

COURSE: CIVIL PROCEDURE
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SEMESTER: FALL 2013
GRADE: A-

COMMENCING AN ACTION

- **Rule 3: “A civil action is commenced by filing a complaint with the court.”**
 - Does NOT toll state statutes of limitations. *Walker*, 434; *Ragan*, 416.

SUBJECT-MATTER JURISDICTION

- **Rule 12(h)(3): If a court lacks subject-matter jurisdiction, it MUST dismiss the action.**
- Subject-matter jurisdiction cannot be waived. *Capron*, 28.
- State courts are courts of general jurisdiction.
- **Determining whether a statute is jurisdictional or substantive:**
 - **Clear-Statement Approach:** If statute uses the word, “jurisdiction,” the statute is jurisdictional, if not, not jurisdictional. *Arbaugh*, 263.
 - **Contrasts with Context/Relief Approach:** If a statutory condition entitles plaintiff to relief, it likely pertains to the merits and not to jurisdiction. *Morrison*, 264.
- A state court cannot deny subject-matter jurisdiction to causes of action arising under laws of different states if it has an analogous state claim per the Full Faith and Credit Clause. *Hughes*, 264.
 - But a state can apply its own procedural law and therefore statute of limitations, which may bar the claim. *Wells*, 265.
- A state court cannot invoke a jurisdictional rule as grounds for declining to hear a federal claim if that state has an analogous state-law claim. *Haywood*, 266.

• **FEDERAL QUESTION JURISDICTION**

- The federal question must arise from the plaintiff’s original cause of action. *Mottley*, 296.
 - Cannot manufacture federal question jurisdiction by pleading an anticipated defense which raises a federal question
- *Eliscu*, 299: A contract dispute over who owns a copyright that raises only state law questions does not require interpretation of the Copyright Act, and therefore does not raise a federal question.
- **To exercise federal question jurisdiction the case must require the interpretation of the Constitution or laws of the United States or at least the implication of federal policy**
 - However, if interpretation of federal law is required to resolve the case, does not necessarily confer federal question jurisdiction. *Gunn*, 313.
 - Legal malpractice case requiring interpretation of patent law in case-within-case analysis.
 - Outcome of case has zero effect on patent law, and therefore no federal interest, no federal question jurisdiction.
- A federal statute that creates a cause of action conferring jurisdiction to state courts does not oust federal courts of jurisdiction. The courts have concurrent jurisdiction. *Mims*, 317.
- **Holmes (Creation) Test: A suit arises under the law that creates the cause of action. *American Well Works*, 303**
 - Exception: If federal statute creates cause of action, but the suit does NOT require interpretation of the Constitution or laws of the United States. *Shoshone*, 304.
 - Federal question jurisdiction requires the interpretation of federal law or at least the implication of federal policy
- **Grable (Importance) Test: *Grable*, 306, *Smith*, 304.**
 - “the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities?” *Grable*, 306, 309.
 - *Grable* involved a pure issue of law, and deciding it would establish a federal principle (does a federal statute, 26 U.S.C. § 6335, require personal service? Quiet title claim).
 - *Cf. Empire Healthchoice*, 311: federal interest but very fact-bound and situation-specific, deciding would create no federal principle
 - In the interpreted Act, Congress conferred federal jurisdiction for different parts, but NOT this one. Negative inference that Congress did not intend to confer jurisdiction.
 - **Interest must be substantial to the federal system, not just the parties of the case. *Gunn*, 313.**

- Implication of a **very important** federal policy can confer federal question jurisdiction even in a purely state law claim. *Smith*, 304.
 - Plaintiff sought to enjoin Defendant bank from purchasing bonds issued by Act of Congress claiming that the Act was unconstitutional – cause of action was that under state law, bank could not purchase illegal bonds
 - Two federal implications of state law claim: (1) Missouri might declare Act unconstitutional, (2) If each state can declare the bonds illegal, U.S. borrowing costs go up, taxation increases – implications have national reach
 - *Cf. Moore*, 305: interpretation of federal act that would have implications only in Kentucky not sufficiently important to confer federal question jurisdiction
 - *See also Merrell Dow*, 305: negligence suit alleging failure to comply with drug labeling requirements under federal statute not sufficiently substantial to confer federal-question jurisdiction.
 - The court found convincing that Congress had created no federal remedy for violation of the statute, and concluded it was “tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently ‘substantial’ to confer federal-question jurisdiction.” 305.
- **DIVERSITY JURISDICTION: § 1332: Diversity + Amount in Controversy**
 - **Rule of Complete Diversity. *Strawbridge*, 266.**
 - Exceptions:
 - Supplemental Jurisdiction:
 - Minimal diversity: § § 1332(d) Class-Action Fairness Act; 1335 Interpleader; 1369 Multiparty, multiform (mass disaster)
 - **DIVERSITY: § 1332(a)(1):**
 - To be a citizen of a State within the meaning of § 1332, a natural person must be a citizen of the United States and a domiciliary of that State. *Mas*, 271, 272.
 - Domicile persists until changed via: (a) taking up residence in a different place with (b) the intention to remain there. *Mas*, 271, 272.
 - **Corporate Citizenship: § 1332(c)(1):**
 - State of incorporation. § 1332(c)(1).
 - Principal place of business (§ 1332(c)(1)) = nerve center. *Hertz*, 275.
 - Special rules for federally chartered banks. 275.
 - **Unincorporated Associations:** Take on the citizenship of all of the association’s members. *Carden*, 276 (limited partnership); *United Steelworkers of America*, 276 (trade union).
 - In *Hoagland* (professional corporation), 7th Cir. drew “a bright line between corporations and all other associations.” Every circuit court to address the question has reached the same holding. 276.
 - **Treated differently under class actions:** § 1332(d)(10).
 - **Representatives:** A representative is deemed a citizen only of the same State as the represented decedent, infant, or incompetent (excludes derivative suits and class actions) per § 1332(c)(2), which ousted the historic rule.
 - Under the historic rule which still applies to derivative suits and class actions not governed by the Class Action Fairness Act, a representative is deemed a citizen of the state of his own citizenship
 - **ALIENAGE: § 1332 (a)(2)-(4):**
 - Citizenship is determined via United States law, not foreign law. *Traffic Stream*, 277.
 - In cases of **dual-citizenship**, the typical view is that only the United States citizenship should be considered. Thus alienage jurisdiction cannot be invoked. *Sadat*, 277.
 - Stateless persons cannot invoke alienage jurisdiction because they are not citizens of a foreign state. *Rubinstein*, 277.
 - Cannot have alien v. alien unless there are U.S. citizens with complete diversity on both sides. *Huilin*, 278
 - Cannot manufacture jurisdiction via assignment (§ 1359, discussed in *Kramer*, 280) or destroy jurisdiction via assignment (*Grassi*, 281 applies § 1359 to destruction of jurisdiction in addition to creation).
 - Cannot destroy diversity by adding nominal non-diverse parties. *Rose*, 281.
 - **AMOUNT IN CONTROVERSY**
 - Exclusive of interests and costs, must **exceed** \$75,000. *Freeland*, 287.
 - The party invoking diversity jurisdiction has the burden of showing that the amount in controversy requirement is met. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. *St. Paul Mercury*, 286.
 - Aggregation:

