1. **Requirements to Sue:**
   1. **Personal Jurisdiction:** Jurisdiction a court has over a person
   2. **Proper Venue**: Is this the right region or district to hear the case?
      1. State court venue is done by country (Texas has 254)
      2. Federal court venue is done by district (94 districts w/ in 12 circuits)
   3. **Subject Matter Jurisdiction:**
      1. State Courts:
         1. SMJ is by subject matter and amount in controversy
         2. JP Courts are usually for under $10,000
         3. SM courts such as: criminal courts, civil courts, family courts
      2. Federal Court:
         1. Federal questions
         2. Diversity (P and D form different states)

* **Notice Pleadings \*Consult Shell Answer on Exam**

1. **Plaintiff’s Complaint**- “A short and concise statement” which must meet the specificity and substantive standards
   1. **Rule 8(a) Complaint Must**: state a claim, show jurisdiction and claim relief.
   2. **Specified Standard**: Complaint must be a short and concise statement that gives reasonable notice to the D of the type of claim
      1. *Twombly* Addition: Must include enough facts so that the conclusions contained can be plausibly inferred
         1. Twombly Two Step:
            1. Strike out all conclusory statements
            2. See if the remaining allegations make the complaint plausible
         2. 12(b)(6) can be used for “failure to state a claim upon which relief can be granted”
         3. Need more than “labels and conclusions” or “formulaic recitation of the elements”
         4. **Note**- Courts are split on whether Twombly applies to Answers
   3. **Substantive Standard:** Complaint is construed in the light most favorable to P. Assume all allegations are true, dismiss only, as a matter of law, P still couldn’t recover
   4. **Particularity**: Some claims must be pled w/ particularity
      1. Fraud- Rule 9(b)
      2. Mistake- Rule 9(b)
      3. Damages- Rule 9(g)
   5. *Test Tip*: Form 11 of the index shows an acceptable complaint
   6. **Defense Attacks on Pleadings**
      1. MT to Dismiss for failure to state claim: Rule 12(b)(6)
         1. Attack on the substantive standard: Even if allegations were true no relief granted
      2. MT for a more definite statement: Rule 12(e)
         1. Claims that P has not given adequate reasonable notice to the D
      3. MT to Strike
      4. **Tip**: Pleading may not contain irrelevant, immaterial or scandalous material
   7. **Relevant Cases**
      1. ***Dioguardi v. Durning, 2d Cir. 1947*** 
         1. **Facts**: Poorly drafted, home-drawn complaint by unrepresented plaintiff with sub-par English language skills. Dismissed on the ground that it “fails to state facts sufficient to constitute a cause of action.”
         2. **Reasoning**: “…he has stated with enough to withstand a mere formal motion, directed only to the face of the complaint…Under the new ruled of civil procedure, there is no pleading requirement of stating ‘facts sufficient to constitute a cause of action,’ but only that there be ‘a short and plain statement of the claim showing that the pleader is entitled to relief’…”
      2. ***Conley v. Gibson, USSC, 1957*** 
         1. **Facts**: Complaint by black railroad workers that they were required to join a union, but then segregated and treated unequally but that union. Motion to dismiss on 12(b)(6) and a vague referral to 12(e).
         2. **Reasoning**: With respect to 12(b)(6): “[W]e hold that…the complaint adequately set forth a claim on which relief could be granted…a complaint should not be dismissed for failure to state a claim **unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief**.”
         3. With respect to 12(e): “The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”
      3. ***Leatherman v. Tarrant County NICU, USSC, 1992* – NOT THAT HELPFUL** 
         1. **Facts**: Civil rights case brought against law enforcement officials who had ransacked the home of a black family, shot and killed pets, and celebrated it, not finding anything relevant to their investigation.
         2. **Reasoning**: Some lower federal courts (specifically Fifth Circuit in this case) had been trying to impose a stricter pleading standard in some types of cases, including civil rights, and also cases against state actors in their individual capacities. Also supported lower court’s dismissal of claims based on 12(b)(6), a motion that defendant had not brought.
         3. “**We think it is impossible to square the ‘heightened pleading standard’ applied by the Fifth Circuit in this case with the liberal system of ‘notice pleading’ set up by the Federal Rules…**that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”
         4. Reaffirms *Conley*.
      4. ***Swierkiewicz v. Sorema N. A., USSC, 2002*** 
         1. **Facts**: Employment discrimination suit based on nationality and age. Plaintiff a Hungarian ex-employee of defendant, a French company. Plaintiff alleges that his French boss demoted him and transferred the bulk of his responsibilities to a younger, less experienced French national. Plaintiff complained and was fired after refusing to resign.
         2. **Reasoning**: Lower courts, in spite of *Leatherman*, were still attempting to impose a heightened pleading standard for civil rights cases. Case was initially dismissed in lower courts on grounds that petitioner failed to plead a prima facie case of discrimination, referring to a case *McDonnell Douglas Corp. v. Green*.
         3. “The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement…The Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.”
         4. Cites and reaffirms *Conley* and *Leatherman*. At this point it probably only applied to civil rights case.
      5. ***Bell Atlantic Corp. v. Twombly, USSC, 2007*** 
         1. **Facts**: This is an anti-trust case under the Sherman Act, which requires a “contract, combination…or conspiracy, in restraint of trade or commerce.” Issue is whether or not a “complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.”
         2. **Reasoning**: “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires **more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do…Factual allegations must be enough to raise a right to relief above the speculative level**.”
         3. “[R]equires a complaint with enough factual matter (taken as true) to suggest that an agreement was made…does not impose a probability requirement…calls for enough fact to raise a reasonable expectations that discovery will reveal evidence of an illegal agreement…requirement of rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”
         4. “‘Conley has never been interpreted literally’…‘[i]n practice, a complaint…must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory’…”
         5. **“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face**. Because the plaintiffs have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”
         6. Does not reject previous decisions or Form 11, and claims not to endorse “heightened pleading.”
         7. *Conclusory* “the complaint claims set out what is set to prove”
         8. **Dissent**: “…‘plausibility’ standard is irreconcilable with Rule 8 and with out governing precedents.”
         9. **Notes**: Documents filed *pro se* (without a lawyer) must be held less stringent standards and courts are typically more forgiving when plaintiffs have no legal representation, so maybe *Conley* still applies in such cases.
            1. The more five w’s you can show the better
            2. What would your fifth grade teacher say?
      6. ***Ashcroft v. Iqbal, USSC, 2009*** 
         1. **Facts**: Post-9/11 race discrimination case.
         2. **Holding**: “Did respondent, as the plaintiff of the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent’s pleadings are insufficient.”
         3. **Reasoning**: “*Twombly* called for ‘flexible “plausibility standard,” which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.’”
         4. Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation…Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’”
         5. “First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a course of action, supported by mere conclusory statements do not suffice…we ‘are not bound to accept as true a legal conclusion couched as a factual allegation’…”
         6. “…two-pronged approach…plaintiffs’ assertion of an unlawful agreement was a ‘“legal conclusion”’ and, as such, was not entitled to the assumption of truth…next addressed the ‘nub’ of the plaintiffs’ complaint—the well-pleaded, nonconclusory factual allegation of parallel behavior—to determine whether it gave rise to a ‘plausible suggestion of conspiracy,’ [using] **judicial experience and common sense**.”
         7. “Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—structures of Rule 8.”
         8. **Extended *Twombly* to all pleadings, striking down argument that it and *Iqbal* only applied to specific cases or types of cases.**
   8. **Summary of Notice Pleadings:**
      1. **Current state:** In a period of flux with respect to notice pleading. Rule makers are actively considering changing the rules, however, recent pleading decisions have had very little effect of litigation, really only affecting unusual cases.
      2. **Purpose:** Rule 8 is the default unless: 1) there is a more specific rule; or 2) congress passes a law indicating otherwise. Pleadings should simply give notice to the other side as to what the case is about. Rule makers sought to facilitate decisions based on the merits, and to do away with hypertechnical pleading requirements. There are two camps: 1) 12(b)(6) is really only meant to weed out cases in which no legal justification is recognizable; and 2) pleadings should be used as a more aggressive filter to weed out meritless cases.
      3. **Current rule:** In evaluating the sufficiency of a complaint, the court may look only to the “**four corners of the complaint**,” and must assume true any factual allegations asserted by the plaintiff. (Does the complaint “on its face” show a lack of legal cause?) *Twombly*/*Iqbal* two-step: 1) strike all conclusory allegations; then, 2) evaluate remaining factual allegations on the basis of plausibility, using “judicial experience and common sense.” (Conclusory is basically parroting terminology needed for a cause of action, but with no factual support. The standard of plausibility is probably akin to the standard at summary judgment, i.e. we only take cases away when, based on the information, if a jury ruled one way it would be unreasonable.) Could you infer a cause of action based on the remaining facts?
      4. **Ways a claim can be insufficient:** 1) No cause of action exists; 2) a cause of action may exist, but has not been plead; or 3) the pleader has “plead themselves out of court.”
   9. **Policy Considerations**:
      1. Balance of liberal and heightened standards: You might dismiss a meritorious case or allow a frivolous
      2. Liberal standards invite potentially expensive discovery and may encourage innocent D to settle to avoid discovery cost
      3. Instead of dismissal P should be allowed to amend
2. **Defendant’s Answer:** 
   1. 1. **In General**: Rule 8(b)
      1. (1) In responding to a pleading a party must
         1. (A) state in short and plain terms its defense to each claim asserted against it; and
         2. (B) Admit or deny the allegations asserted against it by opposing party
   2. **Denials**: A denial must fairly respond to the substance of an allegation
   3. **General and Specific Denials**: You can do, in good faith, a general denial of all claims. If not either deny specific allegations or do a general denial except those admitted
   4. **Denying part of an Allegation**: If denying part you must admit the part that is true and deny the rest
   5. **Lacking Knowledge or Information**: a party that lacks knowledge or info sufficient to form a belief about the truth of an allegation must state so- the effect is a denial
      1. they must state they lack the knowledge
   6. **Service**: The answer must be served (not filed) within 21 days after receiving the complaint: Rule 12(a)(1)
      1. If responding by MT and it is denied then you have 14 days to file a responsive pleading (answer): Rule 12(a)(4)(A)
      2. Use Rule 6(b) if need more time: Mt is stipulated between parties and must be approved by court
   7. **Rule 11-** All pleadings are subject to Rule 11
   8. **Failure to Deny**
      1. A failure to deny is an admission
      2. When no responsive pleading is required an “allegation is considered denied or avoided
   9. **Twombly/Iqbal-** courts are split one whether the test applies to Answers. But they could logically be applied because 8(b) and 8(a) use similar language.
3. **Affirmative Defenses**
   1. Must be done by notice pleadings Rule 8(c)
      1. Short and plain statement- notice and sufficient facts so that it is reasonable to infer the defense
         1. Unavoidable accident is not an affirmative defense, it’s a rebuttal
      2. List in Rule 8(c) of possible, but not exhaustive, defenses
   2. **Confession and avoidance**:
      1. “Even if you prove your cause of action, I’ll still win because of another rule or an exception”
   3. Defendants have the burden of pleading, production and persuasion as to all elements of affirmative defense
4. **Pre-Trial Motions**
   1. **Rule 12(b):** These defenses can be asserted by MT

(1) Lack of SMJ

(2) Lack of PJ

(3) Improper Venue

(4) Insufficient Process

(5) Insufficient Service of Process

(6) Failure to state a claim in which relief could be granted (three ways to show this)

(7) Failure to join absentee under Rule 19

* 1. **Rule 12(c):** MT for Judgment on the Pleadings
     1. Used after pleading stage is over, basically same logic behind 12(b)(6)
  2. **Rule 12(e):** MT for More Definite Statement
     1. Used when a complaint is so vague and ambiguous that the party cannot reasonably prepare a response
     2. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired
     3. Does not address legal or factual insufficiency- aimed only at a complaint that can not be understood
     4. If granted P gets 14 days to clarify and respond, D must also respond w/ 14 days of clarification
  3. **Rule 12(g):** Joining Motions:

(1) **Right to Join:** A MT under this rule may be joined w/ any other MT allowed by this rule

(2) **Limitations of Further MT**: Except as provided in Rule 12(h)(2) or (3), a party that makes a MT under this rule (Rule 12) must not make another MT under this rule raising a defense or objection that was AVAILABLE to the party but OMITTED it from it’s EARLIER MT.

