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**LL.M. 2020**

***FULL OUTLINE FOR:***

**Intro to Civ Pro (LL.M.)**

**MILLER – FALL 2019**

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Background to Civil Procedure

OVERVIEW OF CIVIL LITIGATION

## Adversary system – policies behind this include:

#### Truer decision results from a contest directed by interested parties

* + Party should bear the major burden of time and energy required to resolve a dispute
  + Setting up sides makes it easier to type of yes or no decision necessary to resolve disputes
  + Human instinct to battle is better satisfied by means of settling disputes that are very much in the parties’ hands
* Policies of civil procedure system – differ according to the types of CP rules
  + Participation principle – provides parties with adequate legal representation
  + Accuracy principle – maximize changes of achieving the legally correct outcome
  + Conflict resolution – mechanism for the impartial judgment of personal disputes and voicing of opinions
  + Deterrence factors – restraining or influencing behavior, including by deterring improper behavior by imposing costs
* In resolving legal disputes, courts apply substantive and procedural law
  + Line separating them is not always clear
    - EG: statute of limitations may appear procedural but will eventually affect parties’ substantive rights if it prohibits a claim
  + So, be careful of rigidly applying the distinction
* Features of US civil litigation:
  + No loser pay rules

#### Each party bears the full costs of their attorney fees

##### Calculated by time, fixed, task-based or on contingency

* + - * BUT some “fee-shifting” statutes which require losing party to pay costs in certain kinds of cases (e.g. antitrust and civil rights)
  + No need to hold money in escrow
  + Small filing fees (federal is $350)
* Preliminary considerations
  + Whether legal relief is available
  + Probability of winning
  + Whether what could be won is worth the burden of litigating

CIVIL LITIGATION PROCESS

* Complaint must be filed to initiate civil action [**Rule 3**] – short and plain statement which sets out the jurisdiction, facts and request for relief [**Rule 8**]
  + Purposes of pleadings:
    - Identify legal and factual issues – prevents time wastage
    - Establish what each party proposes to argue at trial, to allow the other fairness in preparing to respond (natural justice)
      * Extent of information required varies amongst jurisdictions – some may be very limited and only give general notice of a party’s arguments (this is called a Notice Pleading) – notice pleadings can lead to frivolous claims and large discovery, while specific pleadings may restrict the parties’ cases
  + Attorney presenting the originating document must certify that it is not for an improper purpose, not frivolous and facts have evidentiary support or will likely have support after discovery [**Rule 11**]
  + If breached, the court may issue fines, costs orders, refer to disciplinary committees and dismiss complaints
  + NOTE: States have specific and different rules for pleadings – reflect each State’s view of the purpose of pleadings
* D files an Answer OR Motion to Dismiss [**R 12**]
  + Motions to dismiss are covered by **Rule 12(b)** – e.g. lack of jurisdiction, improper venue, failure to state a claim or cause of action (AKA demurrer)
    - Difficult to get granted
    - When considering motions, court does not consider pleadings or evidence and assume facts alleged by the P to be true (i.e. just determine whether P may obtain legal relief)
    - Often cured by power of the court to order that parties amend their pleadings – this may be used to rectify issues
  + Answers must include all available defenses and respond to each allegation in Complaint by admitting, denying or saying don’t know enough to respond [**R 8**]
    - May also assert counterclaims (must relate to the same occurrence being sued upon) and affirmative defenses (must be plead to be applicable in the case)
  + D may assert cross-claim – which arises from facts relating to P’s case, and is between same parties [**R 13(g)**]
  + D may assert counter-claim – need not arise from facts relating to P’s case, and can be between different parties [**R 13(a-b)**]
  + If D fails to respond them court may enter default judgment as per **R 55(a)**
* P files a Reply
  + Very rare – often close pleadings at the Answer stage
* Discovery
  + Allowed under **R 26(b)(1)**
    - Enables parties to prepare for trail more extensively than in pleadings
      * Makes summary judgment possible and ensure it is done fairly
  + Primarily through interrogatories, requests for production of documents [**R 34**], depositions, inspections of a site [**R 34**], physical examinations [**R 35**] and written fact statements which become evidence at trial [**R 36**]
    - Most common are depositions [**R 30-31**] – witnesses are questioned by lawyers from each side through direct examination and cross examination, then their evidence is transcribed
      * Used to ascertain other witnesses and impeach a witness (i.e. attack credibility) at trial if they have a different account
      * May be used instead of live testimony if a witness cannot appear at trial
    - Interrogatories are written [**R 33**] – only addressed to one party to the suit, then answered by that party usually with aid of lawyers
      * Often useful where evidence cannot be given immediately but needs to be obtained (e.g. documents)
  + May be limited by privilege, relevance and burden on the producing party
* Court dismissal
  + Court may involuntarily dismiss an action if P fails to timely pursue it or fails to comply with trial rules or court orders [**R 41**]
* Summary judgment
  + Usually after discovery
  + Court must find there are no genuine issues of material fact and therefore moving party is entitled to judgment as a matter of law [**R 56(c)**]
  + May be supported by evidence, but MUST be opposed by evidence – evidence viewed most favorably to party opposing the motion
    - Where there are no factual issues / disputes
    - Judges will not make any credibility assessments of witnesses
  + P must move 20 days after being commencing action or after being served with motion for summary judgment by D [**R 56**]
  + D can move at any time [**R 56**]
* Pretrial conference [**R 16**]
  + Judge may order the attorneys representing the parties to attend a pre-trial conference
  + Used to manage and expedite the trial
* Trial
  + Either party files a note of issue, then given a case number and placed on trial calendar
  + Jury selection
    - In most civil and criminal cases [**7th Amendment; most state constitutions**]
    - If neither party wishes a jury or if no party makes timely demand for a jury, then proceeds by a bench trial [**R 38**]
      * Court retains discretion to order jury trial [**R 39**]
    - Impaneled – questioned by the judge and sometimes lawyers about any biases, often through a voir dire [**R 47**]
    - Federal rules require minimum 6 and maximum 12 jurors [**R 48**]
  + Lawyers make opening statements to the jury, then call their witnesses
    - Each can direct examine, cross examine and sometimes re-direct and re-cross examine
      * Must object to evidentiary issues, otherwise waived [**R 103**]
    - D may call for a directed verdict (AKA judgment as a matter of law) after P closes their evidence, on the ground P has not established a *prima facie* case [**R 50**]
      * Judge will consider evidence most favorably to the nonmoving party
    - Each side may adduce additional evidence after the other’s case is closed – but must be directed to meeting a new matter presented by that side
      * Judges have strict oversight of this to avoid delay
    - P or D may call for a directed verdict after the other rests
      * Must prove that there is no basis for reasonable jury to find for the other party with respect to an issue
      * Used to prevent it going to the jury for a decision – often for limited issues
* Jury deliberations
  + Judge and lawyers confer about instructions to the jury
    - Judge will summarize the facts and issues, tell the jury about the law to be applied on each issue, give information about determining witnesses’ credibility and state who has the burden of persuasion on each issue of fact
      * Burden in civil is preponderance of evidence and criminal is BRD
      * ALSO for serious civil findings, require “clear and convincing evidence” (similar to Briginshaw standard) and for minor civil findings, require “substantial evidence” (similar to having a reasonable basis for decision)
      * Judges may comment on the evidence, but this is very rare and in some states prohibited
    - If party does not request a particular instruction nor object to an instruction, then extremely unlikely to appeal that it was erroneous
  + Lawyers make their final statements to the jury
* Verdict
  + Three types
    - General – most common – permits jurors to determine the facts and apply the law according to those facts
    - General verdict with interrogatories – as above, but jurors also answer several key questions that test their understanding of the issues
    - Special – all factual issues are submitted to the jury and then the judge applies the law to the jury’s answers and determines which party prevails
  + States vary as to unanimous and non-unanimous verdicts
* Post-trial motions
  + Judgment notwithstanding the verdict (AKA renewed motion for JMOL) [**R 50**]
    - P has not established a *prima facie* case
  + New trial [**R 59**]
    - Jury’s verdict is against clear weight of the evidence (common), judge erred in admitting or excluding evidence, the charges were defective, attorneys or jurors have been guilty of misconduct or damages awarded excessive
* Judgment
  + Final determination of the lawsuit
  + Given by default when D does not appear, after the granting of a demurrer, granting a motion to dismiss or for summary judgement, upon the jury’s verdict, or based on settlement agreement
* Remedies
  + Three categories
    - Declaratory – encompasses a court’s defining the rights and duties of parties in a particular legal context – limited by statute and uncommon
    - Specific – an order directing conduct (e.g. injunction) – only given if damages are inadequate
    - Compensatory – requires D to pay P a sum of money to compensate them
* Enforcement
  + Writ of execution can be issued by court to an officer (usually sheriff) to seize property, sell it publicly and use proceeds to satisfy judgment debt
  + Injunctions will apply *in personam*, and if not adhered to, can lead to contempt proceedings (which may lead to fines / imprisonment)
* Costs
  + Often determined by statute
  + Generally out of pocket expenses are included in the judgment in favor of the winner (often clerk’s fees and witness costs)
  + Attorneys’ fees are not usually recoverable as costs
* Appeals [**R 54**]
  + Appellate court receives the case record which contains the pleadings, a portion of the transcript, orders and rulings
  + Parties submit written briefs and will also give oral arguments
  + Court can affirm, reverse or modify the judgment
    - If reversal, then will either remand the case to the lower court for a new trial or other proceedings, or order a new judgment be entered
  + Generally, only judgments are appealed, but can also be important interlocutory decisions
  + NOTE: distinction between reviewability and appealability – everything is reviewable but only certain things are appealable (prevents undue delay and resource expenditure)
  + NOTE: final judgments cannot be challenged in other proceedings (res judicata – ***Allen v McCurry***) – also related concepts of claim preclusion and issue preclusion / collateral estoppel / issue estoppel

THE RULES

* Power to draft civil procedure rules are conferred on Congress but Congress can delegate these powers to the relevant Courts in their jurisdiction to draft the rules
  + May also be a mixture of Congress and court drafted rules – depends on jurisdiction
  + E.g. Federally, the **Rules Enabling Act** vests power in SCOTUS to promulgate rules of procedure and combine law and equity into one single action – SCOTUS then appointed Advisory Committee who proposed rules in 1937 – since revised
* Hallmark is trans-substantivity – apply to all causes of civil action, regardless of type or size
* Main statute is the Federal Rules of Civil Procedure
* NOTE: Federal rules never apply to State courts – each statute judiciary has its own exclusive rulemaking power (some with Congress)
  + No state rules completely track Federal rules, although some come close – interesting that the divergence is growing between them
  + BUT Federal Courts applying State law can apply Federal rules of CP

FEDERAL COURTS

* Courts are the ultimate arbiters of the law [***Marbury v Madison***] - can override federal and state law if it is unconstitutional
* Federal jurisdiction is all matters arising under Constitution or Federal statutes
  + Often disputes involving treaties, foreign persons or states, disputes between states and diversity disputes (companies or persons of different states)
* Hierarchy
  + US Supreme Court
    - Discretionary docket
    - Hears appeals after certiorari is granted by a 4 judge-bench
    - Original jurisdiction over some cases
  + Federal Circuit Courts
    - 9 regional circuits + DC circuit (mainly appeals from Admin tribunals) + Federal circuit (mainly Patents)
      * Most important circuits are the 2nd, 9th and DC
    - Only appellate jurisdiction (auto appeal right from District)
    - Sits in 3 judge panels
    - Does not hear new evidence
  + Federal District Courts
    - 94 districts in 50 states
    - Original jurisdiction over most federal matters
    - No appellate jurisdiction
    - Includes special subject matter courts
* Supreme Court
  + 4 judges sit on cert. hearings
  + Cert. often granted where:
    - Split of opinion amongst circuits
    - Important and unclear constitutional / federal issue
  + Receives 7-8k petitions per year
  + Hears oral argument in only 1% of cases
* Important recent decisions
  + ***Obergefell v Hodges*** – same sex marriage is legal
  + ***Rucho v Common Cause*** – partisan gerrymandering is a matter outside jurisdiction of the federal judiciary
  + ***Dep of Commence v NY*** – adding a citizenship question to 2020 census was inconsistent with administrative record, and there was no reason for Commerce Secretary to include it
  + ***Knick v Township of Scott*** – about questions of when a court can overrule prior decisions (i.e. stare decisis) – disagreement between judges about the appropriate test – a 4-5 majority changed the test, must be demonstrably
* Upcoming decisions
  + ***Altitude Express v Zarda*** – whether Civil Rights Act prevents discrimination on the basis of sexual orientation (i.e. does “sex” include “sexual orientation”)

AUTHORITY OF PRECEDENT

* State
  + Trial – bound by intermediate court in its district/region; court of last resort in the state; federal statutory and constitutional decisions of SCOTUS
  + Intermediate – same as for trial court (NOT bound by intermediates in different districts/regions)
  + Last resort – its previous decisions; federal statutory and constitutional decisions of SCOTUS
* Federal
  + Trial – its previous decisions; court of appeals in its circuit; SCOTUS’ previous decisions
  + Court of Appeals – its previous decisions; SCOTUS’ previous decisions
  + SCOTUS – its own previous decisions
* Federal applying state law
  + Applies the law that it thinks the state’s court of last resort would apply
* **NOTE**: State courts are never bound by Federal court decisions on State law
  + Except US Supreme Court on constitutional matters
  + Note that the parties to the relevant dispute will still be bound by the decision

ROLE OF PUBLIC POLICY

* Ensure you differentiate between PP and legislative intent
* Courts sometimes defer to the legislature on matters of PP
* If courts perceive PP behind precedent has changed, they can depart from it and create new CL aligned with current PP [***State v Valentine***]
* NOTE: equity may also come into play to prevent an unjust outcome (courts will ‘balance the equities’) but this is very rare, and arguments based on law/PP are much stronger

ADMIN AGENCIES

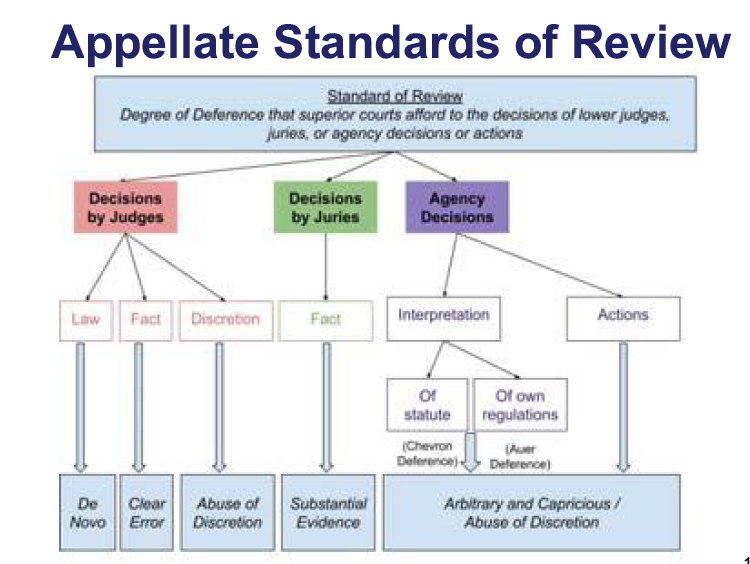
* Key role in US legal system – often called the 4th branch of government
  + Legislative role = delegated rule/regulation making authority (which is governed by the **Administrative Procedure Act of 1946**)
  + Judicial role = apply, interpret and enforce compliance with rules
  + Executive role = investigate, execute and enforce rules
* Publish notices of final regulations in Federal Register (Gazette) and become binding
  + THEN form part of the **Code of Federal Regulations**
* 3 key legal principles:
  + REG. CREATION = courts must defer to agencies’ regulations if Congress explicitly gave agencies’ power to create Regs and the Regs are no arbitrary, capricious or manifestly contrary to statute [***Chevron v Nat Resources Def Council***]
  + REG. INTERPRETATION = courts must defer to agencies’ interpretation of statues unless unreasonable [***Chevron***]
  + AUER = courts must follow agencies’ interpretation of regulations unless the interpretation is plainly erroneous
    - Likely to be overruled in the future, it has already been limited to certain circumstances in the case of ***Kisor v WIlkie***
* Sharp division between current SC justices about the value and constitutionality of the administrative state (see ***Gundy v US***)

STATUTORY INTERPRETATION

* State courts have statutes providing general rules of interpretation for their statutes
* Process of interpretation:
  + Determine plain meaning of the words
    - If language of statute is plain and unambiguous it must be applied according to its terms [***Sebelius v Cloer***]
    - Often use the words, statutory scheme and context to interpret plain meaning (rarely use dictionary)
    - If meaning is determined by using this rule, then court will stop there [***Circuit City Stores***]
  + Apply canons of construction
    - Rules of thumb to help courts determine meaning [***Conn National Bank v*** ***Germain***]
    - Court will determine which canon is appropriate for it to apply – they are like principles of statutory interpretation – some may contradict
    - 3 types
      * Textual = used for interpreting words
      * Extrinsic source = direct court to an authoritative source of meaning (e.g. agency interpretation, legislative history and CL rules)
      * Substantive policy = focus on public policies drawn from CON, statutes and CL
    - TEXTUAL
      * Terms connected by a disjunctive word must be given separate meanings, unless the context dictates otherwise [***Reiter v Sonotone Corp***]
      * Words shall be given their ordinary, contemporary common meaning unless otherwise specifically defined [***Perrin v US***]
      * Shall imposes a mandatory duty, may is permissive [***Weinstein v Albright***]
      * Words shall be read so that their meaning is consistent with other provisions of the same or other statutes [***US v Jones***]
      * *Ejusdem generis* – general words following specifically listed words include only those items that are similar in nature to the listed words
      * Mentioning one or more items of class implies the exclusion of other items [***Barnhart v Peabody Coal***]
      * Meaning of the word phrase may be known from the words immediately surrounding it [***Guiterrez v Ada***]
    - EXTRINSIC
      * Legislative history should be reviewed to interpret the meaning of an ambiguous statue
        + This is the most commonly used
      * Statutes that affect prior CL rules should be narrowly construed
      * Where legislature uses language from another statute, the meeting in the source statute is the meaning of the borrowing statute
      * Presumed that Congress did not create a law that interferes with other nations’ sovereign authority
    - SUBSTANTIVE POLICY
      * Federal law does not preempt matters traditionally within state governance
      * Ambiguous criminal statute is interpreted in favor of D
      * Statute is interpreted to avoid unconstitutional results
      * Statutes covering same subject matter should be similarly interpreted
* Theories of statutory interpretation
  + Textualism
    - Embrace the plain meaning of the statute
    - Use textual canons often
    - Courts should not supplant the role of Congress, if they do, the law will reflect what they think, not what Congress thought
  + Intentionalism
    - Determine the collective intent of the enacting legislature
    - Clarify intent by using external sources
    - Look to intent over the plain meaning of the words
  + Purposivism
    - Paramount consideration is the purpose of the statute
    - Statute must be interpreted according to the purpose (does not really consider legislative intent)
  + Dynamic statutory interpretation
    - Interpret statute in light of what current political, legal or social norms require it to mean
    - Not favored by courts
* NOTE: leading book is Eskridge on Statutory Interpretation

APPELLATE STANDARDS OF REVIEW

* Standard is different for factual and legal questions
* Overview
  + FACT = must be *clear error*
  + LAW = de novo review
  + MIXED (law and fact) = also de novo
  + DISCRETION = abuse of judge’s discretion
* Factual
  + Must not be set aside unless clearly erroneous and reviewing court must give due regard to trial court’s opportunity to judge witnesses’ credibility [**FCR 52(a)**]
  + Must be a definite and firm conviction that court committed a mistake [***US v US Gypsum***]
  + Courts are extremely hesitant to overturn factual findings
* Legal
  + De novo standard – no deference at all
  + Same for mixed legal and factual (justified because it attempts to unify precedent and stabilize legal principles)
* Discretionary decisions
  + Must prove there was an abuse of discretion
    - Presumes expertise on the trial judge’s part
    - Similar to clearly erroneous – some judges see it as identical
    - Rarely and in extraordinary circumstances will appellate court overrule a discretionary decision [***Freeman v Package Mach Co***]
  + Often for motions, evidence rulings or general conduct issues
* Admin decisions
  + For agency actions, findings or conclusions, must prove they are arbitrary, capricious an abuse of discretion or otherwise not in accordance with law [**Admin Procedure Act 5 USC § 706**]
  + For agency formal hearings, decisions must be unsupported by substantial evidence
* NOTE: rules of state courts are now requiring a statement about the applicable standard of appellate review in pleadings
* NOTE: standard of review is also used to refer to the legal standard required to prove a motion (e.g. standard of reviewing a motion to dismiss requires the court to take facts as true *and* standard for motion for summary judgment requires proof that there is no genuine issue as to any material facts) or to review constitutionality of state statutes or government action (e.g. heightened scrutiny, strict scrutiny, or rational basis)
  + Think of these as standard used *to review* rather than *of review*
  + Better to refer to these as legal standards

****

MOTIONS

* Motion is a procedural device through which a litigant asks court for an order
  + Often used as part of a strategy – can look sloppy to judge if your motion practice is poor
  + Criticized for promoting delay and being expensive, especially if multiple motions
* Must be made in writing, except where court is recording a hearing verbatim or when the trial is taking place
  + Must state reasons supporting the request and the relief claimed
  + Must be in proper form determined by State rules
  + May support the motion with a brief or legal memo, proposed order document and affidavits
  + Motions in Feds require litigant or their attorney’s signature – sanctions for failing to
  + Must serve the motion, along with any additional materials on the opposing party

Checklist for Initiating a Claim

* 1. **Court must have personal jurisdiction**
     + Two types = either general or personal
     + NOTE: like venue, essentially a protection for D, who may waive it
  2. **Court must have subject matter jurisdiction**
     + Four types = either Federal Q, diversity, supplemental or removal
     + NOTE: cannot be waived
  3. **Due process requirements must be satisfied – right of Ds (notice and opportunity to defend)**
     + Ds will always look for defects in notice – may provide a basis for motion to dismiss
  4. **Service of process must occur** 
     + Must be completed in the method stipulated under the rules
     + **FCR 4** – extensive rule
  5. **Proper Venue**
     + Question of whether in the correct court within the jurisdiction
     + Each State and the Federal system have venue rules for their courts
       - Rules establish different characteristics for determining venue
     + NOTE: like PJ, essentially a protection for D, who may waive it
  6. **Can D remove the case from a State court to a Federal court?**
     + Unilateral right on the D – might seek to do this for more favorable law
       - Balances the right of the P to elect jurisdiction / venue
         * Enables them to veto the P’s election to have it in state court
  7. **Have any of the above been waived?**
     + Subject matter jurisdiction cannot be waived [**FR 12(h)(3); *Capron***]
     + Personal jurisdiction / service of process / venue may be waived
       - Each may be waived at different times

