

CIVIL PROCEDURE

I. GENERAL INTRODUCTION

- A. Before federal district court may hear P's claim on any cause of action, it must satisfy three prerequisites:
- i. Personal Jurisdiction – jurisdiction over persons and things
 - ii. Subject Matter Jurisdiction – court's ability to hear particular type of claim
 - iii. Venue (only apply to claims brought by P)

II. PERSONAL JURISDICTION

- A. Also known as Territorial Jurisdiction
- B. Major Question – Geography: In what states can P sue D?
- C. Court must have power over something to have personal jurisdiction
- i. Power over D herself – **In Personam**
 - ii. Power over D's property – **In Rem & Quasi In Rem**
- D. In cases where attaining jurisdiction over persons or things is questionable, strategically one should seek to satisfy another type of jurisdiction as well.
- i. ***In absence of any type of personal jurisdiction, Rule 12(b)(2) authorizes dismissal of the claim.***
- E. Major elements underlying personal jurisdiction requirements:
- i. Fair play derived by Due Process constitutional provisions.
 1. Evaluation of the contacts that exist between D and state where court sits.
 2. Evaluation of the quality of notice of the suit that D receives.
 - ii. State limitations on the authority of the state courts to exercise PJ.
- F. Exercise of personal jurisdiction must not be fundamentally unfair to D.
- i. If party ***consents*** to jurisdiction, Due Process requirement of fairness is satisfied. Can be achieved by:
 1. **By Contract**: If the parties, through a contract or agreement prior to the initiation of litigation, consent to the jurisdiction of a court in advance, such agreements will generally be enforced even if the chosen court might not otherwise have been able to sustain its jurisdiction (*National Equip. Rental v. Szukhent*).
 - a. Exceptions: (1) unequal bargaining power **or** (2) absence of *any* rational link b/w court chosen and parties or cause of action.
 2. **By Waiver**: Party who does not object to PJ in timely manner waives objections, and thereby consents (*Preferred Rx, Inc. v. American Prescription Plan, Inc.*).
 3. **Counterclaims**: P sued on a counterclaim may consent to PJ on the counterclaim by filing the original complaint (*Adam v. Saenger*).
 4. **Consent to Determine Jurisdiction**: When D objects to PJ claiming insufficient links b/w he and the court, he may though preserving the objection to jurisdiction, consent for the limited purpose of allowing court to determine whether PJ exists (*Insurance Corp. of*

Ireland v. Compagnie des Bauxites de Guinee). When D appears and challenges jurisdiction, it agrees to be bound by the court's determination on the jurisdictional issue.

- ii. Transient (Tag) Jurisdiction – D served with process while physically present within a state is normally subject to PJ of trial courts within that state; irrelevant whether D lives within state or just passing through.
 - 1. Exception: (1) forced into jurisdiction; (2) induced there by fraud.
 - iii. Minimum Contacts – D has to have contacts with the state in which the court sits of such a quality and nature that exercise of PJ would not offend “traditional notions of fair play and substantial justice” (*Int'l Shoe*). However, contacts necessary to sustain PJ are not always required to be physical. Intentional relationship with state residents can be a basis for sustaining PJ as well (*BK v. Rudzewicz*) – “So long as a commercial actor's efforts are purposefully directed toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat PJ there.”
- G. Governed by Due Process Clause of U.S. Constitution
- i. The state must have a statute establishing limitations of personal jurisdiction in the state. Could either:
 - 1. Allow full extent of federal Due Process clause, OR
 - 2. Could limit to less than the Due Process clause
- H. Strategy for Establishing Personal Jurisdiction
- i. State Statute Analysis – Has the State said we can authorize personal jurisdiction?
 - 1. Long arm statute – state is allowed to reach out long arm outside state borders to extend jurisdiction provided (a) it is not unfair (enough minimum contacts) and (b) satisfies whatever requirements exist under the other state's long-arm statute.
 - ii. Constitutional Due Process Fairness Analysis

IN PERSONAM JURISDICTION

- I. *General In Personam* – D can be sued in forum on claim that arose anywhere in the world.
 - i. In-state contacts are very substantial → D may be sued in the state for any claim, even one completely unrelated to its in-state activities or to the C of A. D's activities in the state are so substantial that they are **systematic and continuous in that state** that D would expect to be subject to suit there on any claim and would suffer no inconvenience from defending there. Emphasis: When P seeks to sustain suit based on unrelated contacts, contacts should indeed be substantial.
 - ii. A corporation will almost certainly be subject to general in personam jurisdiction in states where it is incorporated and where it has its principal place of business, but it may also be subject to general in personam jurisdiction in many additional places, where it has such extensive activities, personnel, and facilities in a state to fairly be considered “at home” there.

- J. ***Specific In Personam*** – D can be sued in forum on claim that arose only in that forum.
 - i. Jurisdiction over claims arising out of a single act within the state. Generally used to indicate that D’s contacts with state may not be large or systematic and continuous.
 - ii. Individuals can benefit from voluntary in-state contacts just as corporations do – those benefits can carry with them the burden of related litigation.
- K. D may have sufficient contacts *with* a state to support minimum contacts jurisdiction there even though she did not act *within* the state.
 - i. If D commits an act outside the state that she knows will cause harmful effects within the state, she will be subject to minimum contacts jurisdiction there for claims arising out of that act.
- L. *Minimum contacts analysis focuses on the time when D acted, not the time of the lawsuit.* Thus a suit will look at “prior contacts,” not necessarily current contacts. Thus, suit applies whether or not D is still acting in the state at the time suit is actually filed.
- M. When a court has in personam jurisdiction, it may render a money judgment against D or may order D to perform act or refrain from acting. Judgment creates a personal obligation on D and is entitled to *full faith and credit* in all other states.
- N. Constitutional Limitations on Specific In Personam Jurisdiction
 - i. ***Pennoyer v. Neff*** → *P is not free to bring suit wherever he chooses.* 14th Amendment forbids states from “depriv[ing] any person of life, liberty, or property, without due process of law.” Would be violated if court entered judgment against D without following a fair judicial procedure, including appropriate limits on the places where D can be required to defend a lawsuit.
 - ii. Traditional Bases for In Personam Jurisdiction
 - 1. *In-State Service of Process (Physical Presence)* – D is served with process while physically within the territorial confines of the forum state. Irrelevant whether D lives within state or merely passing through. Transient D’s can be served with process in-state and be subjected to personam jurisdiction even if served with process for cause of action unrelated to brief presence in the state. Gives us **general jurisdiction** because can be sued on claim anywhere in the world.
 - a. *Good service of process can also be made on D’s agent in the forum state.*
 - b. State Law Exceptions:
 - i. Service by Fraud or Force Invalid – If P brings D into state by fraud or force in order to serve process → invalid.
 - ii. Immunity of Parties and Witnesses – granted to nonresidents in a state or passing through a state solely to take part in a in a judicial proceeding.

2. *D is domiciled in forum state* – Domicile gives us **general jurisdiction**
 - a. Most states grant courts in personam jurisdiction over domiciliaries of the state, even if service of process occurs in another state.
 - b. **Domicile** defined – place where a person maintains permanent home. Can only have one domicile. Requires presence (even for a moment) coupled with intention to make that place home for period of time.
3. *D consents to jurisdiction* – can be express, implied, or through the making of a general appearance.
 - a. Express consent – can be given before or after suit is commenced; can also be by contract where giving advance consent to jurisdiction should suit arise b/w parties; service upon agent translates into express consent of party appointing that agent for service in that state.
 - b. Implied consent – where state has substantial reason to regulate in-state activity of nonresident, statute may require nonresident to appoint a designated state official as agent for service of process.
 - i. Ex: statutes requiring nonresident motorists to implicitly consent to jurisdiction in state where they have accident (*Hess v. Paloski*). Agent is appointed by operation of law.
 - c. Voluntary appearance – where D contests case without challenging personal jurisdiction, in personam jurisdiction is recognized. Most states allow **special appearances** through which D can object to court's exercise of jurisdiction in person without consenting to in personam jurisdiction. Must be made in initial pleading to the court, however. If D argues anything related to merits during special appearance, he will be deemed to have consented to jurisdiction.
4. *Minimum contacts* (not developed in *Pennoyer*, but developed later in *International Shoe*) – where D has committed acts bringing him within the forum state's long arm statutes. Here, D performs or causes to be performed certain acts within the forum state. In personam jurisdiction is granted regardless of whether in-state or out-of-state process, but is limited to causes of action arising from acts performed within the state. Factors for determining whether D's contacts with a state are sufficient to sustain PJ:
 - a. Magnitude of D's contacts – means of measuring magnitude may include the dollar value of D's activity or nature and size of the wrong D is alleged to have committed.

- b. Purposefulness of D's contacts – If D has deliberately engaged itself in activity within a state, the such purposefulness may support a finding of jurisdiction (*BK*). Also, where facts exist that D had no deliberate contact with state, but could reasonably have foreseen that activities outside state might have consequences within state – interstate “stream of commerce.” ***When facts only support specific jurisdiction (if any at all), court may require that D's contacts with the forum state be more purposeful.***
 - c. Systematic and Continuous Nature – longer D's contacts with state endure, greater possibility such contacts may be used to sustain PJ. Domicile usually creates a longstanding relationship with state. *Single contact for short period of time may not be systematic or continuous, but could still sustain PJ b/c contact is large enough, purposeful enough, and sufficiently related to cause of action so that exercise of jurisdiction is not unfair.*
 - d. Relation b/w D's Contacts & C of A – If D's contacts have nothing to do w/ C of A, the burden of establishing PJ based on such contacts will be more difficult to achieve (*Glater v. Eli Lilly & Co.*).
 - e. Availability of Witnesses & Evidence – if burdensome or impossible for D to produce relevant testimony and other evidence, PJ will be more difficult to sustain (*Terracom v. Valley Nat'l Bank*).
 - f. Forum Interest in Suit – presence of special state interest might help sustain PJ, e.g., state's interest in title to land within its boundaries (*Shaffer v. Heitner*, interest in marketability of property within its borders). In practice, special state interests are rarely id'd, and even when id'd, not often significant in weighing fairness factors.
- iii. ***International Shoe v. Washington*** → courts of a state may exercise personal jurisdiction over D if she has such minimum contacts with the state that it would be fair to require her to return and defend a lawsuit in that state. Whether the jurisdiction is permissible depends on the “quality and nature” of the contacts with the state. In some cases, even a single contact will do, but not contacts that are “casual” or “isolated.” ***State has jurisdiction if D has such minimum contacts with the forum so that exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.***
- 1. Allows P to get in personam jurisdiction over D without serving him in the forum. Service of process established in *Pennoyer* can now reach across state lines. Does not overrule *Pennoyer* though – language, in fact, says that it is a test ***if the defendant is not present in the forum.***

