

**Civil Procedure I Outline**  
**Professor Vaughn -- Fall 1998**

**Setting**

- 1) *Can the court(s) adjudicate interests of parties?*
- 2) *What Notice should that court give & how?*
- 3) *Can the court hear this type of case?*
- 4) *In what specific courts in a judicial system must it be brought?*
- 5) *What laws apply?*

**I. Personal Jurisdiction:**

*3 Types: gives state power to decide what your legal rights are.*

1. In personam: over D himself
2. In rem: over all Ds in world w/respect to particular item of property
3. Quasi in rem: over particular Ds w/ respect to specific property w/in court's control.

*Tests:*

1. Statutory: - is there a state law covering jurisdiction?
2. Due Process Clause of 5<sup>th</sup> Amendment of Constitution (14A applies to states): cannot exercise power beyond this. If there is a statute, does the exercise of it fall w/in the parameters of the Constitution.

**A. In Personam**

1. *General J/D*: -sue D for claim that arose anywhere
  - special relationship with the state
  - strong connection between D and state.
2. *Specific J/D*: -sue D for claim that arises in the forum
  - claim arises out of activity that affiliates D w/state.
  - easier to obtain: does not req. many contacts/connections w/ state, only strong contacts which cause of action came out of.

**1. Constitutional Limitations**

- parties directly affected by action must receive fair and adequate notice.
- minimum contacts btwn D or property and forum state so that assumption of jurisdiction is fair and reasonable.
- outer limits of authority for exercising personal jurisdiction.

Pennoyer v. Neff - for court to have authority to exercise personal jurisdiction, D must be served w/process w/in the state in which the court is sitting (where the object of the action is to determine the personal rights and obligations of the parties, service of process by publication against nonresidents is ineffective to confer jurisdiction on the court.

*4 traditional basis for jurisdiction:*

(if any satisfied, enough for ct. to exercise due process and personal j/d can be enforced)

1. presence in state - D present in forum when served (gives general j/d)
2. service in state
3. domicile - (gives general j/d)
4. consent - implied consent or waiver or voluntary jurisdiction

## 2. Expanding the Bases of Personal Jurisdiction

To nonresident companies:

-*Consent theory* - foreign co. could transact business in state only w/that state's consent; state could require corporation to appoint an agent to receive service of process within state.

-*Presence theory*- required that the corporation was "doing business" and "present" in the state; amenable to process if doing business within State in matter & extent as to warrant interference that it is present there.

**Hess v. Pawloski** - expand *Pennoyer* rules, *consent* criteria to incl. *implied consent*: D not a resident & did not consent. But upheld MA non-resident motorist statute → When a nonresident conducted activities (use roads) w/in the state, D consented to be sued according to state laws. The state regulates its laws to protect both its residents and nonresidents indiscriminately. By exercising these privileges, non-resident is obliged to abide by the laws of the state.

## 3. A New Theory of Jurisdiction:

- 1) **minimum contacts w/state and**
- 2) **reasonableness/fairness**

\**International Shoe Co. v. Washington* - State statute authorized mailing of notice to nonresident employers, where served on salesperson w/in state & mailed to D office. (Allows in personam j/d even if don't serve D in state)

→\*5) *Fairness of Due Process* (addition to *Pennoyer* requirements)

*Criteria for assessing minimum contacts:*

- 1) enjoying benefits of state (*quid pro quo* rel. where co. received benefits outside of state & enjoy obligations & privileges under state.)
- 2) nature of relations (ie, continuous & systematic)
- 3) connection btwn P's claim & activities that affiliate D with the state (if claim arises from affiliating activities, then it would be justifiable (ie, driving in MA, get in accident, claim arises from activities))
- 4) inconvenience

-ie, foreign co's systematic & continuous activities → sufficient contacts w/state to make it reasonable to permit P to enforce obligations D incurred in state and maintenance of suit does not offend traditional notions of fair play and substantial justice (Due Process).

→*Long-Arm Statutes*- encouraged states to expand their juris. reach.

consider:

- 1) interest of the forum state in providing redress to its citizens.
- 2) interest of the P in obtaining relief in a convenient forum.
- 3) interest of states in enforcing their substantive law/policy.
- 4) extent of inconvenience to D if she is forced to defend away from home.
- 5) reasonable/unreasonable

*Application of Minimum contacts test:*

- 1) applies to individuals & corporations
- 2) D may have sufficient contacts with a state to support minimum contacts jurisdiction there even though she did not act within the state.
- 3) time when D acted, not time of the lawsuit.

## 4. Specific Jurisdiction and State Long-Arm Laws

Long-Arms provide local forums for local Ps on locally generated causes of action. (long-arm reaches as constitutional fairness allows.)

-McGee v. International Life Insurance Co. - D sells insurance w/in TX. Ins. Co. **solicited** insurance. Ct upheld j/d b/c:

1. *solicitation* - D solicited business in forum state
2. *state's interest* - in protecting its residents & providing forum for them
3. *relatedness* - betwn contact w/ forum & cause of action itself (does cause of action arise from contact)

**NOTE:** interest of P - if have to leave state to sue, may forego suit.

Factors are not determinative by themselves

Hanson v. Denckla - PA forms trust thru DE bank, moves to FL, keeps doing business w/ DE bank. When she dies, relatives fight for \$. →Ct. held that FL did not have j/d over DE bank b/c no relevant contact - contact did not result from **purposeful availment** of benefits & protections of the laws of the forum state (ie, D reaching out to the forum state). - minimum contacts test is threshold for pursuing action (vs. burden on D)

-Gray v. American Radiator & Standard Sanitary Corp. - nonresident's only contact w/state was an injury; Ct. ruled that contact adequate to subject nonresident to j/d of state w/o violating due process; state has j/d if D committed a tortious act in the state. Ct says statute was met b/c injury occurred w/in state (injury here = part of tort itself)

→Illinois statute was within the Due Process clause, b/c place of injury is the most convenient forum.

**\*Note: Fairness** in assertion of personal jurisdiction.

- knew and intended product would reach forum state
- used method of distribution designed to reach forum state.
- received significant benefits from forum state
- suffered no great inconvenience in defending in forum state
- understood if its product/action caused injury in forum state, would have to defend there.

World-Wide Volkswagen Corp. v. Woodsen - bought car in NY dealer, family moved from NY to AZ, car accident & explodes in OK. P brings suit in OK?

yes -manufacturer

yes -N. American importer

? -regional distributor (WW Volks - only did business in CT, NJ & NY)

? -Seaway Motors - doing business in NY

→No jurisdiction b/c no relevant contact & **no purposeful availment**:

1) contact resulted from *unilateral act* of a 3<sup>rd</sup> party (here P was 3<sup>rd</sup> party that did unilateral act of taking car out of state)

2) *foreseeability* is relevant: whether D could foresee that he will get sued in that forum (not foreseeable that product will get to another state).

Burger King Corp. v. Rudzewicz - D entered into franchise agreement (contract)

→A party who establishes purposeful minimum contacts with a state is subject to that state's exercise of personal jurisdiction over him.

→*fairness*: **burden** to show inconvenient is on D (tough std. & relative wealth of litigants is irrelevant).

Asahi Metal Industry Co. v. Superior Court - stream of commerce case.  
Whether there is j/d when minimum contacts are satisfied by placement of product into stream of commerce, coupled w/awareness that its product will reach the forum state?

*Split case:*

Brennan: if could reasonably anticipate product getting somewhere else through stream of commerce, there is purposeful availment & min. contacts req. is met.

O'Connor: need evidence of additional conduct to reveal intent/purpose to serve the mkt in that forum state (ie, advertising in state, marketing thru distributor, designing product for mkt in state)

→reasonableness test: Ct does not exercise j/d b/c says it would not be reasonable to do.

### **5. General Jurisdiction and State Long-Arm Laws**

Helicopteros Nacionales de Colombia, S.A. v. Hall - Mexican co. D purchased helicopters and trained its pilots in Texas. P was killed & sued D in Texas.

→*Test: general j/d if contacts are substantial, continuous or systematic*

-Purchases were not directly related to the transaction giving rise to the suit, & do not constitute sufficiently systematic contacts for D to be amenable to suit in TX.

-Domicile gives general jurisdiction.

**Rule of In Personam:** If D has continuous & systematic ties w/forum, then there is general j/d.

?Is there personam j/d?