Jurisdiction

* Two types of jurisdiction – both are required:
  + Subject matter – relates to court’s power to hear a particular type of dispute
    - Feds have all matters arising under Federal laws and CON, States have all else
      * EG: NY state courts have jurisdiction over all cases in law and in equity
    - Feds also have diversity jurisdiction
      * Requires diversity of citizenship and amount in controversy exceeding $75k
    - Feds also have concurrent jurisdiction over all state matters, unless the enacting Congress has made jurisdiction over certain subject matter exclusive to their State
  + Personal – relates to court’s power over a particular defendant or item of property
    - Either over the person or over property in the jurisdiction
* Must distinguish between general and specific
  + General = gives court power to hear any litigation properly in the forum
    - IE. D has sufficient contacts with forum to warrant asserting jurisdiction over it for all matters
  + Specific = gives court limited power, related to D’s activities in the forum
    - IE. D does not have sufficient contacts to warrant general jurisdiction, but conducts activities within the forum which warrant jurisdiction for matters arising out of, or related to, those activities
  + NOTE: if no general then look to specific (i.e. it is the more specific)
* Three traditionally recognized types of personal jurisdiction

#### *In personam* – court’s power over a person (D)

#### Most important form of jurisdiction

#### Judgment = personal obligation on D and P is entitled to full faith and credit in other states (i.e. P may enforce against D’s property in any state)

* + *In rem* – court’s power to adjudicate rights of all persons in the world with respect to a particular item of property located in the jurisdiction
    - Judgment relating to that property is binding against all possible interest holders
  + *Quasi in rem* – court’s power to adjudicate a person’s rights with respect to a particular item of property located in the jurisdiction
    - Arises where P cannot establish personal jurisdiction, so P attaches property D has in jurisdiction
    - So judgment can only be satisfied out of the property, and does NOT personally bind D [***Shaffer***]
    - Two types (important for tests below):
      * Where cause of action is directly related to the attached property (e.g. competing interests in a property)
      * Where cause of action is unrelated to attached property (e.g. commercial contract dispute and attach D’s boat in the jurisdiction)

#### NOTE: these categories are blurred, and now largely irrelevant because of the current state of US law – no need to classify within a certain category

Personal Jurisdiction (PJ)

DUE PROCESS REQUIREMENTS FOR PJ

## DP doctrine arises from 5th (State DP) and 14th (Federal DP) Amendments and requires [***Mullane***]:

#### Proof of general jurisdiction OR specific jurisdiction OR jurisdiction based on property

##### NOTE: do general first, because if satisfied, do not need to go through specific

#### D to be given appropriate notice of the action and opportunity to be heard (see Notice below)

## If do not satisfy due process requirements, any resulting judgment/order is invalid [***Mullane***]

# 1 – GENERAL PERSONAL JURISDICTION

## Fed courts exercise State courts’ jurisdiction under **FRCP 4(k)(1)(A)**

PERSONS

## For persons, general may be established by:

1. Domicile

##### True, fixed and permanent home to which person has intention of returning whenever absent [***Mas***] (see notes under “Determining citizenship” heading below)

1. Service/Presence – AKA “tag jurisdiction”

##### Physical presence in the jurisdiction at time of service [***Pennoyer***] even if it is transient presence for a purpose unrelated to the cause of action [***Burnham***]

##### EXCEPT where service occurs by force or fraud [***Copas***] or when immunity is granted

1. Waiver/Consent

##### Express

##### By contract – choice of forum clause [***Carnival Cruise***]

##### Clauses are fine unless flagrantly unfair/unreasonable [***Carnival Cruises***]

##### By agent – where D appoints an agent to accept service [***Kane***]

##### Implied

##### Where a D is conducting an activity which leads them to impliedly consent to jurisdiction (often through statute which appoints an agent) [***Hess***]

CORPORATIONS

## For corporations, general may be established by:

1. Domicile

##### Principal place of business AND state of incorporation [***Daimler***]

##### PPOB = nerve center – where decisions are made [***Hertz***]

##### Where corporation’s activities are so continuous and systematic that it can fairly be regarded as at home in that forum [***Goodyear; Daimler; Helicopteros***]

##### Focus on intentional acts of the corporation (DO NOT use stream of commerce)

##### Selling a product is not enough [***Helicopteros***]

##### Temporary home can be sufficient to establish GJ [***Perkins***]

1. Waiver/Consent
   1. Same as above

2 – SPECIFIC PERSONAL JURISDICTION

* Specific may be established by:

1. FRCP 4(k)(1)(A) (need to use long arms) and *International Shoe* test (two steps below)
2. Waiver/Consent (as above)

# STEP 1: 4(k)(1)(A) and Long Arm Statutes

1. **FRCP 4(k)(1)(A)** authorizes Fed Courts to assert PJ of the State in which it sits – PJ of State is established through the relevant State’s long arm statute (see below and p.239 of TB)
2. Then two key questions:
   1. Does the long arm statute cover the claim in question (statutory construction q)?
      * If no, then no jurisdiction
      * If yes, then go to 2
   2. Is the statute constitutional?
      * Apply the ***International Shoe*** test to determine constitutionality

## NOTE: for long arms which are extremely broad (e.g. statute covers all cases that are permissible under the CON) then go straight to step 2

COMMENTS IN RELATION TO STEP 1

#### NO jurisdiction if state long arm does not provide for it

#### No Federal long arm statute – but subject matter statutes often include clauses which assume national jurisdiction (i.e. D may be sued, regardless of their domicile)

#### There are few Federal statutes without a jurisdiction provision in them – if no such provision then look to **FRCP 4**

#### IS led States to expand their jurisdictional reach through long arm and single act statutes

#### Long arm = extend jurisdiction for general activity within a state

#### Single act = extend jurisdiction for certain acts in a State AND acts outside a state which impact the state

# STEP 2: *International Shoe* test

* D must have minimum contacts with forum so that maintaining the suit (i.e. holding there is PJ) does not offend traditional notions of fair play and substantial justice [***International Shoe***]
  + Two elements: minimum contacts and FPSJ
  + Test comes from Due Process requirement in CON – therefore applies to all assertions of PJ

###### ESTABLISHING MINIMUM CONTACTS

* + 1. D must purposefully avail itself of benefits / protections of forum’s laws [***Hanson; Asahi;*** *Kennedy plurality and Breyer concurrence in* ***Nicastro***]
       - Easily established if systematic and continuous activities of D in forum state [***International Shoe; Gray; Burger King***]
       - Sending a child to live in forum state is not purposefully availing yourself of the law of that state [***Kulko***]
       - Choice of law clause alone is not sufficient to establish MC, but is evidence of contacts – must consider other circumstances [***Burger King***]
       - Casual presence of a corporate agent or their conduct of single / isolated activities in a State are generally not enough [***International Shoe***]
         * BUT single contact with substantial connection to State can be enough for minimum contacts [***McGee***]
       - Stream of commerce cases – make it difficult to assess purposeful availment

#### Consumer’s unilateral act does not establish PA [***WWVW; Hanson***]

#### Controlling inquiry [*O’Connor plurality in* ***Asahi;*** *Kennedy plurality in* ***Nicastro***] = knowing product will flow into forum through stream of commerce not enough, need to prove something else directed / aimed at forum state to show PA, such as:

#### D advertised in the forum

#### D conducting business in forum – e.g. advertising, employees, property, offices

#### D designed the product specifically for forum

#### D established channels for advice to consumers in forum

#### D sold a substantial volume of product in forum state

#### BUT Breyer/Alito in ***Nicastro*** said avoid should avoid rigid rule that purposeful availment requires D to have targeted forum

#### NOTE: clear thread between O’Connor, Kennedy and Breyer/Alito is that stream of commerce alone is insufficient – must be additional factor showing targeting of the forum to establish PA

* + - * CONTRARY TEST for stream of commerce:
        + Lower threshold = stream of commerce plus also look at volume of sales [*Stevens concurrence in* ***Asahi***]
        + Even lower threshold [*Brennan concurrence in* ***Asahi;*** *Ginsburg dissent in* ***Nicastro***] = only need stream of commerce and nothing else
    1. Foreseeability
       - D must know or **reasonably anticipate** that their activities in forum may make them accountable in forum’s courts [***WWV v Woodson***]
         * Possibility of consumer bringing product into forum through stream of commerce is insufficient to prove foreseeability [***WWV v Woodson***]
         * HOWEVER debate in ***Asahi*** about foreseeability

*O’Connor concurrence* = stream of commerce insufficient to prove foreseeability

*Brennan concurrence* = as stream of commerce shows regular and anticipated flow of products, it proves foreseeability

* + 1. FOR DEFAMATION ONLY – use ***Calder*** effects test
       - D can reasonably anticipate a harm within a forum resulting from their actions (i.e. where actions will have an effect within the forum) [***Calder***]

###### PROVING FAIR PLAY AND SUBSTANTIAL JUSTICE

* + Considerations [***Asahi***]:
    - Relatedness of the claim to D’s contacts within the forum
      * Specific in-state activity must be related to cause of action
    - Inconveniences or burden on D which would result from trial away from its home or principal place of business [***International Shoe; Burger King***]
      * Must be so gravely and difficult that party is unfairly put at a severe disadvantage compared to their opponent [***Burger King***]
      * Hard to prove
    - Forum state’s interest in the case
    - P’s interest in obtaining effective relief
    - Federalist system’s interests in efficiently resolving controversies [***Gray***]
      * EG: location of witnesses, the substantive law that will be applied (i.e. place of injury will be relevant) and other evidence
    - States’ shared interest in furthering social policies
      * EG: state maintaining its highway systems
  + NOTE: always a factual assessment for the court

3 – JURISDICTION BASED ON PROPERTY

BACKGROUND

* Most states have long-arm statutes providing for *in rem* jurisdiction for certain property matters

## CL test ONLY used when state long-arm does not extend to the constitutional limit

#### Because if it did, you would just sue *in personam* and judgment can be enforced against the person *and* property (i.e. enforce full value of the judgment)

REQUIREMENTS

#### For *in rem* and *quasi in rem* where attached property relates to cause of action, the presence of property in forum is constitutionally sufficient to establish j [***Shaffer***]

#### EXCEPT where property brought into state by fraud or force

#### For *quasi in rem* where attached property does not relate to the cause of action, apply *International Shoe*[***Shaffer***]

#### Presence of property in jurisdiction is not decisive, but relevant [***Shaffer***]

## NOTE: property that can be attached includes intangibles, for example:

#### Any debt, as debt is located wherever debtor is located [***Balk*** – Harris owed Balk, Balk owed Epstein, Epstein sued Harris, attaching debt that Harris owed balk and then recovered]

##### IE: any creditor can collect money from their debtor’s debtor

#### Bank accounts [***Pennington*** – state garnished a bank account of non-resident to pay alimony]

## NOTE: property may also be relevant to the minimum contacts analysis

PJ AND FEDERAL RULES

* **FRCP 1** states that rules govern all civil actions and proceedings
  + Also states that FRCP shall be construed and administered to secure the just, speedy and inexpensive determination of every action
* **FRCP 3** requires all civil actions to be commenced by filing Complaint with Court

#### Short and plain statement which sets out the jurisdiction, facts and request for relief [**8**]

* **FRCP 4** – relates to summonses

#### (a) Deals with content of summons

#### (b) Issuance to the court clerk and defendant(s)

#### (c) Service of summons

#### (d) Waiver of service

#### (e) Service within USA

#### (f) Service of individual overseas

#### (g) Service of minor or incompetent

#### (h) Service of corporation, partnership or association

#### (i) Service of USA and its agencies etc.

#### (j) Service of foreign, state of local government

#### (l) Proving service (through affidavit)

#### (m) Time limits for service (90 days after filing complaint)

#### (o) Asserting jurisdiction over property and assets

* **FRCP 7** – defines the types of pleadings and motions that are allowed
* **FRCP 8** – defines the required content for different types of pleadings

## **FRCP 5** – relates to service and filing of pleadings and other papers

* **FRCP 4.1** – relates to method for serving Processes other than summonses and subpoenas
* **FRCP 9** – special matters and issues relating to pleadings and how they should be dealt with
* **FRCP 10** – form of pleadings (captions, names, paragraphs, exhibits etc.)
* **FRCP 11** – signing pleadings and motions; making representations to court; and sanctions

# DEEMED PERSONAL JURISDICTION UNDER FRCP

* **FRCP 4(k)** provides that each Fed court must analyze PJ as if it were a court of the state in which it is located (i.e. Fed court analysis will be identical to State Court – see below)

#### EXCEPT if there is another special federal statute

* [In State J] Serving D with a summons or filing a waiver of service establishes PJ, if *either* [**4(k)(1)**]:
  + D is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located [**4(k)(1)(a)**]
    - i.e. MUST be subject to state jurisdiction
    - Often through long arm statute
  + D is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued [**4(k)(1)(b)**]
    - Operates to bring people under jurisdiction in cases involving major urban centers where there are multiple states within 100-mile radius of that center
  + Authorized by a federal statute [**4(k)(1)(c)**]
    - Subject matter statutes which include clauses assuming national jurisdiction (i.e. D may be sued, regardless of their domicile)

## [Out of State J] For a claim that arises under federal law, serving a summons or filing a waiver of service establishes PJ over D if both [**4(k)(2)**]:

* + D is not subject to jurisdiction in any state's courts of general jurisdiction [**4(k)(2)(a)**]; *and*
  + Exercising jurisdiction is consistent with the United States Constitution and laws [**4(k)(2)(b)**].

CASES ON JURISDICTION

###### Pennoyer v Neff

* FACTS
  + Mitchell (attorney) sued Neff for legal fees that Neff allegedly owed to him
  + Neff's land was sold at a sheriff's sale to satisfy the judgment, and Pennoyer bought it
  + Neff brought an action to recover possession of that land once he found out about sale
    - Argued sale was improper because State Court that issued the judgment against him did not have personal jurisdiction
      * At time of judgment, he was not a resident of Oregon
      * Also did not receive notice, as notice was attempted through a publication in an Oregon newspaper to inform him of the action against him, under the Code of Oregon
  + The case turned upon the validity of the original judgment in favor of Mitchell
  + Action was brought in the Oregon Federal Circuit (collateral attack)
* HELD
  + NO PJ over Neff because non-resident and not properly served
    - BUT could have been if the property had been attached before start of litigation, as would have been quasi in rem jurisdiction
  + Persons within a state and domiciliaries of a state are subject to its jurisdiction
  + States have the authority to prescribe the conditions upon which proceedings affecting them may be commenced and carried on within its territory
  + State court cannot exercise personal jurisdiction against a non-resident who was not personally served with process in the state
    - I.e. Publication of process or of notice within the state, in which a tribunal sits, is unavailing in proceedings *in personam* against Ds in another state

###### Hess v Pawloski (1927)

* FACTS
  + Hess, a Pennsylvania resident driving in Massachusetts had an accident with Pawloski in Mass
  + Hess then left Penn
  + Mass had a statute which allowed service of a resident of another state to be affected by way of service on the registrar who would then provide notice to the resident of the other state
* HELD
  + PJ over Hess
  + When driving on public road, Hess impliedly consented to the appointment of registrar of roads as their agent for service, therefore service/notice was proper and due process clause was respected
    - Did not matter whether consent was express or implied
  + Notice sent outside the state to a nonresident is unavailing to give jurisdiction for a monetary action
  + Statues are valid insofar as they relate to nonresidents exercising a privilege or right within a forum

###### International Shoe v Washington (1945)

* FACTS
  + Shoe manufacturer, a Delaware corporation based in Missouri
    - No office in W, nor any contracts for the sale and purchase of merchandise there, no stock stored there nor deliveries of goods there
    - BUT employed 11-13 salesmen under direct supervision and control of Missouri sales managers, who resided in W, mainly worked in W by exhibiting samples and soliciting sales for IS, and compensated commissions based on sales
  + IS was supposed to pay contributions to an unemployment compensation fund administered by Washington state, but didn’t
  + IS received a notice of assessment to pay unpaid contributions, which was served upon a sale solicitor employed by IS in Washington, at a copy was sent to its head office in Missouri
  + IS sought to set aside the notice, but ultimately failed in the Supreme Court, and was required to pay the unpaid contributions
  + Then challenged jurisdiction of the relevant court
    - Argued its presence in W was not sufficient to justify jurisdiction
* HELD

#### PJ over IS – having 14 representatives in WA sufficient presence (minimum contact) in forum for WA to exercise PJ over WA’s suit of International Shoe company for unpaid contributions

* + - IS’s activities were continuous and systematic, and neither irregular nor casual, and resulted in a large volume of interstate business
    - Not undue to subject IC to the State’s jurisdiction – because by exercising the privilege of conducting activities within W and enjoying the benefits and protection of the State’s laws, it must also be subject to the liabilities of those laws such as responding to suits
  + Rule – if D is not present within jurisdiction, then must have certain minimum contact with it so that maintaining the suit does not offend traditional notions of fair play and substantial justice
* NOTE: prior to International Shoe, *in personam* jurisdiction was based on theories of presence (in or doing business in a jurisdiction) and consent (express or implied)
  + Complicated by emergence of multi state and foreign corporations – theories did not apply well and so test changed

###### McGee v International Life Insurance (1957)

* FACTS
  + Franklin, a resident of California, purchased a life insurance policy from IL, a Texan company
  + Franklin’s mother, McGee was the beneficiary
  + She sent proof of his death to IL but it refused to pay
  + McGee obtained a judgment against the insurer in a California state court and attempted to enforce it through an action in the Texas state courts
  + Texas courts refused to enforce the California judgment, holding that the judgment was void under the Fourteenth Amendment
* HELD
  + PJ – McGee had minimum contacts with TX
    - There was no violation of 14th amendment if Texan courts enforced judgment
    - Sufficient for purposes of the due process clause that McGee’s suit was based on a contract which had substantial connection with California
    - Contract was delivered in California, the premiums were mailed from there, and the insured was a resident of California when he died

###### Gray v American Radiator (1961)

* FACTS
  + Gray brought a personal injury suit against several defendants, including AR and a foreign corporation called Titan, alleging that a water heater exploded and injured her
  + It charged that Titan had negligently constructed the safety valve, and that Gray’s injuries were suffered as a proximate result thereof
  + Summons was issued and was duly served on Titan’s registered agent in Cleveland, Ohio.
  + Titan filed a motion to quash the summons, stating that it did no business in Illinois and that it sold the completed valves to a co-defendant outside Illinois
* HELD
  + PJ – Titan had sufficient contacts with Illinois to provide jurisdiction because it elected to sell its product for ultimate use in that state
  + If a corporation does business of a sufficiently substantial nature in a jurisdiction then there are sufficient contacts
  + Court also considered convenience, as the law of Illinois will govern the substantive questions because tort was committed there, and witnesses on the issues of injury, damages and other elements relating to the occurrence are most likely to be found here

###### Worldwide Volkswagen v Woodson (1980)

* FACTS
  + New York residents purchased a car from a retailer in New York
  + Involved in a crash with another vehicle in Oklahoma
  + Purchasers brought a products-liability action in Oklahoma against the car retailer
  + Retailer claimed a violation of its due process rights and questioned Oklahoma court’s jurisdiction over them because they were incorporated in NYS and had no contacts with Okl.
* HELD
  + No PJ – retailer had no contacts, ties, or relations with Oklahoma and no reasonable expectations
  + Appropriate test is for D to:
    - First, purposefully avail by having a reasonable expectation that products will enter the forum (stream of commerce)
    - Second, have reasonable expectation of being hauled before forum state’s courts
  + Foreseeability is not a sufficient basis for jurisdiction, but is still relevant in the above test
* DISSENT (Brennan J)
  + Policy of International Shoe is outdated – no longer need to focus on impact on Ds, but look to minimum contact between the parties, contested transaction *and* forum State

###### Shaffer v Heitner (1977)

* FACTS
  + Heitner was domiciled in Delaware
  + Greyhound was an Arizonan company, which performed activities in Oregon
  + H sued GH and 28 of its directors and officers for breaching their duties to the company
  + In Delaware, H sought sequestration of individual Ds property and was so ordered
  + Ds sought to have that set aside as they said they did not have sufficient contacts with Del.

## HELD

#### NO PJ - Delaware’s long arm did not extend to directors/officers – even so, they had nothing to do with DW and no reason to expect to be hauled before courts (i.e. no purposeful avail.)

