<u>CIVIL PROCEDURE OUTLINE</u>
FALL 2007
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Table of Contents
I-IV – related to forum (∏'s choice where they're going to sue)
VII – VIII – Joinder and Pleadings closely related → define scope of litigation

I. **Jurisdiction over persons or things** (must have 1 of 3)
   a. Personal jurisdiction (in personam) - **pg. 2**
   b. Quasi in rem jurisdiction – **pg. 10**
   c. In rem jurisdiction – **pg. 12**
II. **Notice** (Rule 4: Summons) – **pg. 12**
III. **Federal Subject Matter Jurisdiction** – (must have 1 of 3, or you can try Removal) **– pg. 16**
   a. Diversity Jurisdiction (§ 1332) – **pg. 16**
   b. Federal Question Jurisdiction (§ 1331) – **pg. 20**
   c. Supplemental Jurisdiction (§ 1367) – **pg. 21**
   d. Removal – **pg. 23**
IV. **Challenging SMJ and Personal Jurisdiction** [Rule 12(b), (g), and (h)] – **pg. 26**
   a. Challenging Personal Jurisdiction – **pg. 27**
   b. Challenging Subject Matter Jurisdiction – **pg. 28**
V. **Venue** (§ 1391) – **pg. 29**
   a. Forum Non Conveniens – **pg. 30**
VI. ***Erie* doctrine – pg. 33**
VII. **Amended Pleadings** (Rule 15) – **pg. 36**
VIII. **Joinder Issues (bringing in add'l parties and claims) – pg. 38**
   a. **Counterclaims and Cross-Claims** (Rule 13) – **pg. 39**
      i. Compulsory Counterclaim – 13(a) – **pg. 39**
      ii. Permissive Counterclaim 13(b) – **pg. 40**
      iii. Cross-claim- 13(g) – **pg. 41**
   b. **Joinder of Claims** (Rule 18a) – **pg. 42**
   c. **Impleader/Third Party Practice** (Rule 14(a) and (b)) – **pg. 42**
   d. **(Compulsory) Joinder of Necessary Parties** (Rule 19(a) and (b)) – **pg. 43**
   e. **Permissive Joinder of Parties** (Rule 20(a) and (b)) – **pg. 45**
   f. **Consolidation; Separate Trials** (Rule 42(a) and (b)) **– pg. 46**
   g. **Intervention** (Rule 24(a) and (b)) – **pg. 46**
   h. **Class Action** (Rule 23) – **pg. 47**
IX. **Discovery** (Rule 26) – **pg. 52**
X. **Summary Judgment** (Rule 56) **– pg. 54**

<u>**Things to know:**</u>
Before a federal court can hear a ∏'s claim, it must satisfy 3 prerequisites:
1) **Jurisdiction over persons or things**: court's ability to drag individual into its district
   a. 3 kinds of jurisdiction:
2) **Subject Matter jurisdiction**: court's ability to hear a particular kind of claim
3) **Venue**

I. Jurisdiction Over Persons or Things

One question: In what states can the ∏ sue the Δ?

- o Exactly the same analysis whether we end up in state court or federal court
- o For any court to have personal jurisdiction, it must have power over something – must have one of the following:
  - ➢ Power over the Δ herself (in personam)
  - ➢ Power over the Δ's property (in rem and quasi in rem)

3 types of jurisdiction over persons or things:

- i. **In personam (personal jurisdiction)**
- ii. **Quasi in rem**
- iii. **In rem**

Key difference:

- o In personam – court has power over Δ (person) because of min. contacts
- o With in rem and quasi in rem – court has power over Δ's property
- o Always prefer in personam if we can get it
  - ➢ How do we know whether court has power?

PERSONAL JURISDICTION

- o Must not be fundamentally unfair to the Δ
- o First step: (A court can assert personal jurisdiction only if power is authorized by statute and doesn't exceed Due Process Clause) – look at 2 elements:
  - ➢ State limitations: Look at long-arm statute – does the state's statute allow?
  - ➢ Due Process: Then look at if it's Constitutional – does it fall w/in Due Process?
    - → Due Process Clause of the Constitution sets the boundaries and tells courts if they have power
      - o If it falls w/in due process clause, it's entitled to full faith and credit
      - o **But** just because it falls w/in due process clause, doesn't mean it definitely has power
        - →Some states have statutes that give less power

Constitutional analysis: In personam jurisdiction (General vs Specific):

- o General in personam jurisdiction
  - ➢ Δ can be sued in a forum on a claim that arose anywhere in the world
  - ➢ If you're subject to general jurisdiction in NY – you can be sued on a claim that arose in England
  - ➢ You're subject to general jurisdiction if you have continuous and systematic ties with the state, but the Δ's contacts with the state are unrelated to the cause of action
- o Specific in personam jurisdiction

- Δ being sued on a claim that has some conxn w/ the forum: ∏'s claim itself arose from Δ's activities in the forum
- If you're in NY, can only be sued on a claim that arose in NY

Personal Jurisdiction (P/J) & *Pennoyer v. Neff:*

- Main takeaway: State has power over people and things inside the state – a person must be present within the territorial jurisdiction of the court before a judgment can be personally binding on him/her (or get service of agent)
- Neff was never served in the original case, *Mitchell v. Neff*, so he didn't lose that case (and thus didn't really lose his land to Mitchell via a court order) – so Pennoyer, in a later case, doesn't actually own Neff's land because it was never Mitchell's land to sell to him.
- Through *Pennoyer v. Neff*, just need one of these 3 :
  - i. **Presence (In-state service)**
  - ii. **Agent (In-state service of an agent):**
    - When the Δ's agent was served w/process in the forum, Δ is subject to jurisdiction
  - iii. **Consent**
- **Notice is always required**
  - i. If you publish a notice, it doesn't matter because the person might not see it.
  - ii. Must actually serve them with papers
  - iii. Notice doesn't guarantee jurisdiction

3 WAYS TO GET PERSONAL JURISDICTION

- **Consent**
  - Δ consents to jurisdiction and is willing to be tried in the state
  - Parties can consent to personal jurisdiction in a forum in which neither or only 1 party has min contacts (almost always fair if Δ consents)
  - **Consent shown through:**
    - i. Contract or agreement
    - ii. Waiver
      - If no objection to personal jurisdiction in a timely manner, then it's considered consent (he waived any objections) – timely objections are controlled by Rule 12(b)(2), (g), and (h)(1)
    - iii. Counterclaims
    - iv. Consent to determine jurisdiction
      - Simply challenging jurisdiction – consented to let the court look at the facts not on liability but to decide if it has the rights to extend jurisdiction
      - Could do it by operation of law (if you drove your car into a state and that state statute says if you

3 ways to get P/J:
1) Consent
2) In-state service
3) Minimum Contacts

drive your car on our streets and get into an accident, you consent to p/j)

- **<u>In-state service</u>**
  - When the Δ is served w/process in the forum, Δ is subject to general jurisdiction (almost always fair)
- **<u>Minimum Contacts</u> [*International Shoe*]**
  - <u>State has jurisdiction if Δ has such minimum contacts with the forum that exercise of jurisdiction does not offend traditional notions of fair play and substantial justice</u>
  - This test is very flexible and led to an expansion of jurisdiction
  - Can serve process outside the forum state (couldn't do under *Pennoyer*) so long as Δ meets minimum contacts test
  - **<u>Test for Fairness has 6 Factors:</u>** Individual facts of given cases help the court decide when it is <u>fair</u> to use personal jurisdiction (don't need all factors to be satisfied, and other considerations may arise):
    - i. **Purposeful (or can sometimes consider foreseeability)**
      - Did the Δ have a purposeful/intentional contact w/ the state that's trying to exercise jurisdiction?
        - Yes – argues in favor of p/j
        - No – doesn't mean we can't get p/j, just that the argument isn't as strong
      - *Gray v. American Radiator*
        - Foreseeability can replace purposeful
        - If contact with another state is foreseeable, then it could be fair to use personal jurisdiction
        - In *Gray* – Titan (Δ) should have reasonably expected that their defective valve could go outside of OH and injure the ∏ in IL
      - *World-Wide Volkswagon v. Woodson*
        - Court said: No relevant contacts
        - Foreseeability is not enough to establish min contacts
  - Not enough just that it was foreseeable that car would be driven in other states
        - Did not show <u>purposeful availment</u> – the Δ didn't actually reach out to the state in any way and there was no purposeful contact
        - Dissent (Justice Brennan)
  - There are legitimate strong state interests to tie OK to the litigation
      - *Burger King v. Rudzewicz*
        - Δ avails themselves of the laws and benefits of the forum state when they signed the K with the FL corporation and had a 20 year relationship that was continuous and wide-reaching to FL

<u>Weighing Min Contacts Factors for Fairness</u>:
1) **Purposeful**
2) **Magnitude**
3) **Related Cause of action**
4) **Systematic/Continuous**
5) **Availability of Witnesses/Evidence**
6) **Forum interest (State's interest)**

- *Kulko v. Superior Court*
  - Father lived in NY with his 2 children and daughter said she wanted to go to CA to spend time with her mother so father bought her a 1-way ticket

➢ CA court tried to say that when he bought the airline ticket for his daughter, he purposefully availed himself to CA jurisdiction/laws

- SCOTUS said no:
  - No purposeful availment from buying a plane ticket
  - Test of "effects" only applicable if Δ had injured either persons or property in CA
  - No commercial transactions in this case – just personal, domestic relations

➢ No effect in the state and not directed at state by the Δ, so not enough to establish jurisdiction

ii. Magnitude

- How large is the Δ's contact with the state?
- Hard to determine and define
- Can range from dollar value of Δ's activity to the nature and size of the wrong that Δ is alleged to have committed
- *Keaton v. Hustler Magazine*
  - To sue the company in NH, the ∏ had to show that the magazine's sales were large – and the number itself was large, but it was small as a percentage of sales
  - Using just the number itself was okay – didn't have to look at it as a percentage of sales because it was a large income for NH

iii. Related to cause of action

- Is contact with the state related to the cause of action?
  - If yes – Ask how much and use this to lend to p/j
  - If no – Can still get p/j if they have a lot of other contacts to the state (eg: they lived there but no business conducted there)

iv. Systematic

- Was Δ's contact with the state a one-time thing or was there continuous/systematic contact with the state?
  - If yes – lends to p/j

v. Availability of witnesses and evidence

- Would it be unfair to try it in that state because Δ's witnesses couldn't travel out there (travel costs, etc)
- Think about similarly for evidence

- **vi. Forum interest in the suit (state's interest)**
  - State has an interest in its residents
  - Don't jump to the gun on this – state interest alone usually not enough to sway p/j
  - But not always – just because a party is from a state, doesn't necessarily guarantee
    - **State is primary protector of children in their state though** (this is for sure)
  - Think about where you are suing, not where it's easiest to sue
    - If you have an injury to working class from a big corporation, you want the jury to be made up of working class (so you wouldn't sue in Beverly Hills)
- Nowhere does *International Shoe* overrule *Pennoyer*
  - **i.** Implies that presence in the forum when you're served is still in place
  - **ii.** Use International Shoe min contacts test if there's no physical presence in the state (just another test to add on)

- **Don't forget that you must have NOTICE OF SERVICE OF PROCESS for personal jurisdiction to hold**
  - Rule 4

- **Long-arm statute:** Provides jurisdiction over nonresidents who can't be found and served in the forum
  - **Can't go farther than what Due Process will allow – can go as far or cut it short**
    - **i. NO LONG-ARM ON THE EXAM, SO DON'T STUDY!**
  - **Only works with regard to minimum contacts**
    - **i.** Don't need if Δ already consented or was served within the state
  - Statute of a given state reaches outside that state and serves personal jurisdiction over Δ even though Δ hasn't consented
  - Every state has one and attempts to assert personal jurisdiction over nonresidents
  - *Gray v. American Radiator*
    - i. Titan negligently constructed a valve and is an OH business. Does no business or no physical agent in IL, but the injury occurred in IL.
      - But IL long-arm statute says: a nonresident who, either in person or through an agent, commits a tort within the state is subject to its jurisdiction
        - IL saying: We have jurisdiction over a non-resident who commits a tort in our state
        - Court says Titan's association with IL is sufficient to support IL's exercise of jurisdiction over Titan (a nonresident)

            - Though Titan's contact with IL wasn't purposeful or intentional, it was foreseeable
            - It's generally not unjust to hold a corporation accountable for injuries their products cause if it decides to sell its products for ultimate use in another state
    - Use of its products in IL was not an isolated incident
    - Commercial transactions and means of distribution account for out-of-state usage

Statutory requirements

First on an exam – ask if there's a statute first, then go to the Constitutional analysis above

- **In most states, 2 types of long-arm statutes:**
    i. Most common/broadest possible statute: You can't go farther than what the Constitution allows, but up to it
        - California type – "we reach to the full extent of Due Process"
        - If you're attempting to serve a Δ, you only need to use International Shoe test of minimum contacts
        - State saying they want all the personal jurisdiction that they can Constitutionally get
    ii. Laundry list long-arm - Narrower exceptions to exercise long-arm jurisdiction against nonresident, nonconsenting Δs
        - Gives a series of things that the non-resident can do that will subject him to jurisdiction
        - Typical one says – they say Δ has jurisdiction if he:
            - Enters a K in the state
            - Transacts business in this state
            - Uses property in this state
        - Most important takeaway – statutory language can be interpreted in different
        - *Gray v. American Radiator* – (look for *Gray* on the exam!) IL had long-arm statute that said if a tortuous act (court said this meant the tort/injury itself) committed in their state, then they could extend personal jurisdiction to the tortfeaser (Titan – the manufacturer of the valves)
            - We have jurisdiction over a non-resident who commits a tort in our state
            - Suppose I manufacture a widget and I send it into a different state – did I commit a tort in that state? There are 2 ways to argue this – argue BOTH sides!
- Some states will say no because the Δ didn't actually commit the tort in that state