- Single plaintiff v. single defendant: amount in controversy can be met by aggregating value of all claims against defendant. Aggregation is permitted even when those claims share nothing in common besides the identity of the parties. *Everett*, 286.
 - Multiple plaintiffs v. single defendant: amount in controversy can only be met by aggregating the value of those claims that are common and indivisible. *Troy Bank*, 286. An identifying trait of a common and undivided interest is that if one plaintiff were to fail to collect his share, the remaining plaintiffs would collect a larger share. *Durant*, 287.
 - In a case of a car accident with damages: A \$45,000, B \$50,000, CANNOT aggregate
 - **Diversity jurisdiction exception for domestic relations and probate. 289-91.**
- **SUPPLEMENTAL JURISDICTION: § 1367: Supplemental jurisdiction over claims in same case or controversy**
 - *Gibbs*, 319:
 - Derive from a common nucleus of operative fact. 322.
 - Be such that plaintiff would ordinarily be expected to try them all in one judicial proceeding. 322.
 - Substantiality of the federal issues. 322. (Cannot be predominantly state claim with insignificant federal claim tacked on to invoke federal jurisdiction)
 - **District court may decline to exercise supplemental jurisdiction if: § 1367(c):**
 - (1) claim raises a novel or complex issue of State law; or (2) claim substantially predominates over the claim that court has original jurisdiction; or (3) court dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances there are other compelling reasons for declining jurisdiction.
 - In the Ninth Circuit, § 1367(c)(4) reasons must be comparable to (1)-(3): they must be compelling/exceptional. *Executive Software*, 339.
 - **Diversity supplemental jurisdiction: § 1367(b)**
 - *Kroger*, 326: codified in § 1367(b)
 - Plaintiff cannot bring a claim [14(a)] against a non-diverse party except as a counterclaim [13(a)] (non-diverse party must fire first)
 - If one plaintiff meets the requisite amount in controversy, additional plaintiffs who do not destroy diversity bringing claims under a common nucleus of operative fact are permitted to do so (even if their claims do not meet the minimum amount in controversy). *Allapattah*, 330.
 - However, plaintiffs who destroy diversity may not join. *Allapattah*, 334.
 - **Ancillary jurisdiction: recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them. The jurisdiction "serves two purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."** *Kokkonen*, 344.
- **REMOVAL: § 1441: DEFENDANT(S) may remove if federal court has original jurisdiction**
 - **Defendant CANNOT remove if the claim could not have originated in federal court**
 - Removal question requires answering subject-matter jurisdiction question
 - **Procedure for removal of civil actions: § 1446.**
 - Defendant must file notice of removal within 30 days after receipt of initial pleading
 - A federal court's removal jurisdiction over a claim is not predicated upon the state court having subject-matter jurisdiction over that claim. § 1441(f).
 - **Unanimity Rule:** All defendants of the **same action** must consent to removal. § 1441(a). *See also Davis v. Shreveport*, 349.
 - All defendants in a diversity **case** even for different actions must consent to removal.
 - **1441(c) severance:** In cases with:
 - (A) A federal question claim
 - (B) A claim outside the district court's original and supplemental jurisdiction or an exclusively state jurisdiction claim
 - The entire case can be removed by the consent of all the parties to (A), and (B) will be severed and remanded to the state court.
 - Plaintiff **cannot** remove
 - Not even a federal question counterclaim. *Shamrock*, 346.
 - **Federal question:** in-state defendants **can** remove
 - **Diversity:**
 - **In-state defendants:** For § 1332 (diversity) jurisdiction cases, defendant(s) cannot remove if any of the defendants in interest are in-state defendants. § 1441(b)(2).
 - Circuits are split as to whether this is procedural [*Lively*, 348 (9th Cir.)] or jurisdictional (8th Cir.)

- If procedural, plaintiff can waive; if jurisdictional, plaintiff cannot waive
- **Blocking removal:**
 - **Disguising claim:** Plaintiff cannot disguise federal claim to block removal. *Bright* (9th Cir.), 347.
 - **Joining nondiverse parties:** Plaintiff cannot block removal by joining nondiverse parties. *Rose*, 348.
 - Doctrine of fraudulent joinder: removal is permitted if plaintiff has no cause of action against the nondiverse defendant. 348.
 - **Amount in controversy:** § 1446(c)(2): Plaintiff's amount controls except defendant may assert amount if:
 - Plaintiff seeks nonmonetary relief; or
 - The State practice does not permit plaintiff to demand a specific sum; or
 - The State practice permits recovery of damages in excess of plaintiff's demand
- **CHALLENGING SUBJECT-MATTER JURISDICTION:**
 - **Subject-matter jurisdiction may be challenged at trial court and on appeal. Rule 12(b)(1) and (h)(3).**
 - Can rarely be challenged via collateral attack. 355.
 - Subject-matter jurisdiction must be established as a threshold matter. *Steel Co.*, 352.
 - **Remands based on subject-matter jurisdiction are immune from review. *Powerex*, 353.**
 - All other remands are reviewable
 - Including remand declining to exercise supplemental jurisdiction. *Carlsbad Technology*, 353.
 - Cures to jurisdictional defects before final judgment:
 - If nondiverse party is dismissed prior to final judgment, court can enter judgment. *Caterpillar*, 353.
 - If nondiverse party changes citizenship prior to final judgment, court cannot enter judgment. *Grupo*, 354.
- **PERMISSIBLE COURT ACTIONS WITHOUT SUBJECT-MATTER JURISDICTION**
 - Collateral sanctions (as opposed to sanctions on the merits). *Willy*, 353.
 - **Easy dismissal:** When a district court does not intend to resolve the merits of a case, it has leeway to choose among threshold grounds for denying audience to a case on the merits. *Ruhrgas*, 352 (personal jurisdiction); *Sinochem*, 394 (forum non).
 - In a removal action, the court may have to determine subject-matter jurisdiction prior to dismissing on forum non grounds because if it lacks subject-matter, it is supposed to remand, whereas if it dismisses on forum non, the case is dismissed. "Thus, in a removal scenario, the sequencing of the decision may have practical consequences." *Marinduque*, 395 (9th Cir.).

PERSONAL JURISDICTION

- **Traditional Bases – Cannot be obtained by fraud. *Tickle*, 30.**
 - Physical presence. *Pennoyer*, 75, *Burnham*, 180.
 - Tagging defendant while present in the jurisdiction
 - Domicile. *Milliken*, 84.
 - Domicile is the true home, and it persists until changed via: (a) taking up residence in a different place with (b) the intention to remain there. *Mas*, 271, 272.
 - Express Consent
 - Consent by contract: Forum clauses enforceable (must be fair, 196 N&Q)
 - Neither party needs ties to selected forum. *The Bremen*, 194.
 - Forum-selection clauses "should be given full effect" unless "enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching." *The Bremen*, 363.
 - **Forum selection clause** enforceable even between non-sophisticated parties (*Carnival Cruise*, 195)
 - Consent by registration in State, *Ratliff* (4th Cir.)(no consent), *Worldcare* (8th Cir.)(consent), *Wenche Siemer* (5th Cir.)(no consent), 193-94.
 - Circuits split on whether registration in state equals consent to jurisdiction
 - Implied Consent. *Hess*, 87.
 - Statute required use of Massachusetts's roads dependent on implied consent to suit for causes of action arising from use of roads, required actual notice
 - Agency: appointing an in-state agent for service of process (see Express Consent)
 - Waiver
 - Rule 12(h)(1): A party waives any defense listed in Rule 12(b)(2)-(5) by not presenting it in its first motion
 - Appearing before the court non-specially requires waiving personal jurisdiction in most states' procedural rules. 198.
 - Utilizing a court waives the ability to deny personal jurisdiction. *Adam v. Saenger*, 85.
 - Non-compliance with court's attempts to determine personal jurisdiction equals waiver of personal jurisdiction. *Guinee*, 191.

