Civil Procedure – Fall 2012

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# Pleading

## What is a pleading (FRCP Rule 7)

### Complaint

* + 1. FRCP 7a1 – complaint
    2. FRCP 7a5 – third-party complaint (TPC)

### Answers (Responsive Pleading)

* + 1. FRCP 7a2 – answer to complaint
    2. FRCP 7a3 – answer to counterclaim
    3. FRCP Rule 7a4 – answer to crossclaim
    4. FRCP Rule 7a6 – answer to third party complaint (TPC)

### Misc.

* + 1. FRCP Rule 7a7 – court ordered reply to an answer

## What are the Themes/History?

### Notice

* + 1. One underlying goal is to put the other party on notice of the content of the suit

### Debate between Access vs. Efficiency

* + 1. **Three-Pillar Traditional Pleading Doctrine:** The traditional pleading doctrine is a permissive and liberal doctrine supported by **(1)** liberal pleading, **(2)** broad discovery, and **(3)** summary judgment. The push towards access was codified into FRCP 8, which requires only a low level of evidentiary support. There are lots of procedural mechanism to handle “bad” or “frivolous” claims.
       1. This allows more cases to get decided on their merits and gives more Ps an opportunity for their day in court

## How can you dismiss a Pleading?

### Pleading Out of Court

* + 1. **Missing Legal/Factual Elements:** elements of a the claim (legal or factual) that P needs to win do not exist or are contradicted
       1. This will result in a 12b6 or 12c motion by the D

### Legally Insufficient Claim

* + 1. **Missing Legal Element:** elements of the legal claim are missing (i.e. an injury for negligence)
       1. This will result in a 12b6 or 12c motion by the D

### Vague Claim

* + 1. **So Unclear there’s no Notice:** facts plead are so vague that the pleading is made out to be insufficient
       1. This will result in a 12e by the D

## COMPLAINT (FRCP Rule 8)

### General Rule

* + 1. **Requirements of a Pleading (8a):** A pleading that states a claim for relief must contain: **(1)** a short and plain statement of the ground for the court’s **jurisdiction**, unless the court already has jurisdiction and the claim need no new jurisdictional support; **(2)** a **short and plain statement** of claim **showing** that the pleader is entitled to relief; **AND** (3) a **demand for relief** sought, which may include relief in the alternative or different types of relief.
    2. **14-Day Response to Motion for More Definite Statement (12e):** If a court grants a motion for a more definitive statement, P must clarify its pleading and serve D within 14 days of receiving the notice of the courts decision, unless the court grants more time
    3. **Keep It Simple, Stupid (8d1):** each allegation must be simple, concise, and direct. No technical form is required.
    4. **Number of Claims & Consistency (8d2/3):** parties can set out more then one claim in a single court or multiple counts, regardless of consistency.
    5. **Pleadings Construed for justice (8e):** Pleading **MUST** be construed so as to do justice

### What must a pleading include? (i, ii, AND iii)

* + 1. **SMJ (8a1):** short and plain statement of the ground for the court’s **jurisdiction**
    2. **Short & Plain Statement Showing (8a2):** **short and plain statement** of claim **showing** that the pleader is entitled to relief
       1. **Legal Sufficiency:** The pleading must assert a claim for a cause of action that exists. If no cause of actions exists, a court can dismiss sue sponte or with a 12b6.
          1. **Pleading Out of Court**

**Missing Legal/Factual Elements:** elements of a the claim (legal or factual) that P needs to win do not exist or are contradicted

* + - * 1. **Legally Insufficient Claim**

**Missing Legal Element:** elements of the legal claim are missing (i.e. an injury for negligence)

**Facts don’t Relate:** A legal cause of actions exists, but the P failed to plead facts that related to the cause of action.

* + - * 1. **Vague Claim**

**So Unclear there’s no Notice:** facts plead are so vague that the pleading is made out to be insufficient

* + - 1. **Factual Sufficiency:** A pleading must have a short and plain statement of a claim showing that the pleader is entitled to relief.
         1. **Path 1: short and plain** (lenient standard) (NOT SUFFICIENT ALONE)

No set of facts standard: A pleading will survive unless there is “no set of facts” that could be discovered or exist to prove the claim. Effectively, the pleading only needs to put the defendant on notice.

***Conley v. Gibson (Affirmed Dioguardi & not overruled):*** African American workers sued a union for failure to adequately represent, even though the had no specific facts to support the failure in their allegation.   
**HOLDING:** The complaint sufficiently stated circumstances in which there was a harm done and wherein there was a judicial remedy. Petitioners did not have to list a set of detailed facts supporting their complaint.

“Rule 8 requires only that the P give the D fair notice of what the P’s claim is and the grounds upon which it rests.”

“In appraising the sufficiency of a complaint we follow…a complaint should not be a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the P can prove no set of facts in support of his claim which would entitle him to relief.”

***Dioguardi v. Durning (2nd Circuit):*** Italian immigrant shipped lots of medicinal tonic under consignment arrangement. Tonic seized at customs for failure to pay duty and is later sold at auction. P alleges that D sold to a third party at P’s price and 19 bottles were missing.  
**HOLDING:** Allegations are sufficient to survive a 12b6 because they state two claims P strongly believes. /

Short & plain ≠ evidentiary standard: a pleader doesn’t need to meet an elevated evidentiary standard, such as the *McDonnald Douglas* framework, to survive a motion to dismiss for a failure to state a claims.

***Swierkiewicz v. Sorema (not overruled):*** Akos Swierkiewicz, a Hungarian native, brought a discrimination action against Respondent, Sorema N.A. after he was demoted and ultimately fired. Sorema was a French company that replaced P with younger, French people. The pleading could not survive the prima facie case for employment discrimination.   
**HOLDING:** Rule 8(a)(2) only requires a short and plain statement of the claim showing that Petitioner is entitled to relief.

“The issue is not whether a P will ultimately prevail but whether a claimant is entitled to offer evidence to support the claims.”

“Indeed it may appear on the face of the pleading that a recovery is remote and unlikely, but that is not the test.”

* + - * 1. **Path 2: Showing-Twombly/Iqbal Two-Step:** Courts engage in the Twombly/Iqbal two-step in order to analyze whether a pleading properly shows that the pleader has asserted a claim which entitles the pleader to relief. Iqbal noted that this analysis is applied to all civil cases. A lack of factually sufficient claim at the end of the process results in a dismissal.

**Step 1 – Conclusory Test:** A court needs to take its “red pen” and go line-by-line through a P’s complaint and strike all conclusory statements. A conclusory statement consist of any “vauge/formalistic recitation of the elements of a cause of action, legal conclusion, or parroting.” A court is less likely to view allegations containing factual enhancements, such as the who, what, when, where, how, and why of a circumstance, as conclusory. Effectively, the court is looking to omit any allegation that is merely a rote recitation of the elements of a claim.

**Step 2 Plausibility Test:** The remaining allegations in the pleading after striking the conclusory statements must show that the P’s claim is more than just a “mere possibility”; in order to survive a motion to dismiss, the remaining complaint must include enough facts to nudge the claim from “conceivable” to “plausible.” This is distinct from a probability requirement. A court should evaluate the complaint holistically when determining whether the plausibility test is satisfied.

***Bell Atlantic Corp. v. Twombly*:**  Twombly (P) sued on behalf of a class representing all telephone and internet users over a several-year period under a theory of collusion that violated the Sherman Anti-Trust Act. P argued that observable market phenomena following deregulation, such as a failure to enter into competing regional markets by “Baby Bells,” was evidence of a collusion conspiracy and parallel business conduct.   
**HOLDING:**  Claim dismissed because a conspiracy of collusion based on price and output signals is a conclusory statement and the remaining allegations are not plausible.

**Conclusory:** “a P’s obligation to provide the “grounds” of his entitlement requires more than labels and conclusion and a formulaic recitation of the elements of a cause of action.”

**Plausible:** “factual allegations must be enough to raise a right to relief above the speculative level.”

**Nudge the Claim:** “we do not require heightened fact pleading of specifics, but enough acts to state a claim to relief that is plausible on its fact. Because the Ps here have not nudged their claim across the line from conceivable to plausible, their complaint must be dismissed.”

***Ashcroft v. Iqbal*:** Iqbal (P), a Pakistani Muslim, alleged that Ashcroft and another high-ranking federal officer (D) violated his constitutional rights because he was detained in restrictive conditions based on race after the terrorist attacks on 9-11   
**HOLDING:** The allegations that D “knew of, condoned, and willfully and maliciously” endorsed the policy of discriminating against Pakistani Muslims was conclusory and, while it is true that P was racially targeted, the claim was not plausible given other legitimate policy explanations.

**Because of, not in spite of:** “In order to prevail on a claim of purposeful discrimination, a decision maker’s course of action must be “because of” not merely “in spite of” the actions adverse effects upon an identifiable group.”

**Plausibility Test:** “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the D is liable for the misconduct alleged.”

**Deterring Plausibility:** “determining whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

***Form 11*:** bare-bones, but meets the Twombly/Iqbal.

* + - * 1. **Heightened Factual Requirement for Fraud/Damages (9b/g):** A pleader asserting a claim of fraud, mistake, or special damages must present specific facts in their pleading supporting their allegations in order to survive a motion to dismiss.
    1. **Relief (8a3):** a demand for relief sought

## Special Matters (FRCP Rule 9)

### Capacity or Authority to Sue; Legal Existence

* + 1. **No Capacity/Authority/Legal Existence Requirement (9a1):** A party does not need to assert that a party has the capacity or authority to sue or be sued or the legal existence of an organized association that is made a party, **EXCEPT** when required to show that the court has jurisdiction.
    2. **Raising Capacity/Authority/Legal Existence (9a2):** A party can raise an issue regarding capacity, authority, or legal existence through a specific denial with supporting facts that are peculiarly within the party’s knowledge.

### Fraud or Mistake; Conditions of Mind

* + 1. **Heightened Pleading Standard (9b):** A P asserting a claim for fraud or mistake must include the specific facts that constituted the fraud or mistake. P’s ability to show that D acted with malice intent, knowledge, and other conditions of a person’s mind may be alleged generally

### Conditions Precedent

* + 1. **Can Assert Generally (9c):** A P can allege in general terms that all conditions precedent have occurred or been preformed.
    2. **Denial (9c):** A D’s denial of an allegation of conditions precedent requires particularity.

### Official Document or Act

* + 1. **Can Assert Generally (9d):** A P can allege in general terms that the document was legally issued orthe act legally done.

### Judgment

* + 1. **Can Show Judgment without Jurisdiction (9e):** A P can plead the judgment ordecision without showing jurisdiction to render it

### Time and Place

* + 1. **Time & place are always material (9f):** Allegations of time and lace are always material for testing the sufficiency of a pleading.

### Special Damages

* + 1. **Heightened Pleading Standard (9g):** A P requesting or pleading special damages must be specifically state so.

### Admiralty and Maritime Claim

* + 1. General Rule (Designation for Trial)
       1. FRCP 9h1 – the pleading may designate the claim as an admiralty **OR** maritime claim for purposes of Rule 14c, 38e, **AND** 82 **AND** the Supplementary Rules for Admiralty **OR** Maritime Claims **AND** Asset Forfeiture Actions.
       2. FRCP 9h1 – a claim cognizable only in the admiralty **OR** maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated
    2. Elements
       1. Within admiralty **OR** maritime jurisdiction **AND**
       2. Within the court’s subject matter jurisdiction on some other ground
       3. If elements (1) and (2) are met, then
    3. General Rule (Designation for Appeals)
       1. FRCP 9h2 – a case that includes an admiralty **OR** maritime claim within this section is an admiralty case within 28 U.S.C. Section 1292a3

# The Reply

A D has **three options** after they have been served with a complaint: **(1)** answer, **(2)** motion, **or (3)** nothing.

## ANSWER (FRCP Rule 8)

### General Rule

1. **Response (8b1):** In responding to the pleading, a party **must**: **(A)** state in short and plain terms its defenses to each claim asserted against it; **and (B)** admit or deny the allegations asserted against it by an opposing party.
2. **Substance of a Denial (8b2):** A denial must fairly respond to the substance of the allegation.
3. **Default Judgment Rule (8b6):** an allegation, other than one relating to the amount of damages, is admitted ifa responsive pleading is required and the allegation is not denied.
4. **P’s Assumed Answer to a Request (8b6):** A P is not required to file a response to D’s answers. It is assumed that P already denied.

### Timing to Serve a Response

* + 1. **Clock Starts Day After Receipts:** The day-count clock starts the day after receiving the notice (receive 2/1, return by 2/23)
    2. ***Pre*-Motion General Rule**
       1. **Time to Serve a Responsive Pleading (12a1Ai/ii):** 21 days of being served **OR** 60 days after request for waiver was sent, if P waived service
          1. ***Non-US D:***90 days if D is outside any jurisdiction in of the United States
       2. **Response to Counterclaims/Crossclaims (12a1B):** 21 days after being served with the pleading
       3. **Court-Ordered Replies (12a1B):** 21 days after being served with the answer
    3. ***Post*-Motion General Rule**
       1. **Court Denial/Postponing of Motion (12a4A):**  If the court denies or postpones a motion, party must issue a responsive pleading within 14 of receive notice of the court’s action
       2. **Effect of Granting a 12e Motion for More Definite Statement:** If the court grants a motion for a more definitive statement, party has 14 days to produce a response after being served with the updated complaint

[*See MOTIONS for responses that include motions*]

### Elements (AND)

1. **Short and Plain Statement (8b1A):** State in short and plain terms its defenses to each claim asserted **AND**
2. **Reponses to Allegation (8b1B):** Admit or deny the allegations asserted against it by an opposing party

### Methods for asserting denials (FRCP Rule 8b)

1. FRCP 8b3 – *general denial*– a party **MAY** respond with a general denial if it intends to deny all allegations, including jurisdictional ground, **EXCEPT** those specifically admitted
2. FRCP 8b4 – *partial denial*– a party denying part of an allegation **MUST** admit the part that is true **AND** deny the rest
3. FRCP 8b5 – *lack of knowledge*– a party that lacks knowledge **OR** information sufficient to form a belief about the truth of an allegation **MUST** so state, **AND** the statement has the effect of a denial

### Affirmative Defenses (FRCP Rule 8c)

1. FRCP Rule 8c1 – *Asserting*– in responding to a pleading, a party **MUST** affirmatively state any avoidance **OR** affirmative defense
   * + 1. Examples
          1. Accord and satisfaction
          2. Arbitration and award
          3. Assumption of risk
          4. Contributory negligence
          5. Duress
          6. Estoppel
          7. Failure of consideration
          8. Fraud
          9. Illegality
          10. Injury by fellow servant
          11. Laches
          12. License
          13. Payment
          14. Release
          15. Res judicata
          16. Statute of frauds
          17. Statue of limitations
          18. Waiver
2. FRCP Rule 8c2 – *Mistaken Designation*– **IF** a party mistakenly designates a defense as a counterclaim, **OR** a counterclaim as a defense, the court **MUST**, **IF** justice requires, treat the pleading as though it were correctly, **AND** may impose terms for doing so

### Alternative Statements; Inconsistencies (FRCP Rule 8d)

* + 1. FRCP 8d2 – parties can set out more then one defense in a single court or multiple counts
    2. FRCP 8d3 – a party may state as many separate defenses, regardless of consistency

## MOTIONS (FRCP Rule 12) – Generally Asserted by D, Some Can Be Asserted by P

* + 1. FRCP 12i – 12b1-7 and 12c must be heard **AND** decided before trail **UNLESS** the court orders a deferral until trial

### General Rule for Timing

* + 1. FRCP 12a1Ai/ii – *Time to Serve a Responsive Pleading* – 21 days of being served **OR** 60 days after request for waiver was sent, if P waived service
       1. *Non-US –* 90 days if D is outside any jurisdiction in of the United States
       2. **Waiver of Formal Service (4d):**

A D can waive formal service, and is under a duty to do so if it would avoid unnecessary expenses. A breach of this duty would result in the D having to pay the expenses incurred by the P to serve process. If the D waives formal service, D gets 60 days to respond to the complaint. Waving formal service does not waive potential defenses.

* + - 1. The person that is being served can waive it. They just don't engage the long, drawn out precess.
    1. FRCP 12a1B – *Response to Coutnerclaims/Crossclaims –* 21 days after being served with the pleading
    2. FRCP 12a1B – *Court Ordered Replies –* 21 days after being served with the answer

### Misc. Rules for Timing

* + 1. FRCP 12a2 – *US, Agencies, Officers, or Employees in Official* Capacity – 60 days after service
    2. FRCP 12a3 – *US Officers or Employees in Individual Capacity* – MAX [A, B], where A = 60 days after directly servicing officer and B = 60 days after service of the US attorney

### What can be presented as a separate motion, and when?

* + 1. FRCP 12g1 – A party can join multiple motions together
    2. Motion for a more definitive statement, FRCP 12e, **MUST** be asserted before an answer
    3. Least favored defenses (Justified based on FRCP 12g2)
       1. FRCP 12h1 – D **MUST** include these motions in its answer or its pre-answer motion otherwise it is deemed to have waived these motions
          1. FRCP 12b2 – Lack of personal jurisdiction
          2. FRCP 12b3 – Improper venue
          3. FRCP 12b4 – Insufficient process
          4. FRCP 12b5 – insufficient service of process
    4. More favored defenses
       1. FRCP 12h2 – D can assert these motion in any (A) pleading allowed or ordered under Rule 7a; (B) by motion for a judgment on the pleadings (12c); **OR** (C) at trial
          1. FRCP 12b6 – failure to state a claim upon which relief can be granted
          2. FRCP 12b7 – failure to join a party under FRCP 19 (SEE REQUIRED JOINDER OF PARTIES)
          3. State a legal defense to a claim
    5. Most favored defenses
       1. FRCP 12h3 – D can raise this defense at any time, and the court must dismiss the action if the motion is granted
          1. FRCP 12b1 – lack of subject-matter jurisdiction

### Motion for Judgment on Pleadings

1. FRCP 12c – after the pleadings are closed, but early enough not to delay trial, a party **MAY** move for judgment on the pleadings

### Result of Presenting Matters Outside of the Pleadings

1. FRCP 12d – If matters outside the pleading are presented in a 12b6 or 12c, then the court **MUST** treat those motions as a motion for summary judgment under FRCP 56
2. Parties **MUST** be given a reasonable opportunity to present all the material that is pertinent to the motion

### Motion for a More Definitive Statement (MUST Assert 1st = Before or w/ Answer)

1. FRCP 12e – a party may move for a more definite statement if the pleading is so vague or ambiguous that the party cannot reasonable prepare a response
2. Moving party needs to point out the deficiencies in the pleading
3. **MUST** be asserted before an answer

### Motion to Strike (FRCP 12f)

1. Can be used by both P **AND** D
2. FRCP 12f – The court **MAY** strike from the pleading an insufficient defense **OR** any redundant, immaterial, impertinent, or scandalous matter (1) on its own or (2) on a motion made by a party before responding to the pleading **OR** within 21 days of being served if a response is not allowed

## DO NOTHING (FRCP 8)

### Default Judgment Rule (8b6)

* + 1. A D does not have to submit an answer or motion to a P’s complaint, but a failure to submit an answer will result in P receiving a default judgment against D under 8b6 because allegations that are not denied are deemed to be true.

# Certifications and Sanctions (FRCP Rule 11) – “Yellow Blinking Light”

## Certification (NOT APPLICABLE TO DISCOVERY)

### General Rule

* + 1. FRCP 11a – *Rule* – Every pleading, written motion, and other paper (excluding discovery documents) **MUST** be signed by at least one attorney of record in the attorney’s name **OR** by a party personally if the party is unrepresented.
    2. FRCP 11b – *Continued Monitoring Requirement* – Whenever a document requiring a signature is presented to the court, the presenter certifies the document’s content
    3. FRCP 11a – *Failure to Certify* – The court **MUST** strike an unsigned paper **UNLESS** the omission is promptly corrected after being called to the attorney’s or party’s attention
    4. FRCP 11a – *Verification/Affidavit* – Pleadings do not need to be verified **OR** accompanied by an affidavit
    5. FRCP 11d – *Inapplicability to Discovery* – This rule does not apply to disclosures **AND** discovery requests, responses, objections, and motions under FRCP Rules 26 - 37

### Scope

* + 1. Pleadings
    2. Written motions
    3. Other papers, excluding discovery-related documents

### Continued Monitoring Requirement (FRCP 11b)

* + 1. General Rule
       1. FRCP 11b – Attorney or unrepresented party certifies that to the best of the person’s knowledge, information, belief that: [*certify a, b, c,* ***AND*** *d*]
          1. FRCP 11b1 – it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, **OR** needlessly increase the cost of litigation
          2. FRCP 11b2 – the claims, defenses, **AND** other legal contentions are warranted by existing law or by nonfrivolous argument for extending, modifying, **OR** revising existing law **OR** establishing new law
          3. FRCP 11b3 – the factual contentions have evidentiary support **OR** will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; **AND**
          4. The denials of factual contentions are warranted on the evidence **OR** are reasonably based on belief **OR** lack of information
       2. Knowledge, information, and belief is informed by a reasonable inquiry

Reasonable inquiry is impacted by time and money available to research the issue

* + 1. Triggered by:
       1. Signing, filing, submitting, **OR** later advocating a pleading, written motion, or other paper, excluding discovery-related documents

### Failure to Certify

* + 1. General Rule
       1. FRCP 11a – The court **MUST** strike an unsigned paper **UNLESS** the omission is promptly corrected after being called to the attorney’s or party’s attention

## Sanctions (FRCP 11c)

### General Rule

* + 1. FRCP 11c1 – *Appropriate Sanctions* – **IF**, after notice **AND** a reasonable opportunity to respond, the court determines that a party violated FRCP 11b, the court **MAY** impose an *appropriate sanction* on any attorney, law firm, or party that violated the rule **OR** is responsible for the violation
    2. FRCP 11c1 – *Mandatory Law Firm Liability* – Law firms **MUST** be held jointly responsible for a violation committed by its partners, attorneys, and employees
    3. FRCP 11c4 – *Nature of Sanctions* – A sanctions **MUST** be limited to what suffices to deter repetition of the conduct **OR** comparable conduct of similarly situated
       1. Monetary
       2. Performance
       3. Partial or complete payment of movant’s attorney fees and other expenses directly resulting from the violation

### Methods for Sanctioning in Rule 11

* + 1. **Motion for sanctions** (FRCP 11c2)
       1. *Conditions* – must meet all of the following conditions
          1. **MUST** be made separately from any other motion **AND**
          2. **MUST** describe the specific conduct that allegedly violates Rule 11b in motion
          3. **MUST** serve motion be served under FRCP 5b

FRCP 5b – *How Service is Made*

**Attorney Representation (FRCP 5b1):** if represented by an attorney, service must be to an attorney

**Laundry List of Ways to Serv**e (**FRCP 5b2):** A) handing it to the person; B) leaving it i) at the person’s office with a clerk, an employee like a clerk, or a conspicuous place ii) at the person’s dwelling or usual place of abode [if no office]; C) mailing it to the person’s last known address; D) leaving it with the court clerk [if don’t know address]; E) sending it by electronic means if the person consented in writing; **OR** F) other method of delivery the party consented to in writing

* + - 1. **21 Day Correction Rule:** a motion to sanction **MUST NOT** be filed **OR** presented to the court **IF** challenged paper, claim, defense, **OR** denial is withdrawn **OR** appropriately corrected within *21* *days after service* **OR** within another time the court sets
      2. **Optional Reimbursement:** a court can award the prevailing party the reasonable expenses, including attorney’s fees, incurred for the motion
    1. Court’s initiative (FRCP 11c3)
       1. ON its own, the court **MAY** order an attorney, law firm, or party to show cause why conduct specifically described has not violated Rule 11b

### Limitations on Monetary Sanctions

* + 1. FRCP 11c5A – “*I trusted my lawyer”* – court **MUST NOT** impose a sanction against a represented party for a violation of Rule 11b2
    2. FRCP 11c5B – “*Before I warned you”* – court **MUST NOT** impose a sanction on its own authority before issuing a show-cause under FRCP 11c3

### Requirements for an Order to Sanction

* + 1. FRCP 11c6 – An order imposing a sanction **MUST** describe the sanctioned conduct **AND** explain the basis for the sanction

## 1983/1993 Revision Comparison

|  |  |
| --- | --- |
| **More Restrictive** | **Less Restrictive** |
| 1. 1993 2. Both firms and lawyers are accountable 3. Through approach (continued monitoring) | 1. 1993 2. Safe harbor provision 3. More permissive **current** basis for factual contentions 4. More permissive **future** basis for factual allegations 5. Discretionary sanctions 6. Fee shifting vs. deterrence 7. Proportionality of sanctions |
| 1. 1983 2. Required sanctions in 1983 version 3. Higher standard to catch bad behavior |

### How 1983 is stricter than 1993

* + 1. 1983 required sanctions for violations
    2. 1983 had a raised standard that was designed to catch more bad conduct

### How 1993 is less restrictive than 1983

* + 1. Rule 11c2 – Safe harbor provision
       1. Moving party can only request a sanction if two conditions are met
          1. Condition 1: Have to let the party that committed an action that could result in a sanction know
          2. Condition 2: After notification, warned party has 21 days to change behavior
       2. Court can impose sanctions sue sponte
    2. Rule 11b3 – Current basis for factual contentions
       1. 1983 version
          1. “well-grounded in fact”
       2. 1993 version
          1. “evidentiary support”
    3. Rule 11b3 – Future basis for factual contentions
       1. 1993 version
          1. “will likely have evidentiary support
    4. Rule 11c1 – Discretionary sanctions
       1. 1983 version
          1. “shall” impose sanctions
       2. 1993 version
          1. “may” impose sanctions
    5. Deterrence vs. Fee shifting
       1. Deterrence isthe purpose of the 1993 Rule 11, **NOT** fee shifting
    6. Proportional sanctions
       1. General Rule
          1. Sanctions imposed should be limited to what is necessary to deter the action in the future

# Amendments (FRCP Rule 15)

## General Information

### When can you amend?

* + 1. **Overall Timing = Pre-, During, and Post-Trail:** A party can amend its pleading (1) before [15a], (2) during [15b], and (3) after trial [15b]. The standard for amendments is fairly lenient, but there is an overall policy concern because an amended proceeding is harder to dismiss than something like an amended pleading

### Reponses to Pre-Trial Amended Pleading (MAX. RULE)

* + 1. **Minimum 14 Days Response Time:** FRCP 15a3 requires a response to an amended pleading within 14 days of service **OR** the remaining time to respond from original service, whichever is longer.