- And some states will say that yes, because the ∏ was injured in that state and that's where the tort occurred, so Δ is subject

On the exam – Analytical Framework

- **Must have a list of factors to walk the professor through:**
- **First** – Does one of the traditional basis apply?
  i. Walk through traditional basis in *Pennoyer*
  ii. Then if it there is one – say it might be ok by itself
  iii. But then also say it might have to meet min contacts
- **Second:** If there is no traditional basis then go straight to international shoe
  i. International shoe: go through 6 requirements – first, go through these 2:
     - Is there a relevant contact b/w the forum and the Δ?
       - What's a relevant contact?
- Purposeful availment – Δ must reach out to the forum in some way
     - Foreseeability
- **Third**: If the contact met – go to rest of requirements for fairnesss
  i. Tie in *Burger King* and *International Shoe*
     - Takeaway from BK: A high showing of fairness can make up for a small showing of contact
       - It was meant to be fair for the ∏ (BK)
  ii. Factors for fairness:
     - Relatedness: Does the ∏'s claim arise from the Δ's contact with the forum?
       - If so – that helps us find jurisdiction
     - Inconvenience for the Δ and witnesses: the standard is from BK – Δ must show that the forum is so inconvenient that they're at severe disadvantage (hard for Δ to meet)
     - State's interest – does state have an interest in providing justice for its citizens?
     - ∏'s interest: watch the facts for this
     - Legal system's interest in efficiency
     - Interstate interest in shared substantive policies – Kulko (family harmony/custody issues)

Important Cases for Min. Contacts Factors:

- ***World-Wide Volkswagon***
  - The issue: Whether there was jurisdiction over World-Wide which only did business in CT, NY, and NJ and SeaWay which only did business in Encina when the accident happened in OK?
  - Sup Ct says no – there is no **relevant contact**
  - **Relevant contacts**
    - Must result in purposeful availment

        - Δ reaches out to forum in some way – there was not enough significance to their contact with the state
    - **Foreseeability** is relevant to this issue but not central
        - Court said not enough to foresee that the product would get to OK - But it must be foreseeable that Δ could get sued in OK
    - You can have min contacts with a forum w/o ever setting foot in the state
        - Can do it by causing an effect in the state
- ***Burger King v. Rudzewicz***
    - BK is a FL corporation and Δs are franchisees in MI who fell behind in monthly payments, so BK suing them in FL. Δs say they are MI residents and the claim didn't arise in FL, so no jurisdiction
    - SCOTUS said that FL did have jurisdiction because Δs purposefully availed themselves to FL
    - Takeaway: there are 2 parts
        - Contact – you must have a relevant contact before you even look at fairness
            - In BK case– they reached out to FL to enter a 20 year deal, and availed themselves of FL law in the K; one of them even had training in FL
            - Δs benefited from the interstate activities
            - Systematic and Purposeful
        - Fairness – all the fairness in the world won't make up for contact
            - But these franchise owners said it wasn't fair to have them go to FL
            - Sup Ct said that Δ must show that forum is so gravely inconvenient that Δ is at a severe disadvantage in the litigation (and these Δs couldn't make that showing)
            - FL has the right to provide its residents (as ∏s) a forum for redressing injuries inflicted by out-of-state actors
            - Dissent said it was unfair to require Δs to go all the way out to FL, since they had no place of business there, no employees in FL and not even expectation that goods would be consumed by FL residents
                - Δs financially unprepared to litigate in FL and couldn't call their witnesses to FL
                - Said it was offensive to fundamental fairness of due process
                - But majority disagreed – Δs had fair notice that they would have to litigate in FL and failed to demonstrate why FL jurisdiction would be unfair
- ***Asahi v. Superior Court***
    - Stream of commerce case:
        - I manufacture valves in State A and ship them to State B; the company in State B manufactures and sells finished products to States C, D, and E

                - I didn't reach out to States C, D, or E but I get sued by State E because the finished product blows up in that state. Is there jurisdiction?
                - Justices split 4-4 in this case and that was the case
                    - Good law school exam question – know both sides
                        - Position 1: It is a contact if I put the product in the stream and reasonably anticipate that it will get to States C, D, and E
                        - Position 2: You should have the reasonable anticipation plus an intent or purpose to serve States C, D, or E
    - ***Kulko v. Superior Court***
        - Does the traditional basis of being served while in the forum survive or do you have to assess min contacts?
        - SCOTUS 4-4 split
            - Position 1: Presence when served in the state is its own basis – don't need to even assess min contacts at all
            - Position 2: International Shoe must be applied and assess min contacts too

In rem and Quasi in rem

- We'd rather have personal but move on to these 2 if you can't get in personam

QUASI IN REM JURISDICTION

- Alternative to personal jurisdiction (if you can't get it)
- **Get Δ's presence by seizing property belonging to the Δ**
- Remember Pennoyer about dispute in *Mitchell v. Neff*
    - Pennoyer couldn't sue Neff in personam
    - So Pennoyer tried to go quasi in rem and tried to use property but court said no-go because the property wasn't attached to Neff @ beginning of the case
    - Sup Ct held that for in rem and quasi in rem:
        - Constitutionally, the court must attach property at the outset of the case
- Most states have statutes that say they have in rem or quasi in rem if:
    - States have property that Δ owns or claims to own (and statute should require that it's attached at the outset)
- **Quasi in rem jurisdiction: when ALL SIX below are fulfilled:**

    1) Thing of Value
        - Court can only hear a claim for what the seized asset's value is
            - Eg: If claim is for $100 and the seized asset is worth $50, then court can only give up to $50 judgment
            - Conversely, if asset is a diamond ring worth $300K and the claim is only for $100K, then the Δ still owns $200K of that ring

    2) Territorial Limit (present in the jurisdiction)
        - Asset must be seized while within territorial confines of the state in which the court sits
        - Easy if asset is realty but hard if it's mobile (cars) or ambiguous (stocks – either where corporation located or where incorporated) or debt (like money owed) – those may be where the debtor is and it's not in the jurisdiction

        - Generally, courts resolve these problems w/their own arbitrary rules
    - Don't need to address long-arm statutes, because those are only applicable when court is reaching outside its territory – but quasi in rem deals just within their territory (seizing property w/in that state)

3) Δ's asset

- Must arguably belong to the Δ when seized (and seizure is before trial)
- Need to give Δ a reason to appear in court
- Usually look at: <u>Relationship b/w thing seized and ∏'s cause of action</u>

4) Seizure or Attachment

- Court must have effective control of the asset before the court has quasi in rem jurisdiction
- Must interfere with Δ's control (sometimes just by freezing assets/bank accounts/ stock, but other times need physical thing, like a car)
- For seizing property, freeze all transactions relating to that piece of land, like seize papers of ownership of land

5) Pursuant to Notice – cross check with Notice section

- Must satisfy local statute and that means of serving process is constnl adquete
- Notice to the Δ must satisfy both constitutional due process (like personal jurisdiction except maybe less notice to Δ, since seizing property is pretty good notice) and service of process requirements of Rule 4
    - Rule 4(n): Limits how a federal court can assert quasi in rem or in rem jurisdiction to 2 circumstances:
        - If federal statute authorizes it
        - If court can't obtain personal jurisdiction over Δ, jurisdiction is obtained in process of state where district court sits
- <u>Notice = *Mullane v. Central Hanover*</u> (the 2 rqmts from this case – under Notice)

6) Requirements of Fair Play – Min. Contacts are satisfied (use *International Shoe*)

- Due process requirement of "traditional notions of fair play and substantial justice"
- <u>Use only if</u> (both are fact specific)
    - <u>Assets seized bear substantial relation to cause of action OR</u>
    - <u>If other facts suggest that quasi in rem wouldn't be fundamentally unfair to the Δ</u>
- *Schaeffer v. Heitner*
    - ∏ was a stockholder in Greyhound who sued the board of directors and officers for screwing up the company [<u>every Δ that you want to keep in the case must be subject to jurisdiction over persons or things</u>]
    - Delaware court seized officers' stock
        - Stock certificates weren't present in DE, but the stock considered to be in DE and all Δs given notice
    - Using *International Shoe* as a test:
        - <u>It must be fair for a court to exercise quasi in rem jurisdiction</u>
        - <u>The property seized must have a sufficient relationship to the cause of action</u>

- Look at how closely related seized thing is to cause of action
- For in rem and quasi in rem – they're only ok if min contacts are met
- Not enough that Δ had property in the forum and it was attached at the outset – it must also meet min contact factor from Intnl Shoe
- Debt: location of debt is wherever the debtor is (obligation of a debtor to pay the debt follows the debtor) – *Harris v. Balk*

IN REM JURISDICTION

- In rem – the dispute itself is about who owns that property
- Not commonly used

PERSONAL AND IN REM JURISDICTION IN FEDERAL COURTS

- In some situations, federal courts have greater power than state courts:
  - Where Congress authorized federal courts to have exclusive jurisdiction (like patents, antitrust, etc)

II. NOTICE (Rule 4: Summons – aka "Service of Process Rule")

- This is the procedure for letting the Δs know that a federal civil lawsuit is filed against them.
- Assumes Δ can be served properly (there is jurisdiction) and constitutionally (service on the Δ is consistent with the Due Process Clause)

- **Constitutional Requirement**
  - State and federal courts treated the same here
  - Due process requires fair notice (affords a reasonable opportunity to be heard)
    1) Actual notice, or
    2) Notice that is reasonable anticipated to result in actual notice and gives the parties a chance to defend themselves
- ***Mullane v. Hanover Bank***
  - Service of process notice in a publication is not sufficient
    - In this case, the address was known to the trustee and would not have been a huge burden to give service by mail
  - Takeaway: Notice must be reasonably calculated under all the circumstances to apprise the party of the suit
  - Even if the Δ didn't get it, it's still Constitutional
    - Notice must fit the circumstances
      - i. If personal service is too large of a burden (time/expense) then not always required
      - ii. Notice by publication in a newspaper isn't reasonable because very few people will see the published notice, especially if they don't live in an area where the paper is circulated
        - Only okay if you don't know beneficiaries' addresses
    - Service of process in-hand/in-person or even mail service ok

- As long as you met Rule 4 – you're ok, even if you serve Δ's wife at home and she doesn't give it to him, that is still sufficient notice.
- Red flag – "constructive notice" (notice by publication, that's in the newspaper)
    - **i.** Usually it's not constitutional because it's not reasonably calculated to apprise the Δ
    - **ii.** But under all the circumstances, must be reasonably calculated
    - **iii.** There may be circumstances in which publication is all we could do- if we don't know the Δ's names, addresses, etc, then it may be ok
    - **iv.** Publication notice is always the last resort – if anything else works, then
- If you become aware that the Δ didn't actually receive the notice, you may have to pursue other available means of giving notice

- **Service of process:** In a regular lawsuit – notice is service of process
    - 2 documents – both must be given for Δ to be served with "original process"
      1) Summons from court (Rule 4a and 4b)
      2) Copy of the complaint
    - Can be made by any non-party who is at least age 18

- **Service of Process (Nonconstitutional Requirements): 6 Ways to Serve an Individual**: Rule 4(e)
    - Can serve original process on any competent, adult individual in the U.S.
    - **1) Specific Federal Law**
        - Congress may have enacted a statute
    - **2) State Law**
    - Watch out for 4(e)(1) – Service in-state: Can use any method for serving process under state law
            - State where the federal court states, OR
            - State where service is effective
    - **2) Waiver of service by Δ**
        - Under Rule 4(d) → First must meet 4(d)-4(d)(2)(a)-(g)
        - Waiver of Service under Rule 4(d)
            - Is not service of process
            - It is a waiver of personal service through mail (Federal Rules of civpro don't generally say service of process can happen by mail)
            - The Δ is given 30 days to say yes or no to the waiver
                - If Δ responds yes, he waives
                    - Δ has 60 days to give an answer (overseas has 90 days) – 60 days after the request for waiver was sent
                    - If the Δ doesn't waive within 30 days (or 60 days if outside the US) from the day it was sent by ∏ (ignores it), then the Δ has to pay the costs of personal service
                - If he responds and no, he doesn't waive it

- Court says if you don't have a good reason for not allowing mailed service, instead of personal, then Δ must pay for it

3) **Personal service** – walk up and try to hand documents to the person
    - Once the Δ is physically confronted with service, if they refuse, you could still say they are served if you leave documents near the recipient (like on a nearby table or on the floor near the person)
    - Don't need to jam the papers into the Δ's hands
    - But – remember *Hunt* case during Watergate – unpopular public figure afraid of rolling down his windows and ran his windshield wipers
        - Court said not adequate notice to leave papers on windshield if Δ isn't rolling down windows
4) **Left at Dwelling House** – serving a substitute, not the Δ
    - Rule 4(e)(2) – Reasonably adequate notice if it meets these 2:
        - Okay <u>if</u> it's at the Δ's usual abode
        - Served someone of suitable age and discretion who <u>resides there</u>
        - <u>Not required to inform the Δ himself – giving it a person that satisfies those 2 above is constitutionally adequate (doesn't matter if that person never passes the message along)</u>
5) **Agent:** Can serve the Δ's agent
    - The agent must be authorized to accept service either by appointment or operation of the law
    - <u>*National Equipment Rental v. Szukhent*</u>*:*
        - The Δ doesn't have to know the agent, as long as the agent is authorized
        - The Δs signed a lease that designated Weinberg as an agent for purpose of accepting any service of process within the state. When she got the copies of summons and service of process, she promptly delivered them to Δs, and Δs were mailed a notice about service of process upon Weinberg
            - Court said this was ok – Weinberg's prompt sending of summons and complaint was pursuant to the contract and was "sufficient to validate" her being the Δs' agent.
    - Can't serve an individual's attny *unless* that attny is specifically authorized to accept service on individual's behalf

