CIVIL PROCEDURE
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GRADE: A

RULE 3: A civil action is commenced by filing a complaint with the court.

SUBJECT MATTER JURISDICTION

- Rule 12(b)(1) and (h)(3): if the court determines at any time that *it lacks subject matter jurisdiction*, the court *must dismiss* the action
  - *Capron:* subject matter jurisdiction can NEVER be waived
  - ***Lacks*: state courts are courts of general jurisdiction**
- **IS A STATUTE IS JURISDICTIONAL OR SUBSTANTIVE?**
  - Clear-statement approach: if statute contains the word "jurisdiction" then it's jurisdictional, *Arbaugh*
  - Statute of limitations is jurisdictional because the word "jurisdiction" is in the statute, *Sand*
  - Context-relief approach: if statutory provision entitles plaintiff to relief, then it's probably substantive, not jurisdictional, *Morrison*
- **CONCURRENT JURISDICTION**
  - *Hughes*: state court cannot close doors to a cause of action arising under laws of another state per Full Faith and Credit
    - But states can apply their own procedural laws (*Wells*)
  - *Howlett*: per the Supremacy Clause, a state cannot refuse to hear a claim arising under federal law when that defense would not bar an analogous state law claim
  - *Haywood*: per the Supremacy Clause, a state cannot invoke a non-neutral jurisdictional rule to decline to hear a federal claim if there is an analogous state law claim

- ## DIVERSITY OF CITIZENSHIP JURISDICTION (§ 1332)
  - ***Strawbridge*: rule of complete diversity**
    - 3 Statutory Exceptions to *Strawbridge* that only require minimal diversity
      - § 1332(d) – Class Action Fairness Act
      - § 1335 – Interpleader
      - § 1369 – Multiparty, Multiform Jurisdiction (mass accident statute)
        - Need at least 75 deaths
  - **Citizenship of Persons (§ 1332 (a)(1)):** must be BOTH US citizens and domiciliaries of a state
    - ***MAS V. PERRY***: for diversity jurisdiction, citizenship means US citizen and domiciliary of a state
      - **Domicile is one's "true home" and persists until one 1) moves to another place, with 2) intention to remain there**
        - *Zuckerberg*: going to college does not change domicile
        - "Center of gravity" test: documents, taxes, etc.
  - **Alienage Jurisdiction (§ 1332(a)(2-4))**
    - *Traffic Stream:* citizenship is determined using US law, not foreign law
    - *Sadat*: in cases of dual citizenship, only US citizenship is considered, and thus alienage jurisdiction cannot be invoked
      - If no state domicile (but US citizenship), no diversity jurisdiction
    - *Rubinstein*: stateless person cannot invoke alienage jurisdiction
    - *Hiulin*: cannot have alien v. alien unless US citizens with complete diversity on both sides
      - CA + UK v. NV + France = okay
      - CA v. NV + UK = okay
      - CA + UK v. France = not okay
      - CA v. France = okay
      - UK v. France = not okay, even if either or both are domiciled in a US state
        - But a foreign citizen, domiciled in a state, cannot sue or be sued in federal court by a US citizen domiciled in that same state (don't want two people living in the same state suing each other in federal court)
  - **Manufacturing Federal Jurisdiction (§ 1359)**
    - *Kramer* and *Grassi*: cannot use assignment to create or destroy diversity to gain federal jurisdiction
    - *Rose*: cannot tack on nominal non-diverse parties to destroy diversity jurisdiction

- **Citizenship of Corporations (§ 1332 (c)(1))**: place of incorporation & principal place of business
  - To determine principal place of business: "**<u>NERVE CENTER" test (*Hertz*)</u>**
  - Federally chartered banks are citizens where MAIN office is located (*Wachovia*) and maybe principal place of business as well (circuit split)
- **Citizenship of Unincorporated Associations:** <u>sum total of the citizenship of all the associations' members</u>
  - *Hoagland*: drew a bright line rule between corporations and unincorporated associations
  - § 1332 (d)(10) – treated differently under CAFA
- **Citizenship in Representative Actions (§ 1332(c)(2))**
  - Citizenship of the representative of a decedent, infant, or an incompetent is the same as that of the represented (excludes derivative suits and class actions)
  - Historic rule that tested citizenship in terms of the <u>representative</u>, not the represented, still applies to derivative suits and class actions not governed by CAFA
- **Amount in Controversy (§ 1332(a)):** must ***<u>exceed</u>*** $75,000 (*Freeland*)
  - *St. Paul Mercury:* party invoking diversity jurisdiction bears burden of showing amount in controversy
    - Plaintiff's sum controls if claim is made in good faith unless it is **<u>a legal certainty that the claim is really for less</u>** than the requisite amount
- **Joinder of Parties and Claims: Rules of Aggregation**
  - *Everett*: Plaintiff an aggregate multiple claims against single defendant, even when not arising from same incident at all (Rule 18)
  - ***TROY BANK***, *Eagle Star*, *Durant*: multiple plaintiffs v. defendant
    - Can only aggregate claims if the claim is common and **<u>indivisible</u>**, seeking to enforce a single title or right such that if one plaintiff failed to collect, the other would collect a larger share (i.e. estates)
- **Judicial exceptions to diversity of citizenship: domestic relations and probates* (italic)

• FEDERAL QUESTION JURISDICTION (§ 1331)

- ***<u>*Requires the interpretation of federal law or at least the implication of federal policy.</u>***
- *Osborn*: "Federal ingredient" test
- ***MOTTLEY*: *federal question must arise from the plaintiff's original cause of action***
  - Cannot manufacture federal question jurisdiction by pleading an anticipated defense that raises a federal question ("artful pleading")
- *Eliscu*: A contract dispute regarding who owns a copyright only raises state questions about contract law and thus does not implicate the interpretation of § 1338's patent provisions
- **<u>HOW TO OBTAIN FEDERAL "ARISING UNDER" JURISDICTION</u>**
  - **1. "CREATION" TEST**
    - ***American Well-Works*: "Creation test," suit arises under the law that creates the cause of action**
      - Vast majority of federal question jurisdiction arises under this test
        - *Exception – *Shoshone*
    - Not all causes of action created by federal law necessarily confer federal question jurisdiction
  - **2. STATE/FEDERAL LAW "HYBRIDS"**
    - ***SMITH V. KANSAS CITY***: **<u>implication of an important federal policy</u> can confer federal jurisdiction even in a purely created state-law cause of action**
      - MO declaring federal bonds *ultra vires* questions the constitutionality of congressional act to issue bonds (i.e. VERY important) and would destabilize bonds, raise national interest rates
    - ***MOORE***: a state cause of action that **incorporates a federal statute does not necessarily confer federal question jurisdiction** if no important federal policy is implicated
      - KY interpreting Federal Safety Appliance Act to see if there was a violation of safety standards would not have any impact outside of KY, no federal policy implicated
    - ***MERRELL DOW***: state tort claim implicating federal labeling statute did not confer federal question jurisdiction because the **federal interest at stake was not substantial enough**
      - Implication that no private right of action means no federal question jurisdiction
    - ***GRABLE*:** <u>state law must raise a **FEDERAL** issue, disputed and **SUBSTANTIAL**, and exercising federal jurisdiction would not upset **BALANCE OF FEDERALISM**</u> **(IMPORTANCE TEST)**
      - *A federal right of action is NOT always required in order to have federal question jurisdiction* (*Merrell Dow* did not overrule *Smith*)
        - Sole issue in this case was the interpretation of a federal tax statute (in-hand or mail service?) with potentially wide-reaching administrative effects and it would not upset federalism due its rarity (quiet title action)
    - ***EMPIRE***: cf. *Grable* because this case was very fact-driven, not law-driven

        - Court read <u>negative inference into Congress' silence on cause of action</u>, since the act in question conferred jurisdiction on other parts of the statute
            - Federal interest is just not substantial enough, unlike *Grable*
    - ***GUNN***: substantiality inquiry under *Grable* must look to **the importance of the issue to the federal system as a whole** not just to the parties litigating the case
        - A legal malpractice claim that requires extensive interpretation of the exclusively federal patent statute (§ 1338) but does not affect federal patent law one iota
    - *Mims*: a federal statute conferring jurisdiction on states does not oust federal jurisdiction
        - Federal and state have concurrent jurisdiction