#### Must apply IS test

#### Presence of property in jurisdiction is not decisive, but relevant

#### Property was not the subject matter of the action, so it was not sufficient to establish any jurisdiction – therefore no minimum contacts

###### Kulko v Superior Court (1978)

* FACTS
  + Father sent a child to live with the mother in California
  + California had no personal j
  + Argued that sending child invoked the benefit of California law, and so did sending mandatory child support checks there
* HELD
  + No PJ – court held neither were sufficient for minimum contacts

###### Calder v Jones (1984)

* FACTS
  + Slander/libel suit in CA against National Enquirer
  + Reporter traveled to CA to interview others for the story - expressly aimed
  + Jurisdiction challenged
* HELD
  + PJ – National Enquirer foresaw the effect of publication
  + If D reasonably anticipates a certain harm within a forum because of their actions, then jurisdiction in that forum

###### Burger King v Rudzewicz (1985)

* FACTS
  + Diversity suit in Florida Fed Court brought by BK, a Florida company, against Michigan-based franchisees for breach of franchise agreement
  + Parties had choice of law provision in contract
* HELD
  + PJ over franchisees
  + Choice of law provision alone is insufficient to confer jurisdiction
  + Must also look at other circumstances – when that clause is combined with 20-year relationship between Michigan franchisee R and BK in Florida, it is sufficient to show deliberate affiliation with Florida and reasonable foreseeability of litigation there
  + No other factors were sufficient to make it unfair or unreasonable to force R to submit to the jurisdiction – reinforced that facts must always be weighed in determining whether conferring personal jurisdiction would comport with FPSJ

###### Asahi v Superior Court (1987)

* FACTS
  + Zurcher (CA Resident) injured by faulty motorcycle – alleged tire, tube and sealant were defective
  + The valve for the tube was made in Japan by Asahi, and then tube was made by Cheung Shin in China
  + Chinese company implead Japanese company for indemnification
  + There was also a CA plaintiff who settled (jurisdiction obvious)
* HELD
  + No PJ over Japanese and Chinese – not in FPSJ so no PJ
  + For MC, the court held:
    - O’Connor plurality
      * Central test to prove MC = whether there has been an action of the D purposefully directed towards the forum, which is sufficient to establish a substantial connection between D and that forum
        + Placement of product into stream of commerce, without more, is not an act of D purposefully directed towards forum
      * I.e. need to place in stream of commerce plus additional factor – there was no additional factor, as product just flowed from Asahi to CA
    - Brennan concurrence
      * Placing into the stream of commerce constitutes sufficient minimum contacts w/o another factor – being aware that product would flow to and be sold in forum is sufficient to make a lawsuit unsurprising – Asahi did this and should be subject to jurisdiction (but not in FPSJ, so no j)
      * Similar to Ginsburg – very broad
    - Stevens concurrence
      * Not in FPSJ to confer jurisdiction, and this is dispositive
      * No need to consider minimum contacts nor stream of commerce
  + FPSJ test should include an inquiry into various factors (see above) and these factors deprived jurisdiction over Asahi
    - Zurcher’s interest was vindicated in the settlement
    - D’s burden of defending in a foreign legal system outweigh CA’s interest in finishing the case there

###### Burnham v Superior Court (1990)

* FACTS

#### Married couple in NJ separated

#### Wife moved to CA with children, husband stayed in NJ

#### Husband often went to CA for business and to see children

#### In CA, he was served with process in a divorce action filed by his wife

#### He moved to quash j, on basis that his visits did not establish minimum contacts

## HELD

#### PJ – established by physical presence alone – such presence constitutes minimum contacts, even if in CA on unrelated matters and for a short time

###### McIntyre v Nicastro (2011)

* FACTS
  + M was a British Company that manufactured scrap metal machines
  + N was seriously injured while using a machine in New Jersey, that was manufactured by M
  + Scrap metal machine sold by British Company ends up in NJ
  + British company targeted US market through trade shows and other advertising, but not NJ specifically
  + NJ was the state with the most scrap metal refining in the US
* HELD
  + No PJ as there was no proof of purposeful availment
  + Kennedy plurality
    - D must intend to submit to forum through activities / actions
    - Stream of commerce is not enough, need additional factor
    - Foreseeability that product would end up in NJ is not enough
    - McIntyre did nothing to target NJ (even though targeted USA) so there was no jurisdiction
  + Breyer concurrence
    - Stream of commerce plus additional factor
    - No jurisdiction = no additional factor to establish j over McIntyre
  + Ginsburg dissent
    - Prime place in IS was given to reason and fairness
    - Fairer for McIntyre to defend suit as a corporation in NJ than for Ps to go to UK
    - Similar to Brennan in *Asahi*
    - Distinguishes facts of WWVW and Asahi – says those international Ds had far less contacts and activity within forum to warrant jurisdiction

###### Goodyear v Brown (2011)

* FACTS
  + Bus crash in France involving boys from North Carolina
  + Parents brought wrongful death damages action in North Carolina against Goodyear USA and its subsidiaries Goodyear France, GY Turkey and GY Luxembourg
  + GY USA accepted jurisdiction
  + Other GY companies had no little business in USA – only sold tires sometimes through intermediaries when GY USA could not service need – e.g. special types of tires
* HELD
  + No GJ – activities were not so continuous and systematic to render it at home
    - Foreign corporations’ actions in forum were essentially selling tires at irregular intervals in NC, and did so through an intermediary. This did not constitute action which was so continuous and systematic to render them essentially at home in NC so no GJ

###### Daimler AG v Brown (2014)

## FACTS

#### D was selling cars in CA

#### Tried to sue in CA claiming GJ – under Alien Torts Act for claim based in Argentina

## HELD

#### No GJ – selling cars in CA doesn’t make Daimler “at home” there and thus couldn’t be sued for Alien Torts Act claim there

###### Helicopteros

## FACTS

#### D was selling cars in CA

#### Tried to sue in CA claiming GJ – under Alien Torts Act for claim based in Argentina

## HELD

#### No GJ – selling cars in CA doesn’t make Daimler “at home” there and thus couldn’t be sued for Alien Torts Act claim there

###### Mullane v Central Hanover Bank (1950)

## FACTS

#### Statutorily authorized common trust fund, under NY Banking Law

#### There was a judicial settlement of accounts by trustee of the fund to beneficiaries

#### Notice was provided through settlement arrangements

#### Question = was there sufficiency of notice to beneficiaries (3 different types) at time of settlement

##### Appellant objected that notice and statutory provisions for notice to beneficiaries were inadequate to afford due process and therefore court was without jurisdiction to render a final and binding decree

## HELD

#### Amendments require deprivation of life, liberty or property to be preceded by notice and opportunity for a hearing appropriate to nature of the case

##### Applies regardless of *in personam, quasi in rem, in rem*

* + Ruling varied for the 3 types of Bs
    - Beneficiaries whose interests are either conjectural or future
      * *Publication* (of the name of the trust, not Bs) is good enough for this group, too expensive to find them all
    - Known present beneficiaries with known places of residence
      * Service by *mail* required
      * Publication isn’t enough, but no need for personal service
      * Beneficiaries are basically identical in their interests so *good enough to give notice to a substantial proportion*
    - Beneficiaries whose interests or whereabouts could not with due diligence be ascertained
      * Notice by *publication* is good enough

###### Other cases

* *Jones v Flowers:* state sent a certified letter to homeowner to notify. Statute required homeowner to keep his address updated. Letter was returned unclaimed. State took not further steps to notify. Court held taking further steps with knowledge notice had been received violated DP – it could have sent by first class mail or posted the notice on the property.
* *Dusenbery*: Certified mail (delivered successfully to mail room) to prisoner satisfied due process even though no actual notice.
* *Flowers*: If certified mail is returned, sender must take “additional reasonable steps” if practicable to do so (e.g. resend it by regular mail (no signature required)). But don’t have to search through tax rolls or a current phone book to find new address.
  + *Pagonis*: Notice of tax deficiency sent by certified mail returned. No due process violation despite no additional steps because no loss of property yet.
* *Dobkin*: service by ordinary mail to D’s last known address and publication in a local paper sufficient when whereabouts of Ds are unknown and Ps couldn’t do any better.
* *Aguchak v Montgomery*: summons in small claims must be sufficient in content – should have told recipient of options of appearing and requesting venue change

Subject Matter Jurisdiction

## Subject matter jurisdiction cannot be waived [**FRCP 12(h)(3)**; ***Capron***]

#### D can raise lack of SMJ as a defense at *any time* – court must dismiss without motion if its finds there is no SMJ

## Four types of subject matter:

#### Federal question jurisdiction [**28 U.S.C. § 1331; Art III, § 2 of CON**]

#### Supplemental jurisdiction [**28 U.S.C. § 1367**]

#### Removal jurisdiction [**28 U.S.C. § 1441**]

#### Diversity jurisdiction [**28 U.S.C. § 1332**]

## NOTE: §§ 1331 and 1332 are concurrent jurisdiction statutes, so can go to either state or Fed courts for these claims EXCEPT where only exclusive jurisdiction is granted to Feds (e.g. §1338(a), sent. 2)

1 – FEDERAL QUESTION JURISDICTION

## Fed courts have original jurisdiction of all civil actions arising under the CON, laws or treaties of the US [**28 U.S.C. § 1331; Art III, § 2 of CON**]

#### Exclusive jurisdiction = antitrust, bankruptcy, patent and copyright, admiralty, securities regulations and disputes b/w states

#### Commonly arises through statutes enacted by Congress

## To “arise under” US laws or CON, P must show their cause of action is based on Federal laws or the CON – this is “Well Pleaded Complaint Rule” [***Mottley; Skelly Oil***]

#### NOT concerned with Defenses that might be raised by D [***Mottley***]

## Satisfy one of the three types of “arising under” jurisdiction (see below):

#### Fed law with an Explicit Federal Right of Action

#### Fed law with an Implied Right of Action

#### State law claim with a Substantial Federal Ingredient

Arising under jurisdiction

## Explicit Federal Right of Action

#### Where Fed law creates the private cause of action in the Complaint [***Holmes***]

##### Must be clear that P’s right of relief depends on the resolution of a substantial federal law [***Holmes; Franchise Tax Board***]

## Implied Federal Right of Action

#### P’s right of action is implied from a Fed law (i.e. where there is no express cause of action in a statute – e.g. in *Civil Rights Act* below) [***Merrell Dow***]

##### To determine if there is an implied right, court undertakes “balancing test” [***Grable***]:

##### Whether P is part of class for whose special benefit the statute was passed

##### Whether there is legislative intent to create cause of action

##### Whether creating cause of action would further statute’s aims / policies

##### Whether the subject of statute is normally reserved for state law

##### EG: Title VI of Civil Rights Act does not give parties express right to sue for education discrimination, while Title VII which covers employment discrimination does. Title VI deemed to have implied right of action

## Federal Ingredient

#### Where claim arises under state law but requires some interpretation of Fed law [***Osborne***]

#### Considerations [***Grable; Gunn v Minton***]:

#### Whether it is necessary to resolve a Fed question to resolve the lawsuit

##### Look at craftiness of the pleadings and whether there is any attempt to manufacture jurisdiction [***Kansas City***]

#### Fed question must be an issue in the case

#### Question must be substantial enough to the country that a Fed court should hear it

#### IE: Efficiency consideration

#### EG: for uniformity’s sake, or because of particular competencies of Fed courts

#### Consider the level of Fed interest in the suit [***Osborne; Grable***]

#### Allowing Fed jurisdiction will not open the floodgates to litigation and not disrupt the Fed / state balance of power

#### IE: Federalism consideration [***Merrill Dow***]

#### Consider whether there is any state court hostility towards Fed court hearing the claim [***Osborne***]

Cases on Federal Q jurisdiction

## *Merrell Dow* – many State law claims and another State negligence claim based on labelling requirements in a Fed statute – court held it was too insubstantial

## *Mottley* –court held that alleging some anticipated defense based on CON does not satisfy necessary requirement

## *Grable* – court held Fed ingredient test met. Fed interest in resolving the question of what kind of notice must be given to a person before seizing their property to pay taxes, and interest in ensuring uniformity in administration of Fed tax statute. More specifically:

## Meaning of the federal statute governing proper IRS service was the only legal or factual issue contested in the case (i.e. satisfies 1 and 2)

## Deciding tax questions relating to actions for quiet title won’t usurp state power or flood Fed courts b/c such claims are so rare (i.e. satisfies 3 and 4)

## Having Fed judges interpret Fed tax questions is wise because they are best suited to understand and decide those issues and we want uniform tax laws (i.e. 3 and 4)

2 – DIVERSITY JURISDICTION

REQUIREMENTS

##### Party invoking diversity jurisdiction has burden of proving its existence [***Kokkonen***]

#### May only be invoked by a citizen of the USA [***Scott v Sanford***]

#### Cannot manufacture diversity [***Kramer***]

##### Amount in controversy must EXCEED $75,000 [**1332(a); *Freeland***]

#### Including value of damages (even punitive) and injunctive relief – but excluding interest and costs

#### If one D = P can aggregate total amount of all claims against the D

#### If multiple Ds = assess by reference to each D – P’s aggregate claims against EACH D must exceed threshold

#### NOTE: to challenge, D must prove with legal certainty that the claimed AiC is wrong

##### Diversity of citizenship – assessed at time complaint filed [***Grupo Dataflux; Strawbridge***]

##### ONLY DOMESTIC PARTIES

##### Complete diversity = no party from either side is a citizen of same state (e.g. Ps from CA and Ds from everywhere but CA) [**1332(a)(1)**]

##### IE: no P can be from the same state as a D

##### INVOLVES FOREIGN PARTIES

##### Citizen v. foreign citizen with permanent residency in a US state and who is domiciled in a State different to citizen’s state [**1332(a)(2)**]

##### If alien is permanent resident and domiciled in State court, then matter should go to State court

##### Citizen v. foreign citizen (i.e. Alienage) [**1332(a)(2)**]

##### Suit can have aliens on both sides, as long as there are also US citizens on both sides (i.e. cannot have a suit between two aliens) [***Iraola v Kimberly Clark***]

##### Dual nationals are not subject to alienage jurisdiction, they are just treated like all other US citizens (so look to domicile below) [***Sadat***]

##### NOTE: a stateless person cannot invoke alienage jurisdiction as they cannot show that they are a citizen of any state [***Blair v Rubenstein***]

##### Citizens v. foreign State [1332(a)(4)]

##### Where there are MULTIPLE PARTIES – when determining diversity, must disregard nominal or formal parties and only look at the “real parties to the controversy” [***Rose v Giamatti***]

#### Real = parties who by substantive law have a duty sought to be enforced or challenged

#### Nominal / formal = in genuine sense has no interest in the result of the suit or no actual interest or control over the subject matter of the litigation

POLICIES

## Provide a more neutral forum than state courts

## Fed judges are not subject to election and appointed for life – prevent political influence

## Prevent biases against members of other states / countries

## CONTRARY – State courts are most appropriate and apt to deal with State law issues

DETERMINING CITIZENSHIP

## People = citizen of state of true, fixed and permanent home AND principal establishment to which the person has the intention of returning whenever absent [***Mas v Perry***]

#### Mere residence in State is insufficient [***Mas v Perry***]

#### CHANGE = only if a person takes up residence in a different domicile AND intends to remain there [***Mas v Perry***]

#### NOTE: all US citizens domiciled abroad are still subject to PJ in USA

#### NOTE: original domicile is assumed to remain until they have a new domicile (e.g. if driving from NY to CA as part of moving to CA, then remain domiciled in NY until CA is established as new domicile) [***WWV v Woodson***]

## Corporations = citizen of BOTH state of incorporation and state of its principal place of business [**28 U.S.C. § 1332(c)(1)**]

#### Principal place of business = nerve center – where all decisions are made [***Hertz***]

#### NOTE: corporation might try to rely on muscle test – will fail – not current test per ***H***

#### Subsidiaries are different from parent – each is unique corporate entity, so assess each differently [***Daimler; Goodyear***]

## National banks = deemed citizens of states in which they are located [**28 U.S.C. § 1348**]

## Unincorporated associations = have citizenship of each of their members (including REITs) [***Americold Realty v Conagra Foods***]

## Representatives = legal representatives of classes (e.g. class actions) have their own state, which applies to the rest of the state

#### EXCEPT for representatives of estates or infants/incompetents [**28 U.S.C. § 1332**] – this prevents appointing reps to manufacture diversity

3 – SUPPLEMENTAL JURISDICTION [28 U.S.C. 1367]

BACKGROUND

##### Exists where a State law suit consists of more than one claim AND Fed court has valid SMJ (diversity or FQ) over at least one of the claims – allows Fed court to take case off State

## EG: gives Fed extra jurisdiction over State law claims, claims where parties fail AiC req. for diversity, and claims where new Ds are joined which make it better to be heard in Fed court

## NOTE: supplemental jurisdiction is determined differently in Fed diversity cases (see below)

REQUIREMENTS

##### Must be at least one anchor claim over which Fed courts have SMJ (either diversity or Fed Q) [***Gibbs***]

##### That Fed claim(s) must be so *intensely related* to the other State claims that they form part of the same case or controversy [**1367(a)**]

#### Fed and State claims must arise out of a "common nucleus of operative fact" and must be expected to be tried together [***Aldinger; Gibbs***]

#### EG: same witnesses and same documents

#### DIVERSITY ONLY = supplemental jurisdiction CANNOT arise through claims brought by P against (i.e. Fed claim(s) considered above cannot be any of the below) [***Exxon Mobil***]:

#### Impleaded Ds [**§ 1367(b); FRCP 14**]

#### Where P serves summons and complaint on 3P who is or may be liable to it for all or part of P’s claim against D (the 3P becomes another D – i.e. impleaded D)

##### IE: cannot use third party claim to get supplemental jurisdiction

#### Mandatorily joined parties [**§ 1367(b); FRCP 19(a)**]

#### Where court cannot give complete relief to existing parties without a party b/c that deciding the action in that party’s absence might:

##### Impair that party’s ability to protect an interest affected by the suit

##### Leave existing party subject to double obligations

#### Permissively joined parties [**§ 1367(b); FRCP 20(a)**]

#### Where P joins another P b/c their two claims emerge out of the same transaction or occurrence AND they share a common question of fact or law

#### Intervening parties [**§ 1367(b); FRCP 24**]

#### Where P joins and court allows 3P to join b/c:

##### Allowed by statute OR

##### Claim against 3P or Defense raised by 3P shares common questions of fact or fact with the main action OR

##### 3P is a GOV agency or officer acting in that capacity

#### NOTE: above types of claims are excluded from creating supplemental jurisdiction to preserve diversity AND prevent Ps using them to bolster jurisdiction

##### BUT it does not take away from 1367 consideration any counter-claim, cross-claim, or counter-claim to a cross-claim

##### EG: if Ds makes any claim against a third party, it may be considered

#### NOTE: in each of the FRCP cited above, the P’s right to make the claim is conditioned on that claim not destroying complete diversity

#### Discretionary judgment to be made by court – not a right of the P [***Gibbs; Exxon Mobil***]

#### Claims to be considered include ALL related claims such as counter claims, cross claims, third party claims, fourth party claims and any other claims involving joinder or intervention of additional parties [**1367(a)**] apart from those excluded under **1367(b)**

##### May decline to exercise supplemental jurisdiction over a claim if it [**1367(c)**]:

#### Raises a novel or complex issue of [State](https://www.law.cornell.edu/uscode/text/28/1367) law [**1367(c)(1)**]

##### EG: where there is no uniform interpretation in State – better left to State to sort

#### State claims substantially predominate over the Fed claim(s) [**1367(c)(2)]**

#### Fed Court has dismissed all claims over which it has original jurisdiction [**1367(c)(3)**]

##### IE: where there is a sole Fed claim, and the court dismisses that claim – then will send it back to the State courts (b/c no Fed claim to supplement)

#### In exceptional circumstances, other compelling reasons for declining jurisdiction [**1367(c)(4)**]

4 – REMOVAL JURISDICTION [28 U.S.C. § 1441]

BACKGROUND

## Allows D to veto jurisdiction proposed by P, by removing the case from State to Federal Court

#### ONLY available to the D

REQUIREMENTS

## D(s) wants to remove case from State to Federal court [**28 U.S.C. § 1441**]

#### IF MULTIPLE Ds = all Ds must agree to removal

#### D(s) is not domiciled in the State in which the claim was started

#### STRATEGY = P can block right to remove by starting case in the State court where D resides

#### POLICY = D cannot be biased or unfairly treated by own state court

#### Less than one year since the case was filed in the State court [**1446**]

#### Case could have been originally filed in Fed court [**1441**]

#### IE: creates no broader jurisdiction in relation to removal, in consistency with CON

#### Removal is to the Fed district embracing the State court in which the case was originally filed

#### IE: must be the district covering State court area

#### Case is not exempt from removal under **1445**

#### A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1–4 and 5–10 of the Act of April 22, 1908 (45 U.S.C. 51–54, 55–60), may not be removed to any district court of the United States.

#### A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

#### A civil action in any State court arising under the workmen’s compensation laws of such State may not be removed to any district court of the United States.

