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# PLEADING REQUIREMENTS

* 1. Rule 8: Vague language could mean that very little info is needed, or it could mean that details are needed.
     1. **Liberal Pleading standards:** place emphasis on notice alone as the main function of pleadings.
        1. *Conley*: “Simplified notice pleading . . . a complaint shouldn’t be dismissed for failure to state a claim unless it appears beyond doubt that the P can prove **no set of facts** in support of his claim which would entitle him to relief.”
        2. *Dioguardi*: Claims are sufficient, “however inartistically” they are made.
     2. **8(a): Short, plain statement (1) grounds for jurisdiction, unless jurisdiction apparent (2) claim/s showing entitlement to relief (3) demand for relief** 
        1. **Can include related OR unrelated claims against opposing party (42(b)-sever later)**
     3. **8(e): Simple, concise, direct; no technical form is needed**
     4. **8(f): Construed as to do substantial justice**
  2. Rule 9 Heightened pleading standards (state with “particularity”):
     1. b): When alleging fraud or mistake
        1. *Bower* (187): "A well-pleaded complaint of fraud normally includes the time, place and content of the false representations, the facts misrepresented, and the nature of the detrimental reliance."
        2. See rule for specific facts that must be pled
     2. Can be imposed through state or federal statute
        1. E.g., securities fraud/PSLRA, med mal, if liability depends on D's "state of mind" (191)
  3. Issues btwn Rule 8 and 12(b)(6) motions:
     1. First, note that the 12(b)motions are pre-answer motions and must be made *before* D answers.
     2. Tension b/n excluding meritorious claims that need discovery to solidify case (especially discrimination) and requiring plaintiffs to plead w/ sufficient specificity to give "fair notice"
  4. **Traditionalist Opinions:**
     1. *Conley* (179): Hoffman: “discourages overregulation at the pleading stage by making legal insufficiency the principle category of review.” So, if someone makes a claim for NIED, and that’s not a cause of action in that jurisdiction, that’s about the only time that a case will be thrown out under *Conley’s* interpretation of 12(b)(6). “Court is not allowed to undertake factual sufficiency review under traditionalist approach.”
        1. No 12(b)(6) unless “beyond doubt that plaintiff can prove **no set of facts** in support of claim that would entitle him to relief” (Justice Black)
        2. Must give D "fair notice of what the P's claim is and the grounds upon which it rests"
        3. Reinforced leniency of pleading standards
     2. *Leatherman* (181):
        1. Upholds Conley, no HPS in cases against municipalities w/ no immunity
        2. BUT if gov't D raises qualified immunity defense, ct can require HPS response (**Rule 7**)
     3. *Swierkiewicz:*
        1. To make a prima facie case of national origin discrimination, P must show only 1)membership in a protected group; 2) qualification for job; 3) adverse action; and 4) an inference of discrimination
        2. B/c P provided details of termination and requested relief under specific law, pleading was sufficient to comply w/ Rule 8 (discrimination laws specify Ps do not need direct evidence)
  5. **Reformist Opinions:** Under the non-traditionalist/Reformist perspective, the court may grant 12(b)(6), because “conclusory” statements in pleadings may not be sufficient.
     1. *Dura Pharma*:
        1. Must properly allege all elements of a cause of action
           1. 12(b)(6) proper b/c although loss causation alleged, P failed to properly allege an element – economic loss – so Dura ≠ given “fair notice”
        2. Possible that holding only applies to securities, or to class action
     2. *Bell Atlantic v. Twombly*: Ct says heightened pleading will combat discovery costs if there’s a chance of them “spiraling out of control” and/or non-meritorious lawsuits.
        1. Complaint must be plausible on its face, replaces “no set of facts” from *Conley* with: “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations of the complaint”
        2. Claims decision does not impose a heightened pleading standard or “a probability requirement at the pleading stage” but rather requires some **showing** (per Rule 8(a)(2)) rather than baseless allegations
           1. Court interprets "showing" to require higher threshold of plausibility
           2. Compare to Celotex interp of "showing" = conclusory assertion
        3. Effect = unclear (cited 4000 times in 9 mos.)
           1. Ds certainly seizing on it to add a new layer to pre-trial defenses
           2. Very well may only apply to complex litigation cases (Ericson: one week later, upheld lower pleading standard for inmate suing prison)
     3. *Iqbal*: “threadbare recitals of the elements of a cause of action, supported by mere **conclusory** statements, do not suffice.”
     4. A “tool for judges to control dockets and respond to the supposed “litigation explosion.”
  6. Rule 84: Forms that serve as a guideline in pleading "intended to indicate the simplicity and brevity of statement which the rules contemplate"

# SERVICE OF PROCESS

* 1. Def. – formal delivery of documents sufficient to give D notice of pending action
     1. Filing of complaint + citation (summons) = serve process
     2. Clerk prepares citation at filing; gives defendant time period to respond
     3. Statutory rules for manner of service differ b/n states and b/n state and federal
        1. In Texas, can serve Secretary of State and *their* office must serve nonresident
  2. Rule 4
     1. 4(a): Contents; 4(c): Summons + complaint served by anyone not a party +18 yrs old
     2. 4(d) Waiver: P sends D a form asking D to waive service
        1. (1) If waived, party does NOT waive right to contest venue or PJ
        2. (2) If D refuses D must pay for service fees unless "good cause"
        3. (3) If D timely returns waiver b/f being served, has 60 days to answer (90 if outside US)
        4. Designed to lessen cost of service and keep procedure uncomplicated
        5. Effective deterrent; most parties waive service
     3. 4(e): Service on individuals
        1. Personally serve individual or agent authorized by *appt* or by *law* to receive service
           1. Most courts require actual appt to receive process in order to validate service
           2. Some courts more restrictive than others on what constitutes "by law"
        2. Leave copy at dwelling/usual place of abode w/ person of "suitable age & discretion" that also lives in the house
        3. Can serve under laws of state where fed ct sits or state where process being served
     4. 4(l): person serving must make proof of service
     5. 4(m) Time limit: From date of filing, P has 120 days to carry out service
        1. Court can extend time limit on showing of good cause
        2. If serve w/in 120 days, suit commenced on date of filing. If not effected w/in 120 days, suit commenced on date of service. This MATTERS if SOL runs in 120-day period.
           1. Refers to **Rule 3**
        3. Applies to **15(c)** when P attempts to relate back a claim against a new party
  3. Can move to quash or challenge sufficiency, see Rule 12(b)(4,5)
  4. All filings after original process can be served on D's atty (Rule 5)
  5. Types:
     1. Personal- best
     2. By mail
     3. By publication: last resort but usually constitutionally inadequate

**MOTIONS, ANSWERS, AND AFFIRMATIVE DEFENSES**

# PRE-ANSWER MOTIONS

* 1. Rule 12 (208):
     1. 12(a)(4): D doesn’t have to file answer until 12(b) motion decided (then w/in 10 days). Answer could lead D to have to disclose facts or admit allegations

## 12(b): motions to dismiss

* + - 1. can file as pre-answer OR in answer.
      2. If filed in pre-answer, movant must join all 12(b) defenses “then available to him.” *See* 12(g).
      3. 1,6 and 7 are not waived by failure to raise them in pre-answer motion.
      4. “Courts have recently found a heightened sense to use [pre-trial motions to dismiss] more robustly,” and if it’s a complex litigation matter, like anti-trust, court may be more inclined to dismiss.
      5. Even if P proves all allegations, not entitled to relief

no cause of action exists (P will probably replead)

cause of action exists, but P has not plead it (P can amend) (see Twombly)

cause of action known, but P’s facts ≠ correspond to cause stated

* + - 1. lack of subject matter jurisdiction
         1. May be raised at any time, *See* 12(h)(3).
      2. lack of personal jurisdiction
      3. improper venue
      4. insufficient process
         1. Adequacy of summons itself per 4a (e.g., clerk didn't sign it)
      5. insufficient service of process
         1. Adequacy of manner of delivery
      6. **failure to state a claim upon which relief can be granted** (192-93)
         1. Attacks the substantive content of a pleading and must usually be **decided upon the face of the pleading alone**.
         2. Submission of materials in support or opposition of 12(b)(6) motion is not prohibited, but it converts the motion into a Rule 56 motion for summary judgment.
         3. P can moot the motion by amending [***See* Rule 15 – RIGHT NOW, then come back to -->)** but amendment runs risk of waiving P’s argument that orig complaint was sufficient. If P loses, he can argue on appeal that the erroneous granting of 12(b)(6), forced him to fatally alter his complaint, and it was detrimental to his case. If P stands on orig complaint though, and appeal affirms 12(b)(6) dismissal, P forfeits opportunity to amend.
      7. failure to join a party under Rule 19
         1. Ct will order joinder if feasible; if ≠, dismiss (e.g., joinder destroys diversity, etc.)
    1. 12(c): motion for judgment on the pleadings – if clear one party will win (uncommon)
       1. Same as 12(b)(6) except AFTER the answer is filed
       2. Again, submission of materials outside of the pleading converts to Rule 56 motion for summary judgment.
    2. 12(e): motion for more definite statement
       1. If so vague or ambiguous that the D cannot formulate a response
       2. Include “defects complained of and the details required”
       3. If granted, file answer w/in 10 days after new statement (12a4)
       4. Cannot be used as a substitute for discovery
       5. *Bower* (186): Granted when complaint referenced "defendant" ≠ specify which D
    3. 12(f): motion to strike: used to attack sufficiency of defenses.
       1. Insufficient **defenses**, redundant, immaterial, impertinent, or scandalous matter
       2. Can use to strike a cause of action, but (12(b)(6) is more common)
    4. 12(g,h):Consolidation and waivers
       1. To avoid piecemeal motions on issues preliminary to merits of the case
       2. Only relates to those defenses and motions then available to you
       3. 12(b)(2-5) – **less favored** defenses – are waived if:
          1. Failed to consolidate all in one motion
          2. Omitted from a pre-answer motion
          3. Omitted from the answer if no pre-answer motion is made
       4. 12(b)(6-7) are available in any pleading, judgment on the pleadings, or at trial on the merits (**more favored** defenses)
       5. 12(b)(1) can be made at any time (**most favored** defense)
       6. 211 – Why D may strategically wait to raise 12b6