- **General Jurisdiction: contacts so continuous and systematic that the defendant is fairly regarded as “at home” in the forum (*Goodyear*, 151), cause of action not arising from the contacts**
 - “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” *Goodyear*, 154.
- **SPECIFIC JURISDICTION: Minimum Contacts (*International Shoe*, 90) plus cause of action arising from those contacts**
 - **Does the long-arm capture defendant (even in Federal Court: Rule 4(k)(1)(A))**
 - If long-arm extends to Constitution: “The California long-arm statute extends to the limits of the Constitution. Therefore the long-arm and constitutional inquiry become one.”
 - *International Shoe*, 90
 - **Minimum contacts** such that the suit does not offend **traditional notions of fair play and substantial justice**. 93.
 - **Reasonably expected to be haled into the forum**
 - *McGee*, 104: **ONE contact with substantial connection** can still comport to traditional notions of fair play and substantial justice
 - California had a statute specifically exercising jurisdiction over defendant insurance company
 - Defendant derived revenue directly from McGee in California
 - Defendant’s action created the contact (purchasing other insurance company)
 - *Cf. Hanson*, 105: Florida court cannot exercise jurisdiction over Delaware trust company with only contact = settlor in Florida
 - “[I]t is essential in each case that there be some act by which the defendant **PURPOSEFULLY AVAILS itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.**”
 - No statute for exercising jurisdiction
 - No revenue derived directly from Florida (money withdrawn from the trust in Delaware)
 - Hanson unilaterally moved to Florida, creating the trust company’s contact
 - *World-wide VW*, 109: A party’s unilateral action that creates a contact with the forum does not establish defendant’s minimum contacts
 - Foreseeability (**stream of commerce**) insufficient to establish minimum contacts
 - “Fair play and substantial justice” five-factor test:
 - Burden on defendant
 - Plaintiff’s interest in obtaining convenient and effective relief when that interest is not adequately protected by the plaintiff’s power to choose the forum
 - Forum State’s interest in adjudicating the dispute
 - Interstate judicial system’s interest in obtaining efficient resolution
 - Shared interest of the several States in furthering fundamental substantive social policies
 - *Keeton*, 118: the **plaintiff** does not need minimum contacts, only **defendant**.
 - *Kulko*, 119: Father allowed daughter to move to California with mother
 - Court invoked public policy reasons for declining jurisdiction: would impose an unreasonable burden on family relations
 - *Calder*, 120: **Calder Effects Test**: “Jurisdiction over [defendants] is therefore proper in California based on the ‘effects’ of their Florida conduct in California.” 120.
 - California was the focal point both of the story and the harm suffered.
 - The defendants had acted intentionally to produce an article for dissemination in California.
 - *Burger King*, 120: **Choice of Law Clause** very suggestive of purposeful availment but NOT dispositive
 - Other factors: long-term relationship, payments and notices to the forum, corporation exercising control over defendant from the forum, etc.
 - **Contact is not “random, fortuitous”** as it is in *Hanson*, 105.
 - *Asahi*, 124: Forum state had no interest in the suit, foreign relations also played a role, no fair play and substantial justice
 - O’Connor stream of commerce plus: act purposefully directed at forum state
 - Brennan stream of commerce: refers to the regular and anticipated flow of products (foreseeability is key)
 - *Nicastro*, 133: even stricter than O’Connor’s stream of commerce plus
 - Justice Kennedy rejects the idea of a national forum, must conduct a forum by forum analysis to determine minimum contacts
 - “The principal inquiry in cases of this sort is whether the defendant’s activities manifest an intention to submit to the power of a sovereign [...] the defendant must purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”

- **Internet and Other Technological Contacts**
 - *Zippo*, 161 and 164: Sliding scale of interactivity determining whether a defendant is subject to jurisdiction in the forum
- **Quasi In Rem Jurisdiction:** you must be able to conceptualize the property in the state to attach it. *Harris*, 166.
 - Property within the state PLUS minimum contacts analysis. *Shaffer*, 167.
 - Only useful if long-arm does not extend to the bounds of the Constitution
 - Cause of action does NOT need to arise out of the property (TA's said in an email that Miller said this – no case stating this principle)
 - **Limited Appearance:** Allows a defendant in an action quasi in rem to defend on the merits without submitting to the jurisdiction of the court in personam
- **Rule 4(k) contains special service rules**
- **CHALLENGING PERSONAL JURISDICTION:**
 - Special appearance
 - Collateral attack: do not appear, then collaterally attack default judgment
 - Cannot appear specially, lose, and then collaterally attack. *Baldwin*, 199.
 - If the jurisdiction issue has been litigated, cannot re-litigate (res judicata)

NOTICE AND OPPORTUNITY TO BE HEARD

- **Cannot be obtained by fraud. *Wyman*, 241 (2d Cir.) (collateral attack).**
- **Notice must be given with adequate time to respond: 14 days (Rule 6(c))**
 - Proceedings suspended for active-duty military members. 214.
- *Mullane*, 201: “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” 205.
 - “reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.” 205.
 - “within the limits of practicability notice must be such as is reasonably calculated to reach interested parties.” 207.
- **Constructive Notice:** only sufficient if actual notice cannot, by due diligence, be attained. *Mullane*, 201.
- *Greene*, 210: constructive notice insufficient if actual notice can be easily effected (such as by mail)
 - If you know where defendant lives, constructive notice (in this case posting on apartment doors) is insufficient because you can just send them notice in the mail
- *Menonite*, 209: constructive notice (even if defendant should know that a proceeding is likely initiated) is insufficient if actual notice can be easily effected (such as by mail)
- **Certified Mail:**
 - *Dusenbery*, 211: successful certified mail is sufficient even if defendant did not receive actual notice
 - Prisoner did not receive notice, but there was no reason for FBI to assume that the certified mail, which was signed for by prison mail officer, did not reach Dusenbery
 - **“heroic efforts”** not required
 - *Jones*, 211: certified mail which is returned to sender requires “additional reasonable steps” if it is practicable to do so – additional step could be as simple as regular mail
 - *Covey*, 213: if plaintiff reasonably should know that mail will not provide actual notice, mail is no longer sufficient
- **Giving Notice: Rule 4(c) Service [In General, By Whom], (d) Waiving Service, (e) Service in U.S., (f) Service Abroad, (g) Serving Incompetent/Minor, and (h) Serving Corporation, Partnership, or Association**
 - *Szukhent*, 222: service on an agent not personally known or selected by defendant is valid
 - The contract need not expressly state that the agent will forward notice. 223.
 - *Hellenic Challenger*, 227: service is sufficient when made upon an individual who stands in such a position as to render it fair, reasonable and just to **imply** the authority on his part to receive services (person does not need to be expressly permitted by the corporation to receive service).
 - *Fashion Page*, 229: a corporation can designate a person not normally considered adequate for service of process, and in such a case service on that person will be valid
 - **Service Abroad, 230: Hague Convention, etc.**
 - *Rio Properties* and *PCCare247 Inc.*, 231: Service via Email and Facebook allowed in some circumstances
 - Sewer Service, 233
- **Civil Immunity:** immune from civil service of process when entering the state to appear in a criminal or civil action
 - The purpose of the immunity is to ensure a fair trial by encouraging the active and willing participation of witnesses and parties.
 - If a party voluntarily enters the jurisdiction for non-judicial reasons, even if he is prevented from leaving the jurisdiction (such as by imprisonment), he cannot invoke civil immunity. *Duffield*, 236.
- **Seizure of Property: constitutionality of prehearing seizure – factors affecting legality. 248.**

- *Sniadach*, 244: Wage garnishment without hearing violates due process
 - Deprivation of property without prior notice and opportunity to be heard only justified in “extraordinary situations”
- *Fuentes*, 244: deprivation of property without a pre-seizure hearing is unconstitutional. 244.
 - Waiver of due process rights must be clear. 246.
 - Government seizure: (1) important government or public interest, (2) need for prompt action, (3) government official initiating seizure, as opposed to private individual. 247.
- *Mitchell*, 247: upheld statute allowing pre-hearing seizure where:
 - Seizing party’s interest in preventing waste of property minimized the risk of wrongful taking.
 - Writ required judicial authorization.
 - Immediate availability of a post-seizure hearing.
- **Mathews test**: originally for government seizure, but applicable to private seizure per *Doehr*. 249. Private inquiry, 251-52:
 - (1) Consideration of the private interest that will be affected by the prejudgment measure; (2) examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and
 - Government: (3) the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 249.
 - Private individual: (3) principal attention to the interest of the party seeking the prejudgment remedy, with due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections. 252.
- *Bennis*, 258: an owner’s interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was put to such use.

VENUE: § 1390-91.