2. Two parts to new test:
 - a. Must have such minimum contacts.
 - b. Does not offend traditional notions of fair play and substantial justice.
3. Corporation choosing to conduct activities within a state accepts (implicitly) a reciprocal duty to answer for its in-state activities in the local courts. Activities within the state will have an impact there, that those activities may lead to controversies and lawsuits there, and that the state has a right to enforce the orderly conduct of affairs within its borders by adjudicating disputes that arise from such in-state activities. *D who deliberately chooses to take advantage of the “benefits and protections of the laws” of a state will not be heard to cry “foul” when that state holds her to account in its courts for her in-state acts. Minimum contacts jurisdiction is limited to claims arising from contacts with that state.*
- iv. **McGee v. International Life Insurance** → Expanded in personam jurisdiction. Spoke of “nationalization of commerce.” Though the TX insurance company had only sold one contract with California, they solicited that contract in California by “reaching into” that state and asking man to sign up. Court cited **relatedness**, saying P’s claims “arose from” D’s contact with the forum. *If you have relatedness, it can make up for the fact that you have a small number of contacts.*
 1. Cited a “manifest interest” in providing a forum for its citizens injured by an out-of-state insurance company. Although company being susceptible to suit in CA is an “inconvenience,” it does not amount to a “denial of due process.”
- v. **Hanson v. Denckla** → *To be a relevant contact under International Shoe, contact must result from D’s **purposeful availment** of the forum.* The only reason there was a contact in FL was because P moved there from PA. P had carried on relationship with DE bank for years from her home in PA. Although she moved to FL and continued her dealings with DE bank, the company did not seek out FL; simply reacted to her moving.
 1. While mailing of premiums occurred from FL (similar to *McGee*), the bank did not perform any acts in FL that bear same relationship to the agreement as the solicitation in *McGee*.
 2. *Personal jurisdiction is not acquired by being the “center of gravity” of the controversy or the most convenient location for litigation.*
 3. D must have made a deliberate choice to relate to the state in some meaningful way before she can be made to bear the burden of defending there. *Unilateral contacts of P or others will not do.*
 4. **Keeton v. Hustler Magazine** (Another purposeful availment case) → national magazine is probably subject to in personam jurisdiction for libel actions in every state where it is sold. Its publishers may reasonably anticipate causing injury in every state

where it is sold, so should reasonably anticipate being haled into court there.

5. ***Kulko v. Superior Court*** → *Merely causing an effect within the forum state without purposeful availment will not support personal jurisdiction.* Father allowing daughter to move to CA with mother in the interest of family harmony did not qualify as minimum contacts because father did not purposefully avail himself of CA law.
- vi. ***Worldwide Volkswagen v. Woodsen*** → **Foreseeability** is a relevant inquiry in minimum contacts test. Issue was that car was mobile, but court said, “[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the D’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”
 1. Court found the driving of the car into the forum state was the unilateral act of a third party. D did not reach into the state to solicit business, and as such, did not purposefully avail itself of the state’s benefits and protections.
- vii. ***Burger King v. Rudzewicz*** → *There must be a relevant contact in the forum state before fairness can even be looked at. All of the fairness in the world doesn’t matter without contact to start the question.* Court said the burden is on D to show the fairness of the forum. Must show that defense in the forum state is so gravely difficult and inconvenient that D is at a severe disadvantage in litigation and thus it is an unconstitutional forum.
 1. Recognizes the two parts of *International Shoe* test: Contact and Fairness.
 2. *Due process protects D from unfair, but not inconvenient.*
- viii. ***Asahi Metal Industry Co. v. Superior Court*** → “Stream of commerce” case. No majority opinion in this case, thus no real law governs but there are two arguments.
 1. **Argument 1 by Brennan:** *Relevant contact if D put product into stream of commerce and can reasonably anticipate that product will get to other states.*
 2. **Argument 2 by O’Connor:** Need more than that – requires knowledge and foreseeability that product would get there. Plus requires intent or purpose to serve those particular states, either through advertising or customer service there.
 3. O’Connor’s opinion test is more difficult of the two to satisfy.
 4. Two ways D’s goods can reach forum state through so-called stream-of-commerce:
 - a. Out-of-state component manufacturer sells components to a manufacturer of a finished product outside the state. Manufacturer then incorporates component into a finished product and distributes that product into the forum state (*Asahi*).

- b. Manufacturer sells finished products to a wholesaler outside the state, the wholesaler then resells to a retailer in the forum state, and the retailer then sells to the consumer. Manufacturer or component maker may know that such resales take place in the state, may think it highly likely, or may not know or care about the ultimate destination of its product.
- O. General In Personam Jurisdiction
 - i. General Rule: *There is general jurisdiction if D has **continuous and systematic ties with the forum.***
- P. Analytic Framework for Constitutional Analysis
 - i. First Question: **Does one of the traditional bases of jurisdiction from Pennoyer apply?**
 - 1. If so, flag that because there is an argument that that alone gives you personal jurisdiction. Minimum contacts will then not be necessary.
 - 2. **List four bases for jurisdiction on exam.**
 - ii. Second Question: Statutory Inquiry – **Does the state statute allow in personam jurisdiction?**
 - 1. If it does, then we go to constitutional analysis (minimum contacts test). Every state has a statute.
 - iii. **LONG ARM STATUTES** – allows a state to reach out of the state to call nonresident D's back into the state to defend lawsuits. Language: *Before a federal trial court may exert its PJ over an out-of-state, non-consenting D, the court must usually satisfy requirements laid down by the legislature of the state in which it sits, found in the state's long-arm statutes. Burden is in addition to the Constitutionally-imposed fairness obligations.* No use for long-arm statutes if: (a) D has already consented to PJ (*General Contracting & Trading Co. v. Interpole, Inc.*), and (b) if D is properly served with process within a state. 2 versions:
 - 1. Unlimited – full extent of due process → grant power over any person or property over which the state can constitutionally exercise jurisdiction (blanket authority). No need to make separate analysis to determine if both constitutional requirements of fairness and long-arm requirements are satisfied – *if due process is satisfied, so is the long-arm statute.*
 - 2. Limited (or laundry list) – specify situations in which courts can exercise jurisdiction; limits the extent allowed under Constitutional due process.
 - a. Examples: frequently authorize state courts to exercise jurisdiction over cases arising out of contacts such as committing a tortious act within the state, transacting business within the state, or owning property within in the state.
 - b. Claim sued upon must arise out of the specific act itself listed in long-arm statute.

- iv. **Gray v. American Standard** → Generally, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products. The tort occurs where the injury occurred, not the state where it was manufactured (While this was Gray decision, other courts say tort occurs in state of manufacture.). Fair and reasonable for individuals to bring suit in state in which they reside if he or she suffers an injury in that state: Witnesses on the issues of injury, damages and other elements relating to the occurrence are most likely to be found in state where injury occurred → most convenient forum.
1. **Murphy v. Erwin-Wasey, Inc.** → Words “within the state” are interpreted more liberally when the relevant act is an intentional tort. When D in NY communicated by mail or phone false statements to him in MA, the act causing the injury occurred within MA. Rationale: Indistinguishable from “the frequently hypothesized but rarely encountered gunman firing across a state line... Where D knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state.”
- v. Third Question: **Is minimum contacts analysis necessary? If so, two prong analysis.**
1. D **must have** relevant contact with the forum state.
 - a. **Relevancy** – Factors
 - i. **Purposeful Availment** – D’s reaching into the forum, availing itself of the forum. Looks to see if contacts are *intentional*. Also, *is contact large?*
 - ii. **Foreseeability** – must be foreseeable that D would be sued in forum state (that it would be haled into court in that state).
 - b. **Fairness** – Factors
 - i. **Relatedness** – Does P’s claim arise from D’s contact with the forum?
 1. If yes – may overcome small number of contacts (*McGee*). But miscellaneous contacts are not minimum contacts – must be related to cause of action. Single acts because of their “quality and nature” will support “specific in personam jurisdiction.” Do not need relatedness if there is general jurisdiction (in-state contacts are very substantial) – claim could have arisen anywhere.
 2. Also compare *Burger King*.
 - ii. **Convenience** – D will say this is not a convenient forum. Burden is on D (heavy burden) – must be

gravely inconvenient that D cannot defend itself there (*Burger King*).

- iii. **State Interest** – State interest in providing a courtroom for its citizen P; State interest in enforcing their substantive law and policy.
 - 1. *Does state where court sits have a peculiar or special interest in the case?* Answer is almost always no. Just because presence of parties or event occurs in the state does not support a special interest for the state (ex: care of children and title of property to real estate could be argued in state where property falls).
 - iv. **Plaintiff's Interest** – P's interest in obtaining relief in a convenient forum
 - 1. Does P have anywhere else to sue? Rarely comes up because we don't start out by looking at interest of P; focus is on fairness to D.
 - v. **Legal system's interest in efficiency**
 - vi. **Interstate interest in shared substantive policy**
2. SUMMARY: If D engages in systematic and continuous activity within the state, then general jurisdiction and minimum contacts is satisfied. If D's in-state activity is not systematic or continuous (e.g., isolated acts), in personam jurisdiction over D will be proper for causes of action arising from *that in-state activity*, giving the court specific jurisdiction. Even if D's activities are performed outside the state, D will still be subject to in personam jurisdiction for consequences in the state where he *knows or reasonably anticipates* that his activities could give rise to the cause of action in the forum (that he could be haled into court in that forum), and thus it is said D has *purposefully availed* himself of state's benefits and protections.
- a. What is unclear?
 - i. Stream of commerce
 - ii. Personal service without contacts

IN REM JURISDICTION & QUASI IN REM JURISDICTION

- i. Dispute is over who owns that property.
- ii. Basis of jurisdiction is the presence of the property in the state. The state has a great interest in adjudicating the rights of all the world regarding this property. Therefore, the presence of the property in the state is constitutionally sufficient for the exercise of jurisdiction over the property.
- iii. No jurisdiction if property is not located within the state, e.g., in settling a decedent's estate, the court has no in rem power over property in other jurisdictions.