1. Answers and Affirmative Defenses
   1. File w/in 20 days of complaint
      1. Unless service waived, then 60/90 under 12a
      2. If ≠ file, may **default** (but usually only when opposing party files for default)
      3. If default, lose chance to argue on the merits, can only challenge validity of judgment
   2. Generally includes:
      1. Admissions and denials
      2. 12(b) defenses
      3. Affirmative defenses
      4. Counter/cross-claims
      5. Motion to enlarge/reduce parties
      6. Claim a jury trial
   3. Answer, generally
      1. 8(b) :
         1. Admission: taken as true for the remainder of the case
         2. Denial = denying whole paragraph; must specify if D wishes to deny part
      2. **8(d): Failure to deny = admission (except for amount of damages)**
   4. Affirmative defenses
      1. 8(c): Any (see list in rule)
         1. "Even if I did it, you won't win" E.g., SOL
         2. If not plead, waived (4th/9th Circ. found exception if P ≠ prejudiced by delay, 217)
         3. D has burden of pleading AND proving
         4. Still have to admit/deny all claims
   5. Remember – Subject to Rule 11

# RULE 11 - Sanctions

* 1. 11(a): Signature – by lawyer/pleader; if missing address and phone #, court can strike
  2. 11(b): Representations to court – To best of signer’s knowledge, with *reasonable inquiry*, the (signed, filed, submitted, or later advocated) pleading is:
     1. Made with proper purpose – not to harass or cause unnecessary cost or delay
     2. Warranted by existing law – or a non-frivolous argument to change existing law
     3. Well grounded in fact – likely reasonably supported by evidence after discovery (Remember Twombly)
     4. Based on evidence – denials of factual contentions are based on evidence or reasonably based on lack of belief/information
  3. 11(c): Sanctions – if 11(b) is violated, court may (discretionary) impose sanctions
     1. How initiated:
        1. By motion:
           1. Must be made separately from other motions
           2. Must state violation of 11(b)
           3. Can be filed if the pleading is not corrected within *21 days* of notice
           4. Law firms can be held jointly liable
        2. Order to Show Cause: Court initiates the sanctions; the burden of proof will fall on the pleader to show that it is not in violation, and the 21-day safe harbor period does not apply
  4. **“Safe Harbor”** “effectively gives 21 days to the party against whom sanctions may be sought to realize the error of their ways.” (11c1A)
     1. **Lesson (261): a party should file for dismissal (56, 12(b)(6), 12(c)) AFTER it files for sanctions; if MSJ is granted, there is nothing to withdraw or to sanction**
  5. Limitations:
     1. Sufficient to deter repetitions of conduct, not to compensate
     2. Non-$ directives; penalties paid to court; payment of other party’s fees
     3. Discretionary: court MAY not SHALL
  6. Exceptions:
     1. Disclosures, discovery requests, responses, objections, motions subject to provisions in Rules 26-37
     2. Oral assertions made NOT referring to documents submitted to the court (later advocated because lawyer subsequently learns assertion in doc is false and still advocates)
     3. If impossible or unreasonably difficult to discover falsity
  7. Remember: Still must file an answer or risk default
  8. Key differences between the 1983 and 1993 versions of Rule 11: (1) that the rule went from being mandatory to discretionary; and (2) a “safe harbor” provision was added.

# AMENDMENTS – Rule 15

* 1. B/c a judge may refuse evidence @ trial absent from the pleadings, AMEND
  2. BUT amendment runs risk of waiving P’s argument that orig complaint was sufficient. If P loses, he can argue on appeal that the erroneous granting of 12(b)(6), forced him to fatally alter his complaint, and it was detrimental to his case. If P stands on orig complaint though, and appeal affirms 12(b)(6) dismissal, P forfeits opportunity to amend.
  3. Amending
     1. 15(a):
        1. A party can amend a pleading once as a matter of course (w/o court's permission), if:
           1. a responsive pleading has not been filed; or
           2. w/in 20 days of service if a responsive pleading is not permitted (responses ≠ permitted to answers) AND the action hasn't been placed on the trial calendar
           3. A 12(b)(6) motion is not a responsive pleading within the definition of Rule 7, so 15(a) allows the almost automatic right to cure defects in P’s complaint.
        2. If responsive pleading filed or 20 days passed, only amend w/ court's permission "when justice so requires" (arguments against, 222) but LIBERAL standard
        3. For "justice" to so require, must show there was no
           1. Undue delay AND
           2. Undue prejudice

Can also argue issue raised in bad faith or is futile

* + 1. 15(b): when a party raises an issue not expressed in the pleadings, the issue will be treated as if it was expressed in the pleadings unless a party objects

## Relation back

* + 1. **15(c)**: an amended complaint seen as being filed at a prior date for purposes of statutes of limitation, (**must comply w/ 15(a) first**) dependent on:
       1. "Discovery Rule": statute of limitations commences when cause of action is discovered, can "toll" (pause) in certain circumstances (235)
       2. 15c1
          1. "Relation back is permitted by the law that provides the statute of limitations applicable to the action", OR → c2

Use ↑ permissive relation back doctrine, state or federal

* + - 1. 15c2 (New claim)
         1. Claim or defense arose from CTO set forth or *attempted* to be set forth in original pleading

"Same basic injury" (*Swartz*) or "same core of operative facts" that are factually or temporally related (*Mayle*), even if diff. claims that caused

Statute = more stringent for habeas corpus (see *Mayle*)

* + - * 1. Fairly permissive for most cases, if facts are actually related
        2. **Tension – liberal amendment standard in interest of protecting Ps w/ valid claims vs. the fact that this is violating purpose of SOL laws**
      1. 15c3 (New party)
         1. c2 must be satisfied
         2. (A) Party received notice of action w/in 120 days of filing of suit (4m), AND the notice was such so that they will not be prejudiced in maintaining a defense

Notice can be informal, such as a conversation, internal memo, etc.

Prejudice = undue prejudice + undue delay

* + - * 1. (B) They knew or should have known that, but for P’s mistake, they would have been included in the suit

“Mistake” is a more narrow standard and often does not include “John Doe” cases (e.g., where you know a “police officer” did it but didn’t see name tag)

Party knew, but for a mistake, action would have been brought in original

Majority of courts are more restrictive, merely substituting D for "John Doe" = insufficient "mistake" (230-1) BUT some allow

Shared attorney: when D2 shares an atty w/ original D, atty likely communicated that D2 may be joined in the action

Identity of interest: parties are so closely related in biz operations or other activities that notice on one provides notice for the other

* + 1. Court can grant amendment, then examine if 15(c) satisfied when D raises affirmative defense, OR could examine first and deny amendment if ≠ comply
    2. *Swartz v. Gold Dust Casino* (Handout 55):
       1. P injured in fall on Gold Dust's stairs; + 2 years after accident, P moves to amend complaint to replace Doe I w/ Cavanaugh Prop. and relate back b/c SOL ran
       2. P properly used discovery to ID **Doe** I as owner of casino
       3. **Same CTO** b/c "same basic injury" = P's fall on the stairs, even though alleging two different causes of action (neg. maintenance and neg. design)
       4. B/c Mr. Cavanaugh was the president of Gold Dust and also partner of Cavanaugh Prop., he received a copy of the proposed amended complaint b/f SOL ran and was therefore given **sufficient notice** per 15c3
       5. Court employs BROAD interpretation of **mistake** ("whenever a party who may be liable…was omitted as a party defendant")
       6. Although P should have filed earlier, but specific **prejudice** ≠ shown sufficiently to deny relation back
    3. *Singletary v. Penn. DOC* (224)
       1. In civil rights case from son's suicide in prison, P moves to amend complaint to replace "Unknown Corrections Officers" w/ prison shrink & relate back (+2 yrs after SOL run)
       2. Standard of review = "clear error"; amt of prejudice = "direct effect" of type of notice
          1. Notice must be "more than notice of the event that gave rise to the cause of action; it must be notice that the plaintiff has instituted the action"
       3. Rejects P's claims of constructive or implied notice b/c
          1. No shared attorney b/c atty didn’t represent Ds until after 120 days passed
          2. No identity of interest b/c shrink = non-mgmt employee (not high enough) so can't automatically be imputed to share interest of employer
       4. Though most reject, court bound by precedent that Doe (i.e., not knowing ID of D) = sufficient mistake; BUT ≠ matter b/c P ≠ meet notice requirement
    4. *Christopher v. Duffy* (232)
       1. P seeks to add and relate back claims against lead paint companies to suit alleging daughter's wrongful death from lead poisoning
       2. Undue delay in itself is insufficient, but delay can contribute to undue prejudice
       3. D was unduly prejudiced by service 6 yrs later b/c 1) Duffy (painter) died; 2) conditions of apartment have changed; 3) hard to know which company's lead was used
    5. *Mayle v. Felix* (Handout 59)
       1. P wants to relate back added 6th Am. claim (introduction of videotaped testimony) to original 5th Am. claim (coerced statements during interrogation)
       2. Court rejects P's claim that trial and conviction = "same basic injury"
       3. Can't allow relation back "when asserting new ground for relief supported by facts that differ in both time and type from those the original pleading set forth"
          1. Must be factually and temporally related & arise from "common core of operative fact uniting the original and newly asserted claims"
          2. 6th = pretrial police interrogation of different witness; 5th = own interrogation at different time and place
       4. Federal statute imposes 1-year SOL on federal writ of habeas corpus petitions
          1. Allowing would undermine congressional goals of finality and federalism
  1. Statute of Limitations:
     1. Gives potential parties peace of mind after expiration
     2. Permits accused parties to gather evidence while still fresh
     3. Courts avoid depleting resources on stale case; would be very hard to find out what happened
  2. Supplemental
     1. **15(d)**:
        1. Supplemental pleading when additional events occur after pleading filed
        2. Can grant even if new material cures a defect in original pleading
        3. If a new claim is involved and SOL run, must satisfy requirements of relation back