#### A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States

POLICY

## Balances P’s right to choose the forum

REMAND BY P

## If P wants to fight removal, they bring a motion to “remand” (i.e. send it) back to state court

#### EG: where P asserts action is not removable b/c could not initiate in Fed court (as above)

## Often hearing conducted into whether remand will occur – standard is PoE

Notice

## Notice must be reasonably calculated under the circumstances to apprise interested parties of the action and afford them an opportunity to object [***Mullane; Dusenbery***]

#### Generally through service of a Summons and Copy of the Complaint [**FRCP 4**]

#### Traditional methods

#### Personal service methods such as through delivery to a person, leaving papers with a responsible person at office or address, delivery to authorized agent or delivery by registered mail

##### Failure of agent to notify the D they represent will prohibit jurisdiction

#### Substitutes for personal service must be the best practical means to notify [***Mullane***]

##### This may differ for different types of Ds (as was the case in Mullane)

#### Heroic efforts are not required [***Dusenbery***]

#### If P obtains knowledge that a party receiving notice by mail didn’t receive it, they must take all practical alternatives to apprise D of the action [***Jones v Flowers***]

#### Examples

##### Publication (e.g. newspaper) is generally insufficient to provide notice

##### Especially if Ds name and address are known or available from public records, as this requires mailing or personal service [***Adams; Walker***]

##### Notice of eviction posted on apartment doors (where notices are known to sometimes be removed before they could be seen) is not a reliable method [***Greene***]

##### Electronic is sufficient where no reasonable alternative

##### Cannot mail to people who are sick/insane and without guardians [***Covey***]

#### Party may waive receiving notice before or after litigation has commenced [***Overmyer***]

##### Cognovit note may be acceptable to preclude due process, but depends on case by case analysis undertaken by reference to bargaining power of parties and any consideration given [***Overmyer***]

## Timing and content is also important

#### DP requires recipient of notice to be given adequate time to respond [***Roller v Holly***] – governed by Federal Rule **12(a)**

#### DP also requires notice to provide sufficient content (see FRCP for required content of each type of document) [***Aguchak v Montgomery***]

## NOTE: distinction between actual and constructive notice

#### Actual = person directly provided with notice

#### Constructive = where an act which is intended to indirectly notify the D is taken – i.e. where notice was sufficient through means other than actual

Service

* Service is important because it establishes PJ over the D under **4(k)**

#### Personal service is the classic form of notice and always adequate to satisfy DP [***Mullane***]

#### If improper service, court will not exercise its jurisdiction

FRCP 4 REQUIREMENTS

* Service must occur through an approved methodology – namely Summons must be served with copy of Complaint [**4(c)**] w/in 90 days after Complaint is filed [**4(m)**] according to the procedure listed for service of:

#### individual within US judicial district [**4(e)**] OR

#### individual in a foreign country [**4(f)**] OR

#### a corporation [**4(h)**] OR

#### the US or its agencies [**4(i)**] OR

#### a foreign government, state government or local government [**4(j)**]

#### UNLESS D has waived service of Summons under **4(d)**

* UNLESS service occurs through proven fraud, court will refuse to exercise its jurisdiction [***Tickle v Barton; Wyman***]
  + Requires proof of fraud
* Service must be proved to the court [**4(l)**], usually through an affidavit [**4(l)(1)**]
* NOTE: for claims involving property or assets, service is to occur according to the statute authorizing the court to exercise jurisdiction over property OR by serving summons under FRCP 4 [**4(n)**]

CONSEQUENCES OF IMPROPER SERVICE

* If D is not service within time, on its own motion or after notice to P, court must dismiss the action OR order service be made within a specific time [**4(m)**]

#### BUT court may extend time for service if there is no shown [**4(m)**]

Venue

## System of allocating cases within the Federal forum

#### EG: NYS has 63 counties, with a Federal court of first instance in each of those counties, so established a system where certain counties must be allocated to certain higher courts

APPROPRIATE VENUES [§§ 1390 and 1391]

BACKGROUND

## Venue refers to the geographic specification of the proper court for the litigation of a civil action that is within subject matter jurisdiction of the relevant court (i.e. does not confer SMJ) [**1390(a)**]

#### May be multiple proper venues

## Venue rules only apply to transfer of an action between districts and divisions NOT removal from state to Federal [**1390(c)**]

FOUR TYPES OF VENUE

#### In which any D is domiciled, if all Ds are residents of[State](https://www.law.cornell.edu/uscode/text/28/1391)in which that district is located [**1391(b)(1)**]

##### EG: 3 Ds residing in NY, then P can choose a judicial district in NY in which at least one of the defendants live such as Eastern District

##### Residency deemed for [NOTE: the below relate to *districts* not state]:

##### Individuals/aliens residing in USA = district in which they are domiciled [**1391(c)(1)**]

##### Incorporated or unincorporated entity (P) = district in which it maintains its principal place of business [**1391(c)(2)**]

##### Incorporated or unincorporated entity (D) = district in which it is subject to court’s personal jurisdiction with respect to the action in question [**1391(c)(2)**]

##### Alien not residing in USA = any district [**1391(c)(3)**]

#### Where corporation is resident in a State with more than one district (e.g. NYS and California), resides in any district in which it has min. contacts to establish PJ [**1391(d)**]

#### In which a substantial part of the events / omissions giving rise to the claim occurred [**1391(b)(2)**]

#### In which a substantial part of[property](https://www.law.cornell.edu/uscode/text/28/1391)that is subject of the action is situated [**1391(b)(2)**]

#### If NO [district](https://www.law.cornell.edu/uscode/text/28/1391) in which an action may be brought per the above, any district in which any D is subject to the[court’](https://www.law.cornell.edu/uscode/text/28/1391)s PJ with respect to the action [**1391(b)(3)**]

#### Where there is diversity amongst the Ds, may bring the action in any district in the state of any D

## NOTE: for multiparty/multi-forum litigation = action may be brought in any district in which any D resides OR in which a substantial part of the accident giving rise to the action occurred [**1396(g)**]

## NOTE: specific statutes compel certain venues to be used for certain types of claims – also other rules for specific actions (e.g. for patents, apply § 1400)

TRANSFER FOR CONVENIENCE/JUSTICE [§ 1404]

## If for the convenience of parties and witnesses AND in interests of justice, a [district court](https://www.law.cornell.edu/uscode/text/28/1404) may transfer any civil action to any other[district](https://www.law.cornell.edu/uscode/text/28/1404)or division where it might have been brought OR to any[district](https://www.law.cornell.edu/uscode/text/28/1404)or division to which all parties have consented [**1404(a)**]

#### Convenience of parties/witnesses is a separate consideration to IoJ [***Van Dusen v Barrack***]

#### Interests of justice considerations [***Van Dusen***]:

##### Access to witnesses and to the forum itself

##### Docket congestion

##### Speed to trial

##### Relationship of the community to the dispute

##### Court’s familiarity with the governing law

##### Whether P resides in original forum

##### P’s forum choice

## Where a transfer occurs:

#### In a diversity suit

#### Law of forum from which transfer occurred is to be applied by the new court (e.g. goes from CA, applying CA state law in the diversity suit TO NYS Federal Court then the NYS court must apply CA state law) [***Van Dusen; Ferens v John Deere***]

#### In a federal question suit

#### Courts are divided – some held bound by transferee, while others have held not and should exercise their own judgements when determining requirements of Fed law [***Lanfear v Home Depot***]

TRANSFER FOR INCORRECT VENUE [1406]

## If it is in the interests of justice, a case filed in the wrong division or district may be transferred to any district or division in which could’ve been brought [**1406(a)**]

#### IE: cure or waiver of defects in venue selection

#### Can be transferred even if the transferor court lacks PJ – serves efficiency [***Goldlawr***]

#### ONLY apply the new venue’s law (b/c could not have been brought in old court, so that law should not apply) [***Manley v Engram***]

TRANSFER WHERE FINDING OF NO JURISDICTION [1631]

## If it is in the interests of justice, if a case is filed in court which holds there is no jurisdiction to hear that case, the court may transfer it to any other court in which it could’ve been brought [**1631**]

#### IE: transfer to cure want/lack of jurisdiction

FORUM NON CONVENIENS [§ 1404(a)]

## CL process where court exercises its discretionary power to decline to exercise its jurisdiction b/c it is in interests of justice to transfer to another court to hear the case [***Gulf Oil v Gilbert***]

#### Forum non conveniens cases fall under **1404(a)** [***Atlantic Marine v WD of Texas***]

## Unless balance is strongly in D’s favor, then P’s choice of forum shouldn’t be disturbed [***Gilbert***]

## Must weigh public and private factors to determine if changing forum is necessary to avoid “oppressiveness and vexation” to D [***Piper***]

#### Unless remedy by alternative forum is clearly inadequate or unsatisfactory, such that it is essentially no remedy at all, any difference in substantive law between forums should NOT receive substantial weight and is NEVER determinative [***Piper***]

##### IE: as long as there is a remedy available in alternate forum, does not matter if remedy is clearly insufficient (NOTE: rule not strictly followed – courts still consider relief)

#### Private considerations when determining [***Gulf Oil v Gilbert***]:

##### Interest of the litigants (e.g. the relief available to them as in ***Nemariam***)

##### Ease of access to sources of proof

##### Availability of compulsory process for attendance of unwilling Ws

##### Costs of obtaining attendance of Ws

#### Public considerations when determining [***Gulf Oil v Gilbert***]:

##### Is there an appropriate alternative forum [***Piper; Rep. of Iran***]

##### Interest of the forums in the litigation (e.g. USA promoting deterrence of dangerous or faulty foreign products sold in USA, and interests of Scotland in *Piper* to have local issues tried at home)

##### Other practical problems relating to efficiency and expense of trial

## NOTE: court does not need subject matter nor personal jurisdiction to make a ruling on a *forum non* claim [***Sinochem v Malaysia International Shipping***]

## NOTE: for State courts, arises purely under common law b/c 1404 does not apply to them

MULTI-DISTRICT LITIGATION [§ 1407]

## Procedure authorizes the temporary transfer of a set of related cases into one district for pre-trial

## When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings [**1407(a)**]

#### Even if there are various actions involving multiple claims based on different legal theories, it has been held that if factual background is common (e.g. bankruptcy of MF Global) then can still transfer [***MF Global Holdings Investment Litigation***]

##### Practice is to leave it to transferee judge to determine degree of coordination or consolidation of the different actions [***MF Global***]

#### Transfers made by the judicial panel on multidistrict litigation [**1407(a)**] on its own initiation [**1407(c)(i)**] or by motion filed with the panel by any party [**1407(c)(ii)**]

#### Must be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions [**1407(a)**]

#### Must remand the transferred action back to district from which it was transferred [**1407(a); *Lexecon v Milberg***]

#### Pre-trial court cannot simply assign the case to itself for trial [***Lexecon***]

##### BUT courts have accepted this where parties have provided a clear and unambiguous waiver [***Depuy Orthopedics***]

#### NOTE: remand rarely, if ever, occurs in practice – because of parties settling, consenting to current judge, or judge keeping it because have familiarity with it

#### Panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded [**1407(a)**]

## Coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges (AKA transferee judge) to whom such actions are assigned by the judicial panel [**1407(b)**]

#### Circuit judge or a[district](https://www.law.cornell.edu/uscode/text/28/1407)judge may be designated and assigned temporarily for service in the transferee[district](https://www.law.cornell.edu/uscode/text/28/1407)(i.e. district they are not actually from) [**1407(b)**]

##### Any such judge may exercise the powers of a[district](https://www.law.cornell.edu/uscode/text/28/1407)judge in any[district](https://www.law.cornell.edu/uscode/text/28/1407)for the purpose of conducting pretrial depositions [**1407(b)**]

## When a case is transferred, apply the law of the transferee/new court (not one from which transferred) [***Korean Air Lines Disaster; General Motors LCC Ignition Switch Litigation***]

##### Policy = promote efficiency where consolidation occurs from different circuits

##### This is still subject to debate because it conflicts with ***Lexecon***

## Chief Justice created judicial panel on multidistrict litigation [**1407(d)**]

#### Consists of 7 circuit and district judges designated from time to time by Chief Justice

#### No 2 members shall be from the same circuit

#### Concurrence of 4 members is necessary for any action taken by the panel

###### Piper Aircraft (1981)

## FACTS

#### Crash in Scotland

#### Scottish people get killed

#### Plane manufactured in Pennsylvania by Piper and propellers were made in Ohio

#### Ps bring the action in USA state court in CA

#### Action transferred to federal district court in Pennsylvania

#### Piper sought to dismiss it on the grounds of forum non conveniens

#### Most Ws and evidence were located in Scotland

#### Reyno argued that Scottish law was less favorable to Ps than Pennsylvania law because it did not include the doctrine of strict liability for these tort cases

## HELD

#### Inconvenient forum – everything is in Scotland – no specific reasons for USA being more convenient

#### *Forum non* may be used to dismiss a case if P has no specific reasons of convenience for its choice of a forum, and that choice places a heavy burden on D or the court

#### Also held that the remedies provided by the Scottish courts are not inadequate, even though the lack of a strict liability theory might reduce the size of the damages award

#### Unless remedy provided by the alternative forum is clearly inadequate or unsatisfactory, such that it is essentially no remedy at all, the prospect of a difference in the substantive law should not receive substantial weight and is NEVER determinative

Applicable Law in Federal proceedings

**LAW IN FEDERAL QUESTION JURISDICTION**

* Federal question = court applies Federal substantive AND procedural law

#### EG: in patent cases, apply patent law and FRCP

**LAW IN DIVERSITY JURISDICTION**

## Overarching principle of ***Erie***: CON requires a Fed court sitting in diversity to apply the substantive law of the State in which it is sitting, but to apply Federal procedural law

#### POLICY = FC to reach the same outcome – when FC hears a diversity case, it becomes a State court and cannot reach a substantially different result to State court [***York; Ragan; Cohen***]

## BUT issues arise when it is unclear whether a Federal statute or rule is procedural or substantive OR conflict with a State law

## Two relevant statutes:

#### Rules of Decision Act [**§ 1652**] = State laws shall be regarded as rules of decision in civil actions in Fed Courts, except where CON or Fed statutes otherwise require

#### Rules Enabling Act [**§ 2072**] = SCOTUS has power to prescribe “general” rules of practice and procedure and rules of evidence for cases in Fed system [**2072(a)**]

#### IE: carve out from the RODA for Fed rules of procedure

1 – FEDERAL STATUTE v STATE LAW

1. Does the Fed statute cover the relevant issue [***Stewart***]?
   * If yes, go to 2
   * If no, use State law
2. Is the Fed statute constitutional under **Art III** and “necessary and proper” clause [***Stewart***]?
   * Must be “rationally capable of classification” as procedural to apply per *Erie* [***Hanna***]

NOTE: easy test to meet re: procedural, so Fed statute almost always trumps State law

2 – FRCP v STATE LAW [§ 2072 REA ANALYSIS]

1. Does the FRCP conflict w/State law (i.e. is Fed ‘on point’) [***Hanna; Walker v Armco***]?
   * Different methodologies for assessing coverage of FRCP:
     + *Scalia in* ***Shady Grove***: read FRCP broadly
     + *Stevens in* ***Shady Grove***: look at importance of the policy behind the State law and if:
       - Strong state interest in enforcing policy, read rule narrowly per *Ginsburg*
       - Weak state interest in enforcing policy, read rule broadly per *Scalia*
     + *Ginsberg dissent in* ***Shady Grove***and *majority in* ***Gasperini***: read rule narrowly to avoid conflict b/w State and Fed systems AND respect Federalism
       - Echoes *Harlan concurrence in* ***Hanna*** = cautioned against placing FRCP on a pedestal above state rights and interests
   * If yes (i.e. conflicting) go to 2
   * If no (i.e. not conflicting) go to RODA analysis to determine if FRCP is P or S
2. If conflicting, is the Federal rule valid under 2072 (i.e. Rules Enabling Act) [***Hanna***]?

#### Must be a general rule of procedure [**2072(a)**]

#### CANNOT abridge, enlarge or modify any substantive right [**2072(b)**; *Scalia in* ***Shady Grove***]

#### Rule can ONLY govern manner/means by which litigants’ rights are enforced NOT how court will adjudicate those rights [*Scalia in* ***Shady Grove***]

##### BUT alternate approach of *Stevens in* ***Shady Grove*** = Fed Rule can’t displace a state procedural law that is “so intertwined with a state right or remedy that it functions to define the scope of the state right”

##### *Ginsburg* did not explicitly consider this issue in *Shady Grove nor Gasperini* – UNCLEAR Ginsburg’s preferred approach if there is a conflict

#### EG: in *Hanna v Plumber* there was no a/e/m of a substantive right b/c P could simply refile the case or serve D personally

#### NOTE: no Federal rule has been struck down for violating 2072 – unlikely for any FRCP to be struck

1. If conflicting and valid, Federal law prevails because FRCP always trump State rules [***Shady; Hanna***]

3 – FEDERAL JUDICIAL PRACTICE v STATE LAW [§ 1652 RODA ANALYSIS]

## Must look at whether the laws to be applied are P or S using below two tests:

#### Clearly established categories:

##### Statutes of limitations and holding rules are substantive so must apply State versions of these [***York; Ragan; Walker***]

##### Choice of law rules are substantive [***Klaxon v Stentor***]

##### Elements of a claim or defense are substantive

## Controlling outcome-determinative test = whether applying State law is necessary for Fed court to reach the same result as State? [***York; Ragan; Woods; Cohen***]

#### Judge outcome-determination in terms of ‘twin aims of *Erie*’ [***Hanna***]:

#### Avoidance of forum shopping

#### Ensure equal administration of the law (NOT same as equal protection of the law)

## Byrd balancing test = whether State interest in ensuring consistent outcome-determination outweighs Federal policy / essential characteristics or functions of Fed court [***Byrd***]

## Specific considerations [***Byrd***]:

##### Policies underlying competing State and Fed laws

##### EG: in *Byrd,* 7th Am. jury function is one of those essential functions and strong Fed policy of ensuring right to jury trial

##### Degree of certainty about whether applying Fed law would alter outcome (complicates *York* test)

##### IE: assess probability of a different outcome b/w Fed and State law – if little impact then can apply Fed law

##### EG: in *Byrd,* low probability that outcome would change if heard by judge or jury

## If YES, State law is substantive and must be applied (If NO, State law is procedural)

REMNANTS OF FEDERAL COMMON LAW

## Some Federal common law remains untouched by *Erie* (AKA specialized Fed CL)

#### Binding under supremacy clause of CON

## MUST find that advantages of applying state law are outweighed by:

#### Need for national uniformity OR

##### EG: often to fill gaps in the state law

#### That State law’s inconsistency with federal interests

##### EG: national security concerns

## CANNOT create Federal CL where the field seeking to be covered has already been occupied by Congress making laws (e.g. EPA creation in *American Electric)* [***American Electric v Connecticut***]

#### Not concerned with the extent or work in that field, just coverage / delegation

## Accepted areas of specialized Fed CL (i.e. where State law is not applied):

#### There is a gap (i.e. topic not dealt with) in Fed statute and common law rule fills the gap

#### ONLY in Federal Q jurisdiction NOT diversity (i.e. must NOT be any state law issue)

#### EG: where there is a Federal statute which does not contain a statute of limitations

#### Admiralty and foreign relations common law (seen as traditional federal common law)

##### Matters which affect nation and require consistent body of substantive law [***Kossick***]

#### Cases involving Federal interests or rights [***Clearfield Trust; Boyle; Dice v Akron***]

##### Issues concerning Fed government’s contract rights, rights to collect loans / proceeds due to it, or managing US bonds and securities

#### EG: where contractor makes a product according to specifications provided by GOV, then cannot sue either GOV nor contractor unless Fed law allows [as in *Boyle*]

#### Federal procedural CL

##### EG: doctrines of forum non, abstention, stare decisis and rules of finality [***Semtek v Lockheed Martin***]

#### Interstate dispute rules

##### Unfair to apply statute of decisional law from conflicting states [***Hinderlider v La Plata***]

CASES

###### Erie Railroad v Tompkins

## FACTS

#### Dark night in Houston, PA where Tompkins is walking alongside railroad track

#### Erie railroad train is moving across the line

#### Something protruding from train and it strikes Tomkins

#### State CL v Federal CL

#### PA state court had higher burden of proving negligence where he was trespassing

#### PA federal courts had more favorable rules of negligence but could still apply PA state law

#### Went to NYS federal court which had ordinary rules of negligence, even for trespassers – applied general federal common law of torts according to *Swift v Tyson*

#### Tomkins won in district and 2nd Circuit

#### Went to SCOTUS – Erie argued that local law should apply

## HELD

#### Fed court must always apply State substantive law – only apply Fed procedural law

#### Overruled *Swift v Tyson* – went beyond boundaries of the appropriate constitutional role for the judicial branch, and created vertical separation of powers concerns involving the federal government and the states

#### Rule = Federal courts are not entitled to create their own common law for issues that properly fall within state law

#### Rule = Applying state substantive law would lead to more predictable outcomes for litigants and greater efficiency for courts

###### Guaranty Trust v York

## FACTS

#### York alleged he was defrauded in buying stock from GT

#### Relevant statute of limitations from suing on bonds had run in NYS law – prevented action

#### Suit involved debate over whether that NYS law prevented remedy being granted by FC

## HELD

#### No action in FC – State statute applied to bar (because the State statute was outcome determinative)

#### Where FC sits in diversity jurisdiction, it sits as if it is a court of the state in which it is located, so same substantive rules apply to exclusion of equity

##### In all cases where FC has diversity jurisdiction, outcome of the litigation in FC 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

#### SO Federal equitable remedies survive EXCEPT where state law bars the action

#### Affirmed *Erie*

#### Reiterated that source of substantive rights enforced by a federal diversity court was state law, and this law determines the outcome regardless of the forum or whether the remedy was in law or in equity

## NOTE: suggests that the difference between procedural law and substantive law in Erie cases hinges on whether the law in question is outcome-determinative, but later decisions have drifted away from this overly straightforward assessment

###### Ragan

## FACTS

#### Wrongful death action in Kansas

#### Kansas law requires action to be brought within 2 years of death – action is brought at the time D is served, not when filed with court

#### Suit was properly commenced in Federal Court

#### D challenged on basis that FC must apply State law, and the State law action tolled (i.e. was out of time)

## HELD

#### No action (out of time) – applying *Guaranty*, must apply the Kansas (state) statute as this binds all FC

###### Woods v Interstate Realty

## FACTS

#### Foreign corporation brought action in diversity against individual in Mississippi

#### Action was for recovery of the commission of the foreign corporation’s broker

#### D moved for summary judgment because foreign corporation could not bring action in MI under state law (insufficient contacts with MI)

#### District court granted summary judgment on that basis – P appealed

## HELD

#### Appeal unsuccessful – State law was controlling and State courts were closed to P

##### Affirmed Erie / Guaranty / Ragan

###### Byrd

## FACTS

#### South Carolina resident sued North Carolina company that employed him for damages for injuries caused by D’s negligence

#### Dispute about whether worker fell under statutory definition of “worker” under workers comp act to be covered by that Act

##### This Act limited his compensation as amount of damages was decided under workers’ compensation statute

#### SC courts held that question of coverage was to be determined by judge not jury

#### Q = whether FC was bound to follow the state method of judge determination or whether P is entitled to jury trial on coverage issue

## HELD

#### Federal Constitution trumps State law

##### Influence if not the command of the 7th Amendment – presumption of jury trial which means that Federal court will entertain the case and allow jury trial

##### Federal interest in favoring jury decisions should not yield to state interest in consistency between federal and state outcome

##### Especially where no guarantee that the result would have been any different if coverage issue was decided by judge or jury

#### NOTE: SCOTUS has not yet considered whether the 7th Amendment extends to State courts

###### Hanna v Plumer

## FACTS

#### Auto accident resulting in death in Massachusetts

#### Claim against estate of the deceased

#### Diversity case

#### MA law says that must bring the case against estate within one year, and commencement with service of process

#### Brings the action in Federal court – trial court says that suit is barred because the State courthouse door is closed (i.e. outcome determinative)

#### Appeal to SCOTUS

## HELD

#### Statute of limitations is NOT outcome determinative because you judge outcome determination in terms of what is called ‘the twin aims of *Erie*’ which are:

##### Avoidance of forum shopping

##### Unequal administration of the law (NOT the same as equal protection of the law)

#### AND you judge outcome determination *ex-ante* NOT ex-post and therefore no promotion of forum shopping

#### NOT governed by 1652 but 2072

##### So Erie does not arise – to raise Erie doctrine, the effect of a procedural rule on the outcome of a case must abridge, enlarge, or modify the substantive law

##### There was no change to a substantive right here because the plaintiff simply could refile the case or serve the defendant personally

##### Therefore this is a Federal interest – so this becomes a valid exercise BECAUSE the Federal procedure must be applied

###### Shady Grove

## FACTS

#### NYS has a class action statute (901(b)) which prohibits class actions for penalties and fines

#### Diversity action in which Ps sought a fine

#### Question = whether the Federal Court had to honor NYS prohibition

## HELD

#### Sharp division in the Court

#### Scalia majority

##### Federal class action rule (Rule 23) prevails over the NYS rule (§901(b) of NY CP rules) AND did not modify, abridge or enlarge substantive right SO does not contravene 2072