- # SUPPLEMENTAL JURISDICTION (§ 1367)
    - ***GIBBS*:** federal courts **MAY** exercise supplemental jurisdiction over a substantial jurisdictionally sufficient claim and a jurisdictionally insufficient claim if:
        - 1. Both claims must **<u>"arise from a common nucleus of operative fact"</u>**
        - 2. Must be such that **he would expect to try them all in one judicial proceeding**
            - These two elements make it such that the entire action before the court comprises one constitutional "case" (tying back to Art. III, § 2)
        - **Aldinger* and *Finley* both refused to extend *Gibbs*'s approach of pendent-claim jurisdiction to pendent-party jurisdiction (EXPLICITLY overruled in § 1367)
    - **(a) In any civil action where court has ORIGINAL JURISDICTION, it shall also have supplemental jurisdiction <u>over all other claims from the same "case or controversy" (CNoOF)</u>**
        - Includes pendent party AND pendent claim
    - **(b) In <u>diversity actions ONLY,</u> supplemental jurisdiction shall NOT extend to the following categories if it would destroy violate § 1332** (destroy complete diversity, but not amount-in-controversy)
        - **Claims by plaintiffs against persons made parties [defendants] under Rule 14, 19, 20, 24**
            - ***KROGER***: codified in § 1367(b)
                - Plaintiff cannot bring a Rule 14(a) claim against a non-diverse third-party
                    - UNLESS third-party fires first with a 13(a) claim, then plaintiff can fire back with another 13(a) claim
            - ***ALLAPATTAH***: if <u>one plaintiff meets the amount in controversy</u>, then additional plaintiffs' claims arising from the same nucleus of operative fact, even if below the requisite amount, can be permissively joined under Rule 20 and the court can exercise supplemental jurisdiction over them per § 1367 (b)
                - Since Rule 20 as applied to plaintiffs is not excluded in (b)
        - **Claims by persons proposed <u>to be joined as plaintiffs</u> under Rule 19**
        - **Claims by persons seeking <u>to intervene as plaintiffs</u> under Rule 24**
    - **(c) Reasons to <u>decline to exercise supplemental jurisdiction</u>** (originally stated in *Gibbs*)
        - Claim raises <u>novel or complex</u> issue of state law
        - Supplemental claim <u>substantially predominates</u> over jurisdictionally sufficient claim
        - All jurisdictionally sufficient claims have been <u>dismissed</u>
        - <u>Exceptional</u> circumstances
            - *Executive Software*: § 1367(c)'s discretionary reasons for when a federal court can decline to exercise supplemental jurisdiction in either federal question or diversity cases
                - Catchall of "exceptional circumstances" should be construed relatively narrowly

- # REMOVAL JURISDICITON (§ 1441, § 1446)
    - **(a) <u>Only defendant(s) can remove</u>** in both federal question and diversity cases <u>if the federal court has original jurisdiction over the civil action</u>
        - *Shamrock*: plaintiff cannot remove, defendant cannot remove based on a federal affirmative defense or a federal counterclaim (per *Mottley*)
        - *Bright*: plaintiff cannot block removal by hiding federal nature of claim ("artful pleading")
        - ***ALL defendants against whom the same claim is asserted under § 1441(a) must consent to removal (*Davis*, § 1446(2)(A))**
        - ***ALL defendants in a diversity case need to consent to removal (§ 1446(2)(A))**
        - **<u>*Consent of all defendants in same case or controversy (within supplemental jurisdiction) is needed for removal</u>**
    - **(b) (2) Only out-of-state defendants can remove**, but cannot remove if there are any in-state defendants involved
        - *Lively*: circuit split on whether plaintiff can waive the "any in-state defendant blocks removal" rule, unclear if it's a jurisdictional or procedural bar

- **(c)** Remove entire civil action (federal and state/nonremoveable claims) to federal court and then federal court **SEVERS** state/nonremoveable claims (claims not within original or supplemental jurisdiction of federal court) and sends them back to state court
  - Severance is only permitted in federal question cases (NOT diversity)
- **(f)** Federal court not precluded from adjudicating case if the state court did not have original jurisdiction over the case
- ***FRAUDULENT JOINDER: plaintiff cannot block removal by joining nondiverse parties against whom he has no real cause of action (*Rose*)**

- **PROCEDURE FOR REMOVAL OF CIVIL ACTIONS (§ 1446)**
  - **§ 1446 (b)** Defendant has 30 days after receiving service to file notice of removal
  - **§ 1446 (c) (2)** Plaintiff's amount controls unless
    - 1) Plaintiff is seeking nonmonetary damages (injunctive relief) or
    - 2) Money damages (but state practice forbids alleging a specific sum or permits recovery for more than amount alleged)
      - Then the notice of removal filed by defendant may assert the amount in controversy
    - **(B)** – District court must ascertain by a preponderance of the evidence that the amount stated by defendant is more than $75,000 (try to value injunctive relief)

- **Permissible Actions Despite Lacking Subject Matter Jurisdiction**
  - Court can turn directly to personal jurisdiction inquiry for **easy dismissal** when establishing subject matter jurisdiction would be arduous (*Rhurgas*)
  - Court lacking subject-matter jurisdiction can issue **sanctions**, as long as they are collateral to the merits (*Willy*)
- **Jurisdictional "Cures"**
  - Change of parties to the action mid-filing and judgment on merits is okay (*Caterpillar*)
  - Post-filing changes to an existing party's citizenship are not okay (*Grupo*)
- **Challenging Subject Matter Jurisdiction of the Court**
  - Remands based on a lack of subject matter jurisdiction are immune from review
  - Can attack subject matter jurisdiction in trial as a **direct attack** and on **appeal**
  - **Collateral attack** is rarely allowed, unless state court heard an EXCLUSIVELY federal issue (i.e made a huge mistake)

PERSONAL JURISDICTION

- **TRADITIONAL BASES OF JURISDICTION**
  - Physical presence or any other basis cannot be obtained by fraud or deceit (*Tickle, Wyman*)
  - **Touching/Tagging Jurisdiction**
    - *PENNOYER*: absolute principle of state territoriality – a state is all powerful within its borders
    - *BURNHAM*: affirms *Pennoyer*'s principle of touching/tagging jurisdiction within state's borders
      - Does not apply to corporations
  - **Domiciliary Jurisdiction**
    - Domicile: one's "true home"; persists until one takes up residence in a different place with the intention to remain there (*Mas v. Perry*)
      - *Blackmer*: US citizen living abroad can be haled back to federal court
        - Domicile is a traditional basis of jurisdiction
      - *MILLIKEN:* extended *Blackmer* principle to state domicile
        - State has authority over its domiciliaries even if they are not physically present within the state
  - **Waiver**
    - Rule 12(h)(1): a party waives any defense to lack of personal jurisdiction (Rule 12(b)(2)) if it does not challenge it in the responsive pleading
    - Appearing before a state court beyond a special appearance often (depending on the state procedural rule in question) leads to a waiver of personal jurisdiction
    - Noncompliance/obstructing the court leads to waiver of personal jurisdiction (*Guinee*)
  - **Implied Consent**
    - *Subsumes agency jurisdiction
    - *HESS*: involved a MA statute stating that a nonresident that enters and utilizes MA roads is implicitly consenting to personal jurisdiction for suits arising from his motor-related activities
      - "Doing business" in state as form of implied consent
  - **Express Consent**

        - *Subsumes agency jurisdiction
        - **Registration in State**
            - *Ratliff*: consent by registration in state is not sufficient to confer jurisdiction (circuit split though)
        - **Contract**
            - *Bremen*: forum-selection clause will be honored, two parties do not need a tie to the forum (London)
            - *Carnival Cruise*: honor forum-selection clause between a sophisticated and a non-sophisticated party