- **§ 1391(b)**: A civil action may be brought in—
 - (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
 - (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 property that is the subject of the action is situated; or
 - (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which the defendant is subject to the court’s personal jurisdiction with respect to such action.
 - Catchall to be applied when venue cannot be achieved through (1) and (2)
 - § 1391(d): a **corporation’s** residence in a State with multiple districts is any district within which its contacts would be sufficient to subject it to personal jurisdiction, or if there is no such district, its residence is the district within which it has the most significant contacts
- Raises no constitutional issues
- Venue rules may differ for in-state and out-of-state defendants without violating equal protection. *Burlington*, 362.
- Venue may be proper even when the court may not be able to exercise personal jurisdiction. *Bates*, 368.
- **CHANGE OF VENUE**
 - **IF TRANSFEROR COURT IS A PROPER VENUE: § 1404: Change of venue**
 - **Transfer may only be to a district “where it might have been brought.” § 1404.**
 - Cannot transfer to a venue that the plaintiff did not have the right to bring the suit originally. *Hoffman*, 373.
 - **The law of the transferor forum applies even after transfer of the action. *Van Dusen*, 378.**
 - Circuits split as to whether in federal question cases, the transferee court must apply the transferor circuit’s federal law
 - Transferee forum must apply choice of law rule of transferor court. *Ferens*, 378.
 - Must apply **statute of limitations** that the transferor court would have applied.
 - **IF TRANSFEROR COURT IS AN IMPROPER VENUE: § 1406: Cure or waiver of defects**
 - The court will treat the action as if it had been filed initially in the transferee forum.
 - *Van Dusen* rule would not apply in § 1406 transfers (therefore the law of transferee forum would apply)
 - § 1406 authorizes the transfer of an action even if the transferor court lacks personal jurisdiction. *Goldlawr*, 380.
 - **MULTIDISTRICT LITIGATION: § 1407**
 - In multidistrict litigation in which common questions of fact are presented, actions may be transferred to any district for coordinated or consolidated pretrial proceedings.
 - In state law claims, the multidistrict judge must apply divergent state positions on a point of law

- Circuits are split as to whether the transferor court's law should apply in federal claims
 - Then-Judge Ginsburg stated: "because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory [] it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law." *Korean Airlines Disaster*, 382 (D.C. Cir.)
- Once pretrial proceedings are completed, the actions are remanded to their original courts for trial.
 - A transferee court cannot entertain a motion under § 1404(a) to order transfer of a remanded case back to itself once pretrial proceedings have ended. *Lexecon*, 381.
- "Where actions share factual questions, the Panel has long held that the presence of disparate legal theories is no reason to deny transfer." *MF Global Holdings*, 381.

• FORUM NON CONVENIENS

- Central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient.
- **First step is determining whether there exists an alternative forum. If the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the initial requirement may not be satisfied. *Piper*, 384, 389.**
 - Proof of an alternative adequate forum is not required. *Pahlavi*, 393 (N.Y. cert denied).
- ***Gilbert*, 383: Factors to be considered in deciding forum non conveniens:**
 - **Private interests:** relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.
 - **Public interests. *Gilbert*, 383, 384.**
 - "Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gilbert*, 383.
- "There is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Piper*, 384, 389.
 - Foreign plaintiff's choice deserves less deference. *Piper*, 384, 390.
 - Deference due a U.S. resident depends on her affiliation with the forum: "The greater the plaintiff's ties to the chosen forum, the more likely it is that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction." *Wiwa*, 394 (2d. Cir.).
 - But if facts show a significant relationship with an alternative forum, less deference accorded. *Carey*, 394 (finding it was not unreasonable to require a U.S. plaintiff to file suit in Germany, the country in which she had "sought out the relationship that resulted in the suit.")
- "Finding that trial in the plaintiff's chosen forum would be burdensome is sufficient to support dismissal on grounds of forum non conveniens." *Piper*, 384, 391.
- A court may dismiss on the basis of forum non conveniens without first establishing subject-matter or personal jurisdiction. *Sinochem*, 394.
 - May be an exception for a removal action, in which the court may have to determine subject-matter jurisdiction prior to dismissing on forum non grounds because if it lacks subject-matter, it is supposed to remand, whereas if it dismisses on forum non, the case is dismissed. "Thus, in a removal scenario, the sequencing of the decision may have practical consequences." *Marinduque*, 395 (9th Cir.).

ERIE

- **§ 1652: State laws as rules of decision (Rules of Decision Act):** The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.
- **§ 2072: Rules of procedure and evidence; power to prescribe (Rules Enabling Act):**
 - (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
 - The test must be whether the rule really regulates procedure. *Sibbach*, 431.
 - Whether it is rationally capable of classification as procedure. *Hanna*, 428.
 - (b) Such rules shall not **abridge, enlarge or modify** any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
 - "Congress's prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure." *Hanna*, 423, 424 (quoting *Murphree*).

- (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.
- **Erie, 400: RIGHT-DUTY: Pennsylvania law v. federal general common law**
 - Purely substantive
 - Twin aims: discourage forum shopping and avoid inequitable administration of the laws. *Hanna*, 423, 426.
- **York, 409: OUTCOME DETERMINATION: State statute of limitations v. laches or federal statute of limitations**
 - **Twin aims of Erie:**
 - Discouragement of forum shopping
 - And avoidance of inequitable administration of the laws. *Hanna*, 423, 426.
 - “[S]ince, federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.” 412.
 - “[I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.”
 - **Federal courts must apply state statutes of limitations.**
- *Ragan*, 416: State law determines when a statute of limitations is tolled. *See also Walker*, 434.
- *Woods*, 416: If the door to State court is closed, so must the door to federal court.
 - Corporation not registered to do business in Mississippi could not maintain suit in a Mississippi state court; therefore the corporation could not sue in a Mississippi federal court either
- *Cohen*, 417: Federal court must apply a statute requiring a plaintiff in a shareholder derivative suit to post a security-for-expenses bond, even though Rule 23.1 does not require one.
 - The derivative suit right created by the state also imposed liability for costs to the corporation if the plaintiff failed to make good on his claims. This new liability placed on the plaintiff was therefore not simply a procedural device, as it created a liability.
- **Byrd, 418: COUNTERVAILING CONSIDERATIONS: North Carolina judge-jury allocation of duties v. federal judge-jury allocation**
 - The outcome of litigation would be substantially the same in state and federal court whether the federal court used a jury or judge as fact-trier.
 - Countervailing considerations
 - “under the influence—if not the command—of the Seventh Amendment”. 420.
 - Desire for uniformity through the federal system
 - “Bound up with the definition of the rights and obligations of the parties.” 419 and 420.
 - South Carolina’s practice of submitting a factual issue to a judge weighed against the Seventh Amendment right to a trial by jury.
 - Because South Carolina’s requirement appeared to be merely a form and mode of enforcement, SCOTUS ruled that it was **not bound up with the definition of the rights and obligations of the parties.**
- **Hanna, 423: FEDERAL RULE OR STATUTE (as in Stewart, 440): Massachusetts service law v. Rule 4(e)(2)**
 - Ginsburg: accommodating—tends to read Rules narrowly to respect state laws. “Our decisions, however, caution us to ask, before undermining state legislation: Is this conflict really necessary?” *Shady Grove*, 456, 467.
 - Scalia: reads Rules plainly.
 - “Application of the *Hanna* analysis is premised on a ‘direct collision’ between the Federal Rule and the state law.” *Walker*, 434, 437.
 - The federal law and state law need not be perfectly coextensive and equally applicable. The requirement is for the federal law to be sufficiently broad to cover the point in dispute. *Stewart*, 440, 441n.14.
 - **Step-by-step: 423.**
 - (1) Is the scope of the Federal Rule sufficiently broad to control the issue before the Court? *Walker*, 434, 437.
 - “Federal Rules of Civil Procedure are [not] to be narrowly construed in order to avoid a ‘direct collision’ with state law. The Federal Rules should be given their plain meaning.” *Walker*, 434, 437n.9.
 - Although Ginsburg does read rules/statutes narrowly
 - (2) Does the federal rule exceed the congressional mandate of the Rules Enabling Act?
 - The test is **whether the rule really regulates procedure**—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. *Sibbach*, 431.
 - (3) Does the federal rule transgress constitutional bounds?