* 1. **Rule 12(h):** Waiving and Preserving Certain Defenses

(1) A party waives any defense listed in Rule 12(b)(2)-(5) by either

(A) Omitting it from a Mt in the circumstances described in rule 12(g)(2) or

(B) Failing to either

(i) make it by MT under this rule

(ii) Include it in a responsive pleading or an amendment allowed by rule 15(a)(1) as a matter of course

(2) When to Raise Others: Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b) or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a)

(B) by MT under rule 12(c)

(C) at trial

3. Lack of SMJ: if lacking SMJ court will dismiss at any time

1. **Waiver Rules**
   1. **Least favored defenses**: 12(b)(2)-(5). Rule 12(h)(1) applies. Waived by leaving them out of a prior Rule 12 MT (either pre-answer or in the answer), not making a Rule 12 MT at all, or leaving them out of an amended answer (under Rule 15(a)(1))
   2. **More favored defenses**: 12(b)(6)-(7): Rule 12(h)(2) applies. Can be pled in pre-trial MT, any pleading under 7(a), a MT under 12(c), or at trial
   3. **Most favored defenses**: 12(b)(1): Rule 12(h)(3) applies. Can be filed at any time. Can be determined and dismissed anytime by court. Right to SMJ cannot be waived.
   4. **Policy Considerations**:
      1. Why is SMJ a most favored defense? Probably because it can be reasonably relied at any stage of trial. Also because SMJ is a I matter that effect the entired judiciary
      2. Reason by least favorable defenses? These are things the D should have realized toward the beginning if he were reasonably diligent.
2. **Doing Nothing**
   1. P will get a default judgment
      1. Good against the D if the court has PJ over the D
   2. Strategy of doing nothing revolves around whether or not court has PJ over D
      1. P will get a default judgment but it means nothing if D is not from that state (not enforceable unless they do activities in the state)
      2. If P wants to collect thy will have to go to D state and show they have PJ
   3. Doing nothing is only wise if you 1) going to other state is a heavy burden or 2) feel confident about your PJ
3. **Amendments: Start at beginning before jumping in to other parts of this rule.**
   1. **Rule 15(a)(1):** Amending as a Matter of Course
      1. Party may amend once as a matter of course within
         1. (A) 21 days after serving it **or**
         2. (B) if the pleading is one in which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a MT under rule 12(b), (e) or (f)
            1. **Complaint**; it is possible to add an **Answer** in the rare occasion when a court orders that P should file a **Reply**
            2. For a **complaint** you will probably never use rule 15(a)(1)(A) because it gives you 32 days after service of a responsive pleading- so the amendment period is longer in Rule 15(a)(1)(B). Majority of courts.
            3. **Literal way** would be only to read it from amending an answer in that a reply is required, this is the only time when a pleading is required
   2. **Rule 15(a)(2):** Other Amendments
      1. In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. Court should freely do this one justice requires.
         1. Usually the party allows because the court will usually allow. No need to be a jerk.
   3. **Reasons why courts** **will not allow leave to amend**:
      1. Usually the court won’t allow leave if the amendment will be prejudicial to the opposing party
   4. **Response time**
      1. Unless otherwise stated, a party must respond 14 days after service of amended pleading 15(a)(3)
4. **Relation Back Rule**: Rule 15(c) the “Magic Rule”
   1. (1) When an Amendment Relates Back- an amendment to a pleading relates back to the date of the original pleading when

(A) the law provides the applicable statue of limitations allows relation back

(B) the amendment asserts a claim or defense that arose out of the same conduct, transaction, or occurrence set out, or attempted to be set out, in the original pleading

* + - 1. **Note**: a narrower interpretation is appropriate in Rule 15 because it revives a dead claim it would not be fair to arise claims that have no connection

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if rule 15(c)(1)(B) is satisfied, and if w/ in the period provided by rule 4(m) -120 days for serving the summons and complaint the party:

(i) received such notice of the action that it will not be prejudiced in defending on the merits and;

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the party’s proper identity

* 1. **Notes**: notice does not have to be formal but it still has to be notice of the suit
     1. It is not whether or not P should have known the proper party’s identity but whether or not D should have realized the error
     2. Only use this when an amendment is not a matter of course
     3. **Why this should be narrow/SOL analysis**: unfair for D to stay ready to defend themselves, witness die or forget between time, hospitals have records for a certain period of time-
  2. **Relevant Cases**:
     1. ***Swartz v. Gold Dust, District Court, Nevada, 1981*** 
        1. **Facts**: Woman sued Gold Dust for a fall down a stairs, claiming negligent maintenance of the stairwell, and seeks to add a complaint for negligent construction against the owner, Cavanaugh Properties. Owner of the property was also the manager of the casino. Defendants claimed that the maintenance and construction were two different legal theories and two separate negligent acts, and so the construction should not relate back. Court allowed relation back.
        2. “**Three requirements**, (1) the claim asserted in the amended pleading must have arisen from the conduct, transaction or occurrence set forth in the original pleading; (2) the new defendant must have received notice of the action within the limitations period; and (3) the new defendant should have know that but for a mistake concerning the identity of the proper party, the action would have been brought against him.”
        3. “Arose out of the same occurrence set forth in the original complaint, namely the fall.”
        4. “The two acts alleged were but different invasions of appellee’s primary right and different breaches of the same duty. There was but one injury and it is immaterial whether it resulted from the negligence of the users of the scaffold or from its construction, since in either case it was a violation of the same obligation.”
        5. “If a person who receives notice of the legal action within the limitations period should know from the information received that he may be liable to the plaintiff by reason of the claim for relief asserted against another, he has received the notice required by the rule.”
        6. “A lack of diligence…is insufficient to prevent him from seeking to amend, in the absence of purposeful delay or bad faith….Undue difficulty in defending the lawsuit by reason of the passage of time would be prejudicial…Specific prejudice must be shown.”
     2. ***Kimmel v. Gallaudet University (2010)***
        1. **Facts**: Kimmel alleged retaliation in violation of CRA of 1964. Kimmel moves to amend her complaint to add a constructive discharge in violation of the DCHRA. Defendant opposes on the fact that the claim arises from facts that are separate in time and type from original complaint so no relation back rule.
        2. **Procedure**: District court grants Kimmel’s MT to amend complaint.
        3. **Issue**: Did the relation back doctrine of Rule 15 apply to the additional complaints from Kimmel? Yes.
        4. **Reasoning**: The amended complaint asserts a claim that arises out of the same type of conduct alleged in the original complaint and Gallaudet had been put on notice for that. They have also failed to show they would be prejudiced. Kimmel’s original complaint alleged that D subjected her to harassment etc…ultimately Kimmel’s amended complaint alleges the same harassment that created the original complaint.
        5. **Rule**: Relation back rule applies when original and amended complaints state claims that are tied to a common core of operative facts.
     3. ***Krupski v. Costa Crociere, USSC, 2010***
        1. **Facts**: Passenger injured on a cruise. Confused by the language on her ticket, plaintiff sued the Florida company Costa Cruise, daughter of Costa Crociere, the proper company to be sued. Upon motion for summary judgment by Costa Cruise, plaintiff amended to add Costa Crociere after the SOL had passed. Costa Crociere’s existence had not been made know to the plaintiff until after the SOL had passed. Defendants contend that “mistake” should not be construed to encompass a deliberate decision not to sue a party whose identity the plaintiff knew before the statute of limitations had run. They claim ticket “clearly indentified Costa Crociere as the carrier” and the plaintiff should have known of their identity as a potential party.
        2. **Reasoning**: “The question is not whether Krupski knew or should have known the identity of Costa Crociere as the proper defendant, but whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error**.” Rule asks what defendant knew or should have known, not what plaintiff knew or should have known.**
        3. “A mistake is an error, misconception, or misunderstanding; an erroneous belief…That a plaintiff knows of a party’s existence does not preclude her from making a mistake with respect to the party’s identity…The reasonableness of the mistake is not itself at issue.” Antithesis of mistake.

1. **Other Pre-Trial Motions**
   1. Rule 12(f): Motion to Strike
      1. P and D both can file a MT to Strike
      2. D must make a MT to strike before responding to the complaint
      3. Courts can strike *sua sponte*- especially if its redundant, immaterial, scandalous and impertinent matters
         1. Usually will allow time to amend
      4. Rarely granted because it is often used to delay
2. **Certifications and Sanctions: Rule 11**

(A) **Signature**: a complaint must be verified by the attorney’s signature which indicates

(B) **Representations to the Court**- Presenting a paper (by signing, filing, submitting or later advocating) one certifies a good faith belief after reasonable inquiry that:

(1) Claim is not done for improper purpose; e.g harassments

(2) Claim is founded in law or based on a reasonable argument for extension of the law

(3) Allegations have evidentiary support, or they will after discovery

(C) **Sanctions**:

(1) In general- if after notice and are reasonable opportunity to respond, the court determines that Rule11(b) has been violated they may impose an appropriate sanction against a party, lawyer or law firm

(2) MT for sanctions must be made separately from any other MT and describe the specific conduct that violates Rule 11(b). Once served party has 21 days to correct the behavior before it can be filed w/ the court

* + - 1. Safe harbor provision

(3) Court may order a side to show why their conduct did not violate the Rule

(4) Nature of sanctions- only used for deterrence and are limited to that

(5) Cannot impose monetary sanctions (use striking the offending paper, issuing an admonition, requiring CLE, referring matter to disciplinary authorities)

(6) An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction

* 1. **History of Rule 11**
     1. 1938-1983: Unchanged “blinking yellow light” only 19 Rule 11 cases, 11 violations and 3 sanctions imposed
     2. 1983-1993: Response to litigation abuse from the 1970s.
        1. Reform resulted in mandatory sanctions, tightening of language, “well grounded in fact”
     3. 1993 (current version): Pendulum had swung too far the other way. Sanctions had become a sword the other side was willing to use. Created satellite litigation. P suffered and so did Civil Rights cases.
  2. **How is Current version less restrictive?**
     1. Addition of **safe harbor** provision 11(c)(2)
        1. If you think something is wrong you have to give them 21 days to fix their problem- if done no sanctions unless court does it *sua sponte*
        2. You don’t file it w/ the court- you are suppose to serve OC first to fix w/in 21 days
     2. Rule 11(b)(3**) Looser language**
        1. Factual claims have some evidentiary support
        2. 1983 “well grounded in fact”
        3. The rule makers tended to soften scope what you are representing to the court
     3. **Discretionary**, not mandatory sanctions 11(c)(1)
     4. Fee-shifting is not the purpose- **deterrence** is the purpose 11(5)
        1. Don’t use Rule 11 to make other side pay money
        2. It is not that awards cannot be awarded they are usually the least appropriate
     5. **Limit** to what is **necessary** to **deter** (proportional for need of deterrence)
  3. **How is Current Version More Restrictive?**
     1. Both law firms and individual lawyers are accountable
        1. Old version you can only reach one or the other
     2. If case falls apart and you do not dismiss or amend you are violating Rule 11(b)(3)

**Joinder of Claims**

1. **Joinder of Claims:** Rule 18

(A) **In General:** a party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as many independent or alternative claims as it has against an opposing party

(B) **Joinder of Contingent Claims**: A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance w/ the parties’ substantive rights. In particular, a plaintiff my state a claim for money and a claim to set a aside a conveyance that is fraudulent as to the plaintiff, without first obtaining a judgment for the money

* 1. **Note:** Basically you can bring unrelated claims as long as it’s against the same Defendant
     1. Founded on the belief that most cases settle- this allows to settle all at once
     2. If close to trial the D might ask to sever the cases and court can do so under 42(b)
  2. **Joinder Claims can not affect the requirements** of PJ, SMJ or Venue
     1. If a party is joined in a defense capacity the courts must have PJ over them
     2. Every claim asserted must be under the courts SMJ (diversity, federal question, alienage)
        1. Can still have supplemental jurisdiction if this is not met

1. **When a Claim Must be Joined**: Common Law Doctrine of Preclusion
   1. **Claim preclusion**- a final judgment on the merits of an action precludes the parties of their privies from relitigation issues that were on could have been raised in that action (can’t try same case twice)
   2. **Issue preclusion**- once a court has decided an issue of fact for law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case; first judgment (w/ respect to a particular defendant) extinguishes all claims that would have been brought out of the same transaction or occurrence
   3. **Example**: P sues D for damages to car in a wreck but not for medical injury from the wreck
      1. The doctrine says if you do not bring this medical injury claim you will forever lose it since they are w/ the same related claim
      2. Only applies to claims that you are aware of
2. **Counterclaims and Cross Claims**: Rule 13

(a) **Compulsory Counterclaim.**

(1) ***In General.*** A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; **and**

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) ***Exceptions.*** The pleader need not state the claim if:

* + - 1. (A) when the action was commenced, claim was the subject of another pending action; **or**
      2. (B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) **Permissive Counterclaims.** A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(e) **Counterclaim Maturing or Acquired After Pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(g) **Crossclaim Against a Coparty.** A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) **Joining Additional Parties.** Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim. Basically, a D can bring in another party when doing a counterclaim.