- **SPECIFIC JURSIDICTION**
    - ***<u>Continuous and systematic/isolated and sporadic contacts with the forum state with the cause of action arising from those contacts</u>***
    - Does **the state-long arm statute** apply? – Rule 4(k)(1)(A)
        - <u>Does the long-arm apply?</u>
            - NY's long arm statute confers personal jurisdiction over any non-domiciliary who:
                - 1) Transacts any business within the state
                - 2) Commits a tortious act within the state <u>(except for defamation)</u>
                - 3) Commits a tortious act without the state causing injury to person or property within the state if he
                    - (i) Regularly does business or derives revenue for goods consumed within state
                    - (ii) Should expect act to have consequences in state and derives revenue from commerce
                - 4) Owns, uses, or possesses any real property situated within the state
        - 2. <u>Is the long-arm constitutional?</u>
            - If the state's long-arm statute extends to the constitutional limits, then this two-part inquiry is consolidated into one determination of the long-arm's constitutionality (CA)
    - **MINIMUM CONTACTS**
        - ***INTERNATIONAL SHOE:*** **minimum contacts equaling fair play and substantial justice** such that the defendant would reasonably expect to be haled before the forum
            - ***<u>Three ways to get minimum contacts: purposeful availment, stream of commerce, Calder Effects</u>***
        - PURPOSEFUL AVAILMENT
            - ***MCGEE***: **one contact with "substantial connection"** to forum state can establish minimum contacts
                - Mailings from TX to CA, payments, money trail between states, business contact
                    - CA insurance statute strongly indicates that CA had an interest in adjudicating the claim which goes to fair play and substantial justice
            - ***HANSON***: defendant must have **<u>purposefully availed itself of the benefits and protections of the forum state's laws to have minimum contacts</u>**
                - Differentiate from *McGee* – Mrs. Donner's unilateral affirmative act of moving to FL vs. Insurance Co.'s affirmative act acquired the sole CA policy, no direct money flow from FL to DE vs. direct money flow between CA and TX, CA statute v. no FL statute
                    - Policy reason that Court does not want to destabilize relationships
                - <u>Minimum contacts must be analyzed before fair play and substantial justice</u>
            - ***KULKO***: father did not purposefully avail himself of CA laws by sending daughter to live there
                - Did send child support checks there, but that was court-mandated (not voluntary)
                - Policy reasons of not wanting to discourage divorced parents from moving for fear of jurisdiction
            - ***BURGER KING***: choice-of-law clause is suggestive toward the establishment of minimum contacts via purposeful availment but certainly not dispositive
                - But when combined with long-term employment relationship, constant communication with FL, and deliberate affiliation with FL corporation, **contact is not "random or fortuitous"**
                - **"**Great burden" to be tried in MI argument rejected by court
        - **CALDER EFFECTS: 1) committing an intentional act, 2) expressly aimed at forum state, 3) causing harm, the brunt of which is suffered in forum state**
        - **STREAM OF COMMERCE**
            - ***GRAY***: first stream-of-commerce case, "ultimate" use argument established minimum contacts
            - ***VOLKSWAGEN***: Mere foreseeability is not enough to establish minimum contacts
                - Rejects Brennan's argument that it is foreseeable that a car would move to OK
                - ***A party's <u>unilateral act</u> of creating a contact with the forum state does not establish minimum contacts***

            - **Five factor reasonable test** that determines fair play and substantial justice
                - Burden on the defendant (if foreign)
                - Plaintiffs' interest in obtaining convenient and effective relief
                - Forum state's interest in adjudicating dispute (statute? Parties live there?)
                - Shared state interests in furthering substantive social policies
                - Interstate judicial system's interest in obtaining the most efficient resolution
        - ***KEETON***: sales of thousands of Hustler magazines per month establishes minimum contacts in Ohio
            - Plaintiff does not need minimum contacts with forum state
        - ***ASAHI***: O'Connor's **stream-of-commerce-plus** *some other action directed at forum state* that indicates purposeful availment
            - Brennan's **stream-of-commerce** that regular and anticipated flow of products into the forum state is enough to establish minimum contacts if foreseeable the product would be marketed in the forum state
                - Court was unanimous in saying no fair play and substantial justice – forum state had no interest in the suit, foreign relations dynamic
        - ***NICASTRO***: **defendant's action must manifest an intention to submit to the power of a sovereign**
            - ***Personal jurisdiction requires a forum-by-forum analysis – rejects national forum***
                - Ginsburg's dissent urges a national forum analysis, rejects distributors
            - This contact was **attenuated** (only one to four machines), not large volumes
    - ***ZIPPO***: "sliding scale" of passive to active **websites** determines whether it subjects defendant to personal jurisdiction within the forum state

- ## GENERAL JURISDICTION
    - ***Continuous and systematic contacts with the forum state where the cause of action does NOT arise from those contacts***
    - *Do not need state long-arm to apply to assert general jurisdiction
    - ***GOODYEAR***: must be **"at home"**
        - Individuals: paradigm forum is "domicile," but could be something less than that (6 month residency per year)
        - Corporations: equivalent of "at home"
            - Domicile, place of incorporation, principal place of business
            - Stream of commerce activities of distributor do not satisfy requirements for general jurisdiction
    - ***PERKINS***: Philippine company, including executive business offices, relocated and operated from OH (only upheld)
    - ***HELICOPTEROS***: Colombian co. purchased helicopters, negotiated visits, checks, trained pilots in TX
        - *Purchases, even if substantial, are not enough to establish general jurisdiction*

- ## QUASI IN REM JURISDICTION
    - **Only used when state long-arm statute does not extend to constitutional limit (i.e. NY – defamation)**
    - Need property present in state AND minimum contacts analysis (*Shaffer*)
    - Cause of action does NOT need to arise out of the property
        - Recovery is limited to the value of the property in question
    - *Pennington* and *Harris v. Balk*: conceptualize the property in the state (debt), then via *Pennoyer*'s doctrine of territoriality, there is *quasi in rem* jurisdiction
    - ***SHAFFER***: mortally crippled *quasi in rem* jurisdiction
        - ***Shoe*'s minimum contacts analysis applies to *quasi in rem* jurisdiction**

- ## HOW TO CHALLENGE PERSONAL JURISDICTION
    - Make a special appearance
    - Make a limited appearance to contest attachment of property in a *quasi in rem* proceeding
    - Do not appear and then collaterally attack default judgment (*Pennoyer*)
        - *Baldwin*: cannot appear specially, lose, and then collaterally attack

- **RULE 4(k): Special Service Rule**
    - (1)(A): federal court "piggybacks" on long-arm statute of state in which it sits
    - (1)(B): "bulge provision" allows for parties joined under Rules 14, 19 to be served w/in 100 mi. from federal district courthouse
    - (2): Limited federal-long arm statute for claim arising under federal law when defendant is not subject to jurisdiction in any state courts and it is constitutional to exercise such jurisdiction

NOTICE & OPPORTUNITY TO BE HEARD

- Notice and opportunity to be heard involve constitutional issues of due process