- If yes, no, no, the federal rule controls.
 - “Neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.” 427.
 - “power to regulate matters which, although falling within the uncertain area between substance and procedure, are **rationally capable of classification as either.**” 428.
 - Federal Rule 4[(e)(2)] (service of process) controls in the face of a contrary state statute.
- *Sibbach*, 431: “the test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” 431.
 - Federal Rule 35 mandating physical examination controlling over Illinois policy forbidding compulsory physical examinations.
- **Walker, 434:** State law determines when an action is commenced for the purpose of tolling the statute of limitations. *See also Ragan*, 416.
 - “Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations.” 437n.10.
 - **Rule 3 and Oklahoma statute could exist side by side.**
 - Since no direct conflict, policies behind *Erie* control. 438.
- *Burlington Northern*, 439: Rule 38 requiring discretionary determination of penalties in appeals controls over Alabama statute requiring 10% penalty in all affirmed appeals.
- **Stewart, 440:** *Hanna* analysis applies to federal statutes as well. § 1404(a) [transfer of venue] v. Alabama policy against forum-selection clauses
 - “If the district court determines that a federal statute covers the point in dispute, it proceeds to inquire whether the statute represents a valid exercise of Congress’ authority under the Constitution.” 442.
 - Skips the Rules Enabling Act step of *Hanna* analysis.
 - In this case, § 1404(a) (transfer of venue) is sufficiently broad to cover the issue, therefore it controls over Alabama’s policy of denying effect of forum-selection clauses.
- **Gasperini, 446:** N.Y. CPLR § 5501(c) v. *Erie*/*York*, Seventh Amendment Reexamination Clause, and Rule 59
 - Ginsburg (majority) accommodating opinion: reads Rule 59 narrowly so that the Rule and state law can coexist
 - Changes the *York* analysis to “**outcome affective.**” 449.
 - *York/Erie*: application of the federal “shocks the conscience” standard as opposed to New York’s “materially deviates” standard would result in forum shopping.
 - The standard of review acts as a damage cap.
 - *Byrd*: the countervailing consideration of the Seventh Amendment’s Reexamination Clause can be reconciled by maintaining the federal “abuse of discretion” standard for Courts of Appeals, and applying the state’s “materially deviates” standard in the District Courts.
 - Scalia (dissent): reads Rule 59 as sufficiently broad to cover the dispute in question. 455
 - *Hanna*: because Rule 59 covers the issue, and it is rationally capable of classification as procedure, it must control. 455.
 - Rule 59 uses “undeniably a federal standard.” 455.
 - *Byrd*: Application of the state standard “bears the potential to destroy the uniformity of federal practice and the integrity of the federal court system.” 454.
 - Parade of horrors: if we apply the “materially deviates” standard, would we have to apply a standard that requires modification of any verdict that deviates by any degree?
- **Shady Grove, 456:** N.Y. CPLR § 901(b) [no class actions for penalties] v. **Rule 23 [class action if requirements satisfied]**
 - Scalia (majority): Rule 23 is sufficiently broad to cover the issue, and it is valid. Therefore it must control.
 - *Hanna*: the Federal Rule is sufficiently broad to cover the issue in dispute such that there is a direct collision with state law. *Walker*, 434, 437; and *Stewart*, 440, 441n.14.
 - Rule 23: a class action may be maintained if certain criteria are met; CPLR § 901(b): precludes class actions to recover a “penalty.”
 - Congress can make exceptions to the Federal Rules; states cannot. 458.
 - Scalia reads the fact that Congress created exceptions to Rule 23 as evidence that Rule 23 **does** apply generally, such that if Congress has not carved out an exception, Rule 23 must control.
 - Scalia (four judges): Rule 23 really regulates procedure. *Sibbach*, 431. Therefore it is valid under § 2072(b).
 - Whether the state law is of substantive or procedural nature does not matter for *Hanna* analysis. What matters is whether the Federal Rule really regulates procedure. If it does, it controls. 461.
 - Ginsburg (four judges): suggests that the Court ask, “Is this conflict really necessary?” 467.

- “I would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies.
- *York/Erie*: applying Rule 23 would result in forum shopping. The state courthouse door is closed to this remedy, but the federal courthouse door, per the majority, is open.

ASCERTAINING STATE LAW

- **KLAXON RULE: *Klaxon*, 469: federal courts must apply the conflicts-of-law rules of the states in which they sit.** “The proper function of a federal court is to ascertain what the state law is, not what it ought to be.” 470.
- **CERTIFICATION:**
 - *Arizonans for Official English*, 476: appeared to express a preference for certification to reduce costs and ensure an “authoritative response” from the state.
 - Procedures for certification differ, and state courts have discretion to answer certifications, as in *Tunick*, 476.
- *Hague*, 108, 470: a state can apply its own substantive law in a case, so long as the state has significant contacts or a significant aggregation of contacts, creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair.
- **Federal courts as a state’s highest court: *Mason*, 471 (1st Cir.):** CJ Magruder interprets the “just another state court” notion to mean that a federal court is to act as a State Supreme Court. Therefore, he applies the law as he believes the Mississippi Supreme Court would, applying the *MacPherson* rule even though the only precedent on point (*Myers*) was contrary to it.
 - “It is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is.” 472.
- **When no state authority is directly on point:**
 - *McKenna*, 474 (3d Cir. cert denied): ascertaining state law requires “an examination of all relevant sources of that state’s law in order to isolate those factors that would inform its decision.”
 - *Factors Etc.*, 477 (2d Cir. cert denied): District Court, interpreting Tennessee law on an issue never addressed by Tennessee courts, but addressed by Sixth Circuit (encompassing Tennessee), bound by Sixth Circuit’s view of Tennessee law.
- **Abstention or staying proceedings: *Meredith*, 475:** “unless ‘exceptional circumstances’ are present, abstention ‘merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.’”
 - *Louisiana Power*, 475: “found such exceptional circumstance in the ‘special nature of eminent domain,’ allowing district court to stay proceedings to give the state tribunal an opportunity to ‘speak definitely’ about a disputed state statute.”
- **On appeal, Courts of Appeals conduct de novo review of state laws (as they do when questions of federal law are in dispute).** *Salve Regina*, 477.

FEDERAL COMMON LAW: As federal law, Supremacy Clause applies (trumping *Erie* doctrine).

- **Federal procedural common law: forum non conveniens, abstention, stare decisis, res judicata.** 490.
- **Federal substantive common law contexts: admiralty and maritime, cases implicating the international relations of the United States, and statutes that pertain to the fiscal interests of the United States.** 478.
- **Congress can displace federal judicial rulemaking power by establishing agencies:**
 - *American Elec.*, 489: establishment of EPA displaced federal judicial power to regulate carbon-dioxide emissions even though the EPA had yet to exercise its power.
 - EPA’s judgment does not escape judicial review. “Federal courts can review agency action (or a final rule declining to take action) to ensure compliance with the statute Congress enacted.” 490.
- **Congress can also revise federal common law by enacting statutes.**
- *Clearfield Trust*, 479: permits federal courts to develop federal law for “questions involving the rights of the United States arising under nationwide federal programs.” (as interpreted in *Kimbell Foods*, 481).
 - “In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.”
 - “The application of state law [] would subject the rights and duties of the United States to exceptional uncertainty.” 480.
- Federal courts often derive federal common law from rules that operate in the majority of the states.
- ***Kimbell Foods*, 481: Two-step analysis to determine whether a federal or state rule should apply:**
 - (1) does federal law control?
 - If so, this does not inevitably require resort to uniform federal rules.
 - (2) if yes, determining whether to adopt a federal rule or incorporate the state common law requires considerations of uniformity, whether application of state law would frustrate specific objectives of federal programs, and the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.

