CIVIL PROCEDURE OUTLINE - Helen Hershkoff, Fall 2016 (Grade: A)

**PERSONAL JURISDICTION**

**Step 1- Define:** The power of a court to enter judgment against a defendant that resolves rights and liabilities and will be enforced as a matter of Full Faith and Credit.

* A court must be authorized by **statute** to exercise PJx in the circumstances, and jurisdiction must also be proper under due process.

**Step 2- Challenge?**

* **Special Appearance:** D challenges PJx without submitting to full jx of court. If lose, continue to merits.
* **Collateral Challenge:** Challenge a default judgment entered. No res judicata power if no PJx.
* **Limited Appearance:** Quasi in Rem – judgment limited to value of the property in state.

**Step 3 - Statute/Plan**

* No contacts with nation? In rem over property 4(n)

**Step 4:**

**Enumerated Acts?** 🡪Statutory analysis 🡪 CON analysis

**Constitutional Max?** 🡪 CON analysis

**Step 5 - Constitutional Analysis - Contacts**

1. **Traditional Bases?** (rationale: territorial sovereignty)

* Scalia/Burnham: all traditional bases are per se reasonable
  + Shaffer: must do reasonableness inquiry for QIRII actions
  + Brennan concurrence/Burnham: every exercise of PJx subject to I-Shoe review.
  1. **In-state service?** **GJx** (Pennoyer, Burnham – transient presence)
  2. **Domicile? GJx** (Milliken – reciprocity)
  3. **Consent? spJx**
  + *Appearance*: Unless designate appearance as “special”, you consent to PJx.
  + *Sanction*: If you make a special appearance and fail to comply with court’s procedures, the court can presume the facts needed to establish PJx. (CBG)
  + *Statute/Registration (explicit/implied)* for inherently dangerous activity/state reg interest (Kane/Hess)
    - **OPEN QUESTION: Should biz req. registration in-state support GJx?**
* (No) Would violate Goodyear/Daimler (inc/PPOB). Would violate Asahi (only exercise GJx over foreign D in exceptional circumstances)

1. **Forum Selection Clause?**
   1. Consent v. Ouster (🡨 OK per Bremen)

* **Prima facie valid unless proven unreasonable** (even ouster clauses, which used to be unconstitutional - Bremen)
  + Reasonableness ≠ constitutional test (free-wheeling – seen as contract law)
  + Boilerplate corporate contract NOT unreasonable (Carnival)
    - Consider parties’ benefits and burdens

1. **Contacts?**

* The modern due process test derived from I-Shoe asks if it is reasonable to make defendant litigate in the forum based on the nature and quality of his instate activities.
  + **Continuous and So Substantial** 🡪 GJx
  + **Continuous and Systematic** 🡪 spJx
  + **Isolated – Nature/Quality** 🡪 spJx
  + **Casual or isolated** 🡪 Nothing
  + *Rationales*: Reciprocity, Notice, Fairness
* **Specific Jx – Claim arises out of contacts with forum**
* **Product liability**
  + Majority view:
    - 1. **Purposeful Availment** - Affiliating circumstances showing volitional efforts to serve the state market. Foreseeability/SOC NOT sufficient. (WW)
      2. **Notice** - Even if you know products are consistently sold into forum, NOT enough if you “never imagined” you’d have to litigate there. (Asahi pl)
      3. **Consent to STATE Sovereignty** – Even if you know a third party targets the forum and you have contemplated having to litigate in the forum, NOT enough. (McIntyre)
         1. Must target STATE specifically, not US regions generally.
         2. SINGLE isolated sale NOT enough (Breyer – McIntyre conc.)
* Minority views:
  + Purposeful availment is NOT necessary (Brennan conc. – Asahi)
    - Knowingly release products into market over time
    - Profit from instate activity and benefit from state laws
    - Quality and quantity of contacts enough (Stevens Asahi)
  + Purposeful availment of US as a whole IS enough (Ginsburg diss. – McIntyre)
    - Consent an outdated fiction.
* **Contract**
  + **“Contract Plus”** (BK): Contemplated LTR with forum, pattern of negotiations, foreseen benefits from affiliation w/ forum, payments made into forum, choice of law provision
  + OR - State has strong **regulatory interest** (statute) (McGee)
    - But if party’s unilateral movement into forum – NO (Hanson)
* **Intentional Tort**
  + Purposely directed at forum, meant to cause harm inside forum (a la libel) –YES
  + P feels harm in forum after incident elsewhere – NO (Walden)
* **General Jx – all purpose jx** A court’s power over a defendant when the cause of action does not arise out of defendant’s contacts with the forum
  + Go to traditional bases
  + **GJx limited to place where D incorporated, PPOB** (Goodyear, Daimler)
    - Stream of commerce 🡪 NO
  + **…unless exceptional circumstances**
    - Congress passed Alien Tort Claims act to give US original jx over human rights abuses. NOT EXCEPTIONAL CIRC.
* **Impute subsidiaries contacts to US parent co?** NO per Daimler
* **International comity VERY important**
* Uninhibited approach would impede international agreements regarding reciprocal recognition and enforcement of judgments, and deter foreign investors.
* **Minority view: “continuous and so substantial”** (use for US co – no international issue)
  + CEO office in state, supervising business in another country (Perkins)
* A multi-national conglomerate may be “at home” in multiple states (Sotomayor conc. Daimler)
* Open Questions
  + Need to apply reasonableness test?
  + Can consent through registration support GJx? (probably not)
    - Foreign corp – no (Ratliff)
  + Does Hertz nerve test apply to PPOB?

1. **Property? NOT per se constitutional:** must do MC and reasonableness (Shaffer)
   1. *Stevens dissent*: Should do MC + Reasonableness for intangible property, but jx based on real property should be presumptively constitutional.
      1. **In Rem** Declare title to property against the whole world
      2. **Quasi in Rem:** Resolve dispute between individuals
      3. **Quasi in Rem II**: Can render personal judgment on the defendant enforceable up to value of instate property. (traditional bases for GJx)

**Step 6 - Reasonableness** (perform for all)

* **MC established?** Per WW, we also must establish that PJx over defendant is reasonable according to a five factor balancing test.
* **Traditional Basis?** Per Scalia in Burnham, jx is per se reasonable. However, per Shaffer and per Brennan’s conc. in Burnham, every exercise of PJx is subject to review.
* **MC fail?** Per WW, the inquiry should end here. However, per Brennan’s dissent, reasonableness may be able to make up for a lack of contacts. The plurality in Asahi also considered reasonableness without agreeing on MC.