- Cannot be obtained by fraud (Wyman)
- Rule 6(c): notice must be served at least 14 days before the time set for the hearing (Roller)
- ***MULLANE*: <u>Notice must be reasonably calculated under the circumstances to give actual notice</u>**
    - Applies equally to *in personam, in rem, quasi in rem* actions
    - Categories of people and their respective notice
        - 1. Known present interested parties of a known place of residence
            - Notice must be supplied by regular mail
        - 2. Interested parties whose interests and whereabouts cannot with due diligence be ascertained
            - Statutory/constructive notice is adequate
        - 3. Interested parties whose interests are either conjectural or future
            - Statutory/constructive notice is adequate if ordinary diligence fails to ascertain their location
- *Greene v. Lindsey*: constructive notice (i.e. posting on property) is never adequate to effect notice when actual notice can easily be effected (i.e. plaintiff knows interested party's address)
- *Mennonite Board of Missions*: constructive notice (i.e. posting on property) is not adequate to effect notice if defendant knows about impending proceedings when actual notice can easily be effected (i.e. plaintiff knows interested party's address)
- *Dusenberry*: successful certified mail is sufficient even if defendant did not receive actual notice
    - "Heroic efforts" are not required by the Due Process Clause
- *Jones v. Flowers*: returned and unclaimed certified mail requires additional, reasonable steps if practicable to effect actual notice (i.e. send by regular mail)
    - See *Pagonis*: certified mail for tax notices may be enough
- *Covey*: notice by mail if not reasonably calculated to provide actual notice (i.e. to a person known by the plaintiff to be in a hospital) does not satisfy due process
- **RULE 4: SUMMONS**
    - 4(c): anyone who is over 18 and not a party may serve a summons and complaint
    - 4(d): Waiving Service
        - If not waived, then service of process is effected
            - 4(e)(1): <u>following state law</u> (i.e. if state allows service by mail)
            - 4(e)(2)(A): via personal service
            - 4(e)(2)(B): by leaving a copy with someone of suitable age at the abode
            - 4(e)(2)(C): on an agent
    - 4(f): Serving an Individual in a Foreign Country
    - 4(h): Serving a Corporation, Partnership, or Association
        - *Szukhent*: <u>service via agency</u> is allowed, even if not personally known or selected by defendant, and the contract need not state that the agent will forward notice to defendants
            - Case of service of process via agency ought to be determined by federal (not state) standards
        - *Hellenic Challenger*: person does not have to be expressly authorized by corporation to receive process
        - *Fashion Page*: corporation can designate a person not normally considered adequate to receive process as agent
        - *Rio Properties* & *PCCCARE247*: service via email and Facebook allowed in some circumstances
- **IMMUNITY**
    - Applies to diplomats, Congressmen in districts, other higher purposes
        - Largely archaic now – been curtailed by development of long-arm statutes
    - ***DUFFIELD***: can be served with process (even if prevented from leaving the state – i.e. in prison) if party originally enters state voluntarily for non-judicial reasons
        - **Immune from civil service of process when entering state to serve in a criminal or civil action**
        - Ensures interests of judicial system by not discouraging people from entering state to serve as witnesses, attorneys, defendants, etc.
    - ***WYMAN***: service of process (and thus personal jurisdiction) cannot be obtained by fraud
- **SEIZURE OF PROPERTY**
    - *Involves the constitutionality of provisional remedies
    - ***SNIADACH***: pre-action wage garnishment without an opportunity to be heard violates due process
        - **<u>Deprivation of property without affording notice and opportunity to be heard is only permissible in extraordinary circumstances</u>**
            - To secure an important governmental/<u>public interest</u>, a special need for <u>prompt action</u>, person initiating the seizure is a <u>govt. official</u> (arguably a judge) (*Fuentes*)
        - <u>Judge</u> must be decision-maker
        - Whether party seeking relief has <u>pre-existing interest</u> in property to be seized
        - Whether seizure is effected before notice and hearing, availability of <u>immediate post-seizure hearing</u>

    - Whether seizure is to establish jurisdiction (quasi in rem) or for security purposes (exceptional circumstances?)
    - Whether person seeking seizure can show probable cause or some lesser burden (can't be conclusory, *Di-Chem*)
  - ***FUENTES***: replevin of consumer goods without a pre-seizure hearing violates due process clause
    - Cannot effect a waiver of due process rights via contract
  - ***MITCHELL***: risk of wrongful taking low due to judicial authorization and immediate availability of a post-seizure hearing
  - ***GOLDBERG:*** extends logic of Sniadach to require a hearing before termination of public assistance
  - ***MATTHEWS:*** test for when government itself seeks to effect a deprivation of property
    - Private interest affected by taking property, risk of an erroneous deprivation, government's interest
  - ***DOEHR:*** Rendered *Matthews* test applicable to private seizure
    - Private interest affected (person losing property), risk of an erroneous deprivation, private interest affected (person taking property)
  - ***BENNIS***: owner's interest in property may be forfeited by the specific use of property even if the owner did not know of that specific use

VENUE, TRANSFER, AND FORUM NON CONVENIENS

- Does not raise any constitutional issues: for convenience of parties/witnesses, interest of justice, does NOT affect SMJx
- Rule 12(h)(1): a party waives any venue defense (Rule 12(b)(3)) if it does not challenge it in the responsive pleading

ASCERTAINING THE VENUE RULE

  - *Reasor-Hill*: **local action doctrine** confined disputes over land to location of land itself due to uniqueness of property and legal inconsistencies of property law (*Livingston v. Jefferson)*
    - Reasons at the time of *Livingston* do not apply (greater mobility, ease of fleeing state, regionalism of laws)
    - Would result in no remedy for the plaintiff (pre-long arm statute days)
    - Majority of states still use local action doctrine (vestige of state territoriality)
  - **§ 1391: VENUE**
    - (a)(1): Venue applies to BOTH diversity and federal question cases
    - (a)(2): **Local action doctrine** does not apply in federal courts
    - (b) Where to bring a civil action
      - (1) Where **defendant resides**, if all defendants are residents of that state
      - (2) Where **substantial part of events** took place (*Bates*) or substantial party of property that is subject of action is there
      - (3) If neither (1) nor (2), file anywhere with **personal jurisdiction** over defendant
    - (c) **Residency for venue purposes**
      - (1) A person is a resident where he is domiciled
      - (2) A corporation/unincorporated association as defendant is resident where court can obtain personal jurisdiction over it, and as plaintiff, in its principal place of business
      - (3) Aliens and US citizens living abroad can be sued anywhere

TRANSFER OF VENUE

  - *Hoffman*: cannot transfer venue to transferee court if transferee court could not have taken the case originally
    - **IF TRANSFEREE COURT LACKED PERSONAL JURISDICTION!**
  - **§ 1404: Change of Venue**
    - Court can transfer case to any court **where it could have been brought** originally OR to a court to which **all parties have consented** (affects *Hoffman*)
      - Many factors – access to witnesses, access to forum, docket congestion, speed to trial, relationship of community to dispute, court's familiarity with governing law, plaintiff's forum choice, if original venue is where plaintiff lives, pre-suit venue agreement
    - *Van Dusen*: transferee courts in diversity must apply law of transferor forum
      - Circuits are split if *Van Dusen* applies in federal question cases
    - *Ferens*: applies *Van Dusen* when plaintiff tries to transfer venue (2-shot rule for P)
    - *Heiman*: transferor court can transfer case even if it lacks personal jurisdiction
  - **§ 1406: Judicial Transfer of Venue**
    - District judge shall either 1) dismiss a case brought in wrong venue, or 2) if it be in the interest of justice, transfer it to the appropriate venue where it could have been brought
  - **§ 1407: Multidistrict Litigation**
    - Created a Judicial Panel that consolidated factually-alike cases (product defect, consumer, aircraft, etc.) for pre-trial purposes ONLY, regardless of different legal theories (*MF Global)*

            - *Lexecon* overruled 30-year practice where transferee judge would manage to keep the case past pre-trial stage using § 1404(a), now judge must send the cases back (blow to efficiency)
        - Circuits are split if *Van Dusen* rule applies to federal claims under § 1407 *(In Re Korean Air)*

- **FORUM NON CONVENIENS**
    - Common law doctrine aimed at **convenience** of parties during the trial
    - 2 step analysis: 1) if **<u>an alternative forum</u>** (state court/foreign) is available, 2) weigh private/public factors in *Gilbert* allows a court to **DISMISS** a case (not merely transfer it)
        - *Gilbert* **private** factors: access to proof, availability of witnesses, cost of transporting witnesses
        - *Gilbert* **public** factors: forum with real interest in case, court's familiarity with choice of law to be applied
    - An initial **deference to US resident plaintiff's choice of forum** (but level of deference depends on strength of ties to the forum state, *Wiwa*)
        - The stronger the ties, the more likely plaintiff is going to be inconvenienced
    - ***PIPER AIRCRAFT*** dismissed case on forum non conveniens to Scotland
        - Private factors (access to proof, availability of witnesses all in Scotland) and public factors (Scotland had real interest in the case, don't want US to become a litigation forum for foreigners) all pointed toward Scotland
        - **<u>Foreign plaintiff's choice deserves less deference than domestic plaintiff's choice</u>**
        - A finding that trial in the plaintiff's chosen forum would be **burdensome** is enough to support dismissal on grounds of "forum non conveniens"
        - **<u>Can't just sue in US because law is more favorable (i.e. strict products liability law)</u>**
    - Boom of transnational litigation: US began to boot out cases on forum non conveniens– no longer a human rights haven, cavalier judgments about adequacy of foreign forums
        - *Islamic Republic of Iran v. Pahlavi, Tuazon, Nemeriam*
    - *Sinochem*: court can turn directly to forum non conveniens for **easy dismissal**, bypassing subject matter or personal jurisdiction for convenience and expediency (analogous to *Rhurgas*)
        - *Provincial Gov't of Marinduque*: *Sinochem* does not foreclose an appeals court from determining whether district court had subject-matter jurisdiction in a case removed to federal court from state court (where it originated) where removal was improper