- *Parnell*, 482: if the United States is not a party to the litigation, the interest in a federal rule is dampened.
- **Boyle, 483**: established government contractor defense.
 - **Displacement of state law occurs where:**
 - (1) there exists a uniquely federal interest
 - (2) significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation.
 - Government contractor defense applied to non-military. *Silverstein*, 489 (N.J. App.).

FEDERAL LAW IN STATE COURTS

- **Dice, 491: Opposite Byrd**
 - Defenses to federal law claims must be determined by federal law, not state law. 492.
 - State courts adjudicating FELA claims must provide a trial by jury; distinguishable from *Byrd*:
 - FELA requires trial by jury, so the right to a jury is arguably bound up in the rights and obligations of the parties.
 - The right to a jury is more important than the right to a nonjury—the right to jury is constitutionally guaranteed.
 - The Supremacy Clause makes application of the federal standard more important than a state standard (as in *Byrd*).

PLEADING

- “The basic purpose of the Federal Rules is to administer justice through fair trials.” *Surowitz*, 643.
 - “If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.”
- **RULE 8**
 - **8(a) Pleading must contain:**
 - (1) basis for jurisdiction unless court already has jurisdiction
 - (2) short and plain statement of the claim showing that the pleader is entitled to relief
 - Allegations can be made in the alternative and inconsistent allegations are permitted. 8(d).
 - (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.
 - Rule 54(c): A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final **judgment should grant the relief to which each party is entitled**, even if the party has not demanded that relief in its pleadings.
 - Relief is generally not limited by the ad damnum clause.
 - Punitive damages must be pled. *Anheuser-Busch, Inc. v. John Labatt Ltd.*, 610 (court struck punitive damages award on the ground that plaintiff had not given sufficient notice of its intent to seek punitive damages; 8th Cir. affirmed; cert denied).
 - **8(b) Response must:**
 - (1) state defenses
 - Must state affirmative defenses. 8(c).
 - **Failure to raise an affirmative defense constitutes a waiver if allowing assertion would result in prejudice. *Ingraham*, 621 (failure to assert noneconomic damages cap defense).**
 - In *Taylor*, 625, defense failed to assert noneconomic damages cap, but all damages were noneconomic. The court allowed later assertion of the defense because plaintiff suffered no prejudice, as compared with *Ingraham*, where the Court argued plaintiff would have tried to categorize more damages as economic had the defense been raised timely.
 - Intended to prevent unfair surprise. *Ingraham*, 624.
 - Defenses can be made in the alternative and inconsistent defenses are permitted. 8(d).
 - (2) admit or deny allegations of complaint
 - Denial must respond to substance of allegation. 8(b)(2).
 - **Partial denial:** must deny specifically **or** generally deny except those specifically admitted. 8(b)(3).
 - **Must admit the part that is true. 8(b)(4).**
 - A party that lacks knowledge or information to form a belief of an allegation must so state. 8(b)(5).
 - Has the effect of a denial.
 - **If an allegation is not denied where a responsive pleading is required, it is admitted. 8(b)(6).**

- Exception is an allegation relating to amount of damages.
 - To avoid unintended admission, defendants often add an all-inclusive paragraph in their answers denying each and every averment of the complaint unless otherwise admitted. 619.
 - **Time permitted for a response** is generally 21 days. Waiver of service (Rule 4(d)) extends the time period. 610.
- **SHORT AND PLAIN STATEMENT SHOWING ENTITLEMENT TO RELIEF: 8(a)(2)**
 - **NOTICE PLEADING: *Dioguardi*, 559, *Conley*, 562, and *Swierkiewicz*, 565:**
 - “All the rules require is ‘a short and plain statement of the claim’ that will give the defendant **fair notice** of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley*, 563.
 - “The purpose of pleading is to facilitate a proper decision on the merits.” 563.
 - “Under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case... [Plaintiff’s] complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner’s claims.” *Swierkiewicz*, 567.
 - “Rule 8(a) establishes a pleading standard **without regard to whether a claim will succeed on the merits.**” 568.
 - “A complaint should not be dismissed for failure to state a claim unless it **appears beyond doubt** that the plaintiff can prove **no set of facts** in support of his claim which would entitle him to relief.” *Conley* (expressly “retired” in *Twombly*, 573).
 - **PLAUSIBLE PLEADING: *Twombly*, 569 and *Iqbal*, 579:**
 - **Courts are divided as to whether the heightened pleading standard of *Twombly* and *Iqbal* apply to defenses.** 626.
 - Rule 8 “governs the pleading standard ‘in all civil actions and proceedings in the United States district courts.’” *Iqbal*, 582 (expressly extending *Twombly* standard to all civil actions, not just antitrust).
 - **“Bare assertions” are “conclusory and not entitled to be assumed true.” *Iqbal*, 580.**
 - **“Rule 8 demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, (edited out).**
 - “A plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do... Factual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 570 (**Antitrust claim against major telephone companies**).
 - “Stating a claim requires... enough fact to raise a reasonable expectation that discovery will reveal evidence [supporting the claim].” *Twombly*, 571.
 - A pleading requires “enough facts to state a claim to relief that is **plausible** on its face.” *Twombly*, 574.
 - “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Iqbal*, 579 (**discrimination suit for detention after 9/11**).
 - The court is not required “to accept as true a **legal conclusion** couched as a factual allegation.” *Iqbal*, 580 (quoting *Twombly*).
 - The more a court can classify as a conclusion, the less it is bound to accept as true.
 - A court also need not accept as true an allegation that is sufficiently fantastic to defy reality as we know it. *Iqbal*, 586 (examples of little green men, or a trip to Pluto).
 - Determining plausibility is “a context-specific task that requires the reviewing court to draw on its **judicial experience and common sense.**” *Iqbal*, 580.
 - The court must also consider alternative innocent explanations. *Iqbal*, 581.
 - Expresses a concern that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases [to avoid discovery expense].” *Twombly*, 572.
 - ***Erickson*, 591: decided after *Twombly* but before *Iqbal* quotes with approval *Twombly* quoting the *Conley* pleading standard. The court states, “Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the claim is and the grounds on which it rests.’” *Bell Atlantic v. Twombly*’ ” (pro se).**
 - **Specific facts** are not necessary. **Plausibility** is.
 - The purpose is still **fair notice**.
 - **Rejects careful case-management approach. *Iqbal*, 582.**
- **PLEADING SPECIAL MATTERS**
 - **FRAUD AND MISTAKE: Rule 9(b):** In alleging 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.
 - Fraud and mistake must be pled using a heightened pleading standard. “Rule 9 merely excuses a party from pleading [malice, intent, etc.] under an elevated pleading standard.” *Iqbal*, 584.