1. **Defendant inconvenience**
   1. D must show SEVERELY inconvenient (BK)
   2. Presumptive inconvenience if D foreign (Asahi)
2. **State regulatory interest**
   1. State MUST show interest in statute (Shaffer, McGee)
   2. Could be negated by “market pressures” to improve products (Asahi)
   3. Does not offset severe defendant burden for foreign co (Asahi)
3. **Plaintiff Interest in litigating in the forum**
   1. P must show that litigating in forum “more convenient” (Sotomayor conc. Daimler)
4. **State’s shared interest in efficient resolution**
5. **State’s shared interest in enforcing substantive norms**
   1. Shared state interest in having one designated forum and in regulating corporate life (Brennan conc/dissent Shaffer)

* Add-ons:
* **International comity; foreign trade**
* **Consent to state sovereignty** is basis for power, NOT reasonableness (McIntyre)

**NOTICE AND AN OPPORTUNITY TO BE HEARD**

Under due process, D must be properly alerted to the commencement of **government proceedings** that implicate his **property or liberty** and be given adequate time to present his defenses

* Establish that government is involved and property/liberty is implicated

**1. NOTICE –** [Due Process inquiry for state]

Personal service (i.e. mail) is baseline, though constructive service may suffice in some circumstances.

**MULLANE STANDARD:**

1. Notice must be **reasonably calculated,** under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
2. The means employed must be such as one **desirous of actually giving notice.**

**If name and address are known, must mail notice**

* Even if D may have reason to know of the action anyway or could have easily found out (Mennonite)

**Constructive notice OK when** (Mullane):

* Party’s whereabouts’ unknown
* Not reasonably possible or practicable to give more adequate warning
* Interests are “remote” or “ephemeral” (e.g. remainderman – child of child of child)

**Notice by proxy** sometimes justified if P is giving notice to most people if "most people" likely have similar interest to rest of group

**Must take additional steps if:**

* There is reason to believe notice will be unsuccessful (Greene – kids tear down eviction notices)
* It is offensive to dignity (Greene – eviction notices posted in public housing)
* If you *know* notice did not reach party (Jones – certified mail returned)
  + Thomas dissent: sufficiency should only be considered ex ante.

**If government has a procedure in place, it is presumptively constitutional**

**2. FEDERAL SERVICE OF PROCESS: FRCP 4**

FRCP is presumed to be constitutional (meets *Mullane* requirements)

When you defeat a lawsuit for lack of proper service, the lawsuit ends and a judgment is entered.

**A. General**

**FRCP(4)** uniform procedure for service of process to be used by all federal courts (state have own rules)

* **service of process:** process of notifying defendant of the commencement of suit
  + **FRCP(4)(c)(1):** summons & complaint must be served in all federal proceedings

**FRCP(4)(a):** contents of summons

**FRCP(4)(b):** procedure forissuing summons

* file complaint w/ court, clerk reviews for procedure and signs, must issue to each D

**FRCP(4)(c):** service

* plaintiff (not court) is responsible for serving summons + complaint to each D within R.4(m) timeframe
* anyone at least 18 y/o who’s not a party can serve process

**FRCP(4)(d):** waiver

* defendant has duty to avoid unnecessary expenses of serving the summons
  + **plaintiff may request that defendant waive personal service of a summons**
    - * defendant who **fails to waive without good cause** must bear the **expenses that P incurs associated with completing service**

**B. Mechanics of Service for Federal Courts**

**FRCP(4)(e):** When serving an individual within US:

* (1) follow the state statute where the district court is located or where service is made
* (2) OR
  + (a) personally deliver
  + (b) leave copy at dwelling or usual place of abode w/ someone of suitable age and discretion who resides there
  + (c) deliver a copy to an agent authorized by appointment
    - **Szukhent**: D’s signed contract agreeing to service of process on CEO’s wife, contract didn’t specify that wife had to inform them of suit. All fine as long as they actually receive service.
      * **Brennan dissent**: Boilerplate contract not real consent.

**FRCP(4)(f):** Service outside US must still comply with due process. Any internationally agreed upon method or alternative method is OK.

**FRCP(4)(h):** serving a corporation, partnership or association

* Any (4)(e)(1) or (4)f (for international) method is OK.
* Personal delivery to officer, managing/general agent, appointed agent plus mail to D if state statute requires.

**Return of Service:** after process-server delivers papers, must file a return, which should disclose enough facts to demonstrate that defendant has been served and given notice

* return assumed to be true. can be disproven/defendants own testimony usually not enough to disprove
* **Service by email OK if other means have failed** *Rio v. Rio –* uncooperative foreign D
* **Service by Facebook OK if:** defendant evading service of process, account is truly associated w/ D, and D checks account. *Flo Rida & Baidoo*

**3. OPPORTUNITY TO BE HEARD**

Due process requires that parties have time to prepare and present defenses before they are deprived of liberty or property.

Courts use the three prong balancing test from *Matthews* and *Doeher* to determine whether the opportunity to be heard is proper. The three prongs are populated with the factors considered in the previous *Snidach-Di-Chem* line of cases.

1. **Private interest that will be affected by prejudgment action** (is DP triggered?)

* What constitutes property? (wages *Sniadach*; consumer goods *Fuentes*; gov. benefits *Goldberg*)
* Temporary loss of property triggers DP (*Sniadach*, *Doeher*)
* Other interests (*Doehr/Shaumyan* -cloud on title, credit score)

1. **Risk of erroneous depravation and value of additional or substitute safeguards**

* Judge > Clerk issue writ (*Sniadach, Fuentes, Di-Chem* – clerk; *Mitchell* – judge)
* Application require credibility determination, standards of proof, probable cause (*Di-Chem* – conclusory statements not sufficient)
* Verified documentary evidence > say-so (*Doeher* – skeletal affidavit RE tort; Shaumyan – verified documentary evidence of contract)
* Does plaintiff have to post bond (*Di-Chem, Mitchell* – required bond)
* Is there a prompt post-seizure hearing/opp for D to dissolve writ (*Mitchell*)
* Exigency/Urgency (*Mitchell* –clear showing that defendant might conceal/waste property)

1. **Interest of plaintiff and government and fiscal implication of additional requirements:**
   * Does plaintiff have pre-existing interest in the property (*Sniadach* –no interest in defendant’s wages; *Fuentes* – creditor has interest in consumer goods it paid for; *Shaumyan* – contractor sweat equity in home)
   * Does defendant have to post a bond to dissolve the writ (*Fuentes­ ­*– had to post bond but for 2x value, likely can’t afford that)
   * Cost to the government
   * Are there exigent circumstances (war, economic disaster, dangerous product recall, etc.)

