fight PJ
- Ask for no venue.

Piper Aircraft Co. v. Reyno: The federal court is the one who decides the jurisdiction issue. **Even if the venue is changed under §1404, the P gets to keep choice of law of the forum that it chose.**

Venue hypos

Π sues Δ, a resident of the Southern District of NY, for a contract dispute involving an item manufactured in Illinois, designed in New Mexico, w/ parts from Ohio and California.

1. What are the proper venues?
  - a. SDNY: That's where Δ resides. 1391a(1)
  - b. Maybe in Illinois: Significant part of the breach. a(2)
  - c. NM, OH, CA may not be as significant under a(2).
2. What if Π sued under a federal patent law?
  - a. New Mexico may be a district where a substantial part of the events occurred.
3. Add Δ<sup>2</sup> from the Eastern District of New York under the contract claim.
  - a. Π could sue in either district b/c both Δ<sup>1</sup> and Δ<sup>2</sup> are from the same state. 1391a(2)
4. Add Δ<sup>2</sup> from New Jersey.
  - a. Might just have to sue where both Δ's are subject to jurisdiction. 1391a(3)

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FORUM NON CONVENIENS (Judge Made Decisions)

- A. Forum non-conveniens – Even when jurisdiction and venue are proper, courts may decline to exercise jurisdiction on the ground that the location the P selected for the case is grossly inconvenient. Not every state has a forum non-conveniens rule. The trial court is given BROAD discretion, as FNC is not considered a constitutional issue.
  - a. Why might not states want a forum non-conveniens? To hold their state companies to high standards. Thus, a big advantage of going to federal court is the forum non-conveniens rule. Even if the claim is constitutionally sufficient, the court can dismiss the case if it feels that the case is better brought somewhere else.

B. Balancing Test for Forum Non-Conveniensi

1. Where are the witnesses and evidence?
2. How confused is the jury going to get?
3. Prejudice to D.

versus

4. Plaintiff's choice of forum (not given great weight if the P is foreign – why should US taxes pay)

C. Under *Gilbert*, dismissal will ordinarily be appropriate where trial in the P's chosen forum imposes a heavy burden on D or the court, and where the P is unable to offer any specific reasons of convenience supporting his choice. But:

“In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus for example, dismissal would not be appropriate where the alternative forum doesn't permit litigation of the subject matter of the dispute.”

BUT, usually, if the foreign court provides NO remedy, the court won't dismiss, but if they provide ANY remedy, regardless of how small, the court is more likely to dismiss. (Piper v. Reyno)

**CHOOSING FEDERAL OR STATE COURT – SUBJECT MATTER JURISDICTION**

A. SMJ IS THE MOST FAVORED DEFENSE. SMJ can be brought up at any time during the trial, even on appeal, even if neither party brings it up.

1. State courts can hear just about anything, they are courts of general jurisdiction. Federal courts are courts of limited jurisdiction.
2. Burden rests on the P to prove SMJ
3. The SCT has jurisdiction on ANY claim that is appealed to it as the “court of last resort,” regardless of if a federal court could have heard the case at the trial level.
4. Article III, Section 1 of the US Con allows for diversity jurisdiction. Amt in Controversy req - §1332(a)
  - a. It is not constitutionally required that no party on one side can be from a state on the other side. The constitution just requires minimal diversity. The statutes require virtually complete diversity.

B. LEVELS OF ANALYSIS FOR FEDERAL CLAIMS

1. Constitutional – Art. III, Section I.
  - a. Congress can establish federal courts
  - b. Federal judges have life tenure
2. Statutory – What claims does Congress say can be in court?
  - a. Citizens of different states (diversity) §1332
  - b. Federal Questions (after 1875) §1331
3. Judicial – What claims does the judiciary say can be heard in federal court?
  - a. Interpretations of constitutional and statutory rules
  - b. A federal court will not hear domestic relation or probate cases.

