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# DUE PROCESS

## Due Process

*What separates legitimate from illegitimate force is usually not the substance, but the procedure that justifies the force.*

|  |  |  |  |
| --- | --- | --- | --- |
| **WHITE’S CHECKLIST** | **Florida (Fuentes)** | **Louisiana (Mitchell)** | **Georgia (Di-Chem)** |
| **Specific allegations** | X | √ | X |
| **Bond** | √ | √ | X |
| **Judge (not clerk)** | X | √ | X |
| **Post-seizure hearing** | Unclear | √ | X |
| **Damages for mistaken writs** | X | √ | X |
| **Access to Counsel** |  | √ (if wrongful) |  |
| **CONSTITUTIONAL?** | NO | YES | NO |

* Pre-Mathews Cases
  + Judge must apply a checklist to the procedure in question to ensure it has enough safeguards to adequately prevent mistaken deprivation
  + Exceptions must meet the following 1) Necessary for public good 2) prompt action 3) state acting on its own behalf
* Post-Mathews
  + When there is a due process concern the **Mathews balancing test** controls; it requires you to weigh:
    - Private Interest
    - State Interest (Private Interest when acting on behalf of a private party)
    - Risk of Error/ Value of Additional Safeguards (Safeguards from White’s Checklist)
  + The question moves from “Did you receive due process” to “What process is due under the circumstances?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Case** | **Private Interest** | **Risk of error factors** | **Gov’t Interest** | **Result** |
| ***Fuentes (pre-M)*** | Household goods (low) | Bond only (high) | Enforcement of credit relationships (Low, medium low) | Unconstitutional *(Con. Under dissent)* |
| ***Mitchell (Pre-M)*** | Household Goods (low) | Numerous safeguards (low) | Enforcement of credit relationships (low, medium low) | Constitutional |
| ***Di-Chem***  ***(Pre-M)*** | Frozen bank account (medium-high, high) | No meaningful safeguard (high) | Integrity of commercial dealings/none (low, medium-low) | Unconstitutional |
| ***Doehr*** | Attachment of real estate/home (medium) | Affidavit of right to property (high) | Enforcing ongoing tort proceeding for private citizen (low) | Unconstitutional |
| ***Van Harken (Posner)*** | Parking ticket (low) | Affidavit of right to property (high) | Interest in the efficient enforcement of laws, relatively low. (high) | Constitutional |
| ***Goldberg*** | Welfare payments terminated (high) | Ex post hearing only (high) | Stopping the immediate loss of government funds to ineligible people (medium/high) | Unconstitutional |
| ***Hamdi*** | Freedom (high) | No habeas corpus (high) | Protecting against terrorism (high) | Unconstitutional |

\*\*Rights in order of importance -- Life > Freedom/Liberty > Property \*\*

*Life/Liberty are usually always high; if you want to argue for property to be high, attempt to relate it to life/liberty (welfare benefits)*

## Fuentes v Shevin—1972—SCOTUS—Stewart—Florida

**Household goods (stove) seized; law required general affidavit and 2x bond**

* Statute lacked specific allegations, judicial interaction, and damages for mistake
* Dissent (White, who wrote Mathews) -- the likelihood of a mistaken claim is not sufficiently real or reoccurring to justify a broad constitutional requirement that one do more than the typical state law requires or permits him to do.

## Mitchell v Grant—1974—SCOTUS—White—Louisiana

**Household goods (stereo) seized; statute required presentation to a judge and authorization, immediate hearing**

* Given the risk of wrongful deprivation is low, the law does not violate DPC
* Dissent -- considers Fuentes overruled (Rehnquist & Powell sitting now and were not in Fuentes)

## North Georgia Finishing v Di-Chem—1975—SCOTUS—White

**Bank Account seized for contract dispute; law required falling of affidavit w/ general allegations**

* Process fails to safeguard against wrongful deprivation -- it authorizes a form of legal extortion when a contract dispute arises with no dis-incentive for mistaken writs

## Goldberg v Kelly—1970—SCOTUS—Brennan

**Welfare benefits stopped on notice of fraud; no hearing, based on anonymous tips**

* Welfare benefits are a property interest -- and a substantial one since welfare requires one to have little/no other income (unlike disability).

## Mathews v Eldridge—1976—SCOTUS—Powell

**Disability benefits stopped upon review of medical records**

* The same hearing required in Goldberg is not de facto; *introduces Mathews balancing test*
* Disability is not income based -- those terminated have other options / done after medical review that person is not disabled so in that sense there are specific allegations

## Connecticut v Doehr—1991—SCOTUS—White

**Attachment to real property to secure pending/disputed tort proceeding**

* Private Interest - medium -- can still live in the house but doesn’t have complete freedom to do whatever
* Public Interest - low -- acting on behalf of private citizen with no joint-possessory interest
* RRD/VAS - high -- only verification by oath there was probable cause for attachment

## van Harken v City of Chicago—1997—Posner

**City parking tickets changed from criminal to civil -- appeals process treated ticket as officer’s affidavit**

* Private Interest - low -- if you can afford a car, you can afford a $100 ticket (but can you?)
* Public Interest - high -- speedy, efficient adjudication of parking tickets / income
* RRD/VAS - low -- having officers present do not outweigh the cost of such policy -- The less at stake the less process that is due

## Hamdi v Rumsfeld—2004—Rehnquist

**American citizen declared enemy combatant -- not allowed to challenge status before neutral**

* American citizens are afforded Due Process in any situation -- status does not change that
* Private Interest -high -- Guantanamo Bay with no hope
* Public Interest - High -- terrorism is a problem
* RRD/VAS - (?) -- regardless of the cost, the interest is so high that the right to challenge must be maintained

# PLEADINGS

## Pleading

### Rule 1 Scope and Purpose -- to ensure “just, speedy, and inexpensive” judicial determinations

* Rule 3 Commencing an Action -- by filing a complaint with the court
* Rule 8 General Rules of Pleading -- “short and plain statement re:”
  + 1) Jurisdiction (Why are you before *this* court)
  + 2) Detailed entitlement to relief (What happened?)
  + 3) Relief sought (What do you want?)
* Rule 8(d) - Allows alternative pleading
* Rule 9 Pleading Special Matters (Heightened Pleading) -- Fraud or Mistake
* Rule 12(b)(6) -- Failure to state a claim upon which relief can be granted
* Rule 12(2) -- motion for a more definite statement

Common Law pleading v Notice pleading

* The common law pleading system was based on purely triadic resolution (A+B+Judge) and parties were required to plead in a technically precise way that -- or face common law claim preclusion on the un-plead claim
* Common law system neglected the fact that ∆ has the needed information on liability -- collectively all the needed information was present but that information was not shared -- which led to notice pleading
  + Discovery tools added to ensure disputes are resolved “on the merits” v technicality

## Conley v Gibson—1957—SCOTUS—Black

### Railroad Workers discrimination (*Overturned in Twombly*)

* *Rule 8(a)(2): “short and plain statement of the claim showing that the pleader is entitled to relief”*
* “A complaint should not be dismissed for failure to state a claim unless it appears ***beyond doubt that a plaintiff can prove no set of facts in support of his claim*** which would entitle him to relief.” (Think of Adickes SJ)
* Δ must know enough to be able to respond to the allegation

## US v Board of Harbor Commissioners—1977

**Gov sues multiple companies for oil in water -- 12(e) asking for more specifics in complaint**

* *Rule 8*.These companies are the *cheapest cost providers* of the information because they would have records from the course of business and would easily be able to tell if they were missing oil -- so ∆ receives B-prod
* The plea is sufficient to place ∆ on notice of what the allegation is -- that is all that is required

## McCormick v Kopmann—1959

**Husband killed in accident -- alternative/inconsistent liability to other driver or owner of bar (dram shop statute)**

* *Rule 8(d).* When pleading in the alternative, each count stands alone and inconsistent statements cannot be used to contradict statements in another count -- π just can’t recover on inconsistent claims
* Issacharoff -- Court was wrong because widow is cheapest cost provider -- autopsy would determine if her husband was drunk -- Kopmann could have requested separate trials under 20(b) for prejudice in joint trial
  + “This is the nasty side of liberal pleading”

## Mitchell v A&K—1978

**Truck driver shot in face on street -- π rejected leave to amend complaint to “constructive premises”**

* *12(b)(6).* π pleaded in a legally insufficient manner for separating the premises from the adjacent area (street) -- Court of appeals could not extend definition of premises under Illinois law because of *Erie*.
* By drafting in such manner and refusing to amen -- the attorney forces a decision on the legal question before the factual evaluation -- protects the attorney from losing on appeal (contingency fee) -- *Principle-agent problem*