## When are you amending & can you amend? (STEP 1)

### Pre-Trial Amendments (FRCP 15a)

* + 1. **Amendments as a Matter of Course if ≤21 days (15a) [PATH 1 of 3]:**  A party can amend its pleadings **once** as a matter of course (on its own without the court’s permission). [apply the apply **1** or **2**, whichever is appropriate].
       1. **D’s 21 Day Rule (15a1A):** A party can amend if it is within 21 days of serving the pleading **OR**
       2. **P’s 21 Day Rule (Min. Rule) [15a1B]:** If the pleading is one which a responsive pleading is one which a responsive pleading is required, 21 days after service of a responsive pleading **OR** 21 days after service of a motion under FRCP 12b, e, or f, whichever is earlier
    2. **Amendments with the Non-Moving Party’s Consent (15a2) [PATH 2 of 3]:** If the moving party has the nonmoving party’s written consent, then the party is free to leave to amend
    3. **Court-Granted Leave to Amend (15a2) [PATH 3 of 3]:** the court should freely give leave when justice so requires
       1. **Justice So Requires Test:**  The default assumption is that “a motion to amend should be granted unless some good reason appears for denying it.” A non-moving party can show a good reason by showing that the amended pleading would result in **(1) undue delay and prejudice**, **(2)** that the amended pleading would raise a **new issue in bad faith**, and **(3)** that **the new issue** raised in the amended pleading **is futile.**
          1. ***Undue Delay:*** Undue delay means a showing that allowing the amendment will push the trial back or that the moving party was very negligent in bringing up its amendment
          2. ***Prejudice:*** Prejudice can be showing by indicating that key resources necessary to combat the amended pleading are no longer available (records destroyed, witnesses died, memory fading, etc.)

***Foman v. Davis:*** Court listed the relevant factors and emphasized the need to balance harm caused to the other party if leave to amend it granted. There were other factors such as: (a) whether the moving party has delayed unduly in seeking leave to amend, (b) bad faith or dilatory purpose, (c) whether the moving party has failed to fix deficiencies in previous amendments, and (d) whether amendment would be futile.

### During and Post-Trial Amendments (15b)

* + 1. **PATH 1** – *based on an objection at trial (FRCP 15b1)* – Court may permit a pleading to be amended in response to an objection made based on evidence being outside of the issue raised by the pleading
       1. Court should freely permit when **i AND ii**
          1. Amendment would aid in presenting the merits of the case (moving-party’s burden) **AND**
          2. Non-moving party fails to satisfy the court that the evidence would prejudice that party’s action **OR** defense on the merits

A court could grant a continuance to meet the evidentiary burden

* + 1. **PATH 2** – *issues tried by consent* *(FRCP 15b2)* – an issue tried based on express or implied consent **MUST** be treated in all respects as if raised in the pleadings. A party may move at any time, even after judgment, to amend the pleadings to conform them to the evidence and to raise the unpleaded issue. Failure to amend has no impact.

## Has the statute of limitations run? (STEP 2)

### Magic Revival Potion

**“Magic Revival Potion” (FRCP 15c):**  amendment relates back to the original complaint in one of three conditions is satisfied. Failure to satisfy means that the amendment will not relate back.

* + 1. FRCP 15c1A – *“Borrowing Rule”* – when the applicable local statute has a more permissive relation back provision
    2. FRCP 15c1B – *Transactional Test –* when the amendment arises out of the same conduct, transaction, or occurrences that the original pleading set out **OR** attempted to set out.
       1. This test is construed narrowly because reviving a dead claim is serious and requires the court to challenge legislative intent. Moreover, it prejudices the other party because it is harder to extinguish the revived claim through procedural mechanism
          1. *Swartz v. Gold Dust Casino* - P was injured when she fell down a staircase in Gold Dust Casinos. P used several placeholders. Attempted to add another party after SOL ran. The issue of whether the cause was the maintenance or design was not relevant because the stairs caused the injury.  
             **HOLDING:** Court granted leave to amend to add another name because it related to the same basic injury and her use of placeholders gave notice. Court noted that it generally disfavored placeholders.

Key Language

“Same basic injury”

“Different invasions of the same basic right”

“One episode-in-suit”, which means that we are talking about one action and there is no good way to separate the action into different elements.

* + - * 1. *Kimmel v. Gallaudent University* - P left her employment with D after being harassed and retaliated against. P’s initial complaint only contains information relating to a charge of retaliation against D. After a statute of limitations runs, P requests leave to amend the complaint and include an additional cause of action for constructive discharge.   
           **HOLDING:** Since the new claim arises out of the same operative facts, P is allowed to amend. D also had adequate notice for rule 15c.

Key Language

“Same pattern of harassment”

“Byproduct of original complaint”

“Newly associated claim that is a direct extension of the original”

* + - * 1. *Felix v. Marley* – P sued employees working on scaffolding for negligence when she suffered an injury. Later, it was discovered that the injury was the result of negligent construction of the scaffolding.  
           **HOLDING:** P was granted leave to amend because the amended claims arose form the same core of operative facts.

Key Language

“Common core of operative facts.”

Injuries suffered are the same in respect to “time” and “type”

* + - * 1. This test is construed narrowly because reviving a dead claim is serious and requires the court to challenge legislative intent. Moreover, it prejudices the other party because it is harder to extinguish the revived claim through procedural mechanism
    1. FRCP 15c1C – *Change Parties* – a party’s amended pleading to change the name or adding the name of a party against whom a claim has been asserted will relate back **IF** **(a)** transactional-relatedness of FRCP 15c1B is satisfied; **(b)** the amended pleading is filed and served within 120 days (FRCP 4m) **AND (c) the party to be brought in satisfies (1) AND (2)**
       1. FRCP 15c1Ci – *Notice –* the party received such notice of the action that is will not be prejudiced in defending on the merits **AND**
       2. FRCP 15c1Cii – *Knew or Should have Known –* that party knew or should have know that the action would have been brought against it, but for a mistake concerning the proper party’s identity.
          1. Focus is on D, not P.

*Kurpski v. Costa Crociere* – P sued the wrong entity in the family tree after receiving an injury on a cruise. The mistake was reasonable  
**HOLDING:** It does not matter what P knew or should have known, the inquiry is from the perspective of the D.

* + - * 1. Placeholders are not favored, but permissible

*Swartz v. Gold Dust Casino* – court allowed a P to amend under 15c1C, but indicated that it did not like the use of placeholders.

## Supplemental Pleadings

### FRCP 15d

* + 1. it is possible for the court to allow a party to supplement their original pleadings with things that happened after the original pleading was submitted. A defective original pleading does not invalidate this rule.
    2. A party must provide reasonable notice and the court should grant on just terms.

# Joinder of Claims and Parties

## Is the joinder supported by the FRCP? (Part 1 of 3)

### Can P join a claim? (FRCP 18)

* + 1. **Anything Goes Rule (18a):** A party asserting a claim, counterclaim, crossclaim, or third-party claim may join as many claims as it has against an opposing party.
    2. There is no transactional relationship requirement.
    3. **Permissive (Non-Mandatory) Rule**: P is not required to assert all claims in a single case.
    4. **Judicial Discretion to Split**: A judge can split joined claims if he feels that it would confuse the jury or harm the trial.

### Can a party be joined? (FRCP 20)

* + 1. **General Rule:** if a person satisfies the two-part transactional-relationship and common question test, they can be joined. Not for Class Actions
       1. **Transactional-Relation Test (Broad Rule) [PART 1]:** any right to relief in respect to a claim arises out of the same transaction, occurrence, **or** series of transactions or occurrences.
          1. Policy focus on allow litigation to mirror real world grouping in order to increase efficiency. This rule is broader than FRCP 15 because there are more remedies available to the court if a mistake was made.
          2. ***Poster v. Central Gulf Stream Corp.:***a seaman contracteda painful stomach problem twice while working at two different shipping companies several years apart companies due to bad food preparation from the same potential source.  
             **HOLDING:** Court allowed the joinder holding that Ps present condition was the result of both episodes.
          3. ***Schwartz v.*** ***Swan:*** P was injured in two different car accidents 10-days apart.   
             **HOLDING:** Court allowed the joinder holding that Ps condition was the cumulative effect of a single indivisible injury.
          4. ***Hall v. E.I. DuPont de Nemours Co.:*** Injuries sustained by about 12 children at different times over a four-year period in different areas of the country while playing with unmarked blasting caps.  
             **HOLDING:** Court allowed Ps to join together under a theory of enterprise liability.
       2. **Common Question Test [PART 2]:** there is at least one common question of law **or** fact.
          1. The common question does not have to be the focus of the trial.
       3. **Compulsory Joinder:** In certain situations, a P must join all interested parties or face dismissal of the lawsuit. The first Q is should the absentee be joined?
          1. **Should the absentee be joined?** The absentee should be joined when (1) complete relief cannot be accorded among the other parties to the lawsuit without the absentee being made a party or (2) the absentee has such interst in the subject matter of the lawsuit that a decision in his absence will (a) as a practical matter, impair or impede his ability to protect the interest or (b) leave any of the other parties subject to a substantial risk of incurring multiple or inconsistent obligations.
          2. **Can the absentee be joined?** Assuming that the absentee should be joined, the question is whether the court can get PJ over the absentee and SMJ after the joinder.

If the court has PJ and SMJ over the absentee and his joinder will not destroy diversity or venue, the party must be joinded.

* + - * 1. **Should the action proceed absent the absentee if he cannot be joined?** IF the absentee cannot be joined, the court must determine whether in equity and good conscience, the action should proceed among the parties before it or should be dismissed. The courts must consider: (1) the extent of prejudice to the absentee or the available parties to a judgment; (2) the entent to which the prejudice can be reduced or avoided by means of protected provisions in the judgment, the shaping of relief, or other measure ; (3) the adequacy of a judgment rendered without the absentee; (4) whether the P will have an adequate remedy in another forum if the case is dismissed for nonjoinder.
    1. **Class Action Rule (FRCP 23):** A party can sue/be sued as a representative of a class if there is **(a1)** numerosity, **(a2)** commonality, **(a3)** typical, **AND** **(a4)** adequate representation by the representative of the class.
       1. Numerosity: so many Ps or Ds that a normal joinder would not work
       2. Commonality: there is a common question of fact or law
       3. Typical: the claims or defense by the representative are typical of the class
       4. Adequately Represent: the representative party will fairly represent the class
          1. Conflict of interest would invalidate a class.
    2. **Misjoinder Leads to Severance (FRCP 21):** a misjoinder of parties is not a basis for dismissalof a suit, but a court may sever any claim against any party
    3. **Consolidation (FRCP 42a):** A court is allowed to consolidate two or more pending cases for any purpose as long as there is one common question of law **or** fact.

## Do the joined parties/claims invoke SMJ? (Part 2 of 3)

### [SEE SMJ SECTION]

## Do the joined parties/claims invoke Supplemental jurisdiction? (Part 3 of 3)

### [SEE IF PART 2 FAILED]

## Common Law Doctrines of Preclusion

### Claim Preclusion (res judicata):

* + 1. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action (can’t try the same case twice).

### Issue Preclusion (collateral estoppel):

* + 1. Once a court has decided an issue of fact or 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 (with respect to a particular defendant) extinguishes all claims that could have been brought out of the same transaction or occurrence.

# Counterclaims, Cross-Claims and Necessary and Indispensable Parties

## Can a D assert a counterclaim? [NO VENUE ASSESSMENT REQUIRED]

### Is the claim a compulsory counterclaim (FRCP 13a)? (Part 1a of 3)

* + 1. **Mandatory Counterclaim Two-Part Test [strict interpretation]:** Under FRCP 13a, a pleading **must** state as a counterclaim any claim that the pleader has against the opposing party if a two-part test is satisfied: (1) **[Transactionally-Related]** the claim arises out of the same transaction or occurrence that is the subject matter of the opposing party’s claim and (2) **[Federal J]** the claim does not require adding another party over whom the court lacks J. The counterclaim is asserted as part of the D’s answer.
       - 1. **Four-Tests for “Transaction or Occurrence”: (1) [ISSUES]** are the issues of fact and law largely the same; **(2) [RES JUDICATA]** would res judicata bar a subsequent suit; **(3) [EVIDENCE]** will substantially the same evidence be relevant; **(4) [LOGICAL RELATION]** is there a logical relation.
         2. ***Podhorn v. Pargon Group:***  Landlord D sued P in state court for rent. P later sued the landlord in federal court over eviction issues. Landlord moved to dismiss on grounds that this was a compulsory counterclaim that P failed to file in the state suit.  
            **HOLDING:** Claim precluded because the claim arose from P’s tenancy in D’s apartments, which was the basis of the original claim.
       1. **Amending Answer:** A D can use FRCP 15 (**SEE AMENDMENTS**) to amend its answer to include a counterclaim.
       2. **Relief Sought can be ≥ P’s original claim (13c):** A counterclaim need not diminish or defeat the recovery sought by the opposing party. A counterclaim may require relief that exceeds in amount or differs in kind from the relief sought by the opposing party.
       3. **Failure to Assert (Estoppel by Rule):** Failure to assert the claim loses the claim and the D cannot assert it in another proceeding. Professor Charles Alan Write described this as estoppel by rule. If, through no fault or lack of diligence of her own, D was not informed of her right (let alone obligation) to assert the claim, perhaps she should not be estopped from brining the separate action. However, few cases address this particular issue.
       4. **Previously/Currently Asserted (13a2A):** A D need not assert an otherwise compulsory counterclaim if she has already asserted the claim in another case.
       5. **In Rem / QIR Exception (13a2B):** If the court did not acquire in personam J over the D, the D’s claim that would otherwise satisfy the compulsory counterclaim rule is not compulsory.

### Is the claim a permissive counterclaim (FRCP 13b)? (Part 1b of 3)

* + 1. **Non-Transactionally Related Counterclaims:** Under FRCP 13b, a pleading may state as a counterclaim against an opposing party any claim that is not fall within FRCP 13a. This allows a D to assert a claim against a P that is transactionally unrelated to the P’s claim against the D.

### Does the claim invoke SMJ? (Part 2 of 3)

* + 1. **[SEE SMJ SECTION]**

### Does the claim invoke supplemental J? (Part 3 of 3)

* + 1. **[SEE SMJ SECTION]**

### Can a D join a party to a counterclaim (13h)?

* + 1. FRCP 13h provides that a D asserting a counterclaim can join new parties to the claim so long as those additional parties are joined in accordance with FRCP 19 and 20.
       1. Can a party be joined? (FRCP 20)
          1. **General Rule – Two Part Test:** There is a two-part test for determining whether a party can be joined under FRCP 20: (1) the transactional-relationship test and (2) the common question test. Failure to satisfy either test means that a party cannot be joined.

**Transactional-Relation Test (Broad Rule) [Part 1 of 2]:** any right to relief in respect to a claim arises out of the same transaction, occurrence, **or** series of transactions or occurrences.

Policy focus on allow litigation to mirror real world grouping in order to increase efficiency. This rule is broader than FRCP 15 because there are more remedies available to the court if a mistake was made.

***Poster v. Central Gulf Stream Corp.:***a seaman contracteda painful stomach problem twice while working at two different shipping companies several years apart companies due to bad food preparation from the same potential source.  
**HOLDING:** Court allowed the joinder holding that Ps present condition was the result of both episodes.

***Schwartz v.*** ***Swan:*** P was injured in two different car accidents 10-days apart.   
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**HOLDING:** Court allowed Ps to join together under a theory of enterprise liability.

### Requirement of counterparty to counterclaims

* + 1. **Functions as a Complaint:**  A counterclaims functions like a complaint. Therefore, the parties against which the counterclaims are asserted must perform some type of reply. [**SEE REPLY SECTION – Rule 12 defenses are available]**.

## Can a party assert a crossclaim?

### When can the party assert a crossclaim (13g)? (Part 1 of 3)

* + 1. **Three Options:** Under FRCP 13g, a party can assert a crossclaim in in one of two situations: **(1) [TRANSACTIONALLY-RELATED]** when the crossclaim arises out of the same transaction or occurrence of the original action **or** of a counterclaim; **(2) [PROPERTY]** if the claim relates to any property that is the subject matter of the original action; or **(3) [INDEMNITY]** the crossclaim may include a claim that the coparty is or may be liable to the cross-claimant for all of part of a claim asserted in the action against the cross-claimant. Regardless of which option the party uses, a court must still have SMJ or supplemental J.
       1. **Permissive, not required.**
    2. **No Venue Assessment:**  There is no requirement to assess venue on counterclaims.

### Do the joined parties/claims invoke SMJ? (Part 2 of 3)

* + 1. **[SEE SMJ SECTION]**

### Do the joined parties/claims invoke Supplemental jurisdiction? (Part 3 of 3)

* + 1. **[SEE IF PART 2 FAILED]**

### Can a D join a party to a crossclaim (13h)?

* + 1. FRCP 13h provides that a D asserting a crossclaim can join new parties to the claim so long as those additional parties are joined in accordance with FRCP 19 and 20.
    2. Can a party be joined? (FRCP 20)
       1. **General Rule:** There is a two-part test for determining whether a party can be joined under FRCP 20: (1) the transactional-relationship test and (2) the common question test. Failure to satisfy either test means that a party cannot be joined.
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### Requirement of counterparty to crossclaim

* + 1. **Functions as a Complaint:**  A crossclaim functions like a complaint. Therefore, the parties against which the counterclaims are asserted must perform some type of reply. [**SEE REPLY SECTION – Rule 12 defenses are available]**.

## Is a party indispensable?

1. When can D trump P’s Choice of Parties
   1. **Failure to Provide Relief (19a) [Part 1]:** A joinder is required if the court could not award complete relief in the absence of the party **OR**
   2. **Party Interest Subject to the Action (19a) [Part 2]:** The party claims an interest relating to the subject of the action and is so situated that ruling on the case without them may: **(1)** impair or impede ability to protect that interest or **(2)** leave parties already existing subject to a risk of double obligations by reason of the claimed interest.
   3. **What Happens if it is not feasible to join party (19b):** If a party cannot be joined, the court will consider potential prejudice and adequacy of judgment and remedy without them.
      1. The extent to which of 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; (c) or other measures
      3. Whether a judgment rendered in the person’s absence would be adequate; and
      4. Whether the P would have an adequate remedy in the action were dismissed for nonjoinder.
   4. **Necessary**: A party is necessary when it is not possible for the case to proceed without them.
   5. **Indispensible**: A court can dismiss a case under 12b7 if “in equity and good conscience” the case cannot proceed because the party is so critical to the underlying case.
   6. **Joinder Cannot Destroy SMJ**: A court cannot grant a joinder of a party as a indispensable party if it would destroy SMJ (think diversity). :

# Third-Party Practice (Impleader)

This rule works in conjunction with crossclaim. A party asserts a crossclaim using FRCP 13 when the other party was a part of the original complaint filed by the P. However, if the third-party was not part of the original complaint, D can use FRCP 14 to join the party to the litigation. This is generally only used in cases of indemnification*.*

## When can a defending party bring a third party into the litigation?

### Three Types of Claims

* + 1. FRCP 14a creates three claims: (1) the impleader claim under 14a1 asserted by a defending party against an **absentee** (the TPD) who may owe her **indemnity or contribution** on the underlying claim against her; (2) the upsloping 14a claim asserted by the P against the TPD, under 14a3; and (3) the downsloping claim asserted by the TPD against the P, under 14a2d. The upward and downward sloping claims (2 and 3) **must** arise from the same transaction or occurrence as the underlying dispute.
       1. **Timing of the Summons and Complaint (FRCP 14a):** If ≤ 14 days, a defending party may, as a third-party plaintiff (TPP), 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. However, the TPP must file a leave to amend **and** obtain the courts permission to serve a third-party complaint if it is > 14 days after filing the answer.
       2. **Third-Party D’s Claims and Defenses (FRCP 14a2):** A TPD functions like a D. (1) The TPD must assert any defenses against the TPP in accordance with FRCP 12. (2) The TPD must assert any counterclaims against the TPP in accordance with FRCP 13 [remember compulsory counterclaims and permissive counterclaims]. (3) The TPD may assert any crossclaims against the TPD in accordance with FRCP 13. (4) The TPD may assert against the P any defenses that the TPP has to the P’s claim. Finally, (5) the TPD may also assert against the P any claim arising out of the transaction or occurrence that is the subject matter of the P’s claim against the TPP.
       3. **Motions to Strike, Sever, or Try Separately (FRCP 14a4):** Any party may move to strike, sever, or try separately the third-party claim.
       4. **Fourth Party Claim (FRCP 14a5):** A TPD may implead a nonparty who is or may be liable to the TPD for all or part of any claim against it.

## When a P May Bring in a Third Party (FRCP 14b)?

* + 1. Under FRCP 14b, a P may bring in a third party because of a claim asserted against P if FRCP 14a would allow a D to bring in the same party.

# Personal Jurisdiction (PJ)

## Does the court have person jurisdiction over the D?

* 1. **Rule**

Personal jurisdiction is the power the court must have over the parties to the case to enter orders that bind those parities. Exercising a judgment absent personal jurisdiction makes the judgment void. The court always has personal jurisdiction over the P because the P voluntarily submits to the court’s jurisdiction when the P files its complaint. There is a three-part analysis regarding whether the exercise of PJ was proper: **(1)** was there adequate notice; **(2)** was there statutory amenability; and **(3)** was there constitutional authority.

* + 1. ***In personam:*** A valid in personam judgment creates a personal obligation that functions similar to a debt. A P receiving a judgment against a D could use the property of D that is located in a state outside of the forum to satisfy the judgment. In order to perfect in personam jurisdiction, the D must be personally servedwith the summons.
       1. However, seizure and sale of the property on quasi-in-rem jurisdiction would have to its standard jurisdictional principles (i.e. would have to be attached at the outset of the P’s motion to seize the property and there must be sufficient notice).
    2. ***In Rem & QIR:***  In Rem and QIR jurisdiction relate to disputes over property. Depending on the category, property includes tangible, intangible, and real property. A D can be constructively served through publication or other legislatively approved means in these types of cases.
       1. In rem:an in rem case, a dispute over ownership of property that is the jurisdictional predicate. The court seeks to determine the ownership of the property interest with respect to everyone in the world.
       2. QIR Type 1: a QIR Type 1 case adjudicates the ownership of the property that is used as the jurisdictional predicate among parties to the case. It only applies to **(1)** seizure at beginning of a suit in anticipation of a judgment and **(2)** Satisfying a judgment rendered elsewhere.
       3. QIR Type 2: a QIR Type 2 caseadjudicates over any issue that could be raised in personam, if that were possible. The property is used as a jurisdictional predicate. P must have the court seize the D’s property at the outset of the litigation, otherwise the court will be deemed to not have jurisdiction
          1. *Public Policy*: want seizure at the onset to increase predictability through notice for D and to minimize the risk to P of D destroying the disputed property during the course of a trial.
  1. **Federal Inquiry:**

USFG has power over every resident or domicile of the US because every resident or domicile has minimum contacts with the US (therefore, process can be served nation-wide), but Congress limited power through statutes (FRCP 4 controls unless there is another applicable statute). Generally, a federal court can only exercise PJ if a state court in the forum could exercise PJ. The exception is for nonresidents that are not subject to the PJ of any state’s court. See TERRITORIAL LIMITS under long-arm statutes.