First...Statutory Test - look at state statute: every state has statutes that say personal j/d exists if:

1. D is served in that state.
2. D is a domiciliary
3. D is incorporated in that state
4. D is doing substantial business in the state
  
5. non-resident motorist act: *specific jurisdiction* arises from smthg D did in state.
6. Long-arm statutes - trying to get nonresident D  
2 types:
  - can reach to the fullest extent of due process
  - most states - give list of factors for *specific j/d* for claim in the state.  
(transacted business, committed tort in state, owns property in state)

2 things to watch out for

- language of statute - any business vs. substantial business
- exact some language interpreted differently depending on state.  
(ie, Grey vs. American Standard)

NOTE: if there is not a state statute covering j/d, then there is no need to proceed to,

Second...look at **Constitutional requirements**

?Is there a traditional basis like in Pennoyer?

-If yes, probably no prob w/ j/d

-If none of these bases are met...

□Step 1: Contacts □ with the D in the forum

- A. Has to be relevant contact
- B. Result from purposeful availment (D has to reach out to that state in some way)
- C. Foreseeability (renders it foreseeable that D will get sued in that forum)

----Step 2: Fairness

- A. Relatedness (btwn D and the claim)
- B. Convenience (burden on D to show there is a major & severe inconvenience)
- C. State's Interests (provide a forum for its citizens)

**NOTE: Make sure to argue all 4 points:**

**State statute met b/c...not met b/c...**

**Constitutional test met b/c...not met b/c**

## **B. Jurisdiction Based Upon Power Over Property**

→If cannot get in personam jurisdiction, use property as jurisdictional basis

Jurisdiction exists solely b/c control over piece of property & therefore state has authority to determine who owns property (real/tangible/intangible)

→Use Due Process analysis

-control exercised via:

1) **in rem jurisdiction** -P shows that he has a better claim than everyone else; superiority of one person's claim over anyone else.

-state interest in property b/c property in state; satisfies due process test (presence)

2) **quasi in rem jurisdiction**

a) **Quasi in Rem I** - dispute about claims over ownership of property by limited number of individuals - name specific person that he has better title to property than they do. (ie, deed)

-State interest in assuring transferrable title of property in state.

Who owns property? Who has lien on it?

Compare to others, one individual has a superior claim over the property.

b) **Quasi in Rem II** - dispute about claim unrelated to the property (ie, attachment)

- *special appearance*- challenging courts lack of jurisdiction (ie, state does not have control over the property).

- *limited appearance* - defend property on merits of the unrelated claim for judgment limited to the value of the property (in quasi in rem cases)

Requirements:

1. smthg w/ monetary value

2. thing seized must belong or arguably belong to D (Pennoyer)

3. it must be present in the j/d or territorial confines w/in j/d of court

4. it must be seized by court; court must control it

5. somebody must give notice to D

6\*j/d must be *fair* □ (Int'l Shoe fairness test) (how closely related is seized item to the cause of action, then the better the chances that quasi in rem will be sustained)

→assertions of state ct juris. must be evaluated according to standards set forth by Int'l Shoe & its progeny (DUE PROCESS ANALYSIS)

-state's power not enough, must satisfy test of fundamental fairness & reasonableness.

Shaffer v. Heitner - P owned D stock. D subjected to a large antitrust judgment in Oregon. DE statute (if incorporated in state, state could exercise control over stock) & state stopped transfer of stocks.

-D made special appearance, asked Ct to vacate sequestration order

-no basis for personal jurisdiction

-not received due notice = Quasi in rem (2) case

→Rule: Mere presence of property w/in state is insufficient to confer j/d on court absent independent contacts w/in the meaning of International Shoe, which will be constitutional. \* did not satisfy minimum contacts test

?Should quasi in rem j/d be used to govern actions in rem & in personam?

-argument against - people could move property around to avoid j/d

-counterargument -if you exercise personal j/d, that person is still responsible no matter where property is b/c of full faith & credit clause.

?in rem jurisdiction?

- presence of property in state, claims against property would be in state, so it would be unusual for state not to be able to exercise j/d under due process analysis.

Shaffer seems to invalidate quasi in rem (2) j/d

-quasi in rem (2) - your property is w/in our borders

in-personam - you are in the state

→both have interests in the state & the state has control over interests & do not really need quasi in rem.

#### G. A Refrain: ***Jurisdiction Based Upon Physical Presence***

→Fourteenth Amendment (Due Process Clause) does not deny state jurisdiction over a person personally served with process while temporarily in a state, in a suit unrelated to his activities in the state

**Example: Burnham v. Superior Court** - D was personally served with process while temporarily in a CA, in a suit unrelated to his activities in Ca. (divorce).

→(J. Scalia) Regardless of minimum contacts, physical presence & service in state is sufficient to confer personal jurisdiction by the state; due process/fairness considerations are considered only where state attempts to exercise jurisdiction over a nonresident who is not physically present.

-not a burden b/c modern transportation & communication.

-J. Brennan - transient jurisdiction - avail self to benefits of state, by visiting the forum state; consistent w/ reasonable expectations & entitled to due process.

#### J. Challenging a Court's Exercise of Jurisdiction Over the Person or Property

1. Raising the Jurisdictional Issue Directly
2. Collateral Attack on Personal Jurisdiction
3. The Limited-Appeal Problem



### "Sewer" Service

After process-server has delivered the papers, she must file a return, which should disclose enough facts to demonstrate that defendant has actually been served and given notice that he is required to appear in court. A proper return is ordinarily necessary in order for the trial court to conclude it has jurisdiction. Proof of service: affidavit by person who served process, or sworn statement.

### 3. *Service of Process and Statutes of Limitations*

The statutes of limitation impact whether P loses the opportunity to invoke the assistance of the courts to obtain relief of an otherwise valid claim. And an action is not deemed "commenced" until process is served on D.

## C. *Immunity from Process and Etiquette of Service*

### 1. *Immunity from Process*

Immunity extends to witnesses, parties, & perhaps attorneys during the necessary time required to attend the court proceeding.

### 2. *Etiquette of Service*

→A judgment procured fraudulently lacks jurisdiction & is null and void.

(Wyman v. Newhouse - party involved in fraud to serve D

-cannot bring person into j/d by fraud; affects ability to exercise j/d; Ct. concerned w/integrity of process.)

→difference btwn inducing a party to be served in j/d vs. being served while in state.

## D. *Constitutional Right for Notice*

→Procedural due process requires that parties whose rights are to be affected are entitled to be heard at a meaningful time; and, in order that they may enjoy the right, they must be notified.

→For the opportunity to be heard to be effective, need: (Mullane v. Central Hanover Bank)

1. *Reasonable Time*

2. *Actual Service*

3. *Legal Representation*

→Efficient b/c prevents subsequent litigation & the outcome is more likely to be correct.

**Example:** Fuentes v. Shevin - P had her stove & stereo picked up by the sheriff prior to adjudication of a suit filed by Firestone for nonpayment of the installment sales contract.

→Notice and an opportunity to be heard prior to the seizure of property (hearing).

-An individual must be given an opportunity to be heard before he is deprived of any significant property interest, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."

**Example:** Connecticut v. Doe - CT law permitted ex parte judgment attachment of real estate w/o a showing of extraordinary circumstances.

→Mathews v. Eldridge - balancing test of prejudgment remedies:

1) Will private interest be affected by prejudgment measure?

2) Risk of erroneous deprivation of that interest?

3) Interest of the party seeking the prejudgment remedy?

→A state may not allow ex parte prejudgment attachment of property w/o prior notice or hearing w/o a showing of extraordinary circumstances. & w/o requiring posting a bond.

3 exceptions to notice of hearing:

1. seizure is necessary to secure governmental or public interest

2. need for very quick action

3. state has kept strict control over its monopoly of force, the person initiating the seizure has been given a govt' official responsible for determining under the stds of a narrowly, drawn statute, that it was necessary & justified in the particular instance.

#### IV. SUBJECT MATTER JURISDICTION

What court do you go to? → State or Federal?

-Federal Courts require both personal j/d and subject matter j/d to go forward,  
hear cases that incl: 1. diversity of citizenship  
2. federal question

State courts - general subject matter jurisdiction (SMJ)  
-only exceptions are cases that have exclusive federal juris.

##### A. Subject-Matter Jurisdiction in State Courts

Whether the particular court has jurisdiction over the subject matter of the action?