# JOINDER OF CLAIMS AND PARTIES

* 1. Remember restraints of jurisdictional (PJ and SMJ), venue, and notice requirements
  2. Rule 18: Joinder of Claims **Check supplemental Jurisdiction Section!**
     1. 18(a): P can bring as many unrelated claims against D as available
     2. 18(b): Can join two claims, even if one claim is contingent on disposition of the other
     3. Permissiveness is misleading b/c res judicata (claim and issue preclusion) says if a party fails to bring all related claims available *before trial* → barred
     4. 42(b): Allows severance: For "convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim"
     5. Aggregate (some, but not all) claims for SMJ purposes (to reach AIC requirement)
  3. Rule 20: Permissive Joinder of Parties **Check supplemental Jurisdiction Section!**
     1. 20(a): Requirements to join party (P or D), allows P to sue multiple D in the same action if:
        1. Must have claim arising from same TO (or series of TO) as original **AND**
        2. A question of law or fact common to the parties will arise in the action
        3. REMEMBER:
           1. Convenient? Efficient (time and money)? Fair?
           2. **WHY** does it arise from same TO? Which facts, evidence, and legal questions are relevant to each cause of action and where do they overlap?
        4. "Judgment may be given for one or more of the [Ps] according to their respective rights to relief, and against one or more [Ds] according to their respective liabilities"
     2. 20(b): Discretion to make orders or separate trials to "prevent a party from being embarrassed, delayed, or put to expense by the inclusion"
        1. To prevent fraudulent joinder – "a party against whom the party asserts no claim and who asserts no claim against the party" (e.g., to destroy diversity)
        2. Why overall rule is ↑ permissive
     3. Rule of efficiency if parties choose to invoke BUT strategic considerations include: 1) discovery; 2) cost; 3) evidence; 4) the jury; 5) res judicata; and 6) control (see pg. 276)
     4. *Kedra v. City of Philadelphia* (270)
        1. P joins ↑ parties from police department in civil rights abuse case; D claims improper joinder b/c actions in question span 14-15 month period, so no TO or series of TO
           1. In multiparty cases, joinder of claims also limited by rule 20
           2. "Very liberal" for efficiency → "Absolute identity of all events is unnecessary"
        2. Claims "reasonably related" although occurred over lengthy time period → same TO
        3. BUT possible Ds will be prejudiced (20b) b/c different Ds involved in different events
        4. Defer decision until after discovery shows extent to which Ds involved in each event

## Rule 21: Misjoinder

* + 1. "**Parties** may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any **claim** against a party may be severed and proceeded with separately."
  1. Rule 19: Necessary and Indispensable Parties **Check supplemental Jurisdiction Section!**
     1. Necessary = ↑ Important, but it is possible for the case to proceed without them
     2. Indispensible = dismiss case if "in equity and good conscience" the case cannot proceed
     3. Court must have PJ ("subject to service of process") and joinder must not destroy SMJ
     4. (a) Joinder **is required** if:
        1. In the party’s absence, complete relief ≠ be accorded among the current parties, OR
        2. The party claims an interest relating to the subject of the action and is so situated that ruling on the case WITHOUT them may:
           1. impair or impede the person’s ability to protect that interest OR
           2. leave any of the persons already parties subject to a substantial risk of incurring double/multiple/otherwise inconsistent obligations by reason of the claimed interest
     5. (b) If cannot be joined (e.g., joinder would render venue improper), court considers potential prejudice and adequacy of judgment and remedy w/o them:
        1. "to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;
        2. the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
        3. whether a judgment rendered in the person's absence will be adequate;
        4. whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder"
  2. Rule 14: Impleader **Check supplemental Jurisdiction Section!**
     1. D1/3PP can implead a third party IF D1/3PP can show that D2/3PD "**is or may be liable**"
        1. If D2 could be liable for full or partial contribution or indemnification (e.g., insurer)
        2. Treated like an original suit for purposes of pleading, service, notice, etc.
     2. Must be **derivative** of P's claim against D1/3PP, so CANNOT implead a party that would only be liable to P, not to D1/3PP
        1. If **"either/or"** (either D1 is liable to P or D2 is, but not both), impleader is IMPROPER
           1. D1 can defeat suit on grounds that D2 = liable, but can't force P to also sue D2
        2. Once D2/3PD impleaded on derivative claim, can join unrelated claims per **Rule 18**
     3. Permissive: Don't have to implead, can sue separately later
        1. Important point if impleader would destroy jurisdiction
        2. But once impleaded, remember compulsory **Rule 13** claims
     4. D1/3PP ≠ need permission to implead IF serves 10 days or less after filing answer
        1. If +10 days, must obtain leave after giving notice to all parties
        2. But "any party may move to strike the third-party claim, or for its severance or separate trial", includes judge (limits permissiveness)
     5. D2/3PD ≠ liable if **1)** defeats D1/3PP's claim against D2 or **2)** P's claim against D1/3PP
        1. Therefore, D2/3PD may introduce defenses to both claims
     6. Counterclaims:
        1. D2/3PD may bring counterclaims against D1/3PP if arise from same TO, per Rule 13
        2. P and D2/3PD may bring any claims against each other from same TO
        3. P may implead a third party in response to a counterclaim by any D
     7. ISSUES:
        1. Does NOT affect jurisdiction over original claim b/n P and D1 (e.g., if D2/3PD = non-diverse, SMJ ≠ affected unless P asserts a claim against D2/3PD)
        2. Even if D2/3PD ≠ meet requirements of SMJ, court can exercise supplemental juris.
        3. D2/3PD citizenship ≠ affect venue
        4. Allows 3PD to implead other Rule 14 parties BUT **not Rule 20** parties

1. COUNTERCLAIMS & CROSS-CLAIMS**:**
   1. Rule 13: Counterclaims
      1. D brings claims against P for
      2. 12(a)(2): Respond w/in 20 days
      3. 13(a): If counterclaim arises from the same TO, it makes sense to make parties litigate all claims at once, b/c it is judicially and economically efficient, and prevents inconsistent outcomes. Also note that the court already has PJ over original D’s counterclaim against original P, b/c P consented to PJ by bringing suit in the first place.
         1. **Compulsory** if:
            1. Arises from same TO of opposing party's claim
            2. Does not require adding a party over which the court does not have jurisdiction
            3. Exceptions:

If, when served, the claim was the subject of another pending action

Original suit brought did not establish personal jurisdiction

* + - * 1. Barred from bringing if not brought in first case – *"use it or lose it"*
        2. Definition of TO read more narrowly than Rule 20 b/c harsh consequences if barred
    1. 13(b): **Permissive**
       - 1. bring any claim against opposing party – doesn’t necessarily relate to orig. claim
    2. So bring ALL counterclaims b/c may lose the right (and can make D more sympathetic)
    3. 13(c):
       1. May or may not diminish or defeat the recovery sought by the opposing party, or "claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party"
    4. 13(f):
       1. Court may grant leave to amend "when a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires"
    5. 13(h):
       1. Can bring a claim, if so related, against co-party (same side of "v"), includes **Rule 14**
    6. *Banque Indosuez* (277): clause waiving right to counterclaim ≠ valid if compulsory
  1. Rule 13: Cross-claims – D brings a claim against another D
     1. 12(a)(2): Respond w/in 20 days
     2. If P brings action against more than one D, **or** D1 impleads D2
     3. Must be closely related to original claim

**PERSONAL JURISDICTION AND RELATED ISSUES**

# PERSONAL JURISDICTION STEP BY STEP

1. Was D present in forum state when served?
   1. Yes = PJ
   2. No = *below*
2. Does FS long-arm statute provide for jurisdiction over D?
   1. No = FS can’t exercise PJ.
   2. Yes = *below*
3. Are any of these true? (a) Is D domiciled in FS, or, if a corp, is D incorporated in FS? (b) Did D consent to being sued in FS? (c) Does D own property in FS? (d) Does D regularly transact business in FS? (read: does he have **min contacts** per *Shoe* and *Asahi*?)
   1. Yes = PJ is valid
   2. No = *below*
4. Are at least some of D’s contacts in FS voluntary?
   1. No = PJ not valid, b/c D lacks min contacts per *Hanson* (D must have purposefully availed himself of the privilege of conducting activities in forum state).
   2. Yes = *below*
5. Does cause of action arise out of D’s contacts in the FS?
   1. No = Are D’s contacts in FS “systematic and continuous?” (read: is there **general jurisdictional** from ***Shoe***?)
      1. No = Contacts not sufficient and PJ not valid.
      2. Yes = *below*
   2. Yes = *below*
6. Are D’s contacts w/ FS “minimum contacts,” so that he could reasonably anticipate being hauled into court there?
   1. No = D lacks min contacts and PJ not valid.
   2. Yes = *below*
7. Is jurisdiction reasonable and does it comport w/ “traditional notions of fair play?” ***Asahi***.
   1. No = even though min contacts are established w/ FS, due process is offended and PJ not valid.
   2. **Yes = PJ is VALID!**

1. **PERSONAL/ADJUDICATORY JURISDICTION** = power to render judgments enforceable in the forum and by other sovereign states
   1. In personam: dispute about personal obligation, not title to property
   2. In rem: dispute about and ONLY about title to property
   3. Quasi in rem: dispute about personal obligation, but jurisdiction is tied to in-state property
      1. Damages awarded cannot exceed value of property
      2. *Shaffer* (and *Burnham* clarifies) that quasi in rem cases are subject to minimum contacts test

1. **TRADITIONAL JURISDICTION:** almost always the only authorized form of jurisdictional authority
   1. Domicile/citizenship
   2. In rem: Property ownership when property in dispute
   3. Incorporation
   4. Service of process in state
      1. Presence in forum (*Burnham*, 633)
      2. Such "transient jurisdiction" important in human rights abuse cases (645)r5
   5. Consent
      1. Voluntary consent (express)
         1. Appearance in court (NOT special appearance)
      2. Involuntary consent
         1. Failure to bring personal jurisdiction defense (12(b)(2))
      3. K terms
         1. Forum selection clauses as consent generally upheld (Carnival, 655) but CANNOT vest a court w/ jurisdiction that would otherwise be unconstitutional
         2. Mandatory arbitration clauses generally binding to uphold lack of subject matter jurisdiction
   6. Territoriality: Historical limit of judicial jurisdiction
      1. Power theory*:*  limits judicial power to state borders in virtually all cases (*Pennoyer*)
         1. Legacy lingers that state judicial power is limited by the due process clause
         2. But as mobility increased, territorial model became too restrictive
      2. Before *Shoe*, courts circumvented *Pennoyer*'s restrictions, with "constructive presence" (*Harris*) and "implied consent" (*Hess*)