- <u>Service of process on a business</u> – Rule 4(h)
    - Can serve an officer or managing or general agent
        - **i.** Has to be somebody with enough job responsibility that we can expect him to transmit important documents (this will vary with the facts)
    - Can also apply 4(e)(1)
        - **i.** Can use state law methods for service of process

- <u>Territorial limits</u> of effective service (Rule 4k)
  - **<u>Rule to watch for: 4(k)(1)(a)</u>**
  - **ii.** Can serve process throughout the state in which the federal courts sit
  - **iii.** We can serve out of state only if a state court in the state could do so
    - Federal courts piggy-back on long-arm statute of state where the federal court sits
    - Eg: A federal ct in NY can only serve process (have personal jurisdiction) outside of NY if a NY state court could
    - For example – w/ a state long arm statute
    - Eg: Federal District Ct in CA has the same personal jurisdiction as a CA County Court
  - **iv.** There are exceptions to this rule in 4(k)(1) in (b), (c), and (d)

  <u>4(k)(2)</u> – Like a limited federal long-arm provision
    - Someone in another country violates US antitrust law, but not enough contacts with one state to say a state gets jurisdiction. Treat all states collectively – as sufficient min contacts with entire U.S. and get jurisdiction w/respect to claims arising under fed law

- Pre-judgment seizure of property
  - If authorized by federal statute, district court can exercise jurisdiction over property as permitted under State law
    - ∏ can't enforce quasi-in-rem or in-rem judgment against Δ's property outside of the forum state

III. **<u>Federal Subject Matter Jurisdiction</u> (SMJ)**

- Diff from personal jurisdiction; you need BOTH for each count in a case:
  1) Personal jurisdiction over the parties (tells you where you can sue the Δ)
  2) Subject matter jurisdiction over the case (tells you what court you can go to) – always the same choice: are you going to federal or state court?

- Why does it matter?
  - Federal courts have limited SMJ – they can only hear limited kinds of cases; can't hear claims about state law
  - State courts can hear any cognizable claim – could be divided up w/in state
  - Don't get SMJ from consent
    - Don't care about fairness to the parties
    - Worried about state-federal relations

- Must meet one of these 3:
  - **Diversity of Citizenship, or**
  - **Federal question, or**
  - **Supplemental Jurisdiction** [If you don't fall in one of those 2, then you can't go to federal ct, unless you meet s/j]
  - Also:
    - **Removal** – allows you to remove from state to federal court

A) **Diversity of Citizenship/Diversity Jurisdiction**

§ 1332 is a statute enacted by Congress – **not** a federal rule of civ pro
[§ 1332(c) not on exam]
There are 2 things we need:
1) Citizens of different states AND
2) Amount in controversy (more than $75K)

FIRST: Citizens of different states

i. **Complete diversity rule:** There is no diversity if **any** ∏ is a citizen of the same state as **any** Δ
   - Δs don't have to be diverse from each other, just from ∏s
   - ∏s don't have to be diverse from each other, just from Δs

ii. Puerto Rico, Virgin Islands and DC = US States

iii. **Diversity met in 4 ways (can meet either of these 4):**

1) Parties on ∏ and Δ sides are citizens of different states:
   - If all 3 ∏s are from KS and Δ from NH → Yes
   - FL ∏ and 99 AL Δs but 1 FL Δ → No

2) One side's parties are citizens of a U.S. state and other side's parties are citizens or subjects of a foreign state
   - ∏s from NY and Δ from Nigeria → Yes

3) Citizens of different States and in which citizens or subjects of a foreign state are additional parties

- o ∏ citizen of NY and Δs citizens of NY and Mexico → No
- o ∏ citizen of NY and Δs from ND and Mexico → Yes

4) A foreign state as ∏ and citizens of a State (or multiple different States)

- o US citizens domiciled in a foreign country:
  - ➢ Not citizens of an American state for diversity purposes
  - ➢ US citizens domiciled in another country not diverse from anyone (they have no real domiciliary), unless they have dual citizenship in that country where they are domiciled

- ➢ **How to decide citizenship of a person:**
  - **i.** A US citizen is citizen of the state where she is domiciled
    - **ii.** Only 1 domicile at 1 time, so can't be a domiciliary of more than 1 state – you retain your domicile until you find another one
  - ➢ **Domicile**: established by these 2 factors:
    - **1) Physical presence in a jurisdiction**
    - **2) Intent to live there indefinitely**: intent to make that your permanent home (subjective and court will look to relevant factors – voting, tuition, etc)
      - o **You keep your old domicile until you find a new domicile** (must establish yourself there)
      - o Assume that you plan on staying somewhere for 10 years, but you don't think you'll be there indefinitely – then that place is not your domicile
      - o **Hypo**: Pres Clinton was from AK and moved to DC when elected. He never intended to move back to AK, but DC wasn't a place he was planning on living indefinitely. So he kept his AK domicile until he moved from DC and found a new domicile (even though no intent to go back to AK)
      - o *Mas v. Perry*: A couple married in MS and working as grad students in LA
        - ▪ Court said a person's domicile is place he's planning on returning – mere residence in a place doesn't mean that's your domicile
      - o **§ 1332(a)** – an alien admitted to the US with permanent resident status deemed a citizen of state where he is domiciled (even though that might not be true for voting purposes)
  - **ii.** Hypo: Born and raised in TX (a TX domiciliary); goes to college in Mass for 4 years and then goes to NY for 3 years of law school and then goes to med school in CA for 4 years – he's been out of TX for 11 years but TX is still his domicile because he hasn't had a new place of domicile

- **Citizenship of a corporation**: do not mention domicile
  - **i.** If a corporation has citizenship in more than one jurisdiction, the opposing party **must** be diverse from **all** citizenships, or diversity not met
    - Subsidiaries are separate corporations – so you must test citizenship of each separate corporation (treat like 3 separate people)
  - **ii.** § 1332(c)(1) – 2 things (so you could have 2 if incorporated state and ppb are 2 diff states)
    - A corporation is a citizen of all states where incorporated: Can incorporate in more than one state (almost never happens – usually just one state) – prof will tell us where the state of incorporation is
      - If unincorporated, they look at every individual member's domicile (so like if a labor union sues, they usually won't use diversity because court looks at each individual member's domiciliary)
    - Principal place of business (PPB) – there is only **one** place where corporation has its principal place of business – will have to figure this out on the exam
  - **iii.** How do you test for PPB?
    - Talk about corporation's nerve center: Where the decisions are made (usually this is the headquarters)
    - Place of economic activity – place of activity; where corporation does more stuff than anywhere else (manufacturing, selling, etc)
    - Total activities test: what most courts will do – will look at both nerve and economic center; usually will look at nerve center unless all the activity is in one state.
      - But if it has activity in more than one state, then look at nerve center

SECOND: Amount of controversy exceeds $75,000

- Must be more than $75,000 (not at $75K)
  - **i.** Don't count interest on the claim or costs
  - **ii.** What ∏ asks for controls it
    - Very little consequence if ∏ gets less than $75K but asked for more
  - **iii.** Whatever the ∏ claims is ok unless it is clear to a legal certainty that she cannot recovery more than $75K (rare)
    - Eg: judge wouldn't give $100K for sore toe
    - Eg: A K has a liquidated damages clause for $20K – then you can clearly see that it's not going to meet the $75K reqmt
- ∏'s ultimate recovery is irrelevant to jurisdiction (§ 1332b)

- **Aggregation:**
  - **i.** Adding multiple claims to get over $75K
  - **ii.** You <u>can</u> aggregate if there's 1 ∏ vs 1 Δ – can add all the claims you want to get over $75K and the claims don't have to be related in any way
    - Eg: A has a count for battery for $50K and a count for breach for $30K → Yes - aggregation
  - **iii.** Multiple ∏s can't sue unless they're suing on <u>joint ownership</u> → <u>Cannot</u> aggregate if there are multiple parties on either side
    - Eg: A and B each sue X for $40K → No aggregtn
    - Eg: A sues X and Y each for $40K → No aggtn
  - **iv. Unless:** A and B are <u>co-owners</u> (joint ownership) in what was damaged (like a car) – then they can each sue for $40K and you can aggregate
    - **Lost property interest derives from the same source** (like same car)
      - <u>But if A and B in the same accident and suing X – couldn't aggregate claims</u> (∏s can't aggregate personal tort claims)
    - If Δ is jointly liable to multiple ∏s, so **joint claims** – <u>use the total value of the claim</u>
      - Don't care about the number of parties at all
      - In joint claims, anyone can be liable for the full amount, so just look to the total value of the claim

Hypos for Aggregation:

#1 (one v. one): A sues B for $50,000 on one count and $60,000 for another count. Amount in controversy satisfied because where a single plaintiff asserts two or more claims against a single defendant, the amounts may be added together to reach the required amount.

#2 (one v. two): A sues B for $50,000 and sues C for $50,000. No amount in controversy because a <u>single plaintiff cannot aggregate amounts sought from different defendants</u>. He must meet the amount requirement against each individually.

#3 (two v. one): A sues B for $50,000. C joins in as plaintiff against B for $30,000. No amount in controversy <u>because plaintiffs may not add their claims together to meet the amount requirement in a case where neither meets the amount-in-controversy requirement.</u>

#4 (one v. two): A sues B for one count for $200,000. Also sues C on another count for $50,000. No amount in controversy because a plaintiff cannot bootstrap an insufficient claim onto a sufficient claim.

#5 (two v. one): A sues B for $200,000. C joins as plaintiff against B for $35,000. Amount in controversy satisfied because supplemental jurisdiction allows a co-plaintiff to join in an action even if they are seeking less.

B) <u>Federal Question</u> (FQ) - § 1331

- Don't care about Diversity of Citizenship requirement:
  - Citizenship is irrelevant and no amt in controversy requirement at all
- <u>Original jurisdiction: Exclusively federal jurisdiction</u>
  - Some claims can <u>only</u> be heard in federal court
  - Eg: arose under federal antitrust or federal civil rights law (then you can't bring in state courts)
  - <u>Federal courts have original jurisdiction of all civil actions arising under:</u>
    - US Constitution
    - Laws of the US
    - Treaties of the US
- <u>Concurrent jurisdiction</u>
  - Could be brought in federal or state court
- If a federal law **incorporated** into a state law, then it's a **state question**, <u>not federal</u>

- <u>**∏'s complaint**</u>: look at what the complaint is saying
- <u>**A federal question has to arise as part of a well-pleaded complaint**</u>
  - Must be based on a federal question that is apparent on the face of ∏'s well-pleaded complaint
  - <u>*Louisville & Nashville v. Mottley*</u> (case where ∏s accepted lifetime passes on railroad for injury)
    - Congress passed a law that said railroads can't give away free passes (when you hear Congress passed law – you think "federal question")
    - Motleys sue the railroad for not honoring their lifetime passes – they want specific performance of K and said in their complaint that new federal law doesn't apply to them
    - Court said this was not a federal issue because the cause of action was over a breach of contract
      - **i.** Their claim is simply breach of K – not a federal right; they're just <u>anticipating a federal defense</u>
    - The defense related to federal subject matter (Congress's new law) – but that's not why the litigation was going to court
  - <u>Just because a party might set up a claim or make a statement referring to the Constitution or federal subject matter, doesn't mean the suit is actually arising under those laws</u>
    - Did that complaint state a claim that arose under federal law?
    - Look at well-pleaded complaint and <u>ask one question:</u>
      - i. **Is the ∏ enforcing a federal right?**
      - **ii.** The easy way to apply this – <u>look at the federal law that the professor gives and see – is the ∏ enforcing a federal right under the law or just anticipating it as a defense?</u>

C) <u>Supplemental jurisdiction</u> - § 1367 (s/j)

- Must have met diversity or federal question first to get to federal court – but there may be additional claims once they're in federal court
- **For <u>every</u> claim asserted in federal court – there <u>must</u> be federal subject matter jurisdiction**
  - For every claim you ever see, does it invoke federal question or diversity? If so, it comes in
  - What if you have additional claim that, alone, doesn't meet diversity or federal question?
    1. Might still be able to get it into federal court through supplemental jurisdiction
- **<u>Original claim (to get the case in federal court) must meet diversity or federal question, but state law counts may be added through s/j</u>**

<u>How do you get it?</u>

1) First – make sure that you have at least one count that meets original subject matter jurisdiction (so must satisfy either Diversity or Federal Question)
2) Second: **<u>§ 1367(a) – Common Nucleus of Operative Facts</u>**
   - **Show same case for controversy** b/w claim 1 (that has SMJ) and claim 2 (doesn't meet that – so show common nucleus)
   - <u>How overlapping the facts are</u>
   - <u>Do they arise from the same transaction or occurrence?</u>
     - See if it meets *Gibbs*
   - <u>*Gibbs v. United Mine Workers*</u>
     - ∏ asserted 2 claims – 1 under state law, 1 under federal law
     - ∏ - citizen of TN and Δ – citizen of TN
       - Claim #1 – invokes fed question jur., federal labor law against secondary boycotts
       - Claim #2 – based on state law on conspiracy, so doesn't invoke fed question and clearly no diversity
       - By itself, claim 2 couldn't go to fed court, but could be heard
       - How do you get it heard?
         - **<u>Common nucleus of operative fact</u>** – from the same tranxn or occurrence (T/O); from same real world event
         - Say that Claim #2 was related to the boycotts
3) Third: **<u>§ 1367(b) – Make sure it doesn't strike out on 3 counts</u>**
   - **Exception to § 1367(a)**
     - **i.** You could fulfill (a) but also must check the 3 strikes – if all 3 are fulfilled then you can't have supplemental jurisdiction
   - **Ask: Does § 1367 (b) take away supplemental jurisdiction?**
   - **Need all 3 strikes** (if the answer is No to Any of them, then you didn't strike so you could have supplemental)
     - **i.** <u>Strike 1:</u>
       - The federal count we are attaching is based **solely on § 1332 (Diversity jurisdiction),** (doesn't matter if solely on federal question)
       - What if 3 counts on a case?