- iv. No jurisdiction if property is brought into the state by fraud or force.

Quasi In Rem Jurisdiction

- i. Means of obtaining presence of D in court by judicial attachment (i.e., seizure) of property belong to D
 - 1. No need for use of long-arm statutes because quasi in rem is territorial in nature. Long-arms are only applicable when court is attempting to reach outside its own territory.
- ii. Rule 4(n)(2) – Seizure of Property
- iii. Jurisdiction resulting from a thing the court can see (has to thus be a thing within the court's state). Lawsuit has nothing to do with ownership of the property in state territory (We know who owns it.) – would have been in personam if we could have gotten it. Permits court without in personam jurisdiction to determine certain disputes between P and D regarding property when the property is located in the forum state.
- iv. P is unable to obtain personal jurisdiction over D, but D has property in the state that P attaches. The court then adjudicates the dispute between the parties on the basis of its power over the property. Since the court's sole basis of jurisdiction is the property, any judgment against D can be satisfied only out of that property. *Quasi in rem is only useful up to the value of the thing being seized.*
 - 1. *Property needs to be seized at outset.*
- v. Two Types
 - 1. Type I – involves disputes between parties over their rights in property within the state.
 - 2. Type II – involves disputes *unrelated* to the in-state property
 - a. Has been severely limited by the Supreme Court.
- vi. Required Elements for Seized Item in Quasi In Rem Jurisdiction
 - 1. Has to be thing of value – economic value
 - a. Value of asset seized determines monetary limit of court's jurisdiction.
 - 2. Belong to D or at least arguably belong to D (See *Pennoyer*).
 - a. D's title need not be absolutely clear though – if purpose of P's suit is to resolve dispute b/w parties as to title in asset that was seized, this requirement of quasi in rem is satisfied if D merely claims the property or will claim the property.
 - 3. Territorial limit → Within jurisdiction of court's reach
 - a. If intangible (stock ownership, accts receivable), can be seized by freezing of title.
 - i. Corporate shares are generally held to be located where the certificate evidencing ownership is found or in the state where the entity is incorporated.
 - b. Mobile assets present problem b/c some risk that they will be moved before attachment can occur.
 - 4. Seizure or attachment by the court

- a. Suit cannot begin until court has effective control of the asset. Generally, it is enough that court has effectively interfered with D's control, even if court does not have actual possession.
- b. W/ land, title can be frozen in local records office pending suit outcome. W/ stock shares, halt trading in the particular shares at issue. W/ rare diamond or car, take physical custody of property.
- 5. Pursuant to notice to D
 - a. Notice must satisfy both constitutional due process and service of process requirements under Rule 4.
 - b. Requires same level of notice as in PJ, with allowance for fact that sometimes less notice is required, e.g., where seizing of D's property may reasonably be assumed to notify D of pendency of case.
- 6. Requirements of Fair Play – Minimum Contacts
 - a. Quasi in rem is only sustained where assets seized bear a substantial relation to C of A on which P is suing, or in circumstances where other facts suggest that exercise of quasi in rem would not be fundamentally fair to D.
- vii. Rule 4(n) limitations:
 - 1. Quasi in rem and In rem jurisdiction permitted only if federal statute authorizes it.
 - 2. Permits such jurisdiction even in the absence of a federal statute authorizing it, if the court is unable to obtain PJ over D – Rule 4(n) provides that jurisdiction will be obtained according to process of state in which district court sits.

In Rem Jurisdiction

- Q. Tying title to property and, in theory, determining the rights of all people throughout the world in that property.
- R. In practice, used very infrequently.
- S. Most frequently used in actions for admiralty (involving shipping on navigable waters where the vessel is seized as the basis of jurisdiction) and condemnation of property that was instrumentality of a crime, which the gov't seeks to keep as its own.
- T. Elements → Requires same elements as quasi in rem except for property of D.

Strategy for Both

- i. Question: **Is there an attachment statute?**
 - 1. Can attach any kind of property – typically land though.
- ii. Assuming you meet the attachment statute, then perform constitutional analysis – minimum contacts.
- iii. ***Shaffer v. Heitner*** → Mere presence of property within a state is not itself sufficient to permit a court to exercise quasi in rem jurisdiction over property in a quasi in rem action. *For all assertions of jurisdiction (in*

personam, in rem, quasi in rem), D must meet the minimum contacts test. Effect: substantially reduced quasi's reach.

1. Seemed to indicate that in in rem jurisdiction case arguing about ownership (especially land), that attachment of that property alone may be alright.
 2. In quasi in rem area, D must meet minimum contacts. Not enough to just attach property.
- iv. To obtain quasi in rem jurisdiction, P must "bring the asset before the court" by attachment. This will inhibit the sale or mortgage of D's interest, since a new owner must take subject to the decision of the court.
 - v. Quasi In Rem over Accounts → looks to freeze assets in question
 1. *Location of a debt is wherever the debtor is.*
 - a. If you want to sue creditor, basis of jurisdiction is state where the bank is located, even though the bank is not the one being sued. Bank would likely receive order freezing any movement on the account.
 2. Accounts receivable – not tangible but can be bought and sold.
 3. If no longer a thing of value belonging to someone (it has been paid off), then cannot be used to establish quasi in rem. Must be there presently and related to the cause of action.
 - vi. Quasi in rem is most used when P cannot get D to consent to in personam jurisdiction, and has difficulty with personal contacts in a state.
 - vii. Rule 4(n)(2) – if P can obtain personal jurisdiction over D, does not get added advantage of in rem where you seize assets of D and injure his opportunity to perform normal business procedures. One or the other.
 - viii. Notice: Both in rem and quasi in rem require *the best practical notice*. Therefore, *posting of notice or notice by publication will be insufficient where the addresses of persons affected by the action are known or reasonably ascertainable.*

U. **Personal Jurisdiction and Reach of the Federal District Courts**

- i. Rule 4(e)(1) – Service upon individuals within a judicial district of the U.S.
 1. Unless otherwise provided by federal law, personal service may be effected in *any* U.S. judicial district pursuant to the law of the state in which the district court is located, or in which service is effected.
- ii. **Limits on Exercise of Personal Jurisdiction by Fed Cts - RULE 4(k)**
 1. Rule 4(k)(1)(A) (embodying former Rule 4(E)) – in actions other than federal question and interpleader cases, the federal court may assert jurisdiction over D in a state when a court of that state would be empowered to do so. (fed ct can use state's long arm statute only to reach those parties that that state court could also reach)
 2. Rule 4(k)(1)(B) – permits service (within U.S. only) outside the forum state (but within 100 miles of the court where the action is commenced or is to be tried) if such service is necessary to add a

third party under Rule 14, or to join under Rule 19 an indispensable party to an action or a counterclaim or cross-claim, or parties who can be served under federal statutory interpleader legislation (§1335), and parties subject to service authorized by any other applicable federal legislation. *Does not apply 100-mile bulge to P seeking to initiate an action by serving D.*

3. Rule 4(k)(1)(C) – permits service on D who is subject to federal interpleader jurisdiction under 28 U.S.C. Sect. 1335.
 4. Rule 4(k)(1)(D) – recognizes that Congress in some instances expressly has authorized nationwide, or even worldwide service of process.
 5. Rule 4(k)(2) – **Nationwide Service of Process**: Congress sometimes says federal district courts will have personal jurisdiction nationwide. Typically used for such cases as antitrust and federal securities. This is an exception to the rule.
 - a. Rule 4(k)(2) also permits exercise of PJ in federal C of A where D has sufficient contacts with US as a whole, but not with any particular state.
- iii. Federal district court typically has very similar reach as state courts.
1. Exceptions
 - a. Federal courts sometimes have different jurisdiction requirements than state courts that make it more difficult to obtain federal jurisdiction in the state court.
 - iv. **Effect of International Commerce**: Refers to increased number of claims against alien D's brought in American courts. If federal statute expressly or impliedly authorizes worldwide service of process, fed ct apparently may exercise in personam jurisdiction based on the alien's aggregate contacts with the U.S. *But if fed ct must rely on a state long-arm statute, it can exercise in personam jurisdiction based only on the alien's contacts with the forum state, even if the alien's aggregate contacts with the U.S. as a whole would satisfy due process requirements mandated by 5th Amend.*

V. Challenging Personal Jurisdiction

- i. ***Objection to jurisdiction must be raised immediately or be lost. D who answers on the merits and later concludes that PJ is lacking will have waived the objection by failing to raise it at the outset.***
- ii. Two types of Attack
 1. **Direct attack**
 - a. Occurs when P files complaint w/ court, serves complaint, D then files *motion to dismiss over lack of jurisdiction*.
 - b. Some states allow for a "special appearance, where D is allowed to appear before the court at the beginning of the action for the sole purpose of challenging its power to exercise jurisdiction over him. *If D is careful to appear "specially," he may litigate jurisdictional question without submitting to jurisdiction by the very act of appearing*

before the court. If D raises any objection or argument that court can construe as a defense on the merits, the court may conclude that he has waived his jurisdictional objection.

- i. This is older rule – only some states still enforce.
- c. In most states, D who challenges jurisdiction at beginning of suit and loses may proceed to defend the merits of the suit without waiving his object to the court's jurisdictional ruling. If loses case on the merits, D may then raise PJ issue again on appeal.