## C. DIVERSITY JURISDICTION

1. Two Requirements
  - a. The parties must be from different states, or one party is from the US and one is from another country
  - b. The amount in question must exceed \$75,000
    - The AIQ is determined by the *damages sought in the complaint*, not the actual award. (Mas v. Perry)
    - What if someone sues the D for \$5000, but the D counterclaims for \$75,000? Doesn't matter. The amount in controversy has to be determined from the Plaintiff's complaint.
2. Strawbridge – Created the rule of complete diversity. Prior to Strawbridge, it was okay just to have some diversity, but after Strawbridge, both people on either sides of the D must be from different states.
3. Citizenship is determined by *domicile*, not mere residence. (Mas v. Perry)
4. Domicile Test – Once established, you have domicile in the state forever unless you change it. Requires:
  - a. Presence in the state
  - b. Intent to remain there permanently (very subjective)
5. Corporations are citizens of the state of their principle place of business *as well as* the state in which they are incorporated.
6. It's difficult to bring a diversity action against partnerships. Courts either look at each partner, or at the partners in managing positions.
7. There's no provision for US ex-patriots. If you move to UK, you have no jurisdiction to sue in US courts.
8. EXCEPTION: For class actions, look only at the state citizenship of the main P and the D, the rest of the class doesn't matter for purposes of diversity. In class actions, it must be at least 75k for each member of the class.

### Wrap up on Diversity Jurisdiction – How can you get into Federal Court?

Constitutionally, it is only required that someone on one side of the V be from a different state than someone on the other side of the v. Most will be based on §1332, and most courts have interpreted that to be complete diversity, *everyone on one side of the v must be from a different state as everyone on the other side of the v*. Even though this says the same thing as the constitution, it doesn't mean the same thing. The Constitution just requires minimal diversity. Now, federal judges don't want to hear more cases than they have to. Further, congress imposed an ever-increasing amount in controversy requirement.

### Amount in controversy requirement:

How much play is in that? You cannot add up the claims of the Ps to get the amount in controversy. But, individuals can add up their own claims, and if one individual has more than \$75,000, then that's okay. The amount in controversy is what you put in your complaint, not what you actually get. Beef up w/ IIED, punitive damages, etc.

### Two important points to Remember:

1. General Rule to complete diversity, the exception is for Class Actions.
2. Mas does a good job of illustrating: There is room for manipulating the diversity requirements.

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FEDERAL QUESTION JURISDICTION

1. Generally, a federal claim exists if the P alleges a right or interest that is substantially founded on federal law (be it fed statutes, fed common law, fed constitutional law, or administrative regulations).
2. Jurisdiction is determined from the complaint – a federal defense is inadequate to create federal SMJ
  - a. Louisville & Nashville RR v. Mottley –Must have *well-pleaded complaint* to be in federal court on federal question!!!!
  - b. Even though *P alleged in his complaint that the D based its refusal on a federal statute*, and P attempted to allege information that would defeat the defense of the Ps defense, *this is not sufficient*. The Ps complaint must be based upon the federal laws of the Constitution to confer jurisdiction on the federal courts. Ps cause of action wasn't based on any federal laws or constitutional privileges; it was based on a contract. Even if it's evident that a federal question will be brought up at the trial, Ps cause of action must be based on a federal statute or the Constitution in order to have a federal question which would grant jurisdiction to the federal courts.
  - c. In a Declaratory Judgment case, you look at the hypothetical complaint that P would have filed had they waited until damage was done. Reason is that they didn't think Congress meant to increase the # of cases brought into federal court. Must be brought in state courts in Declaratory judgments.
3. **The federal issue must be necessary and must be in the complaint to be a well-pleaded complaint.**
  - a. If the federal issue is simply tacked on to get into federal court, the court won't hear the issue.
  - b. A court examines the complaint to see if the federal issue *must be present* for the claim to be complete. (\*\*\*\*\*Could the cause of action succeed w/o finding a violation of federal law???)
4. When is there a federal cause of action?
  - a. If federal law creates a private cause of action
    - i. Congress doesn't create a private cause of action for every federal regulation b/c to do so would overflow the courts. (Merrell Dow.) However sometimes, courts will imply a federal c/a even if it doesn't statutorily exist.
    - ii. A state-created c/a that alleges violation of the federal statute as an element of the state-law claims will **never** be construed to arise under the Constitution, laws, or treaties of the U.S.
  - b. If a state law claim includes a federal claim that could be brought under existing federal cause of action
    - i. Note the doctrine of preemption: If a federal law "so occupies" a given field, a federal court should may hear the issue (e.g., labor relation suits)
  - c. If there is a *very important constitutional question at issue*
5. The founding fathers meant to have federal jurisdiction over any case "which has a federal issue." Osborn said any case in which any federal issue may come up, not just brought up. This is constitutional. And, it will constitutionally have SMJ. But, the federal courts choose to limit, so **the federal question must be a central claim in the case to get federal jurisdiction.**
6. WHAT DOES THE WELL-PLEADED COMPLAINT RULE MEAN - WHEN IS A FEDERAL QUESTION WELL-PLEADED IN THE COMPLAINT?
  - A. If you want to be in state court, make the state claim, and sneak in the federal claim later.
    - a. Smith – State c/a that allowed you to prevent corporate officers from engaging in unlawful transactions. The claim was brought under state law. This transaction was

unlawful b/c the corporation was buying bonds that were issued in violation of the US constitution. SCt said that arose under federal law.