- Eg: First count is federal question, second is diversity, and third is the one we want as s/j → This **is ok – not based solely on diversity, we have a federal question count too**
  - Court does not want to attach to a count based solely on diversity, so if it is, then that is 1 strike

ii. Strike 2: Do any of the claims fall under these Rules?
  - Claims by ∏ against a party joined under Rules 14 (impleader), 19 (joinder), 20 (permissive joinder), or 24 (intervention) of Fed Rules of CivPro

iii. Strike 3: Claims by "plaintiffs" (original ∏s or otherwise)
  - Could be persons who entered the case as ∏s under Rule 19 (joinder) or Rule 24 (intervention)
  - A sues X and it's a federal question; X counterclaims – the claim by X is a Δ's claim so it is not a strike
  - Only gets rid of s/j over certain claims by ∏s (not by any other party)
  - Doesn't prohibit supplementary claims by Δ, even if it's based solely on diversity

4) Fourth: **§ 1367(c)** – **Four reasons when a federal court may decline to exercise s/j over a claim (might dismiss a count that qualifies for s/j) –** don't need all of them, one is ok:

1. **Difficult questions of State law**
   - Claim raises a novel/complex issue of state law that should be untangled by the state courts, not federal courts
2. **Non-diverse State claim substantially predominates**
   - Non-diverse claim predominates over the other claims that formed original basis of court's subject matter jurisdiction
3. **Original counts dismissed**
   - **If the original claims that asserted SMJ are dismissed, then court can dismiss supplemental (but can retain based on the merits)**
     - Will look at when dismissal occurred – if it was early in the case, then more likely to dismiss supplemental
     - If gone through much of trial and knows about the supp. claims, then maybe not justified in dismissal
4. **Other exceptional circumstances**

D) <u>Removal</u>

- Allows a Δ (only the original Δ) in a state court case to have the case transferred to federal court – goes from a state trail ct to federal court [don't have to redo service of process)
- There are 3 statutes to look at:
- § 1441, § 1446, § 1447 → all together are relevant

  - **<u>§ 1441(a): Only Δs can remove</u>**
    - ∏ can <u>never</u> remove, even if they're a Δ on the counter-claim <u>(the point is to allow Δs to be heard by federal judges to protect them from regional bias)</u>
    - Unlike p/j where only thing Δ can do is resist ∏'s choice of court
    - Citizenship of Δs sued under fictitious names is disregarded
    - *<u>Shamrock Oil & Gas Corp. v. Sheets</u>*
      - **i.** Δ filed a counterclaim against the ∏ but ∏ can't remove the original state action to federal courts
      - **ii.** ∏ was the one who chose the forum so only Δ is entitled to right of removal

  - **<u>§ 1441(b) Jurisdiction:</u> You can remove if the entire case has federal subject matter jurisdiction**
    - **§ 1441(b) – Federal question (f/q)**
      - **i.** <u>Δ can remove any cause of action based on Constitution, laws or treaties of the U.S. if federal court has jurisdiction over the claim</u>
      - **ii.** Can use § 1331 as a guideline (governs federal subject matter jurisdiction over federal questions)
    - **§ 1441(b) – Diversity jurisdiction (d/j)**
      - **i.** <u>Δ can remove only removable counts (not the entire case) when parties meet requirements of d/j</u>
      - **ii.** **2 exceptions to this rule** (only apply in <u>diversity, not federal question)</u>
        - <u>Exception 1:</u> **There is no removal if any Δ is a citizen of the state where claim was filed** (doesn't matter in class actions)
          - <u>Be careful of fraudulent joinder: ∏ can't bring in a nondiverse Δ to prevent removal</u>
          - Hypo – ∏ (citizen of SC) is suing A (citizen of NY) and B (citizen of GA) and claim exceeds $75K. Case is filed in state court of GA. Can Δs remove?
            - No – because B is a citizen of GA – is a citizen of the forum
            - Suppose the ∏ dismisses the claim against B. Then the case is now removable – because there is now no longer a Δ who is a citizen of the forum

- So now you have 30 days from dismissal of B (assuming it was w/in 1 year) to remove to federal court

- Exception 2: **Cannot remove more than one year after the case was filed**
  - So going back to hypo – if case was around for one year and then B was dismissed, you can't remove because it's been one year
  - If it was a federal question, you could theoretically file at any time you find out you're eligible to remove

- **§ 1441(c): Discretion to Retain/Remand Claims**
  - **Only use if basis for removal is federal question**
  - The **whole case** goes to federal court and federal judge decides that if there are non-diverse state counts, whether he wants to decide all the issues together or remand the state counts back to state court
    - **i.** Look at same case for controversy (Use § 1367a – supp jur)
    - **ii. If non-removable count is insufficiently related, then federal judge will keep the federal question and remand the non-federal (now known as a state count)**
    - **iii.** Some courts permit remanding both federal and state claims if the state claims predominate
  - Separate and Independent Claims can be remanded
    - **i.** § 1446(c) – you can remove claims that are technically not removable because the entire case is removed
    - **ii.** But once you are in federal district court, if you can't prove that the state claims are connected to the federal question claim that it was removed with, then the judge has the authority to remand those claims
    - **iii. Once you're in federal court – to keep it there, you have to prove same case for controversy/common nucleus of operative fact**
    - **iv.** *Borough of West Mifflin v. Lancaster*
      - Where the 2 men alleged that security guards harassed and assaulted them.
      - The ∏s tried to remand a count that they claimed was separate and independent
      - Court said that district court can only remand if the federal claims are separate and independent from state claims, and in this case, all counts arose from the same transaction and occurrence (same series of events)

- **§ 1446: Procedure for Removal:** Important things to note:
  - **Removal is a 1-way street**
    - **i.** Only from state to federal (can't remove from federal to state); if it doesn't belong in federal, it will be remanded to state court

  - **Unanimous consent:**
    - **i.** **All Δs must agree** to remove
    - ii. Remove on the basis of claims asserted against Δs – not on counterclaims asserted by them

  - **§ 1446(c) – Timing/When to file: Δs eligible for removal must file notice of removal w/appropriate federal district court w/in 30 days of receipt of service of the document that first made the case removable** (usually receipt of ∏'s original pleading)
    - **i.** **Δ has 30 days from receipt of service that makes it clear Δ is eligible for removal**
      - Some cases become removable later during the litigation
      - Hypo: A from NY sues B from CA and C from NY. No way to have removal because diversity req't not met. But if A voluntarily dismisses C, then once B finds out that C is dismissed, this is the point from which 30 day time limit starts
    - **ii.** Time: for cases involving foreign countries, and Δ seeks removal because suit is against a foreign country, § 1441(d) allows court to extend time provisions in § 1446(b) [only granted "for cause shown]
    - **iii.** Notice should have concise statement of grounds upon which removal is based

  - **What does filing do? Filing = Removal**
    - **i.** Automatically removes the case to federal court, who decides:
      - Inappropriate removal: then remand back to state court (don't dismiss)
      - Approve: federal court hears the case
    - **ii.** The **whole** claim gets removed

  - **Geography of removal:**
    - **i.** **Can only remove to federal district embracing the state court where it was filed –** filing state must be w/in that district court

IV. <u>Challenging Forum, P/J, SMJ and Rule 12 Motions</u>

- Suppose Δ doesn't like the forum and wants to challenge

- **<u>Rule 12</u>**
  - Within 20 days of being served with process, must respond by:
    - Motion, or
      - Is <u>not</u> a pleading
      - Is a request for a court order (anytime you ask for something, that's a motion)
      - Rule 12 lists some motions
    - Answer
      - <u>Is</u> a pleading

  - **<u>Rule 12(b)</u>: The kinds of motions you can make to dismiss a case:**
    - Rule 12(b)(1) – Motion to dismiss for lack of subject-matter jurisdiction
    - Rule 12(b)(2) – Motion to dismiss for lack of personal jurisdiction
    - **A party may challenge jurisdiction either in the responsive pleading or by a motion served before a responsive pleading is due**

  - <u>Rule 12(b) gives us 7 defenses</u> – Δ can raise these by <u>either</u> by motion or in an answer; for the exam – 12(g) and 12(h) are most important part
    - **No Subject Matter Jurisdiction**
    - **No Personal jurisdiction**
    - **No Venue**
    - **Insufficient process** – problem with the process (copy of complaint and summons) – pretty unusual
    - **Insufficient service of process** – more common
    - **Failure to state a claim**
    - **Failure join an indispensable party**

  - **<u>Rule 12(g):</u> All Rule 12 motions should be made together (consolidated)** – <u>so if you're challenging p/j, venue, process, or service, if you don't raise it the first time, you've waived it and lost your right to raise it later [but you can challenge subject matter jurisdiction at any time]</u>
    - **<u>Must consolidate your motions to dismiss for lack of jurisdiction, venue, etc – and if you don't, you lose the ones you don't raise</u>**

  - **<u>Rule 12(h)</u>** <u>– sets forward defenses and objections that are waived if not timely asserted and what's not waivable</u>
    - **<u>Rule 12(h)(1) –</u>** <u>If you make a motion to dismiss that should have been consolidated under Rule 12(g), and you didn't:</u>
      - <u>You've waived it – treated as if you consented to jurisdiction</u>
      - <u>Absence of objection – you've lost your attack to make a direct attack on personal jurisdiction</u>

- **12(g) and 12(h) mean:**
  - **Defenses: 12(b) 2, 3, 4, 5 must be put in your first Rule 12 response (whichever you do first – motion or answer) or else you waive them and they're gone**
  - 12(b) 6 and 7 can be raised at any time on trial – can't raise them on appeal though – on trial
  - **12(b) 1 can be raised at any time at all on this case – can even be raised on appeal – you do not waive subject matter jurisdiction**

- Hypo – ∏ sues Δ and Δ files motion to dismiss for insufficient service of process
  - Court denies the motion and says it was okay
  - In the answer, Δ asserts lack of personal jurisdiction and improper venue
  - What's the problem? Those are 12(b) 2 and 3 and he didn't raise those in the original motion, so he'd already waived them

➢ **Challenging Personal Jurisdiction**

→ In some state courts, they say you have to have a "special appearance" – you're challenging only personal jurisdiction, not anything else with it. If you raise anything else with it, you will have waived your personal jurisdiction.

- Defenses and objections to p/j – **Rule 12(b)(2)**

3 different routes to take with challenging p/j:

- **Defaulting**
  - If Δ shows up but doesn't challenge p/j, then they have consented
    - ➢ Can rarely later challenge p/j if they consented
- **Direct Attack**
  - When Δ challenges jurisdiction in the original case
    - ➢ At trial courts or continues to attack in appellate courts
  - If court agrees with Δ, then ∏ can appeal
  - If court disagrees with Δ , then Δ can appeal
  - Can preserve *continuation of attack* by showing up and keep challenging – by directly attacking, they have the opportunity to continue by appealing previously defeated direct attacks
    - ➢ Different than just showing up and not challenging p/j
  - Limited/special appearance – allows Δ in quasi-in-rem basis to appear for limited purpose of defending his interest in the attached property without submitting to full p/j
    - ➢ The Δ appears with the express purpose of making a jurisdiction objection
- **Collateral Attack**
  - Δ can invoke collateral attack when ∏ seeks to enforce an original ruling against Δ
    - ➢ Δ says in the original ruling there was no p/j
  - Δ doesn't get to challenge the 1st court's jurisdiction unless they
    - ➢ But if you raised p/j already or showed up and didn't raise it
  - So you get to do this if you didn't show up the first time
  - Anything that is not a direct attack

- Eg: In *Pennoyer v. Neff*, Neff's theory for why he owns the land is because Pennoyer never lawfully got Neff's land. Neff challenges the courts jurisdiction over himself in *Mitchell v. Neff* – this is an eg of collateral
  - Eg: A sues B in KS. B has no assets in KS but does have million dollar account in NY. A takes judgment to NY and asks NY court to enforce a KS judgment. B says NY court shouldn't enforce KS judgment because the KS court had no p/j over B.
    - In order for this to be a collateral attack, B couldn't have challenged p/j in first KS case [that would've been a direct attack]
  - <u>Available if Δ **not present** for initial proceeding, so had default judgment against Δ and ∏ just asking another court to enforce</u>
    - <u>*Baldwin v. Iowa State*</u>:
      - <u>Δ who makes no appearance at all remains free to challenge a default judgment for lack of p/j</u>
      - SCOTUS said that judgments are final and can't keep going back to revisit if Δ appeared in a court – shouldn't have appeared at all
  - If you don't show up in the first case, you reserve the right to make a collateral attack later
  - You're not objecting to merits of original case since that was decided by the court in the original judgment – so you can only raise defenses attacking p/j
  - <u>No collateral attacks on quasi in rem jurisdiction</u>

- <u>**Challenging Subject-Matter Jurisdiction**</u>
  - **Direct Attack on a court's lack of SMJ:**
    - <u>**Can be asserted at any time**</u> – <u>as long as the original case is alive at all (can continue as long as it keeps getting appealed)</u>
    - Once the original case is over [either you didn't file appeal in timely way or got a final response from highest court] then you could move to collateral attack (in a new state court to attack previous court)
    - Who can raise?
      - Anyone can point out lack of SMJ (even a nonparty witness)
      - *Sua sponte* – judge can raise it
  - **Rule 12(h)(3)**
    - <u>**Whenever it appears by suggestion of parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action**</u>
    - Because remember, <u>parties didn't consent to SMJ, so challenging p/j rules don't necessarily apply (not up to Δ's consent)</u>

  - **Collateral attacks on SMJ –**
    - <u>If you already made a direct attack, can still make a collateral attack</u> (but discouraged)
      - Unlike challenging p/j, where if you've already made a direct attack, collateral attack is barred

- A judgment rendered by a court that lacked jurisdiction renders the judgment null and void
- **One of the biggest reasons for collateral attacks is if there's a FEDERAL POLICY**
- To make a collateral attack, it must fall into 1 of these 3 categories - (can use these to also allow collateral attack on p/j and inadequate notice):
  - **Significant judicial error** – judge screwed up
  - **Infringes on authority of another tribunal or agency of gvt**
  - **Court lacked capability to make informed decision** – can belatedly attack the court's SMJ

V. Venue

Exactly which federal court do we go to? We must lay venue in an appropriate district.