##### NOTE: does not really go into whether the laws were procedural or substantive in nature – doesn’t care – just says Fed overrules as both cover same subject

#### Criticizes Ginsburg’s approach of looking at subjective intentions because it would produce confusion and be arduous for courts to determine for each statute

##### Says that do not look at substantive “reasons” or substantive “purpose” but just the right itself

#### Kennedy concurrence

##### NYS rule is a procedural rule and therefore is trumped by Federal rule – also holds that the rule is within the 2072 rulemaking power (but for different reasons to Scalia)

#### Ginsburg dissent

##### Must look at subjective intentions of State legislature because that establishes the State’s substantive regulatory interest (invoking *Erie*) – if they intended to cover the topic or achieve purpose, then respect their substantive interest

##### In this case, NYS limitation on class actions is a state substantive interest and Federal system should honor that interest – respect Federalism

###### Clearfield Trust v US

## FACTS

#### Check issued by Fed GOV was lost in the mail, stolen by a person who cashed it at JC Penney

#### JCP endorsed it and then Clearfield endorsed it too, provided a guaranty and collected money from Fed Reserve

#### Fed GOV discovered it was stolen and fraudulently cashed after 8 months

#### Fed GOV demanded Clearfield to pay on the guaranty

#### C refused, so GOV brought action, and trial court held Fed GOV could not because of delay

## HELD

#### Overruled – 8-month delay should not have prevented the case from being heard, as C had not suffered any damage from the delay (i.e. new rule is D must show damage for delay to prevent action)

#### Establishing new rule was authorized because:

#### CON gives Fed GOV authority over disbursing funds or paying its debts

##### Federal courts may use their own standards to create the applicable rules of law for issues regarding commercial paper, since Congress is silent on this subject

##### Using state rules would be counterproductive because of the divergences among them

##### A single overarching standard would create a useful uniformity

###### Boyle

## FACTS

#### Dead US marine sued helicopter manufacturer for defectively designing its copilot emergency escape hatch

#### State tort law allowed manufacturer to be liable, but Federal "military contractor defense” prevented any manufacturer from liability

## HELD

#### Fed laws valid and trump State laws on contractor liability b/c matter of Fed concern

#### Despite absence of specific legislation immunizing GOV contractors from liability for design flaws, questions of their liability are of unique federal concern

#### State law significantly conflicted with federal interests and had to be displaced

###### American Electricity Power v Connecticut

## FACTS

#### Ps brought action against power companies for excessive CO2 emissions

#### Action was Federal CL nuisance claim

## HELD

#### Cannot bring action – federal judicial power displaced by Congress passing “Clear Air Act” and establishing EPA

##### Relevant question was whether Congress occupied field, and it had

##### Delegation to EPA displaces Fed CL – also noted that any decision of EPA would be subject to judicial review

###### Dice v Akron

## FACTS

#### When you base a state case on a federal statute, you need to apply federal law

## HELD

#### SCOTUS reversed and ordered issue to be submitted to jury because jury trials are just too important a part of the substantive rights provided by FELA (federal statute) to be eliminated in a state action

Pleadings

* Three purposes:

#### Give notice to opponent (and indirectly the court) about what is being alleged

#### Reveal the factual basis for the suit

#### Reveal the legal issues in the case

## NOTE: discovery has limited the importance of pleadings – now pleadings are largely used for notice whereas discovery is used to reveal factual basis and legal issues

PLEADING CONTENT [FRCP 8]

## Pleading (i.e. complaint) that states a claim for relief must contain [**8(a)**]

#### short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support [**8(a)(1)**]

#### short and plain statement of the claim showing that pleader is entitled to relief [**8(a)(2)**]

##### To give D fair notice of what the claim is and grounds upon which it rests [***Conley***]

#### demand for the relief sought, which may include relief in the alternative or different types of relief [**8(a)(3)**]

## Allegations in the pleading must be simple concise and direct (although no technical form is required) [**8(d)(1)**]]

## P may state 2 or more claims alternatively or hypothetically [**8(d)(2)**] and can state separate claims regardless of the consistency [**8(d)(3)**]

## Pleadings must be construed so as to do justice [**8(e)**]

OTHER PLEADING REQUIREMENTS (see more below)

## Must contain enough facts to convince the court that the claim to relief is plausible on its face [***Iqbal; Twombly***]

#### Claim is plausible on its face when P pleads facts that allow court to reasonably infer that D is liable [***Iqbal; Twombly***]

#### NOT just facts consistent with D’s liability NOR just a possibility that a D acted unlawfully [***Iqbal; Twombly***]

## NOTE: P might try to argue that should apply lower standard under ***Gibson*** but will not succeed – not current test

ANSWER CONTENT [FRCP 8]

## In its Answer, D must:

#### State in short and plain terms its defenses to each claim asserted against it [**8(b)(1)(A)**]

#### Admit or deny allegations asserted against it by an opposing party [**8(b)(1)(B)**]

#### Denial must fairly respond to the substance of the allegation [**8(b)(2)**]

#### D may either generally deny all pleading allegations OR specifically deny designated allegations (can also generally deny all except those specifically admitted) [**8(b)(3)**]

#### Can deny part of an allegation as true, and deny the rest [**8(b)(4)**]

##### If D lacks knowledge/info sufficient to give a belief about the truth of an allegation, it must state so and statement has effect of a denial [**8(b)(5)**]

#### Affirmatively state any avoidance or affirmative defense (e.g. contributory negligence, laches, illegality, fraud, waiver or estoppel) [**8(c)(1)**]

##### D may state 2 or more defenses alternatively or hypothetically [**8(d)(2)**] and can state separate defenses regardless of the consistency [**8(d)(3)**]

##### If D mistakenly designates a defense then if justice requires, the court may treat it as correctly designated [**8(c)(2)**]

##### EXCEPT for defenses asserted by motion under **12(b)**

## If fail to deny an allegation which requires a responsive pleading, then it is admitted [**8(b)(6)**]

#### EXCEPT an allegation relating to the amount of damages [**8(b)(6)**]

SERVICE OF ANSWER [FRCP 12]

## Must be served within 21 days after being served with the summons and complaint [**12(1)(A)(i)**]

#### If waived service under 4(d) within 60 days after request for a waiver was sent, or within 90 days after it was sent to D outside any US district [**12(1)(A)(ii)**]

## NOTE:0 21 days from service of crossclaim or counterclaim for answer to it [**12(1)(C)**] AND for a reply, 21 days after service of answer [**12(1)(C)**]

## NOTE: longer for US, its agents and officers [see **12(2)/(3)**] and time periods change if a motion is served [see [**12(4)**]

ADDITIONAL PLEADING REQUIREMENTS [FRCP 9]

## Pleading need not allege [**9(a)(1)**]:

#### party's capacity to sue or be sued;

#### party's authority to sue or be sued in a representative capacity; or

#### legal existence of an organized association of persons that is made a party

## To raise any of the above issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge [**9(a)(2)**]

## Alleging fraud or mistake [**9(b)**]

#### Party must state with particularity circumstances constituting f/m

#### Malice, intent, knowledge and other conditions of person's mind may be alleged generally

## Pleading conditions precedent [**9(c)**]

#### When alleging, it suffices to allege generally that all CPs performed

#### When denying, must do so with particularity

## Official Document or Act

#### Suffices to allege that the document was legally issued or act legally done [**9(d)**]

## Pleading judgment/decision of a domestic or foreign court OR a judicial or quasi-judicial tribunal or board/officer

#### Suffices to plead judgment/decision without showing jurisdiction to render it [**9(e)**]

## If item of special damage is claimed = it must be specifically stated [**9(g)**]

## An allegation of time or place is material when testing the sufficiency of a pleading [**9(h)**]

COMMENTS ON FRCP 9

## Imposes heightened pleading requirements in ALL types of civil actions [***Kearns v Ford***]

## Pleading as a whole must satisfy any of the particularity requirements in FRCP 9 (e.g. fraud) [***Kearns***]

## Rule 9(b) [***Kearns v Ford***]

#### Fraud does not need to be an element of a claim/CoA, it must simply be grounded in fraud

#### Facts must be specific enough to give Ds notice of particular charged conduct so they can defend against it specifically and not just deny they did anything wrong

#### Averments of fraud must be accompanied by who/what/when/where/how of the misconduct charged

#### Three purposes of heightened requirement are to:

##### Provide D’s with notice to defend

##### Deter Ps from filing complaints as a pretext for discovery

##### Protect reputation of those charged from improper fraud charges

##### Prohibit excessive economic and social costs on litigants and court from claims without factual basis

CERTIFICATION [FRCP 11]

## Pleadings, motions and other written papers must must be signed by at least one attorney of record or unrepresented party [**11(a)**]

#### Must state the signer's address, e-mail address, and telephone number [**11(a)**]

#### Need not be verified or accompanied by an affidavit [**11(a)**]

## Representations on certification

#### To best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, attorney or party certifies that:

##### document is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation [**11(b)(1)**]

##### claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law [**11(b)(2)**]

##### factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery [**11(b)(3)**]

##### denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information [**11(b)(4)**]

## Effect of failure to certify

#### If unsigned, court must strike it out unless omission is promptly corrected after being brought to attorney's or party's attention [**11(a)**]

#### If no action taken after notice and reasonable opportunity to respond, court may sanction any attorney, law firm, or party that violated the rule or is responsible for violation [**11(c)**]

MOTIONS [FRCP 12]

## Motions for more definite statement in pleading [**12(e)**]

#### Motion for more definite statement of a pleading which is so vague or ambiguous that the party cannot reasonably prepare a response

#### Must be made before filing a responsive pleading and must point out the defects complained of and the details desired

#### If the court orders a more definite statement and it is not obeyed within 14 days after notice of the order or within the time the court sets, court may strike the pleading or issue any other appropriate order

## Motion to strike part of pleading

#### Court may strike an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter either on its own [**12(f)(1)**] or on motion made by a party either before responding to the pleading [**12(f)(2)**]

## Motions for defenses

#### If D is not going to include it in the Answer, may assert following defenses by motion before pleading [**12(b)**]:

##### (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; and

##### (7) failure to join a party under 19

## Motion for judgment on pleadings may be filed after pleadings are closed BUT early enough not to delay trial [**12(c)**]

## NOTE: if matters outside pleadings are alleged in motion for judgment (**12(c)**)or motion for failure to state claim (**12(b)(6)**), motion must be treated as one for summary judgment under **56** [**12(d)**]

## NOTE: any motion under 12 may be joined with any other motion allowed by 12 [**12(g)**]

MOTION TO DISMISS

## Brought under one of the **12(b)** categories

## Namely **12(b)(6)** for failure to state a claim

## Under 12(b)(6) – pleading must contain enough facts to convince the court that the claim to relief is plausible on its face [***Iqbal; Twombly***]

#### Claim is plausible on its face when P pleads facts that allow court to reasonably infer that D is liable [***Iqbal; Twombly***]

#### NOT just facts consistent with D’s liability NOR just a possibility that a D acted unlawfully [***Iqbal; Twombly***]

##### NOT just a formulaic recitation of the elements of the relevant claim (e.g. constitutional discrimination) [*Kennedy majority in* ***Iqbal***]

#### Critical focus on facts – problematic because of no discovery before pleadings – hard to get the facts that you need

#### Allegation that court re-wrote Federal Rule 8 – as it overruled earlier principle that it must be clear that P can prove no facts in support of claim which would entitle P to relief [***Gibson***]

#### ISSUE = test makes it extremely hard for a P to get into court – imposes high standard

##### On one hand, balances frivolous suits, but on other, prevents some

## Doesn’t need to be probable but cannot be conclusory [***Swanson***]

## In determining a motion to dismiss, court must take all factual allegations as true but not legal allegations (must make a finding according to presumed-true facts) [***Iqbal; Twombly***]

#### Any allegations which are conclusory in nature cannot be presumed true – they are legal conclusions [*Kennedy majority in* ***Iqbal***]

#### Court will exercise its judicial experience and commonsense [***Iqbal***]

AMENDING PLEADINGS [FRCP 15]

## Party may amend its pleading within 21 days after serving [**15(a)(1)(A)**]

## In all other cases, party may amend its pleading only with opposing party's written consent or court's leave [**15(a)(2)**]

#### Court should freely give leave when justice so requires

## Unless court orders otherwise, any required response to an amended pleading must be made at the later of [**15(3)**]:

#### Time remaining to respond to the original pleading

#### Within 14 days after service of amended pleading

## NOTE: rules for pleading amendments *during and after* trial are in **15(b)**

## NOTE: special rules about relating back to the previous pleading in the text of new pleading in **15(c)**

SUPPLEMENTAL PLEADINGS [FRCP 15]

## On motion and reasonable notice, court may, on just terms, permit party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after date of original pleading [**15(d)**]

#### Even if original pleading is defective in stating a claim or defense

#### Court may order that opposing party plead to supplemental pleading within specified time

DETERRING FRIVOLOUS PROCEEDINGS

## If there is violation of representations regarding certification (Rule 12(b)), which is not responded to after notice and reasonable opportunity to respond, court may sanction any attorney, law firm, or party that violated the rule or is responsible for violation [**11(c)(1)**]

#### Sanction = limited to what suffices to deter repetition of conduct [**11(c)(4)**]

##### May include an order to pay a penalty to the court, nonmonetary directives or payment of reasonable attorneys’ fees or other expenses

##### ALTHOUGH any monetary sanction is limited by **11(c)(5)**

#### Made by motion [**11(c)(2)**] OR on court’s initiative [**11(c)(3)**]

## Attorney or other admitted person who unreasonably and vexatiously multiplies proceedings may be required by court to personally pay excess costs, expenses AND attorneys’ fees reasonably incurred because of such conduct [**28 USC § 1927**]

###### Bell v Twombly

## FACTS

#### T and other consumers brought a class action against Bell and other telecomms companies

#### They alleged that the companies violated § 1 of the Sherman Act

#### District Court granted Bell’s motion to dismiss the suit, because T failed to “allege sufficient facts from which a conspiracy can be inferred”

## HELD

#### Upheld – claim dismissed because failed to identify any facts that suggested illegal conspiracy over the alternative: a concurrent appraisal of the economic situation by several telecomm companies

#### Must be sufficient facts in a complaint to state a claim to relief that is plausible on its face to avoid dismissal for failure to state a claim

#### Claims only valid under § 1 if they plausibly suggest a conspiracy

#### Facts need only be alleged; a suit can go forward even if the facts are unlikely to be proven

#### CANNOT just be merely consistent with a conspiracy

###### Ashcroft v Iqbal

## FACTS

#### P filed damages claim for violation of his constitutional rights while he was detained in a maximum security prison during the 9/11 investigations

#### Ds moved to have claim dismissed

## HELD

#### Dismissal motion granted – no plausible claim

#### Twombly is applicable to all civil proceedings

#### Kennedy majority

#### Complaint does not nudge Iqbal’s claim of discrimination from conceivable to plausible

#### Fails to plausibly show that Ds adopted a policy of classifying detainees as high interest because of their race/religion/national origin and fails to intimate that Ds put P in prison due to their race/religion/national origin

##### Contains bare assertions which are nothing more than a formulaic recitation of the elements of a constitutional discrimination claim

##### Conclusory nature of the allegations disentitles them to the presumption of truth

#### Souter dissent / Breyer dissent

##### Agree as to the test, but find that the facts alleged are sufficient to pass the Twombly test – says the majority failed to properly consider facts

###### Kearns v Ford Motor Company

## FACTS

#### Ps filed class action in California state court alleging violations of competition laws by Ford and its dealerships to increase sales

#### District court consecutively dismissed three complaints filed by Ps

#### Ps appealed the dismissal of the third amended complaint

## HELD

#### Dismissal motion granted – did not satisfy heightened pleading requirements of 9(b)

##### Failed to identify who/what/when/where/how of the misconduct charged, just stated forms of conduct such as advertising without specifying how fraudulent

Class Actions

BACKGROUND

* Procedure which aggregates claims and defenses that the named rep and class members share but which individual litigants might not be able to bring because of expenses and inconvenience
* Relevant statute is CAFA
* Relevant rule is FRCP 23 – establishes legitimacy of the action for all parties by creating a “structural assurance of fair and adequate representation” [***AmChem***]

#### Procedural safeguard

POLICIES

## Efficiency of proceedings – preservation of public and private resources in adjudicating a common dispute at once, rather than individual cases

## Overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights [***AmChem***]

## Providing a private means for redressing problems that Congress / States are unwilling or unable to address (negative value cases)

## Also expanded democratic access, influenced policy-making and secured compensation for injured persons

## Mitigate risks of inconsistency of treatment amongst class members

HISTORY

## Class actions emerged from collective actions brought in UK courts of Equity

## Also group joinder devices early in US history during colonial period – as early as 1821

## Rule 23 did not create the class action – existed well before then

## Civil rights movement generated need for procedural vehicle for class actions (this was R23)

1 – PERSONAL JURISDICTION

## Class reps must satisfy PJ requirements – no need for PJ over absent Ps [***Shutts***]

## BUT for any class action judgment to be binding on absent class members, absent members must be actually represented in action OR have a legal relationship with a party in the action [***Hansberry***]

2 – SUBJECT MATTER JURISDICTION

## If CAFA applies, under **CAFA 1332(d)** OR if it does not, under normal **1332(a)** diversity requirements

3 – VENUE

## Assume brought in proper venue per **§§ 1390 and 1391**

4 – CERTIFICATION OF CLASS REQUIREMENTS

1. Relevant FRCP 23 – establishes legitimacy of the action for all parties by creating a “structural assurance of fair and adequate representation” [***AmChem***]
2. P bears the burden of proving all four requirements [***Walmart v Dukes***]
3. Certification determination must be rigorous and may involve merits inquiries into Ps’ claim BUT courts cannot undertake free-ranging merits inquiries at certification stage [***Amgen***]
   1. Numerosity [**23(a)(1)**]

#### Joinder of the class members as individual parties is impractical

#### Other considerations [***Walmart***]:

##### Size/ease of identifying and finding individual class members

##### Future/unknown members make joinder impracticable

##### Geographical separation/fluid composition of class population

##### Size/value of individual claims (e.g. many very small claims)

##### Individual ability and motivation to bring separate actions

#### NOTE: > 40 usually enough, < 22 usually not enough

* 1. Commonality [**23(a)(2)**]

#### CA must generate common answers to the central factual / legal issues [*Scalia in* ***Walmart***]

#### Need to have a “common contention” arising from sufferance of the same injury from same event [***Falcon;*** *Scalia in* ***Walmart***]

#### Prove differences in factual background of each claim must not affect the outcome of the legal issue [***Califano***]

#### BUT *Ginsburg dissent in* ***Walmart*** suggests that only need a claim resulting from the same law or injury – asserts that *Scalia* approach confuses commonality with predominance

* 1. Typicality [**23(a)(3)**]

#### Class representatives’ claims / characteristics must be typical of the whole class so that their representation is fair to the whole class [***In re Schering Plough Corp***]

#### Relevant factors [***Amchem; Giuliani***]:

##### Whether their interests in pursuing the litigation are similar

##### Whether injuries are similar

##### Whether injuries arise from similar conduct or a similar legal theory

##### Whether each has a claim on foot

#### Different defenses and conflicting interests may kill typicality [***Hansberry***]

* 1. Adequacy [**23(a)(4)**]

#### Representative parties and their lawyers must fairly + adequately protect interests of class members [***Phillips Petroleum; Holland***]

##### Purpose is to “uncover conflicts of interest between the named parties and the class they seek to represent” [***Amchem***]

#### ALSO look at zeal / competence of representative party and their lawyer and willingness / ability to take an active role in the litigation [***Jones v Singing River***]

#### Recognizes judge as a guardian of justice for class members

#### Particularly b/c court appoints class counsel

#### NOTE: potentially conflicting interests do not automatically prevent certification, as they may be cured by other methods such as certification of subclasses

4 – TYPES OF CLASSES (Choose One)

* Only need to fill one of below classes – classes may change after discovery until judgment [**23(c)(1)(c)**]

1. Limited fund class (AKA anti-prejudice class) [**23(b)(1)**]
   * Where there are reasons to avoid individual litigation such as:
     + Inconsistent or varying adjudications [**23(b)(1)(a)**]
     + Adjudications to individuals which would be dispositive of other’s interests or substantially impair their ability to protect their interests [**23(b)(1)(b)**; ***Ortiz***]
   * Main goal is to prevent any potential prejudice from bringing individual lawsuits
     + (1)(a) focuses on prejudice to D (e.g. creating incompatible standards / uncertainty through individual lawsuits which may only be brought by some members of class)
     + (1)(b) focuses on prejudice to absentees (e.g. competing claims)
   * NOTE: no need for notice unless judge requires AND no opt-out
2. Injunctive / declaratory class (AKA equitable class) [**23(b)(2)**]
   * Where D has acted/refused to act in a way that applies generally to whole class so final injunctive/declaratory relief is appropriate to whole class
     + D’s conduct only needs to apply generally to class, perfect harmony not required
     + EG: for civil rights and environmental cases
   * NOT suitable to cases where final relief relates exclusively or predominately to money damages (this is for (b)(3))
     + IE: no claims for individualized relief (e.g. back pay) [***Walmart***]
   * NOTE: no need for notice unless judge requires AND no opt-out
3. Damages class [**23(b)(3)**]
   * Common questions of law or fact predominate over questions affecting only individual members AND class action is superior to other available methods for fairly and efficiently adjudicating the controversy [**23(b)(3); *Walmart***]

#### Relevant considerations [**23(b)(3); *Walmart***]:

##### (A) class members’ interests in individually controlling the prosecution or defense of separate actions;

##### (B) extent and nature of any pre-existing litigation concerning the controversy;

##### (C) desirability of concentrating the litigation of the claims in the particular forum

##### (D) likely difficulties in managing a class action

##### EG: size of class, number of class members who seek to intervene, practicality of providing mandatory notice

* + NOTE: only type which directly includes monetary damages

## NOTE: can form subclasses of Ps [**23(c)(5)**] – often where there are different sets of claims

#### EG: where there are present and future claims = division into homogenous subclasses

## NOTE: hybrid (b)(2)/(3) actions where may seek damages + I/D [***Walmart; Allison***]

* + Must be incidental to the requested injunctive or declaratory relief
  + Damages must not require additional hearings for individual claims, introduce new substantial legal / factual issues, nor entail complex individual decisions [***Walmart***]