**SUBJECT MATTER JURISDICTION**

**STEP 1: Define**: The power of the court to hear a particular kind of dispute. A party cannot waive an objection or consent to a defect in subject matter jurisdiction. A case can be dismissed for lack of SMJx at any time through appeal.

**STEP 2:** **Jurisdictional or Merit-Based?**

Legislature must include a CLEAR STATEMENT in statute if it wishes for a matter to be jurisdictional.

* Use word “jurisdictional” or in jurisdiction section of code
* Can be relaxed if historically jurisdictional issue (e.g. SoL) or important to system related goals (e.g. gov’t immunity)

***STEP 3: State Court?***

* **Plenary power** to hear all types of claims.
* **Concurrent** jx with fed courts unless
  + Explicitly ousted by a federal statute. (e.g. antitrust)
  + Legislative history shows reason to remove
  + Incompatibility w/ state and federal interests
* **Federal Regulations over State SMJx:**
* Full Faith & Credit: states *must* hear transitory causes of actions from other states & respect judgments that have been entered by other states (*rationale: favor state forums*)
  + exception: if state has a strong public policy that outweighs this national policy *(Hughes)*
* Supremacy Clause: state courts can’t discriminate against federal causes of action

**STEP 4: Federal Court?**

* **limited jurisdiction** (presumption against jx)
* The party invoking federal SMJx has the burden of allegation and proof; the federal court also has an independent obligation to determine whether SMJx exists.
* need both Constitutional (Article III Section 2) & statutory power to exercise SMJx

1. **OK to REMOVE from State 🡪 Federal Court?**
   1. Only defendants can remove (1441). Party removing has burden to show SMJx. (1446)
   2. Must remove to federal court physically closest to state court where claim filed (1441)
   3. If instate defendant sued or joined, NO diversity removal (1441b2)
   4. OK if state court removed from did not have jx (1441f)
   5. **Action can only be removed if federal court would have had original jurisdiction over claim from day 1**. (1441a)…

**Diversity Jurisdiction**

protect out of state resident from bias, provide forum for claims that affect national markets, fed/state cross-pollination of ideas

**1. Constitutional** - **Art. III, § 2** “between citizens of different states” or “between a state, or the citizens thereof, and foreign states, citizens or subjects”

**2. Statutory** - **28 U.S.C. § 1332** – uses Art. III, § 2 language, but imposes more conditions – Key additions: (1) Complete Diversity (2) AIC

* **Abstention**? Court has discretion to decline to exercise jx for traditional state law claims – divorces, wills.

**Q1: Determine State Citizenship of Parties** **28 USC 1332**

* **Determined @ time complaint filed**, ignore subsequent changes. *Mas*

**US Citizens/Residents (no PRA) –** Domicile (fixed residence + intent to remain)

* Domicile remains the same until it affirmatively changes *Mas* *v. Perry*
* Determined through *objective* indicia.

**Guardians** – that of decedent, infant or incompetent 1332(c)(2)

* Open question: can incompetent person’s domicile change? (“intent”)

**Corporations** – citizen of every state and foreign state in which it is incorporated AND the state OR foreign state where it has its principal place of business 1332(c)(1)

* *Rationale*: give citizens more possible state forums
* **PPOB = Nerve center**. Where essential decision-making takes place (Hertz)
  + **Dissolved corp?** If corp still wrapping up business, argue for citizenship based on rationale.
  + **Bank?**Citizen of where main office listed in articles of incorporation.
    - Open question whether also citizen in PPOB.

**Unincorporated Associations** –anything not called a corporation (bright line rule)

* Citizen of all states in which at least one is a member.
* Use trustee’s personal citizenship. *Americold Realty*
* **Class actions** § 1332(d)(10): state under whose laws the association is organized and the state where it has PPOB. (Rationale: make federal forum available – otherwise a million different state citizenships)

**Insurance Companies**

* citizenship of insured (in direct action)
* if insured joined as party 🡪 place of inc., PPOB.

**PRA** – considered FOREIGN citizen unless US Citizen (State A) v. PRA (State A)

* Deemer provision – meant to destroy diversity, not create it.

**Stateless person** (refugee) – not a state citizen and not a foreign citizen – no diversity or alienage jx

**Expat** who has no intent to return – not a state citizen and not a foreign cit. – no diversity or alienage jx.

**Q2: Do we have diversity of state citizenship?**

1. **Constitutional Authorization: Article III, § 2** “between citizens of different states”

* Minimal diversity

1. **Statutory Authorization: 28 USC 1332(a)(1)**

* Imposes **complete diversity** (Strawbridge). Does not run full length of constitution.
  + No plaintiff can be a citizen of the same state as that of any defendant
  + Out-of-state plaintiff can invoke diversity jx on day 1 even if defendant is being sued in his own home state **28 USC 1332(a)** (but no removal 1441)

**Q3: Do we have diversity for Alienage Jurisdiction?**

**1. Constitutional Authorization: Article III, § 2** “between a state, or the citizens thereof, and foreign states, citizens or subjects”

**2.** **Statutory Authorization: 28 USC 1332(a)(2)(3)(4)** three permitted forms of alienage jx

1. (a)(2): [**US Citizen (s)] v. [Foreign Citizen (s)]** COMPLETE DIVERSITY

*Citizens of a state and citizens or subjects of a foreign state*

* + US Citizen (state A) v. PRA (state B) **YES!**
* U.S. Citizen (state A) v. PRA (state A) **NO!** *Strawbridge* applies (Congress Clarific. Act)
* At least one party MUST be US Citizen
  + - PRA v. PRA **NO!** PRA v. Foreign **NO!**
* At least one party MUST be a foreign citizen (PRA ok, no stateless ppl or expats)