* + **Notes**: A D asserting a counterclaim or crossclaim can join new parties to the claim so long as these newcomers are joined in accordance w/ 19 and 20
    1. This puts D asserting a cross/counter claim on the same footing for party joinder as P in originally structuring the case

1. **Counterclaims- discussion:**
   1. Rule 13(a) and (b) are counterclaims against the opposing party
   2. **Compulsory Counterclaims** (a): A counterclaim is required if it arises out of the same transaction or occurrence as the original claim
      1. “Same transaction/occurrence” is more strict here than Rule 20, because here, this is a waiver
      2. You must raise the compulsory counterclaim or it will be dismissed if you try and bring a new suit- “estopped by rule”
      3. You can file a MT to dismiss, and if granted, turn around and sue the former P
      4. Cannot assert a compulsory counterclaim if it as already been asserted in another case- Rule 13(a)(2)(A)
   3. **Permissive Counterclaim** (b): A party may bring as many claims as he wises against an opposing party, related or not
      1. Not compulsory when the counterclaim implicates nonparties who should be joined but cannot be joined (no PJ for example)- Rule 13(a)(1)(B)
      2. Not required to assert it in the pending case
2. **Crossclaims- discussion:**
   1. **Crossclaims** must be closely (tranactionally) related to at least one claim in the action.
      1. Once a party has asserted a tranactionally related crossclaim they may however assert unrelated claims under Rule 18
   2. **Not compulsory**- preclusion does not apply
   3. Rule 13(g) is a crossclaim against a coparty
      1. Ex. If D1 sues D2 he brings a 13(g) crossclaim and if D2 wants to counter sue D1 then it would be a 13(a) counterclaim because D1’s 13(g) claim made the two opposing parties- even though they are both D and coparties
   4. **Can not be used as a defense**
      1. Have to assert a claim for which there are damages
   5. **Counterclaims and Crossclaims must invoke federal SMJ**
      1. Venue and PJ are not relevant because if the court lacked this over the D, the D would not file a rule 13 MT they would instead file a 12(b)(2) or (3) MT to dismiss
   6. **Supp. J for compulsory counterclaims but not for permissive counterclaims (do not arise out of CNOF)**
3. **Third Party Claims: Rule 14**

(a) **When a Defending Party May Bring in a Third Party.**

(1) **Timing of the Summons and Complaint.** A defending party **may**, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

(2) **Third-Party Defendant's Claims and Defenses.** The person served with the summons and third-party complaint — the “third-party defendant”:

(A) must assert any defense against the third-party plaintiff's claim under [Rule 12](http://www.law.cornell.edu/rules/frcp/Rule12.htm);

(B) must assert any **counterclaim** against the third-party plaintiff under [Rule 13(a)](http://www.law.cornell.edu/rules/frcp/Rule14.htm#Rule13_a_), and may assert any counterclaim against the third-party plaintiff under [Rule 13(b)](http://www.law.cornell.edu/rules/frcp/Rule14.htm#Rule13_b_) or any crossclaim against another third-party defendant under [Rule 13(g)](http://www.law.cornell.edu/rules/frcp/Rule14.htm#Rule13_g_);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(3) **Plaintiff's Claims Against a Third-Party Defendant.** The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under [Rule 12](http://www.law.cornell.edu/rules/frcp/Rule12.htm) and any counterclaim under [Rule 13(a)](http://www.law.cornell.edu/rules/frcp/Rule14.htm#Rule13_a_), and may assert any counterclaim under [Rule 13(b)](http://www.law.cornell.edu/rules/frcp/Rule14.htm#Rule13_b_) or any crossclaim under [Rule 13(g)](http://www.law.cornell.edu/rules/frcp/Rule14.htm#Rule13_g_).

(4) **Motion to Strike, Sever, or Try Separately.** Any party may move to strike the third-party claim, to sever it, or to try it separately.

**(5) Third-Party Defendant's Claim Against a Nonparty.** A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(b) **When a Plaintiff May Bring in a Third Party.** When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

1. **Impleader- Third Party Practice**
   1. **Structure:**
      1. Can only bring in third party if they would be liable to D in the event that D is liable to P. If D wins the claim is severed
         1. Usually for indemnity or contribution
      2. Only a defending party (TPP) can join an absentee (TPD) through impleader
         1. Once they are added they become an opposing party and then the TPP (the original D) may file any claim against them pursuant to Rule 18(a)
      3. Permissive
      4. This rule does not allow Ds to suggest new targets for the P. Rather, it allows D to bring in targets of their own if they may be able to pass on liability (either some or all) to the impleaded party
   2. **Creates three claims:**
      1. 1. *Impleader claim* under rule 14(a)(1) asserted by defending party against an absentee (TPD) who may owe indemnity or contribution
      2. 2. *Upsloping* claim: asserted by the P against the TPD under 14(a)(3)
         1. This is not a counterclaim because they are not yet opposing parties. If TPD now has a claim this would be a counterclaim because they are now opposing parties.
      3. 3. *Downsloping* claim: asserted by the TPD against the P under rule 14(a)(2)(D)
         1. Not a counterclaim, *supra*
      4. **Note**: if one of these are done and if the defending party wants to counterclaim it would be under 13(a) because they are now defending parties (counterclaim will be compulsory)
   3. **Time Limit**: TPP has the right to implead w/ in 14 days after they serve original answer to P’s complaint
      1. Beyond 14 days they must make a MT seeking court’s permission (this is usually granted)
   4. **Pjx, Venue and Smjx** 
      1. Whenever a party is brought in to a suit, including a TPD, the court must have the power to require that party to appear and defend in that state- TPD can challenge PJ
      2. For diversity/venue purposes, a third parties citizenship is not relevant

* **Joinder of Parties**
* 1. **Required Joinder of Parties**: Rule 19 (will not be on test)
  + (a) **Persons Required to Be Joined if Feasible.**
    - (1) **Required Party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
      * (A) in that person's absence, the court cannot accord complete relief among existing parties; **or**
      * (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
        + (i) as a practical matter impair or impede the person's ability to protect the interest; or
        + (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.
    - (2) **Joinder by Court Order.** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.
    - (3) **Venue.** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.
  + (b) **When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
    - (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
    - (2) the extent to which any prejudice could be lessened or avoided by:
      * (A) protective provisions in the judgment;
      * (B) shaping the relief; or
      * (C) other measures;
    - (3) whether a judgment rendered in the person's absence would be adequate; and
    - (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.
  + (c) **Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state:
    - (1) the name, if known, of any person who is required to be joined if feasible but is not joined; and
    - (2) the reasons for not joining that person.
  + (d) **Exception for Class Actions.**
    - (1) This rule is subject to Rule 23.
  + **Notes**:
    - This lets you trump and override who the P brings in to the case
    - W/ Rule 12(b)(7) you can make a MT to dismiss for failure to join a party under this rule
* 2. **Permissive Party Joinder:** Rule 20
  + (a) **Persons Who May Join or Be Joined.**
    - (1) **Plaintiffs.** Persons may join in one action as plaintiffs if:
      * (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; **and**
      * (B) any question of law or fact common to all plaintiffs will arise in the action.
    - (2) **Defendants.** Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if:
      * (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; **and**
      * (B) any question of law or fact common to all defendants will arise in the action.
  + **Note**: Courts liberally stretch “same transaction, occurrence or series of transactions series or occurrences”
    1. Most liberal was the case of the cap guns where P was allowed to sue whole industry
    2. P/D must raise at least one common question of fact or law
       1. Does not need to dominate the event but simply must exist
       2. Further, they do not need to sue under the same legal theories
       3. Once you get one claim in under this, you can assert any unrelated claim
  + **(3) Extent of Relief.** Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.
  + **(4) Protective Measures.** The court may issue orders — including an order for separate trials — to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.
  + **Purpose:**
    - Governs who may be joined in a single case
    - Available to P when they are structuring the case
    - Tip: use the two part test in joining co-P or co-D
  + **Misjoinder of Parties**: Rule 21
    - Misjoinder of parties is not a basis for dismissal of the suit, instead the court my sever any claim against a party
      * This would result in two separate suits
        + Different than court ordering a separate trial under 20(b) or 42(b)
      * Rule 42 permits the court to consolidate related cases if they involve at least once common question of fact or law
        + May do for purposes of discovery, MTs or for trial

**3. Class Action**: Rule 23

* 1. **History**:
     1. Use to only be an opt in class- you would have to affirmatively opt in to the class
     2. Now it is an opt out class- you have to affirmatively opt out of the class
        1. Hardly any one does this
  2. **Opt Out Class** Rule 23(b)(3):
     1. Everyone is a part of the class unless you opt out
     2. If you are certified then everyone in losses if the person loses and you can not retry the case
  3. **Requirements**Rule 21(a):
     1. 1. Numerosity (if it is very small they should sue on their own
     2. 2. Have to have commonality
     3. 3. Claims have to be typical between the class
     4. 4. Adequate representation

**Personal Jurisdiction**

* 1. **Definition**: Personal jurisdiction is the power a court has to render a judgment against the defendant.
     1. It determines in *which* state the case can be heard, regardless of whether it will be held in federal or state court.
     2. If no PJ then everything is void- it will violate the Due Process Clause of the 14th Amendment
     3. **Two things needed: Statute & Constitution**

1. **Ways to approach personal jurisdiction**:
   1. Voluntary appearance—show up and argue the merits (lose the right to argue personal jurisdiction in forum or at home)
   2. Special appearance—show up only to argue personal jurisdiction (if you lose, you lose the right to argue personal jurisdiction at home; forced to argue merits in forum)
   3. Direct attack—challenge personal jurisdiction before you do anything else, e.g. simultaneously with your answer
   4. Collateral attack—enter default judgment in forum and then argue personal jurisdiction in home state where judgment is entered (but you forever lose the right to argue the merits of your case)
2. **Types of Personal Jurisdiction**
   1. **In personam:** power of a court to enter a money judgment against the defendant; said to follow the defendant; given full faith and credit and enforced by any state in which the defendant or his assets are found.
      1. Jurisdiction is exercised over the defendant themselves because they have some appropriate connection to the forum
         1. If Judgment for P the D has a debt which is a personal obligation
            1. Can be obtained by seizing the property and selling it
      2. *Full Faith and Credit*
         1. Provides that the valid judgment of the courts of one state are entitled to enforcement in the courts of other states
            1. Courts “domesticate” a judgment from state to state

Ex. Judgment in Kansas is domesticated if enforced in Texas

* 1. **In rem:** the power of a court to act with regard to property within its borders; affects the interests of persons in the property, but does not create an obligation for the defendant to pay money to the plaintiff; example—action to determine title to property among opposing claimants
     1. Jurisdiction is exercised over the property
        1. Can be tangible property, intangible property and real property
     2. True in rem cases are rare and involve **ownership** of the property that was used as the jurisdictional predicate
  2. **Quasi in rem:** based on presence of defendant’s real or personal property within the state; based on claims unrelated to the property that provides the basis for jurisdiction; allows money judgment not exceeding the value of the property which may be satisfied through forced sale of the property
     1. **QIR-1**
        1. Adjudicate the ownership of the property that is used as the jurisdictional predicate and purport to determine that ownership as between and among the parties to the case
        2. Difference w/ in rem is judgment does not bind the whole world
     2. **QIR-2** (Hoffman says this does not exist anymore)
        1. Dispute between the parties has nothing to do with who owns the property it is clear that the D owns it. Rather, the dispute is one that would be personam if we could get in personam
        2. If P gets judgment it can be for value of the property
        3. *Pennoyer* case shows the seizure must take place at the outset of litigation to ensure that there is something over which the court actually has power and will not be transferred or destroyed during litigation
  3. **Status:** e.g. determining marital status or child custody; court may, for example, entertain a divorce action although one spouse is beyond the usual reach of its in personam or in rem jurisdiction; money awards, such as alimony, still require in personam power over the defendant

1. **Traditional Theory**
   1. ***Pennoyer v. Neff, USSC, 1877* (pages 612-617)**
      1. **Facts**: Neff is a guy living in Iowa who hears the government is giving away land for settlement. Neff went and stayed in Oregon for 4 years, needed help filing his land title, and employed Mitchell. Mitchell sued for $200 in fees in Oregon. Mitchell claimed he didn’t know where Neff was (California at the time) and, by statute, was able to substitute personal service with service by publication in a small, obscure newspaper. Default judgment for $341. Action to enforce judgment by sale of the land. Mitchell buys the land for $341. Mitchell sold to Pennoyer. Pennoyer upkept and improved the land for 9 years. Neff comes back. Original judgment found invalid in collateral attack; was rendered unconstitutional. (Original judgment in state court, new case in federal court.)
      2. **Territorial theory of jurisdiction** (power theory)—states have exclusive power over persons or property within the territory and completely lack power over persons or property outside the territory.
      3. **QIR**: Cannot have power over a person not in the state. In personam jurisdiction is valid only in the place where the defendant is. Could rule over land in Oregon, but only in rem, not for personal action. Quasi in rem jurisdicion is OK, but it has an additional restraint. The land has to be attached at the beginning of the suit, secured and put in the possession of the court by an attachment process. Big sign on land to warn those with an interest. If you seize at the beginning of suit it gives proper notice; control of the court should be notice enough to the owner. “The validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently…”
      4. Notice depends on physical presence within the state. Idea: 14th Amendment due process provides the right to limits of where you can be subject to suit.
      5. **Big question is why does Neff win?**
         1. States have complete control over every one w/ in their borders but have no control of people outside of the borders
            1. **You’re in you’re in, you’re out you’re out** – Field comes up w/ this and it’s a big deal (Neff was not in and was not served in the forum)

“Out you’re out” is not applicable anymore- specifically w/ in rem

* 1. ***Hess v. Pawloski, USSC, 1927*** 
     1. **Facts**: D, a resident of PA, negligently drove a motor vehicle in MA, injuring P, a resident of MA. D was not personally served, and no property belonging to him was attached.
     2. **Reasoning**: “Under the statute, implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the nonresident may be involved.”
        1. The state may declare that the use of its highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served.”
  2. **Traditional bases for Pjx**
     1. Service within state (addressed *Pennoyer*, explicitly expressed in *Balk,* reaffirmed in *Burnham*)
     2. Domicile (“where you live and intend to stay”)
     3. Agency (agent amenable to process within borders)
     4. Express consent (e.g. states making you sign off at the border)
     5. Implied consent (*Hess*-driving in a state implies that you consent to jurisdiction and that you appoint the registrar as you agent for service; same in *Kane v. New Jersey*)
     6. Waiver (didn’t contest soon enough)
     7. Corporate presence