- **STRONG INFERENCE: *Tellabs*, 603: “strong inference” required by Private Securities Litigation Reform Act (PSLRA)**
 - The court must consider competing inferences. To qualify as strong, an plaintiff’s inference “must be cogent and at least as compelling as any opposing inference.” 603.
 - The plaintiff’s factual allegations are still accepted as true under a 12(b)(6). 603.
- **SPECIAL DAMAGES: Rule 9(g):** If an item of special damage is claimed, it must be specifically stated.
 - Special damages are those that are not “an inevitable or necessary result of the injuries averred.” *Ziervogel*, 606, 607 (requiring pleading special damages to recover for increased blood pressure and shoulder injury as a result of motor vehicle accident).
 - “The condition must be pleaded or the evidence must establish the condition as being the inevitable or necessary result of injuries which are particularly set out in the petition.” 607.
 - Case interpreted Missouri’s rule, which copied verbatim Rule 9(g).
 - The consequence of failing to plead special damages is being barred from proving them at trial.
- **DERIVATIVE ACTIONS: RULE 23.1**
 - Adopted to discourage strike suits. *Surowitz*, 643.
 - **Plaintiff need not understand the substance of the complaint. *Surowitz*, 641 (overruling dismissal where plaintiff knew she was not receiving dividends, but did not understand the legal relationships or comprehend any of the business transactions described in the complaint).**
- **RULE 12:**
 - (b) **to dismiss** for: (1) subject-matter jurisdiction; (2) personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim; (7) failure to join a party under Rule 19.
 - (c) **judgment on the pleadings**
 - (d) a 12(b)(6) or 12(c) that introduces outside matter is treated as a motion for summary judgment (Rule 56).
 - (e) **more definite statement**
 - Generally disfavored and granted only when the pleading is so unintelligible as to make the opposing party unable to respond.
 - (f) **to strike:** an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter
 - Court may act sua sponte.
- **AMENDMENTS**
 - The court should **freely give** leave when justice so requires. 15(a)(2).
 - **RELATION BACK: 15(c)**
 - **Rule 15 “mandates relation back once the Rule’s requirements are satisfied; it does not leave the decision whether to grant relation back to the district court’s equitable discretion.” *Krupski*, 636.**
 - **15(c)(1)(C):** relation back for amending complaint to name the correct defendant allowed if:
 - (i) defendant will not suffer prejudice defending on the merits.
 - (ii) defendant knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party’s identity.
 - **Applies to defendant’s knowledge, not plaintiff’s. *Krupski*, 635** (allowing relation back for plaintiff’s complaint when she knew of the proper party’s identity [*Costa Crociere*], but mistakenly sued *Costa Cruise*).
 - Prior to the addition of Rule 15(c)(1)(A) (allowing relation back when the law that provides the statute of limitations allowed it), SCOTUS held that Rule 15(c)(1)(C) controlled over a more liberal state rule. *Schiavone*, 639.
- **RULE 11: REPRESENTATIONS TO THE COURT; SANCTIONS**
 - (a) Signature.
 - (b) Representations to the court: By presenting papers to the court, an attorney or unrepresented party certifies that:
 - (1) they are not for any improper purpose.
 - (2) legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.
 - (3) factual contentions have evidentiary support.
 - “An attorney is entitled to rely on his or her client’s statements as to factual claims when those statements are objectively reasonable.” *Hadges*, 648 (2d. Cir.)(quoting *Calloway*, 652 (2d. Cir.)).
 - (4) denials of factual allegations are warranted on the evidence.
 - (c) Sanctions
 - (2) motion for sanctions must be served to the opposing party and cannot be presented to the court for 21 days until after service, giving opposing party a safe harbor during which he may withdraw or fix the challenged conduct.
 - (3) court may sua sponte order to show cause why conduct has not violated Rule 11(b).
 - (4) sanctions must be limited to what suffices to deter repetition.
 - (5) court must not impose a monetary sanction:

- (A) against a represented party for violating Rule 11(b)(2) [legal contentions]; or
 - (B) on its own unless it issued show-cause order before voluntary dismissal or settlement.
- (d) **Rule 11 does not apply to Discovery.**
- **RULE 23.1: DERIVATIVE ACTIONS**

JOINDER

- **RULE 82: JURISDICTION AND VENUE ARE UNAFFECTED BY FEDERAL RULES**
- **Transaction & Occurrence:** “logical relationship” test between the counterclaim and the claim. *Moore v. New York Cotton Exchange*, 669 (“The refusal to furnish the quotations is **one of the links in the chain** which constitutes the transaction upon which plaintiff bases its cause of action”).
 - Same witnesses, evidence, legal structure
 - Would res judicata bar the claim?
 - Would the same evidence support the claim and the counterclaim?
 - Is the counterclaim a link in the chain upon which plaintiff’s claim is based?
- **RULE 18: JOINDER OF CLAIMS**
 - Total free fire zone to join any and all claims against a single defendant (don’t need T&O).
 - Permissive, not compulsory
 - If there are fears that some claims will prejudice others, the judge can separate the suit into different trials post-discovery under Rule 42.
- **RULE 19: REQUIRED JOINDER OF PARTIES**
 - Necessary: must be joined if possible, but non-joinder (no SMJx or PJx) will not result in dismissal of the suit
 - Indispensable: party is so important that non-joinder will result in dismissal of suit
 - (a)(1): parties required if feasible (can get SMJx and PJx)
 - (A) absence prevents complete relief to persons inside the case already.
 - (B) unfair to persons outside the case to not join the party.
 - Paradigm: multiple claimants to a single fund; disposition of the fund will impact each claimant’s interest in the fund, and so each claimant must be joined if feasible.
 - (b) when joinder is infeasible (no SMJx or PJx):
 - Court does not have to dismiss for lack of an indispensable party
 - Has discretion to take measures (protective provisions in the judgment, shaping relief, etc.) in order to do partial justice
 - System decides, “we’re going to do the best we can.”
 - Factors to consider whether to move forward without an indispensable party:
 - Will the judgment be prejudicial to that party or other parties?
 - Can court take measures to lessen that prejudice? 19(b)(2).
 - Would judgment without the indispensable party be adequate?
 - Would the plaintiff have an adequate remedy if the action were dismissed for nonjoinder?
- **RULE 20: PERMISSIVE JOINDER OF PARTIES**
 - (a) Joinable parties
 - (1/2)(A): same T&O or series of transactions and occurrences
 - (1/2)(B): common question of law or fact
 - Applies to plaintiffs (1) and defendants (2) alike.
 - Rule 42 allows judges to consolidate like things if the parties don’t themselves.
- **RULE 13: COUNTERCLAIMS AND CROSSCLAIMS**
 - (a) **COMPULSORY COUNTERCLAIMS**
 - (1) Must be asserted (or lost) if:
 - (A) arises from same T&O that is the subject-matter of the opposing party’s claim.
 - (B) Won’t require adding a party over which the court cannot get SMJx or PJx
 - (b) **PERMISSIVE COUNTERCLAIMS**
 - ANY claim that is not compulsory (don’t need same T&O)
 - **REMEMBER claims must still satisfy SMJx and PJx; if not same T&O, § 1367 supplemental jurisdiction would be improper**
 - (g) **CROSSCLAIM:** a claim on the same side of the “v” that is not a counterclaim
 - No crossclaims are compulsory—don’t want them to overwhelm the plaintiff’s original case (tail wagging the dog).
 - Must arise from the same T&O as the original action.
- **RULE 14: THIRD-PARTY PRACTICE**
 - Rule 14(a) claims must satisfy all of the things you need for a lawsuit, such as PJx, notice and opportunity to be heard, venue, etc.

- The defendant, third-party plaintiff, may bring in a third-party defendant for indemnification—the claim needs more than T&O; it must involve transfer of liability. 14(a)(1).
 - Original plaintiff can then assert any T&O claims against the third-party defendant **unless** SMJx is via diversity AND the parties are nondiverse, in which case third-party defendant must fire first. *Kroger*, 326 (codified in § 1367(b)); *See also Diversity Supplemental Jurisdiction*.