b. Moore – State law said you had a state c/a if the employer violates the statutory duty. The statutory duty arose under federal law. But, the SCT said that that cause of action didn't arise under federal law.

c. Bendectin - Suit was filed in OH state court, and MD wanted to remove to federal court. The other foreigners who sued in federal court got thrown out for forum non-conveniens. §1441, says the D has 30 days to ask to transfer to federal court.

Why wasn't it removed for diversity reasons? Look at §1441(b)! **If the D is a citizen of the state in which the action is brought, the D cannot be removed to federal court for diversity reasons.** Why? B/c it removes the local prejudice against out-of-staters.

In order to get into federal court, all you need is a colorable claim under federal law. That is enough to confer SMJ, then the court may decide on the merits. The court may dismiss on the merits by 12(b)(6), and Ps can't re-file.

Plaintiff is the master of his claim. Rule in this case: Hybrid, raises state law claim but has a federal element.

***RULE: When congress decides there is no federal private remedy, there will be no federal jurisdiction.*** If there is federal cause of action, then it's still open. Look at the necessity! Is the federal statute constitutional? When is a federal issue important enough to confer federal jurisdiction? Since there is no private cause of action, then Congress must not have thought it important enough, then no federal jurisdiction.

Brennan's Dissent:

Federal law is a minimum, but the state laws can set higher standards unless federal law preempts state regulation. Statute says there's no federal or state remedies. Would the federal court have SMJ? No! The D brings it up as an affirmative defense. Preemption doesn't create SMJ. Brennan has a good point. Hansen likes that.

The rule is the only bright line they can draw. What if Merrell Dow had said they thought there was a private cause of action? Could the P still have avoided federal jurisdiction? It's still open, it still may not be important enough. This doesn't make sense, but it's easy to apply.

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**SUPPLEMENTAL JURISDICTION (Ancillary and Pendant) §1367**

If a claim has both federal and state issues, the federal claim is substantial, and both claims would ordinarily be expected to be tried in one proceeding, the federal court may hear all of the issues. 1367A.

“If in any case of original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action...that they form part of the same case or controversy. This includes claims that involve joinder or intervention of additional parties.”

Test:

1. Substantial Federal Claim
2. Common nucleus of Operative Fact

anchor claim – claim that gives you a right to be in federal court

How many other claims can you bring that piggyback on that anchor claim?

Focus on if the court has SMJ on claims that don't have any independent basis for federal jurisdiction.

Pendent jurisdiction

P sues the D and has a federal claim. Can the P also join a state law claim? In order to join that claim under Rule 20, Permissive Joinder of Parties, it must arise out of the same transaction or occurrence.

**There is pendent jurisdiction over the state law claim:**

1. **So long as the federal and nonfederal claims arise from a “common nucleus of operative fact,” which has been interpreted as meaning the same thing as the same transaction or occurrence.**
2. **Logical Relationship test**

Constitutionally federal courts can exercise jurisdiction over the state law claim, but the federal courts don’t have to. It’s discretionary. There are **3 factors federal courts consider when determining whether to take a case:**

1. Is it a novel or complex state law issue? If so, they may not want to hear it.
2. Does the state law issue predominate?
3. Have the federal claims been dismissed before trial? The court may still take it if the federal claim gets dismissed after 4 years of discovery in federal court.

Ancillary Jurisdiction:

P	v.	D	→	3PD
Federal Claim				State law claim

There is ancillary jurisdiction from D1 to D2 so long as it arises from a common nucleus of operative fact. What about counter claims? They are okay, too.

There is SMJ as long as state law claims arise out of the common nucleus of operative fact.

**Piggyback claims are allowed so long as they arise from a common nucleus of operative fact and there is an anchor claim.** Problem arises when a P brings an action against the non-original D.

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Three Rings for Getting your claim in under Ancillary Jurisdiction:

1. Joinder
2. Is it efficient and fair to the Plaintiff? Is it fair to the D to have to defend in the forum? Is there PJ?
3. SMJ - Does the court have power over the additional claims you are trying to bring, if you bring suit in fed courts?