1. (a)(3): **[US citizen (state A)** + Non-US] **v. [US citizen (state B)** + Non-US]

*citizens of different states and in which citizens of a foreign state are additional parties*

* + Non-US parties can be added where diversity otherwise satisfied
  + based on **minimal diversity** theory (US citizens are from different states)
    - non-US citizens can be from same country

1. (a)(4): **[foreign state (as plaintiff)] v. [US citizen]**

*a foreign state, as plaintiff and citizens of a State or of different States.*

* **Class Action?** 1332(d)
* Only requires minimal diversity (con’l) (*Rationale*: make federal forum available)
* D can aggregate all P claims against him to meet $5mill AIC even though not S&I (con’l)

**Q4: Is diversity/lack of manufactured or collusively made?**

**28 U.S.C. §1359**: Fed court may refuse to hear a case in which diversity was collusively created

* **Assignment of Rights** Is there a bonafide business purpose for the assignment? Is there a procedure in place or if this is a one-off?
* **Parties in name only?** Parties joined fraudulently who have no interest or only a nominal interest in the case may be ignored (Rose) – Rule 21 allows fed court to sever misjoined parties to preserve diversity jx.

**Q5: Do we have AIC?** (decided on Day 1)

**28 U.S.C. § 1332(b);** purely statutory – Must exceed $75k on the date complaint filed (remember .01c!)

* **Maximum amount claimed by P controls** if alleged in good faith **unless D demonstrates to a legal certainty** that P cannot recover >75k. *St. Paul Mercury*
* Open question: What is injunctive relief worth? (no SCOTUS decision)
  + Options: take P’s perspective, take D’s perspective, take both perspectives.

**Aggregation Rules**

* + P v. D (aggregate all claims)
  + PPP v. D (aggregate only S&I claims)
  + P v. DDD (aggregate only S&I claims)
* S&I: higher standard than CNOP. Don’t perform just state.
* Mass tort actions are not S&I.

**Federal Question Jurisdiction**

Federal forum - 1. sympathetic to fed interests 2. develops uniformity of law 3. expertise on fed issues

**STEP 1: Constitutional Authorization: Article III, § 2** “arising under” constitutional and federal law.

* **Federal Ingredient:** SMJx exists as long as there is and federal ingredient in the lawsuit. *Osborn*

**STEP 2: Statutory Authorization: 28 USC 1331** (OR another given federal jx statute)

* tracks language of Constitution, but courts have narrowed its scope
* “arising under” jx may be present in “special and small category” of state law claims that raise a federal issue.

**STEP 3: Grable Test for HYBRID claims**

* Arising under jurisdiction can be exercised even when there is no explicit federal cause of action.
* 4-prong test for whether § 1331 jurisdiction is proper
* **GRABLE TEST:**

1. **State law claim must NECESSARILY RAISE a federal issue** (“no artful pleading” *Mottley*)
2. **Federal issue must be ACTUALLY DISPUTED**
   * Legal dispute (interpretation) > Factual dispute (application) (*Empire*)
     + *Prof* factually bound state claims that implicate the CON should have fed forum
3. **Federal issue must be SUBSTANTIAL** 
   * **Substantial to Federal system NOT the parties** (*Gunn*)
     + Constitutional issue 🡪 Substantial
     + Dispute triggered by action of the United States 🡪 Substantial
     + Right of action explicit in federal statute 🡪 Substantial (unless state rule of dcn)
     + Right of action absent from federal statute 🡪 Not dispositive
       - *Brennan dissent Merrell*: Congress has an interest in instate compliance with federal standard. 🡪 Substantial

* *Empire* ***-*** assume Congress intentionally excluded if:
* Right of action in other sections of statute but not yours
* Gov’t right of action but no private
  + - Federal money involved 🡪 Substantial

1. **Federal jurisdiction must not upset the State/Federal judicial balance** 
   * will it lead to a flood of fact-specific state-law claims in federal court? **NO**
     + Unique/unusual enough? **YES**
     + Traditionally state domain? **NO**
       - Garden variety tort, atty malpractice, family law, in rem

**Note:** Declaratory Judgments

* Arising under jurisdiction is present only if the complaint, had it been styled as a conventional coercive lawsuit, would meet the Mottley test (DJs styled differently, must unravel them)

**Supplemental Jurisdiction**

**STEP 1:** **Define** Federal courts can exercise jurisdiction over claims they would not otherwise have SMJx over when those claims are adequately related to “anchor” claims that fall under federal jurisdiction.

* **FRCP** allows a plaintiff to join as many claims and parties as he wants in one lawsuit, but court must have PJx, SMJx, and venue over all parties and claims joined

**STEP 2: Anchor Claim?**

* There must be a claim over which the federal court has **original jurisdiction** (either based on diversity or arising under) **(28 USC 1367(a))**

**STEP 3: What is the Supplemental Claim?**

* Can the court exercise original jurisdiction over the joined claim? (just rule it out)
* How to join claim/party?

**Claims:**

**FRCP 18:** allows joinder of claims (any)

**FRCP 13:** allows parties to assert counter-claims

**(a):** compulsory (arises out of same transaction or occurrence as original claim)

* + must assert counter-claim in original answer or be barred from doing so later

**(b):** permissive (unrelated to original claim)

**(g):** cross-claim (claim asserted by one party against co-party)

* + must be transactionally related to original claim or counter-claim

**Parties:**

**FRCP 20 –Permissive Joinder:** allows joinder of parties *if they assert claims arising out of the same transaction* and the claims *involve common question of law or fact*

* same rule for joinder of either plaintiffs or defendants
  + court must have personal jx over the party joined
* narrower than FRCP 18 claim joinder rule (which allows *any* claim)

**FRCP 14 - Impleader:** allows third party impleader/indemnification claims

* requires joinder of both claim & party
* **FRCP 14(a)(3):** allows plaintiff to assert transactionally related claim against 3rd party defendant

**FRCP 19 -Required:** (e.g. *Hanson v. Denkla*)

**FRCP 24 - Intervention:** new party enter a lawsuit on the ground that their interest will not be adequately represented by the parties in the lawsuit

**FRCP 23 – Class Action:** don’t have to be present in court, are represented by named representative

**STEP 4: Does power exist over the Supplemental Claim?**

**STEP A. 1367(a) – Claims are “so related” that they form part of the same case or controversy under Article III** (unless expressly provided otherwise by federal statute)

* **Gibbs Test** – Are the claims **transactionally related** such that plaintiff would “ordinarily be **expected to try them … in one judicial proceeding?**
* Minority alternative: Are the claims logically related? Broader than Gibbs.