CLASS ACTION: RULE 23

- Contractual waiver via **arbitration clause** (with waiver of class arbitration) enforceable. *Concepcion*, 823. Such clauses are enforceable even where proving individual claims is financially unviable. *See Italian Colors*.
- (a) Prerequisites: A class action requires:
 - (1) Numerosity: > 40 (met), < 25 (not met), 25-40 (depends on the practicability of joinder)
 - (2) Commonality of questions of law or fact
 - **“Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’”** *Dukes*, 755, 758 (quoting *Falcon*, rejecting class certification for female Wal-Mart employees claiming Title VII injuries).
 - Common contention “must be of such a nature that it is capable of classwide resolution—which means that the determination of its truth or falsity will resolve an issue that is **central** to the validity of each one of the claims in one stroke.” *Dukes*, 758.
 - “What matters to class certification... is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.” *Dukes*, 758 (quotation from *Nagareda*).
 - *Dukes* seemingly requires something akin to the “predominance” of (b)(3). 755.
 - (3) Typicality: claims of the representative party need to be typical of those of the class
 - (4) Adequate representation: representative parties will fairly and adequately protect the interests of the class
 - Class actions have preclusive effect on class members without giving them their “day in court,” so those class members must have adequate representation.
 - Class cannot have subclasses with competing interests. *Amchem*, 770 (denying class certification for asbestos claim where currently injured plaintiffs interested in generous immediate payments and exposure-only plaintiffs interested in ensuring an ample, inflation-protected fund for the future).
 - “Certification is proper only if ‘the trial court is satisfied, after a **rigorous analysis**, that the prerequisites of Rule 23(a) have been satisfied.” *Dukes*, 758 (quoting *Falcon*).
- (b) A class action **may be maintained** if Rule 23(a) is satisfied and if (state law cannot carve out exceptions, per *Shady Grove*, 456; *See Erie*):
 - (1) prosecuting separate actions by or against individual class members would create risk of:
 - (A) inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class; or
 - (B) adjudications with respect to individual class members that would be dispositive of the interests of other members (for example limited common fund: those who sued first would get money at non-parties’ expense).
 - (2) the class seeks injunctive relief
 - (3) **SEEKING DAMAGES**: questions of law or fact common to all class members **predominate** over any questions affecting only individual members, and that a class action is **superior** to other available methods for fairly and efficiently adjudicating the controversy. Matters pertinent to these findings include:
 - (A) class members’ interests in individually controlling their own actions;
 - (B) extent and nature of any litigation already begun by or against class members;
 - (C) desirability of concentrating the litigation of the claims in the particular forum; and
 - (D) likely difficulties in managing a class action.
 - For example if the class is enormous; example *Castano*, involving a class of all persons addicted to cigarettes who tried to quit.
 - **Predominance**: (a)(2) on steroids: predominance of commonality.
 - For mass tort cases, a single event will have predominance (plane crash) as compared with a dispersed tort action, which will not (Agent Orange, discrimination)
 - Agent Orange claims will require questions of exposure; temperature on days of exposure; did plaintiff wash off AO after exposure; etc.
- (c)(2) **NOTICE**
 - (A) For (b)(1) and (b)(2) classes, the court may direct **appropriate notice** to the class.
 - (B) For (b)(3) classes, the court must direct to class members the **best notice that is practicable under the circumstances**

- *Shutts* used the *Mullane*, “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,” language. 800.
 - The codification of *Shutts* in 23(c)(2)(B) is **slightly different**.
 - **NOTICE MUST INCLUDE:**
 - Nature of the action; definition of the class; class claims, issues, or defenses. (i)-(iii).
 - (iv) class member may enter an appearance through an attorney if desired.
 - (v) OPT OUT
 - (vi) time and manner to opt out
 - (vii) binding effect of a class judgment on members (res judicata)
 - **DIVERSITY CLASS ACTIONS:**
 - Choice-of-law: “[The forum state] must have a ‘significant contact or significant aggregation of contacts’ to the claims asserted by **each member of the plaintiff class**, contacts ‘creating state interests’ in order to ensure that the choice of [its] law is not arbitrary or unfair.” *Shutts*, 803.
 - **Courts must apply the law that would have applied to each class member’s claim had it been brought individually.** “[The forum] ‘may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.’ ” *Shutts*, 803 (requiring application of Oklahoma and Texas law in addition to Kansas law).
 - The court can only apply its own law if there are state interests.
 - In essence, choice-of-law analysis applies to each individual claim in the class.
 - **At the pleading state, must show that the law in each state is predominantly the same, otherwise each state must be litigated separately.**
 - Personal jurisdiction
 - *Shutts*, 795: non-present plaintiffs do not need minimum contacts with the forum state for the state to exercise personal jurisdiction over their claims.
 - They only require adequacy of representation, notice, opportunity to opt out. *See* Rule 23(c)(2).
 - Might need personal jurisdiction over a **defendant class**, but so rare that we don’t know.
 - **§ 1332(d): CLASS ACTION FAIRNESS ACT (CAFA):** Federalizes nearly all significant class actions
 - Any class action in which the aggregate claim is > \$5M and in which any member of the class has diversity of citizenship from the defendant (**minimal diversity**) is federalized.
 - If such a class action is brought in a state court, it is **removable**. “The district courts shall have original jurisdiction...” § 1332(d)(2).
 - Class must have at least 100 members. § 1332(d)(5)(B).
 - “Local controversy” exception:
 - Defendant is a citizen of the state in which the action was brought.
 - The class has > 2/3 members of the state in which the action was brought. § 1332(d)(4)(A)(i)(I).
 - If the class has > 1/3 and < 2/3 members from the same state, a court may decline to exercise jurisdiction. § 1332(d)(3).
 - Also captures mass actions (mass joinder, not a class, just join everyone).

DISCOVERY: RULES 26-37

- Code discovery was restrictive (*Kelly*, 838): to be discoverable, matter needed to be (1) relevant to an issue in the **action** as opposed to relevant to an issue in the pleading; (2) admissible as evidence; and (3) related to an issue which the party seeking discovery had the burden of persuasion at trial.
- *Pre-action discovery is virtually unknown; Texas allows it.
- Purpose of Federal Rules discovery: **EQUAL ACCESS TO ALL RELEVANT DATA.**
 - Equal access makes summary judgment (Rule 56) more meaningful.
- **RULE 26(b)(1): SCOPE OF DISCOVERY**
 - First tier: “Parties may obtain discovery regarding any **nonprivileged matter** that is relevant to any party’s claim or defense.”
 - *Erie* question: **privileged** under federal or state standard?
 - Relevant to ANY party’s claim or defense: the party seeking discovery **need not** have the burden of persuasion.
 - **Limited to CLAIM or DEFENSE.**
 - Second tier: “For **good cause**, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information **need not be admissible at the trial** if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”
 - **ANY relevant matter; NOT limited to claim or defense.**
- **Rule 26(b)(3): attorney work product**

- *Hickman*, 886: **establishes qualified immunity** for attorney work product to protect the adversarial system and role of attorneys (as advocates, not witnesses) in it. Approximated in 26(b)(3).
 - The immunity can be lifted in cases which requesting party “shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Rule 26(b)(3)(A)(ii).
 - For example, if the witness is dead.
 - If the immunity is lifted, “the court **must protect** against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning litigation.” Rule 26(b)(3)(B).
 - Protects litigation strategy for the sake of the adversarial system.
- **DISCOVERY DEVICES**
 - **Depositions: Rules 27-29, 32**
 - Oral: Rule 30: gold standard, but expensive
 - Written questions: Rule 31: cheap, but lack spontaneity; lose the ability to make deviations from the script based on the answers
 - Rarely used
 - **Interrogatories: Rule 33:** extremely cheap; essentially shifts the work burden on the interrogated party
 - May only be used against parties; cannot propound interrogatories against nominal parties
 - 25-question limit
 - Useful for getting baseline data to plan deposition strategy
 - **Documents: Rule 34:** the “search for the smoking gun”
 - Can only request documents
 - **Physical and mental examinations: Rule 35:** valid exercise of procedure under the Rules Enabling Act § 2072. *Sibbach*, 431.
 - Extended to include **defendants** by *Schlagenhauf*, 871.
 - “The chain of events leading to an ultimate determination on the merits begins with the injury of the plaintiff, an involuntary act on his part. Seeking court redress is just one step in this chain. If the plaintiff is prevented or deterred from this redress, the loss is thereby forced on him to the same extent as if the defendant were prevented or deterred from defending against the action.” 873.
 - Must make a motion showing that the physical condition is in controversy and show **good cause**, which presumably just means you cannot get it any other way.
 - **Requests for admission: Rule 36:** often used to establish very intermediate or baseline facts (“admit the accident took place on December 19,” “admit that it was snowing,” etc.).
 - **Failure to cooperate in discovery: Rule 37**
 - (a) Motion for an Order Compelling Disclosure or Discovery
 - (b) Failure to Comply With a Court Order
 - (2) Sanctions
 - (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination. *See Hickman*, 886 (court adjudged attorney in contempt and ordered him imprisoned until he complied; motion to compel discovery was overruled in the case).