1. **EXTENDING JURISDICTION:** exercising jurisdiction over nontraditional defendants (3 STEP ANALYSIS)
   1. (Note: Pendant personal jurisdiction – Once P establishes D's amenability to one claim, P can join another claim even if amenability is lacking)
   2. Types:
      1. Specific jurisdiction: the "quality and nature" of action (a single act OR continuous but limited acts) within a forum can extend jurisdiction over claims arising out of that act
         1. Products liability relies on stream of commerce
      2. General jurisdiction: substantial or pervasive action can extend the forum's jurisdiction over both claims related AND unrelated to the action
         1. "Continuous, systematic, and substantial activities within the forum" ***Shoe***.
         2. Other than incorporation, principal place of business, ↑ hard to prove sufficient contacts to justify (Helicopteros, 647)
         3. Individual persons have NEVER been found to be subject to general jurisdiction
         4. Doctrine: There's always a "safe" place where D is amenable to suit
   3. (1) Notice/Proper Service of Process (statutory and constitutional)
      1. Statutory/Rule compliance
         1. Did P comply w/ statutory requirements for service?
         2. Unless a nonresident defendant consents to suit in the state or is physically served while located therein, plaintiff must identify statutory authority for service of process
      2. Constitutional compliance:
         1. Do the (fulfilled) statutory requirements satisfy due process?
         2. If type/method of service allowed does not give fair notice, can be unconstitutional
         3. Method of notice has to be reasonably calculated to apprise the D of the pending suit
         4. See NOTICE below (Mullane, Jones)
   4. (2) Statutory Amenability
      1. State Long Arm Statutes: (collapses statutory analysis into constitutionality of due process)
         1. Types:
            1. No limit: extends state's jurisdiction to the limits of due process
            2. Lesser limit: majority of states limits amenability to suit to certain circumstances

BUT courts generally interpret to the limits of due process

* + - * 1. Limited w/ catchall: Seems limited but has clause extending limit to due process
      1. Consider (573):
         1. What type of LA?

Does it reach to or beyond limits of DP? (overreach?)

Any case law extension? (E.g., Helicopteros extends TX's LA)

* + - * 1. Does the statute apply to the particular case?

Remember catch-all phrases that extend seemingly limited LA to DP limits

* + 1. **Rule 4(k)(1)(a)**: When no applicable federal standard, federal courts in a forum state are subject to long-arm statute of that state
       1. Federal courts act as state courts, with state court statutory and constitutional jurisdictional limitations, when applying state law (remember 4k2)
    2. **Rule 4(k)(2):** "Fall back" provision (Handout 105)
       1. In federal Q cases where Congress has not specifically provided for nationwide or worldwide service, and there’s not one state where D is subject to PJ, fed cts may issue service of process consistent w/ 5th Amendment (due process in fed ct)
       2. Prevents foreign Ds who have violated federal law from escaping PJ BUT must have MC w/ U.S. as a whole (i.e., does not in itself establish constitutionality)
       3. To avoid engaging in 50 PJ analyses, burden shifting requires D (who is disputing PJ) to identify a state where the suit can proceed. If he can’t , then he is served under 4(k)(2)
  1. (3) Constitutional Amenability

## Shoe:

* + - 1. “ prevented unwilling Ds from “evading the jurisdictional grasp of a court merely by taking the expedient step of retreating from the forum before being served or … not setting foot within the state at all.”
      2. A “principal is amenable to any suit in the forum state arising out of those injuries” caused by the principal’s agent.
    1. Does exercise of jurisdiction offend due process and “**traditional notions of fair play of substantial justice**” *Shoe*?
    2. Two-prong test (*Asahi*, 595)
       1. **Clarifying "Minimum contacts" of *Shoe***: Has D purposefully established such contacts in the forum so as to give D fair notice of the possibility of being haled there to defend a suit arising from their activities?
          1. Burden of proof on P to establish D's contacts
          2. Consider (from BOTH sides):

if the D chose to act w/in the forum and so assumed the risks and benefits

Should be such that D is on notice of amenability to suit arising from actions

Foreseeability of harm to P

Purposeful availment/Direction of action at forum

So as not to offend "traditional notions of fair play and substantial justice"

* + - * 1. Assess both 1) the number of contacts D has in the forum and 2) relatedness of the claim to the contacts in the forum (graph)
        2. Keep in mind cause of action (elements that comprise cause) when assessing meaningfulness/relatedness of a contact
        3. Products liability: unclear as to whether a company that puts a product into the "stream of commerce" is subject to jurisdiction wherever the product eventually causes injury OR if "additional conduct" is required (Asahi, 595)
      1. Reasonableness/Fairness: Even if min contacts are established, can prove forum is still unfair. *Burger King* says to thenconsider *Worldwide Volkswagens* requirements:
         1. Burden on D
         2. Interest of forum state in adjudicating
         3. Interest of P in obtaining relief
         4. Interest of "interstate judicial system" (whatever the hell that means)
    1. Defendants cannot evade the jurisdiction of a court by
       1. Retreating from the forum before being served or
       2. Not entering the state and acting from a distance, if
          1. Knew/should have known actions would lead to injury of party in the other state; purposeful direction of activities at the forum (*Calder*, 591)
  1. Issues
     1. B/n Shoe (1945) and WWV (1980), nonstop expansion of constitutional amenability to suit
     2. Asahi's addition of reasonableness test as a limit on constitutional amenability (also accomplished through forum non conveniens)

1. **ATTACKING JURISDICTION**
   1. At trial:
      1. Consent to suit, argue the case on the merits
      2. Make special appearance, claim 12(b)(2) (if argue on merits, waive b/c less-favored)
   2. After default judgment:
      1. Direct attack: appeal judgment directly thru same court system that entered judgment
      2. Collateral attack: judgment entered, attack in separate suit
         1. Waive right to defend on merits, limited to attacking validity of the judgment
         2. Can claim lack of jurisdiction as defense (b/c "constitutional infirmity") if P sues to collect/enforce judgment
         3. Can also be brought by an absent class member P on claims of inadequate rep.; bring in home state (rather than where settlement/judgment reached) b/c P did not waive right to constitutionally adequate rep.
   3. No court need give full faith and credit to a judgment based on improper jurisdiction

## JURISDICTION OVER CORPORATIONS

* 1. Domestic: Jurisdiction can be predicated on
     1. Grant of a charter: statutory requirement that a corp. consents to be sued in the state the charter is granted; must appoint an agent to receive service =EXPRESS CONSENT
     2. Corporation as a domiciliary of the forum
  2. Foreign: Jurisdiction can be predicated on
     1. “Presence” Theory: any corporation is deemed to be present, and therefore subject to the court’s power, when doing business in the forum (and must appoint an agent to receive service of process)=IMPLIED CONSENT

1. **NOTICE**
   1. Notice that complies w/ state statute does not necessarily fulfill due process
      1. *Mullane* (671): Found that notice by publication (when other means were available) insuff.
         1. "...within the limits of practicality notice must be such as reasonably calculated to reach interested parties."
         2. "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."
         3. Must show "due diligence" in giving notice
      2. *Jones* (handout, 85): When party serving notice has actual knowledge that the other party has not received it, reasonable steps beyond statutory requirements must be taken.
   2. Trend: Notice by U.S. mail is the constitutional minimum for Ds whose addresses can be ascertained by reasonably diligent efforts

1. VENUE (Where in the jurisdiction is the case best heard?)
   1. Issues:
      1. Less-favored defense (12b3 is a fatal flaw if granted) – timely raise improper venue defense or WAIVE per 12h1
      2. "Sub-constitutional" (i.e., proper venue is not a constitutional question for a valid judgment, so no collateral attack)
      3. Jurisdiction is a separate requirement, so venue may be proper per §1391 but still no suit b/c proper jurisdiction has not been established
      4. Unlike many other powers, federal district courts are not limited by state venue rules
         1. Can transfer over state lines (b/n districts)
         2. Venue at the state level is state-specific (TX = venue by county); look to statute
      5. P's citizenship alone does NOT create proper venue
   2. State court:
      1. Can only transfer to other state courts, not over state lines
      2. Can move to dismiss pursuant to 12(b)(3) equivalent; (e.g., if other state's court is required venue by a choice of forum clause)
   3. General venue rules

## §1391

* + - 1. In both diversity (1391(a)) and federal Q cases (1391)(b)), venue is proper in:
         1. District where any D resides, if all Ds reside in the same state

Per 1391(c), a corporate D is deemed to reside in any district where it is subject to PJ at the time the action is commenced (i.e., suit is filed)

Remember PJ in one district ≠ amenable in rest of the state

Even if GJ in forum, venue still only proper in district w/ the most contacts

Individuals residence usually = domicile (i.e., where live + intent to stay)

* + - * 1. District in which a substantial part of the events giving rise to the claim occurred
      1. If ***neither*** scenario produces proper venue the see fall-back provisions):
         1. Diversity 1391(a)(3): Where any D is subject to personal jurisdiction
         2. Federal Q 1391(b)(3): Where any D "may be found" (more lenient)
      2. §1391(d): An alien may be sued in any district
    1. Remember: a mandatory venue rule in a more specific statute will trump the general (and permissive) venue provisions in §1391

## Transfer of Venue

* + 1. **§1404** – Change of Venue (effective 1948)
       1. Original place suit filed in was acceptable, but not the BEST place → transfer
       2. Gives federal courts discretion to transfer cases in the interest of justice and for the convenience of parties and witnesses in the absence of congressional direction to the contrary (leaves intact special venue provision exception)
       3. FORUM MATTERS: P wins in fed ct 58% → after transfer, P wins 29%
    2. **§1406** – Cure or waiver of defects
       1. If original place was improper, judge can dismiss OR transfer
       2. Dismissal mechanism like 12(b)(3), but can rarely be used to transfer (*Piper*)

# FORUM NON CONVENIENS

* 1. Def. – “Gives courts a discretionary device for avoiding litigation in a forum both inconvenient to defendant and far removed from the witnesses and evidence.” *Subrin*.
     1. A "non-merits", procedural issue
     2. Purely discretionary (court can hear the case, but may decide not to)
     3. Lower courts are “splintered over whether, and under what circumstances, a district court may dismiss a **federal statutory** case on FNC grounds.”
     4. If the case is in the 1st or 2nd Circuits, the court is likely to apply the “traditional *Gilbert* FNC analysis, refusing to exempt any federal statutory claim from FNC dismissal.”
     5. FNC is judge made and therefore has evolved over it’s use.
     6. Almost no cases that are dismissed for FNC are re-filed abroad (**so if you win FNC, you probably win the case**)
  2. **Test:** 
     1. Step 1: Is there an adequate and available alternative forum?
        1. Court must have "justifiable belief" in alternative forum (*BCCI*)
        2. Routine to condition dismissal on alternate forum's waiver of SOL defense (and other dispositive motion, e.g., lack of PJ) (See Issues)
        3. Unfavorable change in law is not conclusively inadequate (even if not comparable)
        4. VERY DIFFICULT to dismiss for lack of alternative forum, and
        5. A court may dismiss an action on the ground that a court abroad is a more appropriate and convenient forum for litigating the dispute.
     2. Step 2: Private v. Public interests (must fulfill Step 1 b/f moving on)
        1. Private interest factors: interest of the litigants (focus on burden to D)
           1. Location of witnesses
           2. Ease of access to documents and other sources of proof
           3. Whether view of the premises is necessary
           4. Enforceability of the judgment
           5. Catchall (any other factors of ease, convenience, etc.)
        2. Public interest factors: interest of the forum (institutional convenience)
           1. *Forum interest analysis*

"There is a local interest in having local controversies decided at home" (*Piper*)

* + - * 1. Court congestion
        2. Unfairly burdening citizens w/ jury duty
        3. Conflict of law problems

Difficulty of forum in "ascertaining and applying foreign law"

* + - * 1. “the need to apply foreign law points toward dismissal.” *Piper*, paraphrasing *Gilbert*.