## Tellabs v Makor Issues & Rights—2007—SCOTUS—Ginsberg

### Securities Fraud = higher pleading standard (PSLRA required “strong inference of ∆’s state of mind)

* *Rule 9(b): “a party must state with particularity the circumstances constituting fraud or mistake, mental intent may be alleged generally”* // PSLRA = Private Securities Litigation Reform Act /
* “Strong inference” requires a comparative evaluation of competing inferences -- it must include those urged by π, those urged by ∆, and those rationally drawn -- “*atleast as compelling as any opposing inference*”
* Congress attempts to raise the cost of entry (right or wrong) in securities litigation because there is a public enforcement mechanism and the potential cost expand the settlement zone not on the merits

|  |  |  |  |
| --- | --- | --- | --- |
| *Elements of Fraud:* | *Cheapest Cost Provider:* | ***9(b) Pleading requirements:*** | ***PSLRA*** |
| 1. False or misleading statement | Plaintiff | Specificity | Specificity |
| 1. Reliance upon statement | Plaintiff | Specificity | Specificity |
| 1. **State of Mind** | **Defendant** | **Notice Pleading** | **Specificity** |

\*\*Heightened plea reasoning -- π is in the position to say which statements/actions in particular misled them -- also reputational cost given reason to settle regardless of the merits (settlement zone) of the claim\*\*

## Swierkiewicz v Sorema—2002—SCOTUS—Thomas

**Employment discrimination with French company / Hungarian executive (triggering McDonnell-Douglass)**

* *Rule 8*. Heightened pleading applies to averments of fraud or mistake only -- McDonnell Douglass is an evidentiary standard that cannot be used as pleading guidelines
* Liberal discovery and summary judgment handle meritless claims

\*\*Expressio Unis (One Cannon of Interpretation) -- when a rule/statute gives an express condition, we presume it excludes al other conditions \*\*\*

## Bell Atlantic v Twombly—2007—SCOTUS—Souter

**Pleading case w/ regard to “Baby Bells” anti-trust conspiracy [private suit before SEC suit /hybrid regulatory scheme]**

* ***[Construed broadly (generally applied)]*** Introduces language of plausibility into pleading standard -- π must allege facts plausible on its face -- conclusory allegations based on conduct not enough (Overturning *Conley*)
* ***[Construed narrowly (argument only)]*** only requires plausibility standard for antitrust cases or for cases with potential exposure to massive/costly discovery or the case is one that gives incentive not to defend on merits
* The prospect of unearthing direct evidence of conspiracy is not sufficient to withstand dismissal; π must allege facts that move the claim beyond “conceivable” into the realm of “plausible”
* Marked the first time the court placed the burden of producing evidence on the party with unquestionably less access to the needed information// “Plausibility” allows factual filter pre-SJ through postponed 12(b)(6) motions

**\*\*\*Iqbal and Markman apply in the pleading context as well -- but are not cited very much\*\*\***

# ANSWER

## The Defendant’s Answer

### Relevant Rules

* + Rule 8(b) -- Must admit/deny paragraph by paragraph (except under general denial of everything, including jurisdiction) -- when denying parts of a paragraph the denial must be stated w/ specificity
  + Rule 8(c) -- Δ must affirmatively state any defense in the answer to the plea
  + Rule 8(b)(5) -- lacks sufficient knowledge to admit/deny the claim
  + Rule 13 - Compulsory counterclaim
* Affirmative Defenses (Modern conception of common law plea “confession and avoidance”)
  + Failing to plead an affirmative defense means it cannot be brought up later in trial and evidence relating to the defense is not admissible at trial
  + 18 affirmative defenses listed in Rule 8(c) and the list is not comprehensive
  + ∆ bears the burden of proof in all affirmative defenses
  + Affirmative defenses can be used w/ 12(b)(6) such as citing the statute of limitations
* Failure to Plead/Answer sufficiently
  + Rule 12(c) -- “Motion for judgment on the pleadings” -- used if ∆ admits an essential allegation and fails to plead an affirmative defense -- can be used w/ “motion to strike” an insufficient affirmative defense
  + Rule 15(a) -- *Amendments granted freely when justice so requires* -- must show good cause
  + Rule 55(a) -- Entering a default
  + Rule 55(b) -- Entering a default judgment (by judge at hearing / clerk if damages for “sum certain”)
  + Rule 55(c) -- Setting aside an entry of default-- “good cause required”
  + Rule 60(b) -- Grounds for relief from a final judgment -- standard after entry becomes judgment
  + Handwritten answers have been upheld -- answers not served to opposing counsel insufficient

## Shepard Claims v Williams Darrah—1986

**Dispute over extension granted to answer -- default entered -- ∆ files notice of appearance to preclude judgment**

* *Rule 55.* Under 55(c) good cause -- the standard from *United Coin* is used
  + Whether the default was willful or by mistake?
  + Whether the set-aside would prejudice π
  + Whether the alleged defense was meritorious (legally sufficient)
* Strong policy in favor of trial on the merits outweighs any inconvenience to π or the court for a relatively short delay in answering -- balancing must include the fact that the mistake resulted from confusion a/b the extension
* Denying amendment here punishes the client and not the lawyer -- unless lawyer is under instruction

*\*\*Much harder to set aside judgment under 60(b) than to show good cause under 55(c)\*\*\**

*\*\*\*Good Cause = United Coin Test\*\*\**

## Zielinski v Philadelphia Piers—1956

**Answer misleads π; Δ is aware and waits/attempt to amend post-running of statute of limitations**

* *Rule 15*. Principles of equity require amendment denial because Δ’s own inaccurate statements would otherwise prejudice π (deprive him a right of action)
* Amendment is denied when culpable (strategic) behavior would lead to prejudice
* Under the *United Coin* “good cause” test -- Δ fails 2/3 prongs

## David v Crompton & Knowles—1973

**Π injured by shredding machine -- Δ assumed liability through asset purchase in 1961 -- plead insufficient information**

* *Rule 8(b)(5).* Answers under 8(b)(5) generally has the effect of a denial, but when an averment is obviously one in which Δ has the knowledge to answer it will be deemed as admitting the claim
  + Or knowledge is a matter of record peculiarly under ∆’s control
* *Rule 15*. Despite the liberal attitude toward amendments, they may be denied if the amendment would result in 1) prejudice to the other party (SOL had run) or 2) the amendment has been unjustifiably delayed
  + ∆ fails *United Coin* test

## Wigglesworth v Teamsters—1975

**Teamsters denying free speech --∆ brought counterclaim for slander (Rule 13); π brought 12(b)(1) [lack of jurisdiction]**

* Four separate test for determining if a counterclaim is compulsory or permissive [whether jurisdiction can be extended over a state-law slander claim]
  + 1) requires there be a logical relationship between the claims, not an absolute identity of factual backing
  + 2) Are there similar/overlapping issues of fact or law?
  + 3) Would ∆ be claim precluded from brining the claim at a later date
  + ***\*\*4) will the same evidence substantially dispose of the issues raised in the counterclaim? (Interpretation of “same transaction or occurrence”)***
* Court says counterclaim is based on events unrelated to original claim (free speech @ meeting v. press conference months later) and such would require new facts to be established
* *Issacharoff* -- The court bended the rules a bit here to protect Wigglesworth from the teamsters -- this should have been a compulsory counterclaim