## Was there Proper Notice? (PART 1 of 3)

### Rule

Due process requires that the D be given notice and the opportunity to be heard before a judgment to be entered. There is a two-step inquiry for determining whether this due process requirement is met: **(1)** was notice served in a manner prescribed by a statute or rule and **(2)** does the statute conform with the requirements of due process. If the answer to either of these question is no, then there was not notice. In the context of PJ, service of processes is similar to the process by which the court perfects its PJ over the D. **See notice section.**

## Was there Statutory Amenability? (PART 2 of 3)

### Three-Flavors of Statutory Amenability

Statutory amenability is the prerequisite for an exercise of jurisdiction. All states have statutes granting J over Ds that are present or domiciled/reside in the form. States also have long-arm statutes that cover a non-resident’s action in the forum. Generally, these statutes come in **three flavors**: **(1)** those that expressly grant PJ to the **full extent of the Constitution**; **(2)** those that appear to grant less PJ than the Constitution, but courts have **interpreted the statute to allow for PJ** to the full extent of the Constitution; and **(3)** those that grant **less than the constitutional maximum** expressly or via judicial interpretation.

### Attachment Statutes (Property/QIR Claims)

In the case of in-state property-related claims, there must be a statute thatprovide mechanism for attaching nonresident D’s in-state property in QIR-1, QIR-2, and in rem cases.

* + 1. Words to be aware of:
       1. Substantial business vs. any business
       2. Tortious act vs. tortious act or omission

### Implied Consent

1. Nonresident motorist statutes that a party is deemed to consent to by entering into the forum-state.
2. Generally only grants specific jurisdiction
3. See due process clause for more detail

### Long-arm Statutes

1. *Full Extent of Constitution Statutes* – provides a court with the authority to exercise J over a nonresident to the full extent of the constitution
2. *Laundry-list Statutes* – list of activities (generally transacting business or committing a tortuous act) that subject a nonresident to in personam J. Generally there are two statutes
   * + 1. Statue 1 – *In-State Acts* – J in the state if nonresident D committed the tortious action in the state
       2. Statute 2 – *Out-of-state Acts –* J if nonresident D committed a tortious action out of the state so long as P shows either **(a)** D engaged in some persistent course of conduct in the forum **OR (b)** D derived substantial revenue from its activities in the forum.
          1. ***Gray v. American Radiator & Standard Sanitary [state case SJ YES]:***  D manufactured a defective valve in OH, which was incorporated into a product in PA, which caused an injury in IL. D sold lots of valves to PA company.  
             **HOLDING:** Courts interpret place of wrong in IL statute as the location where the injury-causing event takes place.

### Territorial Limits of Effective Service

1. General Rule
   * + 1. FRCP 4k1 – *Service Creates Personal Jurisdiction –* serving summons **OR** filing a waiver of service establishes personal jurisdiction over D when either a, b, **OR** c is met.
          1. FRCP 4k1A – D is subject to the jurisdiction of a court of general jurisdiction where the federal court is located
          2. FRCP 4k1B – *Bulge Rule –* D is a party joined under FRCP 14 **OR** 19 **AND** is served within a judicial district of the US **AND** not more than 100 miles from where the summons was issued
          3. FRCP 4k1C – When authorized by federal statutes
       2. FRCP 4k2 – *Federal Claims Outside State-Court Jurisdiction –* for claims that arise under federal law, serving a summons **OR** filing a waiver of service establishes personal jurisdiction over D if conditions a **AND** b are met
          1. FRCP 4k2A – *No State Court Option* – D is not subject to jurisdiction in any state’s courts of general jurisdiction
          2. FRCP 4k2B – *Consistent with Constitution –* exercising jurisdiction is consistent with the US Constitution and laws.

## Was there Constitutional Authority? Due Process or Full Faith and Credit (PART 3 of 3)

### Power Theory/Traditional Base of Jurisdiction (Step 1):

1. The first part of the analysis is whether the traditional *Pennoyer* “if you’re in, you’re in” applies to the case. Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. Under *Pennoyer*, a forum has personal jurisdiction over a D if the D is a domiciled in the forum, voluntarily or involuntarily consents to jurisdiction, or is present in the forum when served.
2. Presence: D merely being present in the forum at the time of service is sufficient under *Pennoyer*. This rule is construed fairly liberally, which allows tag-jurisdiction for person flying in airspace over area.
   * + 1. ***International Harvester Co. v. Kentucky [SJ YES]*:** – D corporation (formed outside of Kentucky) set up business in Kentucky very deliberately, in an attempt to qualify as the transaction of interstate business, which could not be prohibited per the Commerce Clause of the Constitution. D argued that Kentucky had no personal jurisdiction to exclude it, but no authority to coerce consent.   
          **HOLDING**: Kentucky had personal jurisdiction over D through its presence in the forum.
       2. ***Burnham v. Superior Court [GJ YES]:*** Burnham lived in NJ. His wife lived in CA with their two children. The couple had separated and apparently agreed that his wife would file for a divorce in CA. However, D filed for a divorce in NJ. On a business trip to CA, he went to visit his children. His wife served Burnham process for a CA action for divorce.   
          **HOLDING:** CA has PJ over Burnham because he was served within the state. Even under the *Shaffer* suggestion that the *International Shoe* Test applies, the outcome is no different because Burnham purposefully entered into the state and reaped the benefits of its protection and services.
3. Consent: D can either **voluntarily** or **involuntarily** consent to jurisdiction. A D voluntarily consents when they sign a forum selection clause, for example. Similarly, a D involuntarily consents to the PJ of the forum if they fail to properly file a 12b2 motion.
4. Domicile/Resident: If the D is a domicile in a particular forum, the courts of that forum has jurisdiction over the individual. A person has only one domicile, and can never have more than one. It is established by presence in the forum state plus forming the subjective intent to make that forum state a permanent home. *Goodyear* expressly stipulated that a business resides/is domiciled where its principle place of business is located or its place of incorporation.
   * + 1. ***Milliken v. Meyer [SJ YES]:*** *–* there is a quid pro quo relationship between the domiciled individual and the state. The individual gets certain privileges and benefits form the state and, in return, the domicile make the individual amenable to the jurisdiction of the forum. Personal service not necessary in the state where an individual is domiciled.
5. Partnership/Association: D is a nonresident **partnership or association** within its limits, or made contracts enforceable within the state, and appointed an **agent** within the state to receive service per state requirements
6. ***Pennoyer v. Neff [SJ NO]:***– Defendant Neff was being sued by Mitchell in Oregon for unpaid legal fees. A default judgment was entered against Defendant for his failure to come to court or otherwise resist the lawsuit, despite the fact that he was not personally served with process, nor was a resident of Oregon. Later, in an attempt to collect upon his judgment, Mitchell attached land located in Oregon belonging to Defendant, and had it sold to Plaintiff Pennoyer through a Sheriff’s sale. Neff later returned to the land and sued to recover the land under quite title. Neff was successful, and Pennoyer appealed.   
   **HOLDING:** The court in *Mitchell v. Neff* did not have personal jurisdiction over the property because it failed to attach the land at the outset of the proceedings. Allowing jurisdiction in this case would have been a violation of the Due Process Clause.
   * + - 1. “Every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. No State can exercise direct jurisdiction and authority over persons or property outside of its territory.”
7. **Force and Fraud Exception:** Under *Pennoyer*, a state has the constitutional power to exercise jurisdiction over an individual that enters the forum because of force or fraud, but courts tend to not to exercise jurisdiction over the case because it would be unseemly.

### International Shoe Test (Step 2)*:*

The second part of the analysis is whether the non-resident D satisfied the two-part test articulated in *Shoe*. In essence, the D must have “such minimum contact with the forum that the exercise of J will not offend traditional notions of fair play and substantial justice.” A failure to satisfy either test will result in PJ.

1. **Minimum Contact Test:** PJ is predicated on a finding that the D has a minimum contact such that is purposefully avails itself to the forum such that it is reasonably foreseeable that the D could be haled into court there. A mere unilateral or isolated act by the D is not sufficient.
   1. Minimum contacts (akin to purposeful availment):
      1. Specific act directed at forum (*Shoe)*
      2. Foreseeability of suit (*WWV)*
      3. Purposeful availment of market (*Gray*)
      4. Seeking to serve (*WWV*)
      5. Effects reasonably calculated to be felt in forum (*Calder*)
      6. NOT unilateral act of buyer (Denckla)
2. **Specific Jurisdiction (Related–Path 1):** Specific jurisdiction is jurisdiction created only for a claim that arises from a particular activity within the forum.
   * + - 1. ***Tort Cases***

***Gray v. American Radiator & Standard Sanitary [state case SJ YES]:***  D manufactured a defective valve in OH, which was incorporated into a product in PA, which caused an injury in IL. D sold lots of valves to PA company.  
**HOLDING:** Courts interpret place of wrong in IL statute as the location where the injury-causing event takes place.

***Hess v. Pawloski [SJ YES]:*** Hess, a citizen of Pennsylvanian, drove his car in Massachusetts, where he was involved in an auto wreck with Pawloski, a citizen of Massachusetts. Pawloski sued Hess in an in personam action in Massachusetts, seeking damages for the wreck. However, Pawloski did not sue Hess before he left Massachusetts.   
**HOLDING:** Massachusetts had personal jurisdiction in the form of specific jurisdiction because of the nonresident motorist statute that Hess implicitly agreed to upon driving into the state. No violation of the 14th Amendment.

***Kane v. New Jersey [SJ YES]:*** State has an interest in highway safety that justifies preventing a motorist that does not apply to the nonresident motorist statute from entering the state.

***Keeton v. Hustler Magazine [SJ YES]:***  P, NY citizen, sued a magazine publisher in NH for damage caused by an article published by the magazine.   
**HOLDING:** NH has PJ because it has an interest in providing a forum for all claims arising out of a unitary act of libel.

**Calder Effect Test**: A D purposefully avails itself of the forum such that it is foreseeable to be sued when the activities of the D are intentionally directed at the forum and causes an injury there

***Calder v. Jones [SJ YES]:***  Writer and editor published a story about a citizen of CA, which caused reputational damage. Ds worked in FL and only contacted CA for this story.   
**HOLDING:** CA has jurisdiction because Ds aimed their efforts at CA (they specifically targeted P, even after a request not to) and caused a harmful effect there (reputational damage).

* + - * 1. ***Contract Cases***

***McGee:***  Decedent, a California resident, purchased a life insurance policy by mail from a Texas company. Decedent regularly mailed his premiums from California to the Texas company, which had no other contracts with California. In a suit brought by the beneficiary of the life insurance policy, the Supreme Court held that California had specific PJ over the Texas company. Among other things, the court noted that California had a strong interest in protecting its citizens from alleged misfeasance of insurance companies. The single contract was enough because it was closely related to the claim.

***Burger King Corp. v. Rudzewicz [SJ YES]:*** Ds (little guys; MI) entered into a franchise agreement with BK (FL). BK’s nerve center was in FL, but muscle center was in MI. D’s franchise became unprofitable and BK demanded that they close the franchise down. Ds refused. D’s contract contained provisions including a choice of law clause. All of the negotiations and training happened in FL. BK filed suit in FL.   
**HOLDING:** The D must show that the forum is not constitutional and that due process does not guarantee the best forum, just not one that is not so gravely inconvenient and unfair. An adversaries greater wealth on its own is not enough. Minimum contacts with the forum are established through two factors: **(1)** prior negotiations and contemplated future consequences and **(2)** the parties actual course of dealing. The long-term nature of the contract was not random or fortuitous. Choice of law clause alone is not sufficient. The interaction with FL was not random.

Contacts:

Burger King is a FL corporation whose principal offices are in Miami. It has over 3,000 outlets in the 50 states, Puerto Rico, and 8 foreign nations. In exchange for franchise benefits, franchisees pay BK and initial $40K franchise fee, monthly royalties, advertising and promotion fees, and monthly rent.

The governing contracts provide that the franchise relationship is established in Miami and governed by FL law, and fall for payment of all required fees and forwarding of all relevant notices to the Miami headquarters.

Day-to-day monitoring of franchises is conducted through a network of 10 district offices. In this case, R applied for franchise located in Michigan through the Michigan district office, and the application was forwarded to Miami headquarters.

Coplaintiff McShara took a management course in Miami, the franchise purchased restaurant equipment from BK’s division in Miami, Ps negotiated with both the Miami and district offices.

The agreement finally signed was for a 20-year franchise relationship involving personal payments of over $1MM.

R fell behind in payments and BK in Miami sent notices of default, and an extended period of negotiations began between R and both the Miami and district offices.

* + - * 1. ***Stream of Commerce (Non-Internet)***: There are **two** dominant **theories** for evaluating whether a SOC case meets the purposeful availment test. **(1)** Under the **O’Conner theory**, purposeful availment requires “additional conduct that indicates an intent or purpose to serve the market in the forum, such as specially designing a product for a particular forum, advertising in the forum, establishing channels for giving advice to customers in the forum, or marketing through a distributor who agrees to serve as the sales agent in the forum. **Kennedy** in *McIntire* expounds on by stating that you have to specifically target the forum and **Breyer** signed onto this notion. **(2)** Under the **Brennan theory**, the purposeful availment test is satisfied if a D places a product in the SOC with the awareness that the final product is being marketed in the forum. **Ginsberg** in *McIntire* supported this notion by articulating that targeting the US as a whole is sufficient.

***--OR--***

*McIntyre* revealed three possible theories for evaluating with a SOC case meets the purposeful availment test. **(a)** Under the **Kennedy theory**, a D purposefully avails itself by invoking the benefits and protections of its laws such that the D’s activities manifest an intention to submit to the power of a sovereign. **It is not enough that a D might have predicted that its products could enter the forum. It is enough to target a specific market as a whole (i.e. targeting the US)**. Sending agents into the forum or sending products into a forum targeted by the D are sufficient. **(b)** Under the **Breyer theory**, a D purposefully availed itself of the “privileges of conducting activities in the forum or that it released its goods in the stream of commerce with the expectation that they will be purchased in the forum.” **A single, isolated is not sufficient. The transaction must be part of the regular and anticipated flow of commerce into the state.** **(c)** Under the **Ginsberg theory**, the purposeful availment test is satisfied if the D places a product into the stream of commerce intending it to end up in the forum state (the market is large and you would want to be a part of it). [*Ginsberg would argue that this is not different than a single insurance policy or a single accident*].

***Gray v. American Radiator & Standard Sanitary [state case SJ YES]:***  D manufactured a defective valve in OH, which was incorporated into a product in PA, which caused an injury in IL. D sold lots of valves to PA company.  
**HOLDING:** IL had PJ because there were lots of sales of end-product to IL and D sold valves in contemplation of their use in IL.

***World-Wide Volkswagen v. Woodson [SJ NO]:***  Family was moving form NY to AZ. While driving from NY to AZ in a car purchased from a dealer in NY, the car was rear-ended. The family suffered server bodily burn injuries. The family sued Audi (German), VW of North America (??), WWVW (NY), and Seaway (NY) in OK state court.   
**HOLDING:**  No PJ over WWVW or Seaway because the companies did not purposefully avail themselves of OK. When a corporation purposefully avails itself of the privileges of conducting activities within the forum, it has clear notice that it is subject to suit there. Isolated sale is insufficient. A company must target expecting that a consumer will purchase the product. The companies did not target OK. Similarly, the fact that the car was mobile is irrelevant.

***Asahi Metal Industry Co. v. Superior Court [SJ NO]:*** Defective tire sold by a Cheng Shin, a Taiwanese corporation, caused an accident injuring P in CA. Cheng Shin attempted to implead Asahi because it manufactured the fault-causing component and owed Cheng Shin indemnity. Asahi had no other contact with CA.  
**HOLDING:** O’Conner rejected PJ because there was no contact +; Brennan allowed PJ because there was a contact. No PJ based on fairness.

Contacts

Ashai is Japanese. It manufactures tire valves in Japan and sells them to Chen Shin and others for use in finished tire tubes. The sales to CS took place in Taiwan. The shipments were sent from Japan to Tawain.

CS bought and incorporated 1.35 MM Ashai valves from 1978-82 and accounted for approximately 1.24% of Ashai’s income in ‘81 and .44% in ‘82. CS also purchases valves from other suppliers.

CS sells finished tubes throughout the world. About 20% of its US sales are in CA.

In one cycles sore in Solano County of 115 tubes 97 were manufactured in Japan or Taiwan. Of those, 21 valve stems were marked with Ashai’s trademark. Of those 12 were in Cheng Shin tubes. The store had 41 other Cheng Shin tubes with valves from other suppliers.

There is conflicting testimony as to whether or not Ashai contemplated that is valve assemblies would end up throughout the US and in California.

***Nicastro v. J. McIntyre Machinery Ltd.:*** Defendant is J. McIntyre Machinery, Ltd., a company incorporated in the UK, which sold through its exclusive distributor in the US, McIntyre Machinery America, Ltd., a machine to Curcio Scrap Metal of whom Nicastro was an employee. Nicastro was injured at work because the model did not have a safety guard that would have prevented the accident. He sued on a products liability claim. Court found jurisdiction (presumably specific).  
**HOLDING:** A foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes NJ, may be subject to in personam jurisdiction of a NJ court in a product-liability action.

Contacts:

Sold machine to NJ through exclusive American distributor.

Owner of Curico was introduced to the machine at McIntyre America booth at a trade convention in Las Vegas.

Machine was shipped from McIntyre America in Ohio, to NJ. Invoice was made payable to McIntyre America.

Machine and information sheet listed McIntyre’s address in England as well as telephone and fax numbers. Instruction manual referenced both US and UK safety regulations. Buyers would have had to call England office for parts and service

McIntyre Ltd. holds both American and European patents.

President attended scrap metal conventions in Las Vegas, New Orleans, San Diego, and San Francisco.

Distributer’s advertising and sales efforts were in accordance with England’s direction and guidance when possible. Some of the machines were sold on consignment to distributor.

* + - * 1. ***Stream of Commerce (Internet):***Court has used test to evaluate whether a website site as a D satisfies the purposeful availment and foreseeability test: (1) interactivity and (2) targeting. Passing either test will allow a state to have personal jurisdiction.

Interactivity Test: PJ is directly proportionate to the nature and quality of the commercial activity measured on a “sliding scale” from **(1)** active to **(2)** interactive to **(3)** passive. In the Facebook era, this test may not last.

***Zippo Manufacturing Co. v. Zippo Dot Com, Inc. [SJ YES]*:** Zippo Dot Com (D) had an “active” website that allowed is 3,000 subscribers in PA to download and transmit files. D’s servers were in PA. Zippo Manufacturing (P) sued for trademark infringement in PA.  **HOLDING:**  D had sufficient contact for PA to have PJ because of its active website.

***Bensusan Restaurant Corp. v. King [SJ NO]:*** P had a “passive” website that provided information about upcoming events at the club. A party could not sign up for an event or purchase a ticket through the site. D sued P for patent infringement in NY.  
**HOLDING:** No PJ in NY because the company did not reach out to or maintain ties with NY.

*Passive Site Isn’t Enough:* “simply creating a site, like placing a product into the stream of commerce, may be felt nationwide-or even worldwide-but, without more is not an act purposefully directed toward the forum state.”

Targeting Test: With a website, the *Calder* Effects Test is modified to require that the D have knowledge that P will bear the brunt of the harm in a particular forum.

***Revell v. Lidov [SJ NO]:*** Professor at a university in NY published an article on a bulletin board that defamed P’s actions while P was the associate director for the FBI in DC. The site allowed users to subscribe, advertise, and submit applications for admissions. P sued D in TX, where the brunt of the harm was felt.  
**HOLDING:** TX has no Specific PJ because D did not intent to cause an effect in TX. TX has no General PJ because D there were not sufficiently continuous and systematic contacts with TX.

“knowledge of the particular forum in which a potential P will bear the brunt of the harm forms an essential ingredient of the Calder test.”

“while it may be doing business *with* TX, it is not doing business *in* TX.”

1. **General/All-Purpose Jurisdiction (Non-Related–Path 2):** s
   * + - 1. If D is under GJ, it can be sued for claims that arose anywhere in the world if the D’s contacted with the forum is continuous and systematic. Per *Goodyear*, A D has continuous and systematic contacts in the forum it is essentially at home. Per *Goodyear*,a human is “**essentially at home**” where she is **domiciled** and a corporation is “**essentially at home**” where it is **incorporated** and where it has its **principle place of business.**

***Burnham v. Superior Court [GJ YES]:*** Burnham lived in NJ. His wife lived in CA with their two children. The couple had separated and apparently agreed that his wife would file for a divorce in CA. However, D filed for a divorce in NJ. On a business trip to CA, he went to visit his children. His wife served Burnham process for a CA action for divorce.   
**HOLDING:** CA has PJ over Burnham because he was served within the state. Even under the *Shaffer* suggestion that the *International Shoe* Test applies, the outcome is no different because Burnham purposefully entered into the state and reaped the benefits of its protection and services.

***International Shoe v. Washington [GJ YES]:*** Suit brought within the State of Washington against International Shoe Company (Appellant), a Delaware corporation. Appellant had a principal place of business in St. Louis, Missouri and engaged in the manufacture and sale of shoes and other footwear. The suit sought to recover unpaid contributions to the state unemployment compensation fund.  
**HOLDING:** Solicitation within a state by the agents of a foreign corporation plus some additional activities render a foreign corporation amenable to suit within the forum state to enforce an obligation arising out of its activities within the forum state. In this case, Appellant’s activities within Washington were systematic and continuous within the years in question. **These activities resulted in a large volume of business**. Further, Appellant received the benefits and protections of the laws of Washington. As a result, the suit against Appellant within the state does not involve an unreasonable or undue procedure.

***Perkins v. Benguet Consolidated Mining Co. [GJ YES]:***D was a corporation formed under Philippine law. The company was forced to suspend its gold mining during WWII because of Japanese occupation of the Philippines. The company moved to Ohio and conducted all of its business from there  
**HOLDING:** General jurisdiction granted because the contacts in Ohio were continuous and systematic (actual operations was centered there).

***Helicopteros Nacionales de Colombia v. Hall [GJ NO]:*** P, representatives of the estates of former employees of D, sued D, a helicopter company, in Texas court after a helicopter crash in Peru killed several employees. D is a Colombia corporation which was engaged in a joint venture based in Texas and had some contacts with Texas pertaining to the purchasing of helicopters and the training of its pilots. D moved to dismiss the case based on lack of personal jurisdiction.  
**HOLDING:** No general jurisdiction because the action of purchasing aircrafts was insufficient for establishing continuous and systematic contact.

***Goodyear Dunlop Tires Operations, S.A. v. Brown [GJ NO]:*** Two teenagers from NC were killed in a bus crash that occurred in France. The families brought suit in NC state court alleging faulty tires. The tires were made in Turkey. The families sued Goodyear’s Luxembourg affiliate and it braches in Turkey and France. Goodyear had a few production facilities NC, but the affiliates had no connection with NC.   
**HOLDING:** In order for a court to have PJ, the connection between the D and the forum must be “continuous and systematic”. The interaction with NC was not such that it would be reasonable to satisfy GJ.

Contact

Tire contained information written in English, including US DOT required markings. Also had load and pressure ratings to conform to US Tire and Rim Association standards and an English safety warning.

From 2004-07 at least 5906 GY Turkey tires were shipped into NC, at least 33,932 GY France tires, and at least 6402 Luxembourg tires, not including tires on vehicles equipped with them.

**One Safe Place Argument**: The risk of a jurisdictional challenge is eliminated for P and D has the option to its most advantageous forum

**Sovereign Interest Argument:** State has an interest in holding its citizens accountable for their bad conduct outside of the US.