1. **Modern-Two Step Approach for Pjx**
   1. 1**. Long-Arm Statues**: Court must ask whether there is a state statute that authorizes it to exercise Pjx under the circumstances
   2. 2. **Constitutional Analysis**: If there is, the court must ask whether it would be constitutional under the Due Process clause to do so
      1. It is up to the legislatures of each state to actually grant the power to its courts to exercise Pjx
2. **Long Arm Statues** *They are state law and the SCOTUS can not say anything about them* ***(as long as they are constitutional****)*
   1. **Statutory Limitations on Personal Jurisdiction**
      1. The due process clause does not actually confer any jurisdiction on state courts; it only defines the outer bounds of permissible jurisdictional power
         1. Therefore, even if it is constitutionally permissible for a court to exercise Pjx in a case, that court may still lack the power to call the D before it
   2. **Three Ways of Interpreting Long-Arm Statues**
      1. Statute provides less than the constitutional maximum
         1. Laundry-list statute: contains a list of activities that subject a non resident to in personam jurisdiction
            1. Usually transact business or commit a tortious act w/ in the forum
            2. In re tortious act w/ in the state- questions are split if something was manufactured in state A but injured someone in state B- how will it apply?
            3. Provision may address what happens when tort happened IN the state compared to when a tort happened outside the state but injured someone in the forum state
      2. Statute provides less than the constitutional maximum but they have been interpreted to be equal w/ the constitutional maximum
      3. Statue is expressly equal to the constitutional maximum
         1. Will say “subject to forum w/ they w/ in due process”.
   3. ***Gray v. American Radiator, SC of Illinois, 1961*: Not really that helpful for precedential value**
      1. **Facts**: Gray was injured in Illinois when a water heater manufactured by American Radiator, a PA company. The explosion was caused by a defect in a valve manufactured by Titan, a foreign corporation, and then sold and incorporated into the water heater by American Radiator outside of IL. Titan was served via service of its registered agent in Ohio. Titan moved to dismiss based on contentions that it had not committed a tortious act in IL, had no agent there, and sold its components to AR outside of IL.
         1. IL long arm statutes provide that “a nonresident who, either in person or through an agent, commits a tortious act within this state submits to jurisdiction.”
      2. **Issues**: Two questions: **(1)** whether a tortious act was committed within the state, and **(2)** whether the statute, if so construed, would violate due process of law.
      3. **(1)** “We think it is clear that the alleged negligence in manufacturing the valve cannot be separated from the resulting injury; and that for present purposes, like those of liability and limitations, the tort was committed in Illinois.
      4. **(2)** “Defendant’s only contact with this state is found in the fact that a product manufactured in Ohio was incorporated in Pennsylvania, into a hot water heater which in the course of commerce was sold to an Illinois consumer….We do not think, however, that doing a given volume of business is the only was in which a nonresident can form the required connection with this State…**it is sufficient if the act or transaction itself has a substantial connection with the State of the forum**.…Reasonable inference that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this state…**benefited, to a degree, from the protection** **which our law** has given to the marketing of hot water heathers containing its valves…presumably sold in contemplation of use here…where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary stream of commerce is sufficient contact with this State to justify a requirement that he defend here.”
3. **Minimum Contacts** (quality not quantity)

* **\*Shoe Test:** Due process requires only that in order to subject a defendant to judgment in personam, if he be not present such within the territory of the forum, he have certain (1) minimum contacts with it such that the maintenance of the suit (2) does no offend “traditional notions of fair play and substantial justice.”
  1. **Rules on Minimum Contacts**
     1. **Purposeful Availment:** where individuals ‘purposefully derive benefit’ from their interstate activities, it may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities (***Burger King***) (***World Wide***)
        1. **Substantial Connections:** Justice O’Conner stated instead in Asahi that you need “substantial connections” in that minimum contacts must come about by an action of the D purposefully directed toward the forum state. (***Asahi***)
        2. **Stream of Commerce:** The D transmission of goods permits the exercise of jurisdiction only where the D can be said to have targeted the forum; as a general rule, it is not enough that the D might have predicated that its goods will reach the forum state. (***McIntyre***)
           1. **Stream of Commerce Plus**- O’Conner thinks you need to go one step beyond regular flow in the market- need ads, research etc.. in market (***Asahi***)
           2. “The necessary ‘purposeful availment’ has been found where a corporation ‘delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state. (***Goodyear***)
           3. Ginsberg- Seek to serve the market when you put one product in the market or if there is a regular flow in the market
           4. Hoffman: just a catch phrase, not a test for general jurisdiction
        3. **Test tip**- the courts are split (Asahi and McIntyre are prime examples) don’t worry about getting it right- worry about showing both sides have an argument
           1. Internet Cases- SCOTUS has not set out a specific test or standard

See. Concurrence of ***McIntyre***

* + 1. **Foreseeability:** The relationship between the party and the state must be such that it is reasonable to require the corporation to defend the particular suit which is brought there. (***World Wide***)
       1. Foreseeability that a product might make its way to the forum state is not relevant what is important is whether the D’s conduct and connection w/ the forum would reasonably allow them to anticipate having suit there
       2. **Reach Out**: State has Pjx over any party whose actions intentionally reach another party in the state and are the basis for the cause of action. (***Calder***)
          1. May only apply to torts, such as defamation
       3. **Physical Presence-** Traditional way to have Pjx is by being served while present is the forum state (*Burnham*)
          1. Shoe Test does not apply when somebody is in the forum state
          2. Traditional theory shown in ***Pennoyer***
  1. **Fairness Factor from Shoe**
     1. ***Asahi*** is the only case where there was no jurisdiction to this second prong
     2. Argue that a strong showing of FF may make up for a lesser amount of contact
     3. **Fairness Factors from Courts**
        1. The burden of the D which the Court calls a primary concern
           1. D will usually complain that the forum is inconvenient for various factors- this is a very high burden

If they go to the state for business or anything such as that then its probably not a high burden

***Burger King*-** can’t be gravely inconvenient

* + - 1. The forum state’s interest in adjudicate the dispute- Hoffman thinks this is important
         1. Courts have an interest in providing justice for their citizens- vague argument
      2. The P’s interest in obtaining convenient and effective relief- Hoffman thinks its important
         1. Less impotant than the burden of D
      3. The interstate judicially system’s interest in obtaining the most efficient resolution of controversies
      4. The shared interest of the several states in furthering fundamental substantive social policies
  1. **Relevant Minimum Contact Cases:**
     1. ***International Shoe v. Washington* (1945)., pg. 83: Use to assess the constitutionality of Pjx in cases involving nonresidents or others not falling w/ in the traditional category of Pjx**
        1. **Facts**: International Shoe Co. (D, appellant) was a Delaware corporation with its principle place of business in St. Louis, Missouri. It had no offices in the state of Washington and made no contracts for sale there. International Shoe did not keep merchandise in Washington and did not make deliveries of goods in intrastate commerce originating from the state.
        2. International Shoe employed 11-13 salesmen for three years who resided in Washington. Their commissions each year totaled more than $31,000 and International Shoe reimbursed them for expenses. Prices, terms, and acceptance or rejection of footwear orders were established through St. Louis. Salesmen did not have authority to make contracts or collections.
        3. **Procedure**: The state of Washington brought suit against International Shoe in Washington State court to recover unpaid contributions to the unemployment compensation fund. The Supreme Court of Washington held that the state had jurisdiction to hear the case and International Shoe appealed.
        4. **Issue**: Did International Shoe’s activities in Washington make it subject to personal jurisdiction in Washington courts? Yes.
        5. **Reasoning**: A casual presence of a corporation or its agent in a state in single or isolated incidents is not enough to establish jurisdiction. **Acts of** agents of the corporation, because of the **nature, quality, and circumstances of their commission, may be deemed sufficient**. Consent may be implied from the corporation’s presence and activities in the state through the acts of authorized agents.
        6. The activities carried on by defendant corporation in Washington were systematic and continuous rather than irregular or casual. The defendant **received the benefits and protection of the laws** of the state and is subject to jurisdiction there.
        7. International Shoe had conducted “systematic and continuous” business operations in Washington. A large volume of interstate business for the defendant was created through it’s agents within the state and the corporation received the benefits and protection of Washington’s laws. International Shoe had established agents in the state permanently.
        8. **Rule**: Minimum contacts with the forum state can enable a court in that state to exert [**personal jurisdiction**](http://www.lawnix.com/cases/personal-jurisdiction.html) over a party consistent with the Due Process clause.
           1. “…rule frequently stated, that **solicitation** within a state by the agents of a foreign corporation plus some **additional activities there are sufficient** to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there.”
     2. ***World-Wide Volkswagen v. Robinson* (1980)., pg. 141**
        1. **Facts**: The Robinsons (P) purchased an Audi from Seaway Volkswagen, Inc. (D1), a New York car dealership. One year later while driving through Oklahoma, another car hit them from behind, causing a fire which caused severe injuries to Mrs. Robinson and her two children.
           1. The Robinsons brought a products liability suit in state court against four parties including Seaway and its distributor, World-Wide Volkswagen Corp. (Ds). The defendants were New York corporations and conducted no business in Oklahoma. The defendants entered special appearances claiming that Oklahoma could not exert in personam jurisdiction over them by virtue of the Due Process Clause of the Fourteenth Amendment.
        2. **Procedure**: The trial court found that it had jurisdiction and the Oklahoma Supreme Court denied defendants’ request for a writ of prohibition to restrain the trial judge from exercising in personam jurisdiction over them. The U.S. Supreme Court granted cert and reversed the OK SC decision.
        3. **Reasoning**: A state court may exercise [Pjx](http://www.lawnix.com/cases/personal-jurisdiction.html) over a party only if the party has minimum contacts with the forum state (Shoe). The court held that there was a total absence of circumstances that are necessary to permit an exercise of personal jurisdiction. **The D did not purposefully avail themselves of any benefit to Oklahoma**. The defendants **did not solicit business in Oklahoma** through salespersons or advertising reasonably calculated to reach the state.
        4. Although it was foreseeable that one of their cars could be involved in an accident in Oklahoma, **foreseeability alone is not sufficient for personal jurisdiction under the Due Process Clause**. The degree of foreseeability that must exist is not the mere likelihood that a product will find its way into the state, but that the defendant’s conduct and connection with the state are such that he should **reasonably anticipate being haled into court there**. Purposeful availment provides clear notice of jurisdiction.
        5. **Rule**: The relationship between the party and the state must be such that it is reasonable to require the corporation to defend the particular suit which is brought there. **“Chattel can not serve as an agent”**
        6. **Dissent (Brennan):** States may exercise jurisdiction over a defendant even if that party has not deliberately or purposefully sought contact with the state. It would be difficult to believe that the defendants truly believed that none of the cars they sold would ever leave the New York area. Their contacts with Oklahoma were not extensive but it was reasonable for them to be subjected to jurisdiction. Fairness dictates that the sale of a mobile item such as a car should satisfy the minimum contacts necessary for jurisdiction.
        7. **Dissent (Marshall): J**urisdiction here is based on the deliberate and purposeful acts of the defendants in choosing to become part of a global network for marketing and servicing cars. They must have anticipated that a substantial portion of the cars sold would travel to remote states. The probability that some of the cars would eventually get to all contiguous states is a virtual certainty. This knowledge would alert a reasonable businessman to the likelihood that a defect might manifest itself in the forum state.
        8. **Dissent (Blackmun)** It is the nature of the instrumentality that is critical. With our network of interstate highways, the defendants could not have believed that their cars would remain in the vicinity of their retail sale. It is not unreasonable, unconstitutional, or beyond International Shoe to uphold jurisdiction in this instance.
     3. ***Calder v. Jones* (1984)., pg. 111**
        1. **Facts**: Jones brought suit in California claiming that she had been libeled in an article written and edited by petitioners in Florida. She served petitioner by process through mail in Florida, whey they are residents. D argues that California did not have PJ over them.
        2. **Issue**: Does California have PJ over D? Yes.
        3. **Reasoning**. When judging minimum contacts, a court properly focuses on the relationship among the D, the forum and the litigation. The allegedly libelous story concerned California activities of a California resident. The article was drawn from California sources and the brunt of the harm occurred in California. Jurisdiction over D is there proper in California based on the “effects” of their Florida conduct in California. Their torts were aimed at California. Under these circumstances D must reasonably anticipate being haled into court there to answer the truth of the statements made in the article.
        4. **Rule**: Effects test- a state has personal jurisdiction over any party whose actions intentionally reach another party in the state and are the basis for the cause of action. Probably use this effects test for intentional tort since it is so open ended
     4. **Burger King Corp v. Rudzewicz (1985)., pg. 114**
        1. **Facts**: Rudzewicz (D) and MacShara entered into a franchise contract with Burger King Corp. (P) to open a restaurant in Michigan. Burger King was incorporated in Florida and a choice of law clause in the contract indicated that Florida law was controlling.. All financial obligations owed to Burger King were sent to Florida and D received training in Florida. An economic downturn led to decreased sales and Rudzewicz failed to meet his obligations under the contract
        2. **Procedure**: Rudzewicz and MacShara moved to dismiss on the grounds that the court did not have personal jurisdiction over them because they did not have sufficient minimum contacts with the state.
        3. On appeal, the court held that while Rudzewicz had sufficient contacts with the state of Florida to satisfy the state’s long arm statute, the exercise of personal jurisdiction was fundamentally unfair and was a violation of due process. Burger King appealed.
        4. **Reasoning**: The general rule is that Defendant must have minimum contacts with the forum state so that Defendant’s conduct and connection are such that Defendant can reasonably foresee being hailed into court there. In addition, the court must consider whether asserting personal jurisdiction will comport with “notions of fair play and substantial justice.” If litigation in the forum state would cause a “severe disadvantage,” then minimum contacts are not enough. The contract term stating that the franchise relationship would be governed by Florida law constituted “purposeful availment” of the benefits and protections of Florida law by the defendants. When a contract calling for a certain forum is not made under duress or misrepresentation then jurisdiction over the defendants is proper unless the defendants would be inconvenienced to such an extent that having to litigate in the forum state would be unconstitutional.
        5. **Rule**: Where individuals ‘**purposefully derive benefit’** from their interstate activities, it may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities
           1. where the D ‘deliberately’ has engaged in significant activities within a state, or has created ‘continuing obligations’ between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there
        6. **Dissent**: It is unfair to require a franchisee to defend a case of this kind in a forum chosen by the franchisor. Rudzewicz did no business in the state of Florida. The principal contacts were in Michigan with the local office of Burger King. Rudzewicz had a local operation with far less resources than Burger King. It would be fundamentally unfair for Rudzewicz to be required to defend in Florida.
        7. **Reasons court cites for jurisdiction being proper** (according to Hoffman):
           1. Brief training in FL
           2. Negotiating with FL for a nationwide contract
           3. Long contract requiring continuing contacts with FL company
           4. Refusal to make payments would have impact on FL company
     5. ***Asahi*** (1987)- motorcycle wreck, valve of tube of rear tire manufactured in Japan, wants to bring suit in California. Basically the case became Taiwan v. Japan. Fairness factors were not met because it would be unfair to have this case in Cali. Analyzes from a manufacture/distributor point of view for SOC.
        1. Separate theories b O’Conner and Brennan (see McIntyre Reasoning)
        2. No Pjx in California based on fairness, not contacts
        3. O’Conner’s ways of purposeful availment:
           1. Designing the product for the forum state market, advertising in the forum, establishing channels for giving advice to customers in forum, marketing through a distributor who agrees to serve sales agent in the forum
        4. Brennan looks at if placing a product in the stream of commerce, could the D foresee that it would enter into the forum state
        5. They will benefit from the forum state
        6. **Note**. Asahi deals w/ a foreign defendant, you can make the argue that a US manufacture would be held to pjx because it may not be unfair.
     6. ***Burnham v. Superior Court of California*, USSC, 1990., pg. 126**
        1. **Facts**: Burnham, a NJ resident, was personally served with process by his ex-wife (then living in CA with their children) when, while on a business trip, he stopped in to see his children. Court upheld in-state service
        2. **Reasoning**: “The short of the matter is that jurisdiction based on **physical presence alone** constitutes due process because it is one of the continuing **traditions** of our legal system that define the due process standard of ‘traditional notions of fair play and substantial justice.’”
     7. ***McIntyre v. Nicastro* (2011)., pg. 153: Look to this because it is the most recent- it is most important to what the legal standard is because this is the current composition of the court**
        1. **Facts:** Nicastro seriously injured his hand while using a metal shearing machine manufactured by the Petitioner. The accident occurred in New Jersey and the machine was manufactured in England, where the Petitioner his incorporated. Petitioner did not sell its machines to buyers in the country beyond its US distributor. Petitioner had attended conferences in US but never in NJ. Only four of their machines were in NJ. NJSC holds that their activity satisfies the stream of commerce doctrine. SCOTUS no Pjx given contacts.
        2. **Reasoning:** All of the ways a D can be subject to Pjx “infers an intention to benefit from and thus an intention to submit to the laws of the forum state.” “Submission through contact w/ and activity directed at a sovereign may justify specific jurisdiction in a suit arising out of or related to D contact w/ the forum.” Justice Brennan in *Asahi* argued that if it was foreseeable that placement in the stream of commerce would make it to the forum state then there would be Pjx. McIntyre Court follows what **Justice O’Conner stated instead in Asahi that you need “substantial connections” in that minimum contacts must come about by an action of the D purposefully directed toward the forum state**. The place of a product into the stream of commerce without more, Is not an act of the D purposefully directed toward the forum- the conclusion that the authority to subject a D to jurisdiction depends on purposeful availment. Respondents have not established that Petitioner engaged in conduct purposefully directed at NJ. Can not use stream of commerce argument.
        3. **Rule: The D transmission of goods permits the exercise of jurisdiction only where the D can be said to have targeted the forum; as a general rule, it is not enough that the D might have predicated that its goods will reach the forum state.** The conclusion that the authority to subject a D to jurisdiction depends on purposeful availment.
        4. **Concurrence:** Compares this case to World Wide. A single sale of a product in a State does not constipate an adequate basis for asserting jurisdiction over an out of state defendant, even if they place it in the stream of commerce, fully aware that it might take place. This case has no regular flow- just an isolated incident. Breyer and Alito take a modern approach saying this will be burdensome for selling things online in a modern world.
        5. **Dissent**: Compares Petitioners actions to shoe in that they went out of their way to avoid liability even though they were benefiting from the states. Says this opinion turns back the clock on long arm statutes. They argue that the machine did not enter into NJ by accident it was by Petitioner extensive marketing and work in the US. It would be reasonable to subject Petitioner to suit in NJ.
  2. **Class notes: We don’t have a majority opinion, so we are forced to go backwards and look at other cases**
     1. Kennedy plurality (4 for no Pjx), Breyer/Alito (2 no Pjx), and Ginsburg dissent (3 for Pjx)
     2. **Kennedy**- No jx over McIntyre because there was no active marketing to New Jersey but it was marketing to the US as a whole- this will not give you minimum contacts (maybe limited to PL cases)
        1. “defendant’s activities manifest an intention to submit the power of a sovereign” (minority argument- not really supported)- still try and argue this, its transcends case types
        2. Fair question to ask if this is connected to the O’Conner SOC plus doctrine?
     3. **Alito/Breyer concurrence**- it is hard to square away their decision w/ Hess or McGee
        1. “none of our precedents find that **a single isolated sale**, even if accompanied by the kind of sales effort indicated here, is sufficient”
        2. There was no regular flow, which is similar to Brennan’s view in Asahi
        3. Everything turns on their side- when you have a Pjx question address this
     4. **Ginsburg**- sold one very big product that is enough, look at Hess!