# PARTIES & PRECLUSION

## Preclusion:

* Claim Preclusion (Res Judicata)
  + CP bars all action on the same claim including what was litigated and also any matter that could have been alleged on the same set of operative facts -- Winner’s claim is “merged”/Loser’s claim is “barred”
  + *Claim Preclusion is the implementation of the transactional theory of completion* -- it requires consideration of the end game before pleading or risk limiting the chance to bring claims discovered later -- affirmative defenses/counterclaims can also be precluded if not brought up front
* Issue Preclusion (Collateral Estoppel)
  + Issue preclusion applies to actions based on a different transaction or occurrence but involving matters already litigated (not those that might have been litigated).
  + Can be used against any party who has already had their day in court (Parklane)
* Exceptions
  + The two exceptions are Intervening Change in Law and Intervening Change in Fact. This would not vacate the original case, but allows the decision to be retried on the merits. (Rush)
* Relevant Rule / Joinder Devices
  + **Rule 17 Proper Parties to a Suit**
    - Suit must be prosecuted in the name of the real party in interest (who will receive the benefit) --17(a) provides general exceptions such as a guardian/executor/trustee -- serves primarily a negative function to *ensure judgment will have proper claim preclusive effects*
  + **Rule 18 Joinder of Claims / Rule 13 Joinder of Counterclaims** 
    - Allows a party to join “any claims it has against an opposing party” -- claims need not be related on efficiency argument given the parties are already in court -- 18(a) is a pleading rule and thus claims may be tried separately if fairness justifies separate treatment (Rule 42b)
  + **Rule 19 Compulsory Joinder of Parties**
    - 19(b) requires the weighing of 1) π’s interest in federal forum 2) Δ’s interest in avoiding inconsistent liabilities or bearing sole responsibility for joint liability 3) absentees’ interest in avoiding prejudice 4) public/court interest in efficiency/finality
    - 19(a) is generally bypassed so court’s can get to the 19(b) balancing test and provide equity
  + **Rule 20 Permissive Joinder of Parties** 
    - Allows joinder of multiple persons if they assert the same right to relief jointly, severally, or alternatively and such right arises out of the same transaction/occurrence (Δ too)
    - Or if any question of law or fact common to all πs or Δs will arise in the action (class actions-esc)
  + **Rule 21 Remedy for Misjoinder** 
    - Remedy for misjoinder is not dismissal of the claim but to add/drop parties by court order or to sever and proceed with claims separately. (Insufficiently similar claims and/or prejudice to Δ)
  + **Rule 14 Impleader**
  + **Rule 22 Interpleader (Statutory and Rule based Interpleaders)**
    - Allows a Δ who fears inconsistent obligations with regard to a identifiable and limited fund to institute its own action in which all claimants are required to litigate simultaneously at T1F1
    - The limitation must preexist the dispute -- U.S.C.§1404 allows distribution among district courts
  + **Rule 24 Intervention (of right) -- Permissive something to add**
    - 1) Interest 2) Possible Impairment of that Interest 3) Inadequate Representation

## Rush v City of Maple Heights—1958

**Motorcycle accident on bumpy road -- Injury to body brought separate from Injury to Body**

* *Claim Preclusion* -- the second suit is barred because it was not brought at F1T1
* Since both injuries were the result of a single transaction/occurrence, there can be but one cause of action with different counts for damages.
* (Policy) Necessary to prevent multiplicity of suits, burdensome expense, delays to π, and vexatious litigation against Δ
* Establishes common law exceptions to claim preclusion -- intervening change in law/fact

## Manego v Orleans Board of Trade—1985

**Roller Rink -- 1st Conspiracy claim centered on discrimination laws -- 2nd Conspiracy claim centered on anti-trust laws**

* *Claim preclusion*. CP does not turn on the legal theory used or a complete overlap of facts/parties; it bars all transactionally related claims.
* Under a transactional approach to claim preclusion suits with the same or substantially similar facts are barred from multiple attempts at litigation

## Taylor v Sturgell—2008—SCOTUS—Ginsburg

**Freedom of Information Request for details on old airplane -- friends brought similar claims**

* *Nonparty Preclusion*. Limits on nonparty preclusion reflect the view that a party should not be bound unless they have had their day in court.
* Six categories of nonparty Preclusion
  1. A party who agrees to be bound by contract (test case)
  2. Preexisting substantive legal relationships (assignee/assignor, succeeding property owners)
  3. “Adequate Representation” by someone with the same interest in a representative capacity
  4. A party who “assumed control” of a prior suit (Insurance/Subrogation)
  5. Proxy relitigation by a designated representative (more than a whiff of tactical maneuvering)
  6. Under certain special statutory schemes, if otherwise consistent w/ the DPC (Bankruptcy)
* Court sidestepped the “*collective rights v. individual rights*” problem -- With publically held rights anyone can bring a lawsuit but can everyone bring the same suit? Do private law courts work for publically held rights?

## Blonder-Tongue Laboratories, Inc v. University of Illinois —1971—SCOTUS

**Patent infringement suit -- No mutuality of parties**

* *Issue Preclusion*. The doctrine has moved away from the traditional view of mutuality -- shifting the inquiry away from whether the person asserting preclusion at T2F2 would have been bound at T1F1 to whether the party against whom it is asserted had full and fair opportunity to litigate at T1F1.
* Allowed defensive use of issue preclusion -- stopping a losing π from relitigating the same (patent) issue against a second Δ at T2F2.
* The issue 1) must have been litigated 2) adverse judgment rendered

## Parklane Hosiery v Shore—1979—SCOTUS—Stewart

**Company loses in proceeding vs. the SEC -- π(Shore) shareholders brought civil action based on Issue Preclusion**

* *Issue Preclusion*. A losing Δ is barred from relitigating the same issue at T2F2.
* A party only gets one full and fair opportunity for judicial resolution of the same issue.
* Trial courts have broad discretion to determine when offensive issue preclusion is applicable-- prohibited where 1) π knew of and could have joined the earlier action (wait-and-see πs) or 2) it would be unfair to allow (little incentive at T1F1).

\*\* ***Parklane*** stops a losing Δ from relitigating; ***Blonder-Tongue*** stops a losing π from relitigating -- incentive at T1F1 because if you lose then you lose against the world \*\* winning π cannot issue preclude; no common-law classes\*\*

## SMU v Wynne and Jaffe—1979

**Suit for employment discrimination in Dallas legal field brought under fictitious names**

* *Rule 17 Proper Parties to a Suit*. Fictitious names are only allowed in cases where highly personal/illegal information must be disclosed and/or there is a high risk of retaliation beyond the typical π (Roe v Wade)
* Suits allowing fictitious names generally involve the government which has no stake in the preservation of its reputation -- basic fairness dictates π’s name must be on the record since Δ’s name is
* Courts have considered the following when allowing fictitious names -- 1) Whether π is challenging the government 2) intimate nature of information 3) admission of illegal conduct 4) risk of retaliation or 5) possible prejudice to Δ by allowing use of fictitious name.

## Kedra v City of Philadelphia—1978

**Suit by entire extended family filed against police department -- Δ argued improper joinder**

* *Rule 20 Permissive Joinder***.** Joinder is permitted where there are reasonably related claims for relief by or against different parties
* Court’s impulse is toward the broadest possible scope of action consistent with fairness to the parties -- such is more convenient, less expensive, less time-consuming for the courts and the parties
* *Judge denied separation of claims at the onset -- but held motion to reconsider after discovery had been made and the court would be in a better place to weigh prejudice on to both parties* (right decision).

## Insolia v Philip Morris—1999

**Suit against 5 tobacco companies alleging industry wide conspiracy to hide negative effects -- dissimilar πs**

* *Rule 21 Remedy for Misjoinder*. Motion to sever claims granted; insufficient similarity and/or prejudice to Δ
* Abstract similarities or dissimilarities in the claim suggest they are not logically related -- claims require highly individualized inquires -- leading to wealth of evidence and possible jury confusion which = prejudice
* Joinder requires conceptualization of a single unit w/ similar facts -- π’s have “different stories”

## Pulitzer-Polster v Pulitzer—1986

**Attempt to move suit from state court to federal court -- family beef**

* *Rule 19 Compulsory Joinder*. Absent parties could be prejudiced by adverse precedent and Δ prejudiced by inconsistent liabilities -- but what matters is balancing test which π fails
* 1966 amendments favor a highly fact-based decision subject to review only for abuse of discretion o
* Four part balancing -- 1) π’s interest in forum 2) Δ’s interest in inconsistent obligations 3) Absentee’s interest in avoiding prejudice 4) Public/judicial interest in efficiency

## VEPCO v Westinghouse—1973

**Generator malfunction resulting in loss of $2.2M -- Argued for 17/19, which would destroy jurisdiction**

* *Rule 19 Compulsory Joinder/ Rule 17 Real Party in Interest*. In the absence of prejudice, a party cannot be compelled to join a suit purely to destroy diversity jurisdiction
* Insurer (INA) does not have to use its name because there is only partial subrogation -- since VEPCO still has interest in the suit and Δ will not be prejudiced due to nonparty preclusion -- suit may proceed in either name
* Rule 19 introduces a standard and not a rule -- Court’s must determine whether the action should proceed in “equity and good conscience” in light of all the circumstances.
* Rule 19(a) is generally applied only if a court wants to dismiss a clam -- 19(b) used when it wants to keep it