- Doesn't mean "forum" – that is what court will hear a case
- Venue determines which county or district within state X the case should be tried
- Is ∏'s problem, not Δ's
- You can, as an original Δ, consent to venue

- **§ 1391(a)** – When basis of jurisdiction is solely diversity, can only bring suit in just one of the following (must go in the order below – try 1 first, then move on to 2, etc):

1) In any district where ALL Δs reside (if in the U.S.)

- Sub rule – if all Δs reside in different districts of the same state – you may lay venue where any one of them resides
- **Resides** = Your **domicile** (district in which you're domiciled)
  - Don't ever confuse citizenship and residence (usually citizenship less states than residence of corporation)

2) In any district where substantial part of the events or omissions giving rise to the claim arose

- Can be more than one district where these events occurred (must have occurred in the U.S.)
- If you're using (a)(2) – doesn't matter where the Δs are from
- *Bates v. C&S Adjusters*: The debtor's (∏) collection notice was forwarded by the US Postal Service to his NY home from the Δ (a corporation with no regular business in NY).

→ Court said ok for ∏ to sue Δ in NY under (2) because the location of the events (where the notice was rcvd) was in NY. Doesn't matter if Δ intended that to be the location of the events giving rise to the claim

3) District where any Δ is subject to personal jurisdiction at the time action is commenced

- Use only if (a)(1) or (a)(2) not available
- Like where K was entered or signed
- Eg: If cause of action in Singapore but Δ is American citizen, resident of Singapore, and served in San Fran
  - → Can't use (a)(1) because Δ not a resident of the U.S.
  - → Can't use (a)(2) because cause of action in Singapore
  - → Stuck with (a)(3)

- **§ 1391(b) –** If basis of jurisdiction not diversity –for <u>all other jurisdiction</u> (fed questn)
  - Exactly the same as the 3 parts of (a) → and go in the same order too

- **§ 1391(c)**
  - For a <u>corporation's residence</u> – corporation resides in <u>all districts</u> where it is <u>subject to p/j (where ANY place it DOES BUSINESS) when case is filed</u>
  - <u>Establishing a corporation's residence:</u>
    - **<u>First:</u> Does it have person jurisdiction the State?**
      - Look at p/j w/in State [<u>under *International Shoe*</u>]
        - <u>If you can't establish p/j in the whole state, then you have no venue and can't continue</u>
        - <u>If you meet min contacts, then you've established p/j and can move on to #2</u>
      - If in a state with 1+ judicial districts (like CA) and if corporation is subject to p/j in that state at the time of action, then move to #2
    - **<u>Second:</u> Figuring out which district it's a resident of**
      - Corporation is deemed to reside in any district in that state <u>if its contacts w/in that district would be sufficient to subject the corporation to p/j</u>
      - Can be subject to multiple districts
      - Treat the district like a separate State and ask if contacts are sufficient
    - **<u>Third:</u> If it satisfies p/j in overall state, but individual districts don't give us enough to satisfy p/j, then we look to <u>most significant contacts</u>**
      - If no such district, corporation deemed to reside in the district in which it has <u>most significant contacts</u>
- **§ 1391(d)**
  - An alien has no defense venue
  - Eg: citizen of Italy has no defense of venue as a Δ
  - Doesn't give alien no reason to satisfy venue if they're the ∏ (if you're suing a US citizen and you're an alien, must still satisfy venue requirements)

- **<u>Forum non conveniens</u> (FNC)** – class 12 for details

  Where court dismisses the case where there is another court that makes more sense and is more appropriate? Why would you do this? Because the other court is in another judicial system – so you can't transfer, so the best you can do is to dismiss and let the litigants go there. Often – it's in a foreign country (can't transfer to foreign country)
    - First check - Jurisdiction is good; venue is good – but then say - more appropriate to be somewhere else
    - <u>Additional way</u> for Δ to get case out of court that ∏ has chosen [Δ moves for dismissal on grounds of FNC)
    - Decided by the court
    - Meant to <u>prevent misuse of venue</u>

- *Piper Aircraft v. Reyno* – plane crash in Scotland, all victims, owner, etc were Scottish. But the aircraft was manufactured in Pennsylvania
  - SCOTUS says the PA federal court should dismiss and let them go to Scotland
  - We don't care if another forum's laws are less or more favorable to the ∏s or Δs – we're worried about which courts are most adequate/have strongest interest in applying the laws, with relation to this case)
- What factors do we look at (look at footnote 6 in *Piper* – public and private factors); exactly the same factors you'll list in § 1404 transfer in order to make the decision (but showing has to be stronger in an FNC case since you're dismissing)

- **Factors For FNC:**

  - **Don't address FNC unless requirements of jurisdiction (p/j and smj) and venue are 1st satisfied for original forum and there is an alternative forum** (*Gulf Oil Corp. v. Gilbert)*

  - **Must have alternative adequate forum**
    - Δ has burden of showing that there's an alternate adequate forum
    - Before dismissing, court wants to make sure that there's another place the case can be tried
    - **If no other alternative adequate forum, court must retain case**
    - **Adequacy determined by:**
      - Service of process: Are Δs subject to service of process there?
      - Jurisdiction: Usually Δ can show he has jurisdiction in the alt forum and it's ok
      - If in another country, ask whether foreign court has capacity and integrity (don't care if it will apply US laws)
        - Eg – wouldn't dismiss if alt forum is Iraq

  - **Want to give substantial deference to ∏'s choice of forum**
    - Try not to use FNC – courts don't want to disturb ∏'s choice of venue
    - Exceptions: If it's a non-American ∏, then not as much deference
      - **i.** If they're suing a big American corporation, will get some deference, but not as much if they were American ∏

  - Court selected by ∏ won't hear the litigation if **inappropriate forum**
    - State's interest – state does not want to burden its courts with litigation not connected to the state (when a more convenient forum exists)

  - **Public Interest Factors** (weighing factors)
    - **Local disputes**

        i. Desire to have local disputes settled locally
- **Application of foreign law**
    i. Don't want to take cases where they'll be obligated to apply the law of another jurisdiction
- **Burdening jurors with cases of no local interest**
    i. Don't want a jury to decide a case that has no relevance to them – especially if another area of citizens has greater interest in the outcome of the case
- **Enforceability of a judgment**
    i. Saw in *Gulf Oil* – enforcing a prospective judgment could require litigation outside of the US – so why did the original case even need to come to the US?
        - Would be a waste of time/resources
- **Public policy**
    i. Unusual – but courts may retain a suit because public policy favors US forum

- <u>**Private Interest Factors**</u> (weighing factors)
    - **Ease of access to evidence**
        i. Availability of witnesses and evidence
    - **Cost for witnesses to attend trial**
        i. Could be financially difficult to have witnesses testify in the forum and can't force someone to come across the country
        ii. Not necessarily the # of witnesses in each location, but <u>access and convenience to forum and cost of travel</u>
    - **Availability of compulsory process**
        i. Carries weight only where it looks like important witnesses would be unwilling to testify
    - **Other factors that might shorten trial or make it less expensive**
        i. No reason why a court should be burdened with a dispute that could take less time in another court (and that court might have more interest in it anyway)

- **In State Court** (or if adequate forum is **foreign court**) → **Dismiss and ∏ can refile**
  → Can't transfer unless the state court has a transfer statute

- **In federal court, if FNC granted → Can have Transfer of Venue (§ 1404)**
    - When we talk about transfer – we mean transfer of judicial opinion
    - The original court is called the <u>transferor</u> (where it was originally filed, and what we're transferring away from) and where it's going to be transferred to a <u>transferee</u> court
    - Under both § 1404 and 1406 – the transferee must be a proper venue under the rules we looked at <u>and</u> must have personal jurisdiction over the Δ → both must be independently true
    - **Good exam question:** Great way to check personal jurisdiction and venue

- o **<u>Use § 1404 to allow federal court with inappropriate forum to transfer a case to another fed district ct where case "might have been brought"</u>** <u>(not outside of the US – if that's the reason, then with FNC, you must dismiss the action with permission for ∏ to file cause of action elsewhere)</u> **§ 1404 – Transfer based on:**
  - ➢ **Convenience for parties and witnesses**
    - **i.** Which court is the center of gravity (where more witnesses can get to, etc)
  - ➢ **Interest of justice**

VI. *Erie* doctrine (Classes 14-16)

- Generally comes up in <u>diversity jurisdiction</u>
- A federal judge in a diversity case faces a particular issue <u>and does the federal judge have to apply state law or can she ignore it?</u> [**Not** – what forum should hear the case]

- <u>§ 1652 – Rules of Decision Act says:</u>
  - o In federal court – must apply state law <u>unless</u> there's some federal law on point
- Must apply federal law if the <u>Constitution</u> requires it (10th Amendment – states retain all power that hasn't been given up to the federal government)
- Remember facts of *Erie*

➢ **<u>First</u>: Ask- Is it a <u>substantive</u> issue?** (versus procedural issue):
  - o Must apply state law if it is a <u>substantive issue</u> (eg – a negligence claim would have to prove duty, breach, causation, damage; contracts, lack of consideratn)
    - o <u>Not procedural (which are how to serve process, rules of evidence, etc)</u>

  → **Under *Erie:* <u>Must follow state law if it is substantive law</u>**
  - o Ask if following state v. federal would be:
    - ➢ **<u>Outcome determinative</u>** – *Guarantee Trust*
      - **i.** If the issue will probably determine the outcome, then it's probably substantive
      - **ii.** Can the federal judge ignore the state statute of limitations? [No – cannot if it changes outcome]
        - o Sup Ct said the federal judge <u>must</u> follow state law on <u>statute of limitations</u> because it was outcome determinative
        - o If state law was applied – the case was dismissed
        - o If state law ignored – the case goes farther
        - o So you can see the outcome is different – so you apply state law
        - o The problem – at some point, every rule is outcome determinative
    - ➢ **Twin aims of *Erie* (come from *Hanna*)**
      - **i. First aim - <u>Avoid forum shopping that is outcome determinative</u>**
        - o If the federal judge ignores the state law, will it cause the people to flock to federal court to avoid the state law?
      - **ii. Second – Avoid inequitable administration of the law**

- **Second: Ask - What is the source of the law? Can have 3 types:**

  1) Source = Federal Case Law – Apply *Byrd v. Blue Ridge* standards
    - Where federal procedure is developed through case law (not statutes and rules), then must weigh interests
    - **3 factors** in *Byrd* that want you to **balance the interests**
      - **First:** Relative strength of state interests
        - **i.** Is the state interest strong? Then good argument for applying state procedure
      - **Second:** Relative strength of federal interests
      - **Third:** Strength of outcome-determination (that would affect likelihood of forum-shopping)
        - **i. If federal procedure will significantly alter the outcome, then don't use it** (because then we are encouraging forum-shopping)

  2) Source = Rule or Case construing a Rule – apply *Hanna v. Plumer*
    - **Ask yourself: Is there a federal rule of CivPro or some other federal rule (like statute, Constitution) on point that covers this issue?** [Doesn't matter what the source of state procedure is]
      - **First:** Determine if rule is procedural or substantive
        - **i. If substantive: Apply state law**
        - **ii. If procedural: Go to step #2**
      - **Second:** Ask: Are the state and federal rules in direct conflict?
        - **i.** If yes, and you determine that state and federal law directly conflict – apply the federal law as long as the federal law is valid
          - In *Hanna*, they directly conflicted, so had to go with federal law
          - In *Walker*, it affected the state's tolling of statute of limitations – not a direct conflict, so went with state law
        - **ii.** If no – then harmonize the rules [If the rules are exactly the same, then it doesn't matter which one you apply] – can probably apply the state procedure
        - **iii.** Note: Rule 3 (Commencement of a civil action by filing a complaint with the ct) does not conflict with state procedure (if state procedure requires service on Δ before a statute stops running) – Rule 3 can't tell states how to stop running of state's statute of limitations

- **Third**: Ask: <u>Was there forum shopping?</u> (Don't care if it's outcome determinative)
  - i. Outcome determination not a specific weighing factor, unlike in *Byrd.*
  - ii. In *Hanna*, Justice Harlan's concurring opinion is important: he says that outcome determination is expected
  - iii. *Erie* discouraged forum shopping, so want to honor that, but won't punish a lawyer for wanting the best outcome and choosing a federal forum for that

3) **Source = <u>Procedure enacted directly by Congress</u>**
   - <u>*Stewart Organization v. Ricoh Corp.*</u>
   - Look to Title 28 of U.S.C. – statutes, not from rules or case law
   - Apply federal procedure if:
     - Federal statute is on point (relevant) – even if it doesn't match competing state procedure
     - Federal statute is enacted by Congress

<u>Finally</u>: If federal district court decides it should apply state law (whether substantive or procedural), but the <u>state law is unclear, the issue is: how to identify state law</u>?