BUT substantial changes in law cannot be given determinative weight, or FNC motions would become too difficult (*Piper*)

* + 1. No single factor should weigh more than another; SCOTUS has provided little guidance how courts should weigh competing interests (balance = "reasonable")
  1. Issues:
     1. Choice of law: Look at forum's COL rules to determine what substantive laws apply
        1. COL is a de novo (of new) review, so each court on appeal revisits proper COL application
        2. Although SCOTUS insists that COL does not weigh heavier than other factors, it does
           1. If U.S. substantive law applies, court almost always keeps the case; if foreign law applies, courts almost always grants dismissal for FNC
           2. *Piper*: COL used as a proxy for interest analysis; i.e., substitute above for U.S. and foreign *interests* for *substantive law*
        3. § 1404: B/c original forum was proper, transferor court COL applies
        4. § 1406: B/c original forum was improper, transferee court COL applies
     2. Generally only granted when alternative forum available and acceptable *abroad* (e.g., *Piper*, Scotland; *Sinochem*, China), b/c § 1404 is available to transfer b/n domestic districts
        1. Only used domestically to transfer from federal to state court (rare)
     3. State FNC laws:
        1. Dismissal from one state court to another OR from state court to a foreign court
     4. **Degree of deference to P's choice of forum should be considerable**
        1. Strongest case is when a P files in D’s home forum (b/c obviously most convenient)
        2. But P's choice of forum is given less weight if he is a non-citizen
           1. *Piper*: If only reason for non-citizen P's choosing a forum is more favorable substantive law, FNC dismissal is not barred
        3. When determining level of deference given to P's choice of forum, courts scrutinize P's residency far more than D's
           1. Discretion may have led to improper dismissal when P is willing to sue D in D's home forum (general jurisdiction should be "safe" place to sue)
  2. Legislative prescription of venue v. judicial discretion to dismiss
     1. *Kepner* (1941): Broad deference to P's choice of forum when the choice complies with legislative prescriptions
        1. "A privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative…"
        2. Special venue provision of FELA barred FNC dismissal if P's choice of forum = proper
        3. But other SCOTUS decisions b/f *Gilbert* allowed some discretion to dismiss
     2. *Gilbert* (1947): A court may dismiss a case under common law doctrine of FNC, even though it has subject matter jurisdiction, personal jurisdiction, and venue
        1. Distinguished Kepner b/c Gilbert case relied on general venue statute and Kepner relied on special venue provision (FELA)
        2. Still allows only limited discretionary dismissal when "balance is strongly in favor of the defendant" (but discretion still broad b/c only overturn if clear abuse of discretion; *Piper*)
        3. Probable backlash against jurisdictional expansion post-Shoe
  3. Diversity cases v. federal statutory cases
     1. Fed. statutory cases: Which sovereign has ↑ significant interest in adjudicating the dispute?
        1. Can distinguish Piper b/c diversity
        2. Courts disagree about the extent to which a court may take a foreign jurisdiction's interest into account when considering dismissal (*Hartford Fire* suggests limitations)
        3. Hoffman argues sovereign interest analysis should be given greater weight in federal question cases (as opposed to diversity, where all factors are generally given equal weight)
  4. Choice of law rules guide courts as to which substantive law rules should apply

**SUBJECT MATTER JURISDICTION AND RELATED ISSUES**

**FEDERAL JURISDICTION STEP BY STEP**

1. All of the following must be met there to be federal juris:
   1. Either **diversity** or a **federal question**?
   2. PJ over **all** Ds (in personam or quasi in rem)
   3. Were all Ds properly served?
   4. Is venue proper?
   5. Did Ds receive notice?

1. SUBJECT MATTER JURISDICTION**:** 
   1. Def. – the authority of a court to hear a particular type of case
      1. Federalism: any power not explicitly reserved for federal gov't are for the states
      2. Separation of powers
   2. Original jurisdiction gives federal courts power to hear a case
      1. Diversity & fed. Q cases can generally be heard in federal OR state court (concurrent)
         1. If **concurrent** grant of original jurisdiction, both parties must agree to stay in state court (b/c § 1441 gives D right to remove)
      2. But some **exclusively** federal as granted by statute(e.g., patent-1338, copyright, bankruptcy)
   3. Federal constitutional SMJ NOT self-executing
      1. Requires authorization of 1) constitutional; 2) statutory; and 3) common law
      2. Constitutional authority must be augmented by "positive grant of statutory authority"
         1. Though fed. courts are only constitutionally limited to diversity and federal question cases, Congress has statutorily limited federal authority
         2. Provides for the adjudication of state law claims in federal court

## DIVERSITY STEP BY STEP

1. Does at least one side consist solely of foreign countries or citizens?
   1. Yes = Is suit btwn a citizen of a state on one side and a foreigners on the other?
      1. No = No diversity
      2. Yes = Go to numeral 20. (amount in controversy question)
   2. No = *below*
2. Is a corporation a party?
   1. Yes = Note that for diversity a corp is a citizen of *both* its state of incorporation AND it’s principle place of business, e.g., its nerve center. *Then* continue to numeral 19.
   2. No = *below*
3. Is there *complete* diversity? (read: no P is a citizen of the same state as any D)
   1. No = No diversity juris.
   2. Yes = *below*
4. Does amount in controversy exceed $75,000 for *every one* of the plaintiffs and claims?
   1. Yes = amount in contro is met.
   2. No = *below*
5. Are there multiple Ps?
   1. No = *directly below*
      1. Do P’s claims against a single D total more than $75,000?
         1. No = No DJ.
         2. Yes = amount in contro is met.
   2. Yes = *directly below*
      1. Is this a class action?
         1. Yes = Each named P(but not unnamed Ps) must have a claim greater than $75,000. If this is true, amount in contro is met.
         2. No = *directly below*
            1. Does at least one P have claims against a single D totaling more than $75,000?

No = Aggregation among Ps is **not** allowed and amount in contro is not met.

Yes = Other Ps do not have to meet amount in contro, because **Supplemental Jurisdiction** applies and amount in contro reqs are met.

* + 1. Constitutional:
       1. Article III, § 2: allows jurisdiction when–
          1. U.S. is a party
          2. B/n two or more states
          3. B/n a state and a citizen of another state
          4. B/n citizens of different states
          5. B/n citizens of the same state claiming lands under grants of different states
          6. B/n a state, or the citizens thereof, and foreign states, citizens or subjects
          7. Does not allow for suits b/n two foreign parties
       2. Not self-executing, so look to →
    2. Statutory:
       1. 28 U.S.C. § 1332(a): Citizenship determined by where party is domiciled
          1. Domicile = Residence in fact + intent to stay (at the time the suit is filed)
          2. Test is subjective but factors available to determine intent to stay
       2. Amount in controversy:
          1. Requires that the dispute involve +$75,000 and +$5,000,000 if class action
          2. To meet requirement, parties must plead sufficient amount in good faith (even if final award does not meet limit b/c impractical to vacate suits dependent on outcome)

*St. Paul Mercury*: "It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

High standard of proof (e.g., allow even if P contractually limited recovery but alleges K fraudulently entered; e.g., allow even if less than required amount after set-off)

Corporation = citizen where incorporated and PPB (if different)

* + - * 1. Aggregate P's claims to meet requirement BUT can exercise supplemental jurisdiction over Ps that ≠ meet AIC as long as one P does
        2. Commonly litigated b/c don't need to plead AIC in state court, so how do you know if there is sufficient AIC to remove?
    1. Common law limitation on § 1332:
       1. Requires complete diversity in most cases (*Strawbridge*)
       2. If presence of D2 destroys complete diversity, D1 can seek to remove D2 in order to obtain complete diversity (WWV)
          1. D1 could also claim "fraudulent joinder" (by 12(b)(6) or Rule 56 MSJ) where P joins a party solely to destroy complete diversity; D1 must show that P's claims against D2 are completely without merit (cannot base this allegation on final outcome of case)
          2. Absolute limit of removal of one year in diversity cases
  1. Federal Q:

Under the “complete preemption doctrine, “since all state law claims are preempted by the applicable federal statute, and viable cause of action can only arise under federal law and, thus, a suit filed in state court in these circumstances can be removed to federal court.”