## Clark v Associates Commercial—1993

**Repossession of tractor-trailer -- third party repo man injured π**

* *Rule 14 Impleader*. Trial Courts should generally impleader unless it will result in prejudice to other parties.
* Impleader requires privity with Δ -- or some preexisting legal relationship -- not purely a separate duty to π

## State Farm v Tashire—1967—SCOTUS—Fortas

**Greyhound bus wreck in CA -- SF brings interpleader in Oregon -- Trial judge extends interpleader to all Δs**

* *Rule 22 Interpleader*. The mere existence of a fund cannot be used to accomplish purpose that exceed the confines of the fund -- it was establishes only with regard to SF therefore others are liable beyond fund
* *Interpleader was never intended to solve all the vexing problems of multiparty litigation arising from a mass tort (bill of peace)* -- intended to distribute a fixed pot when there is a possibility of inconsistent obligations
* Wreck took place in CA; not fair to require the bulk of litigation to take place in Oregon just because SF established an interpleader in Oregon

## National Resource Defense Counsel (NRDC) v US Nuclear Regulatory Commission (NRC)—1978

**New Mexico issuance of licenses for operation of uranium mills w/o preparing environmental impact statement**

* *Rule 24 Intervention*. Intervention requires 1) interest 2) possible impairment 3) inadequate representation
* Movants show a significantly protectable interest -- requiring a direct interest in the outcome of the litigation is too narrow a construction of Rule 24
* Question of impairment is not totally separate from the question of interest -- any significant legal effect may be considered including state decisis in cases of first impression/instance
* Burden of inadequate representation is minimal -- it is enough to show that representation “may be” inadequate by showing the possibility of divergent interest
* In practice -- intervention of right ask if a party has information/expertise to add to the primary issue at hand -- not just a different opinion but be speaking for a group currently unspoken for in the litigation

# CLASS ACTIONS

## Class Actions

* Rule 23(a) requirements
  1. Numerosity - Impractical Joinder
  2. Commonality - Efficiency gain through certification
  3. Typicality - same interest/same injury
  4. Adequacy - capable/intends to vigorously prosecute
* Rule 23(b) type requirement
  + (b)(1) - Involve situations of similar interest with reasons to avoid individual litigation -- similar to situations requiring compulsory joinder under Rule 19 (Prize Courts / π interpleader)
  + (b)(2) - Suit for injunctive or equitable relief on grounds generally applicable to the entire class -- created to foster Civil Rights cases
  + (b)(3) - Involves question of law/fact common to class members where the class I superior to other available methods of adjudication -- only one to include monetary damages (mass tort / predominance)
* Rule 23(c)(2) notice
  + (b)(1) & (b)(2) court ***may*** give notice (**not required to give notice**) -- (b)(3) requires notice practicable under the circumstances reasonably calculated to reach class members, personal notice to those easily discovered (Mullane)
* Collateral Challenge
  + If there is insufficient procedural rigor in class certification (inadequate representation), the certification can be challenged in an attempt bypass claim preclusive effects
  + Common law collateral challenges (*Wilks*)

## Hansberry v Lee—1940—SCOTUS—Stone

**Racially restrictive covenant -- Collateral challenge to class certified in *Kline v Burke* (Class Decertified ex Post)**

* *Adequacy*. A class cannot consist of members who are free to alternatively assert or challenge the same right -- both interest cannot be represented by one person (Burke)
* It is a fundamental principle of Anglo-Saxon jurisprudence that one is not bound by a judgment in personam in a litigation in which he was not a party -- classes certified without rigor violate DPC

## Mullane v Central Hanover Bank—1950—SCOTUS—Jackson

**NY Common Trust law; combines smaller trust--Individual notice to principal holders before settlement (Certified)**

* *Notice*. In (b)(3) classes, notice must be reasonably calculated under the circumstances to reach most of those interested -- those known throughout the “course of business” must have direct notice
* Notice by publication is generally a supplement; not the only means of providing notice “in personam”

## Holland v Steel—1976

**Class action against Sherriff for restricting access to counsel on civil matters while detained (Certified)**

* *23(a) & (b)(2).* (b)(2) certification requires that relief be generally applicable to the entire class
  + Numerosity. Must have a reasonably purported class -- seeking relief on behalf of future members is an easy way to meet the requirement of impractical joinder when seeking injunctive relief.
  + Commonality. Claims need not be identical, but common elements of law/fact so there is efficiency gain through certification.
  + Typicality. Generally met when the representative is a member of the class generally and posses the same interest and suffers the same injury as other class members
  + Adequacy. Representation is adequate when it appears the representative is capable and intends to vigorously prosecute the interest of the class -- experience/qualifications of counsel important

## In the Matter of Rhone-Poulenc—1995 - Posner

**Class of hemophiliacs exposed to HIV against manufactures of contaminated blood solids (Certification reversed)**

* Class Action & Mass tort. Class certification of mass tort provides incentive for Δ not to defend on the merits and face the risk of overwhelming liability (Δ had won 12/13 cases but would face pressure to settle)
* There is no “Esperanto” instruction -- or single instruction encompassing different applicable state tort laws

## Castano v American Tobacco—1996

**Massive tobacco case -- attempt to certify issue class for phased trials under Rule 23(c)(4) -- (Denied)**

* *(b)(3)* **/** *(c)(4)*. The most compelling rational for finding superiority in class action (efficiency gain) is the existence of negative value individual suits -- such is not the case at bar
* Predominance certification is best when the focus of a common trial will be on a single event and the conduct of Δ in bringing about that event
* Individual causation issues + variation in law/negligence standards = no efficiency gain/transactional savings

## Amchem Products v Windsor—1997—SCOTUS—Ginsburg

**“Bill of Peace” for asbestos related clams (Certification Reversed)**

* *(b)(3)*. A class cannot be certified for settlement when certification for trial would be improper.
* There must be caution in predominance certification when individual stakes are high and disparities among class members is great -- differences in state law compound such disparities
* Interest within the class must be aligned (fast payment v protected funds) -- when using subgroups members must understand their role is to represent the interest of that sub group (structural assurance)
* Rule 23(e) protects unnamed members from representatives who have incentive to sacrifice the rights of the members to secure satisfaction on their individual claims
* *Dissent & Issacharoff* -- opinion is structurally fair but tragically wrong -- people need relief before they die

## Wal-Mart Stores v Dukes—2011—SCOTUS—Scalia

**Class of all women employees for (b)(2) injunction, which included back pay under 1991 CRA (Decertified)**

* *(b)(2)*. Equitable monetary relief must be “incidental” to the main injunctive relief -- it is incidental when liability would not require additional hearings for to individual determinations.

## Martin v Wilks—1989—SCOTUS—Rehnquist

**Black Firefighters defending employment consent decrees against -- collateral attack against class preclusive effects**

* *(b)(2)*. Burden of transactional completion rest upon the party seeking injunctive relief. Joinder over mandatory intervention for preclusion -- mandatory intervention would create a common-law class for nonparties
* A party seeking relief under (b)(2) is the cheapest cost provider of joining parties which may be affected by the relief -- compulsory joinder is the method by which nonparties are precluded from relitigation/collateral attack
* Dissent. Common law requirement’s for collateral attack are 1) if the court had no subject matter jurisdiction at T1F1 or 2) if the judgment is a product of corruption, duress, fraud, collusion, or mistake (not present at bar)

# DISCOVERY

## Discovery

## The Promise and Reality of Broad Discovery

* + Broad discovery has evolved from a procedural rule to more of a procedural institution of seemingly constitutional foundation
  + In reality and in response to increasing litigation cost -- in most cases discovery is proportional to the stakes involved in the case -- such increases the role of the managerial judge in discovery (1983 amds.)