- <u>Court will then consider doing one of the following:</u>
  1) **Abstain from deciding the issue** (even though good jurisdiction)
     - Recognize that difficult questions of state law best handled in state cts
     - Rarely used – because you waste resources

  2) **Certify the question to the state supreme court**
     - Federal district judge can certify a question to the state supreme ct
     - Not a very good solution either

  3) **Attempt to predict how state supreme court would have decided the issue, using available resources**
     - <u>Most frequent solution</u>
     - <u>Federal courts just address the issue directly by solving it themselves</u>
     - Saves time and expense but may not know enough
       - Greatest potential for producing analyses of state law that are later established to be incorrect
       - Provides best answer w/o forcing parties into delay and expense
     - Use reported decisions from lower state courts, trends in neighboring/similar states, judicial trends across the country, and scholarly sources

VII. Amended Pleadings (Rule 15)

- **Pleading =** Anything that states a claim for relief and any responses to that claim
  - Counter-claim, Cross-claim, etc
  - Motions are not pleadings [A motion filed in opposition to a pleading is not a response to the original pleading]
- **Rule 15**
  - Very liberal in allowing amended pleadings
  - Remember: When you amend a pleading, you **replace the original**, so include everything from the original that you want to keep

- **First:** Do you have **Amendment as of Right? – 15(a)**
  - ∏ (or Δ) has a right to amend once "as a matter of course" (without leave of court) before the Δ (or ∏) serves his answer – **under 1 of these circumstances**:

    1) Responsive pleading required
    - If response is required, the amendment must be filed before receipt of response to the original pleading
    - A motion is not a responsive pleading
    - Eg: Pleading 1 by ∏ - Complaint
      Pleading 2 by Δ – Counter-claim
      Pleading 3 by ∏ - Response to the counter-claim

    Δ has time to amend pleading [counterclaim] before ∏ responds
    But if no response required, then go to #2

    Hypo – ∏ sues Δ and Δ moves to dismiss. ∏ files an amended complaint. Did the ∏ have a right to do that?
    Yes – because the Δ had not served her answer. Δ had only served a motion.

    2) Response not required
    - If pleading doesn't require a response (when Δ responds to ∏, if it doesn't require a response, or ∏ responds to Δ and doesn't rqr response) and action not on court's trial calendar (not scheduled yet), then **pleading must be amended 20 days after service of original pleading**
    - Remember that counterclaims always require a response, so this category doesn't work in that situation
    - If time expires – can ask opposing party to consent to amendment (and no need to obtain court approval) – usually you should consent or court will be annoyed (if parties agree- courts have to allow)

- **Second: If can't amend using above, use Amendment by Leave of Court – 15(a)**
  - If a proposed amendment can't be filed under 15(a) because time limit not met or opposing party won't consent: **then pleading can only be amended by leave of court**
  - Court will usually grant "when justice so requires"
  - Burden usually on opposing party to show why amendment shouldn't be allowed

- Likelihood of getting court's permission drastically reduced after court enters scheduling order w/deadlines for amendments
- After discoveries have all taken place, dropping issues no longer relevant
- Court weigh factors that might show it's inappropriate to grant leave to amend:
  - **Bad faith**
  - **Undue delay in amending** (could've amended earlier)
  - **Futility of an amendment** (won't really improve position)
  - **<u>Would create unfair prejudice to another party</u>**
    - Not just because other party has new claims to defend against
    - Usually prejudice occurs when substantial unjustified delay in moving to amend – creates unfair disadvtg for opp. party

- **<u>Third</u>: When issue raised at trial, but not in pleadings, ask to <u>Amend to Conform to Evidence</u> – Rule 15(b)**
  - **Rule 15(b) –** about **variance**
    - The evidence at trial does not match what was pleaded
    - Only relevant when case goes to trial
    - Hypo – the pleading is about breach of K but on trial, the evidence also shows a tort.
    - When that happens, one of 2 things must happen – other side objects or doesn't object:
      - Other side objects to issue because it wasn't raised in original pleadings
        - Court may say yes, then it's not admissible
        - But, the party offering that evidence may be able to amend if the proposed amendment won't create unfair prejudice (or any of the other 3 grounds under (a) above) or such prejudice that results can be cured by another judicial action (like go back and do more discovery)
      - Other side fails to object (implied consent of parties)
        - If failure to object to variance – it is handled by 1st 2 sentences of 15(b):
          - Since other side didn't object, allow the evidence and treat it like it was always there
          - Don't need a formal amended pleading

- **<u>Final issue: Relation Back</u> – 15(c)**
  - **Assuming that amended pleading allowed under either 15(a) or 15(b) standards (you have authority to amend) but there is a statute of limitations problem**
  - <u>Trying to amend **after** the statute of limitations has run</u> – so we want to say it relates back to the <u>original pleading</u> so it can meet the statute of limitations deadline

- **Hypo:** Complaint filed on July 1. Statute of limitations runs on July 10. In Aug, the ∏ wants to amend to add a new claim. Under 15(c)(2) – ∏ can amend if he gets **relation back.**
- **Relation back:** The amended pleading treated as though it was filed when the original was filed (treat them all as if it was filed on July 1 so it would be timely)

- **First:** Ask if original complaint was timely filed and court has been persuaded that the amended pleading is permitted (wouldn't violate standards in (a))

- **Second: Can have relation back in ANY of 3 cases** (don't all have to be satisfied)

  1) Rule 15(c)(1): Statute of limitations permits relation back (statute of limitations hasn't run out y et)

  2) Rule 15(c)(2): Trying to amend to add a new claim (more likely)
  - **Must arise from same transaction or occurrence that was in the original pleading**
  - Could cite same event, same Δ [NOT adding new parties, just a new count]
  - Show same occurrences, conduct, overlapping facts (same as concept from supplemental jurisdiction) – logical relationship to original tranxn
  - Varies with courts – SCOTUS recently held more restrictive construction, so not as broad

  3) Rule 15(c)(3) Trying to amend to change Δs
  - **Adding a party or changing party's name**
  - **15(c)(3) – you sued the wrong Δ but the right Δ knew about it**
  - **Then you can move to have the right Δ**
  - **4 main components:**
    - i. **Relate to Rule 15(c)(2)**
      - Must arise from same tranxn/occurrence
    - ii. **Within 120 days after original pleading was filed**
      - Look to Rule 4(m)/service of process (the service must be satisfied according to that Rule)
    - iii. **And must meet both:**
      - **Fair notice**
        - Δ added rcvd sufficient notice of pending action so not prejudiced in prepping defense
        - Generally satisfied if they learned of suit w/in 120 day period required
      - **Knowledge of mistaken identity**
        - Very fact-specific
        - The person who is joined knew (or should have known) that he/she would've been sued under the original pleading but there was a mistake in identity [say, for example, the complaint names "Fortune magazine" as the

Δ but really should've named "Time, Inc" since they're the parent company – Time should have known it would be sued and if given notice within 120 days then it will be ok]

- Mistake in choosing who is vulnerable to suit or lack of knowledge as to joined party's identity doesn't satisfy mistake
- **John Doe's are not encouraged (prohibited in federal court)**
- Naming the John Doe later is not a mistake

VIII. JOINDER ISSUES

Counter-claim and Cross-claim (Rule 13) – Class 19

- **Rule 13**
  - **Allows people already party to an action to assert counterclaims against opposing party and controls circumstances when cross-claims maintained**
  - May be raised in pending litigation or retained for subsequent litigation
  - Counterclaims are either compulsory or permissive – **not both**
    - **Compulsory:** Δ is required to file it and arises from same tranxn or occurrence (unless it fits an exception)
    - **Permissive:** Δ not required to file it

- **Counter-claim** (Rule 13(a), (b) and (c)) – a claim against an opposing party.
  - 2 kinds of counter-claims
    - **Compulsory (13a)**
      - **i.** Arises from the same tranxn or occurrence as ∏'s claim
        - So closely related to claims already raised by ∏ that they won't create confusion for trier of fact
        - How do you decide this? Ask:
          - Whether issues of law & fact are essentially the same
          - Whether the same evidence could be used to support or refute the claim & counterclaim
          - Whether there's a **logical relationship** b/w the claim & counterclaim (broader)
          - **Common evidence**: Is there a **substantial overlap in all elements** of the claims (narrower – so just having similar facts may not be enough)
      - **ii. Always filed by persons who are parties to the case**
      - **iii.** Must be filed in this case or you lose that claim (can't assert it in the future) – use it or lose it
        - Can file as a permissive if it's not compulsory
      - **iv.** Must satisfy SMJ and P/J (but not venue)
      - **v. Hypo**: Lucy and Ethel are driving and collide. Lucy sues Ethel. In a second case, Ethel sues Lucy – that case is

dismissed because Ethel should have counterclaimed in the first case (it was compulsory)

vi. **<u>Exceptions</u>** – Sometimes, even if they arise from same txn/occ – they are still not compulsory:
  - <u>Immature claims</u>
    - If it doesn't mature until after the party has been served a pleading
  - <u>Not compulsory **until** party holding the counterclaim required to file responsive pleading</u>
  - **<u>Lack of Personal Jurisdiction over 3rd parties</u>**
    - Court doesn't have (personal) jurisdiction over these 3rd parites, so not compulsory, even though arising out of same txn/occurrence [usually SMJ not a problem because you can always end up getting supp. jurisdiction if fed ques. or diversity not met)
    - Eg: A (FL) sues B (NY) and B counterclaims and says A had another party, X (FL) helping him. Court has <u>no personal jurisdiction</u> over X [A consented but X didn't]
  - <u>Pending lawsuits</u>
    - If already been sued upon or pending action in other litigation
  - **<u>Δ is Quasi in rem/In rem</u>**
    - Quasi in rem/in rem doesn't produce compulsory counterclaims <u>unless</u> B files any counterclaim against A
    - B not required to file any counterclaims if A got quasi in rem or in rem
    - <u>Assuming Δ isn't making any other counterclaim in the action</u> [But if another compulsory counterclaim is filed and this arose out of same txn/occ, then must file this quasi in rem/in rem compulsory counterclaim]
  - <u>Injunction/Declaratory judgment actions</u>
    - If Δ sued on equity claims, no reqmt to assert claims for money damages as counterclaims

- **Permissive (13b)**
  i. Doesn't arise from same tranxn/occurrence as ∏'s claim
  ii. <u>May</u> assert it here but you do not have to
  iii. <u>No claim is too far removed to be allowed as a permissive counterclaim</u> (doesn't have to do with the subject matter at all of the original claim)
    - Eg: ∏ sued on a breach of contract and Δ has a counterclaim about a tort that happened at a diff

place/time (just that parties are the same), then counterclaim probably permissive
- But must weigh factors like
  - Judicial efficiency vs.
  - Fair play in the court (avoiding jury confusion, etc)

iv. But remember you need subject matter jurisdiction:
- Must almost always satisfy diversity or subject matter jurisdiction
- Supplemental jurisdiction: harder to do than with compulsory because you can't really satisfy same txn/occurrence – unless it was an exception to compulsory counterclaims in 13(a)

➢ **Counterclaim Exceeding Opposing Claim - 13(c)**

i. Counterclaims can be for any amount, regardless of whether the amount is more than the other party's claim

ii. Can seek all kinds of relief that weren't sought in opposing party's claim.
- Eg: if original claim asks only money damages, the counterclaim can ask for money damages and/or equitable relief

- **Cross-claim** (Rule 13(g))– against a co-party (on your side of the litigation – weren't originally your opponents) → Always permissive (never compulsory)
  - **Requirements:**
    - ➢ First: Must arise from same txn/occ from underlying case
    - ➢ Must be for actual relief (either affirmative relief or compensation) – can't just be blaming the other party (that is just a defense)
    - ➢ Must meet SMJ
      - **i.** Even if it doesn't meet diversity or fed question, it's ok
      - **ii.** Almost always meets supplemental since it arises out of same txn/occ
    - ➢ Must meet personal jurisdiction
      - **i.** Since court already has jurisdiction over the parties, then has jurisdiction over cross-claim Δs
      - **ii.** But if original action didn't have jurisdiction, then cross-claim will have defects
  - You could join a party (under 13(h)) to sue an additional person, but at least 1 cross-claim Δ must be a party already
  - No venue rqmts

Hypo: 3 people are in accident and one of them sues the other 2
∏ (NJ) suing B (VA citizen) and C (VA citizen); assume all the claims are over $75K. No federal questions.
We represent B – what claims do we suggest B assert in this case?

First: B must file a compulsory counterclaim against ∏ - because otherwise we lose the claim and can't assert it later. Also - Assess subject matter jurisdiction – that compulsory counterclaim invokes diversity jurisdiction

Second: B may assert a cross-claim against C – doesn't have to because it's permissive. It's a cross-claim because it's against C (co-party).

The problem is that there is no diversity over this claim and no federal question because nothing federal about this car wreck. (don't forget to apply these first!!)

So must look to see if it meets supp jur.