<u>ASCERTAINING THE APPLICABLE LAW</u>

- **ERIE PROBLEM: Federal courts sitting in diversity jurisdiction apply state or federal law?**
    - *SWIFT* interpreted "laws of several states" in Rules of Decision Act § 1652 to include only state statutory law, not state decisional law
    - ***ERIE***: overruled *Swift*, federal courts must apply state statutory AND state decisional law on ***<u>substantive (right/duty)</u>*** issues per § 2072
        - No such thing as federal general common law
        - *Swift* resulted in forum-shopping and inequitable administration of laws
        - Constitutionalized as to immunize *Erie* from congressional manipulations
    - ***YORK***: federal court must apply state statute of limitations to prevent ***<u>outcome-determination</u>*** between state and federal courts (state door closed, federal door open)
        - ***<u>Federal court sitting in diversity jurisdiction is just "another court of the state"</u>***
            - ***<u>If state law is bound up with rights and obligations of parties so as to result in a different outcome in federal court, it becomes substantive and federal court must apply state law</u>***
        - Trio involving seemingly procedural issues but that are outcome-determinative because they were "bound up with rights and obligations of parties"
            - ***RAGAN***: federal court must apply KS statute of limitations that tolled when process was served (not when complaint filed, Rule 3)
            - *Woods;* state requirement of registration in state to do business before filing a diversity suit does bind federal courts
            - *Cohen*: federal court must apply NJ rule requiring shareholder's derivative plaintiff to pay a security-for-expenses bond prior to bringing suit
    - ***BYRD***: ***<u>balancing test</u>*** between ***<u>state and federal countervailing interests</u>*** can lead to application of federal law
        - Three prongs – significance of state policy (if it's "bound up" with rights), countervailing federal interest, likelihood of outcome-determination
            - *Adamson* gave no reason for judge, 7th Amendment, uncertain outcome
    - ***HANNA***: federal court can apply Rule 4 (and not MA in-hand delivery rule)

- Pt. 1: redefined *York's* outcome-determinative test to reference ***Erie's twin-aims of preventing forum-shopping and inequitable administration of laws***
- Pt. 2: § 2072 Rules Enabling Act analysis gives ***Federal Rules prima facie effect***
  - **Does the Rule apply, reach, or cover the issue, thus conflicting with state law?**
  - **Does the Rule "abridge, enlarge, or modify" a substantive right?**
    - *Sibbach* test: does it really regulate procedure?
  - **Is it constitutional?**

- ***WALKER***: OK statute (*Ragan*) trumps Rule 3's tolling of statute of limitations
  - *Hanna* analysis isn't triggered: **no direct collision** between state law and Rule 3
  - *York* analysis applies: if state law is bound up with rights of parties so as to result in forum-shopping or inequitable administration of laws, then it becomes substantive and federal courts must apply it
- ***STEWART***: *Hanna* analysis (though collapsed) applies to federal statutes as well as Federal Rules
  - Redefined "directly collide" to "**broad to cover the issue at hand"** in Pt. 1 of *Hanna*
  - § 1404 covers forum-selection clause and is constitutional
- ***GASPERINI***: conflict between Rule 59, NY law, and 7th Amendment on jury verdicts
  - Ginsburg: Rule 59 and NY law do not collide, apply *York* (NY law is a substantive damage cap, so could be **outcome-affective** with regard to *Erie*'s twin aims), only apply NY standard at federal trial level to not disrupt 7th Amendment (*Byrd*)
  - Scalia's dissent: Rule 59 covers issue and conflicts with state law, apply *Hanna*, and Rule trumps state law; also strong federal interest in proper judge/jury relationship (*Byrd*)
- ***SHADY GROVE***: conflict between Rule 23 and NY law prohibiting certain class actions
  - Scalia (4): a straight *Hanna* analysis upholds Rule 23, no interest in evaluating substance of NY law whatsoever
  - Stevens (1): some cases where Rule cannot apply because it affects a substantive state right more than federal interest in rule (*Byrd*-esque), NY law is not substantive
    - If state law is important – read rule narrowly, do Ginsburg RDA analysis
    - If state law is not important – read rule broadly, do Scalia REA analysis
      - If "saving construction" isn't possible – rule violates REA (but bar is a high one)
  - Ginsburg (4): Rule 23 and NY law do not directly conflict, applying *York*'s twin-aims would lead to blatant forum-shopping

1. No controlling federal statute or rule – Rules of Decision Act § 1652 analysis

- Will result in application of state law if:
  a. A substantive right/duty issue (*Erie*)
  b. Outcome-determinative – forum shopping/inequitable administration of law (*York* redefined in *Hanna*)
  c. No strong federal interest (*Byrd*)
     i. IF strong federal interest (ex. 7th Amendment), apply federal law despite possibility of outcome-determination

2. Federal rule or statute – *Hanna* (Rules Enabling Act § 2072) analysis

- Will result in application of federal rule if:
  a. Is it broad enough to cover the issue at hand? Does it conflict with state law?
     i. If not, then use Rules of Decision Act § 1652 analysis *supra*
        1. Ginsburg's approach in *Shady Grove* and *Gasperini* to construe federal law narrowly so as to avoid collision with state law and then do § 1652 analysis
        2. Scalia's approach of just giving rules their plain meaning to conflict with state law, as is stated in *Walker* and do REA analysis
        3. Stevens' approach of first evaluating the importance of the state policy, and then going either Ginsburg's route or Scalia's route
     ii. If yes, then move on in this analysis
  b. Does it **"abridge, modify, or enlarge" a substantive right?**
     i. Two views from *Shady Grove*
        1. Scalia: look only at federal rule
           a. *Sibbach* (1941) test: does it really regulate procedure?
        2. Stevens: cases where rule just cannot apply because state procedural rule is bound up with rights as to become substantive and exceeds REA (a high bar though)
           a. Must engage in *Erie/York* (Rules of Decision Act) analysis, as Ginsburg would from the very beginning
  c. Is it constitutional? (never a problem)

• ASCERTAINING STATE LAW

- Once federal court has to apply state law, how to figure out what state law actually is?

- ***KLAXON***: <u>federal courts must apply the conflicts-of-law rules of the forum state</u>
    - Ex. NY federal court in *Erie* applied NY substantive law, which stated that in the case of a tort, one applies the laws of the place where the tort took place (PA)
- **Follow clear state supreme court precedent**
    - *Mason*: federal court has some flexibility to consider lower court decisions if doctrine is in flux
- <u>*If state supreme court has not ruled on the issue at hand:*</u>
    - **Use best judgment about what state supreme court would do**
        - *Ortho*: federal court cannot engage in "speculative crystal-ball gazing", but must look at lower court decisions and dicta by state supreme court
        - *Factors*: TN courts had never addressed the issue of whether publicity rights survived death, so NY federal court used 6th Circuit's view of TN law
    - **Cannot abstain** (*Meredith*) **absent "exceptional circumstances"**
        - *LA Power & Light Co.* allowed abstention for eminent domain
    - **Certification – ask state supreme court to answer unresolved state law question**
        - Approved by SCOTUS in *Clay* and expressed preference in *Arizonans*
        - Available in 49 states (not NC)
            - Different procedures in every state – accept from all courts, just SCOTUS, etc.
            - State supreme court can decline to answer, *Tunick*
    - **Appellate courts can always conduct *de novo* review of district court's interpretation of state law**, *Salve Regina College*

FEDERAL "COMMON LAW"