## Two Major Structural Problems of Discovery

## Burdens of Discovery

* + - No mutually assured deterrence as envisioned -- Assumes parties don’t ask for what they don’t need to avoid “tit for tat” escalation which has not happened
    - Parties may demand anything -- the burden is placed on the party resisting the demand to give reasons why it should not comply with demand; instead of articulating the need for information
    - Asymmetric information 🡪 strategic abuses. RISK / COSTS are different between parties:
  + Moral Hazard.
    - Parties don’t internalize costs—it’s cheaper to ask than to produce—no incentive to weigh the marginal benefit of production—
    - Δs generally have more info🡪 repeat Δ want more strict discovery and repeat π want more liberal discovery
    - CONSEQUENCES—excessively expensive because we can’t tailor the litigation to cases. Increasingly, people opt-out of the public forum for private Alternate Dispute Resolution (ADR) or public small claims court
* Alternative Dispute Resolution
  + In response to the cost of public litigation (mostly through discovery), may have started to choose alternative dispute resolution schemes [mediation = negotiation / arbitration = judgment]
  + Problematic because there is a recreation of power structures -- the upper class benefits from the development of public law while not bearing the cost of helping to develop it
* Discovery Devices
  + **Rule 16 Pretrial Conference** - common practice to schedule at onset of litigation now -- shows increased role of managerial judge
  + **Rule 26 Initial Disclosure** - Disclosure of witnesses/documents a party may use to support its claims/defenses
  + **Rule 34 Request for Production** -- used in conjunction with Rule 33; a party must assemble documents in its “possession, custody, or control” including documents from others which the party has influence
  + **Rule 33 Interrogatories** -- 25 interrogatory limit unless by stipulation or court order
  + **Rule 30 Deposition** -- Reasonable written notice required -- 10 deposition limit per side per rules
  + **Rule 35 Physical/Mental Examination** - only discovery tool which advance court approval is necessary in all situations -- party’s mental/physical condition must be “in controversy”
  + **Rule 36 Request for Admission** - Creation of stipulations to be read to the jury -- important tool for tightening the litigation funnel
  + **Rule 37 Failure to Comply** -- forbids use of information that should have been disclosed but for whatever reason was not -- also allows other sanctions to lawyers

## Hickman v Taylor—1947—SCOTUS—Murphy

**Court’s first major decision after adoption of the rules and explains the general attitude toward discovery**

* Discovery serves as 1) a device to narrow/clarify the basis issues for trial 2) a device for ascertaining info as to existence/whereabouts of facts relative to those issues
* Notice pleading + liberal discovery = mutual knowledge of all relevant facts -- essential to proper litigation

## In re Convergent Technologies—1985

**Case describing the 1983 Amendments and the superimposed concept of proportionality in discovery behavior**

* It is no longer to show the info sought appears reasonably calculated to lead to admissible evidence -- must now make a common sense/good-faith determination on the use of discovery tools
* Consider 1) The information is of sufficient potential significance to justify the burden of producing and 2) the timing of the probe is sensible (best place when weighing benefit and burden)
* Ask 1) what info am I really likely to need? and 2) what is the most cost effective way of obtaining it?

## Davis v Ross—1985

**Defamation claim from ex-employee of Diana Ross -- Fired/Resigned**

* The concept of relevance is critical to the scope of discovery -- evidence of wealth is inadmissible until one is entitled to punitive damages because that is when such info becomes relevant
* Doctor/Patient privilege is waved when π put her mental/physical state at issue by requesting damages for mental distress -- such information is discoverable when it becomes materially relevant to the litigation

## Coca-Cola Bottling v Coca Cola—1985

**Coke bottling wants secret formula to show difference between diet coke/coke**

* Court deems the information relevant and discoverable -- regardless of the trade secret status
* Coke decides to settle instead of giving up formula
* “Capitulates to extortion rather than share their trade secret” -- problem with some discovery

## Kozlowski v Sears—1976

**Minor burned in sears pajamas -- joint/several liability with gas station**

* Party from whom discovery is sought has burden of showing sufficient reason why discovery should be denied -- cost or time commitment are not ordinarily sufficient alone to deny needed materials
* Δ is not excused from producing the records because they chose a confusing record keeping system which makes documents unduly difficult to locate/obtain -- burden cannot be a symptom of Δ’s own actions

## McPeek v Ashcroft—2001

**Sexual harassment while working at DOJ (gay dude) -- discovery of backup computer files/emails**

* Allows a “test run” or partial discovery based on principle of marginal utility -- the more likely evidence will be discovered; the fairer producing party covers cost / less likely; less fair and gives incentive to settle
* Burden, time, expense must be weighed against the potential gain from discovery --- judge orders discovery of one year w/ cost monitoring; followed by argument on marginal utility of discovery/ placing the burden
* \*\* Cost-shifting is generally only considered when e-discovery imposes undue burden or expense\*\*

# SUMMARY JUDGMENT & BURDEN SHIFTING

## Summary Judgment

* Post-Adickes (1970)
  + Moving party had the burden or proving the negative -- Δ must foreclose the possibility of any genuine issue of material fact -- effectively removed SJ from judges tools with onerous burden
* Post-Celotex (1986 Trilogy) [Controlling law]
  + Burden of production (burden of going forward to trial) rest with the party who would have the ultimate burden of proof at trial -- needed for functioning summary judgment regime
  + Shrinks “settlement zone” by increasing cost of summary judgment hearing
* Relevant Rules
  + **Rule 50. Judgment as a Matter of Law (Directed Verdict).** Granted if a party has been fully heard on an issue and reasonable jury would not have a legally sufficient basis to find for the party. <50%
  + **Rule 56. Summary Judgment.** Initial inquiry into the facts of a case -- without a functioning Rule 56 there would be no gatekeeping beyond the initial 12(b)(6) motion
    - *SJ hearings are generally scheduled at pre-trial conference -- integral part of litigation now*
* Types of Burdens
  + *Burden of Proof*—always on party departing from the status quo (plaintiff in case; movant in motion) -- Refers to matters of fact proper for determination by a jury
  + *Burden of Production*—Also called the burden of moving forward -- refers to matters of law proper for judicial determination -- it is an understanding of who must product what at any given point

|  |  |  |  |
| --- | --- | --- | --- |
|  | ***Adickes*** | **Rehnquist maj. in *Celotex* (Currie)** | **Brennan dissent in *Celotex* (Louis)** |
| **B-Proof** | Movant | Movant | Movant |
| **B-Prod** | **100%**  Movant assumes B-Prod  *Moving party cannot place burden on non-moving; thus assumes* | **0%**  B-Prod = B-Proof  *-If Δ moving, no B-prod since there is no B-Proof* | **50%**  Δ bears limited B-prod to offer  *1) affirmative evidence 2) review showing absence of evidence* |

## Adickes v Kress—1970—SCOTUS—Harlan

**Freedom teacher in Mississippi -- conspiracy theory between local SH Kress store & police**

* Δ, as moving party, has burden of showing there is an absence of the possibility material fact at issue -- Δ failed to foreclose the possibility that there was a policeman in the store
* *Issacharoff* -- wrong decision because if shifted the B-prod higher than Δ’s burden at trial --removed summary judgment from judicial tools
* Technically good law under Celotex -- but the two are incompatible and Celotex controls

## Celotex v Catrett—1986—SCOTUS—Rehnquist

**Asbestos case -- 15 Δs move for SJ for failure to discovery evidence π was exposed to their asbestos**

* Moving Δ is entitles to SJ by showing the nonmoving party lacks sufficient evidence to prove an essential element of the claim where the nonmoving party bears the ultimate B-Proof
* Principle purpose of SJ is to dispose of factually unsupported claims/defenses -- the rule must be interpreted in a way to allow it to accomplish this; which *Adickes* did not
* SJ must be a back-end filter to accompany liberal notice pleading -- get in funnel easy but hard to get to trial
* Dissent -- adopting Louis 0% rule puts π at systematic disadvantage -- must require *something* of Δ

**\*\*\*SJ Trilogy essentially engrained SJ as a pre-trial factual filer of stupid/unsupported claim\*\*\***

## Matsushita v Zenith—1986—SCOTUS—Powell

**Japanese TV manufacturer price fixing allegation -- both sides present expert evidence**

* Manufactures entitled to SJ after the court finds one side’s experts/legal theory more plausible than the other
* Radical decision -- invites judicial weighing of the facts; generally retained for the jury **--** gives the court the ability to grant SJ if an argument is not plausible/makes no sense

## Anderson v Liberty Lobby—1986—SCOTUS—White

**Libel/Slander case**

* Within reason and caution -- SJ can be granted as long as an issue of fact is marginal and is not a major issue in the case -- factual disputes that are not major will not preclude SJ

*\*\*\*After the SJ trilogy -- one can expect SJ to be similar to a trial preview -- both sides have incentive to produce most of their evidence to ensure they do not lose after the bulk of cost have been absorbed\*\*\**