Owen Equipment and Erection Co. v. Kroger

**RULE: In an action in which federal jurisdiction is based on diversity of citizenship, the P may not assert a claim against a third party D when there is no independent basis for federal jurisdiction over that claim.**

Under what circumstances may a federal court decide a state-law claim arising b/t citizens of the same state?

1. Federal and nonfederal claims must arise from a “common nucleus of operative fact.”
2. Has Congressional intent negated the exercise of jurisdiction over the nonfederal claim?

The SCT says since she couldn’t start with it, she can’t have it as the end result. Ct. is worried about opening the floodgates to bad faith based cases.

How come you don’t let the P have ancillary jurisdiction?

1. The nonfederal claim in this case was simply not ancillary to the federal one in the same sense that, for example, the impleader by a D of a third-party D always is.
2. A P cannot complain if ancillary jurisdiction doesn’t encompass all of his possible claims in a case such as this, since the P chose the federal rather than the state forum and thus must accept its limitations.

What if Kroger sued in IA and OPPD moved to federal court? She still cannot sue Owen. §1447 (e).

General Rule: Piggyback jurisdiction for anyone other than the Plaintiff. Policy: They don't want Ps to take advantage of getting into federal court. Thus, if diversity citizenship is destroyed, there can be no supplemental jurisdiction.

Piggybacking: If a state law claim meets the test of common nucleus of operative fact, the original state law claim meets the test for supplemental jurisdiction by piggybacking on the second state law claim.

What if P sues D, both are from Nebraska, and she brings a federal claim against the official who fired her, and she also wants to bring a state law cause of action against the county?

It has a common nucleus of operative fact, but the court says they won't allow a piggyback claim by the P, so the state cause of action requires the case to be thrown out. (This has been overturned by 1367.)

Finley case – P sued the US Govt for an air crash (which must be done in federal court), and she also wanted to sue the airline. The court threw out the claim for the airline and said she must bring a separate case in state law. This pushed the line too far. §1367 was drafted by Civ Pro professors.

**§1367** – If Ps want to go to federal court in a diversity case, they must pay the consequences. We want no pendent party jurisdiction in diversity cases.

BUT

The same sort of result came out of federal question cases. They wanted to change that so the Plaintiff wouldn't be “punished” for bringing a federal question claim.

**§1367(d) says if case is dismissed for lack of SMJ, the SOL will be tolled the entire time the case is sitting in federal court, plus 30 days.**

HYPOS:

K, from MN, is arrested by a S, MN officer. K claims excessive force, and brings a federal §1983 claim and a state claim for battery. Does the court have power to hear the case?

The court has power to hear the 1983 claim in federal court, and the state law claim arises from the same “nucleus of operative fact” so there is constitutional power to hear it.

Now, there is supplemental jurisdiction under §1367. If the federal and state claims are part of the same controversy or case, the court has supplemental jurisdiction under §1367A.

If the court lacked jurisdiction over the state claim, it would have to dismiss it, but NOT the federal claim.

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## **STATE V. FEDERAL LAW – THE ERIE ISSUE**

Swift v. Tyson

Federal courts sitting in diversity are not obligated to follow decisional precedent. The REA, found at 28 USC §1652, mandates that federal courts sitting in diversity follow state law. However, Swift says *the decisions of courts are not laws; they are interpretations thereof and can be reexamined, qualified or reversed by courts themselves. While federal courts sitting in diversity must follow state statutes, they must not follow state court decisions.* State law = state statutes and court decisions on local matters.

According to Story, the federal court, rather than applying state law, should look at all common law authorities (all states, federal courts, English courts, respected scholars) and determine the proper rule.

**Erie Railroad Co. v. Tompkins**

**RULE: In diversity cases, federal courts must apply the law that would be applied by the courts of the state in which they sit. Rather than create ‘general common law’ their job is to apply common law.**

OPINION:

1. Swift v. Tyson is overruled. Federal courts no longer have unlimited power to make ‘general law statutes.’
2. **Swift had numerous political and social defects.** The hoped-for uniformity among state courts had not occurred. There was no satisfactory way to distinguish b/t local and general law. Further, Swift introduced

grave discrimination by non-citizens against citizens. Citizens would bring suit in whatever court was more favorable to the, if they could evade the law. Corporations would reincorporate in a different state.