2. **Collateral attack**

- a. *Any attack that takes place not in original litigation in the rendering state, but in subsequent litigation in the enforcing state.*
- b. Typically arises when D views suit as mere harassment, an ineffective proceeding that can give rise to no binding judgment and that can therefore, be ignored with impunity. However, poses a serious risk as court enters default judgment; meaning D loses suit without ever having chance to defend it.
- c. Occurs when P overcomes motion to dismiss, and then case goes to trial on merits, which either P or D wins. If P loses and doesn't appeal, D is satisfied. But if D loses trial on merits, D has two options.
 - i. Option One: D can file appeal for lack of personal jurisdiction – still a Direct Attack because it still occurs in the original jurisdiction of the case (appeal of trial decision where jurisdiction is raised is still a direct attack → considers Direct Attack *renewed*). To bring up PJ on appeal, D must have first brought it up in trial court. If D did not, it is considered *implied consent to PJ* or *waiver*. *D can only make one attack on PJ* (bringing it up in trial court and on appeal is considered only one attack). *Rules of collateral estoppel provide that a party who has fully litigated an issue in one action may not relitigate it in another.* D has choice to raise objection to PJ in one court or the other, but not to resurrect it after it has been fully litigated and decided in a different jurisdiction.
 - ii. Option Two: D fails to show for trial and default judgment is entered. D is not said to be consenting or waiving because he is not doing anything. Though judgment is entered, D does not pay amount mandated by the judgment. P then brings judgment to jurisdiction where D has an asset and asks court to seize property, which that court has a

duty to do under “full faith and credit” clause of Article IV §1 (court in one state has duty to enforce judgment from other state). If D hasn’t shown up, D is said to have not consented and has not waived jurisdiction. D may bring up objection to jurisdiction now. *It is said that by not showing up in original litigation, D has not yet had a chance to raise PJ issue.* This is *collateral attack*. D is objecting to State 1’s PJ over him in the first place and is asking State 2 to reexamine issue. *The enforcing court may always inquire as to whether the rendering state had jurisdiction in the original action and refuse enforcement if it did not* (See *Pennoyer*).

1. The last word by a competent jurisdiction is the ruling jurisdiction → *State 2’s holding would take priority over State 1’s.*
2. Collateral attack won’t often be heard though. Only where D doesn’t appear for original litigation. In civil courts, do not have to come to court if you do not want to, and are willing to accept the consequences. Can make collateral attack though because D is entitled to make issue at least once.
3. Reasons for Collateral Attack: more convenient for D if he does not wish to travel for something he clearly believes he shouldn’t have to do; allows him to litigate the jurisdictional issue in his home state.
4. Risk: Once D goes for collateral attack, second court will not look at merits again. If court determines that jurisdiction was good default judgment is *valid and enforceable*, then State 2 will enforce judgment and not hear appeal on the merits. Thus, *if you pursue collateral attack, State 2 will not hear case on merits.*

III. NOTICE AND SERVICE OF PROCESS

- A. D must be notified of suit.
- B. *No matter how strong contacts are, at basic elementary level, even if D knows he is likely to be sued in that state, he must be provided adequate notice and service of process to have fair opportunity to present a defense.*
- C. *No limit on the amount of times P can try to serve process provided that it is within the statute of limitations time frame.*
- D. Service of Process (statutory process)

- i. Federal Service - Must comply with Rule 4.
- ii. State Service – Minor children must be mentally competent.
- iii. Requirements (both must be presented)
 - 1. Summons – Rule 4A and 4B defines summons – official court notice
 - 2. Copy of the complaint
- iv. Service can be made by any non-party that is at least age 18 → Rule 4(c)
 - 1. Some states require that sheriff or deputy provide actual service.
- v. **What constitutes actual service for an Individual**
 - 1. Rule 4(e)(1) – defines in-hand service
 - 2. Rule 4(e)(2) – Three alternatives for serving process on person:
 - a. Personal Service – can be anywhere in the forum state
 - b. Substituted Service – serving a substitute instead of D
 - i. Two requirements:
 - 1. Must be at D’s “dwelling house or usual place of abode.”
 - 2. Must serve someone of suitable age and discretion.
 - a. No magic age.
 - 3. Person must reside there.
 - a. Butler could work, but babysitter would not.
 - c. May serve D’s agent in the forum state.
 - i. Could be appointed by operation of law (ex: accident occurs in the state for insurance company purposes) or by contract (ex: corporation appoints someone for service of process in that state).
- vi. **What constitutes actual service on a Corporation**
 - 1. Rule 4(h) – corporation is treated as a legal person. To provide service on a corporation, *P must find an agent of the corporation.*
 - 2. Must serve an officer or a managing or general agent of that corporation.
 - a. Officer – President, Vice President, etc.
 - b. Agent – Someone with some kind of sufficient responsibility; would expect this person to transmit these types of important papers.
 - 3. Can also incorporate Rule 4(e)(1) for states.
- vii. **Waiver of Service**
 - 1. *Rule 1 – “[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”*
 - 2. Rule 4(d) – when D waives service of a summons, he does not waive any objection he may have to the venue or to the court’s jurisdiction over him. Anyone (incl. Corporations) subject to service and receives notice of an action has a duty to avoid unnecessary costs of serving the summons. To avoid costs, P may

notify D of action commencement, and request D waive service of a summons. If D does not comply and forces P to serve summons, then court will impose costs of service of process on D, unless good cause for the failure can be shown (costs include whatever costs incurred in effecting service, and of any motion required to collect the costs, along with a reasonable atty's fee.

- a. When P sends notice and request of waiver to D, it must be in writing, addressed directly to D if individual or authorized rep of corp., sent through first class mail or other reliable means, accompanied by copy of complaint and ID court in which it is filed, inform D of consequences of complying with request, include date request sent, allow D reasonable time to return waiver (at least 30 days from date on which sent; or 60 days if outside U.S.), and provide extra copy of notice and request, as well as prepaid means of compliance in writing.
 - b. If D waives, D is not required to serve an answer to complaint until 60 days after the date on which the request for waiver was sent, or 90 days after that date if D's address is outside U.S.
 - c. Once P files waiver w/ court, action shall proceed as if a summons and complaint had been served at time of filing waiver, and no proof of service is required.
 - d. ***This is not service itself, simply a waiver of service.***
3. Where can you serve process?
- a. Rule 4(k)(1)(a) – P can serve process throughout the forum state.
 - b. P can reach out of state only if state court in that state would allow P to do it – State Long Arm Statute.
 - c. Exception
 - i. Rule 4(k)(1)(b) – can serve outside forum state even if there is no state long-arm so long as within 100 miles of federal courthouse – BULGE RULE.
 1. ***Bulge Rule does not apply to original D's, only to those joined under Rules 14 and 19.***
 - ii. Rule 4(k)(1)(c) & (d) – there may be federal statutes.

E. **Notice (Constitutional process)**

- i. ***Mullane v. Central Hanover Bank & Trust Co.*** → *Constitutional standard is that notice must be reasonably calculated under all the circumstances to apprise D of the pending action and afford D a reasonable opportunity to prepare a defense.* Problem arose for trustee required to serve notice of hearing to beneficiaries (who are like D's in this case), but some trust beneficiaries are not yet born. Cannot locate them nor provide them notice. For that, NY Court said in ad publishing notice in newspaper would be sufficient for people who you do not know

whether they do or do not exist. For people known though, statute requiring just a newspaper ad was unconstitutional for providing notice under 14th Amend. First-class letter would be required and state must rewrite statute to require proper notice be constitutionally required.

1. Notice by Publication – **Constructive Notice**
 - a. Almost always no good.
 - b. “Under all the circumstances” – where identity or whereabouts are reasonably unknown, little in the way of notice is required. *If publication in notice is best P can do, then under all the circumstances, publication notice may be allowable.*
 2. Normally, notice by 1st Class Mail is satisfactory for Due Process purposes (*Robinson v. Hanrahan*).
- F. If P attempts several ways of notice – both handing letter and posting notice – it appears as if P is not confident in either means of service.

IV. **SUBJECT MATTER JURISDICTION (SMJ)**

- A. What court do you go to – state or federal?
- B. Every single count of a suit must satisfy SMJ one way or another; if not, it is dismissed. Every single D must satisfy PJ or that D is dismissed.
- C. Separate inquiry from Personal Jurisdiction – need both for good suit.
 - i. PJ is over person – geography issue.
 - ii. SMJ is over the case.
- D. Federal courts can hear only certain kinds of cases → courts of **LIMITED SMJ**.
 - i. Diversity of Citizenship
 - ii. Federal Questions
 - iii. Supplemental jurisdiction (third type of SMJ)
- E. **Rule 12(h)(3) – whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.**
 - i. Means no time limit on objections. Can be raised whenever they appear and that the court can act on motion of either party or on its own motion.
- F. *State courts can hear any type of cases. States have General SMJ. Define their own SMJ.*
 - i. Exception: In narrow area of Federal Question Jurisdiction
 1. Patent Infringement
 2. Securities claim
 3. Corporate _____
- G. In federal courts, SMJ must be raised in initial complaint. Fed district court has SMJ, but not called “general.” Can only hear federal questions and diversity cases – thus **LIMITED JURISDICTION**.
- H. Cannot consent to SMJ.
- I. Dismissal if SMJ Absent – Standard remedy for failure to satisfy SMJ is dismissal of claim without addressing merits.

DIVERSITY OF CITIZENSHIP

- A. Governed by US Code §1332
- B. Within the concurrent jurisdiction of federal courts, so can be filed in either state or federal court.
- C. Goal of diversity jurisdiction is to protect out-of-staters from bias in suits against in-staters.
- D. Party asserting the existence of diversity jurisdiction has the burden of proving its existence.
- E. Not diversity of residence
- F. Diversity is measured as of the date of the filing of the lawsuit, not when nature of suit arose.
- G. **Elements**
 - i. State cause of action – state law question
 - ii. §1332(a) - Citizens of Different States
 - 1. **Complete Diversity Rule** – There is no diversity if any P is a citizen of the same state as any D (*Strawbridge v. Curtiss*).
 - 2. How do we determine citizenship of human being?
 - a. For American citizen → citizen of the state where domiciled.
 - b. Domicile is test for citizenship; created under state law. Domicile is established by two *concurrent* factors:
 - i. Must be present in that state – physical aspect.
 - ii. Must have *subjective* intent to make that state your permanent home.
 - c. Can only have one domicile at a time – impossible to have more than one. You only have that until you go to a new state and get there, and make that your permanent home.
 - d. To establish domicile: Looks at purchase of real estate, paying taxes, driver’s license, voter registration. *Actions speak louder than words*.
 - e. Alien’s Domicile (under §1332(a)) – alien permanently residing in US is, for diversity purposes, a “citizen” of the American state where the alien is domiciled.
 - 3. **Mas v. Perry** → *A person’s domicile is the place of “his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom.* A change of domicile may be effected only by a combination of two elements: (a) taking up residence in a different domicile with (b) the intention to remain there.” To be a citizen under §1332, a natural person must be both a US citizen and a domiciliary of that State. *For diversity purposes, citizenship means domicile; mere residence in the State is not sufficient.*
 - 4. Although a party temporarily residing out of state may indicate he has no intention of returning to a state in which he is technically still domiciled, if that person lacks the requisite intention to stay in the current state of residence and has not yet chosen their next

destination, a change of domicile is not yet effected. Until she acquires a new domicile, she remains a domiciliary, and thus a citizen of her old domicile. Mr. Mas was allowed to bring suit since as a French citizen he stands as an alien against a State citizen.