## Markman v Westview—1996—SCOTUS—Souter

**Dry cleaning patent case -- judicial determination of the patent “claim construction” [Markman hearing]**

* Where there is a fine line whether an issue is a matter of fact or matter of law; uniformity/predictability favor treating the issue as a matter of law where there is no mandatory authority on the issue (efficiency argument)
* Judge can decide proper meaning of patent predicated on special training in “exegesis” -- functionally, courts can step in and evaluate issues of fact to ensure “sound administration of justice”
* *Issacharoff* -- this case changed the 7th amendment inquiry from its historical background giving deference to issues tried by jury at common law to an inquiry of what makes since under the circumstances

## Bell Atlantic v Twombly—2007—SCOTUS—Souter

**Pleading case w/ regard to “Baby Bells” anti-trust conspiracy [private suit before SEC suit /hybrid regulatory scheme]**

* Introduces language of plausibility into pleading standard -- π must allege facts plausible on its face -- conclusory allegations based on conduct alone will not suffice
* The prospect of unearthing direct evidence of conspiracy is not sufficient to withstand dismissal; π must allege facts that move the claim beyond “conceivable” into the realm of “plausible”
* Marked the first time the court placed the burden of producing evidence on the party with unquestionable less access to the needed information
* [***Stevens-Dissent***] “Plausibility” allows courts to make the first factual filter pre-SJ through postponed 12(b)(6) motions

## Ashcroft v. Iqbal—2009—SCOTUS—Kennedy

**Conspiracy against DOJ officials -- alleges he was designated person of high interest based on religion (post-9/11)**

* Facts merely consistent with unlawful activity do not meet the plausibility standard -- when the court may only infer the possibility of misconduct the complaint will not suffice
* If there is an alternative explanation -- pleading must allege specific facts to get beyond 50/50 to atleast 51% (not bare recital of the elements of a cause of action which create a conclusory allegation based on conduct)
* Dissent (Souter). Pleading standard does not need to be raised to filter factually insufficient cases -- the filter could come through a managerial judge being more involved in the expensive discovery process

*\*\*\*Issacharoff does not know what to make of Iqbal -- says most cases/courts cite back to Twombly when there is a question about pleading standards\*\*\**

*\*\*\*Arthur Miller believes factual inquiry at pleading stage introduces subjectivity and will lead to the barring of meritorious claims for an inability to obtain the needed evidence outside of discovery\*\*\**

# PERSONAL JURISDICTION

## Personal Jurisdiction

* Personal jurisdiction relates to the court’s ability to render judgment to a specific person -- Subject Matter jurisdiction relates to the Court’s authority to hear the type of dispute
  + General jurisdiction gives court power to hear any litigation properly in the forum -- with corporations it is the place of incorporation and the principle place of business (nerve cell)
  + Specific jurisdiction is transactionally related and depends on the nature of the dispute
* **Nicastro is the controlling inquiry into minimum contacts (Repeat of International Shoe & O’Connor in Asahi) -- regular flow of products + something else** 
  + ***Higher bar*** for minimum contacts is in WWVW -- “Activities which lead to a reasonable expectation that Δ will be hauled into court within the forum (majority)
  + ***Lower bar*** is in Brennan’s Concurrence in Asahi -- pure stream of commerce w/o plus factor
  + ***Lowest bar*** is in WWVW’s dissent by Justice Marshall -- π centered inquiry would grant jurisdiction if product entered forum in the course of its intended use
  + ***Note:*** There are two more accounts of
* **Asahi is the controlling inquiry into Fair Play and Substantial Justice (Due Process-esc test)**
  + ***Lower bar*** for FPSJ is in McGee -- Justice Black essentially collapsed FPSJ into the minimum contacts analysis -- Considered the high-water mark of expansive jurisdiction
* ***Pennoyer* (Power Theory) is still good law per *Burnham***
* **Dealing with Digital (Express aiming) -- Dealing with Physical (Purposeful Availment)**

*\*\*\*Pennoyer and WWVW are status inquiries concerned with* Δ*’s status within the forum-- International Shoe and McGee are more transactional inquires concerned with the* Δ*’s connection to the forum with regard to the claim\*\*\**

## Pennoyer v Neff—1877—SCOTUS—Field

**Neff contracted for legal fees in Oregon -- moved to California -- Neff’s collateral challenge to jurisdiction**

* Three common law sources of personal jurisdiction
  + Domiciliary
  + In-State service
  + Consent
* *Issacharoff* -- Problems with Pennoyer were 1) the movement of people (automobiles) and 2) the integration of markets (Corporations) and 3) information age (internet/globalization) -- leading to minimum contacts analysis

## Hess v Pawloski—1927—SCOTUS—Butler

**Car wreck in Massachusetts -- long arm statute appointed state registrar as agent for in-state service of process**

* Implied consent under the statute is 1) limited to proceedings growing out of auto accidents (transaction) 2) requires actual notice be sent (aware of suit) and 3) gives reasonable opportunity for time/defense
* Statues are valid insofar as they relate to nonresidents exercising a privilege or right within a forum
* Beginning the move toward a transactional approach to jurisdiction

## International Shoe v Washington—1945—SCOTUS—Stone

**Salesmen in Washington -- Company in Missouri -- Unemployment insurance contribution**

* Minimum contacts requires continual and systematic business relations (flow of products) within a forum plus some additional activities (transactional approach)
* Must not offend traditional notions of Fair Play and Substantial Justice

***Concurrence (Black) [In the majority in McGee]***

* There is strong emotional appeal in FPSJ, but they are not in the constitutional and serve no real purpose

## McGee v International Life—1957—SCOTUS—Black

**Life insurance policy on possible suicide -- TX courts refuse to enforce CA decision in personam**

* It is sufficient for DPC purposes that the suit is based on a contract which had substantial connection with the state (transaction’s relation to the state)
* ∆ must have “certain minimum contacts such that maintenance of the suit does not offend traditional notions of fair play and substantial justice” -- circular reasoning that collapses FPSJ into the minimum contacts analysis

## Worldwide Volkswagen v Woodson—1980—SCOTUS—White

**Automobile accident in OK -- NYC retailer -- manufacturers fronts cost of jurisdiction challenge to obtain diversity**

* Switches from a transactional approach to a status approach -- chattel-driven approach is insufficient to meet the standards of DPC
* Minimum contacts requires business activities that 1) lead to a reasonable expectation that products will enter the forum (Stream-of-commerce) and/or 2) reasonable expectation of being hauled into court there
* Makes foreseeability the only test w/ regard to minimum contacts (Purposeful availment + hauled into court)

***Dissent (Marshall/ Brennan)***

* Jurisdiction should be granted if the product enters the forum during its intended use by the customer -- (Brennan) Cars are made to move around -- there should be jurisdiction

## Calder v Jones—1984—SCOTUS—Rehnquist

**Slander/Libel suit in CA against National Enquirer -- jurisdiction challenged**

* When ∆ can reasonably anticipate a certain harm within a forum as a result of their actions-- jurisdiction regarding the anticipated harm is proper -- ∆ caused “Effect” within the forum (*Calder Effects Test*)
  + Important to note that people traveled to California to interview others for the story -- expressly aimed

*\*\*Effects test used in: Gordy v. Daily News; Indianapolis Colts v. Baltimore Football Limited Partnership; Mwani v Bin Laden; and others \*\**

## Walden v. Fiore—2014—SCOTUS—Thomas (9-0)

**“Professional Gambler’s” cash seized at airport by DEA agent in GA -- suit brought in NV**

* Π’s cannot be the only link between ∆ and the forum -- it is ∆’s conduct which must establish the necessary connection with the forum to make jurisdiction proper
* Minimum contacts inquiry proceeds by asking 1) is ∆’s contact with the forum willful and meaningful (not by the result of unilateral consumer action) and 2) Is contact continual /wide-reaching? (Purposeful availment plus)

## Asahi v Superior Court—1987—SCOTUS—O’Connor

### Zurcher (CA Resident) injured by faulty motorcycle -- Asahi possibly made intertube

### Shifts/Establishes the *FPSJ* test to include an inquiry into π’s connection to the forum

* + 1) Burden on ∆ litigating within the forum
  + 2) Interest of the forum state in maintain the suit
  + 3) π Interest in obtaining relief within the forum state
  + 4) Shared interest in fundamental state sovereignty (efficiency measure asking, “what makes sense?”)
* Because Zurcher’s interest was vindicated in the settlement; ∆’s burden of defending in a foreign legal system outweigh the states interest in finishing the case there

∧∧∧***Fair Play Substantial Justice*** ∧∧∧ ∨∨∨***Minimum Contacts Analysis*** ∨∨∨