**Example:** Lacks v. Lacks - P moved to vacate D's divorce final judgment contending that the entering court lacked subject matter jurisdiction.

→ A final judgment is not void for lack of subject matter jurisdiction, if the defect alleged concerns a judicial error as to the existence of a necessary element of the cause of action.

##### B. Subject-Matter Jurisdiction of the Federal Courts -- 28 USC §1332

###### 1. Diversity of Citizenship

req.: 1. dispute btwn citizens of different states (not nec. btwn residents)  
2. amt. in controversy exceeds \$75,000

a. Citizenship of Individuals = domicile

→ the place of his true, fixed & permanent home & principal establishment, and to which he has the intention of returning whenever he is absent;  
→ citizenship at time claim was filed

1332(c)(1)

b. Citizenship of Corporation = incorporation and principal place of business.

Tests:

- 1) nerve center test - ppb- where decisions are made. Co. hq
- 2) corporate activities or operating assets test;
- 3) total activity - where bulk of activity (ie, biggest plant)

c. Citizenship of unincorporated parties/ associations = citizenship of all members  
ie, law firm has partners from 12 states = law firm citizen of all 12 states

1332(c)(2)

d. Representative suits (for minors, incompetents, decedents) = citizenship of represented person (ie, citizenship of decedent, not executor)

**Example:** Mas v. Perry - pervert landlord D appealed damage award contending that federal court lacked subject matter jurisdiction b/c lacked diversity of citizenship.  
→ Mere residence in a state does not establish domicile for purposes of diversity jurisdiction, until he formulates an intent to permanently remain in another state.

**Example:** A Civil Action -

<u>Plaintiffs</u>	vs.	<u>Defendants</u>	<u>Inc.</u>	<u>PPB</u>
MA		Beatrice	Del.	IL
		Grace	CT	NY

-Join Charles Anderson (living in Canada, not domiciliary of U.S.)

→ not alien, not U.S. citizen under 28 U.S.C. 1332

###### 2. Amount in Controversy

→ 28 USC § 1332(a) - the matter in controversy must exceed the sum or value of \$75,000, not including interests and costs.

→ Amount in controversy is determined by a pecuniary consequence to those involved = ***past losses + potential harm.***

-Complaint governs, unless it is clear to a legal certainty that P cannot recover that much.

- Sufficient if there is a probability that the requisite amount will be recovered.
- Aggregation* -- have to add 2 or more claims to get over \$75,000
  - can be done if there is one P vs. one D only
  - multiple Ps cannot add up their claims, each P has to meet j/d amt requirement.
  - if there is single indivisible harm or claim over \$75,000 & multiple Ps (or Ds or both), still meets amt in controversy

**C. Federal Question Jurisdiction --- 28 USC §1331**

Summary: - "*arising under*" federal law (constitutional or statute or treaties, etc)  
 -not waivable by the parties  
 -raised by the court  
 -well-pled complaint  
 -implication of Federal Declaratory Judgment Act - declaration of rights under fed. statute

*private rights of action*

- if not implied, claim under the law
- how silence is treated
- federal law incorporated into state law

3 main questions:

1. Is there power?
  - constitutional?
  - congressional?
2. Can it be executed? (statutory prohibition)
3. May it be? (discretion)

*Note:* anytime mentions "Congress," think federal law (probably fed. question issue)  
 ask whether or not P is enforcing a federal law

- mere presence of a federal law does not make it a federal question
- P's cause of action must be based on a violation of federal rights
  - look at P's complaint (not counterclaims, etc)
- Well-pled complaint rule* □ court will only look at what claim is about:
  - Complaint - P
  - Answer - D
  - Reply - P

**Example:** *Louisville & Nashville R. Co. v. Mottley* - Congress passes a statute forbidding free RR passes. P claimed federal jurisdiction by claiming that D would raise a constitutional defense in their answer/response, thus raising a federal question.

→Even though complaint alleges claim arose out of a federal questions, no basis for federal jurisdiction b/c P's claim really arose out of breach of contract. P raised federal question as an anticipated constitutional defense & also no diversity of citizenship between the parties.

→*Object/waive* lack of federal jurisdiction; subject matter jurisdiction can be challenged at any stage of proceeding.

OR Supreme Court can raise on own merits own motion re: subject matter jurisdiction (interest in constraining courts to authority w/in Constitution to make sure that federal courts don't exceed Constitutional authority)

→Whether federal statute creates a private right of action

- How silence is interpreted →against; If the Act is silent (legislative intent), the courts will not imply a private right of action, unless the Act expressly provides the right or otherwise foreclose the right. (b/c of uniformity of control of behavior of parties.)

?Does a private right of action of federal statutes justify federal question jurisdiction?

-incorporation of federal law into state claim:

**Example:** Merrell Dow Pharmaceuticals Inc. v. Thompson - D argued that the presence of a federal standard (FDA) in a state law private action created federal question jurisdiction, even though the standard carried no federal right of action.

→No fed question j/d, when there is just an incorporation of a federal standard in a state law private action, & when that standard creates no federal right of action.

**Example:** Smith v. Kansas City Title & Trust Co. - state-created cause of action that turned on federal issues (whether a Missouri law to enjoin the investment in securities where the issuance of unconstitutional)

→Federal jurisdiction, b/c federal law is integral part of state law & the interpretation of federal law was necessary to determine the claim.

In A Civil Action:

-Federal Groundwater Protection Act:

1. Act specifically states that injured parties may bring an action for damages under the statute →complaint could be brought in federal court.
2. Act specifically states that it creates no private right of action →complaint would be in state court
3. Act is silent on the issue

would use Cort v. Ash test to decide

-could treat as if there is a right or as there is no right

NOTE: Cort v. Ash resolved question w/ a bias against fed. j/d

Cort v. Ash test: whether a private right of action should be implied from federal statute that does not expressly provide for a private remedy.

1. Is P one of the class for whose especial benefit the statute was enacted
2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?
3. Is it consistent with the underlying purposes of legislative scheme to imply a remedy for P?
4. Is cause of action one traditionally relegated to state law, in an area basically the concern of the states, so it would be improper to infer a cause of action solely on fed. law?

**D. Supplemental Jurisdiction**

Constitutional power statutorily granted §1367(a)

Exercise of power statutorily prohibited §1367(b)

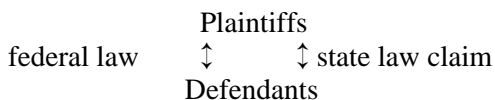
Court's discretion to exercise supplemental jurisdiction §1367(c)

-Every claim joined in federal court must also have basis for subject matter jurisdiction.

-Allows federal court to hear claims over which there is no diversity or federal question

NOTE: Do not mention supplemental jurisdiction unless there is no diversity or federal question.

United Mine Workers of America v. Gibbs - P filed claims for violation of §303 of the Labor Management Relations Act and a state law claim, based on pendent jurisdiction, that there was an unlawful conspiracy & boycott aimed at him to interfere with his employment contract.



→When there are both state and federal claims involved in the *same set of facts* and the claims are such that the plaintiff would ordinarily be expected to try them all in one judicial proceeding, the federal court has the power to hear both the state and the federal claims, as long as the federal claims have substance sufficient to confer subject matter jurisdiction in federal court.

→Are the claims closely related enough that they arise out of a "common nucleus of operative facts" that they can be treated as the same constitutional case or controversy (Gibbs test)

*common nucleus of operative facts = same constitutional case or controversy*

-Constitutional case or controversy [different than same cause of action]

b/c of judicial efficiency in hearing claims closely linked in facts & legal issues, & the federal court is more adept in addressing questions re: federal questions.

-1367(a) *-common nucleus of operative facts = same constitutional case or controversy* (codified the Gibbs test) - Gives supplemental j/d over any claim that arises out of a common nucleus test. FIRST, must pass this same case or controversy test. If yes, then move onto (b)

-1367(b) *Limitations:*

1) applies only to claims where original smj founded solely on diversity (not to federal question cases)

2) no supplemental j/d, if claims brought by Plaintiffs.