5. *Not diversity of domicile; always diversity of citizenship.*
6. Citizenship of Representatives - §1332(c)(2) says that with decedents, minors, and incompetents, we *look at their citizenship and not the representatives*. Look at person being represented, despite their legal capacity.
7. U.S. Citizens Domiciled in Foreign Countries: Americans domiciled abroad are obviously not domiciled in an American state, and thus cannot be citizens of an American state for diversity purposes. Since not citizens or subjects of foreign countries in which they are domiciled abroad, they do not qualify for diversity jurisdiction as citizens or subjects of foreign states. *American citizens domiciled abroad do not qualify for diversity jurisdiction under any of the 4 categories under §1332, and thus may not sue or be sued in fed dist ct on basis of diversity juris.*
8. Timing of Citizenship: Must be diverse at time suit is filed; irrelevant that parties may not have been diverse at time C of A arose or that party diverse at time of filing acquire a non-diverse citizenship in course of suit.
9. Long-established doctrine that a federal court in its determination of whether there is diversity of citizenship between the parties must *disregard nominal or formal parties to the action, and determine jurisdiction based solely upon the citizenship of the real parties to the controversy.*
10. Citizenship of Corporation - §1332(c)
 - a. Has nothing to do with domicile.
 - b. §1332(c)(1) – *corporation is a citizen of ALL states where it is incorporated* (typically only incorporated in one state though) and in state where it maintains its principal place of business (can only have one PPB).
 - i. **Corporations can thus be citizens of multiple states** → if corp. has citizenship in more than one jurisdiction, opposing party must be diverse from **all** the citizenships, or diversity is not established.
 - c. **Determining Principal Place of Business** – 3 Tests:
 - i. Nerve Center – where decisions are made; usually the headquarters; where the suits are.
 1. “the locus of corporate decision-making authority and overall control constitutes a corporation’s PPB for diversity purposes.”
 - ii. Corporate Activities or Operating Assets – greater weight is attached to the location of a corp.’s

production or service activities in determining PPB under this test; muscle center – where it does more stuff than anywhere else.

- iii. TOTAL ACTIVITIES ASSESSMENT – used most recently; hybrid of “nerve center” and “corporate activities” tests, which considers all the circumstances surrounding a corporation’s business to discern its principal place of business. Provides a realistic, flexible and nonformalistic approach to determining a corp.’s PPB through a balancing of relevant factors. *Uses the nerve center unless all of the corporate activity is in a single state.*

11. ***China Nuclear Energy Industry Corp. v. Andersen, LLP*** → §1332(a) does not permit an alien corp. to sue a partnership made up of both US citizens and perm resident aliens. *A partnership’s citizenship is determined by the citizenship of each of its individual partners, so that Andersen is a citizen or subject of every state or notation that its partners are citizens.* Court also interpreted §1332(a) to adhere to the longstanding rule that there *must be complete diversity between each plaintiff and each defendant, even in alienage cases.*
12. Unincorporated association (Incl. Partnerships, joint ventures, labor unions): Treated as a citizen for purposes of fed diversity jurisdiction in every state in which one or more of their members is a citizen (*Carden v. Arkoma Associates*).
 - a. Thus, very large unincorporated entities (e.g., nat’l labor unions), diversity of citizenship is unlikely to exist b/w it and its opponent in suit.
13. Limited partnership: Citizenship is determined by the citizenship of each of its partners. Not a citizen of the state under whose laws it was created for purposes of diversity jurisdiction.
14. Stateless Foreign Persons and Corporations: §1332(a)(2) – treated as a citizen or subject of a foreign sovereign for diversity purposes.
15. Foreign Citizens Suing One Another: No provision in §1332 authorizing citizens or subjects of one foreign state to sue citizens or subjects of another foreign state in diversity. If both foreign, needs an additional party who is a citizen of an American state.
16. Insurance Companies & Direct Action Suits: §1332(c)(1) provides that insurance companies will be treated as citizens of the state where alleged tortfeasors have citizenship, in addition to states where insurance company has citizenship. Practical effect – reduce P’s possibilities for obtaining diversity jurisdiction. Applies only to circumstances where P has claim against insured that may also properly be asserted against the insurer w/o necessarily first joining or suing the insured.

- iii. Amount in Controversy must exceed \$75,000, not including interest on claims or representative (litigation) costs.
1. Cannot be for exactly \$75,000.
 2. Measured on date suit is filed.
 3. **Legal Certainty Test:** P's prayer for relief governs, unless it is clear to a legal certainty that P cannot recover. When P pleads amount in controversy in good faith, usually not questioned by the court, and thus may be considered that this section of diversity citizenship is satisfied.
 4. P's ultimate recovery is irrelevant to SMJ. Only thing that might happen under §1332(b) is that P may have to pick up other side's costs since less than \$75,000. Other than that, focus is on initial claim amount, not actual amount recovered.
 5. **A.F.A. Tours, Inc. v. Whitchurch** → Test for determining whether P meets the jurisdictional amount is that unless the law gives a different rule, the sum claimed by P controls if the claim is apparently made in good faith. It must appear to be a legal certainty that the claim is really for less than the jurisdictional amount to justify a dismissal.
 6. **Aggregation** – where P needs to add 2 or more claims to exceed \$75,000 amount.
 - a. *P can aggregate claims if 1 P v. 1 D. Can add together all claims even if they are totally unrelated.*
 - b. *P cannot aggregate if there are multiple parties on either side though.*
 - c. If there is a joint claim or joint liability, must go with the total value of that claim.
 - i. Ex: If suing 3 tortfeasors over joint liability, P is not suing 3 individual parties, but instead is suing the 3 together over 1 claim. Can aggregate value to exceed \$75K. It is not \$25K against each D.
 - d. If there are 2 P's and 1 D arising out of the same cause of action (ex: D beat up 2 P's at same time), 2 P's cannot aggregate their claims because though suit arose under same act, injuries are separate from each other. *Only where there is an interest owned jointly (e.g., joint ownership in a car) can damages sought be aggregated.*
 - e. **Summary Aggregation Rule** – In general, single P's can aggregate single claims against single D's. two P's may not aggregate if they have separate and distinct claims. If there is a single indivisible harm, P's may aggregate.
 7. **If there's lack of jurisdiction over the subject matter, would bring up issue of amount of damages sought not amounting to \$75K under Rule 12(b)(1).**

FEDERAL QUESTION JURISDICTION

- A. §1331 – The district courts shall have original jurisdiction (trial jurisdiction) of all civil actions *arising under the Constitution, laws or treaties of the United States*
- i. Can still go to state court with federal question – Congress believes you should have the option to go to federal court under statute – not required though if parties don’t demand it (called **Concurrent Jurisdiction**, where federal jurisdiction is concurrent with that of state courts, thus claims could have been filed in either).
- B. Some specific statutes authorize federal district courts to hear causes of action relating to certain areas of federal law. Where these overlap with §1331, P must sue under that statute and not FQ.
- i. Specific Jurisdictional Statutes:
 1. §1333 – admiralty claims
 2. §1337 – federal laws regulating commerce
 3. §1338 – federal patent law
 4. §1343 – federally guaranteed civil rights
 - ii. Consequences of bringing suit under specific statutes as opposed to §1331
 1. Exclusive SMJ – Claim can’t be brought in state court, must be brought in federal court (unlike FQ, where there is option for state court to hear case).
 2. Limitations in Specific Statute – limitations associated w/ C of A attach to the filing (e.g., admiralty cases have no right to jury).
 3. Absence of Specific Statute – Many federal C of A do not enjoy their own specific grant of jurisdiction – just those above.
 4. Suits Based on Treaties - §1331 is only provision authorizing SMJ in fed ct to enforce C of A arising under U.S. treaties.
- C. Citizenship is irrelevant and there is no amount in controversy requirement.
- D. Requirement: Case that “*arises under*” federal law.
- E. Jurisdiction is evaluated on basis of facts as they existed at the time complaint was filed. Events that occur subsequent to filing normally have no bearing on the court’s jurisdictional decision.
- F. No amount in controversy requirement and citizenship of parties has no relevance.
- G. **Well Pledged Complaint Rule** – *The federal question must appear as part of P’s cause of action as set out in a well-pleaded complaint. It is therefore sometimes necessary to determine whether certain allegations are proper in pleading the cause of action, and whether the federal element is essential to P’s case (or just trying to slip in an extra claim to have a fed claim). Look at P’s complaint only. Do not look at D’s defenses.*
- i. In assessing FQ jurisdiction, look only at the actual claim. It is P’s claim itself that “must arise under federal law.”
 - ii. Do not look at anything else in the complaint. P may anticipate a defense and try to rebut it in complaint. Do not look at this. Just P’s complaint alone. *D’s Answer or Defense or P’s anticipation of some defense arising is irrelevant. Existence of a defense based on federal law will not give FQ juris.*