* ***O’Connor (4 Votes)*** -- Purposeful availment plus additional activity -- which Asahi did not do
* ***Brennan (4 votes)*** -- Placement into the stream of commerce constitutes sufficient minimum contacts w/o plus factor -- Asahi did this and should be subject to jurisdiction
  + Regular and anticipated flow of products from manufacture through distribution to retail and use
* ***Stevens (3 votes -- 2 from Brennan)*** -- Even if you apply the stricter (O’Connor) standard -- Asahi still had sufficient minimum contacts -- however there was no reason to decide such because of FPSJ -- minimum contacts collapses into FPSJ balancing test
  + *Issacharoff*-- problem w/ this is we need some sort of ex ante regulation -- need to confer jurisdiction without expensive hearing to determine FPSJ

## J. McIntyre v. Nicastro—2011—SCOTUS—Kennedy

**Dangerous scrap metal machine -- English company**

* Kennedy (Plurality 4 votes) -- Jurisdiction proper only when ∆ purposeful avails itself of the privilege of conducting activities within the forum -- thus invoking the benefits and protections of its law
  + Ginsberg -- essentially makes you liable everywhere but nowhere if you’re a foreign company using a distributor
* Breyer (2 Votes; Controlling) -- Regular flow of products into the form plus something more such as advertising, marketing, agents, etc -- there is no plus factor at bar
  + Increasingly globalized world economy has removed boarders as to barriers to trade; this case presents none of those issues -- it is unwise to refashion the rule without consideration of modern-day consequences
* Ginsberg (3 Votes; Dissenting) -- Interprets International Shoe as “giving prime place to reason and fairness” -- as such it is much more fair to have company defend in America than to have π go to England (FPSJ Test)
  + If not, ∆ is liable everywhere but nowhere at the same time -- precludes recovery w/o undue burden

## Pavlovich v Superior Court—Cal—2002

**DVD CCA sues π for posting an algorithm decrypting and allowing illegal copies**

* Placement into the stream of commerce along with something else aimed at the privileges of a forum (plus factor) constitutes purposeful availment / express aiming (express aiming with regard to information)
* Mere awareness that harm may occur in a distant forum alone does not suffice (rejects foreseeability of harm)
  + Distinguishes between “active” and “passive” websites -- if passive site than no minimum contacts (*Zippo* test)

*\*\*\*Calder and Pavlovich seem to be in direct conflict with each other -- run through both if you see a foreseeability of harm basis for jurisdiction \*\*\**

## Daimler v. Bauman—2013—SCOTUS—Ginsberg

### (General Jurisdiction case) Mercedes-Benz USA sued in CA for alleged crimes committed in Argentina

* Requiring substantial, continuous, and systematic business transactions is an unacceptable formulation of general jurisdiction -- stream of commerce theories do not warrant a General Jurisdiction determination
* Place of incorporation and principle place of business (nerve cell) even if temporary provide general jurisdiction in those forms -- must be “essentially at home in the forum state”
* There are foreign policy arguments against exercising general jurisdiction over foreign companies

*\*\*Sotomayor (Concurring alone) introduces the idea of using FPSJ for general jurisdiction questions as well -- would have concurred in judgment (no jurisdiction) given ∆ is a foreign company and the harm occurred in a foreign forum\*\**

## Burnham v. Superior Court—1972—SCOTUS—Scalia

**Ex-husband (NJ Resident) served with divorce papers while visiting children in CA**

* Pennoyer is still good law -- there can be no challenge to transient jurisdiction; does not offend FPSJ
* 4 believe Pennoyer is untouchable by FPSJ -- 5 agree that Pennoyer is subject to review for FPSJ but its pedigree generally means everyone has notice and it would thus be fair to continue the rule

## Noteworthy Cases

* **Keeton v. Hustler** (SCOTUS 1984) -- π’s contacts with the forum alone cannot confer jurisdiction upon a ∆ -- but π’s lack of contacts with a forum is not preclusive of jurisdiction either -- only relevant to the state interest (FPSJ Asahi Test)
* **Grace v. MacArthur** (E.D.Ark. 1959) -- Service on plane; transient jurisdiction

# SUBJECT MATTER & SUPPLEMENTAL JURISDICTION

## Subject Matter Jurisdiction / Supplemental Jurisdiction

* **Diversity Jurisdiction - §1332**
  + Complete Diversity
  + Amount in Controversy must **exceed** $75K
* **Federal Question - S1331**
  + Over all claims arising under the Constitution, laws, or treaties of the United States
    - *Well Pleaded Complaint Rule*. “Four Corners” approach -- on the face of the complaint
  + Is there an express right of action?
  + Is there an Implied right of action?
    - *Merrell Dow* Test
    - *Preemption*. Any suit seeking injunctive relief against state law on the grounds of preemption is granted federal question jurisdiction under an Implied Right of Action
  + Federal Ingredient -- Claims arising from state law that turn on substantial and disputed issues of federal law (predominance almost)
    - 1) Raise a federal question? 2) Substantial and disputed? 3) Proper fed/state balance?
    - Practically folded into Implied right of action after *Merrell Dow* and *Grable*
* **Supplemental -- 28 USC 1367**
  + (a) [Gibbs / Pendant] -- Except under (b) any civil action which the court has original jurisdiction confers supplemental jurisdiction over all other claims arising from the same case/controversy including claims involving the joinder or intervention of additional parties
  + (b) [Owens / Ancillary] -- In any civil action where original jurisdiction is founded solely on diversity, courts shall not have supplemental jurisdiction over claims by π against people made parties under Rules: 14, 18, 20, or 24 or over claims by persons joined as πs under Rules 19 or 24 when such claims would not confer jurisdiction in themselves
  + (c) The district court my decline to exercise supplemental jurisdiction over a claim if
    - The claim raises a novel issue of state law
    - The claim substantially predominates the original claim
    - The district court dismissed all claims which gave it original jurisdiction
    - In exceptional circumstances, if there are compelling reasons for declining jurisdiction
  + (d) - 30 day tolling period from statute of limitations on claims dismissed for lack of jurisdiction
* **Removal** -- if a case filed in state court would have had federal jurisdiction -- ∆ may remove it to Federal court

## Mas v. Perry—1974

**Married couple at LSU -- Peeping tom landlord -- LA domicile & French National**

* A citizen for diversity purposes must be 1) a U.S. Citizen and 2) A domicile of said state
  + Domicile - The last place you lived with the intention to remain there -- evidenced by taxes, voter registration, drivers license, utilities, bills, etc.
* Citizenship is taken at the time the complaint is filed -- subsequent changes do not matter
* Amount in Controversy is determined by the amount claimed by π in good faith -- unaffected if recovery is less than that amount -- suit may be dismissed if it is clear the claim would never justify the sum after trial

## Nashville Railroad v Mottley—1908—SCOTUS—Moody

**Free train passes in injury settlement -- Intervening change in Fed law prohibiting free transportation passes**

* Well-Pleaded Complaint Rule -- π’s original cause of action must arise under the constitution, laws, or treaties of the United States -- π cannot allege an anticipated defense that raises a federal question
* Court can raise subject matter jurisdiction on its own motion -- consent can’t confer subject matter jurisdiction

## Merrell Dow Pharmaceuticals v Thompson—1986—SCOTUS—Stevens

**Morning sickness drug causes birth defects; negligence per se based on FDCA -- ∆ removed to federal court**

* There are no express/implied rights under the FDCA -- cause remanded to state court -- mere presence of a federal issue does not confer federal question jurisdiction
* Three factors bear on the ***proper balance of power between state and federal courts (Fed Indegrident)***
  + Inferences a court should draw from congressional action/inaction in creating a private right of action
  + The likely impact on federal dockets (state tort claims would flood)
  + Significance of the federal question (How important is uniformity?)
* Implied right of action
  + Π in the class to be protected?
  + Was the legislative intent to create a remedy?
  + Does a private right of action serve the statutory purpose?
  + Is this a traditional area of state law?
* Essentially must show evidence of advancement of a statutory purpose to satisfy the federal ingredient test

## Grable v Darue—2005—SCOTUS—Souter

**Quiet Title Action -- argument over definition of notice in IRS statute**

* Court rejects any reading of Merrell Dow that no express right of action precludes federal ingredient jurisdiction -- the absence of a private right of action is relevant to but not dispositive of the federal ingredient analysis
* *Fed indegrident* -- Does a state-law claim necessarily raise a federal issue that is 2) substantial and disputed 3) which a federal forum may entertain w/o disturbing the proper balance of state/federal jurisdiction