- <u>Federal common law uses Supremacy Clause and takes case out of *Erie*</u>
    - Creates federal question subject matter jurisdiction
    - Binding on state courts because of the Supremacy Clause
    - Federal law, but not constitutional federal law – Congress has power to change it (unlike *Erie*)
- Sources of federal common law
    - Congress has given federal courts power to develop substantive law relating to the interpretation of broad, vague federal statutes (antitrust, bankruptcy, civil rights)
    - Admiralty and maritime contexts (now heavily statutized)
    - Foreign relations/international commerce
    - Areas where a federal decisional rule is necessary to protect a <u>**strong federal interest**</u>
    - Federal common law of internal procedure – <u>**forum non conveniens**</u>, abstention, stare decisis, res judicata, preclusion
        - *Unlike other federal common law, this type generally <u>does not bind states</u>
- **"Federal Interest" federal common law**
    - ***CLEARFIELD TRUST*: strong federal interest in its <u>commercial instruments/finances</u> necessitates a federal decisional rule**
        - Application of various state laws would lead to disparity with regard to national fiscal interests: need uniformity! (*Smith v. Kansas City*)
        - *Parnell* refused to extend *Clearfield* to a dispute between two private parties involving US bonds
    - *Kimbell Foods*: two-step analysis
        - 1. Does this situation implicate **a strong federal interest** necessitating the application of federal common law?
        - 2. **What should that federal law be?** adopt existing state law or fashion a nationwide uniform rule?
    - ***BOYLE*:** federal contractor defense from liability**, <u>strong federal interest in national defense</u> would be frustrated by state tort liability** (won't contract with government, higher prices)
        - *American Elec. Power*: no more federal common law for environment, displaced by congressional creation of the Clean Air Act and EPA

FEDERAL LAW IN STATE COURTS

- Reverse *Erie* problem: common when federal defenses are litigated in state court (as in *Mottley*)
- ***DICE***: in a **nonremoveable FELA action (§ 1445)**, state court must apply federal trial by jury, not state practice of judges determining issue of fraud
    - An inverse *Byrd* problem, yet federal standard still triumphs – how?
        - **Right to trial by jury is "bound up with rights" of the federally-created FELA**, rendering it substantive, as in *Walker, Ragan, York*
        - **Influence of the 7th Amendment**: right to jury trial more important than not having it
        - Do not even reach *Erie* analysis because of the **Supremacy Clause**

- *Brown*: imposes federal pleading standard on GA court in FELA action
  - Power of Supremacy Clause, plus *York/Byrd/Hanna* analysis
    - GA standard would invite forum-shopping, undermine plaintiff's right under FELA to go to state court, Federal Rules are supreme over state rules
- Result is that federal courts impose their procedural rules on state courts in FELA claims if state practice would detract from "substantive rights" granted by Congress in FELA

PLEADING

- CODE PLEADING: required a plain and concise statement of facts constituting a cause of action, *Gillispie*
  - Problems: what kind of facts, how many facts, couldn't plead evidence or conclusions
- **RULE 8: MODERN PLEADING**
  - ***Transsubstantive*** pleading standard that applies to all civil actions, *Swierkiewicz, Iqbal*
  - **(a)(1):** complaint needs to show SMJ (diversity, FQJ, personal, etc.)
  - **(a)(2):** complaint only needs ***a short and plain statement of a claim showing that plaintiff is entitled to relief***, *Dioguardi*
    - Must provide defendant ***fair notice*** of what claim is about and ***legal grounds*** upon which it rests
    - No mention of facts or causes of action at all, no bar to pleading conclusions, no showing of evidence
      - Low-access barrier for plaintiffs
    - Construed liberally in light most favorable to the plaintiff
    - Pass a 12(b)(6) – "failure to state a claim upon which relief can be granted" unless ***"plaintiff can prove no set of facts in support of his claim which would entitle him to relief,"*** *Conley*
      - Claim had to rise above "speculative level" (i.e. couldn't sue Satan or God)
    - *Garcia*: complaint for defamation against Hilton for calling him a pimp
      - Construed liberally under *Conley* standard and survived 12(b)(6) despite not alleging publication
        - Plaintiff provided enough in the pleading to suggest that he could prove publication
      - Granted **12(e) motion for a more definite statement** because defendant could not reasonably prepare a response
      - Granted **12(f) motion to strike** privileged governmental communications
  - ***Twombly***: heightens pleading standard under 8(a)(2) with respect to antitrust actions (similar to fraud??)
    - ***Pleading must state enough facts to state a claim to relief that is PLAUSIBLE on its face***
      - Seemingly below probability, but above speculation
      - A return to "fact pleading" under the code pleading regime
    - Retires Conley's language "no set of facts that would entitle plaintiff to relief" with respect to a 12(b)(6) motion
    - Pre-Twombly: 12(b)(6) was a pure law motion asking whether the complaint (all assumed to be true) was recognized under the law – "legal sufficiency"
      - Twombly now involves evaluating pleading on the merits; moved summary judgment (Rule 56) to motion to dismiss
    - "Conceivability" pleading standard led to discovery abuse and fishing expeditions that judges cannot control
  - ***Iqbal***: extends Twombly's plausibility pleading standard ***to ALL CIVIL ACTIONS*** via doctrine of ***transsubstantivity***
    - **Twombly takeaways: assume facts are true, but NOT legal conclusions; complaint must then be evaluated for plausibility on its face**
    - A "context-specific task" involving "judicial experience and common sense" (very subjective element, rather than just looking at the law) and hypothesizing an "alternate, innocent explanation"
      - Cannot get to discovery (even if pinpoint/limited) unless one survives 12(b)(6) motion
  - **(a)(3):** complaint must demand relief sought (damages, injunction)
- **RULE 9: PLEADING SPECIAL MATTERS**

- **(a)(1)(A-C):** pleading need not allege capacity to sue or every condition precedent under a contract
    - Burden-shifting mechanism for efficiency purposes that defendant needs to contest under (a)(2) with a specific denial
- **(b):** Heightened pleading standard for ***fraud or mistake***
    - A party must state with ***particularity the circumstances constituting fraud or mistake***
        - Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally
            - NOTE: does NOT affect Rule 8's *Twombly/Iqbal* standard
    - Policy to protect businesses from potentially damaging fraud allegations which are easy to make
    - *Denny v. Carey*: did not really impose a higher burden than under *Conley*'s 8(a)(2) standard
        - ***Denny v. Barber***: must plead who, what, when, where, and why to survive pleading stage
- *Tellabs*: regarding pleading standard under Private Securities Litigation Reform Act of 1995 (PSLRA)
    - "Does the totality of fact, documents, or other matters given judicial notice give rise to a "**strong inference**" of scienter/intent for fraud?"
        - "Strong inference" means *at least as compelling* as any other inference that could be drawn from the complaint
- **(g):** must specifically state a claim for **SPECIAL DAMAGES**
    - Version of *Hadley v. Baxendale*: if you're going to ask for something out of the ordinary (unnatural or improbable), must plead it specifically in order to give defendant notice
        - *Ziergovel* needed to plead for damages for increased blood pressure and shoulder injury from collision
    - **RULE 54(c):** in cases of ***default judgment***, relief sought is limited to amount pled in complaint
        - In every other final judgment, court grants relief to which party is entitled even if it's not sought in the pleading
            - Doesn't matter what you pled for as the case unfolds (i.e. can recover more than asked for)