**STEP B**: Is the anchor claim based on **arising under**? Go to STEP D

**STEP C**: Is the anchor claim based on **diversity jurisdiction?** (and you’ve added new party)

* + - * + **28 USC 1367(b)** [codifies Owen]

**Is defendant asserting a claim against an additional party?**

*Don’t need complete diversity or independent AIC* (he’s involuntarily in court)

* **Is plaintiff asserting a claim against an additional party?**
  + Impleaded party? (Rule 14)
  + Required party? (Rule 19)
  + Permissive party? (Rule 20)
  + Intervening party? (Rule 24)
    - *Need complete diversity and independent AIC* (rationale: P can’t play fast and loose with Strawbridge)
* **Is a joined party asserting a claim?**
  + Required party? (Rule 19)
  + Intervening party? (Rule 24)
    - *Need complete diversity and independent AIC*
  + Permissive party? (Rule 20)
  + Joined via class action? (Rule23)
    - *Need complete diversity, do NOT need independent AIC* (Allapatah judicial rule)

**STEP D**: Should the court **decline** to hear the supplem’l claim on a **discretionary** basis?

* **28 USC 1367(c):** the district courts may decline to exercise supplemental jurisdiction if

**(1)** claim raises a **novel or complex issue of state** law (jury confusion)

**(2)** state law claim substantially **predominates** over the anchor claim(s)

**(3)** the district court has **dismissed** all the anchor claims

**(4)** in exceptional circumstances/other compelling reasons (open Q – what qualifies?)

**NOTE**: Court should find compelling reasons to use discretion under 1-3, and must explain use of 4. (Finley overturned, which required default to abstention in absence of explicit statute)

* *Does statute confer jurisdiction over certain parties and not others?* (Aldinger – it is implicitly withholding power – no supp jx)
* *Is complete diversity violated?* (Owen – no supp jx – legislature wants complete diversity as they continually reenact the statute with it)

note: court can always reconsider their exercise of supplemental jurisdiction at any time during the litigation (can remand state law claim to state court at any time)

**VENUE, TRANSFER, and FNC**

**Venue:** the geographic specification of the proper court for litigation of a civil action

* rules are mainly concerned with **convenience** and **fairness**

**Venue/Transfer in State Court:**

* some follow **local action doctrine** (property actions can be heard only in county where property located)
* could be matter of **venue** (can waive) or **subject matter jurisdiction** (can’t waive)
  + check statute
* A **state cannot transfer an action to another state**
* must dismiss on FNC (other favorable forum)

**Venue in Federal Court:**

Purely statutory (no constitutional requirements)

* venue in federal system is queued to **district**

districts are (usually) whole states and don’t cross state lines, but not always

* important because district courts often look at the laws of the state in which they sit

**28 USC 1390**

* applies only to diversity and arising under cases
* case removed from state court?

Must remove to federal court physically closest to state court where claim filed (1441)

Subsequent transfers 🡪 normal venue rules.

**28 USC 1391**

* **(a):** **unitary approach** (same rules for all cases) (no LAD)
* Three options for where an action may be brought: (1) Residence, (2) Transaction, (3) Property
  + **(b)(1)RESIDENCE. If all D’s reside in the same state, P can choose a district where any D resides.** Ignore D’s who aren’t US residents. (c)(3). *If all D’s do NOT reside in the same state, residence inapplicable for venue choice.*

**(c): What are the defendants’ state residences?**

**(1): Natural Person** (including PRA) 🡪 domicile(citizenship N/A)

**(c)(2): Entities** (corporation & non-corporations)

* + - * + **if D:** any district in which they are subject to personal jx for action in question
        + **if P:** only in district where they have their ppb

OPEN QUESTION: what is ppb – *Hertz* “nerve center”?

* + - * **(c)(3):** **non-US resident defendant** can be sued in any judicial district.

OPEN QUESTION**:** Apply to foreign entities? See (c)(2)

* + - * **(d): corporation in** **multi-district state**. district where corp would be subject to PJx if district itself were a state.
        + if no such district exists, defendant is deemed to reside in the district with which it has the most significant contacts, within a state that has PJx
  + **TRANSACTION OR PROPERTY (b)(2):** can lay venue in a district where a **substantial part of the events** giving rise to the claim occurred or where a **substantial part of the property** that is the subject of the action is located
* **NONE APPLY?**
  + **Default Rule (1391(b)(3)**: venue can be laid in *any* district that has PJx over the defendant

**Transfer in Federal Court:**

plaintiff *or* defendant can move to transfer an action to a different venue (even if in a different state)

* Why would P transfer? To try the case in T2 but apply COL rule from T1. *Ferens*

**28 USC 1404:** **Was venue in original court proper per 1391?** (not per FSC)

* **28 USC 1404(a):** for the *convenience of parties and witnesses* in the *interest of justice* a district court may transfer any civil action to:

**(1)** any other district or division **where it might have been brought** or

**(2)** to any district or division to which **all the parties have consented**

* + interpretation question: does “in the interest of justice” need to be considered on its own?
    - courts usually follow **broad reading** and *also consider*: docket congestion, speed of trial, court’s familiarity w/ governing law, existence of forum-selection clause, etc.
* **T2 court applies the state law/fed law interpretation of the T1 court** *Van Dusen*
  + Even if P transfers – strategic choice for P who wants T1 law in T2 forum.
* **… UNLESS parties signed a forum selection clause**
  + Parties have already bargained away the “private factors”, so courts should only consider the public factors when deciding transfer.
  + Law of T2 court applies so as to avoid COL shopping

**28 USC 1406:** **Was venue in the original court IMPROPER per 1391?** (not per FSC)

* D can file FRCP(12)(b)(3) motion to dismiss for improper venue
  + court can either dismiss or transfer to where venue would be proper (based on 1391 + jx)
    - **T2 choice of law applies** (T1 court didn’t have power)
      * case starts over as if it was originally filed in the new, proper venue
    - **T1 court can transfer (instead of dismiss) even if it lacks jx over suit (28 USC 1391)**
      * + open question: does “no jx” = personal jx, subject matter jx, or both?