- First - Under § 1367 - Automatically meets supplemental jurisdiction because same txn/occ
- Second - But does § 1367(b) take it away?
  - No! Because this is a claim by a Δ

Joinder of Claims – Rule 18 (Class 20)

-Exam tip: Might be added with subject matter jurisdiction in federal court

- Rule 18: Allows claimants to bring all claims they might have against people who are already parties to a case, even if the claims are unrelated

- **Joinder of Claims - Rule 18 (a)**
  - **∏ can assert any and all claims that she has against the Δ** (but not required – just an option
    - Don't have to be related in any way
  - **Can join claims as long as you're already a party to the case**
  - **Must independently satisfy Subject Matter Jurisdiction**
    - Usually not a problem if there was already SMJ. Must meet either:
      - **i.** Federal Question, or
      - **ii.** Diversity – unaffected by adding a claim & you can aggregate the claim amounts to meet the $75K rqmt
      - **iii.** Supplemental not usually met because they have to be the same case for controversy, but if the 2 counts are sufficiently related, then could use it
  - **18(a) is subordinate to 13(a), (b), (g) and 14(a) and (b) – must meet those first**
    - Joinder claims between the Δs must have some commonality to the Π [look to rule 13(g)]

Third Party Practice (Impleader) – Rule 14(a) and (b) (Class 20)

- Where a defending party brings in a 3rd party Δ because the 3rd party Δ may be liable to you, the existing Δ for some claims (usually this means you have a claim for indemnity or contribution from that 3rd party Δ)
  - 3rd party only subject to derivative liability – if the Δ wins, then 3rd party Δ is never liable
  - 3rd party Δ can't be liable for more than what original Δ is liable for

- Generally, joint tortfeasers are <u>not</u> indispensable – so you don't really need them, you just want them

- Permits parties who are defending against claims (usually Δ) to join (*implead*) outside persons who aren't currently parties (<u>is optional – not compulsory</u>)
    - Diff than 13(g) → that Rule is a cross-claim against a co-party, so you're not bringing in outside parties
    - ∏ can assert a claim against 3rd party Δ
    - And the 3rd party Δ can assert a claim
- <u>Vocab</u>
    - Party A (original Δ and 3rd party ∏) can implead Party B (now a 3rd party Δ)
    - B can implead C → so B now 3rd party Δ and 4th party ∏ and C is 4th party Δ
- <u>Party A can only hold B liable if A is found liable by court</u> – A can't say that B is the only one liable. Only works if <u>A says that B owes A something if A is found liable</u> (A can sue B for indemnification, contribution, breach of warranty, subrogation)
- **<u>If you're impleading 3rd party Δ - must relate to the claims being brought against you, and must depend in some degree on outcome of original action</u>**

- <u>Every 3rd party claim must fulfill SMJ and P/J (no Venue reqmts)</u>
    - Fed question or Diversity or Supplemental
        - Usually meets supplemental because out of same txn/occ
        - <u>Be careful of Δ bringing in a 3rd party Δ and the original ∏ suing that 3rd party from same state – can't do it because it's a ∏ impleading this time</u> (doesn't meet diversity or supplemental, and if it's a state claim, won't meet fed question)
            - <u>Eg:</u> A from NY sues B from CA on a state claim and B impleads C from NY. A can't then sue C (should have done it on the original action)
- **14(b) – ∏ can only implead 3rd party if ∏ is subject of a counterclaim**

<u>Compulsory Joinder of Parties</u> – Rule 19(a) and (b) (Class 21)
- When a court should order the joinder of party who isn't currently part of the case because <u>they are "necessary" (19a) or "indispensable" (19b) to the action</u>
- <u>Usually it's a Δ saying that another ∏ should be joined</u>

- <u>First:</u> Ask – is it **<u>necessary</u>** <u>for them to be joined</u> as a party? AKA – <u>Ought</u> they be joined? (Usually as a Δ, but can also be ∏) – 19(a)

    - <u>Check:</u>
        - → Can <u>service</u> be made validly?
        - → Venue must be satisfied
        - → <u>Will the joinder destroy subject matter jurisdiction and p/j?</u>
            - If it's a state claim, then <u>no fed question</u>
            - Would it <u>destroy diversity? (either same state or claim against additional party doesn't meet amount in controversy)</u>
            - <u>Supp jur</u> <u>can't apply</u>
            - P/j not met because <u>local long-arm doesn't reach</u>

- Then go on: - Joinder is necessary if facts meet 1 of these 2:
    - 1) **Incomplete Relief:**
        - In this party's absence, there can't be complete relief among the existing parties
        - Ask:
            - Will current parties get justice? [Not entitled to victory, **just a fair hearing and presumed just result**]
            - Ask: What will happen if A wins, if B wins, etc? And decide if result/hearing is just
    - 2) **Impaired Interest:**
        - The absent party has an interest relating to the action and if it proceeds without person it will either:
            - **Impair or impede** absentee's ability to protect his interest
            - Will leave the parties (who are already part of the case) with substantial risk of incurring **multiple or inconsistent obligations** because of the claimed interest

- Second: Go to 19(b)
    - Maybe persons should be joined under 19(a) but can't because it would defeat jurisdiction or venue [party is not subject to process, objects to venue or would destroy diversity jurisdiction]
    - If 19(a) doesn't work [and even if it does, on the exam, still must go through 19(b) – say "just in case I'm wrong, this is what would happen under 19(b)] then ask: is the party **indispensable** to the action? 19(b)
    - **Tells us if it would be unjust to proceed without the party (dismiss) or if the court can go ahead w/action:**
        - In most cases, court tries to continue suit rather than dismiss
        - **4 weighing factors to decide**
            - **1) Adverse consequences of proceeding w/o a person**
                - Prejudice: Would judgment in party's absence be prejudical toward that party or existing parties?
                - Basically repeat what you did under 19(a) – Ask: what will happen if A wins, if B wins, etc?
            - **2) Avoiding adverse consequences**
                - Framing of judgment: Can prejudice be reduced/avoided through protective provisions and framing the judgment to mitigate prejudice? (like shaping relief or changing from injunction to money damages if that prevents adverse consequences)
            - **3) Adequacy of judgment**
                - Adequacy of remedy: Will the judgment rendered in the party's absence be adequate?
                - Will you be able to get rid of the litigation to avoid further litigation to take care of additional remedies?
                    - Focused on public interest evaluation and not how it affects the parties – but if you know there

will be subsequent litigation, then you might be wasting taxpayer money

4) Availability of another forum

- Result of dismissal: Will **plaintiff** have adequate remedy if action is dismissed? Could they bring suit in another forum?

Permissive Joinder of Parties - Rule 20(a) and (b) – Class 22

- Allows ∏ to either (1) Join other ∏s with himself or (2) Make several parties co-Δs to his claim (the initial decision by ∏ to sue – there are multiple ∏s wanting to sue, so they need to pass Rule 20)

Rule 20(a): Make sure you can have permissive joinder

- **First: REQUIREMENTS for permissive joinder (20(a))**
  - Must satisfy 2 tests: (See *M.K. v. Tenet* – all of the claims by ∏s proposed Rule 20 joinder satisfied these 2 prongs – when former CIA employees alleged various constitutional rights which were different, but because all their attnys were blocked from seeking documents, their claims were related – but the damages don't have to be the same: because diff rights obstructed)

    1) Same txn/occ → see factors for whether counterclaim is compulsory

    2) Must share at least one common question of fact or law → must be of substantial importance to all of the claims

- **Second: Must satisfy Jurisdiction:**
  - If joinder of Δs:
    - Each Δ must satisfy service (must be served personally)
    - Each Δ must meet min contacts (p/j)
    - Long-arm – Δs may be out of long-arm reach
  - All parties (whether ∏s or Δs) must meet SMJ:
    - **Supplemental jurisdiction does NOT apply to Rule 20 joinder of multiple Δs (but can apply to joinder of multiple ∏s)**
    - **Diversity** necessary if ∏ is trying join Δs (no states can be on both sides) – but not necessary if ∏ is trying to join another co-∏ (because then it can meet supplemental)
  - Venue must be satisfied (usually satisfied by bringing suit where substantial part of the events occurred)

Rule 20(b): Even if 20(a) allows joinder, court can order separate trials in interest of justice

- Court has discretion
- Wants to avoid **embarrassment, expense, or delay (inconvenience or prejudice) to any party or confusion to trier of fact or injustice**

Consolidation – Rule 42(a) and (b) – Class 22

- Court can **consolidate** several actions into single proceeding (Rule 42(a)) OR
- Order **separate trials** of various issues that were originally part of single action (42(b))
- **Cases can't be consolidated unless in the same district court** (either in the court already, or another judge is transferring it over) → and if it's transferred, then the state law of the state that it's transferred from is applied (according to § 1404 – Venue)
- EG:
  - **a.** A sues X
  - **b.** B sues X
  - **c.** A and B didn't sue together (20a gives them permission to do it but doesn't require it)
  - **d.** If it's the **same txn/occ** and **common question of law/fact: consolidate**
- **Court must balance savings to judicial system against possible inconvenience, delay, or prejudice to parties.**

F. Intervention – Rule 24(a) and (b) – Class 22

- Compare to Rule 19:
  - i. In that situation, parties already in the case are looking to bring in outside parties
  - ii. In this case, an outside party wants to join (not previously invited)
    1. Can choose to come in as a Δ or a ∏
- An person not already a party brings herself into the current case (intervenes) – their choice
- Court has substantial discretion in deciding whether to permit:
  - **i.** Want to balance interests of intervenor vs. current parties
  - **ii.** Court can't prevent if it's Intervention of Right – it's the party's right

- 2 kinds of intervention
  - **1) 24(a) - Intervention of Right** (most likely going to be on exam) –
    - ➢ Don't need leave of court
    - ➢ 2 ways to get it

    1) 24(a)(1) – Federal statute gives right to intervene

    2) 24(a)(2) – if you show these 4 things (see *Smuck v. Hobson*: DC school desegregation case where parents bringing action against school board for segregation – and these 4 were applied)
    [*sounds like 19(a)(2)(1) usually raised by Δ though, not intervenor… on exam watch out if Δ or absentee is raising it]*

    - i. Timely application (fact-specific application)
      - Ask: Why didn't they intervene earlier? (Length of delay?)
      - Will delay cause unfair prejudice to other parties?
      - Will there be prejudice to intervenor if denied?
    - ii. Shown interest in the case
      - Is there substantial interest in the case?
    - iii. Risk as a practical matter
      - If they don't intervene, do they run the risk that their interests will be impaired?

iv. Interest is not adequately represented by current parties
- Can the current parties adequately represent their interests?

2) 24(b) – Permissive Intervention
- Need leave of court
- Your claim must have at least 1 common question of law or fact w/pending case
- Court can deny permissive intervention if it will result in undue delay or prejudice to pending litigation
  i. Courts more strict with **timeliness** with 24(b)

- Subject Matter Jurisdiction:
  - 24(a) – For Intervention of Right, can meet through all 3 unless intervenor would be ∏, **then can't use supplemental (in most cases –** there's a note case on pg. 539 of supplement that's an exception or watch for if intervening person isn't **diverse**
  - 24(b) – Can't use supplemental jurisdiction

- P/J – if you're attempting to intervene, then you've submitted to p/j

Class Action – Rule 23(a)-(h) – Classes 23+

Steps for determining Class Action *[6 rqmts to meet in 23(a) and then 1 of elements of 23(b)]*

First: Go through the 2 case law requirements in 23(a) – must meet both

Second: Go through the 4 additional requirements in 23(a) – must meet all 4

Third: Meet one of the 3 elements of 23(b) (but allowed to meet more than 1)

Fourth: Must meet requirements of:
- Personal Jurisdiction, AND
- Federal subject matter jurisdiction

23(a): 2 Case Law Requirements – Must meet BOTH

1) "Definable": Class must be logical and be sufficiently describable that court can figure out who can actually qualify to be a member of the class
- Bad: Examples of what is overly broad or wouldn't count:
  - Class made up of "all the females in the world"
  - Class of all American citizens who support national health insurance (hard to tell what "support" means and don't know if personal views will change)
  - All African-American males living in Virginia
  - Class of people of Hispanic heritage bringing suit

a. Problem: How do you define Hispanic heritage? How much can you have? One relative from 800 years ago?
  - All users of drug X who suffered medical problems (too vague – specify medical problems as related to the drug)
- Good: Examples of what could work as a class:
  - Class of females who suffered or may suffer because of past use of defectively designed or manufactured birth control device
  - Class of employees alleging illness caused by defective ventilation system

2) Representatives: Must be a member of the class → make sure that the class reps reflect the interests of the class

- If the rep was once a member but isn't anymore, then a new, suitable member of the class must be selected as a replacement
- If action was certified before the rep was no longer a member of the class, it's ok
- If individual rep's claim is resolved/moot after certification, generally the class action isn't rendered moot

23(a): 4 Additional Requirements - you must meet them all

1) Numerosity
   - An important requirement
   - Class so large that joinder of all of them would be impracticable (40+ members is usually the cutoff – but no exact number)
   - Classes of 10 or less almost definitely don't meet it and will be directed to Rule 20 (Joinder of parties)
   - When class is b/w 25-40, look at geographic dispersion of class members and sizes of individual claims as variables
     - Joinder usually impracticable if claims are small (since people unlikely to be involved in litigation for small claims)

2) Commonality requirement
   - Questions of law and fact in common
     - Common nucleus of operative fact
     - As long as there's at least one issue, and its resolution will affect all or significant number of the class members
     - No commonality where there's significant differences in the applicability of the laws to differing members of the subgroups
   - Not usually difficult to meet – courts are liberal with this and the common questions don't need to predominate
   - Addresses the suitability of the class action itself

3) Typicality
   - Addresses the suitability of the ∏
   - Claims or defenses of the representatives must be typical of the claims of the class
     - Can't just be typical of parts of the class
     - Don't have to be identical, as long as there's substantial commonality

- Ensures that reps are representing the best interests of class members who are taking a less active part in litigation
- Also overlaps with the case law requirement that reps are members of the class
- Not quality of attnys – that is covered by 24(g)

4) Quality of the character of the class representatives
   - Representative parties will fairly and adequately protect interests of class
     - Proposed reps should have an interest in pursuing claims in the class
     - Reps shouldn't have interest antagonistic to the interests of other class members
   - Potential conflicts of interest may disqualify applicants
     - Like attnys and reps being friends
   - During litigation, if court finds that previously approved reps are inadequate, the court can appoint new reps
   - Could be most "sophisticated" investor – when the class action falls w/in the scope of Private Securities Litigation Reform Act of 1995, the court must appoint as the lead ∏ the one who is the "most adequate"
     - Doesn't mean that they must posess most experience, expertise, wealth or intellect
     - Does mean that usually it's the party with the largest financial stake in the litigation, so you know they're representing the class to the best of their ability, because their stake is so high

Must meet 1 of these 3 from 23(b)

- Advantages to fitting in more than 1

1) **23(b)(1): Prejudice Class Actions**
   - Will individual actions that might cause prejudice that can be avoided if you use class action?
   - Members **cannot opt-out** of the class if it meets this category
   - **2 parts – is there a risk of EITHER A or B? Then go ahead w/class action:**

     A. **23(b)(1)(A) – Is there prejudice to the nonclass party?**
        - **a.** Is the opponent of the class running the risk of being subject to incompatible duties through inconsistent individual decisions?
          - **i.** So asking is it unfair to opponent of class(Δ)
        - **b.** Does not mean that Δ may have to pay damages to some members of the class and not to others
        - **c.** Does mean – if there were individual cases instead of class action, then the Δ could have a judgment that could be confusing
          - **i.** Eg: If there's 15 spots for promotion and 30 women sue in 30 diff discrimination suits – who should get those 15 spots if there's different actions taken? Can't satisfy all 30 judgments.