3. Except in matters governed by the Constitution or by acts of Congress, the law to be applied in any case is the law of the state. There is no federal common law. The federal courts have no power derived from the Constitution or by Congress to declare substantive rules of common law applicable in a state.
4. The federal district court was bound to follow the PA case law, which denied recovery to Tompkins.

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GLANNON NOTES:

Q. What if an issue had not reached a state's supreme court, but it is being argued in federal district court?

A. A federal court construing state law should give proper regard to decisions of trial and intermediate appellate courts, but its job is to apply the law as announced, or as it would be announced, by the state's highest court. The judge may look to all available data, including decisions from the state's lower courts, developing trends in the area of law that cast doubt on the earlier decisions and dicta or legislative developments that weaken or reaffirm the existing precedents.

Q. What if there were significant advancements in law and trends in an area leading to a different outcome than the precedent by the state supreme court, and the issue comes up in this area in the federal district court?

A. The federal judge may still predict what the state supreme court would do. He may uphold the precedent, or overrule it and give the reasons for doing so. The irony is that this opens up a narrow opportunity for diversity Ps to choose more favorable substantive law by choosing state or federal court, which is what Erie tried to prevent. Thus, some judges may be apt to uphold the state supreme court decisions to prevent forum shopping among Ps. Others, however, follow the Supreme Court predictive approach.

Real way to understand Erie: Brandeis is upset with the federal government for the new deal and for their worker unfriendly attitude. Thus, this is a way to take power away from the federal courts.

ERIE TEST: Apply state law to issues upon which there is no federal law-making power. But, where an issue is a matter of procedure or practice, and NOT a matter of substantive law, federal practice/law may apply. State law trumps unless it's procedural.

TWIN AIMS OF ERIE: Prevent Forum shopping and inequitable administration of the law.

What is procedural and what is substantive?

- Burden of Proof – S
- SoL – S
- Right to jury trial – P
- Personal service – P
- Choice of law – S

Ask, What is the Conflict???

York: Outcome determinative test. If applying state v. federal law is outcome determinative, it would be substantive. The federal court, in order to assure uniformity, applies the outcome-determinative state law even on procedural issues as to which there is federal constitutional authority to supply a separate rule.

Byrd: Federal courts must honor state law in areas where it has no power to create law.

Balancing test: federal interest v. difference in outcome

Hanna 1: Modified outcome determinative test. The test must be viewed in light of the policies underlying Erie, to prevent forum-shopping and inequitable administration of the law.

Hanna 2: Is it such a big impact that it would change the way people act out of court? (B & Y taxicab, yes; legal size v. regular paper, no.) A Rule though procedural, may be invalid if it impinges on the substantive rights.

RDA: Apply the laws of the state

Swift – state statutes plus state court decisions but only on local matters not on general matters of law.

After Hannah, Issue is whether the rule conflicts w/ a FRCP, federal statute, etc..., we apply federal provision.

### Areas of Fuzziness

1. Biggest problem is when state law conflicts with a federal judicial practice. Then we go to the twin aims of Erie – how significant is the difference b/t the state rule and the federal practice.
2. Whether or not there is actually a conflict b/t the state and federal rules.
3. If you have a FRCP under the rules enabling act, the FRCP cannot abridge any right.

## DISCOVERY

### 1. Goals of Discovery

- a. Getting the information out so you can have a fair trial.
- b. Promotes settlement.
- c. Prepare for SJ BUT
- d. Discovery is very expensive, and FRCP say everyone is entitled to “a fair, speedy, and inexpensive trial”
- e. Discovery may be used to frustrate the other side and abuse it by asking thousands of questions
- f. 1993 Amendments allow for sanctions and also require the Mandatory Disclosure

### 2. FRCP 26(b) - gives the scope of discovery as set out under FRCP

#### Scope:

1. Relevant – Tends to prove or disprove something the law requires (Is it legally relevant?)
2. Not Privileged
  - a. attorney-client privilege
  - b. attorney’s work-product privilege – prepared for litigation itself
  - c. doctor-patient privilege
  - d. Fifth Amendment against self-incrimination
  - e. Government secrets
3. GENERALLY, A party is entitled to seek such information if it is likely to lead to the discovery of admissible evidence, not privileged, and not unduly burdensome.
  - a. EX: How much money is in the bank account? Not legally relevant and discoverable, unless you are suing for punitive (punishment) damages. Exception 26(a)(1)(d) – Insurance policies must be disclosed. It’s an exception b/c it’s relevant for settlement.
  - b. Someone brings a civil rights case against a law firm. Is information regarding how many female partners discoverable? Maybe, b/c a pattern could show an inference. Most judges would allow this. Further, you can ask for discoverable information that may lead to admissible evidence.
  - c. If you sue someone for a defective machine and get it subsequently repaired, that repair is not admissible evidence but it is discoverable.
4. Tends to be very broad b/c we want to have a fair adjudication on the merits.