**Transfer & Forum-Selection Clauses:**

* Venue is not improper if it violates a forum selection clause…1391 governs
* Use 1404 if venue was proper under 1391, (1406 if not)
* Give no weight to private factors, which have been bargained away
* T1 law does not apply

**Forum Non Conveniens**

**common law principle**: A court may **dismiss an action in favor of a more convenient forum**, even if it has jurisdiction and venue

* If there is an **adequate alternate forum available** and the court in **unable to transfer the action** to that forum (State A 🡪State B / Fed Court 🡪 Foreign Court), the court can **dismiss the action** on FNC.
  + **Conditional dismissal**: When P must waive PJx and SoL objections in new forum.
  + A court can dismiss on FNC grounds **without deciding PJx or SMJx** first (Sinochem), but should not impose conditions on it’s dismissal. (no power)

1. Defendant’s FNC motion should not be granted unless the plaintiff’s forum choice **“vexes, harasses or oppresses”** the defendant. *Gulf Oil*

* + - Unless plaintiff foreign (no deference to forum choice) *Piper*

2. Consider **mix of private and public factors** when deciding FNC motion. *Gulf Oil*

* + - Private: access to proof, availability of process and witnesses, view of premises, and other factors that make trial easy, expeditious and inexpensive
    - Public: docket control, jury burden, local interest in trying localized controversy, and familiarity with law to be applied

**3. Alternative forum’s substantive law** should not weigh against FNC unless it is it provides no remedy at all**.** *Piper*

Rationale: Burdensome/confusing for US court to apply foreign law. (reality – no scrutiny of foreign law)

**FNC v. Transfer v. Removal**

State Court A 🡪 State Court B **FNC** Court can’t transfer between states, so will dismiss under FNC and parties will re-file suit in State B.

State Court 🡪 Federal Court **Removal** (1441)

Federal Court 🡪 Federal Court **Transfer** FNC inapplicable when § 1404 or § 1406 transfer is possible.

Federal Court 🡪 Foreign Court **FNC**  Transfer unavailable; instead, court dismisses case and P re-files elsewhere

**Choice of Law**

When a federal court is sitting in diversity, which law does it apply?

**Identify FRCP that covers the issue**

* **USC 2072 (Rules Enabling Act):** SCOTUS can establish procedural rules for the federal courts as long as they *do not abridge, enlarge or modify substantive rights.*
  + RDA analysis doesn’t apply when there is a FRCP or codified procedural rule on point, because we have constitutional authorization under the necessary and proper clause. *Hana*

**Step 1: Is there an FRCP that covers the dispute? i.e. “on point”** (*Hana*)

* + Narrow v broad reading (subjective)
  + If NO 🡪 Apply state rule.
  + If YES 🡪 NEXT…
* **Step 1(b): Can federal and state law co-exist?** (read both narrowly – *Ginsburg* Shady Grove)

**Step 2: Is FRCP valid (*Hanna*)?**

* + Constitutional Authority (Necessary & Proper Clause)
    - is the federal rule “arguably procedural”? (always yes – just state) *Hana*
  + Statutory Authority (Rules Enabling Act)
    - 28 USC 2072(a): is federal rule procedural?
      * does the FRCP “really regulate procedure” (*Sibbach*)? (easy yes)
        + Note: Harlan in *Hana* says federal rule does not “really regulate procedure” if it affects primary activities of citizens and ensures predictability in their everyday lives.
        + Scalia plurality in Shady Grove says STOP HERE

If procedural 🡪 Apply; If not 🡪 Apply state law

* + - 28 USC 2072(b): does the federal rule “abridge, enlarge or modify any substantive right”?
      * **Incidental effects on substantive rights are OK** *Hana*
        + service of process rule does not implicate a substantive right
* **Clear statement rule** (Steven Shady Grove): If state puts alternate rule in procedural code or calls it procedural, use FRCP. (don’t let state hide interests in procedure)
* **Analyze under RDA** (Stevens and Ginsburg refer to “bound up” and “outcome determinative” tests in Shady Grove)

**28 USC 1652 (Rules of Decision Act):** When sitting in diversity, a federal court should apply the laws of the several states in cases where they apply. (unless constitution/federal law provides otherwise)

* ***Erie v. Tompkins:*** Federal court sitting in diversity must follow state substantive law, which includes state commonlaw. Constitution does not authorize the federal courts to use general common-law to regulate state activities. (overruled Swift)
  + **Aims:**

1. Litigant equality 🡪 no forum shopping
2. Uniformity 🡪 same results in state and federal court

**Step 1: Identify State Law, is it procedural or substantive?**

1. Governs rights and obligations outside court? *Substantive 🡪 Apply State Rule (Erie)*
2. Governs activities inside the court? Procedural 🡪 NEXT…..

**Step 2: Is state procedural rule bound up with state rights and obligations?**

* Per Byrd, the court **still has to follow state procedural rules that are bound up with state rights and obligations.** If the rule is just a form or mode of enforcement, we can apply the federal rule instead.

1. Bound up? *Apply State Rule (Byrd)* (Appears in substantive code?)
2. Form or mode of enforcement? NEXT…

**Step 3: Would application of the alternative federal rule be outcome determinative within the twin aims of Erie?** [Hanna v. Plumer modifying Guaranty]

* From an ex ante perspective, would application of the federal rule produce a different outcome such that a litigant would choose one forum over the other? (forum shopping)

(i) would applying a different rule encourage forum shopping?

* + - Service of process rule, NO *(Hana)*
    - Allowing class actions in federal court but barring them from state court, YES *(Shady)*
    - Difference in amount of damages available, YES *(Ginsburg, Shady)*

(ii) would it lead to inequitable administration of the law?