-1367(c) *Judicial Discretion*

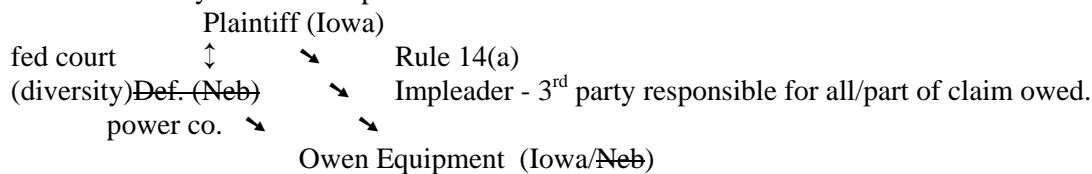
-Lists reasons ct. can use to deny supplemental j/d over claim, even if it does meet common nucleus test.

-Ct. has ability to exercise discretion throughout trial.

**Example:** Aldinger v. Howard - pendant party

→*statutory prohibition* - Although claims met Gibbs "common nucleus of operative fact" test, Congress prohibited exercise of Constitutional authority to federal jurisdiction, where the statute stated opinion and intent that an individual cannot sue the state county.

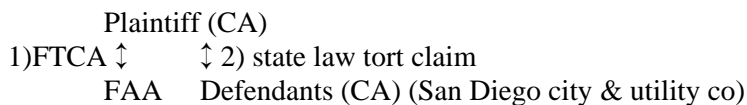
**Example:** Owen Equipment v. Kroger (p294) - filed claim against power co in federal court based on diversity of citizenship.



→*Plaintiff doing indirectly, what cannot do directly* - Plaintiff could not have brought suit against plaintiffs b/c at the time complaint was filed would have violated complete diversity requirement of §1332. (statutory prohibition)

→Plaintiff's option would be to bring case in state court.

**Example:** Finley v. United States - first brought suit on federal claim, then state claim.



→Affirmative statutory grant is required. Congress must affirmatively grant constitutional power. see §1367 (vs. Gibbs) - granting jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties.



## 2. Collateral Attack on a Judgment for Lack of Subject-Matter Jurisdiction

### V. VENUE

3 different kinds:

1. common law venue provision - local action rule
2. statutory 1391
3. statutory 1441(a) -removed actions

-waive venue objections in advance through contracts.  
-purely statutory

**A. Rules for Venue** - place/district of trial in an action w/in a state.

§1391 - applies when P is applying, not in removal cases (S. 1441)

1391(a) 1. diversity choices

1391(b) 2. federal question choices

→ 1. P can lay venue in any district where all Ds reside

2. or, in any district where a substantial part of the claim arose (ie, may be in more than 1 district)

-If all Ds reside in diff. dist. of same state, can sue in any of those districts - residence & domicile.

#### **1. Local and Transitory Actions**

Common Law venue limitation (minority rule)-

→ "**local action rule**" - bring claim where land is; if a local action cannot be brought at the situs of property because of lack of jurisdiction of the defendant, the action may be brought in the state where the defendant resides.

-purpose: states cannot pass title or handles disputes over land in other states, convenience & respect for state sovereignty

-applies b/c in damage claim, it is established that it is the claimant's property & in order to establish/confirm property title, it has to be brought locally.

1391(c) Corporations-

→ defendant corporations - §1391(c) - resides in any court where subject to personal jurisdiction at time action commenced = where licensed to do business or actually conducting business

→ specific jurisdiction - claim arising out of activities

→ general jurisdiction - minimum contacts

\*-if claim arose in a district in a state w/o a long-arm statute, the district court may not be able to secure jurisdiction over the defendant.

→ Proper venue for unincorporated associations is where the association itself resides, and not residence of its individual members.

→ In a state w/more than one judicial district, a corporation is deemed to reside in any district w/in which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate state -- §1391(c)

#### **B. Transfer of Venue in Federal Courts**

28 USC §1404 - change of venue

-state court - can only transfer w/in that state, not btwn states

-federal court - can transfer to another federal court (note difference from removal

**Rule:** Plaintiff can transfer only to a federal district court that has personal j/d (where could have originally brought the case) (apply personal j/d requirements) & has proper venue.

1404(a) → when original ct. is a proper venue, may change for

- 1. "for convenience of parties & witnesses"
  - or 2. "in the interest of justice"
- 1404(b) - applies when original ct. is an improper venue
- 1. transfer in interest of justice
  - or 2. dismiss
- Choice of law: Apply law of transferred-ordered court (rules of original court)
- motion to transfer is not final judgment; as long as order is not abuse of discretion, parties can appeal

**Example:** A Civil Action

MA vs. Maine (less pre-publicity) → MA law applied.

Defendants strategy was to delay litigation, plaintiff's burden, not addressing merits of the case.

### **C. Forum Non Conveniens**

-P usually given choice of courts to ensure has a place to pursue a remedy.

But, forum non conveniens allows ct to dismiss b/c a better alternative forum exists (state court/court of foreign country) b/c balance of convenience is strongly in favor of another ct.

b/c the principle of forum non conveniens is that a court has the discretion not to impose jurisdiction even when jurisdiction is authorized by the general venue statute.

-court's discretion - common law tradition by courts to exclude from jurisdiction, even though comply with all requirements.

→balancing test -private vs. public interests (weigh burden, not fairness)

-private interests:

- 1) relative ease of access to sources of proof,
- 2) availability & cost of obtaining witnesses,
- 3) possibility of viewing premises, if appropriate to action,
- 4) enforceability of judgment, once obtained.

-public interests:

- 1) administrative efficiency
- 2) local interest in having localized controversies decided at home,
- 3) conflict of laws (esp. foreign laws), choice of law (confusion), inconsistent verdicts.

→unless balance strongly in favor of defendant, plaintiff's choice of forum remains b/c satisfied all requirements & presumption that most convenient forum. (Gulf Oil Corp. v. Gilbert); does not apply to foreign plaintiffs.

→Plaintiff may not defeat a motion to dismiss for forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favorable to him than that of the present forum.

**Example:** Piper Aircraft Co. v. Reyno - air crash in Scotland; all victims other plaintiffs live in Scotland. Piper (D) moved to dismiss for forum non conveniens, contending that Scotland was the proper forum. P opposed motion on basis that the Scottish laws were less advantageous to her than American laws.

Plaintiffs (rep. of 5 victims)

CA state court

Piper Hartzell → 1441 Removal (diversity) → 1404 Middle Dist. PA  
(PA) (OH) Fed. Dist. Ct. in CA

→Most convenient forum is Scotland: all evidence, witness, & interests.

→law of other forum sometimes considered; if so unfavorable, it offers no remedy, then trial should remain. But not in this case.

→International Trade - if foreign plaintiffs are injured overseas, cannot bring action against U.S. in U.S.; foreign manufacturers sell products to U.S., foreign manuf. are held to U.S. laws.

**Example:** Union Carbide & India → cases are tried in India under forum non conveniens.  
-International trade policies re: standards of U.S. manufacturers should be held to?

### **Challenging Jurisdiction and Venue**

Federal Rule 12

2 choices if you get sued:

1. file an answer/pleading in response to complaint (no later than 20 days after service)
2. bring a motion/request to court (no later than 20 days after service of process)

Timing - no later than 20 days after service of process; 10 days after more definite statement

Rule 12(b) - 7 defenses that D can put in his answer or by motion (ie, motion to dismiss)

(1) lack of subject matter jurisdiction -

## **VI. ASCERTAINING THE APPLICABLE LAW**

What if law is not a federal rule of civil procedure?

- Erie law applies

- If substantive, state law applies

Tests: 1. outcome determinative (Guaranty Trust) - outcome of case should be same in fed. ct as in state court.

2. balance the interest (Byrd) - balance interests of state & fed (judge/jury)

3. avoid forum shopping (Hanna) - If fed ct did something different than what state would do, would that cause Ps to flock to fed. ct.

### **A. State Law in the Federal Courts**

**Applies only to diversity cases**

1. **The Rule of Swift v. Tyson** - 1789 Rules of Decision Act left federal courts unfettered to apply their own rules of procedure in common law actions brought in federal court.

2. **The Erie Doctrine: The Rules of Decision Act and the Rules Enabling Act**

→**The Erie Doctrine - State law governs substantive issues** (state law includes both statutory law & case law); **federal ct. may apply their own procedural rules.**

Test: 1) "outcome determination test" - a substantive law question under Erie is any question in which permitting application of federal law would *alter the outcome* of the case. Where a state statute that would completely bar recovery in state court has significant effect on the outcome-determination of the action, even though the suit be brought in equity, the federal court is bound by the state law.