1. **Fairness Test:** In *World-Wide Volkswagen*, the Court explained that **(1)** the burden on the D, **(2)** the forum state’s interest, **(3)** P’s interest in obtaining convenient and effective relief, **(4)** the interstate judicial system’s interest in obtaining most efficient resolution of controversies, and **(5)** the shared interest of the several states in furthering fundamental substantive social principles are relevant factors that a court must weigh in order to determine whether the exercise of jurisdiction is constitutional.
2. Burden on the D
   * + - 1. **Asahi:** Litigation was thousands of miles from home and imposed a severe hardship. The hardship rises to the level of a deprivation of due process.
         2. **BK:** Disparity between the parties is not enough to show that the burden on the D is unfair. Cost and ability to get witnesses into the forum may influence. The Ds were unable to show this because change of venue could accomplish.
3. Forum state’s interest
   * + - 1. ***Asahi:*** The litigated issue has nothing to do with the road safety and would not be determined with reference to CA law. Asahi was not a CA citizen.
         2. ***BK:*** The litigated issue would be governed by FL law. Moreover, the parties had extensive contact with FL in relation to the disputed issue.
4. P’s interest in obtaining convenient and effective relief
   * + - 1. ***Asahi:*** There was really no clear interest because neither party was of a US origin.
         2. ***BK:*** BK was familiar with the court system and had an interest in having its litigation localized to a particular area. It creates predictability.
5. The interstate judicial system’s interest (judicial efficiency)
   * + - 1. ***Asahi:*** There is an actual interest in preventing state courts from deciding international disputes.
         2. ***BK:*** While it is true that Michigan’s Franchise Investment Law governs many aspects of the dispute, there is not indication that Michigan’s interest in trying the case exceeds FL’s interest, or that it is mutually exclusive with FL’s interest.
6. The shared interest of the several states (Shared substantive policies)
   * + - 1. ***Kulko v. Superior Court [SJ NO]:*** After a divorce, father retained custody of children in NY while mother moved to CA. Children wanted to live with mother and father bought them a one-way ticket to CA. Mother sued in CA for child support.  
            **HOLDING:** permitting a suit would discourage parents form accommodating the interest of family harmony.
         2. ***Asahi:*** There is an actual interest in preventing state courts from deciding international disputes.
         3. ***BK:***Not really applicable.
         4. ***Asahi Metal Industry Co. v. Superior Court [SJ No]:*** Defective tire sold by a Cheng Shin, a Taiwanese corporation, caused an accident injuring P in CA. Cheng Shin attempted to implead Asahi because it manufactured the fault-causing component and owed Cheng Shin indemnity. Asahi had no other contact with CA.  
            **HOLDING:** CA lacks PJ because it would be unfair because

### Full Faith and Credit Clause of the Article 4 of the Constitution

1. **Other State Must Adhere to Valid Judgments:** The valid judgments of the courts of one state are entitled to enforcement in the courts of the other
2. **Limited to State Courts:** The Full Faith and Credit Clause only applies to state courts enforcing the judgments of other state courts, not the federal courts enforcing the judgment of state courts
3. **Trigger:** A valid judgment flowing from a forum (court) that has **(1)** personal jurisdiction **and** **(2)** subject matter jurisdiction.

# Notice

## Was notice proper?

### Rule

Due process requires that the D be given notice and the opportunity to be heard before a judgment to be entered. There is a two-step inquiry for determining whether this due process requirement is met: **(1)** was notice served in a manner prescribed by a statute or rule and **(2)** does the statute conform with the requirements of due process. If the answer to either of these question is no, then there was not notice. In the context of PJ, service of processes is similar to the process by which the court perfects its PJ over the D.

## Was notice serviced in a statutorily authorized manner? (Step 1) FEDERAL & TEXAS

## TEXAS,

In Texas, a P may serve process through **(1)** personal service **(2)** registered/certified mail, or through **(3)** subsisted service.

### Services of Process:

Service of process is the method for delivering a copy of the complaint and summons to a D. P drafts both the complaint and the summons, an official summons requires the signature of the court’s clerk and bear the court’s seal. Under FRCP 3, an action is commenced when P files a complaint, and a P must serve process within 120 days according to FRCP 4m.

* + 1. **Failure to Serve:** P’s failure to serve process results in the court dismissing the complaint without prejudice or that the P must complete service within a specified period of time. If a P shows good cause for its failure to serve process, a court must extend the time for service for an appropriate period.
    2. **Who can serve process:** FRCP 4c2 allows anybody over the age of 18 and not a party to serve process. Under FRCP 4l, the process server must provide proof of service to the court in the form of an affidavit, if the party is within the US.
       1. ***Failure to provide proof:*** Failure to provide proof does not affect the validity of service, and the court may permit a party to amend its evidences of proof of service. P has the burden of showing proper proof of service.
    3. **When serving process on a business (4h1B):** Under FRCP 4h1B, a P or its agent can serve process on an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process of a business.
       1. **Officer ≠ Owner:** while it is possible for an officer to be an owner, service of process on an owner is not sanctioned by FRCP 4.
       2. **Assessing a Managing/General Agent:**  Courts look to the level of responsibility and the authority exercised by the person receiving process after the fact when determining whether they were a managing or general agent under this section.
    4. **Content and Issuance of a Summons (4a1 & 4b):** A summons must include (1) the name of the court and parties, (2) the name and address of the P or P’s attorney, (3) the time within which the D must appear or defend, (4) notice that a failure to appear will result in a default judgment, (5) the signature of a court clerk, (6) the court’s seal, and (7) be directed at the D. A clerk is required to sign, seal, and issue a summons for each D when the P presents a complete summons under 4b.

### Methods of Serving Process:

FRCP 4e2 provides four methods of service of process on an individual: (1) personal service, (2) substituted service, (3) service upon an agent, or (4) through a state method, when incorporated by the court. There is not hierarchy of service in the rules.

* + 1. **Personal Service (4e2A):** Every jurisdiction allows for P or its agent to serve process on the individual personally. Personal service can be made anywhere within the forum state.
       1. *Force or Fraud Exception:* Personal service of process is not valid if a D is tricked or forced into the forum.
       2. *Participation in Litigation Exception:* Federal courts grant immunity to individual who enter the forum in order to participate in another civil case.
    2. **Substituted Service (4e2B):**  A P or its agent can service process at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there. However, it is not necessary that the person receiving the process deliver it to the D.
       1. ***Definition of Dwelling:*** Courts define a dwelling or usual place of abode as the place where the D is living at the present.
       2. ***Suitable Age & Discretion:***Whether a person served is of suitable age and discretion is determined on a **(1)** case-by-case basis or **(2)** state statute.
       3. ***Reside:*** Whether a party resides at the dwelling is decided on a case-by-case basis.
    3. **Service on an Agent (4e2C):** A P or its agent can serve process on an agent authorized by appointment or by law to receive process.
    4. **Approved State Method (4e1):** A court may incorporate the la of the state the action is pending in or the state in which service is effected.

### Waiver of Formal Service (4d):

A D can waive formal service, and is under a duty to do so if it would avoid unnecessary expenses. A breach of this duty would result in the D having to pay the expenses incurred by the P to serve process. If the D waives formal service, D gets 60 days to respond to the complaint. Waving formal service does not waive potential defenses.

### Geographical Restrictions (4k):

A federal court can serve process to establish PJ only if the D would be subject to PJ in state court in the state in which the federal court is located.

* + 1. **Statutory Exception (4k1C):** A court can serve process outside of the state in which it sits when authorized by **(1)** federal or **(2)** state statue.
    2. **Bulge Rule (4k1B) Exception:** A court can serve process on impleaded parties (FRCP 14) or necessary parties (FRCP 19) that are located within 100 miles of the courthouse.
    3. **Federal Question Exception (4k2):** A court can serve process when no other court in the US has PJ and the exercise of PJ would be Constitutional. This is effectively a federal long-arm statute.

## Does the statute conform to Due Process requirements? (Step 2)

There are two potential challenges: **(1) facial constitutional challenge**, which means that the statutory method for serving notice is not reasonably calculated, and **(2) form challenge**, which means that the party delivering notice used an inappropriate form/method.

### Reasonably Calculated Notice:

The second part of the analysis is whether, under the circumstances, the statutory notice scheme was of such a nature that it would reasonably convey the required information and allows reasonable time for the interested parties to appear so that they could present their objections. Notice does not have to actually reach all of the Ds so long as it is reasonably certain that it will reach most of the Ds. In general, the fact that a D has independent knowledge of the pendency of a suit generally will not suffice in the absence of proper notice form the court.

* + 1. ***Mullane v. Central Hanover Bank & Trust Co. [YES]:*** NY statute allowed bank to consolidate small trusts and make periodic accountings to the court. If court approved of accounting, bank received a fee and trust owners lost right to sue. Bank published notice in a local newspaper.   
       **HOLDING:**  Publishing notice in local newspaper met the Due Process requirement for unknowable or discoverable trust owners. Due process requirement not met for known beneficiaries.
       1. **Three Categories of Notice Recipients: (1)** those whose whereabouts are unknown and unknowable; **(2)** those whose whereabouts are unknown but discoverable; and **(3)** those whose whereabouts are known.
    2. ***Jones v. Flowers [NO]:*** State sent certified letter to homeowner to regarding delinquent real estate tax and consequences of a failure to pay. Letter was returned to the State, and the State took no additional steps to notify the homeowner.  
       **HOLDING:** Notice failed to satisfy Due Process because State knew that the owner was not notified and took no reasonable steps to notify the owner.

### Knowledge Based on Notice & Improper Service:

Actual knowledge based on notice by the court may suffice, even in the absence of proper service of process.

* + 1. ***United Student Aid Funds, Inc.*** ***v. Espinoza [YES]:*** Debtor filed to discharge the interest associated with his student loans. Debtor failed to serve D with a summons and copy of the complaint. The court sent notice to the D, per applicable rules.  
       **HOLDING:** Notice by the court met the Due Process requirements, even though the D failed to properly serve process.

### Actual Receipt Not Necessary:

There is no Constitutional requirement that the notice is actually received by the party, or that one must make a “best effort” to ensure that notice is received. Due Process only requires that a reasonably calculated method be employed for notice.

* + 1. ***Dusenbery v. United States [YES]:***  FBI seized P’s automobile and cash due to federal drug charges. P was convicted. FBI sent notice of administrative proceedings to forfeit the property to P at his prison, but P never acknowledged receipt.   
       **HOLDING:** Notice was proper because actual receipt of notice was not necessary. Only using a reasonably calculated, not best effort, under the circumstances to notify the party.
    2. ***Greene v. Lindsay [NO]:*** Eviction notice was given to a tenant by posting the process conspicuously on the tenant’s premise.   
       **HOLDING:** Notice was insufficient because it could be torn down. It must be accompanied by additional actions, such as mailing a copy of the eviction notice.

### E-mail Notice:

While sending notice to a party through certified mail is the preferred method of service, it is possible to service notice to a party through e-mail.

* + 1. ***Rio Properties Inc. v. Rio Intl. Interlink [YES]:*** Notice was sent to D via e-mail because it lacked an office or representative in the US. There was evidence suggesting that the D used and preferred e-mail.  
       **HOLDING:** Notice reasonably calculated because a company that uses e-mail as a preferred mechanism for communication is likely to receive the notice.

# Venue

## Was venue proper?

### Intro Block

The meta-issue is whether venue was proper. USC §1390 defines venue as the geographical specification of the proper court or courts for the litigation of a civil action that is within the subject matter jurisdiction of the court in general. There are two mutually exclusive paths for assessing venue based on where the P files its complaint: (1) state or (2) federal.

### State Rule (Path 1)

If a claim brought in a state court, P can lay venue where the statutory scheme authorizes, based on whether the cause in a location action or a transitory action.

### Federal Rule (Path 2)

If a claim is brought in federal court, 18 USC §1391 is the general venue statute that gives a P three basic options for venue: **(1)** where the D resides; **(2)** where the underlying claim arose; and **(3)** where a substantial part of the property that is the subject of the action is situated. State statutes are irrelevant when assessing federal venue. Federal rules aslo

* + 1. **Failure to Assert Defense of Improper Venue:** Generally, a D must raise an improper venue defense in a timely fashion or it will be waived under 12h1.

## State Analysis

### Is the case a location action or a transitory action?

* + 1. **Local Action**: A location action generally includes: (1) in rem or QIR cases in which the land is used as a basis for jurisdiction; (2) cases claiming a remedy in real property; and (3) cases involving damage to reality. P must bring its action in the court or political subdivision where the relevant property is located.
       1. **Trespass**: Court has typically found that trespass cases fall within the category of local actions because the essential characteristics of the land ordinarily can be tried with a stronger likelihood of the truth and doing right between the parties in a J where the land is situated than a foreign state.
          1. ***Livingston v. Jefferson:*** D mistakenly trespassed on P’s land believing that the government owned it in LA. P sued D *in personam* for trespass in damages in VA.   
             **HOLDING:** Venue was improper because an action for trespass to land must be brought where the land lay.
    2. **Transitory Action**: A transitory action is any action other than a local action. To have proper venue, a P must select a venue in the appropriate political subdivision from the state’s statutory options.

### Removal

§1391 does not apply to cases that are removed to federal court. Cases can only be removed to the federal district embracing the state court in which the case was filed under USC §1441.

## Federal Analysis

### Venue Based on Residence

Under §1391b2, P may lay venue in the district **(1)** where all of the Ds reside in or **(2)** any district that a D resides in if the Ds resides in multiple districts within the **state**. If the Ds reside in **multiple states**, than P cannot lay venue based on residence.

* + 1. **Residence of Natural Person 1391c1:** A natural person shall be deemed to reside in the judicial district in which that person is domiciled under §1391c1. A natural person establishes a domicile through its presence plus the intent to make the place falling within the judicial district the natural person’s home. A natural person can only have one domicile.
       1. **Assessing Domicile:**  It is possible to evaluate domicile based the actions of the D, such as whether they got a new drivers license, bought a house or car, or took up a job there.
       2. **Non-Resident Alien Exception (1391c3):** Any natural person that does not reside in any district in the US can be sued anywhere in the US. This statute can apply to *ex-pat workers*.
    2. **Residence of Business Association [PJ ANALYSIS] 1391c2/d:** Under 1391c2, a business association resides in any judicial district in which the court would have PJ with respect to *the civil action in question*, treating each district as a separate state. In the case a business has sufficient contact with the state, but not with any district within the state, the business will be deemed to reside in the district where it has the most significant contacts under 1391d.

### Venue Based on Events

Under §1391, P may lay venue in any district in which a substantial part of the events or omissions giving rise to the claim occurred.

### Venue based on Property

Under §1391, P may lay venue in any district in which a substantial part of property that is the subject of the action is situated.

### Fall-Back Provision

Under §1391b3, a P can lay venue in any district in which any D is subject to the court’s PJ with respect to the action if no district in the US satisfies the residence-, event-, and property-based venue selection process.

## Transfer of Venue

### Assuming Proper Initial Venue (28 USC 1404)

* + 1. **Transfer for the Convenience of the Parties (1404a):** For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civl action to any other district or division where it might have been brought. **If convenient for everyone and in the interest of justice to do so, the court may move to another district where suit could have originally been brought.** 
       1. **Convenience and Justice Factors:** Motion to transfer is granted when “only slightly better”; Where there is no issue of perversely offending a party by being sued in the other venue.
       2. **Choice of Law:** The court should always employee the choice of law rules of the original court. This is done to prevent forum shopping and the first court the parties were correctly in was the transferor court.
    2. **Other Transfers within the same District (1404b):** Upon motion, consent, or stipulation of all parties, any action, suit, or proceeding of any civil nature may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district.
    3. **Sue Sponte Transfers (1404c):** A district court may order any civil action to be tried at any place within the division in which it is pending.

### Assuming Improper Initial Venue (28 USC 1406)

1. **Dismissal or Transfer (1406a):** If venue is improper, the court shall dismiss, or, if it be in the interest of justice, transfer the case.
   * + 1. **Choice of Law:** Apply the law of the transferee court because the first court the parties were legitimately in was the transferee court.
2. **Waiver (1406b):** If venue is improper, a party waives its right to challenge J if it does not interpose a timely and sufficient objection to venue.

### Forum Non Conveniens (FNC)

1. **When is it applicable?**
2. Fed. 🡪 Foreign
3. Fed. 🡪 State
4. State 🡪 Fed (when state has FNC rule).
5. State 🡪 Foreign
6. **Dismissal of an Otherwise Proper Forum:** FNC allows for a dismissal when a particular forum is proper, but not the most appropriate forum. A party filing a motion to dismiss based on FNC must establish (1) the availability of an adequate alternative forum where the case can be heard and (2) a balancing of the public and private factors suggest a transfer.
7. **Is there an adequate, available and alternative forum?**
8. **Justifiable Belief:** A forum is adequate and available if the court has a justifiable belief that the alternative forum can hear the case. This almost always works.
   * + - 1. **Inadequate Justifiable Belief:** (1) when the corruption is so extreme that the P would not be able to get justice; (2) there is an insurmountable procedural barrier.
         2. **Conditional Dismissal:** Conditions can be sent to ensure that the other forum is available. These conditions to dismissal include: (1) consent by D to the J of the new forum; (2) Waiver of statute of limitations on the D’s claim if it has run; (3) conditioned also on the court accepting the case and keeping J.
         3. **Unfavorable Law Excuse:**  The fact that the laws are less favorable to a P is not enough to prevent an FNC dismissal.
9. **Public/Private Interest Factors:** Less deference is given to the forum chosen by an alien than chosen by an alien than a forum selected by a citizen.
10. **Public Factors**
11. Administrative difficulties
12. Forum Interest – Local interest in having localized controversies decided at home (Choice of Law)

***Piper:***  Scotland had strong interest because accident occurred in Scottish airspace, the potential Ps were Scottish or English.

1. Desire to have a case tried in a forum well versed in the law that will apply
2. ***Piper:***  Scotland knows its laws well
3. Avoiding undue problems with conflicts of laws or in the application of foreign law
4. ***Piper:***  PA court was not familiar with Scottish law.
5. Unfairness of burdening citizens with jury duty in a case unrelated to the forum.
6. ***Piper:***  PA law would apply to one D and Scottish law would apply to the other D. This was too much of a burden on the jury.
7. **Private Factors**
8. Relative access to sources of proof (viewing evidence site, etc.)
9. ***Piper:***  Crash site was located in Scotland, but the record concerning the design, manufacture, and testing of the propeller and plane were located in the US. Decided that the crash site was more important.
10. Ability to compel attendance of witnesses at trial through subpoena
11. Whether judgment could be enforced
12. All other practical problems that make trial of a case easy, expeditious, and inexpensive.
13. ***Piper:***  Impleader claims and a desire to have one trial that hit all of the issues weighed in the favor of granting the FNC and moving to Scotland. Counter that this would make the trial burdensome and unfair is insufficient.
    * + 1. ***Piper Aircraft v. Reyno:*** A plane manufactured by Piper Aircraft (D1), a Pennsylvania corporation, crashed in Scotland. Parts of the airplane were manufactured by Hartzell (D2), an Ohio corporation. Reyno (P) was appointed administrator for the families of five UK citizens involved in a plane crash in their suit against the defendants for negligence and strict liability. The families of the dead passengers sued Air Navigation, the operator of the plane (McDonald), and the estate of the deceased pilot in a separate action in the UK.  
           **HOLDING:** When an alternative forum has jurisdiction to hear a case and when trial in the chosen forum would establish oppressiveness and vexation to a defendant out of proportion to the plaintiff’s convenience, or when the chosen forum is inappropriate because of considerations affecting the court’s own administrative and legal concerns, the court may in the exercise of sound discretion dismiss the case by applying the list of private and public interest factors.

# Subject Matter Jurisdiction (SMJ)

## Does the court have subject matter jurisdiction over the case?

### Rule:

Subject matter jurisdiction (SMJ) addresses whether the court has power to adjudicate over the case. Exercising a judgment absent SMJ makes the judgment void. There is a three-part analysis regarding whether the exercise of SMJ was proper: (1) was there constitutional authority; (2) was there statutory authority; (3) was the exercise of SMJ supported or barred by common law interpretations of constitutional and statutory requirements. There is a presumption against federal jurisdiction and, therefore, the party initiating litigation in a federal court bears the burden of establishing federal jurisdiction. **A court has an obligation to verify SMJ on EVERY claim.**

* + 1. **Federal Court = Limited SMJ:**  Federal courts have limited SMJ, which means that they can hear only specific types of cases.
    2. **State Courts = General SMJ:**  State courts have general SMJ, which means that they can hear any cognizable claim.
       1. **Exclusive Federal Jurisdiction Exception:** State courts cannot hear cases that invoke exclusive federal SMJ. Examples of exclusive SMJ include: (1) admiralty under §1333; (2) bankruptcy under §1334(a); (3) patent and copyright infringement and patent variety protection under §1338(a); (4) antitrust under 15 U.S.C. §§15-16; and (5) securities under 15 U.S.C. §78(a).
    3. **Timing of a Dismissal for lack of SMJ:** A court is under an obligation to dismiss a case whenever it determines that a case before it lacks SMJ. A court can make this determination on its own or in response to a party’s Motion to Dismiss because of SMJ under FRP 12b1. A party can raise a 12b1 at any point since it is a “most favored defense” under FRCP 12h3.
    4. **Timing of SMJ Assessment:** As a general rule, the requirements of federal SMJ are assessed as of the time the P commences, or files, the case.
       1. ***Dataflux v. Atlas Global Group, L.P.:***  A limited partnership sued a Mexican D under alienage jurisdiction. The P was a citizen of Texas and the D was a citizen of Mexico. However, at the time the case was filed, one of the P’s limited partners was a citizen of Mexico.   
          **HOLDING:**  No alienage jurisdiction because one of the limited partners shared citizenship with the D at the time the case was filed.
       2. ***Caterpillar, Inc.*** ***v. Lewis:*** There was not complete diversity when a case commenced in federal court, but the parties and the court failed to notice the fact.  
          **HOLDING:** The court upheld the judgment and embraced post-filing dismissal as a way to cure the jurisdictional defect since a court could drop a non-essential party under FRCP 21 on terms that are just.

## Was there constitutional authority? (PART 1 of 3)

### Article III §2 Heads of Jurisdiction:

Article III §2 provides nine heads of SMJ: **(1)** cases arising under the law or treaties of the U.S.; **(2)** cases affecting ambassadors, other public ministers, and consuls; **(3)** cases of admiralty and maritime jurisdiction; **(4)** controversies to which the US is a party; **(5)** controversies between a state and citizens of another state; (6) controversies between citizens of different states; **(7)** controversies between citizens of the same state claiming lands under grants of different states; **(8)** controversies between a state and a foreign state or citizen; and **(9)** controversies between a citizen and a foreign state or citizen. Courts can only hear cases that fall within one of these nine heads.

* + 1. **Diversity Jurisdiction:** The Constitution only requires minimal diversity. In other words, at least one P be of diverse citizenship from one D.
    2. **No Waiver of SMJ:** Parties cannot waive or consent to SMJ.

## Was there statutory authority? (PART 2 of 3)

### Rule

* + 1. The second part of the analysis is whether there is statutory authority permitting the court to have SMJ. There are three major statutory grants of federal SMJ: (1) diversity under §1332a1, alienage under §1332a2, and federal question under §1331. A federal court cannot hear a case that fails to qualify within one of these statutory grants and exceeds the amount in controversy (AIC) requirement.

### Is this a diversity of citizenship case?

* + 1. **General:** §1332 grants district courts original jurisdiction in all civil actions where (1) the parties diverse and (2) the amount in controversy exceeds $75,000. The goal of diversity jurisdiction is to provide a neutral forum for litigants who might otherwise suffer from bias in the local courts of a state.
       1. ***Mas v. Perry:***  Married couple sued their landlord, alleging that he invaded their privacy by installing two-way mirrors that allowed him to spy on them in their bedroom and bathroom. P1 was citizen of MI. D was citizen of LA. P2 was a citizen of France.  
          **HOLDING:**  Diversity under §1332.
       2. **Timing of SMJ Assessment [If not previously addressed]:** As a general rule, the requirements of federal SMJ are assessed as of the time the P commences, or files, the case.
          1. ***Dataflux v. Atlas Global Group, L.P.:***  A limited partnership sued a Mexican D under alienage jurisdiction. The P was a citizen of Texas and the D was a citizen of Mexico. However, at the time the case was filed, one of the P’s limited partners was a citizen of Mexico.   
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             **HOLDING:** The court upheld the judgment and embraced post-filing dismissal as a way to cure the jurisdictional defect since a court could drop a non-essential party under FRCP 21 on terms that are just.
    2. **Are the parties diverse? (Step 1 of 2)**
       1. **Rule:** Under §1332a, parties are diverse when the controversy is between citizens of different States,
       2. **Complete Diversity Rule**: In order to qualify as a diversity of citizenship case, there must be complete diversity between the parties in controversies; in other words, each P must be of diverse citizenship from each D.
          1. ***Strawbridge v. Curtiss:*** Ps were citizens of MA and VT. There were multiple Ds, most who had citizenship in MA, but one who was a citizen of VT.   
             **HOLDING:**  Diversity jurisdiction not invoked because “each distinct interest should be represented by persons, all of whom are entitled to sue or be sued in federal court.”
          2. **Statutory Interpreader Exception:** Under §1335, statutory impleader requires only minimal diversity to qualify as a diversity of citizenship case.
          3. **Multiparty, Multiforum Trial Jurisdiction Act Exception:** Under the Multiparty, Multiforum Trial Jurisdiction Act Exception, minimal diversity is sufficient for satisfying the statutory grant for jurisdiction if any cases that “arises from a single accident were at least 75 natural persons died in the accident at the disaster location.”
          4. **Class Action Fairness Act:** The Class Action Fairness Act permits jurisdiction based upon minimal diversity to facilitate access to federal courts for some complex litigation.
          5. **Severing Jurisdictional Spoilers under FRCP 21 (Misjoinder):** In the case where a nonessential party acts as a “jurisdictional spoiler,” a court can use FRCP 21 to sever that party from the case under a theory that FRCP 21 relates back to the date of the complaint.