- iii. Narrow Exception: Where P's C of A arises from state law, but depends for its resolution on "a substantial question of federal law," it is possible that a district court will have FQ jurisdiction under §1331 (*Franchise Tax Bd v. Construction Laborers Vacation Trust*).
- iv. **Exam Language**:
 - 1. Facts alleged in the complaint establish a C of A arising under the Constitution, law or treaties of the U.S.
 - 2. Such defenses, though otherwise appropriate, and perhaps even central to the merits of a case, will not confer FQ jurisdiction on a fed dist ct – not b/c there is no FQ, but b/c the FQ arises only in a defense and not in a well-pleaded complaint.
- v. Question → ***Is P enforcing a federal right?***
 - 1. If the answer is YES, then there is a FQ.
- H. In areas where federal law has completely preempted state law, P cannot avoid the FQ by pleading only state law (*Avco Corp. v. Aero Lodge No. 735*, where case was controlled by fed law notwithstanding P's plea of state law). Can't try to circumvent fed law in complaint just so not removable by D to fed ct.
- I. ***Louisville & Nashville R. Co. v. Mottley*** (Congressional law/Train ticket case) → Congress passes law that says RR's cant give away free passes. Mottleys denied use of their pass b/c of statute. In suit complaint, claim that RR has to honor pass, and anticipated RR would rely on fed statute, but asserted that fed statute doesn't apply to them and even if it did, it is unconstitutional. ***Established well-pleaded complaint rule***. No diversity of citizenship here, and no ground for jurisdiction in fed court other than fact suit arose under the Constitution and U.S. laws. Jurisdiction can only be established under the Constitution and U.S. laws when P's statement of cause of action alone shows that it is based upon those laws or the Constitution. P cannot allege some anticipated federal defense to his cause of action that may or probably would arise, and then assert that defense as being invalidated under a provision of the Constitution. Court says it was not a federal question, as Mottleys were not enforcing a federal right – statute did not give them a right. Only claim they had was breach of contract – nothing federal about it. ***The claim itself must arise under federal la despite how much factual background is based in federal law.***
 - i. If case were argued in state court, state court may find a federal law unconstitutional but that decision is subject to appeal.
 - ii. *Federal question must be well-pleaded doesn't mean very skillful. Just asks whether P stated the elements of its cause of action, and in those elements the question becomes is there a federal question? Though the questions may be federal and may turn on federal questions, the fed questions are not going to arise in the elements of cause of action, thus must be addressed by state law.*
- J. Hypothetical Situation → If case is tried in sate court con contract theory, federal question can be raised as a defense and state court must decide that issue, and appeal would go through state system, though if US Sup. Ct. decides to take case, there is a federal question which could have a material impact on the outcome of the case. They then have SMJ where state court would not have had it.

K. **Federal Corporations under FQ Jurisdiction**

- i. FQ jurisdiction does not arise merely from the fact that a corporate party was incorporated by an act of Congress *unless* the U.S. *owns more than one-half* of the corporation's capital stock, in which case it is treated as a federal agency that can sue or be sued on that basis in federal court (28 USC §1349).

SUPPLEMENTAL (PENDENT & ANCILLARY) JURISDICTION

- A. Means by which parties may add state law counts in a federal court case, even though state law counts could not have been brought by themselves b/c they cannot satisfy requirements of either FQ or diversity jurisdiction.
- B. To do so, must already exist at least one count that can satisfy federal SMJ through either diversity, FQ, or a suit where U.S. is a party, and thus have an initial claim in federal court. Once the case is in federal court, there may be additional claims inserted into the case, provided that they meet supplemental jurisdiction requirements.
- C. Allows for judicial economy – P does not have to necessarily prosecute two separate suits, one in federal and one in state court → intended to reduce such diseconomies that come with that.
- D. **Pendent jurisdiction** defined → When P appends a claim lacking an independent basis for federal SMJ to a claim possessing such a basis
- E. **Ancillary jurisdiction** defined → When P or D injects a claim lacking an independent basis for jurisdiction by way of a counterclaim, cross-claim, or third-party complaint
- F. To get Supplemental Jurisdiction, must show that the relationship between that claim and the state claims made in the complaint permits the conclusion that the *entire action before the court comprises but one constitutional case*.
- G. **For every single claim ever inserted into federal court, there must be a basis for SMJ.** Does supplemental claim invoke diversity or FQ?
 - i. If yes, then can come in.
 - ii. If no, then look at Supplemental Jurisdiction under 28 U.S.C. §1367.
- H. **Purpose of Supplemental Jurisdiction:**
 - i. Ensures that litigants will not be dissuaded from maintaining their federal rights in a federal court solely because they can dispose of all claims by one litigation in the state but not federal forum.
 - ii. Is only way possible to provide a complete remedy when jurisdiction over federal claims is exclusive to federal judiciary.
 - iii. Supplemental jurisdiction allows federal courts to hear claims federal courts would typically not hear. P must have had at least an original claim that got into federal court under SMJ. It is this additional claim that lacks federal SMJ, but can get into the court under supplemental jurisdiction.
- I. Fed court has *discretion* to exercise supplemental jurisdiction over the claim based on state law if the two claims “**derive from a common nucleus of operative fact**” and are such that P “would ordinarily be expected to try them all in one judicial proceeding.”
- J. *U.S. Mineworkers v. Gibbs*

- i. Case setup
 - 1. P – citizen of Tennessee
 - 2. D – also citizen of Tennessee
 - 3. P sued D on federal question (issue of labor law which is federal).
 - 4. P's 2nd claim against D arose under state law.
- ii. First claim got in b/c FQ
- iii. Second claim – does not invoke FQ jurisdiction nor does it get in under diversity (Both TN). Sup Ct. said it can be heard as supplemental jurisdiction (also called Pendent Jurisdiction), since second claim is part of same constitutional case and closely enough related.
 - 1. Looks to see if came from common nucleus of operative fact → means that claim arose from same transaction or occurrence.

K. Interpretation of §1367

- i. Does §1367(a) grant supplemental jurisdiction to this claim?
 - 1. Yes, if it meets *Gibbs*, codified by §1367(a). A non-diverse state claim may be brought in under §1367(a) if it arises from same transaction or occurrence – “common nucleus of operative fact,” or “forms part of the same case or controversy” as another count or counts in the action.
 - a. Requires some relationship b/w the supplemental count and the count that already satisfies jurisdiction → ***usually looks to see how much similarity exists b/w the witnesses and evidence relevant to the respective counts.***
 - b. §1367(a) specifically provides that in appropriate circumstances, supplemental jurisdiction may be extended to include counts involving joined or intervening parties, so long as it can pass §1367(b), which imposes restrictions on such claims.
- ii. §1367(b) - Even if P has proven “same case and controversy,” may not have supplemental jurisdiction. Effect of 1367(b) – usually precludes use of supplemental jurisdiction by P if original basis of fed SMJ is diversity. If original basis for fed jurisdiction is FQ, then restrictions imposed by §1367(b) simply do not apply. However, if the original basis for SMJ is solely diversity, district courts shall not have supplemental jurisdiction under §1367(a) if it is killed by the additional two subprovisions under §1367(b). Answer is mechanical – looks at 3 STRIKES.
 - 1. **First Strike** - ***1367(b) applies only in diversity (§1332) cases – not in federal question cases.*** If original count is a federal question and supplemental count is made possible under §1367(a) “same case and controversy,” then there is supplemental jurisdiction notwithstanding §1367(c), and can ignore 2nd and 3rd strikes. If first count in fed ct based on diversity though, then must look at next potential strike.
 - 2. **Second Strike** - Only kills supplemental jurisdiction in claims by P's, not by D's nor other parties that bring claims seeking supplemental jurisdiction.

3. **Third Strike** - Kills supplemental jurisdiction only over specific types of claims listed in statute. Three categories:
 - a. Claims by P against parties joined under Rule 14, 19, 20, or 24.
 - b. Claims by Rule 19 P's.
 - c. Claims by Rule 24 P's.
 4. If it is a federal question claim, or a diversity claim and survives second and third strikes, then have supplemental jurisdiction notwithstanding §1367(c).
- iii. §1367(c) – Allows court to ***decline to exercise supplemental jurisdiction at its discretion***. Court says to itself, even though it can hear supplemental count (or put another way, has supp. jur.), maybe it should not exercise it on this count.
1. Subsections A and B are thus jurisdictional – power to hear claim.
 2. Subsection C is prudential issue – allows court to use wisdom whether or not to use fed court to resolve issue.
 3. **Reasons it may decline to exercise jurisdiction.**
 - a. Claim raises ***a novel or complex issue of State law*** (e.g., state law question in supp count where state has a blank slate on it).
 - b. Claim ***substantially predominates over claim or claims*** over which district ct has orig. jurisdiction.
 - c. District court has ***dismissed all claims over which it has original jurisdiction*** (not saying it dominates state question, but state claim somehow got dismissed).
 - d. In exceptional circumstances, there are ***other compelling reasons for declining jurisdiction*** → catch-all area.
- iv. §1367(d) – Actions filed in fed ct under §1367(a) and subsequently dismissed, will usually not be barred by a SOL b/c of time lost in fed ct. ***If fed court dismisses state claims and you wish to bring case in state court, you have the longer of 30 days (or the amount of time remaining on the statute of limitations for bringing such a suit) to file that suit in state court.*** If claimant chooses to dismiss other claims as well to refile them altogether in state court, §1367(d)'s tolling provisions extend to claims voluntarily dismissed in aftermath of denial of supp juris to one claim.
- v. Pendent Parties
1. One as to whom there is no claim satisfying a basis of federal SMJ. The claim by or against this party is, however, transactionally related to a claim by or against another party that does invoke federal jurisdiction. *Under §1367, claim by or against the pendant party can be entertained in federal court if the jurisdiction-invoking claim against the other party is not based on diversity.*
 2. If 2nd claim is against different D who is also from the same state – no diversity and no FQ.