1. **General Jurisdiction**
   1. **Rules for General Jurisdiction**
      1. **Essentially at Home**: A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliation w/ the state are so continuous and systematic as to render them essentially at home in the forum state (Goodyear)
         1. **One Safe Place Theory:** One way to get GJ is that there is one place where a D is at home, and if the P wants to go there then the D will be subject to jurisdiction to that place
            1. **Pros:** No risk that P will file suit and have it dismissed for lack of jurisdiction. Also it can be beneficial for the D because they get to pick their home- find one that is favorable**.**
   2. **Extend of Business**: Merely doing some business or making some purchases in the forum does not give rise to general jurisdiction (*Helicopteros*)
   3. **General vs. Specific Jurisdiction**
      1. A. You can have so many contacts with a state that you are subject to any suit there. (General jurisdiction.)
      2. B. It is also possible that you could have only 1 contact that I perfectly related to the claim, and that would be enough to subject you to jurisdiction. (Specific jurisdiction.)
   4. **Relevant Cases**
      1. ***Goodyear v. Brown* (2011)., pg. 97: essentially at home in the forum state**
         1. **Facts**: The families of two North Carolina teenagers killed in a bus crash in France brought suit in North Carolina state court, alleging faulty tires. The tires were made in Turkey, and the plaintiffs sued Goodyear's Luxembourg affiliate and its branches in Turkey and France. A North Carolina appeals court held that the foreign defendants had sufficient contacts in the state to support general personal jurisdiction. SCOTUS overturns.
         2. **Reasoning**: Supreme Court reversed the lower court order in a unanimous decision by Justice Ruth Bader Ginsburg. "A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction," Ginsburg wrote. "Such a connection does not establish the 'continuous and systematic' affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation's contacts with the State." Only a small percentage of petitioners’ tires were distributed within NC by other Goodyear USA affiliates. The type of tire involved in the wreck was never distributed in NC. They fail the minimum contact test from International Shoe.
         3. **Rule**: A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliation w/ the state are so continuous and systematic as to render them essentially at home in the forum state. Specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.
      2. ***Perkins***- was the only time Court has approved general jurisdiction
         1. Filipino company essentially became an Ohio company
         2. Easy case because they were only in Ohio at that point
      3. ***Helicopteros***- said no general jurisdiction
         1. Joint venture in Colombia/Peru and does some stuff (trips, bought helicopters, etc.)
         2. Merely doing some business or making some purchases does not give you general jurisdiction
2. **Supreme Court is unresolved on Pjx issue**
   1. 1. Scalia viewpoint articulated in Burnham and the Kennedy plurality in McIntyre
      1. If you are physically present in the forum and **voluntarily consented** (*such as forum selection clause, being a domiciliary, incorporated, having PPB in state, such a huge volume of business in state*) to suit in the forum of if you **involuntarily consent** to the forum (*waiver blew it under Rule 12*) you are subject to jurisdiction in the forum- period, no exception
      2. Could also be constitutional to exercise Pjx if you have minimum contacts w/ forum state
      3. This is **specific jurisdiction** because general jurisdiction is *supra*
   2. 2. Brennan/Ginsberg viewpoint
      1. Everything is about fairness w/ minimum contacts
      2. General jurisdiction would be if you do a huge volume of business in the forum or w/ the forum (same reasons, *supra*)- we do this because it is fair

**Notice**

1. **Service of Process** - Must meet the due process requirement and comply with the 1) governing state and federal rules. 2) Due process is the minimum standard. Must serve the summons and the complaint.
   1. **Due process** requires that notice be *reasonably calculated* to give the D actual notice of the action
   2. **Serving an Individual:** 4 Ways to Correctly Serve Process
      1. Personal – in hand Service (can’t be a party)
      2. Through an Agent authorized by appointed or by law (could be an implied agent – think nonresident motorists)
      3. Leave With:
         1. Dwelling or usual place of abode, with a
         2. Person of suitable age and discretion
         3. Then residing therein
         4. OR agent for a foreign person
      4. Per State-Law Methods – registered mail works in TX and if you have an evasive D, then any method “reasonably calculated” under the circumstances with judge approval
   3. **Serving a Corporation:** 3 Ways to Serve a Corporation
      1. Per state law – e.g. registered mail
      2. Delivering to an officer, managing agent, or general agent
      3. Agent authorized by appointment or by law (must also mail to D if governing law so requires)
2. **Relevant Cases**
   1. ***Mullane v. Central Hanover Bank***- “notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”
      1. Must convey information and afford a reasonable time for those interested to make their appearance
         1. Last resort that is rarely upheld
      2. Allowed notice by publication for those D who could not be found or were difficult to find
   2. ***Espinoza***
      1. Debtor does not send a summons w/ a copy as per the applicable rules. The court does and this is upheld
         1. Actual receipt of proper notice from the court “more than satisfied [loan company’s] due process rights”
   3. ***Dusenbery v. United States***- Constitution does not require that the D actually receive notice
      1. Sent certified mail, Dusenbery never received it
         1. Court says Mullane would apply and that they “reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”
      2. **Rule**: that it must attempt to provide not must provide actual notice
   4. ***Greene-*** not enough to post eviction notice somewhere on property
   5. ***Jones v. Flowers*** (2006)., pg. 179
      1. **Facts**: State sent a certified letter to a homeowner to inform him that he was delinquent in paying real property taxes and that failure to pay would result in public sale of the land
         1. Letter was returned as unclaimed and state took no additional steps
      2. **Rule**- this inactivity in the face of knowledge that the owner had not received the letter violated due process
         1. Although sending a certified letter is usually reasonable and comports w/ due process, things change when the state knows that the notice was not received
         2. In these circumstances due process requires that some additional steps must be taken to give actual notice

* **Venue, Venue Transfer and Forum Non Conveniens**

1. **Venue**- determines where, geographically the case may be filed within a chosen court system
   1. **Basic Rules of Venue**
      1. Venue statutes give P the choice of where to bring suits
         1. Most common are where the D resides and where the claim arose
      2. Courts will not raise a venue question on its own, the D must assert venue as improper
      3. All states allow for venue transfer within the state system
      4. Forum selection clause allows parties to chose venue before litigation
   2. Residence probably = domicile. (Where you live and intend to stay.) State of citizenship has no bearing. You are domiciled in the previous state until you change your domicile.
   3. Permanent residents are considered citizens of the state where they are domiciled. (No effect on 1391.)
2. **Federal Courts look at 28 U.S.C §1391**
   * **(a) Applicability of section.**--Except as otherwise provided by law--
     + **(1)** this section shall govern the venue of all civil actions brought in district courts of the United States; and
     + **(2)** the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.
   * **(b) Venue in general.**--A civil action may be brought in--
     + **(1)** a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
     + **(2)** a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
     + **(3)** if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.
   * **(c) Residency.**--For all venue purposes--
     + **(1)** a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;
     + **(2)** an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's **personal jurisdiction** with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and
     + **(3)** a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.
   * **(d) Residency of corporations in States with multiple districts.**--For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.
   * DISCLAIMER: NOT COMPLETED STATUTE ONLY THE PARTS COVERED IN CLASS
3. **Venue Transfer**
   1. **Transfer can be effected only within a court system**
      1. Ex. Alabama stat court cannot transfer to a Mississippi state court since they are not in the same court system but a federal district court in Alabama can transfer to a federal district court in Mississippi because they are in the same court system
         1. State- county by county
         2. Federal- district by district (94 districts)
   2. **Terms**
      1. Transferor court- the court ordering the transfer
      2. Transferee court- court in which the case is transferred to
   3. **§1404(a) Transfer:** *Must be convenient for everyone*
      1. Applies when the transferor court is a proper venue
         1. The question is whether there is another venue that is sufficiently more convenient that the court should override the P’s choice and transfer the case there
      2. **Two Part Test**
         1. Is the forum where you want to transfer, transferee forum, a forum that the P could have sued original?
         2. Convenience to the parties of interest and justice factors (usually give more deference to the P’s choice)
            1. Factors the court considers:

Court’s ability to compel witnesses more readily

Location of evidence and witnesses

Relative court docket loads in the two courts

Familiarity w/ the applicable law

* + 1. Does not permit dismissal under Rule12(b)(3)
  1. **§ 1406(a) Transfer**
     1. Applies when the transferor court is an improper venue
     2. Court may dismiss but if it is in the interest of justice they may transfer
        1. Transfer is usually the better option because it obviates the need to file a new case
     3. Both statutes clearly speak only to whether the original court is a proper venue not whether it has Pjx
  2. **§ 1407 Transfer**
     1. Multidistrict litigation
     2. Panel seeks to centralize related litigation from federal courts throughout the nation to a single district for consolidated proceedings
        1. For pretrial purposes only- allows for consolidated discovery in related cases
  3. **Relevant Transfer Cases**
     1. ***Goldlawr v. Heiman*** 
        1. Upheld a §1406(a) transfer by a court that lacked Pjx and venue
        2. Rule: even courts lacking Pjx may transfer to a proper venue
     2. ***Hoffman v. Blaski***
        1. Transferee court must be a proper venue and must have Pjx over the D (applies to both statutes)- they tried to transfer to a place that they could not have originally sued
        2. Venue and Pjx of the transferee court must be met independently- no waiver for the D
           1. **Note**- In 2011 Congress said the D can waive as long as **all parties consent** (very rare that P will agree to transfer when they were the ones who originally filed suit in a specific venue)
     3. ***Van Dusen v. Barrack***
        1. SCOTUS held that a transferee court in a 1404(a) transfer must apply the choice of law rules that the transferor would have applied
           1. Change of venue should simple change the courtroom and now the law to be applied to the merits of the case
        2. Absolutely does not apply to a 1406(a) transfer because in such a case the transferor court is not a proper venue and it would be unfair to subject a D to those laws

1. **Forum Non Conveniens- “forum is not convenient” \* consult shell answer**
   1. Phrase is used to refer to a doctrine of dismissal- a case, though pending in an appropriate forum is dismissed because there is another forum that is more appropriate- both a state and federal mechanism
      1. **Where the P is from is perhaps the most important thing, local P get more deference than foreign P, remember is this all about convenience – SAY THIS ON THE EXAM**
      2. Research has shown that a ton of forum non cases do not go to trial- people usually give up
         1. Sometimes it is an all or nothing battle, if the P wins they probably settle and if they lose they probably lose
   2. **When Applicable**: Court dismisses because it cannot transfer
      1. ***State Court-*** filed in state and needs to be moved to (1) different state, (2) different country or (3) to the federal system
      2. ***Federal Courts***- filed in federal court but needs to be moved to (1) different country or (2) to state system
   3. **Forum Non Two Part Test** (of course there is a two part test)
      1. First Step: ***Is there an adequate and available alternative forum?***
         1. Court needs justifiable belief in the alternative forum
            1. For instance if a foreign court did not have Pjx the court would probably not dismiss under FNC
         2. This step is hard NOT to satisfy
            1. When not granted it is usually because the country is corrupt or if no relief was possible
         3. Conditional Dismissal may be met to show the transferee court will be adequate
            1. For instance, a D may waive his right to contest Pjx
      2. Second Step: ***Balancing Private and Public Interest***. (Comes from Piper)
         1. Private Interest Factors (list not exhaustive)
            1. (1) Relative access to sources of proof, (2) witness costs and availability, (3) possibility of viewing premises, (4) whether judgment would be enforced (5) any other logistical problems that may arise
         2. Public Interest Factors (list not exhaustive)
            1. (1) court congestion, (2) burden of jury duty (3) Forum interest usually turns the decision and (4) conflict of law problems
         3. **Test Tip**- analyze ALL the factors- mention first factor-talk about it-conclude on it, move on to the next factor
   4. ***Piper Aircraft v. Reyno***
      1. Why file suit in California?- famous airplane attorney lived there and wanted to litigate in his hometown- Reyno was his secretary (provision for estate was very loose)- looked like Cali would work
         1. D then remove case to fed ct. (was able to get diversity, Scotland v. Ohio/Pa)
         2. Piper then uses 1404(a) to move to Pa, Hartzell ask for dismissal or in the alternative 1404(a)
         3. FNC dismissal to file the case in Scotland since it was more convenient
         4. Court introduces two part test, supra

* **Subject-Matter Jurisdiction**

1. **Smjx**- is the power over the type of dispute. It determines if the case could be heard by either a state court or a federal court. A federal court can establish subject matter jurisdiction over a claim through claims arising from **federal question** or claims involving **diversity of citizenship**
2. **Diversity of Citizenship and Alienage-** *Power to hear cases between: 1) citizens of different states but adds the requirement that the 2) amount in controversy must exceed (not be) $75,000- ADD IN 1332*
   1. **Complete Diversity Rule-** Every P must be of diverse citizenship of every D
   2. **Minimal Diversity-** there is no complete diversity requirement in the Constitution
      1. You can have Tex v. NY and Tex. (this would be constitutional but not under §1332)
      2. At least one D and one P are from a different state
         1. ***Strawbridge*** case says complete diversity is needed to comply w/ statute
   3. **Natural Persons**: Physical and Mental- Look at date of filing suit, not date of action
      1. Citizen of the United States
      2. Domiciled in that state (a person only has one domicile at a given time and a human always has a domicile)
         1. Domicile- the place where you live and intend to stay (looks to most recent place domiciled)
            1. Grab-bag of indicia to show if they intended to live in a place:

Pay in state tuition, voter registration, location of bank accounts, real and personal property taxes, automobile registration, did they just buy a house somewhere etc…

* + 1. ***Mas v. Perry***
       1. Married couple sued their landlord. D was a citizen of Louisiana and the question was if the P was a citizen of Louisiana.
       2. Born in Mississippi, lived and went to school in Louisiana, moved to Illinois then back to Louisiana
          1. Court holds she never changed her domicile form Miss. She never formed the subjective intent to make Louisiana her home
  1. **Corporations-** *Every business either is a corporation or is not a corporation*
     1. §1332(c)(1) provides that a corporation is a citizen of:
        1. ***Incorporation***- every state (could be multiple) in which it’s incorporated and
        2. ***PPB***- in which it has its principal place of business (only one state)
           1. ***Physical aspect***- where the corporation does more of whatever it does than anywhere else
           2. ***Nerve center***- where the managers direct its activity (usually done at corporate headquarters)

Adopted by ***Hertz v. Friend***

* 1. **Nonincorporated Associations**- *harder to get in to federal court*
     1. **Citizenship**- the courts look at the citizenships of all the partners when assessing the partnerships citizenship
        1. ***Carden v. Arkoma-*** you must look to citizenship of ALL the general AND limited partners
        2. It is possible for a corporation to act as a partner in a partnership and if this is the case the same rules for corporations apply to that specific corporation when determining their citizenship
     2. **Example**: P (Tex) v. D1 (Ohio), D2 (Tex), D3 (Cali) there is no complete diversity
        1. Labor unions for example will have smjx in every state almost
     3. **Note**: 1332(c)(1) does not apply- these are limited partnerships, general partnerships, LLC’s, etc… not corporations
  2. **Litigation through representatives**
     1. §1332(c)(2) provides that the representatives of the decedent, an incompetent, or an infant shall be deemed citizens as the same state as the decedent, incompetent or infant
        1. the citizenship of the representative is irrelevant
  3. **Amount in Controversy-** *$75,000 - §1332(a)*
     1. P does not need to set out an exact figure for damages in their complaint but must allege that the amount in controversy EXCEEDS 75k
        1. This amount is exclusive from cost and interest- however it may include atty. fees under the American Rule
        2. P ultimate recovery is irrelevant
           1. However if they recover less they MAY have to pay defendant’s cost
     2. D may challenge the cost and if so it becomes the P’s burden to prove this is the correct amount
     3. **Aggregation-** adding of two or more claims to meet the amount in controversy
        1. Only acceptable if they are joint claims
     4. **Docket control device-** ensures that federal courts do not become a small claim court
        1. This is not a constitutional element
  4. **Alienage Jurisdiction**
     1. §1332(a)(2) provides for jurisdiction over cases between citizens of a state and citizens or subject of a foreign state
        1. requires the same amount of controversy
        2. must between a US citizen v. Non USA citizen

1. **Federal Question***- 28 USC 1331- The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.*
   1. Federal courts have original jurisdiction of “all civil actions arising under the constitution, laws, and treaties of the United States- Art. III, § 2 and 28 USC 1331 grants jurisdiction using same operative language (discuss both on test)
      1. The Plaintiff’s claim must “arise under” federal law
         1. The mere presence of a federal question somewhere in the case does not create federal jurisdiction
         2. Anticipation of a federal Defense is not enough for federal jurisdiction
   2. **Two Tests for whether a claim is “arising under”**
      1. **Ingredient Test**: Is federal law a “substantial ingredient” of the claim; this is the more liberal and generous test
         1. ***Osborn V. Bank of the United States*** 
            1. Bank contended that the Supremacy clause of the Const. prohibited a state from imposing a taxon upon it
            2. Does matter if the federal law question does not arise in litigation, so long that is a possibility
            3. Broad Interpretation
      2. **Creation Test**: Did federal law “create” the claim?
         1. Holmes Test from ***American Well Works***
         2. P is the master of his complaint!
   3. **Well-pleaded complaint rule** (*Louisville RR v. Mottley*): P is the master of her complaint and can sue where she wants. Only look at the face of the complaint for 1331 evaluation. This is a starting point.
      1. ONLY LOOK AT THE P’s COMPLAINT- do not look at possible defenses, counter claims or the like
         1. ***Holmes Group v. Vornado*** (court holds a counterclaim is irrelevant to whether a case can be brought in federal court)
         2. **From Freer-** ask whether or not P is trying to vindicate some rights under federal law- if not then that is a strong inference for state only claim
      2. **Exceptions** that P is the master of their complaint (Watch out! The P may be artfully pleading)
         1. If the P chooses to sue in fed ct. then the WPCR from ***Mottley*** comes in
            1. Mottley sued in federal court claiming that it came within the jurisdiction that congress granted the federal courts within 1331- question is does the federal law justify breach of K

Court says no federal questions arise out of the WPCR

* + - 1. If P sues in state court and she sues on a federal claim- the D has the right to remove the case to federal crt. (1441 removal- will discuss later)
      2. **Complete Preemption**- P sues in state court on a state cause of action- if there is a federal law that preempts state law then it is as if there was no state law in the first place (Supremacy Clause)- this is very rare DISCUSS EVEN IN A SFQ QUESTION
      3. **SFQ Doctrine** P sues in state court on a state cause of action
         1. Two Factors for Determining whether a state law claim should be seen to arise under fed law

The case **necessarily** raises a federal question

The federal issue is actually **disputed** and **substantial**

* 1. **Substantial Federal Question Doctrine**
     1. Problem arises because some claims are mixtures of state and federal law
        1. Usually when state law creates a right of action (a claim) that is measured by federal standards (sometimes the converse is true)
     2. ***American Well Works v. Layne and Bowler***
        1. Company A sues Company B alleging that B had wrongfully claimed that A’s pump violated B’s patent also that B had driven away customers
           1. A based its claim on **a state trade libel law** however the litigation would **focus on federal patent law**

Holding- this case did not invoke federal question jurisdiction

* + - 1. **Holmes Test**- a suit arises funder the law that creates the cause of action
         1. State law in Well Works created the cause of action not federal law
    1. ***Smith v. Kansas City Title & Trust***
       1. P sues D to stop corporation form investing in bonds issued under a fed statute
          1. Argues that fed statute was unconstitutional and therefore the corp investment violated Mo. Law
       2. Holding- Court upholds federal question jurisdiction
       3. Much more flexible test- even a claim based on state law can come under 1331
    2. ***Moore v. Chesapeake***
       1. P sues his employer under a state employer’s liability law
          1. P claims that D violated the Federal Safety-Appliance Act
       2. Holding- no federal question jurisdiction (consistent w/ Holmes Test)
    3. ***Gully v. First National Bank in Meridian***
       1. Bank transfers rights and liability to successor bank- successor bank was liable for state taxes
          1. State officer sued the bank in state court and successor removed to federal
          2. Power to tax federal law provision was lurking
       2. Holding- no federal question jurisdiction- just because a federal question is lurking does not allow for federal question jurisdiction
    4. ***Merrel Dow v. Thompson***
       1. P ingested a drug by D- P asserts a variety of state law claims but says they violated the FDCA misbranding the drug
       2. Holding- no federal question J
          1. Congress failed to a create a private right to action and since there was no federal remedy the court was not free to supplement that decision

If they went the other way it would open up the door for every single case that has a mention to a federal law