***Exxon Mobil Corp. v. Allapattaha Service Inc.:*** diversity cannot attach at all in cases where there are co-citizens on both sides of the case. The court spoke of this as “contamination theory” – the presence of non-diverse parties on both sides of the lawsuits “contaminates” the case because it “eliminates the justification for providing a federal forum.” However, parties can solve diversity by simply refilling the suit with diverse parties.

* + - 1. **Citizenship:**
         1. **Natural Person Citizenship:** For diversity purposes, a human must be (1) a citizen of the United States and (2) domiciled in that state. A person has only one domicile at a time. A domicile is where a person has (A) her true, fixed, and permanent home and principal establishment, and (B) to which she has the intention of returning. **Permanent residents are treated as aliens and not as citizens of a state of the United States.**

**Change of Domicile:** A person can change her domicile by (1) establishing physical presence in a new state with (2) the subjective intent to make that state her home for the foreseeable future.

***Mas v. Perry:***  Married couple sued their landlord, alleging that he invaded their privacy by installing two-way mirrors that allowed him to spy on them in their bedroom and bathroom. D was citizen of LA. P was born in MI, went to graduate school in LA, and took a summer job in IL before returning to LA for more school.   
**HOLDING:**  P was a citizen of MI. P never changed her domicile form MI. Although present in LA for years, she never formed the subjective intent to make that her him.

***Ochoa v. PV Holding Corp.:*** Katrina evacuee not a resident of Texas (Factors: permanent employment, driver’s license, intent to stay, actual residence, bank accounts, property, clubs and churches, home)

**Factors for Assessing Subjective Intent**

Voter registration

Qualifying to pay in-state tuition

Automobile registration

Payment of real and personal property taxes

Location of bank account

“grab-bag of indicia having to do with everyday life.”

**Foreign-Domiciled U.S.:** A U.S. citizen that has a domicile in a foreign country falls outside of §1332. In other words, they cannot access federal court through diversity jurisdiction.

* + - * 1. **Corporation Citizenship:** Under §1332c1, a corporation is deemed to be a citizen of “every State” in which it is incorporated **and** of “the State” in which it has its “principal place of business.” There are two potential test for determining a business’ principal place of business: (1) the nerve test or (2) the muscle test. In 2010, the ninth circuit unanimously endorsed the “nerve center” test in *Hertz*. *LLCs, and similar business associations, are not treated as corporations.*

**Nerve Center:** The PPB would be where the corporation makes its business decisions. In other words, where the corporation’s managers direct the corporation’s activities (i.e., the headquarters).

***Hertz Corp. v. Friend:*** “the PPB is best read as referring to the place where a corporation’s officers direct, control, and coordinate the corporation’s activities. In practice it should normally be the place where the corporation maintains its headquarters.”

**Muscle Center:** The PPB would be where the corporation does more of whatever it does (manufacturing widgets, providing services, etc.) than anywhere else.

* + - * 1. **Non-Incorporated Association Citizenship:** Non-Incorporated Associations are citizens of each state in which its members are citizens. This includes both general and limited partners if the business association is a partnership.

***Carden v. Arkoma Associates:*** A court must look to the citizenship of all the partners – general and limited – in assessing the citizenship of the business.

* + - * 1. **Representative’s Citizenship:** Under §1332c2, the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen of the same State as the infant or incompetent.
      1. **Alignment and Realignment:** The court has a duty to assess whether the true interest of any of the litigants lie with the other side of the litigation. If so, the court may realign a party to the other side of the litigation. This process could defeat diversity and result in a dismissal under 12b1.
    1. **Does the case exceed the amount in controversy requirement? (Step 2 of 2)**
       1. **Basic Rule:** Under §1332a, the second step of the analysis of a federal court can have original jurisdiction assesses whether the amount in controversy (AIC) exceeds $75,000 (Class action = $5M), exclusive of interest and costs. Costs are all expenses of litigation except attorney’s fees. A P’s actual recovery is irrelevant. The P’s good faith allegation that the AIC is satisfied controls unless it appears to be a legal certainty that the claim is really for less than the jurisdictional amount.
          1. ***Freeland v. Liberty Mutual Fire Insurance Co.:***  Dispute between an insurer and an insured. The insured claimed the insurance company was on the hook for $100,000. The insurer claimed it was only on the hook for $25,000. The amount in controversy was, therefore, exactly $75,000.   
             **HOLDING:** No diversity jurisdiction because the amount in controversy fell below the statutory threshold.
          2. ***Mas v.*** ***Perry***: Mr. and Mrs. Mas claimed a recovery for an amount that exceeded the AIC requirement. Their ultimate recovery was below the AIC requirement.  
             **HOLDING:** No challenge to jurisdiction because actual recovery fell below the AIC requirement.

**Recovery of Cost:** Under §1332b, If the judgment in favor of the P is for an amount below the AIC requirement, the P may not recover the P’s cost and may have to pay the D’s costs. Courts only require payment of D’s cost if the P’s made its original assertion of the amount in controversy in bad faith.

* + - * 1. ***Ortega v. Star-Kist Foods, Inc.:*** Minor cut her finger while opening a can of tuna. The minor alleged damages in excess of $75,000, noting that the she suffered severed tendons, and had to undergo multiple surgeries.   
           **HOLDING:** While it was a legal certainty that a bench trial would not award such a high damage figure, it is not a legal certainty that a jury would award damages below the AIC requirement.
        2. **Interest Exception:** A party can claim interest as a component of the amount in controversy when the interest itself is the basis of the suit, such as controversies over bond coupons.
        3. **Attorney’s Fees:** If attorney fees are recoverable under an exception to the American Rule, which states that parties bear the cost of their own representation, those fees can be a component of the amount in controversy.
      1. **Aggregation Rule:** If the case involves a single P suing a single D, the P can aggregate as many claims as the P has to satisfy the AIC requirement. However, if there are multiple parties on either side of the case, aggregation is not allowed unless the multiple parties are joint and severally liable for the claims.
         1. Several P can aggregate their claims only where they are seeking to enforce a single title or right in which they have a common or undivided interest. In class actions, the claims of the class cannot be aggregated if their claims are separate and one must meet the AIC requirement.
    1. **Exceptions Where there will be NO Federal SMJ, even though there is Diversity:**
       1. **Collusive Joinder [Third-Party Assignments]:** Under §1359, the federal court has no J in cases “in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of [the federal] court.” Today, this mostly applies when a party assigns its claims to a third party, the third party litigates that claim and remits a portion of the judgment to the original party.
          1. ***Kramer v. Caribbean Mills, Inc.:*** T (the assignee) agreed to remit to P (the assignor) 95% of any recovery on a claim.   
             **HOLDING:**  No SMJ due to §1359 because (1) T was not related to the claim, (2) P was not diverse, and (3) the assignment failed the factor analysis proposed by the Court.
          2. **Factors:** (1) actual business purpose for the assignment; (2) character of any interest retained by the assignor; and (3) subjective intent of the parties.
       2. **Domestic Relations:** Federal courts do not hear cases “involving the issuance of a divorce, alimony, or child custody decree.”
       3. **Probate:** Federal courts do not probate wills or oversee the administration of a decedent’s estate. However, the federal court can hear probate-related cases as long as it does not take general control over the estate or interfere with the state probate proceedings.

### Is this an alienage case?

* + 1. **General:** §1332 grants district courts original jurisdiction in all civil actions where (1) the parties diverse and (2) the amount in controversy exceeds $75,000.
    2. **Is this a citizen of a State v. a Foreign National (Step 1 of 2)** 
       1. Per §1332a2, Alienage J occurs in controversies between (1) a citizens of a State and citizens or subjects of a foreign state, unless the citizens or subject of the foreign state is a lawful permanent resident of the U.S. and domiciled in the same state and the citizen of the State, (2) citizens of different States and in which citizens or subjects of a foreign state are additional parties, or (3) a foreign state, as P and citizens of a state or of different States.
          1. ***JPMorgan Chase v. Traffic Stream (BVI) Infrastructure, Ltd.:***  A corporation chartered in the British Virgin Islands claimed that it was not a “citizen” of the United Kingdom because, as a resident of a territory, it had fewer rights than a citizen.  
             **HOLDING:**  Proper alienage J because it is immaterial what right a country provides to its citizens. The thrust of the inquiry is whether the litigant is a foreign national.
          2. ***Mas v. Perry:***  Married couple sued their landlord, alleging that he invaded their privacy by installing two-way mirrors that allowed him to spy on them in their bedroom and bathroom. D2 was citizen of France. P was citizen of MI.   
             **HOLDING:**  Alienage J proper because D2 was a citizen of France.
          3. **Both Parties Alien = No Alienage J:** If both parties are aliens, then a federal court has no alienage J.
    3. **Does the case exceed the amount in controversy requirement? (Step 2 of 2)**
       1. **Basic Rule:** Under §1332a, a federal court can have original jurisdiction when the AIC exceeds $75,000, exclusive of interest and costs. Costs are all expenses of litigation except attorney’s fees. A P’s actual recovery is irrelevant. The P’s good faith allegation that the AIC is satisfied controls unless it appears to be a legal certainty that the claim is really for less than the jurisdictional amount.
          1. ***Freeland v. Liberty Mutual Fire Insurance Co.:***  Dispute between an insurer and an insured. The insured claimed the insurance company was on the hook for $100,000. The insurer claimed it was only on the hook for $25,000. The amount in controversy was, therefore, exactly $75,000.   
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**Recovery of Cost:** If the judgment in favor of the P is for an amount below the AIC requirement, the P may not recover the P’s cost and may have to pay the D’s costs. Courts only require payment of D’s cost if the P’s made its original assertion of the amount in controversy in bad faith.

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      1. **Aggregation Rule:** If the case involves a single P suing a single D, the P can aggregate as many claims as the P has to satisfy the AIC requirement. However, if there are multiple parties on either side of the case, aggregation is not allowed unless the multiple parties are joint and severally liable for the claims.

### Is this a federal question case?

* + 1. **Rule:** §1331 grants federal question jurisdiction (FQJ) to the federal district courts using the same operative language as the Constitution in Article III §2. However, §1331 is construed more narrowly than Article III §2. The statutory limitations imposed through §1331 are (1) the well-pleaded complaint rule and (2) a requirement that federal law be sufficiently central to the P’s claim.
       1. ***Osborn v. Bank of the United States:*** Bank of the United States sued to stop a state official from collecting taxes under an Ohio law that taxed non-Ohio banks.   
          **HOLDING:** The constitutional grant for FQJ requires only the mere possibility that a federal issue might be injected in the litigation. (Interpretation of arising under language in the constitution, therefore giving a broad grant. Any case in which there is a federal ingredient).
    2. **Well-Pleaded Complaint Limitation (Step 1 of 2):** In order for a federal court to have proper SMJ under FQJ, federal law must be a part of the P’s well-pleaded complaint. There are two points to this rule: (1) the court looks **only** to the P’s complaint to determine whether there is a FQJ and (2) in looking at the P’s complaint, the court considers only the well-pleaded parts, which refers to the part of the complaint supporting the P’s claim. A nice short-hand test from Freer is whether P is trying to vindicate some right given under federal law?
       1. **Artful Pleading:** This occurs when the P designs P’s pleading in a manner that inappropriately avoids a federal question. Essentially, it is a by the D to remove the case to federal court.
       2. ***Louisville & Nashville Railroad Co. v. Mottley:***  Mottleys were injured in a railway accident. In settlement of their claim, the Mottleys accepted a lifetime free rail pass from L&N RR. Later, Congress passed a law stating that the RR could not allow free passage. In compliance with this law, L&N RR refused to acknowledge the Mottley’s rail pass. Mottley’s sued in federal court under FQJ  
          **HOLDING:** The basis of the suit was a breach of contract suit, which failed to invoke FQJ. Even though L&N RR might use the congressional act as a defense, an anticipated defense is not apart of the well-pleaded complaint.
       3. ***Holmes Group v. Vornado Air Circulation [OVERTURNED BY §1338]:*** P’s asserted a claim that did not arise under federal law and did not invoke diversity J. D’s counterclaim, however, did arise under federal patent law.   
          **HOLDING:** Counterclaims are part of the D’s answer and, therefore, are excluded from the well-pleaded complaint. Overturned by §1338 for patent cases.
    3. **Centrality of the Federal Issue (Step 2 of 2):** The second limitation imposed on FQJ is that the federal issue must be central to the claim being asserted. Assuming that the P’s complaint satisfied the well-pleaded complaint limitation, a P can show centrality through one of two mechanisms: (1) completely federal preemption doctrine and (2) the substantial federal question doctrine.
       1. **Completed Federal Preemption Doctrine (Path 1):** Complete federal preemption occurs when congress passes a law to fully occupy a particular legal space. The federal law preempts conflicting state law because of the Supremacy Clause. Therefore, a preempted claim under state law because a federal claim. The application of complete preemption is extremely limited and tends to apply only to ERISA, LMRA, and National Banking Regulations claims.
       2. **Substantial Federal Question Doctrine (Path 2):** This is an interpretation of §1331 that permits a federal court to exercise SMJ when there is a component of a state claim that is so substantial that it appears to fall within the congressional grant for federal SMJ.
          1. ***American Well Works Co. v. Layne & Bowler [HOLMES TEST; NO: S/F]:***  Company A manufactured a pump. Company B held a patent on a pump. Company B contended that Company A’s pump infringed its patent did not sue. However, Company A sued Company B, alleging that Company B had wrongfully claimed that Company A’s pump violated Company B’s patent under a state libel action.  
             **HOLDING:**  The case did not invoke FQJ. “A suit arise under the law that creates the cause of action.” In this case, that was state law, event though it would look to a federal issue to find an answer.
          2. ***Smith v. Kansas City Title & Trust Co. [LITIGATION REALITY TEST; YES: S/F]:*** The P was a shareholder in a corporation, and sued to stop the corporation from investing in bonds issued under a federal statue. P’s claim was a state law claim.  
             **HOLDING:**  FQJ upheld because the case was one where “it appears form the complaint that the right to relief depends upon the construction or application of the Constitution or law of the US.”
          3. ***Moore v. Chesapeake & Ohio Railway [NO: S/F]:*** P sued his employer under a state employer’s liability law. The P complained that the employed had violated the Federal Safety Appliance Act.  
             **HOLDING:** No FQJ
          4. ***Gully v.*** ***First National Bank in Meridian [LITIGATION REALITY; NO: S/S]:*** a national bank transferred its rights and liabilities to a successor bank. The successor bank was liable for state taxes, where were assessed on the stock of the national bank. State bank failed to pay, and a state officer filed suit. State bank attempted to remove to federal court.  
             **HOLDING:** The court looked to the litigation reality and deemed that the federal issue – whether the state had the power to tax a bank – was merely lurking in the background and probably would not arise.
          5. ***Merrell Dow Pharmaceuticals v.*** ***Thompson [PRIVATE ROA; NO: S/F]:*** Ps’ mothers ingested a drug while the mothers were pregnant. The Ps suffered damages due to the drug. Ps asserted a number of state claims, including a negligence per se violation of Federal Food, Drug, and Cosmetic Act “misbranding.”  
             **HOLDING:** No FQJ because Congress failed to create a “private right of action.” The majority concluded that, once Congress determined there was no federal remedy, the Court was “not free to ‘supplement’ that decision in a way that makes Congress’ decision meaningless.”
          6. ***Grable & Sons Metal Products v. Darue [FACTOR TEST; YES: S/F]:*** The IRS seized P’s land for nonpayment of taxes. After P failed to redeem the property, it was sold at public auction to D. Thereafter, P sued D in state court, on a state law claim. P’ alleged that D failed to properly give notice.   
             **HOLDING:** (1) the court unanimously rejected the notion that FQJ requires a federally created claim. Rather, it is only necessary that a state claim implicate sufficiently a federal law. (2) Established a multi-part factor test to determine whether a state law claims should arise under federal law: (a) the case necessarily raises a federal issue; (b) the federal issue is actually disputed; (c) the federal issue is substantial (applies to other case); and (d) the federal J will not disturb “any congressionally approved balance of federal and state judicial responsibility.”

**(a)** Notice requirement under federal law.

**(b)** The disputed issue was whether the IRS adhered to the federal guidelines for providing notice when it sent out a certified letter, even though the guidelines required personal service.

**(c)** Federal government’s interest in the prompt collection of taxes is a substantial issue.

**(d)** Serves as a veto that an keep cases out of federal courts if recognizing FQJ would swamp those courts. The exercise of federal J would not affect the allocation of cases between state and federal courts; very few state law cases involving title to reality will raise a serious federal issue and, once the court decides this case, it will be decided forever.

## Was there Supplemental Jurisdiction?

### Rule:

* + 1. **All Claims Must Have SMJ or Supplemental J:** Every single claim asserted in a case in federal court, not just the P’s original claim, must satisfy a basis for federal jurisdiction. There are two avenues for satisfying this requirement: (1) through a grant of original jurisdiction under §1331 or §1332 or (2) through supplemental jurisdiction. To get SJ, a three-part test must be satisfied: (1) there is at least *one source of original J* connected to the claim; (2) the claim is *supplemental under §1367*; and (3) the *discretionary factors* do not cut against a federal court hearing the claim. Failure to satisfy the three-part test results in the federal court’s dismissal of the proposed SJ claim without prejudice.

### Is there ≥ 1 basis with original J? (PART 1 of 3)

* + 1. **Diversity or Federal Q Anchor (1367a):** The first test evaluates whether at least one basis for original J articulated in §1331 or §1332. Under §1367a, this is a prerequisite for the proper exercise of SJ. If no claims fall within §1331 or §1332, then it is impossible to assert SJ over a claim.

### Is the claim supplemental under §1367? (PART 2 of 3)

* + 1. **So Related to Anchor (1367a):** Assuming that the first test is passed, the second test evaluates whether the federal court can hear the claim under §1367a. Under §1367a, district courts have SJ over all other claims that are “**so related to claims in the action**”that granted the original J that **“they form part of the same case or controversy under Article III of the Constitution.**” This is Congress’ codification of the *Gibb’s* “Common Nucleus of Operative Fact” Test.
       1. ***United Mine Workers v. Gibbs [Pendant for P]:*** Gibbs was employed as a superintendent in the Grundy Company. However, miners, who were represented by a local union affiliate of the United Mine Workers of America inflicted physical injuries upon Gibbs after learning that Gibbs had employed laborers represented by a rival union. At trial in the USDC returned a jury verdict in favor of Gibbs on both the federal (secondary boycott) and state law claims (conspiracy and boycott to interfere with contract of employment). DC set aside the verdict because failure to prove damages. Court of appeals affirmed.   
          **HOLDING [Common Core Test]:** The state claim and the federal claim were related under pendant J. Pendant J is a discretionary doctrine, not a right. The court should look to factors such as judicial economy, convenience, and fairness to the litigants.
       2. ***Owen Equipment and Erection Company v. Kroger [Ancillary for D]:*** P, a citizen of Iowa, filed suit against Omaha Public Power District, a Nebraska citizen, in federal district court, where the basis of federal court jurisdiction was diversity. The underlying facts causing the incident that the P was electrocuted when the boom of a steel crane next to which he was walking came too close to a high tension electric power line. Respondent amended the complaint naming Owen, an Iowa corporation as an additional D.   
          **HOLDING [Logical Relationship Test]:** Ancillary J typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court. **Supplemental J does not apply when it would destroy complete diversity.**
    2. **Diversity/Alienage J Exception (1367b):** Under §1367b, a federal court will not have SJ over any claims (1) ***asserted by P*** over persons made a party under **Rule 14, 19, 20, or 24**, (2) over ***parties proposed to be joined*** as P’s under **Rule 19**, or (3) or ***parties seeking to intervene*** under **Rule 24** when exercising SJ over those claims would be inconsistent with the requirements of §1332 (diversity, alienage, and AIC requirements) and the sole basis for original J is diversity or alienage (§1332).
       1. ***Ortega v. Star-Kist:*** Ortega brought suit after she sustained an unusually severe cut on her finger from a tuna can lid. Her family joined (FRCP 20) the suit, seeking damages for emotional distress and medical payments. The girl, but not her family had met the requisite monetary requirements of the limit.   
          **HOLDING:** Federal courts have supplemental jurisdiction over all claims as long as no other jurisdictional requirements are violated when the issue is amount in controversy. §1367b does not include FRCP 20 joinders of a party.
       2. ***Exxon v.* *Allapattah:*** Named party in a class action suit was a citizen of TX and defendant was Exxon, a citizen of NY. The claim was a diversity claim for more than $75K. There were state claims for less than $75K. Non-named members of the class were citizens of NY, DE, NY, OH, etc,.   
          **HOLDING:** Only look to the citizenship of the named Ps when you determine diversity.

### Should the federal court exercise its discretion to not hear the case? (PART 3 of 3)

* + 1. **Discretionary Factors:** The third test evaluates whether a federal court should hear a claims when it has power to hear that claim. Theoretically, SJ fosters efficiency, convenience, and consistency of outcome. Under §1367c, a federal court may decline to exercise SJ over a claim on the basis on the following factors: (1) the claim raises a novel or complex issue of State law; (2) the SJ claim substantially predominates over the original J claim or claims; (3) the district court has dismissed all claims over which it has original J; or (4) in exceptional circumstances, there are other compelling reasons for declining J.
       1. **Factors/Arguments:**
          1. Judicial efficiency
          2. Convenience
          3. Fairness
          4. Comity
          5. State claim domination
          6. Consistency of outcomes

### Misc.

* + 1. **Statute of Limitations Tolling:** §1367d provides that any applicable statute of limitations is tolled while the case is pending in federal court and for 30 days after dismissal.

# Removal

STATUTES

**28 USC 1441. Actions removable generally**

1. **Removable if Federal Court has SMJ (1441a):** Any civil action in which the federal courts have original jurisdiction may be removed by the defendants to the corresponding district court.
   1. **Unanimous Vote:** All of the Ds must agree to the removal.
2. **Don’t Look to Diversity in Federal Q (1441b):** Any federal question is removable regardless of citizenship. Diversity cases can only be removed if none of the D’s are citizens of the state in which the action is brought.
3. **Splitting Fed Q from State Claims (1441c):** When there is a 1331 claim joined with otherwise non-removable claim, the entire case may be removed, or the district court may, in its discretion remand all matters in which state law predominates. (There is a different so related standard because unrelated state law claim can be removed).

**28 USC 1446. Procedure for removal**

1. **Short and Plain Statement of Grounds for Removal (1446b):** A defendant shall file a notice of removal with the district where the action is pending, pursuant to Rule 11, containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon each defendant.
   1. **Unanimous Vote (Rule of Unanimity) 1446b2A:** Ds who had been named in the complaint and served with process must join in the removal
2. **30-Day and 1-Year Rules (1446b):** The notice shall be filed within 30 days after the defendant receives a copy of the initial complaint, through service or otherwise, or within 30 days of summons if the initial pleading is not required to be served on the defendant, whichever is shorter. If not initially removable, you have 30 days after which it is ascertained that the case has become removable. Except 1332 cases cannot be removed more than 1 year after the action commences.
   1. ***Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.:*** the 30-day window begins to run from service of process and not from the informal sending of a copy of the complaint.
   2. **Last-Served Approach (1446b2B):** 30-day window restarts each time a D is served.
3. **Who Do You Need to File Notice With (1446d):** Promptly after filing notice of removal, D must give written notice to all adverse parties and shall file a copy of notice of removal with the clerk of the state court, which will effect removal.
4. A D can waive the right to remove by taking some actin in the state court that she is not required to take (filing a permissive counterclaim, for example).
5. **Motion to Remand w/ 30 Days (1447c):** The P must move to remand within 30 days after the removal. IF the P does not, the procedural defect is waived, and the case will not be remanded. The exception is when there is no federal subject matter J, in which case, there is no time limit for the P’s moving to remand the case.