- a. Under Question 1, 1367(a) grants it – same transaction or occurrence – even though it’s against a second D.
 - b. It does not matter if 2nd claim is against different D (see last sentence in 1367(a)).
 - L. Attempt to dismiss claims: *Under Rule 12(b)(1), could try to dismiss a second claim that comes into federal court.* If state claim and federal claim have the potential to confuse the jury, could be reason to dismiss. Attacking second count jurisdictionally, not on the merits. To dismiss, must prove claim lacks SMJ. While it may have some commonality with fed claim, will want to say the commonality of fact between the fed claim and the state claim is not sufficient.
 - i. *Causes of action do not have to be the same for common nucleus of operative fact (same case or controversy – language from statute). The claims just have to substantially overlap.*
 - M. Effect of Dismissal of Federal Claim on Pendent Claim – The district court *may* exercise pendent jurisdiction over the state claim even though the federal claim is dismissed on the merits. *However*, if federal claims are dismissed before trial, whether insubstantial in jurisdiction or not, the *state claims should also be dismissed*. If state issues dominate, state claims may be dismissed without prejudice and left for resolution to state tribunals. *If court dismisses, claimant may choose to dismiss the qualifying claims and prosecute those claims, along with the dismissed claims, in state court for purpose of economy.*
 - i. Might be reasons independent of jurisdictional considerations (likelihood of jury confusion in treating divergent legal theories of relief) that would justify separating state and federal claims
 - N. *Aldinger v. Howard* → Under 1367(a)’s last sentence, “Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties,” can add a supplemental count against a third party provided it gets through (b) and (c).
- V. **REMOVAL**
- A. Allows D to affirmatively choose court, by moving case from state trial court to a federal district court.
 - B. Governed by 28 U.S.C. §§1441 & 1446.
 - C. Policy Implication: If either party (P in choosing the court, D in removing) wants federal judge to decide issue on a federal count, they should have the right to receive it, because that is the court that is best equipped to answer a federal question.
 - D. One-way street – **can remove a case from state to federal court.** Cannot remove case from federal to state. If fed court says state court was wrong for removing to fed court, then it is *remanded* to state court from federal court, or simply *dismissed entirely*.
 - i. Can remove *only to the federal district geographically embracing the state court where claim was filed.*
 - ii. Once removed, will have a different judge, and likely a different jury pool (unless in DC, where same jury pool).

- E. If case starts in federal trial court, will either stay there or be dismissed. **No removal to state trial court.**
- F. If parties have an enforceable agreement that expresses that any dispute would be heard in state court, courts will recognize that and an otherwise removable claim will be remanded to state court.
- G. If P joins a nondiverse D for the purpose of preventing removal of an otherwise diverse claim, such a tactic is permissible so long as there is a legitimate basis for the joinder. However, if there is no “colorable basis” for the claim against the nondiverse D, court will disregard the nondiverse D when ruling on a motion to remand to state court.
- H. WHO MAY REMOVE?
 - i. **Only D may exercise the right of removal.** Even if D files counterclaim, still only original D may remove. P cannot. (In other words, P cannot remove on the ground that a counterclaim against him could have been brought independently in a federal court.)
 - ii. **D on conterclaims, crossclaims, or 3rd party interpleaders have no right to remove cases from state court.** However, these D’s may find claims affecting them removed if D on an original count files a notice of removal.
 - iii. **If multiple D’s, all D’s must be willing to remove and agree on counts that are eligible for removal.** *If not, no removal. If removal, only federal judge can approve.* Thus, if some D’s are precluded under §1446(b) from removing because of delay, or refuse to join in the removal, removal is not authorized.
 - 1. Ex: If A sues B and impleads X, still only B has right to remove.
- I. HOW MUCH TIME IS ALLOWED TO FILE REMOVAL PETITION?
 - i. May remove only within 30 days of service of the document that makes the case removable. 30 days run from service. Almost always that will be at the beginning of the case.
 - 1. Ex: A sues B in state court. A serves B 10 days later. B typically has 40 days to remove (30 days from service).
 - ii. EXCEPTION – Late-arriving eligibility for removal. When case becomes eligible for removal during the course of the suit (ex: when a real party is eliminated from the suit).
 - 1. EXCEPTION TO THAT EXCEPTION: When basis of removal is diversity, under §1446(b), case may not be removed more than one year after commencement of the action.
- J. WHAT TYPES OF CASES MAY BE REMOVED?
 - i. **Under §1441(a), D can only remove case if the case could have originally been brought by P in federal courts, i.e., if the case has federal SMJ → Original jurisdiction is necessary.**
 - 1. Removal is tested only as of the date of removal.
 - 2. D cannot remove on the ground that he has a defense in federal law, since the existence of a federal defense is insufficient to confer original federal question jurisdiction under §1331.

3. The federal court *may* hear and decide a claim in a removed civil action even where the state court had no jurisdiction b/c the action is exclusively federal (28 U.S.C. §1441(e)).
 4. **Two Major Exceptions:**
 - a. **§1441(b)** - There is **no removal** if any D is a citizen of the forum. (more on 1441(b) below)
 - i. P (TX) sues D (AK) and D (TN) on claim that exceeds amt in controversy requirement. Case filed in TN state court. Even though meets general rule that there is SMJ, there would be diversity. Can't remove because TN citizen.
 - ii. Suppose P dismisses claim against D (TN), so now just P (TX) suing D (AK) – case just became removable. However, other exception.
 - b. D cannot remove a diversity case more than one year after it has been filed in state court. Still have only 30 days to remove though after case becomes removable.
 - ii. Once a multi-count case has been removed to fed dist ct in the manner provided by §1441(c), court has discretion to retain jurisdiction over the “non-removable” counts. Court will apply §1367(a) (suppl. juris) to see if it can retain those counts that form part of “same case or controversy” as that which qualified for removal in their own right – court looks to see if it overlaps. Appropriate remedy for those non-supplemental claims is to remand those counts to state court from which they were removed. If federal claim is properly removed from state court, though, federal judge has no choice but to at least retain the federal question.
 1. **Modern Trend** – permit remand under §1441(c) of both fed and state claims if state claims predominate.
- K. WHERE MAY CASES BE REMOVED TO?
- i. Venue for an action removed under §1441(a) lies in the **federal district court “embracing the place where such [state] action is pending.”** Note that in removal cases §1441(a) determines proper venue, not §1391(a). Thus, *in a properly removed case, venue is proper in the federal court of the state where the case is pending, even if venue would have been improper had P originally filed the action in the federal district court of that state.*
 - ii. **§1441(b)** – When the jurisdiction of the federal court is **based on diversity** and **one of the D's is a citizen of the state in which the state action was brought**, the action is **not removable**. However, if the original jurisdiction of the district court would have been based on a FQ, the D's can remove without regard to the citizenship of the parties.
- L. Hypothetical: A (NY) sues B (CA) for \$100K over a state question in California state court. B files a removal petition. Result? Satisfies 1441(a) but fails under last sentence of 1441(b). Only one count (state count) is satisfied. Removal would not be granted because if sued in own state court, cannot remove to fed dist

ct. Had this been a FQ and not a state question, this would have been removable under 1441(b) – see FQ w/o regard to citizenship.

M. **Interpretation of §1441**

- i. §1441(a) – General right of removal is subject to such exceptions as Congress may create... Removable cases are removed to the fed dist ct embracing the location where the state court sits... Restricts right of removal to parties who are D's to P's case in chief... Fictitious names are disregarded as well as their citizenship when looking at diversity issue.
- ii. §1441(b) – Authorizes D to remove *any FQ count*, and where parties meet requirements for *diversity jurisdiction, subject to exception that any D sued is not a citizen of the state in which the claim was filed*. If so, that count is not eligible for removal to federal district court.
- iii. §1441(c) – Original count must be removable. If at least one separate and independent count would qualify for FQ jurisdiction, then a notice of removal will cause *all* counts in the case to be removed to fed dist ct. Removal of the entire case includes removal of counterclaims, crossclaims, and claims against 3rd parties... When claim to be removed is a diverse count, §1441(c) grants no apparent authority for it to take any nonremovable claims (though §1441(b) still allows for diverse claim to be removed but it goes alone). Nonremovable claims are then subject to “same case or controversy” test under §1367(a) to see if they can remain in federal court.

N. **Removal Procedure**

- i. Governed by §1446
- ii. §1446(a) – D desiring to remove any claim from State court to district court must file in district court for the district and division for which such action is pending a *notice of removal signed pursuant to Rule 11 and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings and orders served upon such D or D's in such action*. Copy of the notice should be sent to the other parties *and* to the state court. Once this is done, the state court can no longer deal with the case; should the state court attempt to do so, fed ct can enjoin the state court's action.
 1. Courts may impose sanctions for inappropriate pleadings and motions. There is no rule prohibiting a party from filing more than one removal petition, provided that each petition meets the requirements of Rule 11 and is timely.
- iii. §1446(c) – governs procedure in removal for criminal actions, but has no relevance to removal in civil cases.

VI. **Challenging SMJ: VENUE**

A. Governed by §1391(a) for diversity claims and §1391(b) for FQ.

- i. If action satisfies the jurisdictional requirements for both FQ and diversity, venue provisions for FQ cases govern, because such a suit is not “based solely on diversity.”

- B. Determines the judicial district in which an action within the jurisdiction of federal courts may be brought.
- C. Legislature's attempt to be fair to D, rather than fairness through judicial process. ***Venue is an attempt to make fair play when personal jurisdiction is already satisfied.***
- D. Distinguishing SMJ – SMJ is ***power*** of the court to adjudicate the matter before it. Venue relates to the ***proper district*** in which to bring the action. SMJ is a question of power of authority; venue is a question of convenience. SMJ cannot be conferred by agreement; venue can be. A court can have SMJ without having proper venue.
- E. By this point, P has perfected PJ through service of process, then decided what court, decided federal ct, stayed there, and now must decide which fed dist ct. SMJ says that you can go to fed ct, but doesn't say which one. Venue does that.
- F. Definition of **residence** under §1391 → applies same standard as jurisdictional concepts of "citizenship" and "domicile." If several houses scattered, only one is a domicile, conferring citizenship for diversity purposes and only one is a residence for venue purposes.
 - i. Person who maintains two homes usually will be deemed to reside only in the district of his domicile. It is possible, however, for a domiciliary of one state to reside for venue purposes in different state.
 - ii. **Corporation Residence**: corporation resides in all districts where it is subject to PJ (e.g., Ford motor company subject to residing anywhere in US). See §1391(c) below.
- G. **Interpreting §1391 – Two Basic Choices for P to Select Venue**:
 - i. §1391(a)(1) & (b)(1) – **Where D's Reside**: P may lay venue in any district where a single D resides, provided all of the D's reside in the same state.
 - 1. Not available where multiple D's are not all residents of same state.
 - ii. §1391(a)(2) & (b)(2) – **Where Substantial Events or Omissions Occurred**: P may lay venue in any district in which substantial part of claim arose (or "accrued itself") or for quasi in rem, where a substantial part of the property that gave rise to action is found.
 - 1. Courts generally consider acts of both P and D.
 - iii. If there is no district anywhere in US which satisfies (1) or (2), use (3), but P will lose some of its D's if it wants to stay in fed dist ct because can't have personal jurisdiction in jurisdiction that is not its own. → §1391(a)(3) – **Where any D is Subject to PJ at Time Suit is Filed**: PJ is measured by boundaries of fed jud district. In states which have more than one fed jud district, §1391(a)(3) may be used to satisfy venue requirements only when D is subject to PJ in that portion of the state which comprises the federal judicial district. **May only be employed when party is unable to satisfy venue requirements under subsections (1) and (2). If either of those options is available, may not employ (3). Thus, almost never comes up – usually only when claims arises overseas.**
 - iv. §1391(b)(3) – **Where any D may be Found**: no significant distinction but note different language for Diversity case and FQ case.