* + 1. General rule: Federal SMJ exists when a federal statute creates a federal right of action
       1. From **Holmes' "Creation Test"**; describes the vast majority of cases (provides original jurisdiction AND grants private right of action); Grable test supplements
    2. Constitutional:
       1. Article III, § 2 (↑ expansive): "...judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority…"
       2. "Arising under" jurisdiction encompasses any case in which there is a "federal ingredient" (Osborn)
          1. This broad interpretation enables Congress to pass specific statutes giving federal courts jurisdiction over cases that do not fall under diversity or fed. Q
       3. Not self-executing, so look to →

## Statutory:

* + - 1. 28 U.S.C. § 1331: primary statutory grant of federal Q jurisdiction (general)
         1. Implements full extent of constitutional authority
         2. Full text: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."
         3. Fully under 1331 when statute creates private right of action or independent grant of jurisdiction (if NOT obviously in that category go to common law)
         4. But judicially interpreted ↑ narrowly, so look to →
    1. Common law limitation (Interpreting legislative intent of § 1331):
       1. *Mottley* (1891):
          1. Federal Q must be part of P's **"well-pleaded complaint"**
          2. Court found that complaint only alleged state law claim (breach of K) even though ONLY federal issues were in dispute
          3. Can't base jurisdiction on D's possible invocation of fed. law as a defense
          4. Sua sponte invocation of lack of SMJ
          5. Result = state courts wind up deciding many federal Q cases
       2. *Smith* (1921)
          1. "Substantial federal Q/ingredient"**:** Federal adjudication of purely state law causes of action = valid when they involve an important Q of federal law

Justifies obvious judicial activism by claiming that Congress intended to include this scenario under § 1331

To promote uniform interpretation of federal law (assuming federal judges more capable – no PARITY)

* + - 1. *Grable* (2005):
         1. Although complaint asserted purely state law causes of action and the federal statute did not provide a private cause of action, federal jurisdiction was appropriate b/c the issue in dispute – whether the federal statute required personal service – raised a substantial federal Q that was necessary to the outcome and actually in dispute
         2. A federal question may arise out of a state law case or controversy if the plaintiff asserts a federal right that:

1) involves a substantial question of federal law;

2) is framed in terms of state law; and

3) requires interpretation of federal law to resolve the case.

d. Reaffirms that sometimes the need to resolve an issue of federal law to prove a state cause of action will support federal jurisdiction.

* + - * 1. **Substantial Federal Q Doctrine, 2-part test**: (Expands Smith. When only state law claims asserted, when is federal jurisdiction still proper? See Issues)

Substantial federal Q itself is not sufficient, Q must be necessary to the outcome of the case AND actually in dispute. IF YES →

"Federalism impact": Would exercising jurisdiction upset the balance Congress intended to strike b/n federal and state jurisdiction?

* + - * 1. D alleged "artful pleading"
      1. Exceptions:
         1. Complete preemption: When ordinary federal preemption is not itself sufficient to remove to federal court, if a federal statute so completely preempts the field of law → remove

Constitution Art. VI (Supremacy Clause): If state and federal law conflict, federal law prevails = federal preemption

BUT federal preemption (substantial issue of federal law) is insufficient for federal Q jurisdiction and is not covered by § 1331

Discretion of state judge whether preemption = complete (so significant that it eclipses any state law) and therefore must be tried in federal court

A completely preempted claim made in state court = artfully plead

E.g., ERISA health care, labor mgmt act, banking act (↑ rare)

* + 1. No amount in controversy requirement
  1. Issues
     1. Lack of SMJ = "most favored" defense and can claim at ANY time (12b1)
        1. Must be certain that federal courts only render binding decisions where they have constitutional and statutory authority; those limits are not waivable/bargainable by the parties (to limit federal expansion of power)
        2. Trial and even appellate court has sua sponte obligation to raise SMJ issue
        3. When P or D files in federal court, always assume the risk that any judgment will ultimately be set aside for lack of SMJ
     2. Well-pleaded complaint
        1. Why?
           1. B/c federal courts have limited jurisdiction, requirement draws a clear line at complaint for courts to immediately assess whether cases arises under federal law (rather than waiting for D to bring up federal defense, which they may not)
        2. "Master of her complaint": Generally defer to P's choice of court (i.e., if P chooses to allege only state law claims → state court even if federal causes of action also exist)
        3. "Artful pleading" doctrine: BUT if P's cause of action ONLY and ACTUALLY arises under federal law, P cannot artfully plead her way around federal jurisdiction; opposite of a "well-plead" complaint
     3. **Substantial Federal Question Doctrine** problematic b/c to satisfy 1st prong, issue must be substantial and have a widespread impact (i.e. affect cases outside the instant facts) BUT allocating such important issues (and presumably a large # of cases) to federal courts might upset the congressional balance of the 2nd prong
        1. **Even if issue satisfies two prongs, still has to be part of well-pleaded complaint (i.e., if substantial federal Q doctrine only in *defense* [or counterclaim], no jurisdiction)**
        2. **Only cases that would seem to fit are those where the issue would affect a large number of people but would be unlikely to arise again once settled**
        3. ***Empire* court rejected jurisdiction b/c case "fact-bound and situation-specific" and so would not settle the Q of federal law and lead to ↑ cases removed**
        4. **Most court recognize that to be consistent w/ Grable test, interpretation of a federal statute must be the only legal or factual issue in the case**
        5. **SO reaffirms principle that state courts are to be routinely relied upon to interpret and apply questions of federal law**

# SUPPLEMENTAL JURISDICTION

1. Does claim have (1) diverse P & D and claim is >$75K; or (2) does claim raise a federal Q?
   1. No = SJ does not apply b/c lack of SMJ
   2. Yes= beyond core P1 v D1 claim are either (1) addtl claims by P1 v. D1 that don’t satisfy SMJ? or (2) addtl Ps or Ds whose claims don’t meet SMJ?
      1. No = SMJ irrelevant
      2. Yes= Examine SJ options below.
2. Addtl Claims by P1 v. D1: if P1 has add’l claims they can automatically be tacked onto the core claim.
3. Add’l Ds:
   1. SJ doesn’t apply to brining in of additional Ds. So if no fed Q in second CoA, there must be SMJ.
      1. **§ 1367(b)** no SJ for “claims by Ps against persons made parties under Rule 20.”
4. Add’l Ps: Are there add’l Ps beyond P1?
   1. Yes = Re. add’l Ps v. D1, SJ partially applies. Add’l Ps must be diverse w/ D1 if there’s no fed Q, but P2’s claim need not exceed $75K, b/c ***Allapattah*** says add’l Ps need not satisfy amount in contro.
   2. Yes = Re. add’l Ps v. add’l Ds, SJ prob does NOT apply b/c SJ doesn’t apply to brining in multiple Ds even by a single P. *See* **§ 1367(b)**.
5. Third Party Impleader (Rule 14): if D (or P whose defending against a counterclaim) impleads a 3PD (read: “if I’m liable to P, you’re liable to me for anything I have to pay”):
   1. 3PP v. 3PD claim = SJ applies so no fed Q or SMJ needed.
   2. A compulsory 3PD v. 3PP counterclaim arising from the same transaction or occurrence (TO) as the third party claim = SJ applies so no fed Q or SMJ needed.
   3. A permissive 3PD v. 3PP counterclaim that does NOT arise from the same TO = SJ does NOT apply, so fed Q or SMJ **is needed**.
   4. Claim by orig P v. 3PD = SJ does NOT apply, so fed Q or SMJ req’d.
6. D1 v. P1 Counterclaim Arising Out of Same TO as the P1 v D1(read: a 13(a) **compulsory counterclaim**)
   1. SJ applies to D1 v P1 compulsory counterclaim, so counterclaim can be for <$75K and it can be part of the same suit.
7. D1 v. P1 Counterclaim **NOT** Arising Out of Same TO as the P1 v D1(read: a 13(b) **permissive counterclaim**)
   1. SJ does NOT apply permissive counterclaim, so it must involve a fed Q or have SMJ to part of the same suit.
8. Class Actions:
   1. Multiple Ps: SJ applies. As long as **named** class members are completely diverse and meet $75K amount in contro, unnamed members don’t have to meet SMJ reqs.
   2. Multiple Ds: SJ prob doesn’t apply, b/c SJ doesn’t apply to brining in multiple D even by a single P. So, at least the named Ps must be diverse w/ all Ds, if there’s no fed Q.
9. Compulsory Joinder:
   1. Consider if there is anyone not currently a member of the action who should be “joined if feasible” under 19(a) (either as a P or a D). If yes, it doesn’t matter b/c SJ doesn’t apply.
   2. Issues:
      1. Congressional intent to give plaintiffs the right to bring suit in state or federal court
         1. If ≠ allow courts to exercise supplemental jurisdiction, Ps would be forced to 1) adjudicate all claims in state court; 2) drop state law claims; or 3) litigate state and federal claims in separate suits at the risk of inconsistent verdicts and inefficiency)
      2. Discretionary: If state law claims "predominate", can decline to exercise SJ
   3. Gibbs (699):
      1. Federal SMJ proper even though only claims left after dismissals were state law
      2. Federal courts have constitutional authority to decide state laws causes of action if they are closely related to federal claims also brought in the suit; TEST =
         1. Is the federal claim substantial? Important b/c claim must be substantial to fall under "arising under" jurisdiction. Generally all non-meritorious claims. If yes →
         2. Does the claim derive from the same "common nucleus of operative fact"? If yes →
         3. Discretionary: "doctrine of discretion, not of plaintiff's right"
   4. Kroger (703)
      1. Diverse parties Kroger (Iowa) v. OPPD (Neb.) suit in Neb. federal court on a state law claim for negligence for the death of P's husband
      2. OPPD impleads Owen b/c 1) Rule 14 and 2) ancillary jurisdiction (necessary b/c both OPPD and Owen = Neb.)
         1. Important that OPPD as an involuntary D (rather than P) brought in Owen b/c ensures that P is not abusing ancillary jurisdiction system (logical relationship of claims)
      3. Problem arose when P attempted to assert her own claim against Owen (in addition to OPPD's claim against Owen) and discovered during trial Owen's PPB in Iowa (non-diverse)
         1. Owen brought 12(b)(1) to dismiss for lack of SMJ
         2. P COULD have moved for sanctions/waiver to stop Owen from claiming PPB in Iowa b/c unnecessary delay & reliance
      4. Court refuses to allow ancillary jurisdiction over two non-diverse parties where the original jurisdiction was based on diversity (b/c would open the door for Ps to evade the diversity requirement through impleader)
      5. Outcome would NOT be changed by later passage of §1367 b/c CONTAMINATED
   5. Finley: overturned by 28 USC Sec. 1367
   6. § 1367**:**
   7. **(a)** Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
   8. **(b)** In any civil action of which the district courts have original jurisdiction founded solely on section [1332](http://www.law.cornell.edu/uscode/uscode28/usc_sec_28_00001332----000-.html) of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons (READ: DEFENDANTS) made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section [1332](http://www.law.cornell.edu/uscode/uscode28/usc_sec_28_00001332----000-.html).
   9. **(c)** The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
      1. **(1)** the claim raises a novel or complex issue of State law,
      2. **(2)** the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
      3. **(3)** the district court has dismissed all claims over which it has original jurisdiction, or
      4. **(4)** in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
      5. (a): Exercise supplemental jurisdiction over claim that is "so related"
         1. "So related" = statutory equivalent of "common nucleus of operative fact" that they form part of the same case or controversy
         2. Encompasses requirement of Article III, §2
      6. (b): Exceptions to (a)
         1. Courts do NOT have SJ over claims by P made against Ds brought in under Rules 14 (impleader, Kroger), 19 (indispensible parties), 20 (permissive joinder) and 24 (intervention) **OR** by Ps brought in under 19 and 24; READ: it does not bar PLAINTIFFs brought in under 14 and 20
         2. Only applies to diversity cases, do NOT apply exceptions to federal Q cases
   10. Allapattah:
       1. When 1) original basis of SMJ exists (in diversity context, there is complete diversity and at least one P meets the minimum amount in controversy requirement) AND 2) claims are "so related" under §1367(a) → supplemental jurisdiction is proper over other Ps
       2. Does not work w/ non-diverse P b/c original basis of SMJ eliminated immediately
       3. Why does the presence of a non-diverse P contaminate the suit and the presence of a P that does not meet the AIC requirement does not?
          1. B/c reasoning behind diversity requirement in to reduce bias whereas the reasoning behind AIC is to ensure that federal cases are of a certain importance; allowing Ps w/o AIC in the same case would not diminish importance
   11. Just as Rule 20 Ps are not barred from SJ, neither are Rule 23 Ps; omission odd and may have been a legislative oversight, but up to Congress to fix (haven't since)
       1. Ability to hear these cases in federal court ↑ important b/c :
          1. Ds believe federal judges are more reluctant to certify large classes of plaintiffs (bias)
          2. Protects absent Ps b/c federal judges will give more rigorous scrutiny to settlements
          3. Enables consolidation of a suit that would otherwise be litigated in many state courts
             1. So once a state case is removed to federal court, D can consolidate by transferring cases to one place under §1404
   12. Class Action Fairness Act (CAFA) – Feb 2005
       1. Codified in §1332(d)
       2. Allows for class action cases to be removed to federal court when there is minimal diversity (only one P needs to be diverse from one D) and allows aggregating claims b/n Ps if minimum $5 million AIC.
       3. Key differences from supplemental jurisdiction = not necessary to have an "anchor claim"
       4. Would try CAFA first b/c more lenient, if not (b/c less than $5 mill) try for supplemental under Allapattah