**Example:** Guaranty Trust Co. v. York - P was barred from filing suit in state court b/c of state statute of limitations & brought an equity action in federal court based upon diversity of citizenship.

→The statute so affects the result of the litigation as to be controlling in state law. The outcome of a case should not be affected by the choice of court in which it is filed.

→ The Erie doctrine requires that federal courts in diversity cases must respect definitions of rights & obligations created by state courts, but state laws cannot alter the essential characteristics & functions of federal courts.

Test: Balancing test - balance the respective interest of the fed. & state system Who has greater interest in the rule. Regardless of the outcome, some constitutional doctrines (ie right to a jury trial in federal court) are so important as to be controlling over state law.

**Example:** Byrd v. Blue Ridge Rural Electric Cooperative, Inc. - P brought suit in federal court (diversity of citizenship) against D for negligence. Under South Carolina law, fed.court held that immunity was a question of law to be tried by a judge. →jury function is such an essential function in the federal process provided for in the 7<sup>th</sup> Amendment, protected by the Constitution.

→If matters fall roughly between the two and are rationally capable of classification as either substantive or procedural, the Constitution grants the federal court system the power to regulate their practice and pleading (procedure) →federal rule should apply

→vs. "outcome determination test"

-consideration in determining how a questions should be classified (substantive or procedural):

Test: 1) avoid "forum shopping" - choosing one forum to file in, in order to gain the advantages of one, which permits jurisdictions to infringe on the substantive law defining powers of each other.  
2) avoid inequitable administration of the laws which result from allowing jurisdictional considerations to determine substantive rights.

**Example:** Hanna v. Plumer - direct conflict btwn substituted service under fed. law, state law required personal service. →fed law applies

→The ***Enabling Act for the Federal Rules of Procedure*** requires that a procedural effect of any rule on the outcome of the case be shown to actually "abridge, enlarge or modify" the substantive law.

→Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any (diversity) case is the law of the state.

**Example:** Walker v. Armco Steel Corp. - P contended that Rule 3 of the Federal Rules of Civil Procedure governed the manner in which an action is commenced in federal court for all purposes, including the tolling of the state statute of limitations.

→In diversity actions, Fed. R. Civ. P. 3 governs the date from which various timing requirements of the federal rules begin to run but does not affect the state statute of limitations.

→In a federal diversity suit, federal rules, not state rules, should apply in motions (ie, motion for change of venue) b/c Constitution gives Congress the power to create pleading rules for courts created by it, as are district courts; statute was within the power of Congress.

→Erie principle precludes a federal court from giving a state-created claim longer life than the claim would have had in state court; conversely, Erie precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.

**Example:** Gasperini v. Center for Humanities, Inc. - excessive damage award. Different standards of determining damage awards in NY vs. federal court.

## VII. PLEADINGS

What can the pleadings reasonably be expected to accomplish?

- 1) Provide information
- 2) Narrowness
- 3) Weed out claims
- 4) Give notice of the nature of the claim\*

1938 - Federal Rules of Civil Procedure enacted as a New Deal statute reflecting philosophical & political opinions of the period (Depression/New Deal period), thus should expect change w/time re: interpretations.

-Intent of enactment of Federal Rules of Civil Procedure:

- 1) increase access to court, thus will improve quality of justice & thus society.
- 2) procedure as way of getting to resolution, not as ends of itself.

-legal realists vs. formalism

legal realists - restraint of rules placed on persons who are subject to them

formalism - rules control result in cases

Therefore, Federal Rules substitute procedural uniformity w/lack of substantive predictability/ uniformity.

#### **A. *The Complaint*** (Code Pleading vs. Federal Rule pleading)

##### **1. *Detail Required Under the Codes***

→require "facts sufficient to constitute a cause of action"

(what, when, where, who, how, etc.)

(interpreted in light of 4 purposes of pleadings)

→Problems with code pleadings b/c:

- great weight given to the pleadings
- inconsistent, technical rules

**Example:** Gillispie v. Goodyear Service Stores - problem b/c plaintiff makes conclusion of law. →The complaint must state facts sufficient to constitute a cause of action.

**Example:** McCaughey vs. Schuette - Plaintiff pled evidentiary facts, instead of ultimate facts. →Court requires that plaintiff narrow issues for trial w/ ultimate facts.

#### **Rule 8(a)**

##### **2. *Detail Required Under the Federal Rules***

Complaint: (all three required, or else will be dismissed) (fewer technical rules)

1. Statement of subject matter jurisdiction
2. short and plain statement of the claim
3. demand for judgment

→**Notice of the nature of the claim** (#4) (purpose of Federal pleadings)

-Rely on pretrial procedures to encompass purposes of pleadings:

- 1) provide info →discovery
- 2) weed out claims →summary judgment
- 3) narrow issues →pretrial motions

-favorable to Plaintiffs - advantage of Federal Rules in increase access to court system. [vs. open door to frivolous litigation →Rule11]

-Defendant's argument against Federal Rules - complaint may not say much & therefore defendant does not know what plaintiffs know; therefore, lead into discovery phase where burden on defendant before he gets to challenge whether case has merits; likely to settle case through discovery process and eliminate importance of trial = 95% cases are settled b/c don't know all claims/facts.

-Detail & Interpretation

-Form (Rule 10)

-Caption

-Local Rule (Rule 83) - procedural problems cannot rule substantive issues obsolete & cannot dismiss claim if fail to comply w/

-Structure (Rule 10(b))

-Attachments (Rule 10(c) - part thereof for all purposes; defendant can treat as part of defense)

-Signature

- Content (Rule 8(a))
- Defense → Motion to Dismiss under Rule 12(b)(6) for failure to state a claim.
- ?legally proficient vs. professionally competent claim?
  - amount of detail required?
  - implying/infering claims
  - looking for different theories

**B. Response**

Respond in 2 ways:

1. motion
2. answer

**1. Preliminary Motions 12(e),(f),(b)**

12(e) - Motion for More Definite Statement

12(f) - Motion to Strike (have to show that matter is obviously false & unrelated to claim; even if unrelated, often have to show that matter would prejudice claim in favor of plaintiffs)

→12(b) - Defenses

Waiver?

(raised at any time) no (1) lack of jurisdiction over the subject matter - **never waived**

-Rule 12(h)(3) (**Waiver**)

Rule 12(h)(1) yes (2) lack of jurisdiction over the person

Rule 12(h)(1) yes (3) improper venue

Rule 12(h)(1) yes (4) insufficiency of process

Rule 12(h)(1) yes (5) insufficiency of service of process

Rule 12(h)(2) (6) failure to state a claim upon which relief can be granted

(7) failure to join a party under Rule 19.

→Challenges are waived if not included in the answer under *Rule 12(h)*, except 12(b)(1) lack of jurisdiction over the subject matter b/c court can raise later.

**2. Answer - Rule 8**

-general denials

→If don't respond to allegations, then it is admitted.

failure to deny = admission

Rule 8(b)

**a. Responses to Allegations in Complaint**

1)lack of knowledge or information→effect of denial.

-general denial does not allow plaintiff to respond if defendant denies everything, as opposed to specifically denying certain things.→ denial can't be done in good faith; ? of tactical risks

2)Admit

3) Deny

4) Admit in part/ deny in part

-Conclusions

-Information contained in the answers

Rule 8(c)

**b. Affirmative Defenses -**

- must put in answer - list many -

-defendants must raise affirmatively defenses that do not flow logically from the plaintiff's complaint; defendant not challenging elements of plaintiff's case & defendant has burden of persuasion.

-seeking to avoid claims, not to deny claims

-element of surprise

-the risk of not bringing up an affirmative defense → waive defense

**-Ethical Concerns** - when denial of material facts that are true

- ABA Rule 3.3 - denial of material facts
- ABA Rule 5.1 - supervising attorney must take remedial measures, if he knows of specific conduct, otherwise he will be held liable
- ABA Rule 52. - responsibilities of subordinate attorney

**C. Amendments - notice of other claims - Rule 15**

**Rule 15(a) - Right to Amend**

1. P has a right to amend once before D serves answer  
(Note: Motion does not = answer)
2. D has right to amend once w/in 20 days after serving answer
3. w/ court's permission
  - Amendments should be "freely given *when justice so requires*" → when in doubt, amendment should be allowed; get to determination on merits of claim

A Civil Action

1<sup>st</sup> Amendment -

2<sup>nd</sup> Amendment - accused Beatrice/Riley of dumping

- interference with family relationships
- delay* - info plaintiffs always knew & raising issues at last minute.
  - had made additional amendments before & never included before.
- prejudice* - defendant argue that impose unjust burden on defendant to change course of discovery. Court ruled that no, defendant would have incurred expenses/problems of discovery if brought in original complaint & timely made.
- futility* - no legal basis in MA law for new legal claim
  - factual futility - plaintiffs can't prove new claim.