## United Mine Workers v Gibbs—1966—SCOTUS—Brennan

**Mine shuts down -- secondary boycott, which implicated the Labor-Management Relations Act**

* If claims are such that π would be expected to try them in one judicial proceeding ordinarily, pendent jurisdiction confers jurisdiction -- a doctrine of discretion w/ reference to efficiency, convenience, and fairness
  + “Common nucleolus of operative fact” -- same transaction or occurrence language
* Introduces exceptions in §1367 (c) -- 1) fed claims dismissed before trial 2) state issues/remedies predominate or 3) the state claims may be dismissed w/o prejudice for resolution in state courts
  + Question remains open -- if state-issue predominance becomes clear pre-trial than dismissal is fine

## Owen Equipment v Kroger—1978—SCOTUS—Stewart

### Wrongful death -- Are you from Iowa or Nebraska?

* Jurisdiction of pendent claims are accepted -- jurisdiction of pendent parties is not
* Want to give incentive for state law claims to be in state court -- because there is solely diversity jurisdiction than there is no federal question and once diversity is destroyed there is no longer jurisdiction
* Now codified in §1367(b)

# STATE & FEDERAL LAW

## Erie Doctrine

*\*\*Where Erie is becoming a problem is the Class Action Fairness Act (CAFA) -- entire bodies of law have been federalized leaving no state laws in the area -- because there cannot be a federal common law courts are left to cite to prior rulings interpretation of the law because there is no authority to create federal common law on the matter\*\**

## Swift v Tyson—142—SCOTUS—Story

**Establishes federal common law**

* Under the RDA, federal courts hearing diversity cases are only bound to apply substantive law, judicial decisions are not law and only evidence of what the law is
* Tyson Rule -- Courts are free to exercise independent judgment as to what the common law of the state is or should be

*\*\* Rule led to* ***BW Taxi v. BY Taxi*** *(anti-competition law) -- that case brought the problems created by Tyson rule to light -- 1) vision for uniformity impossible 2) lost faith in judges/higher law 3) courts upholding progressive laws\*\**

## Erie Railroad v Tompkins—1938—SCOTUS—Brandeis

**Penn. Citizen injured along beaten bath -- direct conflict in Fed common law and state common law**

* Except where state law is controlling; state law is applied in federal diversity cases including decisions and statutes *(Represents Brandeis’ vision of state-centric frame of government)*
* Tyson Rule rest on an assumption there is a transcendent body of law outside the domain of any particular state (Esperanto instruction) which does not exist

## Guaranty Trust v York—1945—SCOTUS—Frankfurter

**Class action brought on diversity jurisdiction -- conflicting SOL rules whether state or federal law is applied**

* In diversity jurisdiction -- a federal court is in effect only another court of the state and must follow state law
* When there is a conflict between federal/state law -- if there is substantive state law it should apply (does it significantly affect the result in fed court to discard the state law that would be controlling)
  + Does it change the outcome? But isn’t everything outcome determinative ex post?
* *Issacharoff* -- this is essentially the disabling of the federal courts/federal rules by Frankfurter who is fighting a battle that was won with *Erie* before he made the court

**Ragan v. Merchants Transfer & Warehouse (SCOTUS 1949)** -- Kansas SOL runs until service/Fed SOL runs until filling

* State law applies and the case is barred (Would not be the case under Hanna/Shady Grove)

## Hanna v Plumer—1965—SCOTUS—Warren

**Service of Process made at decedent’s home (Rule4) -- state law required service in executor’s hand**

* The purpose of Erie was not to limit federal courts with outcome determinative test when there is affirmative and countervailing federal considerations supported by constitutional authority (REA)
* Erie does not command displacement of federal rules by inconsistent state rules -- it allows broader state rules to control over more limited but consistent federal ones
* Choice between federal and state law is made by reference to the policies underlying Erie -- 1) avoid forum shopping 2) avoid inequitable administration of laws

***Harlan (Concurring)***

* Erie was more than an opinion concerned with forum shopping and avoiding inequitable application of laws -- it profoundly touched the allocation of judicial power between the state and federal system
* The courts “arguably procedural, ergo constitutional” brightline goes too far too fast in the opposite direction from the outcome determinative test which erred too far toward honoring state rules
* *Ragan must be bad law under Warren’s opinion*
* Thinks fed courts must be faithful to state law where the law would effect ex ante behavior -- rules that do are substantive and thus trigger Erie/RDA

## Gasperini v. Center for Humanities—1996—SCOTUS—Ginsberg

Damn those picture slides are expensive -- NY law required damages review where fed rule was silent

* Common law “shock the conscious” standard of review of damages deviates substantially from the NY review standard -- NY standard must be applied -- bypass 7th amendment concern by having trial judge apply review
* Court’s may give effect to substantive elements of a state law w/o adopting the procedural aspects

**Scalia (Dissent-3)**

* Favors the Hanna brightline -- where there is a federal rule on point then it controls (*Shady Grove*)
* Issacharoff -- the rules need to be clear ex ante because would be tremendous to regulate ex post

## Shady Grove v. Allstate—2010—SCOTUS—Scalia

**Class action dispute -- NY law limited aggregation of liquidated damages -- Rule 23 does not -- which applies?**

* Restores the brightline of *Hanna* that he favored in *Gasperini* -- there is a federal interest in applying federal rules -- mechanical operation of the rules may harm in some situations, but we need ex ante certainty

# ATTORNEYS

## Hickman v Taylor—1947—SCOTUS—Murphy

**Π sought discovery of Δ’s notes from private witness interviews**

* Attorney work product is privileged as implicit in the rules and pursuant to the general policy of privacy -- allowed when material is produced in reasonable anticipation of litigation
* Exception -- where facts remain hidden and those facts are essential to the preparation of one’s case and the information cannot be obtained without undue hardship such as witnesses no longer available
  + Codified in rule 26(b)(3) -- subject to exceptions
  + Runs counter to efficiency ex post -- but ex ante it would reduce incentive to research and thus the product would never be created
* To reject this rule would create a disincentive for Δ’s attorney to research because of the free-rider problem -- the inadequacy of such representation would implicate due process concerns

## Marek v Chesny—1985—SCOTUS—Burger

**Rule 68 Cost-Shifting post settlement rejection -- do “cost” include attorney fees?**

* Cost under rule 68 includes are properly awardable cost under the relative substantive statute or authority -- where congress has authorized the continental/British rule than attorney fees shift under Rule 68
* Opinion admits to “give π attorney disincentive to continue litigation past a settlement offer -- for the first time the court OK’d an incentive for the attorney that runs counter to the client’s incentives (ex post filing incentive)
  + *Issacharoff* -- the ex ante incentive is actually to not take the case -- the attorney has no power to accept the settlement and the client has no liability for incurring the cost of litigation

## Zuk v Eastern Pennsylvania Psychiatric Institute—1996

**Copyright/Replevin case -- Attorney didn’t research copyright law or replevin SOL -- Sanctions under §1927/Rule 11**

* Under §1927 -- a court must find willful bad-faith on part of the offending party to award attorney fees -- there must be statements on the record which provide an implicit finding of bad faith
* Rule 11 post-1993 amendments is to deter not to compensate -- it envisions public interest remedies such as fines and reprimand as the norm s and private interest remedies as an rare alternative
* Rule 11 imposes 1) reasonable inquiry into the facts and law 2) it is true to the best of his knowledge and 3) attest that the law is good or is a responsible extension of current law -- implied in attorney’s signature

***Rule 11 sanctions post-1983 amendments and pre-1993 amendments***

* In 1983 the rules were amended adding meaning to the attorney’s signature -- sanctions were added not to punish the loser but provide recourse to the winner -- evolved into a British like cost-shifting scheme
* Started to see a move against notice pleading under Conley -- liability to lawyers bringing claims where evidence was hard to obtain pre-filing (civil rights cases) was huge -- ex ante incentive to not take cases

***Rule 11 sanctions Post 1993 Amendments***

* The teeth were taken out with the ’93 amendments -- this has led to a more robust 12(b)(6) process where judges postpone the motion until some discovery has been had
* The deferred 12(b)(6) follows Stevens’ dissent in *Twombly* -- increased role of managerial judge

## Evans v Jeff D—1986—SCOTUS—Stevens

**Generous settlement offer conditioned on a waiver of attorney fees, which would shift under statute**

* Allows settlement offer to be conditioned on waiver of attorney fees -- horrible for attorney incentives ex ante