# REMOVAL:

* 1. Under the “complete preemption doctrine, “since all state law claims are preempted by the applicable federal statute, a viable cause of action can only arise under federal law and, thus, a suit filed in state court in these circumstances can be removed to federal court.”
  2. When D removes (and only Ds remove), case transferred to closest federal court
  3. Consent of ALL Ds necessary to remove
  4. D files "Notice of Removal" in Fed court and send to P, but no request or grant is necessary.
  5. Puts onus on P to remand ,BUT federal court has sua sponte obligation to remand if appropriate.
  6. So burden of proving jurisdiction necessarily on D to show federal court has SMJ
  7. **§1447(d)** says once remand granted, no review (note that a denial of remand is reviewable, but unlikely to be over-turned).
  8. When D removes, state court proceeding is suspended until jurisdiction settled.

P can file an answer (depending on jurisdiction), challenge jurisdiction (special appearance), but most actions in state court will lead to waiver

* 1. **§1441**: can remove any case that could have originally been filed in federal court
     1. (b): Local D exception: Case filed by P-TX against D-NY in NY state court cannot be removed even if complies w/ 1332 b/c D-NY is not at a disadvantage in NY state court (even though exact case could have originally been filed in NY federal court)
  2. **§1446**: Mechanics of removal
     1. (a): Remove to the federal court in the district and division of the pending action
        1. Requires "short and plain statement of the grounds for removal", so *Twombly* may impose a standard of plausibility on removal
     2. (b):
        1. If original case not removable but becomes removable (e.g., non-diverse D dropped) Last sentence says removal must take place w/in a year of filing if diversity jurisdiction
  3. ***Martin***
     1. P claims that any time a case is remanded, D must pay attys fees; or, at least, that there should be a strong presumption to grant fees
     2. D claims 1447 only allows granting of fees to give courts jurisdiction to do so, but that courts still need additional statutory/legal grant to impose such fees (e.g., Rule 11)
     3. SCOTUS interprets § 1447(c) – allowing courts to grant attorneys fees – to give courts discretion → absent exceptional circumstances, courts can award fees only where removing party lacked an "objectively reasonable" basis for removal (D's basis for removal had not been struck down yet, so reasonable)
     4. **Effect** = Ds more likely to try to satisfy *Grable* b/c so rare for a P to get attys fees

# CHOICE OF LAW

* 1. **§ 1652**: The laws of the several states, except where the Consti or treaties of the US or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil action in the courts of the US, in cases where they apply.
  2. **§ 2071**:

(a) Fed courts may make rules for themselves as long as they don’t conflict with Fed laws.

(b) any rules made under (a) require a period of public notice

(c)(1)/(2) a rule made under (a) is effective until modified or abrogated

(d) copies of rules made under (a) must be filed with appropriate authority

(e) rules may be made on the fly, but then they have to undergo public comment period

(f) no rule may be prescribed by a district court other than under this section

* 1. **§ 2072**:

(a) The S.Ct. has power to prescribe rules of practice for fed district cts.

(b) Such rules must be strictly procedural in nature. Laws in conflict with those rules are without force thereafter.

(c) Such rules may define when a ruling of a district ct is final for the purposes of appeal under § 1291

* 1. Erie (724):
     1. **CONSTI RULE: Where Congress lacks lawmaking ability, state law governs.**

**If Congress lacks lawmaking power, so too does the Federal court.**

* + 1. Overturns Swift's allowance of application of a "federal common law"
       1. Federal courts now bound to apply state substantive law (statutory or common law) to federal proceedings unless Congress has expressly held otherwise
       2. Chose not to merely reinterpret § 34, but also found unconstitutional b/c federal courts lack general rule-making authority (probably separation of powers rather than federalism issue, but Brandeis left intentionally vague)
    2. P's lawyer carefully chose NY federal court b/c PA law was unfavorable
       1. Didn’t want to file in PA state court OR NY state court b/c NY's choice of law statute applies law from "place of injury," which was PA.
       2. PA federal court in 3rd circuit generally deferred to state law rather than "federal common law", as courts in 2nd circuit like NY did
    3. Background:
       1. Persons (as in those protected by due process) = included corporations
       2. Federal common law option favorable for corporations to escape populist state legislation enacted to promote social welfare (though opposite result in Erie)
    4. Swift:
       1. Interpreted § 34 of Federal Judiciary Act to mean that federal courts are only bound to apply statutory/written law of the state NOT state common law/unwritten
       2. Led to forum shopping (E.g., Black & White Taxicab reincorporated in another state to obtain diversity jurisdiction to gain access to the federal court) & inconsistent results
          1. B/c citizenship established at the time of removal
  1. Test for COL
     1. Federal statute:
        1. Does it apply?
        2. Is it constitutional?
        3. Yes to both → apply
     2. FRCP:
        1. Does it apply?
        2. Is it constitutional? (SC never declared FRCP unconstitutional b/c it approved)
        3. Does it violate the Rules Enabling Act?
           1. 28 USC §2072: in part, rules may not abridge substantive right
        4. Yes to all → apply
     3. Common law procedural rule (not FRCP & not in federal statute):
        1. Would applying it violate "twin aims of Erie" (discourage forum shopping and provide systematic fairness in administration of the law)?
        2. Would it interfere with an important state policy or interest?
        3. Yes to either → don't apply

# DISCOVERY

1. PRE-SUIT DISCOVERY Rule 27**:**
   1. Narrow scope of authority to conduct pre-suit discovery, can be used “to perpetuate testimony regarding any matter that may be cognizable in any court of the US.”
   2. Rarely, **Rule** **27** allows pre-complaint deposition if delay will lead to irreparable loss of evidence, e.g., witness is about to die/be out of court’s subpoena jurisdiction.
2. INFORMAL DISCOVERY **= why ask permission when you can do it w/o court permission?**
3. Anything you don’t have to ask for, e.g., matters of public record, FOIA, our own client's witnesses, internet research, etc.
4. When? Prior to and/or during suit.
5. Why? Cost and time effective.
6. Issues
   1. Liberal discovery rules allow liberal pleading standards of Rule 8, but expense and time required of discovery (and allowing P w/ iffy complaint to reach discovery phase) has led to limits on both
   2. BUT studies show very few cases are actually afflicted by abusive discovery practices (so justification of heightened pleading standard of *Twombly* inapplicable to vast majority)
   3. 2000: last major discovery rule changes
      1. Court more involved in scheduling, including discovery
      2. Scheme of mandatory disclosures put in place
7. **SCOPE**
   1. **26(a)**: Mandatory Disclosures (names, addys, docs, comp of damages, etc.). W/in 14 days of 26(f) conference. **Note requirement to supplement if you find other docs later.**
   2. **26(b)**: Request any matter, not privileged, relevant to the claim or defense of any party that is not unreasonably cumulative or burdensome
   3. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action
   4. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence
8. **PROCESS**: **(1)** suit filed + D served **(2)** R 26(f) conf. **(3)** R 26(a) mandatory disclosure **(4)** R 16(b) conf
   1. Conference – 26(f):
      1. Must occur at least 21 days before Rule 16(b) scheduling conference w/ court, which must occur no more than 90 days after D answers or 120 days after D served (tho may ≠ adhere)
      2. **26(d)**: NO discovery until 26(f) conference
   2. Mandatory Disclosures – 26(a)(1):
      1. W/in 14 days of the meeting, parties make
         1. (A) Contact info of individuals likely to have discoverable information that the disclosing party may use to **support** its claims or defenses, unless solely for impeachment, IDing the subjects of the information
   3. Written Interrogatories – **33:** Hoffman: “Basically worthless: they get a long time to answer and lawyers draft the answers.”
      1. Can send no more than 25 Qs, count by individual Q (sub-parts count separately)
      2. Can only send to parties to the case, and they must swear that answers are true
      3. Receiving party has 30 days to respond
      4. Generally not very helpful b/c lawyers have time to make answers vague.
      5. Benefits: cheap; can tailor to specific facts
   4. Request for Production -- **34**
      1. Unlimited
      2. Can make requests from parties and non-parties, but may need Rule 45 subpoena
      3. Almost any “relevant” docs can be requested.
   5. Request for Admission
      1. Good to narrow scope of dispute (only to parties)
      2. Party can admit, deny, or claim lack of knowledge (like options for answer) w/in 30 days
      3. Failure to respond in 30 days = admission
      4. Admissions thereafter deemed true (at trial), unless retracted
   6. Depositions
      1. Most expensive discovery device
      2. Made under oath; recorded; transcribed.
      3. Except by agreement of the parties or by court order
         1. Limited to one day of 7 hours
         2. No more than 10 per side [30(a)(2)(A)]
      4. **30(b)(1)**: Deposition of an individual (e.g., regular guy, CEO, mid-level manager)
         1. No special preparation required, not officially speaking for a company
      5. **30(b)(6)**: Deposition of an organization (if you don't know/care exact person)
         1. Company designated corporate representative to testify as to the subjects of request
         2. Person w/ most knowledge speaks on behalf of/binds company (any level)
         3. Can be more than one rep (if subject matter = related, may not count toward limit)
9. **LIMITATIONS**
   1. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)
   2. Privilege
      1. Test: 1. Did atty/client relationship exist?