### 3. Devices

1. Interrogatories \*\*\* (produce the most information, can only be requested from a party to the suit)
2. Deposition \*\*\* (produce the most information, expensive, most preferred)
3. Requests for the production of documents – 2<sup>nd</sup> most important
4. Request for Admission- it works like a complaint.
5. Physical examination of physical evidence and *documents* (A favorite)
6. Physical and Mental Examinations

### 4. Disclosures Required

#### Mandatory Initial disclosure:

- a. Name + address of every possible witness w/knowledge of specific facts that may be pleaded w/particularity.
- b. Copies or descriptions of relevant documents.
- c. Computation of damages and the basis of that computation.

d. Copies of any insurance agreements under which an insurer may be liable.

Disclosure of Expert Testimony

Qualifications, opinions to be expressed, and the basis for those opinions.

Pretrial Disclosures

At least 30 days before a trial a party must disclose witnesses expected to be called or who will be called if the need arises.

Rule 37 Motion to Compel Disclosure – Permits sanctions against an offending party

## SUMMARY JUDGMENT

### 1. DEFINITION

- A. SJ is different from 12(b)(6). 12B6 says that even if everything is true, P still doesn't have a case. But, SJ focuses on the evidence. SJ is granted **when there is no genuine issue of material fact** and the **movant is entitled to judgment as a matter of law when viewed in light most favorable to non-moving party**.
- B. If you are at trial, and you are the D, and the P shows no evidence, Move for Directed Verdict. When someone moves for SJ, it's like someone moving for a directed verdict at trial. If at trial, the P presents a case, she must meet the burden of production, then P shows enough evidence that a reasonable jury MUST find for the party w/ the burden. Then the burden of production would shift to the D. If D doesn't meet his burden of production, then P can move for a directed verdict.
- C. Problem w/ summary judgment: Neither party has put on their case. Rule 56 says you can move for summary judgement any time 20 days after if you show there's no genuine issue of material fact. If movant has (P) or does not have (D) burden of production at trial, you use affidavits, letters, what you found during discovery to shift the burden to the other party.
- D. Can be brought:
  - a. By the D at any time
  - b. By P any time after 20 days from start of the action or any time after the opposing party files for SJ.
  - c. 56(f) says the judge can allow time for more discovery.

### 2. HOW CLEARLY DOES THE MOVING PARTY HAVE TO PROVE THE LACK OF AN ISSUE?

- A. In Arnstein v. Porter, 1946, *SJ was said to be inappropriate whenever there was the "slightest doubt" about the outcome at the trial.* This has since changed.
- B. Under the Adickes standard (1970), the moving party had to foreclose the possibility that the other party could win.
- C. Celotex changed the standard in 1986, making it easier to get SJ. The SCT held that "SJ should be an integral part of the Federal Rules." The Celotex standard says that the moving party must simply point out the absence of evidence supporting the non-moving party's claim. If the moving party shifts the burden to the other party, then the non-moving party must come up with sufficient evidence or SJ may be granted. No foreclosure is needed – the burdens reflect those at trial. Some people argue this has made it too easy.
  - i. In Celotex, the court felt that inadmissible documents from the decedent, his former employer, and his insurance company did NOT show a triable issue as to wrongful death from asbestos.
- D. Two Important SJ Issues:
  - 1. What must the D do to force the P to show its evidence?
    - a. Move for SJ and point out the weaknesses in the Ps case.
  - 2. Assuming the D did what he's required, what standard will he have to meet?
    - a. Go through the history, now it is the Celotex standard!

### 3. STRATEGIC IMPLICATIONS OF SJ

- A. Forces the non-moving party to do a dress rehearsal for trial on paper.
  - i. This forces the nonmoving party to either step up discovery or drop the case.
  - ii. It may or may not increase costs of litigation. While it forces more costs into a shorter time span, the discovery costs would probably happen anyway in the course of litigation.
- B. Gives the moving party a sneak preview of at least some elements of the nonmoving party's case.