**Section 1447 – P must respond in 30 days**

1. If P sued on federal law claim, he can still choose to sue in state court unless there is exclusive federal jurisdiction (patent, admiralty, foreign state, aliens).
2. Removal is waiveable. Remand is not reviewable. Judges will likely err on the side of remand because they can’t get reversed.
3. Trend that removal statutes are to be construed against removal. (*Burnett*)
4. 1441(c) applies to any claim where jurisdiction is conferred by 1331, even if jurisdiction is redundantly conferred by another section. (*Burnett*)
5. **Attorney’s fees under 1447(c)**: Should be awarded where removing party has no objectively reasonable basis for seeking removal. (*Martin v. Franklin*) -- if the D have a objectively reasonable reason, okay.

EXAMPLES

Texas Citizen v. New York Citizen

State cause of action for $100,000

***If Tx citizen wants to sue in Texas, in what court(s) may she do so?***

State or federal.

NY Citizen v. Tx Citizen

(state cause of action for $100,000)

***If case is filed in State District Court, Harris County, Tx, can Tx citizen remove the case? If not, why not?***

No. 1441(b), second sentence. Local defendant exception.

State District Court, Harris County, Texas

Texas Citizen v. New York Citizen

(state cause of action for $100,000)

***If D removes the case:***

***What documents does he file (and where)?*** 1446(a) notice of removal with the federal court (Don’t file with state judge. You just do it. Then give notice of removal to P. P cannot stop you. Can only file a motion to remand.) Notice of filing a notice of removal with state court under 1446(d).

***By what date must he remove?*** 1146(b) 30 days after the receipt by the defendant, through service or otherwise, notice of the claim. USSC *Murphy Brothers* – clock starts ticking from day D gets formally served. Otherwise could send informal notice before filing suit and clock would run out. Must include copy of underlying pleading, else D may not know if claim is removable.

***What if D first filed an answer one week after being served and then, the next day, sought to remove the case?******What result?*** Removal must be the first thing you do. You cannot seek affirmative relief with the state judge. (Don’t want D to ask for an early dismissal, get denied, and then move to federal court because he doesn’t like the result.) What about the fact that SMJ is not a waiveable defense? We are not in federal court. State SMJ is not affected by 12bwhatever.

State District Court, Harris County, Texas

Texas Citizen New York Citizen

(state cause of action: damages not plead)

Most common circumstance. In most states you are not allowed to plead the amount in controversy. Some states even prohibit it.

***What does NY Defendant do now? What is the burden of proof in this circumstance and who bears it?*** D must prove. Courts are mixed as to what the standard is you must satisfy. Most common answer is that D must show that D’s claim likely involves issued over more that $75K. Preponderance of the evidence standard. Normally P will not object strenuously. Usually only a battle when right on the border, or when P is seeking something really other than money damages, e.g. an injunction. P can voluntarily choose to disavow damages above $75K. Almost always honored.

***What if P wants to seek remand. What is the burden of proof in this circumstance and who bears it?*** Normally party who wants to be in federal court bears the burden of proving jurisdiction. Here, burden is shifted to P, usually to show that to a legal certainly she cannot recover 75K. Split in courts. Some say same standard as D above.

***What if NY D asserts that in calculating AIC, you include punitive damages but the law in circuit is clear that you do not?*** Would have to be remanded to state court. Compare to *Martin v. Franklin*. 1447(c) may allow award of attorney fees for improvidently removing the case.

***What if the court believes that the defendant was wrong to remove but the P does not make this AIC/punitive damage argument? Is the argument waived?*** No. Rule 12 waiver rules. SMJ never waiveable. Court can sua sponte dismiss.

State District Court, Harris County, Texas

Texas Citizen v. Texas Citizen

(state cause of action for $100,000)

***If D was a Texas citizen at time action filed in state court, but one month later relocates to establish a new citizenship in Oklahoma, can he then remove the case to federal court? Why not?*** No. Citizenship at time the action was commenced.

State District Court, Harris County, Texas

Texas Citizen Texas Citizen

(state cause of action: federal defense asserted by Defendant )

***May D remove case to federal court?***No. *Mottley*. “Well-pleaded compliant rule” 1331. So 1441 would not allow original jurisdiction.

***If it does, what result****?* 1447(c) award of attorney fees.

***Are there ever instances when a D can remove a case to federal court when removal is based only on the existence of a federal defense****?* Yes. Examples are 1442, 1443. (Federal officers, civil rights cases.)

State District Court, Harris County, Texas

Texas Citizen Texas Citizen

(state cause of action: federal defense asserted by Defendant )

***After D asserts his federal defense, P may not remove case to federal court. There are two reasons why P may not. What are they?*** 1) It doesn’t come within original jurisdiction. 2) Only party that can remove to federal court is a D.

***Would the result change if instead of it being a federal defense, the D asserts a federal counterclaim?*** No. Still no original jurisdiction. Still a P for removal purposes. P’s pleading doesn’t raise a question of federal law.

State District Court, Harris County, Texas

Texas Citizen Texas Citizen

(state cause of action)

***If D wants to remove the case based on 1331, what arguments must she make to have a chance at successfully doing so?***Grable. 2 exceptions to when P is not master of complaint. Artfully pled – substantial question of federal law. Or complete preemption. If P files a motion to remand, burden of proof falls on D to prove.

State District Court, Harris County, Texas

Texas Citizen New York Citizen

(state cause of action for $100,000)

Ohio Citizen

(state cause of action for $100,000)

***If NY wants to remove the case now, what must it do?*** Get Ohio to agree. Then file. 1441(a) requires agreement, but doesn’t say explicitly. Unanimity among all Ds.

***What if NY Defendant does not do what it was supposed to do? How is P to challenge once case has been removed?*** Move to remand.

***What if NY D does not do what it was supposed to do, and court is aware of this. But P does not make this argument? Is the argument waived?***Waiveable. This doesn’t go to subject matter. Just a procedural defect. 1441(c).

State District Court, Harris County, Texas

Texas Citizen New York Citizen

(state cause of action for $100,000)

Texas Citizen

(state cause of action for $100,000)

***If Tx citizen brings suit against NY and Tx originally (on January 2, 2009), case is not removable because there is not complete diversity of citizenship.***

***But what if plaintiff voluntarily drops Tx defendant from case on Sept 22, 2009?*** 1446(b) Can remove 30 days after an amended complaint. NY can remove. Strict 1-year removal limit on diversity cases.

***Note, however that if Tx defendant is dismissed from case by way of summary judgment on Sept 22, 2009 granted against the P and in favor of the Tx defendant, case cannot be removed by remaining NY defendant.*** This is a quirky rule that distinguishes between voluntary and involuntary dismissals that isn’t easily explained. Probably has to do issue that dismissal may not be “final” until all appeals run. However, cf. WWV case.

***Why didn’t this happen in WWV?*** 12b2 dismissal came ultimately from USSC. No repeals left. Distinction gone. D’s not coming back.

***What if plaintiff drops Tx defendant from case on January 22, 2010?***No. 1-year bar.

***What other means are there by which NY could argue that the case should be subject to removal?***Fraudulent joinder.

State District Court, Harris County, Texas

Texas Citizen New York Citizen

(state cause of action for $100,000)

Assume that NY Defendant removes case to federal court:

Federal District Court

Texas Citizen New York Citizen

(state cause of action for $100,000)

***If Tx plaintiff, post removal, wants to add a Texas defendant after case is removed to federal court, what result? What rules and statutes bear relevance to this analysis?***

1447(e). Court may deny joinder or permit joinder and remand. Basically indispensible party analysis.

***Would it change the result if NY Defendant removes case to federal court based on federal question jurisdiction, like this:***

Federal District Court

Texas Citizen New York Citizen

(federal cause of action – defendant removed case under §1331)

*Removable by D, so the state claim can come along by supplemental jurisdiction if the claims are so related. 1441.*

State District Court, Harris County, Texas

Texas Citizen New York Citizen

(state cause of action for $100,000)

(state cause of action for $30,000)

***Can D remove both claims? When and under what authority?***Yes. Complete diversity, 1 P, 1 D, aggregate claims.

***What if second claim is by a second TX P*?** 1441 if original jurisdiction. Starkist. Assuming meets 1367(a), can come along for the ride.

State District Court, Harris County, Texas

Texas Citizen Texas Citizen

(federal cause of action )

(state cause of action)

***Can D remove both claims now? When and under what authority? Do you see any constitutional problem here with at least certain applications of the statute?*** 1441(c) if you have a separate and independent claim, within 1331 that is joined with an otherwise nonremovable claim, the entire thing is removable. Probably unconstitutional.

***If removal of both is allowed, what if state law claim predominates?***May remand, but doesn’t have to. 1441(c) rarely seen.

1. REMOVAL SUBJECT MATTER JURISDICTION – **A defendant can remove an action that could have originally been brought by the plaintiff in the federal courts**. The **well-pleaded complaint rule applies**, and the federal court **must have original or supplement jurisdiction** over all claims.
   1. **Defendant** – Only a defendant may remove a case; a plaintiff cannot remove on the ground that a counterclaim against him could have been brought independently in a federal court***.*** If there is more than one defendant, all defendants must join in removal. If some defendants are precluded from removing because of delay, or refuse to join in the removal, removal is not authorized.
      1. **Local Defendant Exception** – **When the jurisdiction is based on diversity and one of the defendants is a citizen of the state in which the state action was brought, the action is not removable**. When the jurisdiction is based on federal question, the defendant can remove the case, even if it was brought in the state of which he is a citizen.
   2. **Venue** – Venue for an action removed lies in the **federal district court “embracing the place where such [state] action is pending.”**
   3. **Procedure for Removal**
      1. **Notice of Removal** – The defendant **files a notice of removal with the federal district court**, containing a **short and plain statement of the grounds** for removal and signed. A **copy of the notice should be sent to the other parties and to the state court** in which the claim is pending. Once this is done, the state court can no longer deal with the case.
      2. **Thirty Day Rule** – The defendant **must file the notice of removal within 30 days “after receipt by the defendant, thorough service or otherwise, of a copy of the initial pleading.”** (28 USC § **1446(b)**). A defendant cannot remove a case after filing a motion, but may be able to after filing an answer. The defendant may file a notice of removal within 30 days of receipt of an amended pleading, motion, order, or other court paper that shows that a non-removable case (or an apparently non-removable case) is in fact removable.
      3. **After Removal** – If the defendant has not answered, she must answer or present the other defenses or objections available to her under the Federal Rules within 21 days after being served, or within seven days after filing the notice of removal, whichever period is longer.
         1. **Remand** – **A plaintiff can file a motion to have the case remanded (sent back) to the state court**. If the plaintiff this motion on a defect other than subject matter jurisdiction (such as removal procedures), it must be brought within 30 days of removal. **The court must remand, however, whenever it is shown that there is no federal subject matter jurisdiction**. If the court erroneously fails to remand, but the subject matter defect is cured before the trial begins, the failure to remand does not require that the federal judgment be vacated. The federal court has **discretion to remand a case to state court once all federal claims have been resolved**, leaving only state claims over which there would be no diversity jurisdiction. **An order remanding the case may require the repayment of just costs and actual expense, including attorney’s fees, to punish defendants who improperly remove cases.** A defendant who objectively reasonably removed the case won’t have to pay such costs or expenses; rarely do courts actually impose costs against defendants.
         2. **Severance** – If there are multiple claims or multiple parties, **a defendant may remove a whole case, and the federal court may sever and remand** any matter over which it does not have original or supplemental jurisdiction.
   4. **Diversity Jurisdiction**
      1. **Dismissal of Non-diverse Party** – Removal is permitted if the non-diverse party is dismissed from the action and there is complete diversity between the remaining parties, subject to limitations:
         1. **Defendant Citizen of Forum State** – **When the jurisdiction is based on diversity and one of the defendants is a citizen of the state in which the state action was brought, the action is not removable**. When the jurisdiction is based on federal question, the defendant can remove the case, even if it was brought in the state of which he is a citizen.
         2. **One Year Rule** – **A case may not be removed on the basis of diversity of citizenship jurisdiction more than one year after it was commenced in state court**. (28 USC § 1446(b)). A case must be removed no later than 30 days after the defendant discovers though service of an amended pleading, order, etc. that the case has become removable. This provision may be important if the case is not removable at the outset but becomes removable later. The one year rule does not apply to removals based on federal question jurisdiction. **If the plaintiff acted in bad faith in order to keep the case from being removed, it may still be removable**.
      2. **Amount in Controversy** – Some states don’t require plaintiffs to plead the damages. **A defendant can assert an amount in controversy in his notice of removal if the plaintiff’s initial pleading seeks nonmonetary relief or a money judgment without a specific sum or a money judgment under the minimum requirement but the state permits recovery of damages in access of that amount**. The defendant must prove the amount in controversy by the **preponderance of evidence**.
      3. **Citizenship** – For purposes of removal, c**itizenship is considered when the suit is filed and when it is removed**, so removal is only proper if diversity in both. There must have be complete diversity when the case was originally filed and when the case was removed.

# Choice of Law

1. Erie **could** only be relevant if (**Three Conditions**)
   1. A Federal Court (**Condition 1 of 3)**
   2. Adjudicating state law cause of action **(Condition 2 of 3)**
   3. Federal Source of Law “Procedural” or Substantive (**Condition 3 of 3)**
      1. Questions that are so utterly bound up with the substantive question that will decide the case that the Erie dictates that a court must apply state law to find an answer.
      2. Substantive provision are so bound up with substantive rights such that Erie requires the use of state law.
      3. Federal Statute
2. History
   1. 1878 – Cusp of an the industrial revolution. The country is about to see the rise of the car and the rise of interstate commerce in a manner that has not been seen in ages.
      1. The US was become much less safe because of all of the industrialization, and so they attempted to add in other types of law to help offset the increased risk. This was at the state level.
   2. Granger Movement – Famers that are concerened about their rights, which transfers into the populist era. This moves into the progressive era.
   3. National Stage – Congress passing lots of regulations as a means to control the excesses of the new industrial era.
   4. Federal courts becomes the perceived protectors of corporations against these trends/aggressors.
      1. Federal courts are staffed by white male protestant people – elitism. (Factor 1)
      2. Federal courts are way fewer in number (Factor 2). This creates an increased cost for Ps.
   5. ***Swift v. Tyson***
      1. If there is a state statute or constitution on point, the federal court has to adhere. However, federal courts are allowed to make up their own common law outside of these. This is **general common law**. **Local common law** is an exception, but is generally limited to issues related to land.

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| --- | --- | --- |
|  | **Before 1938** | **After 1983** |
| **Procedural Law** | State Law Applied (Conformity Act) | FRCP Applies |
| **Substantive Law** | *General Issue*  - Federal Law Applied  *Local Issue*  - State Law Applied | State (No Federal General Common Law) |

1. General Federal Common Law tended to provide better outcomes for big business.
2. State Laws as Rules of Decision (§1652)
   1. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

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| --- | --- | --- | --- | --- |
|  | **State – PA** | **State – NY** | **Fed – PA** | **Fed - NY** |
| **PJ** | “Doing Business Doctrine” | Inc. | “Doing Business Doctrine” | Inc. |
| **SMJ** | General SMJ | | §1332 | |
| **COL** | PA Law = Bad for P Place of Injury Rule | | PA Law (3rd Circuit) Court supposed to be more differential | Fed Common Law, even when state law was different |

1. Lawyering
   1. Railroad Applies, but the last thing they want to do is have the Supreme Court do is overturn Swift v. Tyson because it was wildly beneficial in so many other cases.
      1. There goal was the have the court say that you need not apply federal common law when state law is clear. However, you should apply federal common law when the state common law is unclear.
2. Judging
   1. Holding of the case is not that Article 10 supports Erie.
   2. **Proposition:** if congress has not legislated in an area, or if congress can’t legislate in an area, then there is no provision in the constitution that permits federal courts to make substantive law when congress either cannot or has not made such law.
      1. **This was a question of constitutional import addressing whether courts can be their own law-**making body outside of congress’ actions.
3. ERIE DOCTRINE – The only circumstance in which *Erie* is relevant is that in which: there is **federal** **subject matter jurisdiction based on diversity of citizenship**, and there is a **question of whether the court should apply state law or federal law** to some aspect of the case. A federal court, in the exercise of its diversity jurisdiction, is **required to apply the substantive law of the state** in which it is sitting, including that state’s conflict of law rules, but federal procedural law (***Erie RR v. Tompkins (1938)****)*.
   1. **Procedural** – **A federal court should apply federal procedural law**. Before *Erie*, federal courts applied state procedural law based on the Conformity Act. After *Erie*, federal courts apply federal procedural law, as set forth in the FRCP.
   2. **Substantive** – **A federal court should apply state substantive law when adjudicating state claims**. Before *Erie*, federal courts applied general federal common law but state statutory law based on *Swift*. After *Erie*, federal courts apply state law.
   3. ***Erie*** – If Congress has not legislated in an area (or they can’t), then there is no provision in the Constitution that permits federal courts to make substantive law; federal courts lack authority to make substantive law when Congress hasn’t or can’t. RR didn’t want *Swift* overturned, so the attorney argued that state law should be applied when it is clear but, otherwise, federal law should be applied. *Erie* did overturn *Swift*. The plaintiff (Pennsylvania) was injured in Pennsylvania by a RR and filed his claim against the RR (NY) in federal court because under state law he would be considered a trespasser and would not be able to recover, but the Court held that it should apply that same state law. The plaintiff had four options on where to file:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **State Court in Penn.** | **State Court in NY** | **Fed. Court in Penn.** | **Fed. Court in NY** |  |
| **Personal Jurisdiction** | “Doing business” in PA (territorial presence, before Shoe) | Incorporated in NY | “Doing business” in PA (before Shoe) | Incorporated in NY | All okay for personal jurisdiction. |
| **Subject Matter Jurisdiction** | Good | Good | Diversity – Penn. v. NY | Diversity – Penn. v. NY | All okay for subject matter jurisdiction. |
| **Choice of Law** | Would apply Penn. law because choice of law rule – would apply law of place of injury. Bad for the plaintiff because deemed to be trespassing by walking along railroad so railroad only owed duty not to be willfully bad. | Would also apply Penn. law because choice of law rule of applying law of place of injury – so same problem. | Swift would let them apply general federal common law, but circuit thought the court should be deferential to state law when it could be. | Circuit had a more robust willingness to apply general federal common law.  Treated plaintiff as an invitee, to which the RR owed a higher standard of duty. Went to trial and plaintiff won. | Fed. Court in NY the best place for the plaintiff. |

# Discovery

## Discovery in U.S. Civil Litigation

* 1. ***Olson Transporation Co. v. Socony-Vacuum Co.:***   
     **HOLDING:**  “The rules permit fishing for evidence as they should.”
  2. “Mark the elination of secrecy in the preparation for trial. Each party may in effect be called upon by his aversay or by the judge to law all his cards upon the table, the important consideration being who has the stronger hand, not who can play the clever game.” – Edson R. Sunderland
  3. ***Hickman v. Taylor:*** **HOLDING:** “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”
  4. European (French) Perspective
     1. Parties will disclose all relevant information, including damning information because (1) it is the right thing to do and (2) the government will come and look for it anyways
        1. Leads to a conclusion that we do not need to give a private right of discovery.
  5. American Perspective

## FRCP Rules Governing Discovery

* 1. General Discovery Rules (26)
  2. Depositions to Perpetuate Testimony (Pre-Trail Discovery) (27)
  3. Oral Depositions (30)
  4. Written Depositions (31)
  5. Interrogatories (33)
  6. Producing Documents, Electronic Information, Tangible Things, and Property for Inspection (34)
  7. Physical and Mental Exams (35)
  8. Request for Admission (36)
  9. Failure to Cooperate, Sanctions (37)

## Discovery Considerations

* 1. Basic Objections to Discovery
     1. Plaintiff
        1. D’s stonewalled
        2. Say information is privileged when the information really isn’t
        3. Discovery take forever
        4. Discovery data-dumps
     2. Defendant
        1. P’s are asking for too much
        2. Discovery is overly broad
        3. P’s are on a fishing

## Discovery in Federal Civil Case

* 1. Discovery in US civil cases allows litigants to gain access to all relevant evidence before trail. This result in 3 large benefits: (1) avoids trail by ambush; (2) permits access to facts of case; (3) promotes merits resultions over technical dismissal.
  2. Starting Point (FRCP 26b1)
     1. “Unless otherwise limited by court order, the scope of discovery is as follows: **Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense** — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).”
        1. Parties may obtain discovery regarding any nonpriviledged matter that is **relevant** to any party’s claim or defense
           1. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.
        2. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.
     2. Non-privileged communication
        1. Lawyer-client
        2. Doctor-patient
        3. Priest-pastor
        4. Husband-wife
  3. The American Rule
     1. Generally, the producing party bears the cost of production
     2. **Relative Burden in Discovery (FRCP 26b2):** Proportionality required so that balance achieved between the financial burned of discovery and the evidentiary benefit of discovery.
        1. Tangential information
        2. Costly information relative to the value of the case
     3. **Duplicative or Burdensome Discovery (FRCP 26b2):**
     4. **Proportionality of Discovery (FRCP 26b2):** cost of discovery vs. value of the case.
  4. Mandatory Disclosures – These are the kinds of things you are going to get asked for at every case. Therefore, there is no reason to have parties wait around to get all of that information.
     1. Initial Disclosures
        1. Name, address and phone number of anyone with information to support a claim or defense.
        2. Document/tangible document supporting a claim or defense.
           1. If you have documents that support the other side, you do not have to turn over the information
        3. Computations of damages
        4. Any insurance agreements to the extent that it provides coverage on the issue
           1. Most cases with insurance will settle at policy limits
     2. Expert Witness Disclosures
        1. Identify all testifying experts
        2. Provide a written report for all testifying experts
        3. Flavors of Experts
           1. Non-testifying (Consulting experts): off the record consultants that provide information to the lawyer about how something works. Their information is not admissible unless you ask them to testify
           2. Testifying expert: See above
     3. Disclosures Before Trial
        1. All evidence witnesses a party anticipates presenting at trial

## Pre-Suit Discovery (FRCP 27)

* 1. Federal Court
     1. May only be used in federal court to persevere testimony from: **(1)** one who is about to die and **(2)** one who is going to flee the jurisdiction.
  2. State
     1. Some states allow a broader discovery for investigative purposes (TX is very broad)

## Post-Suit Filing

### Interrogatories (FRCP 33)

|  |  |
| --- | --- |
| **What are they** | Written questions |
| **To whom may they be sent** | Parties only |
| **How many may be sent** | 25 individual questions |
| **Main benefit?** | Party must file answers under oat so you can obtain sworn evidence on specific factual points |
| **Main disadvantage** | Common practice is for lawyer to prepare answer (even if client signs under oat). Lawyers prepare the answer and you don’t tend to get much information. |

### Request for Production (FRCP 34)

|  |  |
| --- | --- |
| **What are they** | Method for requesting documents/tangible items |
| **To whom may they be sent** | Parties and nonparties (through subpoena also may be required for NP) |
| **How many may be sent** | Unlimited |
| **Main benefit?** | May obtain otherwise inaccessible documentary/tangible item proof |
| **Main disadvantage** | Depends on what is sought |

### Request for Admission (FRCP 35)

|  |  |
| --- | --- |
| **What are they** | Written requires to admit specific issues of fact or law |
| **To whom may they be sent** | Parties only |
| **How many may be sent** | Unlimited |
| **Main benefit?** | Principally used to narrow scope of dispute |
| **Main disadvantage** | None from requester’s perspective |

### Depositions (FRCP 30, 33)

|  |  |
| --- | --- |
| **What are they** | Method for recording oral testimony prior to trial |
| **To whom may they be sent** | Parties and nonparties (through subpoena also may be required for NP) |
| **How many may be sent** | No more than ten depositions per side and no more than seven hours/witness, unless agree otherwise |
| **Main benefit?** | Allows for gathering of factual information/witness testimony that migh otherwise be inaccessible |
| **Main disadvantage** | Cost |

## Preservation Obligations

* 1. Obligations as a potential defendant to preserve information that would otherwise be lost if we did not do something to interrupt the normal processes for information being retained and then destroyed in the normal course of business.
     1. **Trigger (Issue 1):** Some kind of event, accident, that leads to the conclusions that litigation is reasonably anticipated. This does not strictly come from the FRCP.
        1. **FRCP 37b2:**
     2. **Scope (Issue 2)**: What do you need to preserve, how much do you need to preserve, how long do you need to preserve it.
        1. **FRCP 26b2b (Electronic Discovery:** You have to preserve relevant information so long as it is reasonably accessible.
           1. Pulling from the datatape
           2. Pulling from a server
  2. Challenge: How do you find authority to regulate pre-suit behavior
     1. This can be viewed as similar to FRCP 11 Sanctions requiring a reasonable inquiry.