5 – NOTICE REQUIREMENTS

1. Costs of notice borne by P class [**23(c)(2)**]

#### If Ps win, costs of sending notice can be subtracted from the common fund

1. For 23(b)(1)/(2) = discretionary – court has discretion to order class representative to give notice to rest of the class [**23(c)(2)(a)**]
   * Class members will be bound by orders regardless
   * Do not provide opt out rights to absentees
2. For 23(b)(3) = required – must be the best notice practicable under circumstances AND provide right to opt-out [**23(c)(2)(b)]**
   * Individual notice to parties identified through reasonable effort [**23(c)(2)(b); *Mullane***]
     + So, must give individual notice to those whose names / addresses are known
   * Constructive notice if that information is not reasonably available [***Eisen***]
   * Must state in plain language [**23(c)(2)(b)**]:

##### **(i)** nature of the action

##### **(ii)** definition of the class certified

##### **(iii)** class claims, issues, or defenses

##### **(iv)** that the class member has option to enter an appearance through attorney

##### **(v)** that the class member can request and receive exclusion (i.e. OPT OUT rights)

##### **(vi)** time and manner for requesting exclusion

##### **(vii)** binding effect of class judgment

Class Action Issues Not Covered

CAFA SMJ REQUIREMENTS [§ 1332(d) – CA Fairness Act]

## Amount in controversy of ALL CLAIMS exceeds $5 million EXCLUSIVE of interest + costs [**1332(d)(2)+(6)**]

## Minimal diversity (i.e. only need one P and one D from different States) [**1332(d)(2)(A)**]

## Class of at least 100 Ps [**1332(d)(5)(B)**]

## NOTE: removal of class actions is dealt with by § 1453 – any D may remove from State to Fed with or without consent of other Ds

DECLINING JURISDICTION [§ 1332(d) – CAFA]

## Court must decline jurisdiction if [**1332(d)(3)**]:

#### More than 2/3 of the members of P class are citizens of the State in which the action was filed

#### A D from whom significant relief is sought is a citizen of that same state

#### The principal injuries were incurred in the state in which the action was filed

#### No similar class action has been filed within the prior three years

## Court may decline jurisdiction if [**1332(d)(4)**]:

#### More than 1/3 but less than 2/3 of the members of P class are citizens of the State in which the action was filed

#### Primary Ds are citizens of that state

#### Consideration is given to 6-factor test (need not satisfy all) [**1332(d)(4)(A)-(F); *Sorrentino***]

##### Whether claims involve matters of national/interstate interest

##### Whether claims will be governed by laws of state of original filing or another state

##### Whether class action has been pleaded in a manner that seeks to avoid Fed jurisdiction

##### Whether the action was brought in a forum with a district nexus with the class members, the alleged harm, or the defendants

##### Whether the number of plaintiffs from the original state is substantially larger than the number from any other state, and the citizenship of the other members is disturbed among many states

##### Whether in the 3-year period before filing, 1 ore more class actions seeking the same or similar claims on behalf of the same or similar persons has been filed

EXCLUDING JURISDICTION [§ 1332(d) – CAFA]

## Primary Ds are NOT States, State officials, or other GOV entities against whom the district court may be foreclosed from ordering relief [**1332(d)(5)(A)**]

## Claim does not solely involve a claim under Federal securities laws or relates to internal affairs of a corporation (based on laws of state of incorporation) [**1332(d)(8); 1332(d)(2)**]

OTHER RULES

## Action can be treated as class action with regard to particular issues [**23(c)(4)**]

## Class actions can be waived via contractual terms (e.g. forcing arbitration) [***AT&T v Concepcion***]

#### Can also be waiver of right to arbitrate on class basis [***Italian Colors***]

#### Mandatory arbitration plus contractual waiver of right to arbitrate on class basis is enforceable even if it would be uneconomical to arbitrate individually

## Federal courts sitting in diversity must apply Rule 23 even when state procedural rules would restrict or prohibit class actions [***Shady Grove***]

SETTLEMENT

## Same requirements apply if court is considering certification of a class only for settlement [***Amchem***]

## Settlement for a certified class requires court’s approval [**23(e)(2)**]

## Court must approve settlement as fair, reasonable, and adequate if it will bind class members

## Reasonable notice must be given to all parties bound by proposed settlement [**23(e)(1)**]

## If it’s a 23(b)(3) class, class members must be given option to be excluded from settlement

## Any class member can object, and the court will consider their objection in deciding approval

## NOTE: if settlement is decided before class certification notice has been sent out, the two notices can be combined into one

#### Settlement-only class certifications still require looking at 23(a) and (b), not just the fairness inquiry in 23(e) [***Amchem***]

COLLATERAL CHALLENGES

## Certification can be challenged to prevent claim preclusion for other class members if there is insufficient procedural rigor in class certification (i.e. inadequate representation)

* Also common law collateral challenges [***Wilks***]

PRECLUSION

## Burden on parties to establish preclusive effects

## Class certification is not destroyed simply b/c it may have unknown preclusive effects on non-parties

## Judgment in a properly entertained class action is binding on class members in any subsequent litigation [***Cooper***]

ATTORNEY FEES

## Court may award reasonable attorney’s fee in any class action [**23(h)**]

#### Courts use different approaches to assess fees

#### Problematic – often contingency and take a % of the settlement sum (can be enormous)

###### Walmart v Dukes

## FACTS

#### Most expensive class action ever (500,000 Ps)

#### Certification was approved by the District Court and Court of Appeals

#### Class comprised current and former female employees of Walmart who alleged the discretion exercised by their local supervisors over pay and promotion matters violated Title VII by discriminating against women

#### Sought injunctive and declaratory relief, and back-pay

#### Crux of the case was commonality

## HELD

#### Scalia majority = no certification because no commonality

##### No evidence of a general policy of discrimination

##### No biased testing procedure for incoming workers

##### Provision of discretion to supervisors was totally opposite of showing common discriminatory treatment (i.e. no common mode of exercising discretion)

##### Expert studies did nothing to show class wide discrimination

#### Ginsburg dissent = certification – satisfied all four requirements

##### BUT majority applied wrong test

##### Court blended the criteria of commonality with the type of class under (b)(3) by looking at whether there were common questions of law and fact

##### Commonality questions did not arise and therefore were not considered by dissenters

###### Philipps Petroleum v Shutts

## CA jurisdiction even though out of state P’s didn’t affirmatively consent to 23b3 CA.

## Because they had adequate representation, best practicable notice, opportunity to be heard, and right to opt out

#### NOT necessary for out of state Ps seeking monetary relief to have min contacts with KA – the fact that the class rep did was sufficient

###### Amchem v Windsor

## CA settlement not approved as certification was improper b/c:

#### 23(a)(2) Commonality requirement not met

#### Common injury from asbestos did not predominate over individual injuries

#### Some Ps had been injured and some hadn’t exhibited symptoms yet

#### Individual Ps have right to their individual day in court

#### 23(a)(4) Adequate representation requirement not met

#### Those currently injured had different interests from Ps who didn’t yet have symptoms

Glossary of terms and concepts

* Collateral attack
  + Where a party subject to a judgment in one jurisdiction attempts to sue them in another jurisdiction to challenge that decision
* JMOL
  + Judgment as a matter of law

## Cognovit note

#### Written document that authorizes entry of judgment against party signing it if an obligation is not paid by the due date

## Alien jurisdiction

#### Matter between foreigner and American citizen

Exam Tips

* Miller likes you to give as much analysis as possible – blurt everything out
* Most answers are not objectively wrong
  + So, analyze different sides to an issue – using dissents and other side’s perspective
* Cite all relevant cases and law – but no need for full citation
* Always draw analogies to facts of cases studied
* Time management is critical
  + Try to knock out some sides/answers in a sentence or two
  + Allocate substantial time to read the question
* Mention FRCP 1 in relation to efficiency etc.
* For policy question, still look to hit the bumpers – these will be the topics and relevant cases we have discussed in class

**NICHOLAS G. SAADY**

**LL.M. 2020**

***SHORT OUTLINE FOR:***

**Intro to Civ Pro (LL.M.)**

**MILLER – FALL 2019**

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Personal Jurisdiction (PJ)

DUE PROCESS REQUIREMENTS FOR PJ

## DP doctrine arises from 5th (State DP) and 14th (Federal DP) Amendments and requires [***Mullane***]:

#### Proof of general jurisdiction OR specific jurisdiction OR jurisdiction based on property

##### NOTE: do general first, because if satisfied, do not need to go through specific

#### D to be given appropriate notice of the action and opportunity to be heard (see Notice below)

## If do not satisfy due process requirements, any resulting judgment/order is invalid [***Mullane***]

1 – GENERAL PERSONAL JURISDICTION

PERSONS

## For persons, general may be established by:

1. Domicile

##### True, fixed and permanent home to which person has intention of returning whenever absent [***Mas***] (see notes under “Determining citizenship” heading below)

1. Service/Presence – AKA “tag jurisdiction”

##### Physical presence in the jurisdiction at time of service [***Pennoyer***] even if it is transient presence for a purpose unrelated to the cause of action [***Burnham***]

##### EXCEPT where service occurs by force or fraud [***Copas***] or when immunity is granted

1. Consent/Waiver

CORPORATIONS

## For corporations, general may be established by:

1. Domicile

#### Where corporation’s activities are so continuous and systematic that it can fairly be regarded as at home in that forum [***Goodyear; Daimler; Helicopteros***]

##### Focus on intentional acts of the corporation (DO NOT use stream of commerce)

##### Selling a product is not enough [***Helicopteros***]

##### Temporary home can be sufficient to establish GJ [***Perkins***]

1. Consent/Waiver

2 – SPECIFIC PERSONAL JURISDICTION

# STEP 1: 4(k)(1)(A) and Long Arm Statutes

1. **FRCP 4(k)(1)(A)** authorizes Fed Courts to assert PJ of the State in which it sits – PJ of State is established through the relevant State’s long arm statute (see below and p.239 of TB)
2. Then two key questions:
   1. Does the long arm statute cover the claim in question (statutory construction q)?
      * If no, then no jurisdiction
      * If yes, then go to 2
   2. Is the statute constitutional?
      * Apply the ***International Shoe*** test to determine constitutionality

## NOTE: for long arms which are extremely broad (e.g. statute covers all cases that are permissible under the CON) then go straight to step 2

# STEP 2: *International Shoe* test

* D must have minimum contacts with forum so that maintaining the suit (i.e. holding there is PJ) does not offend traditional notions of fair play and substantial justice [***International Shoe***]
  + Two elements: minimum contacts and FPSJ
  + Test comes from Due Process requirement in CON – therefore applies to all assertions of PJ

###### ESTABLISHING MINIMUM CONTACTS

* + 1. D must purposefully avail itself of benefits / protections of forum’s laws [***Hanson; Asahi;*** *Kennedy plurality and Breyer concurrence in* ***Nicastro***]
       - Easily established if systematic and continuous activities of D in forum state [***International Shoe; Gray; Burger King***]
       - Sending a child to live in forum state is not purposefully availing yourself of the law of that state [***Kulko***]
       - Choice of law clause alone is not sufficient to establish MC, but is evidence of contacts – must consider other circumstances [***Burger King***]
       - Casual presence of a corporate agent or their conduct of single / isolated activities in a State are generally not enough [***International Shoe***]
         * BUT single contact with substantial connection to State can be enough for minimum contacts [***McGee***]
       - Stream of commerce cases – make it difficult to assess purposeful availment

#### Consumer’s unilateral act does not establish PA [***WWVW; Hanson***]

#### Controlling inquiry [*O’Connor plurality in* ***Asahi;*** *Kennedy plurality in* ***Nicastro***] = knowing product will flow into forum through stream of commerce not enough, need to prove something else directed / aimed at forum state to show PA, such as:

#### D advertised in the forum

#### D conducting business in forum – e.g. advertising, employees, property, offices

#### D designed the product specifically for forum

#### D established channels for advice to consumers in forum

#### D sold a substantial volume of product in forum state

#### BUT Breyer/Alito in ***Nicastro*** said avoid should avoid rigid rule that purposeful availment requires D to have targeted forum

#### NOTE: clear thread between O’Connor, Kennedy and Breyer/Alito is that stream of commerce alone is insufficient – must be additional factor showing targeting of the forum to establish PA

* + - * CONTRARY TEST for stream of commerce:
        + Lower threshold = stream of commerce plus also look at volume of sales [*Stevens concurrence in* ***Asahi***]
        + Even lower threshold [*Brennan concurrence in* ***Asahi;*** *Ginsburg dissent in* ***Nicastro***] = only need stream of commerce and nothing else
    1. Foreseeability
       - D must know or **reasonably anticipate** that their activities in forum may make them accountable in forum’s courts [***WWV v Woodson***]
         * Possibility of consumer bringing product into forum through stream of commerce is insufficient to prove foreseeability [***WWV v Woodson***]
         * HOWEVER debate in ***Asahi*** about foreseeability

*O’Connor concurrence* = stream of commerce insufficient to prove foreseeability

*Brennan concurrence* = as stream of commerce shows regular and anticipated flow of products, it proves foreseeability

###### PROVING FAIR PLAY AND SUBSTANTIAL JUSTICE

* + Considerations [***Asahi***]:
    - Relatedness of the claim to D’s contacts within the forum
      * Specific in-state activity must be related to cause of action
    - Inconveniences or burden on D which would result from trial away from its home or principal place of business [***International Shoe; Burger King***]
      * Must be so grave and difficult that D is unfairly put at a severe disadvantage compared to their opponent [***Burger King***]
      * Hard to prove
    - Forum state’s interest in the case
    - P’s interest in obtaining effective relief
    - Federalist system’s interests in efficiently resolving controversies [***Gray***]
      * EG: location of witnesses, the substantive law that will be applied (i.e. place of injury will be relevant) and other evidence
    - States’ shared interest in furthering social policies
      * EG: state maintaining its highway systems
  + NOTE: always a factual assessment for the court

3 – JURISDICTION BASED ON PROPERTY

BACKGROUND

* Most states have long-arm statutes providing for *in rem* jurisdiction for certain property matters

## If the statute covers, sue the person (*in personam*) and can then enforce thejudgment against the person *and* property

## When State long-arm does not extend to constitutional limit – use CL test (see below)

#### Because if it did, you would just sue

CL TEST REQUIREMENTS

#### For *in rem* and *quasi in rem* where attached property relates to cause of action, the presence of property in forum is constitutionally sufficient to establish j [***Shaffer***]

#### EXCEPT where property brought into state by fraud or force

#### For *quasi in rem* where attached property does not relate to the cause of action, apply *International Shoe*[***Shaffer***]

#### Presence of property in jurisdiction is not decisive, but relevant [***Shaffer***]

## NOTE: property that can be attached includes intangibles, for example:

#### Any debt, as debt is located wherever debtor is located [***Balk*** – Harris owed Balk, Balk owed Epstein, Epstein sued Harris, attaching debt that Harris owed balk and then recovered]

##### IE: any creditor can collect money from their debtor’s debtor

#### Bank accounts [***Pennington*** – state garnished a bank account of non-resident to pay alimony]

CASES ON JURISDICTION

###### Pennoyer v Neff

* FACTS
  + Mitchell (attorney) sued Neff for legal fees that Neff allegedly owed to him
  + Neff's land was sold at a sheriff's sale to satisfy the judgment, and Pennoyer bought it
  + Neff (thought to be living at CA) brought an action to recover possession of that land once he found out about sale
    - Argued sale was improper because Oregon State Court that issued the judgment against him did not have personal jurisdiction
      * At time of judgment, he was not a resident of Oregon
      * Also did not receive notice, as notice was attempted through a publication in an Oregon newspaper to inform him of the action against him, under the Code of Oregon
  + The case turned upon the validity of the original judgment in favor of Mitchell
  + Action was brought in the Oregon Federal Circuit (collateral attack)
* HELD
  + NO PJ over Neff because non-resident and not properly served
    - BUT could have been if the property had been attached before start of litigation, as would have been quasi in rem jurisdiction
  + Persons within a state and domiciliaries of a state are subject to its jurisdiction
  + States have the authority to prescribe the conditions upon which proceedings affecting them may be commenced and carried on within its territory
  + RULE = State court cannot exercise personal jurisdiction against a non-resident who was not personally served with process in the state
    - I.e. Publication of process or of notice within the state, in which a tribunal sits, is unavailing in proceedings *in personam* against Ds in another state

###### Hess v Pawloski (1927)

* FACTS
  + Hess, a Pennsylvania resident driving in Massachusetts had an accident with Pawloski in Mass
  + Hess then left Penn
  + Mass had a statute which allowed service of a resident of another state to be affected by way of service on the registrar who would then provide notice to the resident of the other state
* HELD
  + PJ over Hess
  + When driving on public road, Hess impliedly consented to the appointment of registrar of roads as their agent for service, therefore service/notice was proper and due process clause was respected
    - Did not matter whether consent was express or implied
  + Notice sent outside the state to a nonresident is unavailing to give jurisdiction for a monetary action
  + Statutes are valid insofar as they relate to nonresidents exercising a privilege or right within a forum

###### International Shoe v Washington (1945)

* FACTS
  + Shoe manufacturer, a Delaware corporation based in Missouri
    - No office in W, nor any contracts for the sale and purchase of merchandise there, no stock stored there nor deliveries of goods there
    - BUT employed 11-13 salesmen under direct supervision and control of Missouri sales managers, who resided in W, mainly worked in W by exhibiting samples and soliciting sales for IS, and compensated with commissions based on sales
  + IS was supposed to pay contributions to an unemployment compensation fund administered by Washington state, but didn’t
  + IS received a notice of assessment to pay unpaid contributions, which was served upon a sale solicitor employed by IS in Washington, at a copy was sent to its head office in Missouri
  + IS sought to set aside the notice, but ultimately failed in the Supreme Court, and was required to pay the unpaid contributions
  + Then challenged jurisdiction of the relevant court
    - Argued its presence in W was not sufficient to justify jurisdiction
* HELD

#### PJ over IS – having 14 representatives in WA sufficient presence (minimum contact) in forum for WA to exercise PJ over WA’s suit for unpaid contributions

* + - IS’s activities were continuous and systematic, and neither irregular nor casual, and resulted in a large volume of interstate business
    - Not undue to subject IC to the State’s jurisdiction – because by exercising the privilege of conducting activities within W and enjoying the benefits and protection of the State’s laws, it must also be subject to the liabilities of those laws such as responding to suits
  + RULE – if D is not present within jurisdiction, then must have certain minimum contact with it so that maintaining the suit does not offend traditional notions of fair play and substantial justice
* NOTE: prior to International Shoe, *in personam* jurisdiction was based on theories of presence (in or doing business in a jurisdiction) and consent (express or implied)
  + Complicated by emergence of multi state and foreign corporations – theories did not apply well and so test changed

###### McGee v International Life Insurance (1957)

* FACTS
  + Franklin, a resident of California, purchased a life insurance policy from IL, a Texan company
  + Franklin’s mother, McGee was the beneficiary
  + She sent proof of his death to IL but it refused to pay
  + McGee obtained a judgment against the insurer in a California state court and attempted to enforce it through an action in the Texas state courts
  + Texas courts refused to enforce the California judgment, holding that the judgment was void under the Fourteenth Amendment
* HELD
  + PJ – McGee had minimum contacts with TX
    - There was no violation of 14th amendment if Texan courts enforced judgment
    - Sufficient for purposes of the due process clause that McGee’s suit was based on a contract which had substantial connection with California
    - Contract was delivered in California, the premiums were mailed from there, and the insured was a resident of California when he died

###### Gray v American Radiator (1961)

* FACTS
  + Gray brought a personal injury suit against several defendants, including AR and a foreign corporation called Titan, alleging that a water heater exploded and injured her
  + It charged that Titan had negligently constructed the safety valve, and that Gray’s injuries were suffered as a proximate result thereof
  + Summons was issued and was duly served on Titan’s registered agent in Cleveland, Ohio.
  + Titan filed a motion to quash the summons, stating that it did no business in Illinois and that it sold the completed valves to a co-defendant outside Illinois
* HELD
  + PJ – Titan had sufficient contacts with Illinois to provide jurisdiction because it elected to sell its product for ultimate use in that state
  + If a corporation does business of a sufficiently substantial nature in a jurisdiction then there are sufficient contacts
  + Court also considered convenience, as the law of Illinois will govern the substantive questions because tort was committed there, and witnesses on the issues of injury, damages and other elements relating to the occurrence are most likely to be found here

###### Worldwide Volkswagen v Woodson (1980)

* FACTS
  + New York residents purchased a car from a retailer in New York
  + Involved in a crash with another vehicle in Oklahoma
  + Purchasers brought a products-liability action in Oklahoma against the car retailer
  + Retailer claimed a violation of its due process rights and questioned Oklahoma court’s jurisdiction over them because they were incorporated in NYS and had no contacts with Okl.
* HELD
  + No PJ – retailer had no contacts, ties, or relations with Oklahoma and no reasonable expectations
  + Appropriate test is for D to:
    - First, purposefully avail by having a reasonable expectation that products will enter the forum (stream of commerce)
    - Second, have reasonable expectation of being hauled before forum state’s courts
  + Foreseeability is not a sufficient basis for jurisdiction, but is still relevant in the above test
* DISSENT (Brennan J)
  + Policy of International Shoe is outdated – no longer need to focus on impact on Ds, but look to minimum contact between the parties, contested transaction *and* forum State

###### Shaffer v Heitner (1977)

* FACTS
  + Heitner was domiciled in Delaware
  + Greyhound was an Arizonan company, which performed activities in Oregon
  + H sued GH and 28 of its directors and officers for breaching their duties to the company
  + In Delaware, H sought sequestration of individual Ds property and was so ordered
  + Ds sought to have that set aside as they said they did not have sufficient contacts with Del.

## HELD

#### NO PJ - Delaware’s long arm did not extend to directors/officers – even so, they had nothing to do with DW and no reason to expect to be hauled before courts (i.e. no purposeful avail.)