- v. §1391(c) – Corporation’s residence; *provides at time action is commenced, not when C of A arose*. Looks at 3 component parts:
 1. *Corporate Venue based on PJ*: deemed to be residents of any jud dist in which they would be subject to PJ at time action is commenced.
 2. *Multi-District States*: If state has more than one judicial district, corporations are residents only of the jud dist within the state in which they would be subject to PJ, if the jud dist was a separate state. Thus, while a corporations’s contacts in one jud dist might create PJ over the corp in all jud districts in that state, the corporation’s activity might satisfy venue only in the judicial dist in which its contacts occurred.
 3. *Corporate Activities Dispersed Throughout a Multi-District State*: If unable to establish venue using (1) and (2), then corporation is deemed to reside in judicial district with which the corporation has the “*most significant contacts*.”
- vi. Unincorporated Associations – treats partnerships, sole proprietorships, etc., in same manner as other corporations; resides in every judicial district where it does business.
- vii. §1391(d) – An alien may be sued in any district.

H. Waiver of Venue: Improper venue can be waived by the parties. Venue is considered to be waived unless timely objection (in a pre-pleading motion, or where no such motion is made, in the answer) is made to the improper venue.

I. Transfer of Venue

- i. Must be within the same judicial system – from one federal district court to another in the federal system – this is different from removal.
- ii. Terminology:
 1. Transferor Court – original court transferring case away
 2. Transferee Court – court to which case is transferred
- iii. Rules Re: Transfer
 1. Transferee MUST be a proper venue and must have PJ over D. Must be true independent of waiver. Must be independently true irrespective of offer to waive jurisdiction.
 2. Where Original Venue is Improper: Where alternative to transfer is dismissal of the action, §1406(a) governs in the “interest of justice.” Transfer is more appropriate than dismissal except in extraordinary circumstances. Transferee forum must have SMJ and in personam jurisdiction over D, and venue must be proper.
 3. Where Original Venue is Proper: §1404(a) applies – may transfer based on convenience and interest of justice (i.e., witnesses, evidence).

VII. Forum Non Conveniens

- A. Court selected by claimant will not hear C of A if court is an “inappropriate” forum → dismisses because there is a far more appropriate/convenient court somewhere else.

- i. Why dismiss? Because can only transfer to court in same judicial system.
Ex: in dif. country, must dismiss over FNC, and allow for refiling.
- B. D's usually tries to get FNC b/c there is less tort liability in another country – reduce costs.
- C. Exam Language: Even if P has chosen a court that enjoys: PJ or quasi in rem jurisdiction over D, SMJ over kind of case at issue; and satisfactory venue, court may refuse to hear case if it determines that court is an inappropriate forum.
- D. Timing: will ordinarily be made early in the litigation.
- E. Requirements: Must first determine that an adequate alternative forum exists – D has burden of demonstrating the availability of such a forum. If no such other forum, court retains case. Evaluation requires determination of whether D is subject to service of process in the alternative forum, and whether the alternative forum would hear the case → focuses on question of jurisdiction over D. If there is some question as to PJ over D in alternative forum, D can usually eliminate the issue by stipulating to jurisdiction in that forum.
 - i. If proposed alternative forum is in another country, will also examine whether foreign court has capacity to provide an adequate remedy, and in extreme cases, may look at questions of that foreign court's integrity. If there are distinctions in procedural law application that would preclude a reasonable opportunity for P to present a case, that will be weighed heavily in determining adequacy of alternative forum. Whether or not that forum will apply American substantive law may not be as important though.
- F. ***Piper v. Reyno*** – Public factors v. Private factors used in consideration.
- G. Weighing Factors
 - i. Public Interest Factors:
 1. Having local disputes settled locally
 2. Avoiding problems of applying foreign law – carries only little weight
 3. Avoiding burdening jurors w/ cases that have no impact on their community – or whether citizenry of another area has a greater interest.
 4. Enforceability of a judgment – if enforcement of a prospective judgment could require further litigation outside US, court may weigh that factor in determining whether case should be heard in US in first instance. Do not want a waste of time and judicial resources. Usually only applicable for cases that FNC would move outside US b/c full faith and credit clause eliminates that problem in US.
 5. Public Policy – courts may retain a particular lawsuit b/c public policy favors an American forum for such a suit.
 - ii. Private Interest Factors:
 1. Ease of access to evidence
 2. Cost for witnesses to attend trial
 3. Availability of compulsory process
 4. other factors that might shorten trial or make it less expensive

- H. To find FNC, it is more draconian. Takes an especially strong showing of factors because typically its dismissal, not just transfer.
- I. Remedy: Under §1404, federal court that is an inappropriate forum may *transfer* the case to another fed dist ct in which the case “might have been brought.” Because a transferred case is not dismissed, transfer creates no SOL problems.
 - i. Limitation: Can only transfer to other fed dist ct’s. If outside US, only remedy available is *dismissal* of the action with permission to P to file the C of A elsewhere. Courts often *condition a grant of D’s motion to dismiss for FNC on understanding that D will submit to jurisdiction in another country and will not challenge suit on SOL grounds.*

VIII. **Eerie Doctrine**

- A. Deals with conflict of laws for federal courts hearing a diversity claim in trying to determine which set of laws to apply – state or federal.
- B. General Rule: A federal court, in the exercise of its diversity jurisdiction, is required to apply *substantive law of the state* in which it is sitting, including that state’s conflict of law rules (*Eerie v. Tompkins*). However, the federal courts apply *federal procedural law* in diversity cases (Reed’s concurrence in *Eerie*).
- C. Series of Required Questions
 - i. **Is there a Federal directive on point? Two-part analysis (requires both factors – not weighing analysis):**
 - 1. **Is there a lawful federal rule?**
 - a. Rules involved must be procedural (Congress can only change those) – cannot change common law → Can change procedural, not substantive.
 - b. Approach with caution – under *Walker v. Armco*, Rule 3 – A civil action is commenced by filing a complaint with the court. Supreme Court found this to conflict with the state law. Held that Rule 3 did not address tolling at all, and thus didn’t constitute a federal directive on the tolling question.
 - 2. **Does the federal rule conflict with the otherwise applicable state procedure?**
 - a. Surely, they conflict or we would apply both. If the rules conflict, we apply the federal rule – Federal Rule Wins!
 - b. Essentially, only way federal procedure will lose out is if its not lawfully created.
 - 3. EXAM LANGUAGE: Supreme Court will apply the federal rule if it is on point and it is valid. A Federal Rule of Civil Procedure is valid if it is “arguably procedural” (*Hanna v. Plumer*).
 - ii. **If there is no Federal directive on point, is the issue substance or procedure?**
 - 1. **Substantive v. Procedural**
 - a. If it is substantive, then federal judge must follow state law in a diversity case.

- b. If it is procedural, federal judge may ignore the state law and apply federal procedural law, since that is what he is most familiar with.
2. **Some situations are clearly established.**
- a. For *Eerie* purposes, Sup Ct has established that *statutes of limitations and rules for tolling statutes of limitations* are substantive, and thus federal judge in diversity case must follow state law on those issues (*Guaranty Trust Co. v. York*). *Choice of law rules* are also substantive for *Eerie* purposes (*Klaxon v. Stentor Electric Manufacturing Co.*). *Elements of a claim or defense* are substantive as well.
3. **Law is unclear in other situations.**
- a. When there is no federal directive on point, may be difficult to determine whether issue is substantive or procedural for *Eerie* purposes. Different Tests applied:
 - i. **Outcome Determination** (Frankfurter approach – applied when origin of federal procedure is Federal Rule) – Does the difference b/w two laws affect the outcome in the case, even potentially? *Measured by possibility v. probability that outcome will be affected by application of federal law.*
 - 1. If answer is yes, then federal ct should apply state procedure alongside state substantive law.
 - 2. If answer is no, then presumably fed ct could apply its own procedure even if it is a state C of A. Allowed b/c doesn't make difference in the outcome, then judge should be allowed to use procedure he is most familiar with.
 - ii. **Balance of Interests** (Brennan Approach) – Looks at origin (or source) of fed procedure in question.
 - 1. Could be one of three:
 - a. Case law developed by fed dist ct (ex: FNC)
 - b. Federal Rules of Civil Procedure – Rule 4 (in particular) – all rules are procedural, not developed in cases)
 - c. Congressional enactments – Congress enacts procedure w/o going through rules or case law (Diversity, venue, forum, etc).
 - 2. If Case Law, then (from *Byrd v. Blue Ridge*, jury trial v. judge decision case) Brennan asks following questions under this test (no particular order). *Test arises when fed ct is*

deciding whether to use fed proc that arises from case law or some conflicting state law:

- a. Strength of State's interest in using this approach.
 - b. Strength of Federal interest in using this approach.
 - c. How outcome determinative is the issue.
3. If federal statute (know it's a statute b/c begins with Title 28 at beginning) is source, then rule is:
- a. If federal statute (or case construing statute) is on point, the federal statute wins. Congressional action is supreme over state. No balancing or 2-part analysis (*Stewart v. Ricoh*).
- iii. **Forum Shopping Deterrence** – directs that the federal judge should follow state law on the issue if failing to do so would cause litigants to flock to federal court (*Hanna v. Plumer*).
1. Court wants to discourage forum shopping and says if P wants to use federal court for federal procedure, P will get federal court but will get state procedure applied.