2. Was the communication made in confidence?

3. Does the comm. related to a legal issue?

4. Was the client seeking legal advice? (

5. No waiver (if client later discloses conv ?)

* + 1. Can be waived, may not extend to different suits
       1. Subject to gov't blackmail to waive privilege or be crushed
       2. If waive privilege, usually waived for all future suits from other plaintiffs (rare courts recognize "selective waiver")
    2. Attorney-Client = most common
       1. Covers confidential communication b/n lawyer and client where legal advice sought/given (i.e., with litigation in mind)
       2. ONLY actual communication, not the underlying facts communicated
       3. Recognized by Fed. Rules of Evidence and state privilege law (not in FRCP)
       4. Upjohn
    3. 26(b)(5)(A): If claiming privilege, must provide an explanation w/o revealing contents to "enable other parties to assess the applicability of the privilege"
  1. Claw-back
     1. 26(b)(5): If a party inadvertently releases privileged document, can get it back
     2. BUT party has already seen it, so cat's out of the bag

## Work Product Exemption

* + 1. Cannot be waived, once exempt always exempt (i.e., extends to all future suits)
    2. **26(b)(3)**: (Partially codifies Hickman)
       1. Party may obtain discovery of *documents and tangible* things otherwise discoverable and
       2. **prepared in anticipation of litigation or for trial** by or for another party or by or for that other party's representative

3. but if other party can make showing of substantial need of the materials and

undue hardship they may be able to get the docs. But not if **→**

* + - 1. 26(b)(3)(B): "the court shall protect against disclosure of the **mental impressions, conclusions, opinions, or legal theories of an attorney** or other representative of a party concerning the litigation" (“Other rep” means: not necessarily prepared by lawyer, e.g., report of private investigator, consultant)

## E-DISCOVERY

* 1. Exponentially raises costs of document review (58-90% of total litigation costs in large cases)
  2. Tension b/n practical destruction (to prevent untenable buildup of info) and preservation for suits
     1. Good faith v. bad faith document destruction →
     2. **37(f):** "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system"
  3. **26(f)(3)**: At 26(f) conference, parties must discuss "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced"
     1. **B/c most cases are b/n large companies, both are confronted w/ cost issues**
  4. **26(b)(2)(B)**: permits a party to objects to producing electronic documents "not reasonably accessible because of undue burden or cost"
     1. On a motion to compel, party claiming unreasonableness must prove
     2. Even if proven, court can still compel production on showing of "good cause"
  5. **34**: Parties must produce info in reasonably accessible format
     1. Party can request the form; if not, producing party chooses
     2. Party ≠ need to produce the same electronically stored information in more than one form

# SUMMARY JUDGMENT – Rule 56

1. **POLICY**
   * 1. Can be considered a “tool for judges to control dockets and respond to the supposed “litigation explosion.”
   1. Is there a genuine issue of material fact to be decided by a jury?
   2. What evidence will have been admitted by the time for a motion for a directed verdict?
   3. After reasonable opportunity for discovery, P should be able to survive if case = meritorious
   4. 56 = sufficiency of evidence v. 12(b)(6) = sufficiency of allegations
   5. Almost all MSJ filed by defendants
      1. D only has to show no genuine issue of material fact in one element of P's case, whereas P must show all elements w/ certainty
   6. FJC Study: Trend toward increasing usage of MSJ actually began in 1975, continues today
      1. 1975: MSJ motions filed in 12% of all civil cases (terminated); 2000: 22%
      2. 1975: MSJ motions granted in 6%; 2000: 12%
      3. But there are many other mechanisms to obtain dismissal ≠ reflected in #s
      4. Vary court by court: 5th Circ. 11 motions/100 cases, granted 60%
      5. Vary by type of case: MSJ more likely in K cases than tort; BUT 5th Circ. grants MSJ in 78% of employment discrimination cases (some districts as high as 95%)
2. **RULE 56**
   1. Who and When
      1. 56(a): P may file MSJ 20 days after filing of suit has passed OR after D files MSJ, with or without affidavits.
      2. 56(b): D may file MSJ at any time
      3. 56(c): Must be filed at least 10 days b/f date of trial, grant if "there is **no genuine issue as to any material fact** and that the moving party is entitled to a judgment as a matter of law."
   2. Affidavits
      1. 56(e): Affidavits, to be competent MSJ evidence, must be based on personal knowledge, set forth admissible facts, and show affiant is competent to testify on subject matter
      2. 56(f): Req for continuance, often has effect of taking a prematurely filed MSJ and pushing it to after discovery stage.
      3. 56(g):
   3. Issues
      1. Enacted to enable lower pleading standards but still intercept unmeritorious cases b/f trial
      2. Can raise on factual (e.g., no available facts that support P's argument) or legal (e.g., no cause of action available on P's contentions) basis
         1. Under Celotex, factual basis ≠ require any attachment to MSJ, but legal basis would require a showing of relevant law
         2. Legal basis likely to be challenged on 12(b)(6), potential to be mixed Q of law and fact
3. Adickes:
   1. P suing under § 1983 for conspiracy (b/n store and police) to discriminate
   2. D has burden of proof to show no genuine issue of material fact by negating any possibility that the officer was in the store (important b/c P would have burden @ trial)
   3. Read as signaling a distaste for summary judgment
4. **TRILOGY**
   1. 1986: 3 cases decided by SC to urge increased, proper usage of MSJ
   2. Celotex:
      1. P claims her husband died from asbestos products made by D, district court grants MSJ
         1. Appellate court reversed on grounds D ≠ satisfy burden of showing ≠ issue of fact
         2. SC holds D satisfied burden by merely pointing out deficiency in P's case, remand to decide whether P satisfied her burden to show evidence would raise issue of fact
      2. D claims P's answers to interrogatories don’t list witnesses who are able to testify on asbestos exposure
      3. P responds by attaching 1) letter from insurance company to P's lawyer; 2) letter from a former employer; and 3) deposition of decedent → all establish exposure BUT all documents would be inadmissible at trial for hearsay
         1. P's evidence offered in response to MSJ need not be in admissible form if in 56(c) list
      4. Court rejects P's argument that Adickes decision placed burden of proof on D to show P ≠ have evidence, holds that D need only "show" (56(c)) absence of supporting evidence – that is, point it out.
      5. **Hoffman**: an under used aspect of MSJ is that you don’t have to prove it all in one shot. give the judge more options as to what he’s going to dismiss.
      6. Effects:
         1. Where party ≠ bear the burden of proof at trial, it's sufficient to merely **point out (="show")** lack of evidence of an element of P's case; burden will then shift back to P
         2. After "showing", P must present evidence for a reasonable jury to find for them at trial
         3. 2nd most cited case of ALL TIME: generally adhere to Rehnquist's more liberal standard than White's concurring opinion that a "conclusory assertion" = insufficient
         4. Compare to SC's interp of "showing" in Twombly to require plausibility
   3. Example
      1. P sues D for breach of K, D files MSJ claiming K = forgery
         1. If P does nothing to respond, grant MSJ

# Directed Verdicts / Judgment as a Matter of Law / JNOV

1. If, after Ps case in chief, D moves for Rule 50 JMOL, judge may grant it if he concludes that P’s case is so weak that no reasonable jury could find for the P.
   1. If this is the case, allowing the case to go to the jury could produce irrational results.
   2. BUT, if P has fulfilled his burden of proof – that a preponderance of the evidence favors the P’s claim(s) – then reasonable minds could differ as to the outcome of the case, and the judge must let it go to the jury.
2. Rule 50
   1. (a)(1) JMOL may be entered if “there’s no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party (usually the P).
   2. (a)(2) You have 10 days after close of all evidence to move for a renewed motion for judgment as a matter of law.
3. you can move JNOV as a D, after P’s case in chief, or as either D or P after both sides have rested.
4. Use of JNOV: if a judge grants a directed verdict, thus taking the case away from the jury, it may be reversed on appeal. This will necessitate a new trial, and the orig jury’s work will be wasted. So, most judges “Reserve Opinion” on a directed verdict motion until after the jury has reached a verdict; then it is called a judgment notwithstanding the verdict. R50 obliterates this and calls it judgment as a matter of law.
5. See *Galloway v. United States*.

# Judgment Not Withstanding the Verdict (JNOV: judgment non obstante veredicto)

1. It’s the exact same thing and name under Rule 50: JMOL. But, in state courts it’s usually still called JNOV.
2. This is the judge’s authority to displace the jury’s verdict.
3. It is a renewed motion for a directed verdict.
4. The losing party will move for this when he has lost, and is basically arguing that the jury acted unreasonably and with disregard for the evidence presented. **Argue: compassion or prejudice!**
5. Reasoning for allowing this “renewed” JMOL:
   1. JMOL prior to jury verdict is very likely to be appealed. If appellate court says evidence was adequate for jury decision, then the whole trial will have to be repeated.
   2. If judge just “reserves opinion,” the jury might decide the same way he would have, thus avoiding any appearance of intrusion by the judge.
   3. And, if jury rules the wrong way, judge can still enter JNOV.
   4. Then, if appellate ct reverses, it will “order judgment entered on jury verdict” and retrial will be avoided, saving time, money, judicial resources, etc.