#### Must apply IS test

#### Presence of property in jurisdiction is not decisive, but relevant

#### Property was not the subject matter of the action, so it was not sufficient to establish any jurisdiction – therefore no minimum contacts

###### Kulko v Superior Court (1978)

* FACTS
  + Father sent a child to live with the mother in California
  + California had no personal j
  + Argued that sending child invoked the benefit of California law, and so did sending mandatory child support checks there
* HELD
  + No PJ – court held neither were sufficient for minimum contacts

###### Calder v Jones (1984)

* FACTS
  + Slander/libel suit in CA against National Enquirer
  + Reporter traveled to CA to interview others for the story - expressly aimed
  + Jurisdiction challenged
* HELD
  + PJ – National Enquirer foresaw the effect of publication
  + If D reasonably anticipates a certain harm within a forum because of their actions, then jurisdiction in that forum

###### Burger King v Rudzewicz (1985)

* FACTS
  + Diversity suit in Florida Fed Court brought by BK, a Florida company, against Michigan-based franchisees for breach of franchise agreement
  + Parties had choice of law provision in contract
* HELD
  + PJ over franchisees
  + Choice of law provision alone is insufficient to confer jurisdiction
  + Must also look at other circumstances – when that clause is combined with 20-year relationship between Michigan franchisee R and BK in Florida, it is sufficient to show deliberate affiliation with Florida and reasonable foreseeability of litigation there
  + No other factors were sufficient to make it unfair or unreasonable to force R to submit to the jurisdiction – reinforced that facts must always be weighed in determining whether conferring personal jurisdiction would comport with FPSJ

###### Asahi v Superior Court (1987)

* FACTS
  + Zurcher (CA Resident) injured by faulty motorcycle – alleged tire, tube and sealant were defective
  + The valve for the tube was made in Japan by Asahi, and then tube was made by Cheung Shin in China
  + Chinese company implead Japanese company for indemnification
  + There was also a CA plaintiff who settled (jurisdiction obvious)
* HELD
  + No PJ over Japanese and Chinese – not in FPSJ so no PJ
  + For MC, the court held:
    - O’Connor plurality
      * Central test to prove MC = whether there has been an action of the D purposefully directed towards the forum, which is sufficient to establish a substantial connection between D and that forum
        + Placement of product into stream of commerce, without more, is not an act of D purposefully directed towards forum
      * I.e. need to place in stream of commerce plus additional factor – there was no additional factor, as product just flowed from Asahi to CA
    - Brennan concurrence
      * Placing into the stream of commerce constitutes sufficient minimum contacts w/o another factor – being aware that product would flow to and be sold in forum is sufficient to make a lawsuit unsurprising – Asahi did this and should be subject to jurisdiction (but not in FPSJ, so no j)
      * Similar to Ginsburg – very broad
    - Stevens concurrence
      * Not in FPSJ to confer jurisdiction, and this is dispositive
      * No need to consider minimum contacts nor stream of commerce
  + FPSJ test should include an inquiry into various factors (see above) and these factors deprived jurisdiction over Asahi
    - Zurcher’s interest was vindicated in the settlement
    - D’s burden of defending in a foreign legal system outweigh CA’s interest in finishing the case there

###### Burnham v Superior Court (1990)

* FACTS

#### Married couple in NJ separated

#### Wife moved to CA with children, husband stayed in NJ

#### Husband often went to CA for business and to see children

#### In CA, he was served with process in a divorce action filed by his wife

#### He moved to quash j, on basis that his visits did not establish minimum contacts

## HELD

#### PJ – established by physical presence alone – such presence constitutes minimum contacts, even if in CA on unrelated matters and for a short time

###### McIntyre v Nicastro (2011)

* FACTS
  + M was a British Company that manufactured scrap metal machines
  + N was seriously injured while using a machine in New Jersey, that was manufactured by M
  + Scrap metal machine sold by British Company ends up in NJ
  + British company targeted US market through trade shows and other advertising, but not NJ specifically
  + NJ was the state with the most scrap metal refining in the US
* HELD
  + No PJ as there was no proof of purposeful availment
  + Kennedy plurality
    - D must intend to submit to forum through activities / actions
    - Stream of commerce is not enough, need additional factor
    - Foreseeability that product would end up in NJ is not enough
    - McIntyre did nothing to target NJ (even though targeted USA) so there was no jurisdiction
  + Breyer concurrence
    - Stream of commerce plus additional factor
    - No jurisdiction = no additional factor to establish j over McIntyre
  + Ginsburg dissent
    - Prime place in IS was given to reason and fairness
    - Fairer for McIntyre to defend suit as a corporation in NJ than for Ps to go to UK
    - Similar to Brennan in *Asahi*
    - Distinguishes facts of WWVW and Asahi – says those international Ds had far less contacts and activity within forum to warrant jurisdiction

###### Goodyear v Brown (2011)

* FACTS
  + Bus crash in France involving boys from North Carolina
  + Parents brought wrongful death damages action in North Carolina against Goodyear USA and its subsidiaries Goodyear France, GY Turkey and GY Luxembourg
  + GY USA accepted jurisdiction
  + Other GY companies had no little business in USA – only sold tires sometimes through intermediaries when GY USA could not service need – e.g. special types of tires
* HELD
  + No GJ – activities were not so continuous and systematic to render it at home
    - Foreign corporations’ actions in forum were essentially selling tires at irregular intervals in NC, and did so through an intermediary. This did not constitute action which was so continuous and systematic to render them essentially at home in NC so no GJ

###### Mullane v Central Hanover Bank (1950)

## FACTS

#### Statutorily authorized common trust fund, under NY Banking Law

#### There was a judicial settlement of accounts by trustee of the fund to beneficiaries

#### Notice was provided through settlement arrangements

#### Question = was there sufficiency of notice to beneficiaries (3 different types) at time of settlement

##### Appellant objected that notice and statutory provisions for notice to beneficiaries were inadequate to afford due process and therefore court was without jurisdiction to render a final and binding decree

## HELD

#### Amendments require deprivation of life, liberty or property to be preceded by notice and opportunity for a hearing appropriate to nature of the case

##### Applies regardless of *in personam, quasi in rem, in rem*

* + Ruling varied for the 3 types of Bs
    - Beneficiaries whose interests are either conjectural or future
      * *Publication* (of the name of the trust, not Bs) is good enough for this group, too expensive to find them all
    - Known present beneficiaries with known places of residence
      * Service by *mail* required
      * Publication isn’t enough, but no need for personal service
      * Beneficiaries are basically identical in their interests so *good enough to give notice to a substantial proportion*
    - Beneficiaries whose interests or whereabouts could not with due diligence be ascertained
      * Notice by *publication* is good enough

Subject Matter Jurisdiction

## Subject matter jurisdiction cannot be waived [**FRCP 12(h)(3)**; ***Capron***]

## Four types of subject matter

1 – FEDERAL QUESTION JURISDICTION

## Fed courts have original jurisdiction of all civil actions arising under the CON, laws or treaties of the US [**28 U.S.C. § 1331; Art III, § 2 of CON**]

#### Exclusive jurisdiction = antitrust, bankruptcy, patent and copyright, admiralty, securities regulations and disputes b/w states

#### Commonly arises through statutes enacted by Congress

## To “arise under” US laws or CON, P must show their cause of action is based on Federal laws or the CON – this is “Well Pleaded Complaint Rule” [***Mottley; Skelly Oil***]

#### NOT concerned with Defenses that might be raised by D [***Mottley***]

## Satisfy one of the three types of “arising under” jurisdiction (see below):

#### Fed law with an Explicit Federal Right of Action

#### Fed law with an Implied Right of Action

#### State law claim with a Substantial Federal Ingredient

ARISING UNDER JURISDICTION

## Explicit Federal Right of Action

#### Where Fed law creates the private cause of action in the Complaint [***Holmes***]

##### Must be clear that P’s right of relief depends on the resolution of a substantial federal law [***Holmes; Franchise Tax Board***]

## Implied Federal Right of Action

#### P’s right of action is implied from a Fed law (i.e. where there is no express cause of action in a statute – e.g. in *Civil Rights Act* below) [***Merrell Dow***]

##### To determine if there is an implied right, court undertakes “balancing test” [***Grable***]:

##### Whether P is part of class for whose special benefit the statute was passed

##### Whether there is legislative intent to create cause of action

##### Whether creating cause of action would further statute’s aims / policies

##### Whether the subject of statute is normally reserved for state law

##### EG: Title VI of Civil Rights Act does not give parties express right to sue for education discrimination, while Title VII which covers employment discrimination does. Title VI deemed to have implied right of action

## Federal Ingredient

#### Where claim arises under state law but requires some interpretation of Fed law [***Osborne***]

#### Considerations [***Grable; Gunn v Minton***]:

#### Whether it is necessary to resolve a Fed question to resolve the lawsuit

##### Look at craftiness of the pleadings and whether there is any attempt to manufacture jurisdiction [***Kansas City***]

#### Fed question must be an issue in the case

#### Question must be substantial enough to the country that a Fed court should hear it

#### IE: Efficiency consideration

#### EG: for uniformity’s sake, or because of particular competencies of Fed courts

#### Consider the level of Fed interest in the suit [***Osborne; Grable***]

#### Allowing Fed jurisdiction will not open the floodgates to litigation and not disrupt the Fed / state balance of power

#### IE: Federalism consideration [***Merrill Dow***]

#### Consider whether there is any state court hostility towards Fed court hearing the claim [***Osborne***]

2 – DIVERSITY JURISDICTION

REQUIREMENTS

##### Party invoking diversity jurisdiction has burden of proving its existence [***Kokkonen***]

#### May only be invoked by a citizen of the USA [***Scott v Sanford***]

#### Cannot manufacture diversity [***Kramer***]

##### Amount in controversy must EXCEED $75,000 [**1332(a); *Freeland***]

#### Including value of damages (even punitive) / injunctive relief – but excluding interest / costs

#### If one D = P can aggregate total amount of all claims against the D

#### If multiple Ds = assess by reference to each D – P’s aggregate claims against EACH D must exceed threshold

#### NOTE: to challenge, D must prove with legal certainty that the claimed AiC is wrong

##### Diversity of citizenship – assessed at time complaint filed [***Grupo Dataflux; Strawbridge***]

#### Need Complete diversity = no party from either side is a citizen of same state (e.g. Ps from CA and Ds from everywhere but CA) [**1332(a)(1)**]

#### IE: no P can be from the same state as a D

##### Where there are MULTIPLE PARTIES – when determining diversity, must disregard nominal or formal parties and only look at the “real parties to the controversy” [***Rose v Giamatti***]

#### Real = parties who by substantive law have a duty sought to be enforced or challenged

#### Nominal / formal = in genuine sense has no interest in the result of the suit or no actual interest or control over the subject matter of the litigation

DETERMINING CITIZENSHIP

## People = citizen of state of true, fixed and permanent home to which they have the intention of returning whenever absent [***Mas v Perry***]

#### Mere residence in State is insufficient [***Mas v Perry***]

#### CHANGE = only if a person takes up residence in a different domicile AND intends to remain there [***Mas v Perry***]

#### NOTE: original domicile is assumed to remain until they have a new domicile (e.g. if driving from NY to CA as part of moving to CA, then remain domiciled in NY) [***WWV v Woodson***]

## Corporations = citizen of BOTH state of incorporation and state of its principal place of business [**28 U.S.C. § 1332(c)(1)**]

#### Principal place of business = nerve center – where all decisions are made [***Hertz***]

#### NOTE: corporation might try to rely on muscle test – will fail – not current test per ***H***

#### Subsidiaries are different from parent – each is unique corporate entity, so assess each differently [***Daimler; Goodyear***]

3 – SUPPLEMENTAL JURISDICTION [28 U.S.C. 1367]

BACKGROUND

##### Exists where a State law suit consists of more than one claim AND Fed court has valid SMJ (diversity or FQ) over at least one of the claims – allows Fed court to take case off State

## EG: gives Fed extra jurisdiction over State law claims, claims where parties fail AiC req. for diversity, and claims where new Ds are joined which make it better to be heard in Fed court

REQUIREMENTS

##### Must be at least one anchor claim over which Fed courts have SMJ (either diversity or Fed Q) [***Gibbs***]

##### That Fed claim(s) must be so *intensely related* to the other State claims that they form part of the same case or controversy [**1367(a)**]

#### Discretionary judgment to be made by court – not a right of the P [***Gibbs; Exxon Mobil***]

#### Consider ALL related claims such as counter claims, cross claims, third party claims, fourth party claims and any other claims involving joinder or intervention of additional parties [**1367(a)**] apart from those excluded under **1367(b)** (see below)

#### Conclude that Fed and State claims arise out of a "common nucleus of operative fact" and are expected to be tried together [***Aldinger; Gibbs***]

#### EG: same witnesses and same documents

#### DIVERSITY ONLY = supplemental jurisdiction CANNOT arise through claims brought by P against (i.e. Fed claim(s) considered above cannot be any of the below) [***Exxon Mobil***]:

#### Impleaded Ds [**§ 1367(b); FRCP 14**]

#### Where P serves summons and complaint on 3P who is or may be liable to it for all or part of P’s claim against D (the 3P becomes another D – i.e. impleaded D)

##### IE: cannot use third party claim to get supplemental jurisdiction

#### Mandatorily joined parties [**§ 1367(b); FRCP 19(a)**]

#### Where court cannot give complete relief to existing parties without a party b/c deciding the action in that party’s absence might:

##### Impair that party’s ability to protect an interest affected by the suit

##### Leave existing party subject to double obligations

#### Permissively joined parties [**§ 1367(b); FRCP 20(a)**]

#### Where P joins another P b/c their two claims emerge out of the same transaction or occurrence AND they share a common question of fact or law

#### Intervening parties [**§ 1367(b); FRCP 24**]

#### Where P joins a 3P and court allows 3P to join b/c:

##### Allowed by statute OR

##### Claim against 3P or Defense raised by 3P shares common questions of fact or fact with the main action OR

##### 3P is a GOV agency or officer acting in that capacity

#### NOTE: above types of claims are excluded from creating supplemental jurisdiction to preserve diversity AND prevent Ps using them to bolster jurisdiction

##### BUT it does not take away from 1367 consideration any counter-claim, cross-claim, or counter-claim to a cross-claim

##### EG: if Ds makes any claim against a third party, it may be considered

#### NOTE: in each of the FRCP cited above, the P’s right to make the claim is conditioned on that claim not destroying complete diversity

##### May decline to exercise supplemental jurisdiction over a claim if it [**1367(c)**]:

#### Raises a novel or complex issue of [State](https://www.law.cornell.edu/uscode/text/28/1367) law [**1367(c)(1)**]

##### EG: where there is no uniform interpretation in State – better left to State to sort

#### State claims substantially predominate over the Fed claim(s) [**1367(c)(2)]**

#### Fed Court has dismissed all claims over which it has original jurisdiction [**1367(c)(3)**]

##### IE: where there is a sole Fed claim, and the court dismisses that claim – then will send it back to the State courts (b/c no Fed claim to supplement)

#### In exceptional circumstances, other compelling reasons for declining jurisdiction [**1367(c)(4)**]

4 – REMOVAL JURISDICTION [28 U.S.C. § 1441]

BACKGROUND

## Allows D to veto jurisdiction proposed by P, by removing the case from State to Federal Court

#### ONLY available to the D

REQUIREMENTS

## D(s) wants to remove case from State to Federal court [**28 U.S.C. § 1441**]

#### IF MULTIPLE Ds = all Ds must agree to removal

#### D(s) is not domiciled in the State in which the claim was started

#### STRATEGY = P can block right to remove by starting case in the State court where D resides

#### POLICY = D cannot be biased or unfairly treated by own state court

#### Less than one year since the case was filed in the State court [**1446**]

#### Case could have been originally filed in Fed court [**1441**]

#### IE: creates no broader jurisdiction in relation to removal, in consistency with CON

#### Removal is to the Fed district embracing the State court in which the case was originally filed

#### IE: must be the district covering State court area

#### Case is not exempt from removal under **1445**

#### A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1–4 and 5–10 of the Act of April 22, 1908 (45 U.S.C. 51–54, 55–60), may not be removed to any district court of the United States.

#### A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

#### A civil action in any State court arising under the workmen’s compensation laws of such State may not be removed to any district court of the United States.

#### A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States

POLICY

## Balances P’s right to choose the forum

Notice and Service

## Notice must be reasonably calculated under the circumstances to apprise Ds of the action and afford them an opportunity to object [***Mullane; Dusenbery***]

#### Notice achieved through Service of Process, which may also establish PJ over the D under **4(k)**

1. Service must occur through an approved methodology – namely under FRCP a Summons must be served with copy of Complaint [**4(c)**] w/in 90 days after Complaint is filed [**4(m)**] according to the procedure listed for service of:

#### individual within US judicial district [**4(e)**] OR

#### a corporation [**4(h)**]

1. Service must be proved to the court [**4(l)**], usually through an affidavit [**4(l)(1)**]

Pleading Rules

## Pleading (i.e. complaint) must contain short and plain statements of the grounds for the court's jurisdiction [**8(a)(1)**], the claim showing that pleader is entitled to relief [**8(a)(2)**] and demand for relief [**8(a)(3)**]

## Must be certified in accordance with **Rule 11**

## Must contain enough facts to convince the court that the claim to relief is plausible on its face [***Iqbal; Twombly***]

#### Doesn’t need to be probable but cannot be conclusory [***Swanson***]

#### Must contain facts which allow court to reasonably infer that D is liable [***Iqbal; Twombly***]

## NOTE: P might try to argue that should apply lower standard under ***Gibson*** but will not succeed – not current test

Venue

APPROPRIATE VENUES [§§ 1390 and 1391]

#### Federal judicial district in which any D is domiciled, if all Ds are residents of[State](https://www.law.cornell.edu/uscode/text/28/1391)in which that district is located [**1391(b)(1)**]

##### EG: 3 Ds residing in NY, then P can choose a judicial district in NY in which at least one of the defendants live such as Eastern District

##### Residency deemed for [NOTE: the below relate to *districts* not states]:

##### Individuals/aliens residing in USA = district in which they are domiciled [**1391(c)(1)**]

##### Incorporated or unincorporated entity (P) = district in which it maintains its principal place of business [**1391(c)(2)**]

##### Incorporated or unincorporated entity (D) = district in which it is subject to court’s personal jurisdiction with respect to the action in question [**1391(c)(2)**]

##### Alien not residing in USA = any district [**1391(c)(3)**]

#### Where corporation is resident in a State with more than one district (e.g. NYS and California), resides in any district in which it has min. contacts to establish PJ [**1391(d)**]

#### In which a substantial part of the events / omissions giving rise to the claim occurred [**1391(b)(2)**]

#### In which a substantial part of[property](https://www.law.cornell.edu/uscode/text/28/1391)that is subject of the action is situated [**1391(b)(2)**]

#### If NO [district](https://www.law.cornell.edu/uscode/text/28/1391) in which an action may be brought per the above, any district in which any D is subject to the[court’](https://www.law.cornell.edu/uscode/text/28/1391)s PJ with respect to the action [**1391(b)(3)**]

## NOTE: for multiparty/multi-forum litigation = action may be brought in any district in which any D resides OR in which a substantial part of the accident giving rise to the action occurred [**1396(g)**]

## NOTE: specific statutes compel certain venues to be used for certain types of claims – also other rules for specific actions (e.g. for patents, apply § 1400)

TRANSFER FOR CONVENIENCE/JUSTICE [§ 1404]

## If for the convenience of parties and witnesses AND in interests of justice, a [district court](https://www.law.cornell.edu/uscode/text/28/1404) may transfer any civil action to any other[district](https://www.law.cornell.edu/uscode/text/28/1404)or division where it might have been brought OR to any[district](https://www.law.cornell.edu/uscode/text/28/1404)or division to which all parties have consented [**1404(a)**]

#### Convenience of parties/witnesses is a separate consideration to IoJ [***Van Dusen v Barrack***]

#### Interests of justice considerations [***Van Dusen***]:

##### Access to witnesses and to the forum itself

##### Docket congestion

##### Speed to trial

##### Relationship of the community to the dispute

##### Court’s familiarity with the governing law

##### Whether P resides in original forum

##### P’s forum choice

TRANSFER FOR INCORRECT VENUE [1406]

## If it is in the interests of justice, a case filed in the wrong division or district may be transferred to any district or division in which could’ve been brought [**1406(a)**]

#### IE: cure or waiver of defects in venue selection

#### Can be transferred even if the transferor court lacks PJ – serves efficiency [***Goldlawr***]

#### ONLY apply the new venue’s law (b/c could not have been brought in old court, so that law should not apply) [***Manley v Engram***]

TRANSFER WHERE FINDING OF NO JURISDICTION [1631]

## If it is in the interests of justice, if a case is filed in court which holds there is no jurisdiction to hear that case, the court may transfer it to any other court in which it could’ve been brought [**1631**]

#### IE: transfer to cure want/lack of jurisdiction

FORUM NON CONVENIENS [§ 1404(a)]

## CL process where court exercises its discretionary power to decline to exercise its jurisdiction b/c it is in interests of justice to transfer to another court to hear the case [***Gulf Oil v Gilbert***]

#### Forum non conveniens cases fall under **1404(a)** [***Atlantic Marine v WD of Texas***]

## Unless balance is strongly in D’s favor, then P’s choice of forum shouldn’t be disturbed [***Gilbert***]

## Must weigh public and private factors to determine if changing forum is necessary to avoid “oppressiveness and vexation” to D [***Piper***]

#### Unless remedy by alternative forum is clearly inadequate or unsatisfactory, such that it is essentially no remedy at all, any difference in substantive law between forums should NOT receive substantial weight and is NEVER determinative [***Piper***]

##### IE: as long as there is a remedy available in alternate forum, does not matter if remedy is clearly insufficient (NOTE: rule not strictly followed – courts still consider relief)

#### Private considerations when determining [***Gulf Oil v Gilbert***]:

##### Interest of the litigants (e.g. the relief available to them as in ***Nemariam***)

##### Ease of access to sources of proof

##### Availability of compulsory process for attendance of unwilling Ws

##### Costs of obtaining attendance of Ws

#### Public considerations when determining [***Gulf Oil v Gilbert***]:

##### Is there an appropriate alternative forum [***Piper; Rep. of Iran***]

##### Interest of the forums in the litigation (e.g. USA promoting deterrence of dangerous or faulty foreign products sold in USA, and interests of Scotland in *Piper* to have local issues tried at home)

##### Other practical problems relating to efficiency and expense of trial

## NOTE: court does not need subject matter nor personal jurisdiction to make a ruling on a *forum non* claim [***Sinochem v Malaysia International Shipping***]