     B. **23(b)(1)(B) – Is there prejudice to members of the class?**

a. Would individual litigation produce injustice for class members who aren't parties to those cases?
b. See eg above – Women who didn't sue but may sue later may lose those promotion spots.

2) **<u>23(b)(2): Injunctive and Declaratory Relief:</u>**
- Members <u>can not opt-out</u> (just like 23(b)(1))
- **<u>2 parts (satisfy both elements):</u>**

1) Class must share a general claim against non-class party

2) Class must seek either final injunctive or declaratory relief
- <u>Not about money – about equitable relief</u>
- Can add damages, <u>as long as damages are not more important than equitable relief</u>
  - Still some sort of requirement of notice to the class (because you have rqmt of notice for damages suits – under 23(b)(3) – but rqmt of notice may not be as strict)

3) **<u>23(b)(3): Damage Class Actions</u>**
- <u>Members CAN choose to opt-out</u>
- Usually this class is about money
- The big problem is notice
- **<u>2 things</u>**(must show **<u>both)</u>**:

i. **<u>Common questions Predominate</u>**<u>:</u> Must show that common questions predominate over individual questions

ii. **<u>Superiority:</u>**Class action is the superior method for resolving the dispute
- There are **<u>4 factors for determining Superiority:</u>**
  - **<u>23(b)(3)(A)</u>**<u>:</u> *Individual interests in separate actions*
    - If individuals want to opt out, and there's enough that a class action doesn't make sense, then don't do it
  - **<u>23(b)(3)(B)</u>**: *Pending/Existing litigation*
    - Are there already a number of members of the class already involved in suites against the same Δ? Then hard to justify a class action
  - **<u>23(b)(3)(C)</u>**: *Progress in class litigation & Geography*
    - Court hearing the class action already invested enough resources in the case that it would be inefficient to refuse class action or dismiss
    - Bulk of the class/evidence in a certain area, then <u>proceed in that forum</u>
    - Don't care about ∏s, witnesses, and evidence are spread out – then no justification for that litigation to be in that forum
  - **<u>23(b)(3)(D)</u>**: *Difficulties of Management*

- Too many administrative difficulties, like problems with notification or spans too many states and creates a state law variations problem (how to apply them all)

- If the class is certified:
  - It must define the class, and
  - It must appoint class counsel – **23(g)**
    1. And the class counsel must adequately represent the class

- **<u>23(c)(2):</u> <u>Do we give notice of the pendency of the class action?</u>**
  - <u>Only if you're in 23(b)(3) class</u>
  - **<u>In the 23(b)(3) class –</u>** the representative pays to give individual notice to all matters reasonably identifiable (can get expensive, even if you do it by mail)
    1. What you put in the notice is in 23(c)(2)(b) – <u>Must direct best notice practicable</u> and in <u>plain, easily understood language, and include:</u>
       - Nature of action
       - Definition of class certified
       - Class claims, issues, defenses
       - That class member may enter an appearance through counsel
       - Member <u>has the choice to opt out</u>

- <u>23(c)(1)</u> – Even if court doesn't make a formal certification, it could be an implied class; onus on court to decide class action status, even if parties haven't requested

- Who is bound by class action?
  - All class members are bound <u>except</u> those who opt out of a b3 class
  - Can opt out of b3, but can't opt out of b1 or b2 (that's why they're called mandatory)

- **23(e):** Settlement or dismissal of a certified class must be approved by the court
  - Cannot dismiss or settle w/o the court approving it – and it's up to the judge (in 23(e))
  - But federal judge can't tell the parties what the settlement is going to be, just approves or disapproves (but can g

- What about subject matter jurisdiction?
  - Class action could invoke federal question jurisdiction if the class asserts a federal claim and then we don't care about diversity
  - What about diversity of citizenship?
    1. For the citizenship of the class – you look <u>only</u> at the representative, and not the class (doesn't matter if the class members are from same state as Δ)
    2. What about amount in controversy?
       - We are ok if the <u>representative's claim</u> exceeds $75K – amount of the class members' claims is irrelevant

- Class Action Fairness Act of 2005
  - Allows a federal court to hear a class action if

- Can invoke federal jurisdiction if:
    - i. If <u>any</u> class member is diverse from any Δ
    - ii. <u>And</u> the total class claims are over $5 mil

IX. <u>Discovery</u> – Rule 26 (Class 25+)

- Federal rules very liberal in allowing you to find out everything – as long as it's <u>relevant</u>
- Don't want trial by ambush – no surprises
- Non-rule discovery: You can always go out and interview your client and witnesses (more relaxed and doesn't fall within Rule 26)

A. <u>Required Disclosures – 26(a)</u>

- a. <u>Parties required to disclose this info even though not asked for it</u>
- b. Come up at 3 different times in litigation
    - i. **26(a)(1) –** <u>Initial Reqd Disclosures</u>
        - People and documents that may have discoverable information must be identified, even though nobody asked for it
    - **ii. 26(a)(2)** – <u>Disclosure of Experts</u>
    - **iii. 26(a)(3) -** <u>Pretrial disclosures</u>
        - About a month before trial and discovery is over
        - Say who will testify (smaller group of people than in 1)
        - Must show everything that we're going to raise at trial

B. <u>Discovery Scope and Limits – 26(b)</u>

→ Think about expenses to your client when you're doing discovery!

- Can't throw a lot of money into this if your client just lost his job and doesn't have that much money

<u>First:</u> Must pass (b)(1) test of whether it is discoverable (relevant and not privileged)

<u>Second</u>: Even if it passes (b)(1) – <u>check under (b)(3)</u> – could qualify as work product privilege → which should ideally not be disclosed

a. What can you discover? – Rule 26(b)(1)

- **i. Anything can be discoverable if:**
    - <u>Relevant</u> = <u>reasonably calculated to lead to admissible evidence</u>
        - → **Is broader than admissible evidence – does not have to be admissible** (can discover hearsay or other evidence that could lead to admissible evidence)
    - <u>Not privileged material</u>

b. Limitations – Rule 26(b)(2)

- **i.** Court can limit discovery if:
    - If there's undue burden or cost

- If unreasonably duplicative or cumulative
- If obtainable from another source conveniently
- If there was ample oppty to obtain info during prior discovery

c. Limited protection to trial prep and work product materials – 26(b)(3)

i. Broader than atty-client privilege

ii. Only should be produced in discovery if not reasonably available from any other source

iii. Work product is NOT discovery

iv. <u>4 factors should be met if court will classify it as protected under this rule:</u>

1) Must be a document or other tangible thing
2) Must have been preparted in anticipation of litigation
3) Relevant
4) Privileged

- <u>But you **can overcome work product if you show 2 things:**</u>
  1) <u>Substantial need</u>
  2) <u>The information is not otherwise available</u>
- **<u>But note – court must balance – must try to protect against disclosure of the following (in 26b3):</u>**
  - **i. Mental impressions**
  - **ii. Conclusions**
  - **iii. Opinions, and**
  - **iv. Legal theories**

C. <u>Discovery tools – 5 things</u>

a. Which of these can be used to get information from a nonparty? Look at 5

i. <u>Deposition – Rule 30 (oral) and Rule 31 (in writing – very unusual)</u>

- <u>Deposition – under oath</u>
  1) All the parties get to ask the witness questions
  2) Is all in transcript and witness
  3) <u>Can depose parties or nonparties</u>
  4) <u>A nonparty must be subpoenaed or else he/she doesn't have to show up</u>
  5) <u>A party is already brought before the jurisdiction of the court so just have to give them notice of the deposition</u>

ii. <u>Written Interrogatories</u> – Rule 33

- Written questions answered in writing under oath
- <u>Have 30 days to answer them</u>
- Limit of 35 questions
- Can get all kinds of background information, but aren't going to get anything spontaneous out of them
- <u>Can only be sent to parties (can't send to non-parties)</u>

iii. <u>Document Reproduction: Request to produce</u> – Rule 34

- <u>Ask someone to cough up documents or materials</u>
- Can get info from parties or nonparties
- But again, a nonparty must be subpoenaed (like deposition)

iv. **<u>Rule 45(a)(2)</u> – Subpoenas to nonparties**
- Subpoenas must be served <u>personally</u>
- Ignoring = contempt of the court
- Court that issues is one that has territorial control over the witness

X. **<u>Summary Judgment</u> – Rule 56(a) and (b)**

- Maybe you could get rid of this case without actually going to trial

- If you want to oppose the movement for summary judgment, you don't have to knock down the **entire** case, but <u>just have to show that there may be a dispute as to some of the material facts</u> so it shouldn't go to summary judgment – you <u>want to say the facts are not totally clear</u>

- Where does the evidence come from?
  - Parties proffer the evidence
  - Give evidence in affidavits
    - Treat it as evidentiary because they're sworn statements
  - Can also look at:
    - Answers to interrogatories, other parts of discovery
    - Pleadings are <u>not</u> evidence because <u>not signed under oath</u>
      - <u>Unless verified pleadings (because those are signed) – but they are rare</u>
      - <u>But</u> – pleadings can be <u>relevant</u> to summary judgment
        - <u>Remember that when Δ failed to deny something, that is taken as admitted, and you can use that in summary judgment</u>

- Δ could move for summary judgment by saying ∏ has no evidence on the claim

<u>Either party may move for summary judgment → 56(a) and (b)</u>
- When each party can move for summary judgment:
  - Δ can move at any time for summary judgment
  - <u>∏ can move only after one of 2 things:</u>
    1) Expiration of 20 days after commencement of the action
    2) After service of a motion for summary judgment by the Δ

<u>Affidavits are permitted but not required → 56(a), (b), and (c)</u>
- Affidavits in support of (or opposition to) a motion for summary judgment are permitted but are not required
- EXCEPT – affidavits may be necessary to oppose a summary judgment if the advocate of summary judgment has provided affidavits or other admissible evidence
- You can't just repeat what you've said in your complaint – that's not enough

Must be "no genuine issue as to any material fact" → 56(c)

- Standard for summary judgment is that there's no issues of material facts – no disputes
- Then, "the movant is entitled to judgment as a matter of law"
- **56(c) – 3rd sentence shows the following standards:**
    1. **No dispute on a material issue of fact**
        - **a.** If this is true – you don't need a trial
        - **b.** Want to weed out cases where you don't need a trial
        - **c.** You only have a trial to resolve disputes of fact
        - **d.** Can simply enter judgment as a matter of law
        - **e.** **The court can never resolve a dispute of fact on summary judgment**
- **You're entitled to judgment as a matter of law**

Partial summary judgments are permitted → 56(d) and last sentence of (c)

- Where they're appropriate, partial summary judgments are permitted
- Hypo: A sues B and alleges breach of K. B was supposed to build a building that met several specifications. Both parties signed it and it contains a K price, and A has the document. It was written out by hand. B responds with a motion for summary judgment saying that this kind of K has to be in writing and this writing is insufficient because a lot of the specifications need to be detailed and so the K meets the standards of the statute of frauds. A doesn't dispute that's the writing, just disputes that it meets the statute of frauds.
    - i. If B is correct that it doesn't meet the statute of frauds, what happens to the case?
        1. He gets motion for summary judgment. Why??
            - a. There is no dispute of material fact
            - b. There is a dispute over the legal significance of the facts
                - i. Judges decide the law – trials just decide the facts
                - ii. The facts are undisputed – A just doesn't think that the writing meets the statute of frauds
                - iii. The judge decides whether the statute of frauds is met, based on the undisputed facts

If affidavits are used, they must be based on personal knowledge and allege facts that would be admissible at trial → 56 (e), (f), and (g)

- If opposing party wants to make an argument, it can't just restate its original pleading
    - ii. Opposing party must provide admissible evidence that suggests "genuine issue as to material fact" (56e)

- Sometimes the opposing party can show, through affidavits, that it doesn't have the admissible evidence to say facts are disputed, but could do so, if it had more time and opportunity to get affidavits or other admissible evidence (perhaps through discovery) (56f)

- But can't ask for more time just to buy time or hoping to get lucky on getting favorable evidence. Should have an idea of what you're looking for – Asking for continuance should be in good faith (56g)