* + - Service of process rule, NO *(Hana)*
    - If cases would be barred from state court but not federal, YES *(Ragan)*

If NO for both 🡪 *Apply Federal Rule*

Is YES for either 🡪 NEXT

**Step 4: Is there a counterveiling federal interest that weighs in favor of applying the federal rule?**

* *Byrd*. If applying the federal rule is necessary to preserve the federal courts as an independent system of justice 🡪 *Apply Federal Rule*
  + Balancing test
    - 7th amendment jury right only example we have, so compare to that.
    - Goal of uniform federal system more important than forum shopping concerns. *Part II-D Shady Grove*

**Ascertaining State Substantive Law in Federal Court:**

* Federal court sitting in diversity must apply the law of the state in which it sits (including choice of law rules) *Klaxton*
  + *Rationale:* Uniform application of substantive law within state.
* Options for discerning substantive state law:
  + Decision of highest state court
    - Could lead to forum shopping if lower courts are distinguishing old decision
    - If highest court hasn’t been faced with the issue in a long time, but state case law is moving forward, argue for new rule. *Mason*
  + If no decision:
    - Certification: Ask state certified question. (they can decline)
    - Abstention (dismiss case)
    - Stay of Proceedings (parties go to state court, get decision and come back to fed court)

**Federal Common Law:**

federal courts have power to create federal common law that under the Supremacy Clause is binding on the states, but the scope of their power to create federal common law is debated

* **Scope of Federal Common Law:**
* **Coterminus/Article I Theory:** judicial lawmaking power is coterminous w/ Congress’ legislative power
  + if Congress has the power to enact federal law about issue, court has the power to make federal common law about issue
* **Enclave Theory:** judicial lawmaking power is confined to areas of significant federal interest
  + national security, federal $$, etc.
* **Statutory Theory:** judicial lawmaking power derives from Congress & needs statutory grant

**Applying Federal Procedural Law in State Court (“Reverse *Erie*”):**

when state court is hearing federal law case under concurrent jx, does it have to apply federal procedural law or state procedural law?

* federal procedural rule is just form & mode of enforcement 🡪 apply state procedural law
* federal procedural rule is bound up w/ federal rights & obligations 🡪 apply federal procedural law
  + - Supremacy Clause says state must follow federal procedural rule when it’s a fundamental part of the right accorded by the federal statute (“bound up”)
    - Ask:
      * will use of state procedure burden or frustrate a federal right?
      * will use of state procedure be “outcome determinative”?
        + balance federal interest in procedural uniformity w/ state interest in using own procedures

**Pleading**

* **FRCP 7:** defines the type of pleadings allowed

1. A complaint (P sues D)
2. An answer to a complaint (D responds to P)
3. An answer to a counterclaim designated as a counterclaim (P responds to D after D has sued P
4. An answer to a cross-claim (P2/D2 responding to P1/D1 after P1/D1 has sued P2/D2)
5. A third party complaint (Rule 14; claim for indemnification against a 3rd party)
6. Answer to third party complaint (3rd party responds to D after D has sued 3rd party)
7. If the court orders one, a reply (response to an answer)

* **FRCP 8(a):** a complaint must contain “**a short and plain statement of the grounds for the court’s jurisdiction**,” “**a short and plain statement of the claim showing that the pleader is entitled to relief**,” and “**a demand for the relief sought**.”
* **FRCP 9(b):** in cases of **fraud or mistake**, party must **state with** **particularity** the circumstances constitution fraud or mistake (heightened pleading standard)

**Defendant’s Response to the Complaint:**

* + - * **Answer:** defendant must respond to each allegation in the complaint, can either:

admit truth of an allegation (don’t want it to go before jury)

deny truth of an allegation

deny knowledge or information sufficient to form a belief (DKI)

make general denial (denying name, address, etc. – denies EVERYTHING)

costs and sanctions may result

* + - * **Motion:** requests an order from a court (often challenges form or sufficiency of pleading)
        + **FRCP (b)(1)-(5):** motion to dismiss for threshold questions (e.g. venue)
        + **FRCP 12(e):** motion for a more definite statement (no one uses this anymore)
        + **FRCP 12(f):** motion to strike scandalous or impertinent allegations
        + **FRCP 12(b)(6):** motion to dismiss for failure to state a claim
* **PLEADING ANALYSIS** (complaints, counterclaims and cross-claims)

Question: assuming **factual** allegations are true, would reasonable fact-finder find claims plausible?

1. **State legal standard**
   * Rule 8 requires a “short and plain statement of the claim showing that the pleader is entitled to relief”, which *Twombly* & *Iqbal* have interpreted as requiring plausibility of merit.
2. **Determine cause of action & all its elements** (what plaintiff has the burden to allege)
3. **Excise all legal conclusions & conclusory allegations**

*Court must accept all factual allegations as true, but can ignore legal conclusions or conclusory statements.*

* + “upon information and belief” 🡪 not factual allegation
  + legal conclusions (e.g. “under NY Law”, “negligent”, etc.)
  + statements suggesting causation (e.g. “as a result of”) 🡪 conclusory allegations
    - open question: what makes an allegation conclusory?

1. **Based on the remaining factual allegations, is there a plausible claim for relief?**
   * open question: what is the degree of certainty meant by “plausible”? Iqbal – context, judicial experience, commonsense
     + if all elements not met 🡪 not plausible
     + if elements met 🡪 might still not be plausible
     + if facts in equipoise 🡪 dismiss complaint
     + if complaint plausible 🡪 proceed to discovery
2. **State basis for dismissal (or not)**
   * if dismissing based on factual insufficiency 🡪 dismiss with leave to amend
   * if dismissing based on legal insufficiency 🡪 dismiss outright
   * if complaint sufficient 🡪 proceed to discovery
3. **Address policy considerations:**
   * *Discovery Costs* 
     + distinguish from *Twombly* – would discovery costs be as big as in an anti-trust case?
     + distinguish from *Iqbal* – would discovery require privileged government information?
     + *Erikson* - court used notice pleading standard (pro se, smaller discovery, 8thA theory)
   * *District Court’s Case Management Role* (Stevens & Breyer dissents)
     + *Twombly* & *Iqbal* deprive district court judges of their case management abilities. We should rely on district court to manage discovery & oversee case development
     + Floodgate concerns (docket congestion)
   * *Access to Courts* 
     + does this only allow cases to go forward where parties can afford to hire private investigator beforehand?
     + *Souter dissent:* except for “fantastic” allegations, P’s allegations are to be treated as true
   * *Summary Judgment*
     + back-up so that if it’s determined during discovery that case is frivolous or can’t win it won’t go to trial (trial is most burdensome part of case)
4. **How would the case have come out under *Conley* notice pleading standard?**
   * *Conley* says court should only dismiss case if it’s shown beyond a reasonable doubt that no set of facts would grant the plaintiff relief
     + complaint is just meant to put the defendant on notice that they are being sued & what they’re being sued about
     + no need to strike legal conclusions
   * If facts in equipoise 🡪 allow case to go to discovery (unlike *Twombly* & *Iqbal*)
   * Factually insufficient? 🡪 allow limited discovery, FRCP 12(e) motion, dismiss
   * Legally insufficient? 🡪 must dismiss
     + - ***Swierkiewicz*** plaintiff doesn’t need to plead prima facie case of discrimination under Title VII to survive motion to dismiss (evidentiary standard ≠ pleading standard)
       - ***Johson v. City of Shelby* NEW**complaint does not need to allege legal theory