-abuse of court's discretion

-final judgment rule - immediate review of order is limited only on appeal after trial.

**Rule 15(b) - Variance between pleading & proof**

- can amend the complaint to conform to the evidence. Even at trial, P can move to amend.
- emphasis on trial on merits of case via evidence, rather than what is contained in pleadings.
  - D can object - if at variance
    - keep evidence out
    - allow to amend

If D does not object, evidence is allowed & treats complaint as though amended.

-When issues are not raised in pleadings, issues are tried by express or implied consent of the parties and treated as if they had been raised in the pleadings, b/c by their behavior (not objecting) they have agreed to try issue.

-Objection: If the defendant had objected, the objecting party has the burden of proving that the evidence would prejudice them on the merits of the case.

If the defendant proves prejudice & the court has erroneously allowed introduction of evidence, the court may grant a continuance to enable the objecting party to meet the evidence.

**Rule 15(c) - Relation Back**

Statute of Limitations -amend after statute has run

2 possibilities:

- 1.amend to add new claim
- 2.amend to add new party

→Treat amended pleading as tho it were filed when the original was filed.

- 15(c)(2) →Relation back for new evidence - Amendment of pleading relates back to original pleading, where the claim/defense "arose out of the conduct, transaction, or occurrence" set forth in the original pleading. (not a cause of action)
- 15(c)(3) →Relation back for new party  
*example:* Assuming that the statute of limitations has run to add new claims, plaintiff can use "relating back" to add new claims, alleging that claims are factually related in broader law, b/c interested in fairly resolving claims on merits.  
*example:* A Civil Action -Adding new plaintiffs - Rule 15(c)(3)  
 -Changing identity of defendant - Rule 15(c)(3) - accounts for mistake in naming defendant's company name.

**D. Rule 11** - ethical principles

-Effort to avoid frivolous claims ?Is there a good basis for making the allegations?

*1983 Amendments*

problems: treatment of legal arguments (don't want to limit novel arguments)  
 law firm responsibility  
 sanctions required "shall"  
 fee shifting was principal sanction  
 American vs. English rule  
 disparate impact on parties  
 volume of litigation

impact on pleadings - more specific pleadings (ie, specific evidence)

*1993 Amendments*

"absent exceptional circumstances"

Responses to problems identified w/1983 provisions

incentives to monitor practices of attyns w/in firms

applies to all pleadings

11(c)(1) sanctions against attys/firms/parties

11(c)(1)(A) (A) motion made by opposing party

***Safe Harbor provision*** - requires party to serve motion first before filing with the court (21 days to response) →reduce litigation to allow parties to alter their position

-allowed to withdraw complaint (formal/informal procedures)

*example:* Civil Action- Cheesman sent an informal letter

informal letter - no certainty to seriousness of threat

-questions reasons for filing motion, questions claims.

vs. formal letter - indicates seriousness of threat.

11(c)(1)(B) -*On Court's Initiative* - Courts can file Rule 11 motion on own initiative → Skinner's Second Rule 11 motion. If initial complaint found to be invalid, plaintiff has to show why it has not violated Rule 11(b) = have to alter complaint.

11(b)(3) -*identify allegations after further discovery.*

permits plaintiff to submit claim where have evidentiary support now and allows reasonable opportunity for further investigation/ discovery to support claims. (A Civil Action - Schlichtman could have protected self from Rule 11 under 1993 amended rule 11(b)(3).

11(c)(2) -*Sanctions are discretionary*, no longer mandatory

-limited to what is sufficient to deter repetition of such conduct.

-focus on monetary sanctions

11(d) -*\*not applicable to discovery*

- interpreting "reasonable under the circumstances"  
*objective* - what a reasonable person under these circumstances would believe it was reasonable (acting in good faith may still violate)  
*not subjective* - did they think they were doing the reasonable thing?

## A Civil Action

### Cheeseman's Strategy

- delay proceedings on case on merits (force P to address Rule 11 motion, rather than on developing claims) (slow down process)
  - intimidation
  - highlight weaknesses in plaintiff's case
  - acquiring information
  - using plaintiff's resources (see what evidence P had)
- Cheeseman - relied on newspaper article & lack of scientific evidence, etc.

### Schlickmann's press conference

- Rule 3.6 ethical rule on pre-trial publicity - extrajudicial statements are barred if there is a reasonable likelihood vs. substantial likelihood (present rule) of interfering w/ a fair trial. →Schlickman had greater flexibility in making public statements then, under older rules.)
- responds by stating that he could not testify against own client & evidence (hrs. worked, test wells, leukemia clusters)

### Facher's attitude

did not join in motion →knock down a man once.

### Skinner's view

- dismiss Rule 11 motion - can't use Rule 11 to harrass where there is a claim; Rule 11 is to determine whether there is substance to the claim that the plaintiff is bringing. By consulting with experts to the validity of circumstantial connections indicates that plaintiffs had knowledge other than circumstantial evidence.
- later, grant Rule 11 motion at end of trial

## **VIII. JOINDER OF CLAIMS AND PARTIES: EXPANDING THE SCOPE OF THE CIVIL ACTION**

*What claims, what persons [may, should, must] be part of the litigation?*

*Does the rule permit joinder?*

*Is there subject matter jurisdiction? (diversity / federal question)*

### **A. Joinder of Claims**

#### **1. Rule 18**

- "may" - does not require joining the claims.
- as many claims as the party has against an opposing party
- assert if have asserted certain claims  
 may be required to join claims under *res judicata* b/c under same cause of action.
- Arguments for not joining claims: *confusion, complexity, prejudice*  
 Respond w/ Rule 42(b) -- the court may bring separate trials.  
 Burden is on the defendant to show that claims should not be joined.

#### a. Claims do not need to be related

Claim preclusion - what kinds of claims can be brought together at same time  
 →if same part of action.

#### b. Subject Matter Jurisdiction test

- 1) original subject matter jurisdiction
- 2) supplemental jurisdiction  
 1367(a)  
 then, 1367(b)

then, does it arise from 1332

**Example: Joining unrelated state law claim**

Plaintiff (Maryland)

federal unrelated state law claim

Defendant (Maryland)

→Rule 18 permits joinder of claims, but lack basis for subject matter jurisdiction.

1) original subject matter jurisdiction - No original subject matter jurisdiction b/c no federal question & no diversity of citizenship.

2) supplemental jurisdiction - No supplemental jurisdiction under 1367(a) - not part of same case or controversy

**Example: Joining related state law claim**

1) Joinder permitted under Rule 18

2) No original subject matter jurisdiction b/c no federal question, not diversity.

✓3) Supplemental jurisdiction under 1367(a) b/c related federal and state law claims that they form "part of the same case or controversy."

-Note: 1367(b) does not apply b/c relates only to original jurisdiction founded solely on diversity of citizenship (section 1332)

→Rule: A plaintiff may unite causes of action where they have arisen from the same transaction/transactions connected with the same subject matter.

**B. Claim Joinder by Defendants**

13(a)

1. **Counterclaims** = claim against an opposing party (ie, against P)

2 types: compulsory

**a. Rule 13(a) - Compulsory Counterclaims**

→A counterclaim that *arises out of the transaction/occurrence* that is the *subject matter* of an opposing party's claim is a compulsory counterclaim.

Must be filed in the pending case, or else it is waived

"shall" - required/compulsory

opposing party

*same transaction or occurrence* → apply *logical relationship test*

→Relationship between logical relationship test w/ subject matter jurisdiction test

**same case or ← common nucleus ← same transaction ← logical relationship**

**controversy of operative facts or occurrence**

**1367 Rule 13(a)**

Even though can assert counterclaim, have to pass subject matter jurisdiction test:

1) original

2) supplemental

1367(a)

1367(b)

1367(c)

→**Consequences of Failing to Plead a Counterclaim:**

-if fail to raise a compulsory counterclaim, can't assert it in a subsequent suit in a federal court.