- ## RULE 8: RESPONSIVE PLEADING

- Defendant must directly respond to each allegation in complaint algebraically
    - *Rule 12(a)(1): 21 days to respond to a claim for relief*
- **(b): DENIALS***:* **admit, deny (specific/general (rare, Rule 11 trouble), plead insufficient information and belief** (must be in good faith)
    - *Probably no Twombly/Iqbal standard because no word "show" is present in this rule – "what's good for the goose is not good for the gander"*
- **(c): AFFIRMATIVE DEFENSES**: **must plead them in the responsive pleading or THEY ARE WAIVED**
    - Though liberalized through Rule 15 amendment process
    - List of 19 common affirmative defenses
- **12B'S: 1) Lack of subject matter jurisdiction, 2) Lack of personal jurisdiction, 3) Improper venue, 4) Insufficient process, 5) Insufficient service of process, 6) Failure to state a claim upon which relief can be granted, 7) Failure to join a required party under Rule 19**
    - Can join all motions together (g2), but only get one motion (so JOIN THEM!)
    - **Failing to raise #2-5 in the responsive pleading or in amendment WAIVES DEFENSE**
        - Can NEVER waive SMJ defense, can make a 12(b)(6) or (7) anytime
    - **12 (e):** Motion to amend for a more definite statement due to vagueness
    - **12 (f):** Motion to strike for redundant, immaterial, impertinent, or scandalous matter (court can do this)
- **DEFENDANT GOES ON THE OFFENSIVE: crossclaim, counterclaim, third party claim**
    - Now a plaintiff under Rule 8(a), must satisfy *Twombly/Iqbal*
- *RULE 7: court can order third-tier pleading to get more facts, but very rare (stop exchanging sterile pieces of paper)

RULE 41:DISMISSAL OF ACTIONS

- (a)(1)(B): Voluntary dismissal: unless stated otherwise, first one is without prejudice (can refile)
    - If it's the second voluntary dismissal on same claim, operates as an adjudication on the merits (cannot refile)
- (b): Involuntary dismissal (except for lack of SMJx, venue, or failure to join a party under Rule 19) operates as an adjudication on the merits

RULE 15: AMENDMENTS AND RELATION BACK

- (a): **AMENDMENTS BEFORE TRIAL**
    - (1): "Free fire zone" where plaintiff can amend at will for 21 days or until defendant answers pleading
    - (2): Once "free fire zone" is over, make *motion for leave to amend* (or get defendant to agree to let you amend)
        - Judges are to "freely give leave when justice so requires"
- (b): **AMENDMENTS DURING AND AFTER TRIAL**
    - (1): Objection raised at trial to new evidence
        - Judge should freely allow amendment so long as other party fails to show that it would be prejudiced by the admission of this evidence
    - (2): Consent
        - Express: if an amendment is not objected to, it is in
        - Implied: both parties are arguing a claim, but neither pleaded it (judge can use discretion and put it in)
- (c): **RELATION BACK**: used when you need to add another party or claim but *the statute of limitations has run*
    - (1): Amendment *"relates back" to the date of the original filing* of complaint, circumventing statute of limitations
        - (A): in a diversity case, see ***if state's law allows relation back***
        - (B): if sets out claim that arose from same conduct, ***transaction or occurrence*** set out in original pleading
        - (C): amendment to change parties only allowed if: (*Krupski*)

        - Same T &O
        - New party had to receive summons/complaint within limitations period + 60 days for service of process under 4(m)
        - Received proper notice so it won't be prejudiced
        - Knew or should have known that action would be brought against it but for plaintiff's mistake
            - **Virtually impossible to comply with*

- ## RULE 11: SANCTIONS
    - "Stop and think" principle before filing to see if it's frivolous
    - (c)(2): after notice of frivolous suit, 21 days "safe harbor" to retract material
        - Sanctions are permissive, not compulsory
    - (b): plaintiff can rely on lawyer to certify truth of complaint to "best knowledge, information, and belief," (*Surowitz*)

<u>JOINDER</u>

- **TRANSACTION & OCCURRENCE:** "logical relationship" test between the counterclaim and the claim
    - Same witnesses, evidence, legal structure
    - Would res judicata bar the claim?
    - Would same evidence support the claim and the counterclaim? (*Moore v. NY*)
- ## RULE 18: JOINDER OF CLAIMS
    - Total <u>free fire zone</u> to join any and all claims against a single defendant (don't need T &O)
        - <u>Permissive</u>, not compulsory
        - If fears about prejudice, Rule 42 allows judge to separate suit into different trials post-discovery
- ## RULE 19: REQURIED JOINDER OF PARTIES
    - <u>Necessary</u>: must be joined, but non-joinder (no SMJx or PJx) will not result in dismissal of the suit
    - <u>Indispensable</u>: party is so important that non-joinder will result in dismissal of suit
    - (a)(1): Must join outside party if feasible (can get SMJx/PJx):
        - (A): His <u>absence prevents complete relief</u> (i.e. specific performance, property)
        - (B): He has a stake in the case, and litigating it without him could:
            - (i): impair or impeded his ability to protect his interest (insurance policy)
            - (ii): leave <u>another party subject to double or triple liability</u>
    - (b): If cannot join the indispensable party (can't get SMJx/PJx):
        - Court does not have to dismiss for lack of indispensable party
            - Has <u>discretion to shape relief</u> and do partial justice
                - Ex. escrow share of party's claim to insurance policy
        - Factors to consider whether to move forward without an indispensable party:
            - Will judgment be prejudicial to that party or other parties?
            - Can court lessen that prejudice through protective provisions, shaping relief, other measures?
            - Would judgment without party be adequate?
            - Would plaintiff have adequate remedy without that party?
- ## RULE 20: PERMISSIVE JOINDER OF PARTIES
    - (a): Can <u>join any parties</u> as long as (need both):
        - (1)(A): **<u>same T &O or series of Ts & Os</u>**
        - (1)(B): **<u>common question of law or fact (CQ)</u>**
        - *Also applies to defendants with same T &O + CQ standard
    - Rule 42: allows judge to consolidate like things if parties don't do it themselves
- ## RULE 13: COUNTERCLAIMS AND CROSSCLAIMS (*generally covered under § 1367)
    - *Counterclaim is a claim by defendant back across the "v" against plaintiff
    - **(a) COMPULSORY COUNTERCLAIMS**
        - (1): ***<u>MUST</u>*** assert it (or else it's lost) if:
            - (A): It **<u>arises out of same T &O</u>** that is the subject matter of the opposing party's claim
            - (B): Won't require adding a party over which court cannot get SMJx/PJx
    - **(b) PERMISSIVE COUNTERCLAIMS**
        - Any claim that is not compulsory, doesn't need same T &O
            - ***<u>NOTE:</u>*** **<u>if not CNoOF, not covered under § 1367</u>**
                - A v. B, B files permissive counterclaim against A, who now has to compulsory counterclaim anything arising out of the same T&O as B's permissive counterclaim

- **(g) CROSSCLAIM**: a claim on the same side of the "v"
  - All permissive: don't want them to overwhelm plaintiff's original case
  - Must arise out of the **same T &O as the original action**
    - B crossclaims against C, C now has to compulsory counterclaim all it has against B (component parts situations to get them to fight it out or reach a settlement)

- ## RULE 14: THIRD-PARTY PRACTICE
  - Defendant impleads third-party for indemnification – can't just arise out of same T &O, must involve ***transfer of liability***
    - Pleading process (response, counterclaim) then occurs between third-party plaintiff & third-party defendant
      - Need personal jurisdiction over the third-party (like in *Asahi*)
  - Original plaintiff can then assert a claim directly against the third-party defendant
    - **§ 1367 + *KROGER*: in a diversity case, no supplemental jurisdiction over non-diverse claims by original plaintiff against people made parties under Rule 14(a)**
      - UNLESS third-party defendant fires first with a 13(a) claim, then plaintiff can fire back with another 13(a) claim

- ## RULE 22: INTERPLEADER
  - Have possession of something that you know you will be sued over; give it to the court to avoid being sued over it
    - Court has automatic jurisdiction (per § 1335) because they take jurisdiction over the property
      - Only need minimal diversity (exception to Strawbridge v. Curtiss)

- ## RULE 22: INTERVENTION
  - "Parachuting" man who comes in on his own
  - (a): Mandatory if 1) given unconditional right by federal statute, or 2) claims interest in transaction of subject of action and is so situated that disposing the action without him will impede his ability to protect his interest
  - (b): Permissive if 1) given conditional right by federal statute, or 2) claim share common question of law of fact with main action