* + - 1. Majority from Merrell Dow
         1. Purpose of 1331 is to provide a federal forum for the vindication of federally created remedies
         2. Congress creates no right of action means that a lower federal forum is not necessary since there is no federal rights to vindicate
      2. Minority from Merrell Dow
         1. 1331 has a role in ensuring uniformity of federal law
         2. Federal courts should be used if the case depends upon an interpretation of federal law
    1. ***Grable v. Darue*** (Probably only touch on this unless it is a pure SFQ question)
       1. IRS seized P’s land for nonpayment of Taxes- sold, P sues D to quiet title since the IRS did not follow correct federal procedures (did not send personal service)
          1. P sued in D in state court and D removes to federal court
       2. **Holding**- unanimous SCOTUS opinion that there was federal question jurisdiction
          1. Court revives Smith and rejected any notion that federal question j required a federally created claim
          2. Basically goes w/ the more flexible test in Smith and reinterprets Merrell and say that is a kin to Smith
       3. **Grable Factors** for determining if a state law should arise under federal law (apply facts of hypo to these to get your answer)
          1. Is there a substantial issue of federal law
          2. The federal issue is actually in dispute
          3. Federal issue is necessary to the outcome of the case
          4. Would it upset the balance of state and federal judicial responsibilities congress intended

This will probably be the P strongest argument for keeping a case out of Federal court- argue that it could swamp the system

* 1. **Test Tip**
     1. Step 1: Look at WPCR
     2. Step 2: Normally we just need to look at Holmes Test
        1. Holmes Test has a few exceptions
     3. Step 3: There may be a case when Congress intended a case to be in Federal courts
        1. Complete Preemption Doctrine (very rare) and SFQ Doctrine

1. **Supplemental Jurisdiction**- *allows a federal court to hear claims that could not get into federal courts by themselves because they do not invoke diversity, alienage, or federal question*- Governed by U.S.C § 1367
   1. **Supp. J. Basics**
      1. Never available to get the original case itself into federal court, it is only available for additional claims
      2. This is constitutional because the federal court takes jurisdiction over the entire case or controversy so therefore they take control over the claim w/ in the case
         1. If and only if the claims are so closely related to the claim that invoked the federal court’s jurisdiction as to be considered part of the same controversy (Gibbs)
      3. The purpose of Supplemental Jurisdiction is to achieve efficiency and fairness
      4. The scope of Supp. J. includes multiple claims by a P, as well as counterclaims, crossclaims, and other multiple party claims that are not under the original jurisdiction of the federal ct.
   2. ***United Mine Workers v. Gibbs-*** “Common Nucleus”
      1. **Facts**- No diversity of citizenship, P sues D for violating federal labor law and under a state law action (By itself the second claim could not get into federal court)
      2. **Rule**- SCOTUS said Supp. J. over the second claim because it derived from a **common nucleus of operative fact** (cnof)
         1. This is always satisfied when the claim arises from the same transaction or occurrence
         2. Says Court can use their discretion to limit cases they will hear under Supp. J.
      3. **Two Factors Must be met**
         1. Source of original jurisdiction- § 1331 has to be satisfied
         2. Supp. claim must be cnof
            1. Look for a pattern where there is a casual connection between the two claims but that they do not arise from the same cnof
   3. ***Finley v. United States***- Temporarily freezes *Gibbs*
      1. **Facts**- P’s husband/kids die in airplane crash. P brings suit against the FAA and the city/utility company for negligent air traffic controls/ failing to maintain electrical power lines.
         1. Claim against the city did not invoke SMJ- only way to get it was Supp. J.
      2. **Holding**- even though it came from the same crash , SCOTUS declined Supp. J. because they said that congress has never affirmatively granted it
   4. ***Owen Equipment v. Kroger***- Limits Supp. J. when original jurisdiction is §1332
      1. **Facts**- Iowa v. Nebraska on a state claim (no federal claim but diversity under 1332)
         1. R14 w/ to bring in TPD from Iowa (Source of original jurisdiction is 1332)
            1. “over claims by plaintiffs against persons made parties under Rule 14” does not apply here because the R14 claim was made by the Defendant not the Plaintiff
      2. P makes a R 14(a)(3) claim against Iowa (only way to get this claim in is through Supp. J. but since it was a state claim it was not allowed- original jurisdiction was 1332 so no good)
         1. If they allowed this it would end complete jurisdiction
         2. Permissive counterclaims do not get supp j.
   5. **U.S.C. § 1367** - was a response by Congress from the Finley decision
      1. (a) Grant of Supp. J.
         1. Broad terms that are meant to codify the *Gibbs* common nucleus test
         2. Unless (b) or (c) applies you will have Supp. J. over a claim that is “so related”
            1. You can bring multiple parties as long as there is original jurisdiction and the additional claims relate to the original jurisdiction claim
      2. (b) Withdraws Supp. J. in certain instances
         1. **Applies only to cases in which the jurisdiction invoking claim was done so under § 1332**
         2. Precludes Supp. J. claims asserted in diversity jurisdiction and by the **P**, not by anyone else
         3. P can not have Supp. J. if a party is brought in under 14, 19, 20 or 24
      3. (c) Codifies the discretionary factors the Court set forth in Gibbs
         1. Raises a novel or complex issue of state law
         2. Claim substantially predominates over the claim that invoked federal SMJ
         3. Court has dismissed all claims over which it has original jurisdiction over
         4. Other compelling reasons (questions is whether this does any work)
         5. **Note**- majority view is that unless one of the factors is met then the court MUST exercises Supp. J.
            1. When dismissed it is without prejudice so the P can re-file in state court
      4. (d) Tolling Provision
         1. Only applies when dismissed under (c)
      5. (e) State includes D.C. and other political subdivisions
   6. ***Exxon v. Allapattah*** (class action)
      1. **Facts**- Named Party (TX) v. Exxon (NY) [state claim for more than $75K], Non-named parties (NY, DE, NY, OH, etc.) v. Exxon (NY) [state claims less than $75K]. All allowed.
      2. **Rule**: Only look to the citizenship of the named P’s. Old case: *Zahn* – said you could not ignore AIC for any P.
         1. Split among jurisdictions about how to interpret 1367. SC overruled *Zahn*. Logic: 1367 never mentions Rule 23.
   7. ***Ortega v. Star-Kist***
      1. **Facts**- P1 (PR) v. Starkist (DE) [state claim for $100K], P2 (PR), P3 (PR) v. Starkist (DE) [state claims less that $75K].
      2. **Question**: Does court have original jurisdiction?
         1. **As long as one claim satisfies the amount in controversy requirement and you have complete diversity, 1367(a) says you can join if you have CNOF**.
2. **Removal Jurisdiction-** *right to remove a case from state court to federal court, allows* ***D*** *to override the P’s choice of forum*
   1. **Basics of Removal Jurisdiction**
      1. Governed by §§ 1441, 1446, 1447- not covered in the constitution
      2. Only a Defendant can remove a case (even if D files counter claim making P a D will not allow P to remove)
      3. All D must agree to remove the case
         1. All D who have been properly joined and served 1446(b)(2)(A)
   2. **Exception:** If Diversity is sole basis for federal jx, then the claim cannot be removed if **any** defendant is a citizen of the state in which the claim was brought.
   3. **Timing-** 1446(b)(1) requires notice of removal to be filed 30 days after receipt by the D through service of the complaint
      1. ***Murphy Bros v. Michetti Pipe***- 30 days runs from service of process not sending the complaint
      2. “Last Served Approach”- When multiple D are served the 30 days beings when the last D is served or 1 year for diversity removal
   4. **Steps for Removal**- D does not need permission to remove the case (P has to ask to remand)
      1. File a notice of removal in federal court- 1446(b)
      2. Promptly give written notice of the removal to all adverse parties- 1446(d)
      3. File a copy of the notice in the state court “notice of notice of removal” 1446(?)
         1. at this point the state court should not proceed unless the case is remanded from federal court
      4. **Note**- A D can waive the right to remove by taking some action in the state court that they are not required to take
         1. Ex. filing a permissive counter claim
   5. **MT to Remand**- 1447
      1. If removal is improper for any reason other than lack of SMJ then the P must move to remand w/ in 30 days after removal- 1447(c)
         1. Court must remand *sua sponte* when ever it is determined that SMJ is lacking
      2. ***Martin v. Franklin***
         1. SCOTUS overturns a district court decision that would allowed for P a to recover attorney fees for an order remaining
         2. Rule- followed Tenth Circuit that fees should only be awarded if the removing **defendant lacked objectively reasonable grounds for removal** 
            1. Absent unusual circumstances, attorney’s fees should not be awarded when removing party has an objectively reasonable basis for removal
   6. **Issues of Jurisdiction and Venue**
      1. A D can remove a case only if it is one of which the federal district court has original jurisdiction- 1441(a)
         1. If there is no federal subject matter jurisdiction the federal court must remand to state court even if discovered late 1447(c)
            1. D has the burden of establishing federal SMJ and must do so on the basis of the P’s complaint- only
         2. ***Caterpillar v. Lewis***- if a jurisdictional defect is cured before entry of judgment in federal court, removal might be upheld
      2. **Diversity Jurisdiction**
         1. Some states do not make the P state amount in controversy or allege diversity
            1. D notice of removal will therefore have to allege the citizenship of the parties and the amount in controversy
         2. Federal courts uphold removal in a case that was originally not removable became removable by voluntarily act of the P
         3. **AIC- 1446(c)(2)** determines the starting point of an unclear amount in controversy
            1. provides as starting point that the P dollar demand in their complaint to be the amount in controversy, with a few exceptions:

A. P sues for nonmonetary relief- injunction

B. P sues for monetary relief w/out stating an amount

C. P sues for a relief 75k or less in a state in which the claim does not cap what they can recover

* + - * 1. In any of these situations the D may allege the AIC in her notice of removal w/ preponderance of the evidence 1446(c)(2)(B)
    1. **Venue-** 1441(a) a case may be removed only to the fed. district ct. embracing where the action is pending- embraces means geographically
       1. **Instate D Rule**- if one of the D is a citizen of the forum she has no need for the protection of the federal court
          1. 1441(b)(2) is the local defendant exception
          2. **This rule only applies to 1332 (diversity) not to 1331 (fed question)**
       2. Cases involving 1332 cannot not be removed after one year of commencement
          1. Unless the P was acting in bad faith by adding a D 1556(c)(1)

1. **Erie Doctrine:** *In diversity or other state-claim cases, the substantive law is to be determined not by relevance to general law but rather by substantive law of the state where the district court sits. The only time Erie is relevant is when we are in Fed.Ct. and the basis is diversity, and the question is- does the Fed.Ct. apply state law or fed law to some aspect of the case*
   1. ***Erie v. Tomkins****:* the court held that the law of the forum state governs.
      1. **Policies behind this decision**
         1. To minimize forum shopping
         2. To avoid irrational discrimination based only on the court they are in
         3. The avoid federal interference, because federal courts have no power to make state law rules of decision
      2. B. **History**
         1. Rules of Decision Act – laws of several states shall apply unless there is a federal statute.
         2. *Swift v. Tyson –* RDA only confined to state & “local” laws
   2. **Substantive or Procedural**
      1. If there is a controlling federal rule, then it is procedural (think FRCP)
         1. Unless the rule is clearly substantive, follow the rule
         2. If the rule is arguably procedural, that is, in the gray area of substantive and procedural, then follow the rule.
      2. **If there is no controlling federal rule, then use the following tests:**
         1. **Outcome Determinative Test**
            1. If the rule is likely to make a difference in the outcome, then the rule is substantive and you must follow state law

Problem with this test is that every rule can be outcome determinative, in the literal sense, even if it is truly procedural

* + - 1. **Absolute Outcome Determination Test**
         1. If the rule has a “strong likelihood” or certainly will affect the outcome, then the rule is substantive
         2. If the rule merely changes the process of decision, it is not substantive
      2. **Federal and State Interest Balancing Test**
         1. If there is a strong federal policy behind doing it a certain way, then the rule is procedural
         2. If there is a strong state policy behind doing it a certain way, then the rule is substantive
  1. **Multi-state choice of law:** the federal judge would use the forum state’s rules of choice law to determine what law would apply.
     1. **State interest analysis (used in Texas):** apply the law of the state that had the most significant relationship to the matter
     2. **Lex Loci:** place where the injury occurs.