## Post Filing

|  |  |  |
| --- | --- | --- |
| **Date** | **What happened** | **What you have to do** |
| Jan 2 | Suit Filed |  |
| Jan 10 | D Served | FRCP 26f Conference of the Parties |
| April 20 | Conference with the Parties |  |
| May 4 | Mandatory Initial Disclosure |  |
| May 10 | Conference with the Court |  |

* 1. FRCP 26f Conference of the Parties
     1. A conference to discuss what will be needed and how they will get delivered.
  2. FRCP 26a Mandatory Initial Disclosures (14 Days after FRCP 26f meeting)
     1. You must disclose any document that you have control of that could be useful to you in building or defending your case.
  3. FRCP 16b Conference with the court (21 Days after FRCP 26f Meeting
     1. 90 Days after D answers or 120 after getting served in the case.

1. Helpful Resources (E-Discovery)
   1. Sedona Conference
      1. Ken Witters
   2. Jason Baron (National Archieve)
2. Identification – any relevant information and how to get it
   1. Preservation – protection from changing or deleting information
      1. Collection – gather all ESI
         1. Processing – remove duplicate or irrelevant information
            1. Review – Law firm reviews for private and privileged information

Analysis

Production – give the final stuff to the other side

Presentation – display info in a clear format

1. Electronically Stored Information (ESI)
   1. Challenge = volume and complexity
   2. Preservation obligation
      1. Trigger – reasonably anticipated
      2. Scope – what has to be preserved
         1. One has a duty to discovery records in this possession, custody or control that are reasonably accessible.
            1. Possession, custody or control

Ownership or physical possession not required. Instead, the question is whether one has the right or practical ability to obtain the records.

* 1. The big issue is movements for sanctions because of failing in the duty of preserving evidence (spoliation)
     1. ***Williams v. Spring/United Management Co.:*** P, who was fired in a reduction of workforce, sued for age discrimination. She sought discovery of a spreadsheet. Metadata in the spreadsheet may have shown how the employer reworked pools of employees to be fired to improve its chances of passing muster under discrimination laws. The employer scrubbed the metadata before producing the spreadsheets.   
        **HOLDING:** Data had to be produced in the form that it was normally kept. Burden is on the employer to object and claim privilege or work product. Failure to do so constitutes waiver.
     2. ***Zubulake v. UBS Warburg LLC:*** An equities trader (making $650,000/year) sued her employer for gender discrimination. She sought discovery of e-mils concerning her employment by or from five employees, including her supervisors. The e-mails had been deleted can could be recovered only from backup tapes. The cost of restoring the backup tapes was ~$19,000. However, the cost of restoring the last 89 communications was $273,000.   
        **HOLDING:** The backup tapes were not reasonably accessible and that the P had shown good cause to get access to the tapes. Because of this showing of good cause, the court allowed discovery so long as the P paid 25% of the cost.

## Scope of Discovery

### Is the information discoverable?

* + 1. **Broad Discovery of Non-Privileged, Proportional, and Relevant Information (26b1):** The FRCP grants a broad-basis for discovery. Unless the court otherwise orders, parties may discover “any non-privileged matter that is relevant to any party’s claim or defense. Consequently, the four limiters on discovery are whether the information is (1) relevant, (2) proportional, (3) privileged, or (4) a work-product.

### Is the information relevant?

* + 1. **Tendency to Make Existence of Fact More Probable Standard:** Something is relevant if it has any tendency to make the existence of any fact more probable or less probable than it would be without it.
       1. **No Requirement for Admissibility (26b1):** Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Consequently, a party can seek discovery of material that would inadmissible as hearsay because it could lead to actual evidence to prove a claim or defense.
       2. **Court-Ordered Discovery (26b1):** A court is permitted to grant broader discovery regarding the subject matter involved in the action if good cause is shown. Good cause is assessed on a case-by-case basis.

### Is the discovery proportional?

* + 1. **Unreasonably Redundant Discovery (26b2Ci) (Test 1 of 3):** A court must limit the frequency or extent of discovery when the discovery sought is unreasonably cumulative or duplicative, **and** can be obtained from some other source that is more convenient, less burdensome or less expensive.
    2. **Undue Delay in Discovery (26b2Cii) (Test 2 of 3):** A court must limit the frequency or extent of discovery when the party seeking discovery has had ample opportunity to obtain the information by discovery in the action.
    3. **Burden > Benefit (26b2Ciii) (Test 3 of 3):** A court must limit the frequency of extent of discovery when the burden of expense of the proposed discovery outweighs its likely benefit. Factors that the court can take into account include: (1) needs of the case; (2) the amount in controversy; (3) the importance of the issues; and (4) the parties resources.

### Is the information privileged?

* + 1. **Confidential Information Between Particular People Must Be Kept Secret (26b1):** Privilege refers to the right to keep something secret because of the party’s unique relationship. The person holding the privilege cannot be forced to divulge information and the counterparty can prevent the person from divulging information. There is a two-part test for determining whether privilege sticks: (1) is there a relationship between the parties that justifies privileged communication **and** **(2)** was the information confidential.
       1. **Relationship Test:** Approved relationships are (1) doctor and patient, (2) lawyer and client, (3) clergy member and pastor, and (4) husband and wife.
       2. **Confidential Communication Test:** **(a) [Location of Communication]** did the communication take place in a private location? If communication took place in a public location, like an elevator, it will not be deemed privileged because the party uttering the information did not make an effort to guard the secrecy of the information. **(b) [Provision of Professional Service]** was the communication made in regard to the furtherance of professional services? Communication between parties that are not engaged, or do not plan to engage, in a professional services is not privileged.
          1. **Attorney-Client Privilege Test: (1)** the relation of attorney and client existed at the time the communication was made, **(2)** the communication was made in confidence, **(3)** the communication relates to a matter about which the attorney is being professionally consulted, **(4)** the communication was made in the course of giving or seeking legal advice, **and** **(5)** the client has not waived the privilege.

***Hoffman’s Test:* (1)** Legal advise sought; **(2)** to/from a lawyer (or lawyer’s representative; **(3)** communication relates to advice; **(4)** to/from client; **and** **(5)** confidential.

* + - * 1. ***Upjohn v United States:***The Petitioner, Upjohn Co. (Petitioner) conducted an internal audit and investigation that revealed alleged illegal payments made to foreign officials in exchange for business. Petitioner volunteered notice of such actions to the Internal Revenue Service (IRS), who issued a summons for information collected by Petitioner, including internal questionnaires sent to managerial employees. Petitioner maintained those documents were protected by the attorney-client privilege and attorney work product.  
           **RULE:** **In the corporate context, attorney-client privilege extends to lower level employees, not just to those in control of the corporation**. **The court uses the subject matter test- any employee can be protected by attorney-client privilege if the communication is relevant to the subject matter of a legal issue.  
           HOLDING:** The attorney-client privilege only protects disclosure of communications. It does not protect disclosure of the underlying facts by those who communicated with the attorney. In this case, the Petitioner gave to the IRS a list of those employees to whom the questionnaire was given and those who answered. The IRS was free to question the employees who communicated with Thomas and outside counsel. The court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. The notes and memoranda that the IRS sought in this case were work product based on oral statements. **This required the IRS to show necessity and undue hardship in obtaining the information it sought**
        2. ***Hickman v. Taylor:*** A tugboat that was towing a car ferry across the Delaware River sank. Five of the nine crew members on the tug drowned. The tugboat company hired an attorney to conduct interviews in preparation of a trial. In a wrongful death action, the deceased Ps’ attempted to discover the witness’s statements.  
           **HOLDING:** The statements were not protected by attorney-client privilege because the interviewees were not clients of the attorney.
    1. **Privilege Log Available and Required for Assertion of Privilege (26b5A):** The party withholding information on the basis of privilege must expressly make the claim and describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.
       1. **Accidental Disclosure (FRE 502b):** The accidental disclosure of privileged material does not operate as a waiver to privilege so long as the holder of the privilege promptly tries to remedy the problem once she found out about it.

### Is the information a work product?

* + 1. **“Ordinary” Work Product – Tangible Evidence Prepared in Anticipation of Litigation (26b3A):** Work product is **(1)** documents and tangible things that are **(2)** prepared in anticipation of ligation or for trial. Work produce can be generated **(3)** by or for a party or its representatives, including its attorney, consultant, surety, indemnitor, insurer, or agent. If test is met, the presumption is that the “thing” is a work product (i.e., not discoverable).

***Hoffman’s Test:*** **(1)** Document & tangible things; **(2)** Prepared in anticipation of litigation/trail; **(3)** by or for a party (or its representatives). Hickman test is just 2 and 3.

* + - * 1. ***Hickman v. Taylor:*** A tugboat that was towing a car ferry across the Delaware River sank. Five of the nine crew members on the tug drowned. The tugboat company hired an attorney to conduct interviews in preparation of a trial. In a wrongful death action, the deceased Ps’ attempted to discover the witness’s statements.  
           **HOLDING:** The material was prepared “with an eye towards anticipated litigation” and, therefore, “falls outside the arena of discovery.” Absent showing of (1) a necessity, (2) denial would unduly prejudice the preparation of the party’s case, or (3) cause the party any hardship or injustice, the interview were not discoverable.

***Intangible Items:*** Hickman is a backup for showing that intangible information is discoverable. Some courts have employed a broad reading.

* + - 1. **Material Prepared During Normal Course of Business = Discoverable:** Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes are not protected.
      2. **Use of Interrogatories to Discover Work Product Prohibited:** The discovery of detailed descriptions of the contents of documents through interrogatories is equivalent to discovery of the documents themselves and should not be permitted.
      3. **Privilege Log Available and Required for Assertion of Privilege (26b5A):** The party withholding information on the basis of privilege must expressly make the claim and describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.
      4. **Steps:** **(1)** Does 26b3 apply? **(2)** Does an exception apply? **(3)** Is the product a “core” work product? **(4)** Is this person outside of 26b3 (i.e., expert opinion)?
    1. **Exceptions To The “Ordinary” Work Product Rule (26b3Aii):** The work product protection can be overcome if the party seeking the information shows two things: **(1)** substantial need for the materials to prepare her case **and** **(2)** that she cannot without undue hardship obtain their substantial equivalent by other means. Effectively, the underlying evidence is gone, unreachable, and important to the trial. Showing is relevant, material to the case,
       1. **“Core”/Opinion Work Product are Absolutely Protected Work Product (26b3B):** A court must protect against disclosure of certain things, such as **(1)** mental impressions, **(2)** conclusions, **(3)** opinions, or **(4)** legal theories.
          1. **Strict Reading = One Opinion Negates (Majority View):** If court order discovery of tangible information and exceptional showing has been made, you go through the materials to make sure that there are no opinions contained in the information. If an opinion is present, then a court will not grant access to the work product.

**Non-Discoverable Material Should be Separated/Redacted from Document Containing Discoverable and Non-Discoverable Material:** The court should order production with the non-discoverable material redacted when a single document contains both discoverable and non-discoverable work product. Redacting means that the material would be clocked out.

* + - * 1. **Broad Reading = Applies to Any (Minority View):** That all mental impression, even those that are not tangible.
      1. **Right to Own Statement Exception (26b3C):** Anyone has a right to obtain her own previous statement about the action or its subject matter. *Hoffman’s perception is that statements must be verbatim*. (i.e., can’t receive if attorney’s comments are part of the recording)

### Is the party an expert?

* + 1. **Consulting Experts (26b4D):** Consulting experts are experts hired to assist the lawyer in preparing and monitoring a case. Discovery of facts known or opinions held is not available when an expert is retained or specially employed in anticipation of litigation or to prepare for trail, but who are not expected to testify.
       1. **Work Product Protection for Drafts and Communications (26b4B/C):** Work product protection extends the a consulting expert’s drafts of reports and disclosures under 26a2 and to communications between a party’s lawyer and an expert witness who was required to produce a written report under 26a2B.
    2. **Expert Witness (26a2):** An expert witness is one who will testify at trial on behalf of the party. Expert witnesses are entitled to testify as to their opinions and are hired to give their professional opinion.
       1. **Right to Take Depositions (26b4A):** Gives parties a right to take the depositions of any expert witness identified through 26a2
       2. **Payment of Reasonable Fee (26b4E):** The party seeking discovery of an expert witness generally must pay a reasonable fee to the expert for the expert’s time spend responding to the discovery request

# Judgment as a Matter of Law

|  |  |  |
| --- | --- | --- |
| **Before Trial** | **During Trial** | **After Trial** |
| 26 Motion for Summary Judgment | 50a Judgment as a Matter of Law | 50b JNOV |

## Motion for Summary Judgment (MSJ)

### Overview

* + 1. **No Genuine Dispute of Material Facts (56a):** Summary judgment is appropriate when there is **(1)** no genuine dispute **(2)** as to any material fact **and** **(3)** the movant is entitled to a judgment as a matter of law.
       1. ***Dyer v. MacDougall:*** P sued for defamation and alleged that D said derogatory untruths about P to various third parties. D moved for summary judgment based on sworn statements by third parties. The statements said that D had not made any such statements.   
          **HOLDING:** Summary judgment granted in favor of D because the evidence showed that there was no dispute of fact, and D was entitled to judgment.
    2. **Complete and Partial Summary Judgment:** A party can move for summary judgment on a claim or defense or on a part of each claim or defense. In other words, the court can grant summary judgment on specific issues.
    3. **Evidence (56c1):** A party may rely upon particular parts of the record for its motion for summary judgment, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purpose of the motion only), admissions, interrogatory answers, or other material.
       1. **Affidavits and Declaration Requirements; Interrogatories and Depositions Requirements (56c4):** An affidavit or declaration must be **(1)** made on personal knowledge, **(2)** set out facts that would be admissible in evidence, **and** **(3)** show that the affiant or declarant is competent to testify on matters stated.
       2. **Documentary Evidence Requirement (56c4):** Documentary evidence, such as a contract or a deed, must be authenticated. Authentication means that the proffering party must provide admissible evidence from person with firsthand knowledge sufficient to all hoer to have the document admitted into evidence.
       3. **Verified Pleadings (56c4):** A verified pleading is one that is executed under oath. Normally, a motion for summary judgment is not decided using pleadings, but a court can evaluate a certified pleading because it was executed under oath. Similarly, a court can use a deemed or explicit admission in a pleading.

### Genuine Dispute as to a Material Fact

* + 1. **Based on Substantive Law:** The substantive law creating the claim or defense determines materiality. A material fact is one that might affect the outcome of the case under the governing law.
       - 1. **Irrelevant Facts:** Factual disputes that are irrelevant or unnecessary will not be counted when evaluating whether to grant or deny a motion for summary judgment.
    2. **Has the Movant Met Its Burden?**
       1. **Movant’s Burden (Slight Burden):** “Show me what you go.” The movant in a motion for summary judgment must show the absence of genuine factual issues in the non-movant's case, although the movant is not required specifically to negate any aspects of his opponent's claims. When the movant does bears the burden of proof, the Celotex Test does not apply. Rationale is that they do not bare the burden of proof on the issue, anyways. (Rehnquist)

**Use as a Weapon:** The movant without the burden of proof will always use this to test the other party’s position.

**Non-Movent Burden:** The non-moving party that bears the burden of proof of the claim or defense at trial must prove a reasonable jury could conclude that the allegations are true **(1)** based on the evidence in the record **and** the **(2)** evidentiary standard of the underlying claim.

**White Requirement:** “The movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the P has no evidence to prove his case.”

* + - * 1. ***Celotex Corp. v. Catrett:*** P sued several manufacturers in a wrongful death action caused by exposure to asbestos. One of the Ds moved for summary judgment by pointing out that P lacked evidence showing that it had exposed P to asbestos.   
           **HOLDING:** A party who does not have the burden of proof at trial may move for summary judgment without producing evidence. FRCP 56c1 fact cannot support test.

After that, the burden shifts to the nonmovant to overcome summary judgment.

* + - 1. **Movant’s Burden (High Bar):** The movant must show that no reasonable jury would find for the other side. This standard may be a clear and convincing standard, but it might also be higher. The rule is that it is a high standard.
         1. ***Scott v.*** ***Harris:*** Police officers clocked the P driving 73 in a 55 mph zone. The P led the officers on a high-speed chase, during which the officer attempted to force the motorist’s vehicle into a spin. Instead, they cased the car to run off the road, and the P was severely injured. Officers moved for summary judgment claiming that P endangered human life, and produced a video to support the allegations. Officer’s claimed qualified immunity.   
            **HOLDING:**  No reasonable jury could find that the force was excessive. Therefore, it means that the party is entitled to summary judgment on the matter. When the opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, the court should not adopt that version of facts for purposes of ruling on MSJ.
    1. **Has the Non-Movant Met Its Burden?**
       1. **Reasonable Jury Standard to Combat MSJ:** A motion for summary judgment should be denied when the non-moving party produces enough evidence to convince a reasonable jury of its position. This is above the earlier scintilla of evidence standard.
          1. ***Anderson v. Liberty Lobby:*** Public figures sued for defamation over articles that characterized them as racists, anti-Semitic, and neo-Nazi. The D moved for summary judgment based upon affidavit by the author of some of the allegedly defamatory articles. The author stated that he researched the articles extensively and believed the allegations to be true.   
             **HOLDING:** The nonmoving part must produce more than a scintilla of evidence to deny a motion for summary judgment; the party must produce sufficient evidence from which a reasonable jury could find in favor of the nonmoving party.
          2. ***Celotex Corp. v. Catrett [Remand]:*** P sued several manufacturers in a wrongful death action caused by exposure to asbestos. One of the Ds moved for summary judgment by pointing out that P lacked evidence showing that it had exposed P to asbestos.   
             **HOLDING:** The deposition in a worker’s compensation proceeding, the letter from the former employer, and the letter from the insurance company is sufficient for convincing a reasonable jury that the movant exposed the non-movant to asbestos.

**Reasonable Jury Standard:** Probability is either **(1)** some possibility or **(2)** good possibility. Do not need to exceed the preponderance of evidence. That is the standard for trail.

* + - * 1. Who bears the burden of persuasion at trial? What is that burden?

Mere Scintilla

Some Possibility

Good Probability

Preponderance of the Evidence

Clear and Convincing

Beyond a reasonable doubt

* + - 1. **Plausibility of Allegations:** The party opposing the motion for summary judgment is to receive the benefit of all reasonable doubts as to whether there is a genuine dispute of fact. But the doubts must be reasonable, and courts should not slip into sheer speculation when assessing the nonmoving party’s position.
         1. ***Matsushita Electric Industrial Co.*** ***v. Zenith Radio Corp.:*** U.S. manufacturers of televisions sued several Japanese manufacturers, and alleged that the Japanese companies had conspired to keep prices of their products sold in the US artificially low. D moved for summary judgment based on plausibility of the allegations.  
            **HOLDING:** Ps’ theory of predatory pricing was implausible because it would require the Ds to endure years of losses to drive the S manufacturers out of business. This level of implausibility required the Ps to come forward with than normally required.
         2. ***Kodak Co. v. Image Technical Service, Inc.:*** D moved for summary judgment in an anti-trust case, arguing that P’s theory was economically implausible.  
            **HOLDING:** A reasonable jury might accept the P’s theory of anti-trust violation.
  1. **Timing**
     1. **MAX = 30-Days Before Conclusion After Conclusion of Disovery (56b):** A movant may file a motion for summary judgment at any time until 30 days after close of all discovery. Local rules may take precedent.
  2. **Entitled to Judgment**
     1. The court can grant summary judgmegrant
  3. Perspectives
     1. Need MSJ because of the advent of notice pleading.
     2. Slightest doubt as to the facts, but this does not sound like any of the cases that we read. However, this is the prevailing view until 1986.
        1. Summary judgment should be used sparingly when motive is a critical component of the case.
        2. Trial by affidavit is not a substitute of trail by jury.
  4. Questioning the Movant’s burden under Celotex
     1. Celotex showed that there would be no admissible evidence at trial showing that there was a dispute.
        1. Justic White says that it is not enough to say that you don't have enough evidence. There is good reason to think that the conventional is wrong. Coming forward with the interrogatories is sufficient evidence (they did something).
     2. Texas Difference: 1999 Texas Supreme Court amended the Texas Rules for Civil Procedure
        1. 166a(a) – Traditioanl – Heavy burden that the movant must show no dispute
        2. 166a(i) – No evidence summary judgment movement – borrowing the celotex standard. Party may move with no evidence at all saying that the party has no satisfied the evidentiary standard.
  5. Admissibility of Evidence in MSJ
     1. **No Admissibility Standard (326):** The non-moving party does not need to produce evidence that is admissible in trial in order to win at trial.
        1. **Broad Interpretation (Probably not):** You could come forward with affidavits when the parties lack any information about the underlying issue or may be unable to testify
        2. **Narrower Interpretation (Probably):** At the summary judgment stage, you can come forward with evidence that is in a form that is not in an admissible form so long as you could come forward with admissible evidence at trial.
           1. **Hoff Letter in Celotex [Form = Affidavit vs. Live Testimony]:** The company P worked for had purchase material from D, and that P was employed during the time. The form of the evidence, the letter, was hearsay (out of court statement), but P could get the content of the letter into admissible form by having the author testify, provided the author meet the hearsay standard.

There is no requirement to depose your own witness to combat a MSJ.

* + - * 1. **Hoff Letter in Celotex [Subject = Hearsay]:** There was no evidence that the author of the letter actually had personal knowledge of the exposure or the material in the letter.
  1. FRCP 56
     1. Supporting factual position.
     2. Judge is making a prediction about whether a judge could reasonably decide based on the standard of proof whether the nonmoving party could meet their evidentiary burden. This is a prediction because it is possible that evidence could develop between the date the summary judgment was granted and the date of the trial (i.

1. Motion for Judgment as a matter of law
   1. Same standard as rule 56. Judge has the benefit of being able to see the evidence and then being able to know how to proceed.

|  |  |  |
| --- | --- | --- |
| P’s Proof is Overwhelming | Reasonable jury could find for P or D (the movant) | D’s Proof is Overwhelming |
| No way for a reasonable jury to rule against them. | Just that there is enough evidence for a reasonable jury to believe that the underlying evidentiary standard was met. | If the P has not done the basic thing that they are obligated to do to prove their case, the |

If you, as the movant, want to show that there is no material dispute of material fact, you put your best foot forward so you will go over the minimum level.

These questions require you to put through a lot of information that make you have to debate over whether the evidence. There will not be a detailed sifting of evidence, but you will need to make an assessment weighing the evidence.

1. (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
2. (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
3. (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

# Rules Appendix

## RULE 8. GENERAL RULES OF PLEADING

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses; Admissions and Denials.

(1) In General. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

&nbsp;(2) Denials—Responding to the Substance. A denial must fairly respond to the substance of the allegation.

(3) General and Specific Denials. A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) Denying Part of an Allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) Lacking Knowledge or Information. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) Effect of Failing to Deny. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

• accord and satisfaction;

• arbitration and award;

• assumption of risk;

• contributory negligence;

• duress;

• estoppel;

• failure of consideration;

• fraud;

• illegality;

• injury by fellow servant;

• laches;

• license;

• payment;

• release;

• res judicata;

• statute of frauds;

• statute of limitations; and

• waiver.

(2) Mistaken Designation. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) In General. Each allegation must be simple, concise, and direct. No technical form is required.

(2) Alternative Statements of a Claim or Defense. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

## FORM 11 COMPLAINT OF NEGLIGENCE

2. On <Date>, at <Place>, the defendant negligently \_\_\_\_\_\_\_\_\_\_ against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $ <\_\_\_\_\_> .

Therefore, the plaintiff demands judgment against the defendant for $ <\_\_\_\_\_> , plus costs.

## RULE 12. DEFENSES AND OBJECTIONS: WHEN AND HOW PRESENTED; MOTION FOR JUDGMENT ON THE PLEADINGS; CONSOLIDATING MOTIONS; WAIVING DEFENSES; PRETRIAL HEARING

(a) Time to Serve a Responsive Pleading.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under [Rule 4(d)](http://www.law.cornell.edu/rules/frcp/rule_12#rule_4_d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) United States Officers or Employees Sued in an Individual Capacity. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under [Rule 19](http://www.law.cornell.edu/rules/frcp/rule_19).

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under [Rule 12(b)(6)](http://www.law.cornell.edu/rules/frcp/rule_12#rule_12_b_6) or[12(c)](http://www.law.cornell.edu/rules/frcp/rule_12#rule_12_c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under [Rule 56](http://www.law.cornell.edu/rules/frcp/rule_56). All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) Right to Join. A motion under this rule may be joined with any other motion allowed by this rule.