CLASS ACTIONS

- ### § 1332 (d): CLASS ACTION FAIRNESS ACT (CAFA)
  - (d)(2): FEDERALIZED ALL SIGNIFICANT CLASS ACTIONS
    - **Any class action with MINIMAL DIVERSITY and $5 million aggregated in controversy is federalized**
      - If brought in state court, **it's removable** *(only one defendant needed to remove, can be in-state)*
      - Class must contain at least **100 PEOPLE**
      - Must be a **multi-state class action**
    - (3) **"Local Controversy"** discretionary exception if >1/3 but < 2/3 of plaintiff class and primary defendants are from original state
      - (4) **Mandatory** if > 2/3 of plaintiff class and at least one significant defendant are from forum state and injuries occurred in forum state OR >2/3 of plaintiff class and primary defendants are from forum state

- ### § 1367 for non-CAFA Class Actions
  - If suing under federal question, § 1367(a) attaches, no problem (though plaintiffs try to stretch to include RICO)
  - Need complete diversity between class representatives (those named in suit) and at least one plaintiff with $75K+ claim
  - If diversity, supplemental parties are allowed (§ 1367(b) doesn't include Rule 23)
    - ***ALLAPATTAH***: as long as **one plaintiff meets amount-in-controversy,** other **diverse plaintiffs can be added through Rule 20 without meeting the amount-in-controversy** (overruled *Zahn*)

- ## RULE 23: CLASS ACTIONS
  - (a): PREREQUISITES: A class action can be brought if:
    - (1) **CLASS EXISTS:** (23(c)(1)(B)) cannot require extensive factual inquiry to determine who is a class member
    - (2) **REP. MUST BE CLASS MEMBER**
    - (3) **NUMEROSITY** such that mass joinder is "impracticable" (23(a)(1))
      - > 40 (met), < 25 (not met), between 25-40 (depends on the impracticability of joinder)
    - (4) **COMMONALITY** of questions of law or fact (23(a)(2))
      - Used to be simple, but since ***DUKES***, much harder to establish since it appears to be more "predominance" like in (b)(3)
        - Will differences in the factual background of each claim affect the outcome of the legal issue?
    - (5) **TYPICALITY**: claims of representative party need to be typical of those of the class (23(a)(3))

            - Named plaintiff's claim and class claims are interrelated that the interests of the class members will be fairly and adequately protected (*Falcon*)
        - (6) **ADEQUATE REPRESENTATION**: representative parties will fairly and adequately represent the interest of the class (23(a)(4))
            - Since class members are not getting their "day in court," need them to be protected (due process consideration in *Hansberry*)
                - ***AMCHEM:*** can't be subclasses with competing interests (currently with asbestosis and exposure-only to asbestos)
    - (b): If (a) is met – Types of Class Actions (must also meet this requirement)
        - (1) **<u>PREJUDICE CLASS ACTIONS:</u>** Litigating separate actions would prejudice non-class/class party by:
            - (A) Inconsistent rulings or settlements by the defendant with individual class members OR
            - (B) Adjudications with respect to one class members would be dispositive of the interests of the other members (i.e. limited common fund, though who litigated first would get $, those who came later, no)
        - (2) **<u>EQUITABLE CLASS ACTIONS:</u>** A class seeking injunctive or declaratory relief (equitable)
            - Can't ask for individualized monetary award if it predominates over injunctive relief (if so, classified as a (b)(2)/(b)(3) hybrid)
            - Predominance standard if a (b)(2)/(b)(3) is unclear after *Dukes*
        - (3) **<u>DAMAGES CLASS ACTIONS:</u>** Questions of law or fact common to all class members ***<u>PREDOMINATE</u>*** **over any questions affecting only individual members**, and that a class action is ***<u>SUPERIOR</u>*** **to other available methods for fairly and efficiently adjudicating the controversy**
            - **<u>Predominance:</u>** (a)(2) + super commonality requirement, <u>predominance of commonality</u>
                - For mass tort cases: *single event tort* is predominant (plane crash) v. *dispersed tort* is not (Agent Orange, discrimination)
            - **<u>Superiority</u>**: factors to consider include
                - (A) Class members' interests in **individually controlling their own actions** (can get more money on my own)
                - (B) Extent/nature of litigation that's already begun by a class member
                - (C) Desirability of concentrating the litigation in one forum
                - (D) Difficulties of managing a class action (if class is huge, *Castano*)
    - (c)(2): **<u>NOTICE</u>** for (b)(3) cases is MANDATORY
        - (b)(1) or (2) cases: court may provide any notice it wants
        - **<u>Court must direct BEST NOTICE that is practicable under the circumstances through reasonable efforts to notify each member of the class</u>** (Super *Mullane*)
            - ***SHUTTS:*** personal jurisdiction does not need to be established over each plaintiff in a class action as long as the absent plaintiffs receive notice, an opportunity to be heard, and are adequately represented
                - Nature of action, definition of the class, class claims/issues/defenses
                - Opportunity to be represented by an attorney
                - **<u>OPT OUT choice</u>**, time/manner of doing so
                    - **CANNOT OPT OUT OF (B)(1) OR (B)(2) ACTIONS*
                - Binding effect of a class judgment (res judicata)
                - *Might need PJx over defendant class (but so rare, we don't know)
- **CHOICE-OF-LAW**
    - ***SHUTTS***: Miller created a clusterfuck
        - At pleading stage, need to <u>prove that the law in each state is predominantly the same</u>
            - If not, stuck litigating each state's laws separately

<u>DISCOVERY</u>

- Liberal philosophy of Federal Rules 26-37: ***<u>EQUAL ACCESS TO ALL RELEVANT DATA</u>***
    - Makes summary judgment (Rule 56) more meaningful, done without judicial involvement, settlement options

RULE 26(b)(1): SCOPE

- Restrictive scope of code states (*Kelly*) discover: had to relate to claim (not just action), admissibility requirement, could only discover on issues you had the burden of persuasion on
- *<u>*No pre-action discovery for fear of proverbial "fishing expedition" (except TX)</u>*
- 1st TIER (front-end): "Parties may obtain discovery regarding any ***<u>nonprivileged matter</u>*** that is relevant ***<u>to ANY party's claim or defense"</u>***
    - **<u>Cannot be privileged</u>** (hidden *Erie* question – federal/state standard?)
    - **<u>Can be relevant to ANY party's claim or defense</u>**

        - Can discover on issues you *don't have the burden of persuasion on*
  - 2nd TIER: "For ***good cause***, (have to make a motion) the court ***may*** order discovery of any matter relevant to the ***subject matter of the action***" (wider than claim/defense)
    - Relevant information ***need not be admissible at trial*** if it appears "reasonably calculated" to lead to something admissible" (i.e. no fishing)
  - Current proposed revision regarding proportionality: should not allow more discovery than the case is worth monetarily
  - **(b)(3): Attorney work product**
    - *Taylor v. Hickman*: established a *qualified immunity* for attorney work product to protect adversarial system and role of attorney (as an advocate, not a witness) in it
    - Will breach this immunity if other party cannot obtain the information in any other way (i.e. witness is dead)
      - BUT court must protect against disclosure of "mental impressions, conclusions, opinions, or legal theories" of the attorney (can't give away litigation strategy)

- **DISCOVERY DEVICES**
  - Depositions (Rule 27-29, 32)
    - Oral (Rule 30): gold standard, but expensive
    - Written questions (Rule 31): cheaper, but no spontaneity
  - Interrogatories (Rule 33): to get baseline data to plan deposition strategy
  - Document Production (Rule 34): "search for the smoking gun," new implications with electronic documents
  - Physical and Mental Examinations (Rule 35)
    - A valid exercise of procedure under Rules Enabling Act §2072 by *Sibbach*
      - *Erie* problem if state constitution explicitly protects privacy?
    - *Schlagenhauf* extends to defendants through principle of transsubstantivity
      - Must make a motion showing that physical/mental condition is actually in controversy and show "good cause" (can't get information any other way, i.e. existing medical records)
  - Requests for Admission (Rule 36: often used to establish baseline facts ("admit it was December 19th")
  - Sanctions for Failure to Cooperate in Discovery (Rule 37)
    - Civil contempt of court: equitable enforcement of court order to compel discovery, *Taylor*

"The art of advocacy is to convince a court that what they're doing is not a breach of precedent." – Arthur R. Miller