###### Piper Aircraft (1981)

## FACTS

#### Crash in Scotland

#### Scottish people get killed

#### Plane manufactured in Pennsylvania by Piper and propellers were made in Ohio

#### Ps bring the action in USA state court in CA

#### Action transferred to federal district court in Pennsylvania

#### Piper sought to dismiss it on the grounds of forum non conveniens

#### Most Ws and evidence were located in Scotland

#### Reyno argued that Scottish law was less favorable to Ps than Pennsylvania law because it did not include the doctrine of strict liability for these tort cases

## HELD

#### Inconvenient forum – everything is in Scotland – no reasons for USA being more convenient

#### *Forum non* may be used to dismiss a case if P has no specific reasons of convenience for its choice of a forum, and that choice places a heavy burden on D or the court

#### Also held that the remedies provided by the Scottish courts are not inadequate, even though the lack of a strict liability theory might reduce the size of the damages award

#### Unless remedy provided by the alternative forum is clearly inadequate or unsatisfactory, such that it is essentially no remedy at all, the prospect of a difference in the substantive law should not receive substantial weight and is NEVER determinative

Applicable Law in Federal proceedings

**LAW IN DIVERSITY JURISDICTION**

## Overarching principle of ***Erie***: CON requires a Fed court sitting in diversity to apply the substantive law of the State in which it is sitting, but to apply Federal procedural law

#### POLICY = FC to reach the same outcome – when FC hears a diversity case, it becomes a State court and cannot reach a substantially different result to State court [***York; Ragan; Cohen***]

## BUT issues arise when it is unclear whether a Federal statute or rule is procedural or substantive OR conflicts with a State law

## Two relevant statutes:

#### Rules of Decision Act [**§ 1652**] = State laws shall be regarded as rules of decision in civil actions in Fed Courts, except where CON or Fed statutes otherwise require

#### Rules Enabling Act [**§ 2072**] = SCOTUS has power to prescribe “general” rules of practice and procedure and rules of evidence for cases in Fed system [**2072(a)**]

#### IE: carve out from the RODA for Fed rules of procedure

1 – FEDERAL STATUTE v STATE LAW

1. Does the Fed statute cover the relevant issue [***Stewart***]?
   * If yes, go to 2
   * If no, use State law
2. Is the Fed statute constitutional under **Art III** and “necessary and proper” clause [***Stewart***]?
   * Must be “rationally capable of classification” as procedural to apply per *Erie* [***Hanna***]

NOTE: easy test to meet re: procedural, so Fed statute almost always trumps State law

2 – FRCP v STATE LAW [§ 2072 REA ANALYSIS]

1. Does the FRCP conflict w/State law (i.e. is Fed ‘on point’) [***Hanna; Walker v Armco***]?
   * Different methodologies for assessing coverage of FRCP:
     + *Scalia in* ***Shady Grove***: read FRCP broadly
     + *Stevens in* ***Shady Grove***: look at importance of the policy behind the State law and if:
       - Strong state interest in enforcing policy, read rule narrowly per *Ginsburg*
       - Weak state interest in enforcing policy, read rule broadly per *Scalia*
     + *Ginsberg dissent in* ***Shady Grove***and *majority in* ***Gasperini***: read rule narrowly to avoid conflict b/w State and Fed systems AND respect Federalism
       - Echoes *Harlan concurrence in* ***Hanna*** = cautioned against placing FRCP on a pedestal above state rights and interests
   * If yes (i.e. conflicting) go to 2
   * If no (i.e. not conflicting) go to RODA analysis to determine if FRCP is P or S
2. If conflicting, is the Federal rule valid under 2072 (i.e. Rules Enabling Act) [***Hanna***]?

#### Must be a general rule of procedure [**2072(a)**]

#### CANNOT abridge, enlarge or modify any substantive right [**2072(b)**; *Scalia in* ***Shady Grove***]

#### Rule can ONLY govern manner/means by which litigants’ rights are enforced NOT how court will adjudicate those rights [*Scalia in* ***Shady Grove***]

##### BUT alternate approach of *Stevens in* ***Shady Grove*** = 2072(b) means FRCP cannot displace a state procedural law that is “so intertwined with a state right or remedy that it functions to define the scope of the state right”

##### *Ginsburg* did not explicitly consider this issue in *Shady Grove nor Gasperini* – UNCLEAR Ginsburg’s preferred approach if there is a conflict

#### EG: in *Hanna v Plumber* there was no a/e/m of a substantive right b/c P could simply refile the case or serve D personally

#### NOTE: no Federal rule has been struck down for violating 2072 – unlikely for any FRCP to be struck

1. If conflicting and valid under 2072, FRCP prevails [***Shady Grove; Hanna***]

3 – FEDERAL JUDICIAL PRACTICE v STATE LAW [§ 1652 RODA ANALYSIS]

## Must look at whether conflicting State law to be applied is P or S using below two tests:

#### Clearly established categories:

##### Statutes of limitations and holding rules are substantive so must apply State versions of these [***York; Ragan; Walker***]

##### Choice of law rules are substantive [***Klaxon v Stentor***]

##### Elements of a claim or defense are substantive

## Outcome-determinative test = whether applying State law is necessary for Fed court to reach the same result as State? [***York; Ragan; Woods; Cohen***]

#### Judge outcome-determination in terms of ‘twin aims of *Erie*’ [***Hanna***]:

#### Avoidance of forum shopping

#### Ensure equal administration of the law (NOT same as equal protection of the law)

## Byrd balancing test = whether State interest in ensuring consistent outcome-determination outweighs Federal policy / essential characteristics or functions of Fed court [***Byrd***]

## Specific considerations [***Byrd***]:

##### Policies underlying competing State and Fed laws

##### EG: in *Byrd,* 7th Am. jury function is one of those essential functions and strong Fed policy of ensuring right to jury trial

##### Degree of certainty about whether applying Fed law would alter outcome (complicates *York* O-D test above)

##### IE: assess probability of a different outcome b/w Fed and State law – if little impact then can apply Fed law

##### EG: in *Byrd,* low chance that outcome would change if heard by judge or jury

## If YES, State law is substantive and must be applied (If NO, State law is procedural)

CASES

###### Erie Railroad v Tompkins

## FACTS

#### Dark night in Houston, PA where Tompkins is walking alongside railroad track

#### Erie railroad train is moving across the line

#### Something protruding from train and it strikes Tomkins

#### State CL v Federal CL

#### PA state court had higher burden of proving negligence where he was trespassing

#### PA federal courts had more favorable rules of negligence but could still apply PA state law

#### Went to NYS federal court which had ordinary rules of negligence, even for trespassers – applied general federal common law of torts according to *Swift v Tyson*

#### Tomkins won in district and 2nd Circuit

#### Went to SCOTUS – Erie argued that local law should apply

## HELD

#### Fed court must always apply State substantive law – only apply Fed procedural law

#### Overruled *Swift v Tyson* – went beyond boundaries of the appropriate constitutional role for the judicial branch, and created vertical separation of powers concerns involving the federal government and the states

#### Rule = Federal courts are not entitled to create their own common law for issues that properly fall within state law

#### Rule = Applying state substantive law would lead to more predictable outcomes for litigants and greater efficiency for courts

###### Guaranty Trust v York

## FACTS

#### York alleged he was defrauded in buying stock from GT

#### Relevant statute of limitations from suing on bonds had run in NYS law – prevented action

#### Suit involved debate over whether that NYS law prevented remedy being granted by FC

## HELD

#### No action in FC – State statute applied to bar (because the State statute was outcome determinative)

#### Where FC sits in diversity jurisdiction, it sits as if it is a court of the state in which it is located, so same substantive rules apply to exclusion of equity

##### In all cases where FC has diversity jurisdiction, outcome of the litigation in FC 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

#### SO Federal equitable remedies survive EXCEPT where state law bars the action

#### Affirmed *Erie*

#### Reiterated that source of substantive rights enforced by a federal diversity court was state law, and this law determines the outcome regardless of the forum or whether the remedy was in law or in equity

## NOTE: suggests that the difference between procedural law and substantive law in Erie cases hinges on whether the law in question is outcome-determinative, but later decisions have drifted away from this overly straightforward assessment

###### Ragan

## FACTS

#### Wrongful death action in Kansas

#### Kansas law requires action to be brought within 2 years of death – action is brought at the time D is served, not when filed with court

#### Suit was properly commenced in Federal Court

#### D challenged on basis that FC must apply State law, and the State law action tolled (i.e. was out of time)

## HELD

#### No action (out of time) – applying *Guaranty*, must apply the Kansas (state) statute as this binds all FC

###### Woods v Interstate Realty

## FACTS

#### Foreign corporation brought action in diversity against individual in Mississippi

#### Action was for recovery of the commission of the foreign corporation’s broker

#### D moved for summary judgment because foreign corporation could not bring action in MI under state law (insufficient contacts with MI)

#### District court granted summary judgment on that basis – P appealed

## HELD

#### Appeal unsuccessful – State law was controlling and State courts were closed to P

##### Affirmed Erie / Guaranty / Ragan

###### Byrd

## FACTS

#### South Carolina resident sued North Carolina company that employed him for damages for injuries caused by D’s negligence

#### Dispute about whether worker fell under statutory definition of “worker” under workers comp act to be covered by that Act

##### This Act limited his compensation as amount of damages was decided under workers’ compensation statute

#### SC courts held that question of coverage was to be determined by judge not jury

#### Q = whether FC was bound to follow the state method of judge determination or whether P is entitled to jury trial on coverage issue

## HELD

#### Federal Constitution trumps State law

##### Influence if not the command of the 7th Amendment – presumption of jury trial which means that Federal court will entertain the case and allow jury trial

##### Federal interest in favoring jury decisions should not yield to state interest in consistency between federal and state outcome

##### Especially where no guarantee that the result would have been any different if coverage issue was decided by judge or jury

#### NOTE: SCOTUS has not yet considered whether the 7th Amendment extends to State courts

###### Hanna v Plumer

## FACTS

#### Auto accident resulting in death in Massachusetts

#### Claim against estate of the deceased

#### Diversity case

#### MA law says that must bring the case against estate within one year, and commencement with service of process

#### Brings the action in Federal court – trial court says that suit is barred because the State courthouse door is closed (i.e. outcome determinative)

#### Appeal to SCOTUS

## HELD

#### Statute of limitations is NOT outcome determinative because you judge outcome determination in terms of what is called ‘the twin aims of *Erie*’ which are:

##### Avoidance of forum shopping

##### Unequal administration of the law (NOT the same as equal protection of the law)

#### AND you judge outcome determination *ex-ante* NOT ex-post and therefore no promotion of forum shopping

#### NOT governed by 1652 but 2072

##### So Erie does not arise – to raise Erie doctrine, the effect of a procedural rule on the outcome of a case must abridge, enlarge, or modify the substantive law

##### There was no change to a substantive right here because the plaintiff simply could refile the case or serve the defendant personally

##### Therefore this is a Federal interest – so this becomes a valid exercise BECAUSE the Federal procedure must be applied

###### Shady Grove

## FACTS

#### NYS has a class action statute (901(b)) which prohibits class actions for penalties and fines

#### Diversity action in which Ps sought a fine

#### Question = whether the Federal Court had to honor NYS prohibition

## HELD

#### Sharp division in the Court

#### Scalia majority

##### Federal class action rule (Rule 23) prevails over the NYS rule (§901(b) of NY CP rules) AND did not modify, abridge or enlarge substantive right SO does not contravene 2072

##### NOTE: does not really go into whether the laws were procedural or substantive in nature – doesn’t care – just says Fed overrules as both cover same subject

#### Criticizes Ginsburg’s approach of looking at subjective intentions because it would produce confusion and be arduous for courts to determine for each statute

##### Says that do not look at substantive “reasons” or substantive “purpose” but just the right itself

#### Kennedy concurrence

##### NYS rule is a procedural rule and therefore is trumped by Federal rule – also holds that the rule is within the 2072 rulemaking power (but for different reasons to Scalia)

#### Ginsburg dissent

##### Must look at subjective intentions of State legislature because that establishes the State’s substantive regulatory interest (invoking *Erie*) – if they intended to cover the topic or achieve purpose, then respect their substantive interest

##### In this case, NYS limitation on class actions is a state substantive interest and Federal system should honor that interest – respect Federalism

###### Clearfield Trust v US

## FACTS

#### Check issued by Fed GOV was lost in the mail, stolen by a person who cashed it at JC Penney

#### JCP endorsed it and then Clearfield endorsed it too, provided a guaranty and collected money from Fed Reserve

#### Fed GOV discovered it was stolen and fraudulently cashed after 8 months

#### Fed GOV demanded Clearfield to pay on the guaranty

#### C refused, so GOV brought action, and trial court held Fed GOV could not because of delay

## HELD

#### Overruled – 8-month delay should not have prevented the case from being heard, as C had not suffered any damage from the delay (i.e. new rule is D must show damage for delay to prevent action)

#### Establishing new rule was authorized because:

#### CON gives Fed GOV authority over disbursing funds or paying its debts

##### Federal courts may use their own standards to create the applicable rules of law for issues regarding commercial paper, since Congress is silent on this subject

##### Using state rules would be counterproductive because of the divergences among them

##### A single overarching standard would create a useful uniformity

###### Boyle

## FACTS

#### Dead US marine sued helicopter manufacturer for defectively designing its copilot emergency escape hatch

#### State tort law allowed manufacturer to be liable, but Federal "military contractor defense” prevented any manufacturer from liability

## HELD

#### Fed laws valid and trump State laws on contractor liability b/c matter of Fed concern

#### Despite absence of specific legislation immunizing GOV contractors from liability for design flaws, questions of their liability are of unique federal concern

#### State law significantly conflicted with federal interests and had to be displaced

###### American Electricity Power v Connecticut

## FACTS

#### Ps brought action against power companies for excessive CO2 emissions

#### Action was Federal CL nuisance claim

## HELD

#### Cannot bring action – federal judicial power displaced by Congress passing “Clear Air Act” and establishing EPA

##### Relevant question was whether Congress occupied field, and it had

##### Delegation to EPA displaces Fed CL – also noted that any decision of EPA would be subject to judicial review

###### Dice v Akron

## FACTS

#### When you base a state case on a federal statute, you need to apply federal law

## HELD

#### SCOTUS reversed and ordered issue to be submitted to jury because jury trials are just too important a part of the substantive rights provided by FELA (federal statute) to be eliminated in a state action

Class Actions

1 – PERSONAL JURISDICTION

## Ps = class reps must satisfy PJ requirements – no need for PJ over absent Ps [***Shutts***]

## Ds = must satisfy GJ (see p.2 above) or SJ tests (see p.3 above)

2 – SUBJECT MATTER JURISDICTION

## If CAFA applies, under **CAFA 1332(d)** OR if it does not, under normal **1332(a)** diversity requirements

## Amount in controversy of ALL CLAIMS exceeds $5m excluding interest + costs [**1332(d)(2)/(6)**]

## Minimal diversity (i.e. only need one P and one D from different States) [**1332(d)(2)(A)**]

## Class of at least 100 Ps [**1332(d)(5)(B)**]

3 – VENUE

## Assume brought in proper venue per **§§ 1390 and 1391**

4 – CERTIFICATION OF CLASS REQUIREMENTS

1. Relevant **FRCP 23** – establishes legitimacy of the action for all parties by creating a “structural assurance of fair and adequate representation” [***AmChem***]
2. Certification determination must be rigorous and may involve merits inquiries into Ps’ claim BUT courts cannot undertake free-ranging merits inquiries at certification stage [***Amgen***]
3. P bears the burden of proving all four requirements [***Walmart v Dukes***]
   1. Numerosity [**23(a)(1)**]

#### Joinder of the class members as individual parties is impractical

#### Other considerations [***Walmart***]:

##### Size/ease of finding individual class members

##### Future/unknown members make joinder impracticable

##### Geographical separation/fluid composition of class population

##### Size/value of individual claims (e.g. many very small claims)

##### Individual ability and motivation to bring separate actions

#### NOTE: > 40 usually enough, < 22 usually not enough

* 1. Commonality [**23(a)(2)**]

#### CA must generate common answers to the central factual / legal issues [*Scalia in* ***Walmart***]

#### Need to have a “common contention” arising from sufferance of the same injury from same event [***Falcon;*** *Scalia in* ***Walmart***]

#### Prove differences in factual background of each claim must not affect the outcome of the legal issue [***Califano***]

#### BUT *Ginsburg dissent in* ***Walmart*** suggests that only need a claim resulting from the same law or injury – asserts that *Scalia* approach confuses commonality with predominance

* 1. Typicality [**23(a)(3)**]

#### Class representatives’ claims / characteristics must be typical of the whole class so that their representation is fair to the whole class [***In re Schering Plough Corp***]

#### Relevant factors [***Amchem; Giuliani***]:

##### Whether their interests in pursuing the litigation are similar

##### Whether injuries are similar and arise from similar conduct or a similar legal theory

##### Whether member have already initiated claims

#### Different defenses and conflicting interests may kill typicality [***Hansberry***]

* 1. Adequacy [**23(a)(4)**]

#### Representative parties and their lawyers must fairly + adequately protect interests of class members [***Phillips Petroleum; Holland***]

##### Purpose is to “uncover conflicts of interest between the named parties and the class they seek to represent” [***Amchem***]

#### ALSO look at zeal / competence of representative party and their lawyer and willingness / ability to take an active role in the litigation [***Jones v Singing River***]

#### Recognizes judge as a guardian of justice for class members

#### Particularly b/c court appoints class counsel

#### NOTE: potentially conflicting interests do not automatically prevent certification, as they may be cured by other methods such as certification of subclasses

4 – TYPES OF CLASSES (Choose One)

* Only need to fill one of below classes – classes may change after discovery until judgment [**23(c)(1)(c)**]

1. Limited fund class (AKA anti-prejudice class) [**23(b)(1)**]
   * Where there are reasons to avoid individual litigation such as:
     + Inconsistent or varying adjudications [**23(b)(1)(a)**]
     + Adjudications to individuals which would be dispositive of other’s interests or substantially impair their ability to protect their interests [**23(b)(1)(b)**; ***Ortiz***]
   * Main goal is to prevent any potential prejudice from bringing individual lawsuits
     + (1)(a) focuses on prejudice to D (e.g. creating incompatible standards / uncertainty through individual lawsuits which may only be brought by some members of class)
     + (1)(b) focuses on prejudice to absentees (e.g. competing claims)
   * NOTE: no need for notice unless judge requires AND no opt-out
2. Injunctive / declaratory class (AKA equitable class) [**23(b)(2)**]
   * Where D has acted/refused to act in a way that applies generally to whole class so final injunctive/declaratory relief is appropriate to whole class
     + D’s conduct only needs to apply generally to class, perfect harmony not required
     + EG: for civil rights and environmental cases
   * NOT suitable to cases where final relief relates exclusively or predominately to money damages (this is for (b)(3))
     + IE: no claims for individualized relief (e.g. back pay) [***Walmart***]
   * NOTE: no need for notice unless judge requires AND no opt-out
3. Damages class [**23(b)(3)**]
   * Common questions of law or fact predominate over questions affecting only individual members AND class action is superior to other available methods for fairly and efficiently adjudicating the controversy [**23(b)(3); *Walmart***]

#### Relevant considerations [**23(b)(3); *Walmart***]:

##### (A) class members’ interests in individually controlling the prosecution or defense of separate actions;

##### (B) extent and nature of any pre-existing litigation concerning the controversy;

##### (C) desirability of concentrating the litigation of the claims in the particular forum

##### (D) likely difficulties in managing a class action

##### EG: size of class, number of class members who seek to intervene, practicality of providing mandatory notice

* + NOTE: only type which directly includes monetary damages

## NOTE: can form subclasses of Ps [**23(c)(5)**] – often where there are different sets of claims

#### EG: where there are present and future claims = division into present and future subclasses

## NOTE: hybrid (b)(2)/(3) actions where may seek damages + I/D [***Walmart; Allison***]

* + Must be incidental to the requested injunctive or declaratory relief
  + Damages must not require additional hearings for individual claims, introduce new substantial legal / factual issues, nor entail complex individual decisions [***Walmart***]

5 – NOTICE REQUIREMENTS

1. Costs of notice borne by P class [**23(c)(2)**]

#### If Ps win, costs of sending notice can be subtracted from the common fund

1. For 23(b)(1)/(2) = discretionary – court has discretion to order class representative to give notice to rest of the class [**23(c)(2)(a)**]
   * Class members will be bound by orders regardless
   * Do not provide opt out rights to absentees
2. For 23(b)(3) = required – must be the best notice practicable under circumstances AND provide right to opt-out [**23(c)(2)(b)]**
   * Individual notice to parties identified through reasonable effort [**23(c)(2)(b); *Mullane***]
     + So, must give individual notice to those whose names / addresses are known
   * Constructive notice if that information is not reasonably available [***Eisen***]

###### Walmart v Dukes

## FACTS

#### Most expensive class action ever (500,000 Ps)

#### Certification was approved by the District Court and Court of Appeals

#### Class comprised current and former female employees of Walmart who alleged the discretion exercised by their local supervisors over pay and promotion matters violated Title VII by discriminating against women

#### Sought injunctive and declaratory relief, and back-pay

#### Crux of the case was commonality

## HELD

#### Scalia majority = no certification because no commonality

##### No evidence of a general policy of discrimination

##### No biased testing procedure for incoming workers

##### Provision of discretion to supervisors was totally opposite of showing common discriminatory treatment (i.e. no common mode of exercising discretion)

##### Expert studies did nothing to show class wide discrimination

#### Ginsburg dissent = certification – satisfied all four requirements

##### BUT majority applied wrong test

##### Court blended the criteria of commonality with the type of class under (b)(3) by looking at whether there were common questions of law and fact

##### Commonality questions did not arise and therefore were not considered by dissenters

###### Philipps Petroleum v Shutts

## CA jurisdiction even though out of state P’s didn’t affirmatively consent to 23b3 CA.

## Because they had adequate representation, best practicable notice, opportunity to be heard, and right to opt out

#### NOT necessary for out of state Ps seeking monetary relief to have min contacts with KA – the fact that the class rep did was sufficient

###### Amchem v Windsor

## CA settlement not approved as certification was improper b/c:

#### 23(a)(2) Commonality requirement not met

#### Common injury from asbestos did not predominate over individual injuries

#### Some Ps had been injured and some hadn’t exhibited symptoms yet

#### Individual Ps have right to their individual day in court

#### 23(a)(4) Adequate representation requirement not met

#### Those currently injured had different interests from Ps who didn’t yet have symptoms