* **Policing the Pleading Process:**
* **28 USC 1927:** an attorney or a party who “multiplied the proceedings in any case … so as to increase costs unreasonably and vexatiously” is liable for the costs incurred by the other side”
  + costs include attorneys’ fees
  + courts also have inherent authority to impose costs on parties that litigate in bad faith
* **FRCP 11:** meant to curb abuse of litigation process; police pleadings and regulate behavior of parties & lawyers (pleadings + all D’s papers)
  + FRCP 11(a): must sign all papers submitted to court
  + FRCP 11(b): must certify that to the best of his/her “knowledge, information, and belief:

(1): all papers filed are not for improper purpose (harass, cause unnecessary delay or cost)

(2): the legal claims are warranted by existing law or a non-frivolous argument for new law

(3) factual allegations have evidentiary support, or are likely to have evidentiary support after reasonable discovery

* + - allegations based on “information & belief” only permitted if inferences are reasonable (and likely only “plausible” within meaning of *Twombly* & *Iqbal*)
  + FRCP 11(c): a motion for sanctions must be separately made, and the offending party is given **21 days to cure the alleged violation** (*Hadges* – lawyer sanctioned for relying on his client’s statements)
    - court will consider: time pressure, factual complexity, feasibility, accessibility to date, personal knowledge, exclusive reliance on client, exclusive reliance on other lawyers

**Discovery**

**Rule 26(a) Mandatory Disclosure.**

Each party must disclose:

* + Documents & witnesses that *may be used* to support claims & defenses
  + Computation of damages
  + Insurance
  + Experts (later)

**Rule 26(b): Party Initiated Disclosure.**

Parties can request information that is non-privileged and ***relevant*** to any party’s claim or defense and ***proportional*** to needs of the case

* + - “Relevance”: some courts use “**logical relation” test**
      * Defined by relation to pleadings
    - “Proportionality” factors:
      * importance of issues at stake
      * amount in controversy
      * parties’ relative access to relevant info
      * parties’ resources
      * importance of discovery in resolving dispute
      * whether expense of discovery outweighs likely benefit
    - “Admissibility”
      * information discovered ***does not have to be admissible*** (as of Dec. 1, 2015)
    - “Privilege”: as result of relationship, NOT information itself
      * e.g. doctor-patient, spousal, attorney-client
* **Rule 27: Pre-filing discovery:**
  + To **perpetuate** testimony, NOT to uncover/prove claims

**Preclusion**

* **Res Judicata (Claim Preclusion)**

A judgment will be recognized and enforced if it was:

1. **Valid**
   1. Court had PJx (if made a default judgment)
   2. Notice was adequate
   3. Court had SMJx
      1. collateral attack only allowed if judgment entered by default OR manifest abuse of authority OR substantial infringement of power of another (open Q) OR rendering court lacked capacity to make an informed decision.
   4. QIR not preclusive except as to attached property (questions in light of Shaffer)
2. **Final**
   1. Not interlocutory (e.g. prelim inj, MTD, SJgmt)
   2. “On the merits”
   3. Can be before appeal decided (even though might be revered)
   4. Settlements “so ordered” has preclusive effect

* **Who is bound?**
  + Parties and their privies (Taylor v. Sturgell)
    - Contract
    - Substantive legal relationship (assignee, bailee, etc.)
    - Recognized legal relationship (guardian, trustee, fiduciaries, etc.)
    - Control (non-party who controls lawsuit)
    - Special statutes (e.g. class action)
    - No collusive re-litigation through proxy
* **What is precluded from being re-litigated?**
  + Additional suit based on:
    - Same transaction or occurrence (federal rule)
      * Restatement 2nd: facts related in time, space, origin or motivation/form a convenient trial unit/treating them as one claim conforms to customary business usage
      * Recurring act/events e.g. installment payments, rent, ongoing abuse or discrimination = same transaction. *Jones*

OR

* + - Same right
    - Same wrongful action
    - Same form of action (e.g. writ)
    - Efficient/cost-effective to litigate claims together
* **Collateral Estoppel (Issue Preclusion)** 
  + When an issue has been decided, the court will direct summary judgment on that issue. Does not mean entire claim will be dismissed, because claims often have more than one issue.

**4 Requirements**

**(1) Identical Issue**

**(2) Actually litigated**

**(3) Actually decided** (heard evidence, considered, decided)

**(4) Necessary or essential to the F1 judgment**

**Who is bound?**

* + A party “or its privies” can benefit from a judgment only if they would have been bound by the judgment (mutuality).

**Exceptions:**

**Defensive Non-Mutual issue preclusion**

* + - 1. Fred sues Linda and *loses*
      2. Fred then sues Moe
      3. Moe invokes former judgment as a shield
         1. **Plaintiff must have had a full and fair opportunity to litigate the claim.** Depends on choice of forum, incentive to litigate, complexity of the legal issue and access of evidence. *Blonder*

**Offensive Non-mutual issue preclusion**

* + - 1. Fred sues Linda and *wins*
      2. Moe sues Linda. Moe seeks to estop Linda on the issue decided in Fred’s favor in first lawsuit

**DNMIP**: saves court time from reconsidering facts, BUT creates pressure for plaintiff to join all Ds in F1

**ONMIP:** multiplies litigation, Parklane says only use when:

* Second P could NOT have joined F1
* Does not result in unfairness to D