**b. Rule 13(f) Omitted Counterclaim**

- If fail to bring counterclaim in answer, can amend by asking leave of court, under 13(f) or 15(b) in another action □ ct's discretion.

**c. Rule 13(b) Permissive Counterclaim**

-If claim does not arise out of same transaction/occurrence, may bring claim somewhere else ( can file separately) (claim must be based on some independent ground of federal jurisdiction)

→Defendants often want to assert their claims are compulsory counterclaims b/c 1) want to assert claims in action in federal court, 2) if no original subject matter jurisdiction, can assert claim under supplemental subject matter jurisdiction.

**13(g)**

**2. Cross-Claims** -against a co-party

-if arise under the "same transaction or occurrence"

-"may" (not compulsory to assert cross-claims)

confusion, complexity, prejudice argument →42(b) response

may want to assert cross-claim in another jurisdiction

-Once a cross-claim is asserted, under Rule 18(a) the party can assert another claim that is not allowed. (Rule 18(a) - can assert as many claims against party)

**Example: Lasa v. Alexander** - cross-claim among defendants- Principal contractor hired Alexander (D) as subcontractor to build Memphis City Hall. D contracted w/ LASA (P) to supply it w/ marble. P filed suit, when after fully performing its contract, D still owed balance on contract price.

Lasa

counterclaim (breach of contract)

Alexander

cross-claim → prime contractor, surety, City of Memphis

third-party complaint → architect

→Cross-claims, counterclaims, and third-party complaints arising from the same transaction or occurrence as the subject matter of the original complaint may be joined w/ the original complaint.

-Although different subcontracts involved, they are all relate to same problem arising out of the installation of the marble & words "transaction or occurrence" are interpreted broadly in order to avoid multiplicity of suits. Before the plaintiff can collect, the cross-claims have to be tried with original suit.

-judge's discretion - Although there are complications with cross-claims, the court has the discretion to resolve the counterclaim in one action or order separate trials, under Rule 42(b).

-Once one of the defendants attacks another defendant, they become opposing parties.

**Example:** Cross-claim between plaintiffs

Plaintiff (CA) → 13(g) contribution → Plaintiff (Nev)

↘ 13(a)

↘ counterclaim

Defendant (AZ)

1. Does the joinder rule apply? (differing interpretations of 13(g))

a) No counterclaim pending against plaintiffs → plaintiffs cannot assert cross-claims.

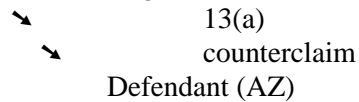
vs. b) broad interpretation - exact text of 13(g) can assert cross-claim against a co-party.

2. Subject Matter Jurisdiction

Yes, original subject matter jurisdiction b/c diversity of citizenship.

**Example:** cross-claim between plaintiffs

Plaintiff (CA) → 13(g) contribution → Plaintiff (CA)



## 2. Subject Matter Jurisdiction?

1) Original - No basis for original subject matter jurisdiction b/c no federal questions, no diversity of citizenship.

2) Supplemental - Constitutional test

a) 1367(a) - common nucleus of operative facts = same transaction

→ arise out of same transaction/occurrence → satisfied

b) 1367(b) - applies only when 1) original subject matter jurisdiction is based solely on diversity and 2) if the plaintiff brings the claim.

→ claims by plaintiffs → satisfied.

→ plaintiffs had joined parties under Rule 20 → can't assert supp. juris.

Owen scenario - "inconsistent with jurisdictional requirements" of diversity of citizenship → can't do indirectly what can't do directly.

→ would not be able to file b/c no diversity of citizenship. (depends on context of claims, b/c presumes that plaintiff chose the forum & therefore should not complain == about not being able to assert all claim there, BUT ie, in Civil Action, Plaintiff trying to bring claim in state court, but then removed to federal court)

## Rule 201. Joinder of parties

### Rule 20 - Permissive Joinder of Parties

- "May" - can join as a co-P or co-D, if

1. all claims *arise out of same transaction or occurrence*.

- give parties discretion as to whom to bring into lawsuit.

→ *more restrictive than Rule 18 joinder* b/c w/ joinder of claims, just adding on another claim; joining parties is like inviting someone to a party, which entails different obligations to assert.

## Rule 192. Joinder of Persons Needed for a Just Adjudication - Necessary and Indispensible Parties

Remaking Plaintiff's composition of suit as they had originally intended

### Rule 19 - who MUST be joined

Old Rule 19 - necessary/indispensible parties

necessary - someone that can proceed without

indispensible - someone that can't proceed without.

Problem in abstract definition and lack of guidance for the courts.

confusion about jurisdiction b/c linked w/ original subject matter juris.

**Rule 19(a)** - *practical considerations in determining when someone should be joined if feasible:*

Addresses problems in joining cases where:

1) subject matter jurisdiction: someone who destroys diversity

2) personal jurisdiction: court claims personal jurisdiction over person.

3) objections to venue.

*Test:* ie, if P left out party A in case, A can be forced to be joined to case by ct, if:

1. w/o A, court cannot afford complete relief to parties already in suit

2. w/o A, A's interests may be harmed

result, as a practical matter, could affect person  
may be disadvantaged, if person wanted to bring a later action  
3. w/o A, the D may be subject to double liability or obligations.  
→A party is indispensable if complete relief is not possible among those already parties to an action unless he is joined, or to proceed without him would impair his ability to protect his interests or expose parties to the action to double liability.

If joining parties not feasible b/c ie:

- lack of smj
- may destroy diversity of citizenship
- can't obtain personal jurisdiction over the person
- change in venue would be improper

Then,

**Rule 19(b)** - When Joinder *not feasible*  
*equity & good conscience test*

Ct has considerations in order to make its decisions: (factors) (see 19(b))  
decide on:       should action proceed  
                          should action be dismissed

**Example:** Provident Tradesmens Bank & Trust Co. v. Patterson - Dutcher lent car to Cionci. Car accident. In Dutcher's car: Harris, Lynch, Cionci. ?join Dutcher as a "person needed for just adjudication"?

1) *State court*

Provident Tradesmens Bank (admin of Lynch estate)  
  \$50,000 settlement  
Patterson (admin of Cionci estate)

→Cionci has no money, therefore settlement is worthless.

2) *Federal Court*

Provident Trademens, Harris, Smith

Patterson       Lumberman (Dutcher's insurance co.)

Dutcher's insurance is worth \$100,000.

-If Cionci drove Dutcher's car w/ permissions, Cionci is covered under Dutcher's policy and therefore, Dutcher's policy is required to cover \$50,000 settlement.

→*Court of Appeals* - Dutcher was a person needed for just adjudication b/c he has an interest in the limited funds of the insurance policy and to protect his own interest; if \$50,000 paid to Cionci settlement, then Dutcher has only □ policy to protect his interest in his own suit for vicarious liability. Court dismissed the case, on grounds that Dutcher was an "indispensible party" (where court cannot proceed to a just conclusion w/o that party) whose joinder would destroy diversity. (allows a party would loses at trial to have the case dismissed by asserting that an indispensable party was not joined, and since his joinder would destroy diversity of citizenship, the case must be dismissed)

**Rule 19(b)** as a relief valve for such tactics, allowing the court to apply equitable principles to achieve a more pragmatic solution.

→In the absence of a party who cannot feasibly be joined, a court should not dismiss the action if, in "equity and good conscience" it could proceed without the party.

→"*Equity and good conscience*" test (In equity and good conscience, can we proceed without the absent party?)

1. *Plaintiff's interest (in the forum* for addressing plaintiff's interest in not allowing the joinder of the party b/c they have an interest in preserving judgment.
  2. *Defendant's interest* (avoiding multiplicity of suits)
  3. *outsider's interest* -  
outsider could have raised his own objections to paying out part of his policy.
  4. *public interest* (efficiency) - problems w/ multiple litigation in litigating on case where there already was a judgment
- Relationship to criteria of Rule 19(b) - overlapping factors

Nobody made an issue of Dutcher's absence until after the trial court's judgment.  
Raised on appeal

12(b)(7) -Rule 12(b)(7) - defense for failure to join a party under Rule 19.  
Defense can be granted under Rule 12(h), if had raised objections at trial stage/ on motion. If D joined as defendant in action, would destroy diversity of citizenship & destroy subject matter jurisdiction.