**Discovery**

1. **Discovery–** *parties may discovery any nonprivileged matter that is relevant to any party’s claim or defense. Relevant information does not have to be admissible at trial; material is discoverable as long as it appears reasonably calculated to lead to the discovery of admissible evidence.* Rules 26-37
   1. **Purpose**
      1. Finding out about the suit – discover **favorable and unfavorable** information
      2. Freezing harmful evidence
      3. Statements made in deposition can be used to impeach the credibility of witnesses if they testify later to it – need to be adept at getting witnesses to give details answers.
      4. Preserving evidence and putting it in useable form
         1. e.g. taking deposition of expert witness who can’t be at trial
   2. **Scope of Discovery**
      1. **Relevant** Information: the information need not be admissible as evidence at trial but **reasonably calculated to lead to admissible evidence.** It does not need to certainly lead to admissible evidence. However, it is not enough that the information is tangentially related or unlikely to *possibly* lead to admissible evidence.
      2. The information cannot be **privileged information.**
         1. Certain privileges – attorney client, doctor patient, husband wife, priest, etc.
            1. In order to determine whether to limit discovery on certain information, the court employs a balancing test between the harm caused by the discovery and the need for the information
   3. **Limits on discovery**
      1. The information cannot be **cumulative, repetitive, or unduly burdensome.**
      2. The party had **ample opportunity** to gather the information **by other means**.
      3. Court weighs whether the benefits that could come from the information do not outweigh the burden of gathering the information.
      4. **Work Product:** attorney’s work product/trial preparation materials are usually protected. It could be material prepared by the party, their attorney or representatives in *anticipation of litigation.* This is **NOT** a full privilege.
         1. **Escape valves:** if the discovering party shows there is substantial need AND undue hardship, the court *may allow* the information to be discovered.
         2. Courts will protect “opinion” work product, but will sometimes allow answers to questions to be discoverable.
   4. **Policy reasons for our discovery**
      1. Avoids trial by ambush
      2. Permits access to facts of the case
      3. Promotes merits resolution over technical dismissals
   5. **American Rule**- generally the producing party bears their own cost of production
      1. 26(b)(2)(C)- discovery is limited if:
         1. Duplicative or burdensome
         2. Burden of discovery outweighs benefit
      2. Proportionality required so that balance achieved between burden and the benefit
2. **Tools for Discovery**
   1. **Required Disclosures**- R26(a) disclosures that each part must make even though nobody asked for them
      1. Why mandatory? You are going to ask for these anyway so stream line the process
      2. 1. **Required Initial Disclosures** Rule 26(a)(1)(A)
         1. a. requires parties to provide name, address, telephone number of people w/ discoverable info related w/ claim or defense
         2. b. a copy of all documents, electronically stored info, tangible things that may use to support claim/defenses (don’t have to turn over documents that help the other side that you will not rely on)
         3. c. computation of damages
         4. d. D must identify any insurance agreement (generally cases settle at policy limits)
      3. 2. **Required Disclosures Concerning Expert Witnesses**- 26(a)(2)
         1. (c)(i) must be produced at least 90 days before trial date
         2. (A) requires each party to disclose to each other party the identity of anyone who may be used a trial for expert testimony
            1. two types of experts- one who require written report and those who don’t

written report must include a statement of all opinions to be expressed and the basis for them along w/ a CV

Consulting experts do not testify- ask them anything you want off the record- the info is private

* + 1. 3. **Required Pretrial Disclosures-** 26(a)(3)
       1. must served on each other detailed info about evidence they anticipate presenting at trial
       2. includes info on witnesses
  1. B. **Depositions**- Rule 30
     1. Questions- testimony is recorded and transcribed
     2. Must notice the depo under 30(b)(1)
     3. Nonparty must be served w/ a subpoena under Rule 45 (subpoena duces tecum- bring docs w/)
     4. No one can be deposed more than one time a case 30(a)(2)(A)(ii)
     5. Generally no more than ten depos for side and limits to a single day depo- court can adjust
     6. Rule 30 is an oral depo (more common) and Rule 31 is a written depo)
  2. C. **Interrogatories**- Rule 33
     1. Written questions to which the responding party must respond in writing w/ in 30 days of being served w/ questions
        1. Responding party may reject to a ROG
     2. Used to discover background info or help to clarify a P’s pleading
     3. Limit of 25 ROGS – 33(a)(1)
     4. Disadvantage- lawyers prepare the answers so nothing good comes out of it- limited value
  3. D. **Request for Production-** Rule 34 (most important)
     1. Party produces documents, electronically stored info, tangible things, or allows entry upon land to permit various acts- such as testing
     2. 34(b)(1)- request must be served on all parties and the request must set forth the doc or things desired w/ “reasonable particularity”
        1. Responding party must respond w/ in 30 days
        2. Party must produce docs as they are kept in usual course of business or must organize and label them to correspond w/ categories in the request- 34(b)(2)(E)
     3. No RFP for non parties- subpoena duces tecum might allow the docs to be produced R45
  4. E**. Medical Examinations**- 35(a)(2)(A) only available if the court grants a party’s MT to subject someone to a physical or mental evaluation
     1. Conclusory allegations are not sufficient to justify an order of a med exam
     2. Can only examine a party
  5. F. **Request for Admissions-** 36(a)(1)(A)
     1. Written request to admit specific issues of fact or law- parties only
     2. Used to narrow scope of dispute
     3. Can be served only on parties- 30 days from being served to serve all parties
  6. **Duty to Supplement Responses**
     1. Rule 26(e)(1) imposes a duty on the responding party to supplement or correct any required disclosure and response to ROGS, RFP and RFA
     2. (e)(1)(A) only if the party learns that in some material response the disclosure or response is incomplete or incorrect
  7. **Preservation obligations-** two main issues (these do not come from FRCP)
     1. **Trigger**- some event has happened that leads to the conclusion that litigation is reasonably anticipated
        1. this starts the preservation obligation
        2. Need to ask whether or not this case will reasonably go to litigation
     2. **Scope**- what do you need to preserve, how far to does it go, what are the limits?
        1. Reasonably accessible- cost is a big issue
     3. Rule 11 applies to the whole law suit and may say there is an obligation before you file your law suit you must do a legitimate pre filing inquiry to make sure your claims are not frivolous
  8. **Work Product Protection:** attorney’s work product/trial preparation materials are usually protected. It could be material prepared by the party, their attorney or representatives in *anticipation of litigation.* This is **NOT** a full protection. **Covered by Rule 26(b)(3)**
     1. **Ordinary Work Product** [26(b)(3)(A)] **applies to:** 
        1. Documents and tangible things
        2. Preparation in anticipation of litigation
        3. By or for a party (or its representative)
     + \***Note**- Starting assumption is that these are not discoverable
     + **Escape valves:** if the discovering party shows there is **substantial need** AND **undue hardship**, the court *may allow* relevant information to be discovered. 26(b)(3)(A)(ii)
     1. **Opinion Word Product-** 26(b)(3)(B), courts will sometimes allow answers to questions to be discoverable but will protect opinion work product.
        1. This may include- mental impressions, conclusions, opinions or legal theories
        2. If in a document that falls under (A) but it has some opinion in it, then (B) will take precedent. However, if you can black out the opinions then you may need to turn it over.
     2. **Only talking about documents and tangible things**
        1. Reading it this way there is no Hickman protection. However, a **majority** of the courts say if it is intangible then Hickman will extend to cover it.
        2. **Minority** view is to extend it to (B) to intangible things
     3. Work product must be generated “with an eye toward litigation” even if no case has been filed
        1. ***Hickman v. Taylor*** -Atty thinks they are about to get sued, atty had statements from the witnesses of tug boat wreck, OC wanted these notes
           1. R- at this time was that you could have any discoverable information if related to this subject matter-
           2. SCOTUS this was not discoverable, part of lawyers effort to prepare case for his clients, otherwise this would put no incentive to prepare for the clients
     4. A party may always recover their **previous statement**, this will never be protected- Rule 26(b)(3)(C)
  9. **Discovery of Experts:** litigation preparation materials, governed by Rule 26(b)(4)
     1. **Four types of experts**
        1. Testifying experts – fully discoverable, Rule 26(b)(4)(A)
        2. Consultants “retained or specially employed” for litigation, but not to testify – usually not discoverable. 26(b)(4)(D)
           1. May use **escape valve** if it’s “exceptional or impractical for party to obtain facts or opinions on the same subject by any other means,” e.g. if the expert is the only one in the world who knows about the materials
           2. If they are a party’s representative you may not need this since 26(b)(3) deals w/ party’s representative, however if they are not then use this.
        3. Experts consulted informally and not “retained or specially employed” – not discoverable
        4. Experts contacted for the purposes unrelated to the litigation – fully discoverable, e.g. experts who designed the product
     2. **Work Product**
        1. The **question** you ask the client is protected (“Did you run a red light?”) Their **answer** (“Sure, I ran the red light!”) is protected. However, the **knowledge** that you have is not (e.g. if opposing counsel asks you if your client ran the red light, you have to say yes).

1. **Summary Judgment. Rule 56**
   1. (a) If court determines before trial that there is “no genuine disputes as to any material fact”, it may enter judgment as a matter of law, without a trial (most states follow something similar to Rule 56)
      1. When ruling for a MSJ the court may go beyond the pleadings and consider other evidence
      2. MSJ is a vehicle for determining whether the facts are in dispute at all
      3. **Discretion**- a court is never required to grant MSJ (court has no discretion to grant MSJ when it should not be granted)
      4. When/ how can MSJ be used?
         1. 30 days after close of discovery
         2. on a claim or defense or on a part of claim or defense- this means the court may look at any material fact in a case and dismiss that specific fact
   2. **Rule 56(c)(1)** permits a party to rely upon particular parts of the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, rogs, answers or other materials
      1. **Affidavits** are quite common in MSJ, 56(c)(4)
         1. 1. Made on personal knowledge
         2. 2. Set out facts that would be admissible in evidence
         3. 3. Show that the affiant or declarant is competent to testify on the matters stated
         4. **Note**- ROGS and depos must satisfy these three elements, supra
      2. **Pleadings** may be used if
         1. They are verified
         2. Nonverified but contain an admission
      3. Court may consider admissions from Rule 36
   3. **Trilogy Cases of 1986**
      1. ***Anderson v. Liberty Lobby***
         1. **Facts**- public figures sued for defamation over articles that characterized them as racist and Nazis
            1. Affidavit stated that the author had researched the articles and that he believed the statements made about the P to be true
            2. P opposed the MSJ because the editor of the paper called the articles ridiculous
         2. **Rule**- court rejected the approach that held that nonmoving party must produce more than a **scintilla**, they must produce sufficient evidence for which a reasonable jury could find in favor of the non moving party
      2. ***Celotex v. Catrett***
         1. **Facts**- Wrongful death claim against several manufactures of asbestos
            1. D moved for MSJ by pointing out that P lacked evidence showing that the decedent had been exposed to asbestos
            2. District court granted MT
            3. COA reversed by stating the requirement a party ahs in making a MSJ to support its MT w/ evidence
         2. **Rule**- SCOTUS reversed and concluded that those who do not have the burden of proof at trial may move for MSJ w/ out producing evidence – burden shift is on P at this point to make a showing
            1. You can simply show that “a fact cannot be…supported” Rule 56(c)(1)
         3. **Movant meets its burden** if it shows that there is no genuine dispute of material fact
            1. Rehnquist- This comes from 56(a)- pointing out to district court that there is an absence of evidence to show there is not genuine dispute

Basically “show me what you got” then the burden shifts to the non movant party (party against MSJ) to overcome MSJ

How do you overcome MSJ?

Basically you need good probability or some possibility that a reasonable jury could rule in your favor – objective standard

Basically they have two burdens, burden to survive MSJ and burden to prove their case at trial w/ preponderance of evidence

* + 1. ***Matsushita v. Zenith***
       1. **Facts**- complex anti trust case, USA company claims Japanese company conspired to keep prices artificially low
       2. **Rule**- SCOTUS upheld D MSJ because it noted that P theory of predatory pricing was “implausible”
          1. Court holds that P was required to come forward w/ more persuasive evidence than would otherwise be required to defeat a MSJ
          2. Courts should “not slip in to sheer speculation”
  1. ***Scott v. Harris***
     1. **Facts**- speeding leads to a high speed pursuit, CR claim- excessive force, D said qualified immunity
        1. P argues that D would not have done that to a regular driver
        2. D produces evidence that P was not driving regularly
     2. **Rule**- When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury would believe that the force was excessive, there should be MSJ
  2. **Long Drawn Out *Cleotex* Discussion**
     1. Courts perceived a bias (though empirical data opposite) against SJ. Wanted to send the message that SJ should not be disfavored.
     2. **PLAINTIFF’S BURDEN (MOVANT)**
        1. Celotex has no application here.
        2. **Must SHOW there is no genuine issue of fact** and that you are entitled to judgment in your favor.
     3. **NON-MOVANT’S BURDEN- BACK TO CELOTEX**
        1. Assuming movant has discharged their burden, what does the nonmovant have to do to survive
        2. SC silent on this in Celotex. Appellate court didn’t get there the first time. SC remanded to decide this question.
        3. In Celotex, appellate court said P have enough evidence to survive. (Interrogatory answer – can’t be SJ evidence; not admissible because Celotex never got to cross.) (Depo transcript from Catlett.)(Hoff (secretary) letter – court considered, but screwed up b/c letter is not in 56(c)(2). Need affadavit. Plus, Hoff was listed as a witness.) (Letter from Celotex’s insurance company – court considered, but should not have for same reasons above.)
        4. Evidence for summary judgment has to be capable of being reduced to admissible form by the time of trial. See 56(c)(2).
        5. Non-movant must bring some evidence on which, when construed in is favor, a reasonable jury could find for you.
  3. **SJ evidence and Admissibility**
     1. If evidence would be inadmissible at trial then it can not be used during MSJ
     2. Debate is that his makes a mini trial going over all the evidence- the point is to save time so why not just go over this evidence at trial?
     3. Premature MT- basically wait till end of discovery
        1. (d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
           1. (1) defer considering the motion or deny it;
           2. (2) allow time to obtain affidavits or declarations or to take discovery; or
           3. (3) issue any other appropriate order.
  4. **Judgment as a matter of law** (JMOL) At trial there is insufficient evidence to justify having the jury consider it
     1. Governed by Rule 50(a), also called a direct verdict
     2. This is ok because the Seventh Amendment does not give an absolute right to a jury trial in a civil/federal case
     3. Any party may move for JMOL but only after the other party has been fully heard on an issue in a jury trial
        1. D can movie it when the P is done and at the close of evidence
        2. P will only be able to move at the close of all the evidence
  5. **Renewed motion for judgment as a matter of law jury** (RJMOL) has reached a conclusion that reasonable people simply could not have reached – Rule 50(b)
     1. Basically taking the victory away from the winner
     2. Judgment notwithstanding the verdict (JNOV)
  6. Standard for, supra
     1. Rule50(a)(1) is that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on the issue
     2. Difference between MSJ and JMOL/JNOV is largely timing
     3. Standard may be difference since Judge gets to hear all the evidence in this compared to MSJ