19(c) Rule 19(c) pleading obligation to name absent parties:  
state why parties are not joined & reasons why.  
-Even though no one raised objections at trial, on appeal Defendants have an obligation to protect interests of party. Since none of the parties did, the Court of Appeals took own initiative in raising question of joining absent party

**Example:** A Civil Action: Should Unifirst be joined if feasible b/c contribution to contamination?

No, joint tortfeasors should not be joined if feasible under Rule 19. Under Rule 19(a), joint tortfeasors are permissive parties

### **E. Impleader - Third Parties- Rule 14**

a common procedure (judicial efficiency)

#### A Civil Action

Grace joins Unifirst under Rule 14(a)

-state law of contribution - MA law - cannot recover for contribution until judgment is made on one of parties.

1. "may" - permission by court

2. Rule 14(a) arise out of same transaction or occurrence

2. ?basis for subject matter jurisdiction?

a. original - diversity of citizenship between Grace & Unifirst, or  
- federal question

b. if no original, supplemental jurisdiction?

-under 1367(a) - arising out of a common nucleus of operative facts that claim can be closely related to Constitutional case or controversy

ACA: pollution of common wells - 3<sup>rd</sup> party claim depends upon outcome of original claim; if P does not recover from Grace, then Grace does not have a claim against Unifirst.

-under 1367(b), if original subject matter jurisdiction based solely on diversity of citizenship, supplemental jurisdiction prohibited where claims raised by P.

ACA: claim not raised by a plaintiff, therefore Grace needs court's permission b/c filed after 10 days.

3. Third-party defendant can assert defenses of 3<sup>rd</sup> party plaintiff.

-After 3<sup>rd</sup> party D brought in, that party can assert any claim against P arising out of the *same transaction or occurrence that is the subject matter* of P's claim against the 3<sup>rd</sup> party P.

ACA- Unifirst moved to vacate, b/c

Prejudice, Delay, Confusion/complication in case.

No evidence that dumped anything on property

→sounds like Rule 11 problem (Grace's objections)

4. If argue that addition of 3<sup>rd</sup> part raising defense that is confusing or prejudicial

→Rule 42(b) - Ct's discretion to order separate trials

ACA - J. Skinner

- no real problem w/delay

- no prejudice - will grant orders/extensions to allow Unifirst to catch up. Unifirst should not be surprised that they are joined in case.

- no complexity - b/c Unifirst in charge of only 1 chemical & claims it did not dump at all.

4. If P finds that 3<sup>rd</sup> party defendant may be in part or wholly liable to him, P can bring in 3<sup>rd</sup> party defendant:

a. Rule 14(b) - Question of Interpretation:

1. "When a counterclaim is asserted against P..."

ACA - Unifirst is not bringing counterclaim against P.

→Rule 14(b) does not apply.

2. Should not be limited to "counterclaims" □ problem w/ drafting. counterclaims are merely a common circumstance (inserted in draft); If D can bring a claim against a 3<sup>rd</sup> party D for contribution, then P should also be able to bring a claim against 3<sup>rd</sup> party D, regardless of whether counterclaim or claim.

b. Supplemental Jurisdiction?

Yes, under 1367(a) - common nucleus of operative facts = arise out of same transaction or occurrence.

→Original Plaintiff may assert any claim against 3<sup>rd</sup> party defendant arising out of the transaction/occurrence that is the subject matter of P's claim

ACA - contamination of the wells

5. Added claims

Rule 18 - includes 3<sup>rd</sup> party claim

## ***F. Interpleader***

### ***Rule 22, 1335, 1397, 2361***

*Importance to stakeholder* - stakeholder is potentially subjected to multiple litigation, where several people are claiming the same thing.

*Interests of claimants* - claimants potentially walk away with nothing.

1. Historical Limitations on the Use of Interpleader

*Historical Requirements:*

a. same thing claimed by all

b. all claims from a common source

c. stakeholder does not claim an interest

d. stakeholder has no independent or separate liability toward any claimant.

2. Modern Requirements -

a. same property/fund

b. stakeholder must be subject to double or multiple vexation.

3. Modern interpleader: Rule 22 or statutory interpleader

→rule & statutory don't replace each other, just give additional ways to bring in interpleader.  
 →Statutory provisions - in order to use, must qualify under 1335

	<b>Rule 22</b>	vs.	<b>Statutory Interpleader</b>
subject matter jurisdiction	<b>1332</b> -complete diversity (btwn stakeholder & claimants) -amount in controversy (exceeds \$75,000)		1) TX (disinterested stakeholder)  TX TX TX TN (claimants) no complete diversity → <b>1335</b> - \$500 juris. amount -no complete diversity requirement. <i>min diversity</i> - req. only that 2 or more claimants are adverse.  2) TX (disinterested stakeholder) 1335 would not work b/c not 2 or more diverse. Ha Ha Ha could be filed under Rule 22.  3) TX ( <i>interested</i> stakeholder) 1335(a)(1) - 2/more adverse claimants →interested stakeholder becomes as claimant.  4) TX (interested stakeholder) Rule 22  TX TX TX TN  Prob. - no complete divers. 1367 - <u>Gibbs</u> test- arise out of common nucleus of operative facts - claims arise out of same property, same factual info. Under 1367(a) - supplemental jurisdiction allows joinder of additional parties. -1367(b) - does not exclude using supp. juris. from rule 22. →can apply supplemental jurisdiction in filing interpleader under Rule 22, provided that have fulfilled jurisdictional amount.
Venue	1391 - where def. resides or substantial part of events		1397 - bring claim where 1/more claimant resides. (i.e., stakeholder as claimant → TX)
personal service	Rule 4 (same as state long-arm statutes would apply.)		2361 - nationwide service of process - anywhere in U.S. giving fed.dist.ct nationwide jur. where P resides/can be found.
Injunction (ability to enjoin other actions)	yes		yes

(injunction against claimants to protect stakeholder from multiplicity of suits about ownership of property; necessary & purpose of interpleaders)

treatment of crossclaims	13(g) 1332	b/c of nationwide service of process, claimant may not be in appropriate juris. (depends on D to D)
law applied	must apply law of state where fed court	affected by nationwide service of process. (?) state law applied.
	Bond/deposit not required under rule	

## **G. Intervention**

What do you do with the uninvited guest?

**Rule 24** - rule for those parties that want to be part of litigation

Intervention as of Right

Permissive Intervention

### **A. Intervention as of Right**

1. statutory grant
2. other circumstances given rise to a right to intervene
  - a) interest (threshold requirement)
    - 1) relating to property or transaction
    - 2) that is the subject matter of action
  - b) applicant's interest impaired or impeded
    - \*important - applicant need not be legally bound
    - focus on whether practical matter
    - (cross-reference to Rule 19 - joinder if feasible)
  - c) adequate representation by parties already part of the action
    - burden on adequacy of representation

**Note:** Interpretation issue:

- 1) burden on applicant intervenor that interests not adequately represented by parties already part of the action.
- vs. 2) burden on parties opposing intervention already part of the action (Rule 24 & language "unless")

*Example:* No friend in litigation vs. Defendant has exact same interests as applicant intervenor and, therefore, applicant intervenor is adequately represented by parties in litigation.

- d) Application must be timely
  - "timely" - Court's discretion.
  - relevant factors: ....

**NOTE:** don't forget jurisdictional requirements

e)(?) Conditions on Intervention as of Right (Smuck v. Hobson)

Even if Court allows this party to intervene, does not mean that will participate as if original party to proceeding. Parents can appeal on those things that are a protection of their interests.

Relationship btwn Rule 24 & 19 (Joinder if feasible)

definition of interest of joinder if feasible is not same as joinder under intervention;  
Courts more willing to allow intervention than joinder of party if feasible b/c party appears to have more at stake.

### **Example: A Civil Action**

Skinner ordered that parties in suit cannot supply information to the media.

Intervention by media b/c violation of 1<sup>st</sup> Amendment.

Facher objected to intervention b/c no claim of right under Rule 24(a) & no common question of law or fact under Rule 24(b).

Rule 24(a) does not apply b/c media does not have interest relating to property/transaction.

→ Skinner - permits media to challenge/gag collateral order b/c media only appearing to challenge collateral order & does not technically fall under Rule 24. Although when media does appear to challenge order, will comply with Rule 24.