(2) Limitation on Further Motions. Except as provided in [Rule 12(h)(2)](http://www.law.cornell.edu/rules/frcp/rule_12#rule_12_h_2) or [(3)](http://www.law.cornell.edu/rules/frcp/rule_12#rule_12_h_3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) When Some Are Waived. A party waives any defense listed in Rule [12(b)(2)](http://www.law.cornell.edu/rules/frcp/rule_12#rule_12_b_2)–(5) by:

(A) omitting it from a motion in the circumstances described in [Rule 12(g)(2)](http://www.law.cornell.edu/rules/frcp/rule_12#rule_12_g_2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by [Rule 15(a)(1)](http://www.law.cornell.edu/rules/frcp/rule_12#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)](http://www.law.cornell.edu/rules/frcp/rule_12#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)](http://www.law.cornell.edu/rules/frcp/rule_12#rule_7_a);

(B) by a motion under [Rule 12(c)](http://www.law.cornell.edu/rules/frcp/rule_12#rule_12_c); or

(C) at trial.

(3) Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in [Rule 12(b)(1)](http://www.law.cornell.edu/rules/frcp/rule_12#rule_12_b_1)–(7)—whether made in a pleading or by motion—and a motion under [Rule 12(c)](http://www.law.cornell.edu/rules/frcp/rule_12#rule_12_c) must be heard and decided before trial unless the court orders a deferral until trial.

## RULE 11. SIGNING PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO THE COURT; SANCTIONS

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that [Rule 11(b)](http://www.law.cornell.edu/rules/frcp/rule_11#rule_11_b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates [Rule 11(b)](http://www.law.cornell.edu/rules/frcp/rule_11#rule_11_b). The motion must be served under [Rule 5](http://www.law.cornell.edu/rules/frcp/rule_5), but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated[Rule 11(b)](http://www.law.cornell.edu/rules/frcp/rule_11#rule_11_b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating [Rule 11(b)(2)](http://www.law.cornell.edu/rules/frcp/rule_11#rule_11_b_2); or

(B) on its own, unless it issued the show-cause order under [Rule 11(c)(3)](http://www.law.cornell.edu/rules/frcp/rule_11#rule_11_c_3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

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6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules [26](http://www.law.cornell.edu/rules/frcp/rule_26) through [37](http://www.law.cornell.edu/rules/frcp/rule_37).

## RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under [Rule 12(b)](http://www.law.cornell.edu/rules/frcp/rule_15#rule_12_b),[(e)](http://www.law.cornell.edu/rules/frcp/rule_15#rule_12_e), or [(f)](http://www.law.cornell.edu/rules/frcp/rule_15#rule_12_f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties’ express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

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

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if [Rule 15(c)(1)(B)](http://www.law.cornell.edu/rules/frcp/rule_15#rule_15_c_1_B) is satisfied and if, within the period provided by[Rule 4(m)](http://www.law.cornell.edu/rules/frcp/rule_15#rule_4_m) for serving the summons and complaint, the party to be brought in by amendment:

(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 proper party's identity.

(2) Notice to the United States. When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of [Rule 15(c)(1)(C)(i)](http://www.law.cornell.edu/rules/frcp/rule_15#rule_15_c_1_C_i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

## RULE 18. JOINDER OF CLAIMS

(a) In General. A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many 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 with the parties’ relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

## RULE 20. PERMISSIVE JOINDER OF PARTIES

(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.

(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.

(b) 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.

## RULE 23. CLASS ACTIONS

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if [Rule 23(a)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members’ interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under [Rule 23(g)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under [Rule 23(b)(1)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_b_1) or [(b)(2)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_b_2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under [Rule 23(b)(3)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_b_3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under [Rule 23(c)(3)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_c_3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under [Rule 23(b)(1)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_b_1) or [(b)(2)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_b_2), include and describe those whom the court finds to be class members; and

(B) for any class certified under [Rule 23(b)(3)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_b_3), include and specify or describe those to whom the [Rule 23(c)(2)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_c_2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members’ opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under [Rule 23(d)(1)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_d_1) may be altered or amended from time to time and may be combined with an order under [Rule 16](http://www.law.cornell.edu/rules/frcp/rule_16).

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision

(e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under [Rule 23(h)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under [Rule 23(g)(1)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_23_g_1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties’ agreement. The following procedures apply:

(1) A claim for an award must be made by motion under [Rule 54(d)(2)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_54_d_2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under [Rule 52(a)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_52_a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in [Rule 54(d)(2)(D)](http://www.law.cornell.edu/rules/frcp/rule_23#rule_54_d_2_D).

## RULE 13. COUNTERCLAIM AND CROSSCLAIM

(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:

(A) when the action was commenced, the claim was the subject of another pending action; or

(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 Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) Relief Sought in a Counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim Against the United States. These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.

(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.

(f) [Abrogated. ]

(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](http://www.law.cornell.edu/rules/frcp/rule_19) and [20](http://www.law.cornell.edu/rules/frcp/rule_20) govern the addition of a person as a party to a counterclaim or crossclaim.

(i) Separate Trials; Separate Judgments. If the court orders separate trials under [Rule 42(b)](http://www.law.cornell.edu/rules/frcp/rule_13#rule_42_b), it may enter judgment on a counterclaim or crossclaim under [Rule 54(b)](http://www.law.cornell.edu/rules/frcp/rule_13#rule_54_b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

## RULE 14. THIRD-PARTY PRACTICE

(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/rule_12);

(B) must assert any counterclaim against the third-party plaintiff under [Rule 13a](http://www.law.cornell.edu/rules/frcp/rule_14#rule_13_a), and may assert any counterclaim against the third-party plaintiff under [Rule 13(b)](http://www.law.cornell.edu/rules/frcp/rule_14#rule_13_b) or any crossclaim against another third-party defendant under [Rule 13(g)](http://www.law.cornell.edu/rules/frcp/rule_14#rule_13_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/rule_12) and any counterclaim under [Rule 13(a)](http://www.law.cornell.edu/rules/frcp/rule_14#rule_13_a), and may assert any counterclaim under [Rule 13(b)](http://www.law.cornell.edu/rules/frcp/rule_14#rule_13_b) or any crossclaim under [Rule 13(g)](http://www.law.cornell.edu/rules/frcp/rule_14#rule_13_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.

(6) Third-Party Complaint In Rem. If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the “summons” includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) in the property arrested.

(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.

(c) Admiralty or Maritime Claim.

(1) Scope of Impleader. If a plaintiff asserts an admiralty or maritime claim under [Rule 9(h)](http://www.law.cornell.edu/rules/frcp/rule_14#rule_9_h), the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable—either to the plaintiff or to the third-party plaintiff— for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

(2) Defending Against a Demand for Judgment for the Plaintiff. The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under [Rule 12](http://www.law.cornell.edu/rules/frcp/rule_12) against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

## RULE 19. REQUIRED JOINDER OF PARTIES

(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. This rule is subject to [Rule 23](http://www.law.cornell.edu/rules/frcp/rule_23).

## 28 USC § 1331 - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

## 28 USC § 1332 - Diversity of citizenship; amount in controversy; costs

**(a)** The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

**(1)** citizens of different States;

**(2)** citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

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

**(4)** a foreign state, defined in section [1603](http://www.law.cornell.edu/uscode/text/28/1603) [(a)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001603----000-#a) of this title, as plaintiff and citizens of a State or of different States.

**(b)** Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

**(c)** For the purposes of this section and section [1441](http://www.law.cornell.edu/uscode/text/28/1441) of this title—

**(1)** a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

**(A)** every State and foreign state of which the insured is a citizen;

**(B)** every State and foreign state by which the insurer has been incorporated; and

**(C)** the State or foreign state where the insurer has its principal place of business; and

**(2)** the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

**(d)**

**(1)** In this subsection—

**(A)** the term “class” means all of the class members in a class action;

**(B)** the term “class action” means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

**(C)** the term “class certification order” means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

**(D)** the term “class members” means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

**(2)** The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

**(A)** any member of a class of plaintiffs is a citizen of a State different from any defendant;

**(B)** any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

**(C)** any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

**(3)** A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

**(A)** whether the claims asserted involve matters of national or interstate interest;

**(B)** whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

**(C)** whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

**(D)** whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

**(E)** whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

**(F)** whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

**(4)** A district court shall decline to exercise jurisdiction under paragraph (2)—

**(A)**

**(i)** over a class action in which—

**(I)** greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

**(II)** at least 1 defendant is a defendant—

**(aa)** from whom significant relief is sought by members of the plaintiff class;

**(bb)** whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

**(cc)** who is a citizen of the State in which the action was originally filed; and

**(III)** principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

**(ii)** during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

**(B)** two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

**(5)** Paragraphs (2) through (4) shall not apply to any class action in which—

**(A)** the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

**(B)** the number of members of all proposed plaintiff classes in the aggregate is less than 100.

**(6)** In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

**(7)** Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

**(8)** This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

**(9)** Paragraph (2) shall not apply to any class action that solely involves a claim—

**(A)** concerning a covered security as defined under 16(f)(3) [[1]](http://www.law.cornell.edu/uscode/text/28/1332" \l "FN-1)of the Securities Act of 1933 ([15](http://www.law.cornell.edu/uscode/text/15) U.S.C. [78p](http://www.law.cornell.edu/uscode/text/15/78p) [(f)(3)](http://www.law.cornell.edu/uscode/text/15/usc_sec_15_00000078---p000-#f_3) [[2]](http://www.law.cornell.edu/uscode/text/28/1332" \l "FN-2)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 ([15](http://www.law.cornell.edu/uscode/text/15) U.S.C. [78bb](http://www.law.cornell.edu/uscode/text/15/78bb) [(f)(5)(E)](http://www.law.cornell.edu/uscode/text/15/usc_sec_15_00000078--bb000-#f_5_E));

**(B)** that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

**(C)** that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 ([15](http://www.law.cornell.edu/uscode/text/15) U.S.C. [77b](http://www.law.cornell.edu/uscode/text/15/77b) [(a)(1)](http://www.law.cornell.edu/uscode/text/15/usc_sec_15_00000077---b000-#a_1)) and the regulations issued thereunder).

**(10)** For purposes of this subsection and section [1453](http://www.law.cornell.edu/uscode/text/28/1453), an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

**(11)**

**(A)** For purposes of this subsection and section [1453](http://www.law.cornell.edu/uscode/text/28/1453), a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

**(B)**

**(i)** As used in subparagraph (A), the term “mass action” means any civil action (except a civil action within the scope of section [1711](http://www.law.cornell.edu/uscode/text/28/1711) [(2)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001711----000-#2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

**(ii)** As used in subparagraph (A), the term “mass action” shall not include any civil action in which—

**(I)** all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

**(II)** the claims are joined upon motion of a defendant;

**(III)** all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

**(IV)** the claims have been consolidated or coordinated solely for pretrial proceedings.

**(C)**

**(i)** Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section [1407](http://www.law.cornell.edu/uscode/text/28/1407), or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section [1407](http://www.law.cornell.edu/uscode/text/28/1407).

**(ii)** This subparagraph will not apply—

**(I)** to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

**(II)** if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

**(D)** The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

**(e)** The word “States”, as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

## 28 USC § 1367 - Supplemental jurisdiction

**(a)** Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

**(b)** In any civil action of which the district courts have original jurisdiction founded solely on section [1332](http://www.law.cornell.edu/uscode/text/28/1332) of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section [1332](http://www.law.cornell.edu/uscode/text/28/1332).

**(c)** The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

**(1)** the claim raises a novel or complex issue of State law,

**(2)** the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

**(3)** the district court has dismissed all claims over which it has original jurisdiction, or

**(4)** in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

**(d)** The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

**(e)** As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

## RULE 4. SUMMONS

(a) Contents; Amendments.

(1) Contents. A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) Amendments. The court may permit a summons to be amended.

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served.

(c) Service.

(1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by[Rule 4(m)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_m) and must furnish the necessary copies to the person who makes service.

(2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) By a Marshal or Someone Specially Appointed. At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under [28 U.S.C. §1915](http://www.law.cornell.edu/jureeka/index.php?doc=U.S.C.&title=28&sec=1915&sec2=undefined&year=undefined) or as a seaman under[28 U.S.C. §1916](http://www.law.cornell.edu/jureeka/index.php?doc=U.S.C.&title=28&sec=1916&sec2=undefined&year=undefined).

(d) Waiving Service.

(1) Requesting a Waiver. An individual, corporation, or association that is subject to service under [Rule 4(e)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_e), [(f)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_f), or [(h)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under [Rule 4(h)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, 2 copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside any judicial district of the United States—to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) Failure to Waive. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) Time to Answer After a Waiver. A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent—or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) Results of Filing a Waiver. When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by [Rule 4(f)(2)(A)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_f_2_A), [(f)(2)(B)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_f_2_B), or [(f)(3)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_f_3).

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule [4(e)(1)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_e_1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by [Rule 4(f)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_f) for serving an individual, except personal delivery under [(f)(2)(C)(i)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_f_2_C_i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) United States. To serve the United States, a party must:

(A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity. To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) Officer or Employee Sued Individually. To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under [Rule 4(e)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_e), [(f)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_f), or [(g)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_g).

(4) Extending Time. The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under [Rule 4(i)(2)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_i_2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under [Rule 4(i)(3)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_i_3), if the party has served the United States officer or employee.

(j) Serving a Foreign, State, or Local Government.

(1) Foreign State. A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with [28 U.S.C. §1608](http://www.law.cornell.edu/jureeka/index.php?doc=U.S.C.&title=28&sec=1608&sec2=undefined&year=undefined).

(2) State or Local Government. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(k) Territorial Limits of Effective Service.

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under [Rule 14](http://www.law.cornell.edu/rules/frcp/rule_14) or [19](http://www.law.cornell.edu/rules/frcp/rule_19) and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(l) Proving Service.

(1) Affidavit Required. Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) Service Outside the United States. Service not within any judicial district of the United States must be proved as follows:

(A) if made under [Rule 4(f)(1)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_f_1), as provided in the applicable treaty or convention; or

(B) if made under [Rule 4(f)(2)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_f_2) or [(f)(3)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_f_3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) Validity of Service; Amending Proof. Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under [Rule 4(f)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_f) or [4(j)(1)](http://www.law.cornell.edu/rules/frcp/rule_4#rule_4_j_1).

(n) Asserting Jurisdiction over Property or Assets.

(1) Federal Law. The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) State Law. On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

## 28 USC § 1391 - Venue generally

**(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.

**(e)** **Actions Where Defendant Is Officer or Employee of the United States.—**

**(1)** **In general.—**A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which

**(A)** a defendant in the action resides,

**(B)** 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

**(C)** the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

**(2)** **Service.—**The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

**(f)** **Civil Actions Against a Foreign State.—**A civil action against a foreign state as defined in section [1603](http://www.law.cornell.edu/uscode/text/28/1603) [(a)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001603----000-#a) of this title may be brought—

**(1)** in any 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;

**(2)** in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section [1605](http://www.law.cornell.edu/uscode/text/28/1605) [(b)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001605----000-#b) of this title;

**(3)** in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section [1603](http://www.law.cornell.edu/uscode/text/28/1603) [(b)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001603----000-#b) of this title; or

**(4)** in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

**(g)** **Multiparty, Multiforum Litigation.—**A civil action in which jurisdiction of the district court is based upon section [1369](http://www.law.cornell.edu/uscode/text/28/1369) of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

## 28 USC § 1404 - Change of venue

**(a)** For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

**(b)** Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

**(c)** A district court may order any civil action to be tried at any place within the division in which it is pending.

**(d)** Transfers from a district court of the United States to the District Court of Guam, the District Court for the Northern Mariana Islands, or the District Court of the Virgin Islands shall not be permitted under this section. As otherwise used in this section, the term “district court” includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term “district” includes the territorial jurisdiction of each such court.

## 28 USC § 1406 - Cure or waiver of defects

**(a)** The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

**(b)** Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

**(c)** As used in this section, the term “district court” includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term “district” includes the territorial jurisdiction of each such court.

## 28 USC § 1441 - Removal of civil actions

**(a)** **Generally.—**Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

**(b)** **Removal Based on Diversity of Citizenship.—**

**(1)** In determining whether a civil action is removable on the basis of the jurisdiction under section [1332](http://www.law.cornell.edu/uscode/text/28/1332) [(a)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001332----000-#a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

**(2)** A civil action otherwise removable solely on the basis of the jurisdiction under section [1332](http://www.law.cornell.edu/uscode/text/28/1332) [(a)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001332----000-#a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

**(c)** **Joinder of Federal Law Claims and State Law Claims.—**

**(1)** If a civil action includes—

**(A)** a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section [1331](http://www.law.cornell.edu/uscode/text/28/1331) of this title), and

**(B)** a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,

the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

**(2)** Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

**(d)** **Actions Against Foreign States.—**Any civil action brought in a State court against a foreign state as defined in section [1603](http://www.law.cornell.edu/uscode/text/28/1603) [(a)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001603----000-#a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section[1446](http://www.law.cornell.edu/uscode/text/28/1446) [(b)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001446----000-#b) of this chapter may be enlarged at any time for cause shown.

**(e)** **Multiparty, Multiforum Jurisdiction.—**

**(1)** Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

**(A)** the action could have been brought in a United States district court under section[1369](http://www.law.cornell.edu/uscode/text/28/1369) of this title; or

**(B)** the defendant is a party to an action which is or could have been brought, in whole or in part, under section [1369](http://www.law.cornell.edu/uscode/text/28/1369) in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section[1446](http://www.law.cornell.edu/uscode/text/28/1446) of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section [1369](http://www.law.cornell.edu/uscode/text/28/1369) in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

**(2)** Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section [1407](http://www.law.cornell.edu/uscode/text/28/1407) [(j)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001407----000-#j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

**(3)** Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

**(4)** Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

**(5)** An action removed under this subsection shall be deemed to be an action under section [1369](http://www.law.cornell.edu/uscode/text/28/1369) and an action in which jurisdiction is based on section [1369](http://www.law.cornell.edu/uscode/text/28/1369) of this title for purposes of this section and sections [1407](http://www.law.cornell.edu/uscode/text/28/1407), [1697](http://www.law.cornell.edu/uscode/text/28/1697), and [1785](http://www.law.cornell.edu/uscode/text/28/1785) of this title.

**(6)** Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

**(f)** **Derivative Removal Jurisdiction.—**The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

## 28 USC § 1446 - Procedure for removal of civil actions

**(a)** **Generally.—**A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

**(b)** **Requirements; Generally.—**

**(1)** The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

**(2)**

**(A)** When a civil action is removed solely under section [1441](http://www.law.cornell.edu/uscode/text/28/1441) [(a)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001441----000-#a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

**(B)** Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

**(C)** If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

**(3)** Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

**(c)** **Requirements; Removal Based on Diversity of Citizenship.—**

**(1)** A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section [1332](http://www.law.cornell.edu/uscode/text/28/1332) more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

**(2)** If removal of a civil action is sought on the basis of the jurisdiction conferred by section [1332](http://www.law.cornell.edu/uscode/text/28/1332) [(a)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001332----000-#a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

**(A)** the notice of removal may assert the amount in controversy if the initial pleading seeks—

**(i)** nonmonetary relief; or

**(ii)** a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

**(B)** removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section[1332](http://www.law.cornell.edu/uscode/text/28/1332) [(a)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001332----000-#a).

**(3)**

**(A)** If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section [1332](http://www.law.cornell.edu/uscode/text/28/1332) [(a)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001332----000-#a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an “other paper” under subsection (b)(3).

**(B)** If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

**(d)** **Notice to Adverse Parties and State Court.—**Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

**(e)** **Counterclaim in 337 Proceeding.—**With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

**(g)**  [[1]](http://www.law.cornell.edu/uscode/text/28/1446#FN-1)Where the civil action or criminal prosecution that is removable under section[1442](http://www.law.cornell.edu/uscode/text/28/1442) [(a)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001442----000-#a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced, the 30-day requirement of subsection (b) of this section and paragraph (1) of section [1455](http://www.law.cornell.edu/uscode/text/28/1455) [(b)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001455----000-#b) is satisfied if the person or entity desiring to remove the proceeding files the notice of removal not later than 30 days after receiving, through service, notice of any such proceeding.

## 28 USC § 1447 - Procedure after removal generally

**(a)** In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

**(b)** It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

**(c)** A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section [1446](http://www.law.cornell.edu/uscode/text/28/1446) [(a)](http://www.law.cornell.edu/uscode/text/28/usc_sec_28_00001446----000-#a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

**(d)** An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section [1442](http://www.law.cornell.edu/uscode/text/28/1442) or [1443](http://www.law.cornell.edu/uscode/text/28/1443) of this title shall be reviewable by appeal or otherwise.

**(e)** If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

## 28 USC § 1652 - State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

## 28 USC § 2071 - Rule-making power generally

**(a)** The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section [2072](http://www.law.cornell.edu/uscode/text/28/2072) of this title.

**(b)** Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

**(c)**

**(1)** A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

**(2)** Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

**(d)** Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

**(e)** If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

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

## 28 USC § 2072 - Rules of procedure and evidence; power to prescribe

**(a)** The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

**(b)** Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

**(c)** Such rules may define when a ruling of a district court is final for the purposes of appeal under section [1291](http://www.law.cornell.edu/uscode/text/28/1291) of this title.

## RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by [Rule 26(a)(1)(B)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a_1_B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under [Rule 34](http://www.law.cornell.edu/rules/frcp/rule_34) the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under [Rule 34](http://www.law.cornell.edu/rules/frcp/rule_34), any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 14 days after the parties’ [Rule 26(f)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the [Rule 26(f)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by [Rule 26(a)(1)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a_1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under [Federal Rule of Evidence 702](http://www.law.cornell.edu/jureeka/index.php?doc=FRE&rule=702), [703](http://www.law.cornell.edu/jureeka/index.php?doc=FRE&rule=703), or [705](http://www.law.cornell.edu/jureeka/index.php?doc=FRE&rule=705).

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under[Federal Rule of Evidence 702](http://www.law.cornell.edu/jureeka/index.php?doc=FRE&rule=702), [703](http://www.law.cornell.edu/jureeka/index.php?doc=FRE&rule=703), or [705](http://www.law.cornell.edu/jureeka/index.php?doc=FRE&rule=705); and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under [Rule 26(a)(2)(B)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a_2_B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under [Rule 26(e)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by [Rule 26(a)(1)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a_1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under [Rule 32(a)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_32_a) of a deposition designated by another party under [Rule 26(a)(3)(A)(ii)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a_3_A_ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under [Rule 26(a)(3)(A)(iii)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a_3_A_iii). An objection not so made—except for one under[Federal Rule of Evidence 402](http://www.law.cornell.edu/jureeka/index.php?doc=FRE&rule=402) or [403](http://www.law.cornell.edu/jureeka/index.php?doc=FRE&rule=403)—is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under [Rule 26(a)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by [Rule 26(b)(2)(C)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_b_2_C).

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under [Rule 30](http://www.law.cornell.edu/rules/frcp/rule_30). By order or local rule, the court may also limit the number of requests under [Rule 36](http://www.law.cornell.edu/rules/frcp/rule_36).

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of [Rule 26(b)(2)(C)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_b_2_C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to [Rule 26(b)(4)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_b_4), those materials may be discovered if:

(i) they are otherwise discoverable under [Rule 26(b)(1)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_b_1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If [Rule 26(a)(2)(B)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a_2_B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures.Rules [26(b)(3)(A)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_b_3_A)and [(B)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_b_3_B) protect drafts of any report or disclosure required under [Rule 26(a)(2)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a_2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules [26(b)(3)(A)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_b_3_A) and [(B)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_b_3_B) protect communications between the party's attorney and any witness required to provide a report under [Rule 26(a)(2)(B)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a_2_B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in [Rule 35(b)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_35_b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under [Rule 26(b)(4)(A)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_b_4_A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. [Rule 37(a)(5)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_37_a_5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by [Rule 26(f)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_f), except in a proceeding exempted from initial disclosure under [Rule 26(a)(1)(B)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a_1_B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless, on motion, the court orders otherwise for the parties’ and witnesses’ convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under [Rule 26(a)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under [Rule 26(a)(2)(B)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a_2_B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under [Rule 16(b)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_16_b).

(2) Conference Content; Parties’ Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties’ views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under [Rule 26(a)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under [Rule 26(c)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_26_c) or under [Rule 16(b)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_16_b) and [(c)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_16_c).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for [Rule 16(b)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_16_b) conferences, a court may by local rule:

(A) require the parties’ conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under [Rule 16(b)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_16_b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties’ conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the [Rule 16(b)](http://www.law.cornell.edu/rules/frcp/rule_26#rule_16_b)conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

## RULE 50. JUDGMENT AS A MATTER OF LAW IN A JURY TRIAL; RELATED MOTION FOR A NEW TRIAL; CONDITIONAL RULING

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under [Rule 50(a)](http://www.law.cornell.edu/rules/frcp/rule_50#rule_50_a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under [Rule 59](http://www.law.cornell.edu/rules/frcp/rule_59). In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under [Rule 59](http://www.law.cornell.edu/rules/frcp/rule_59) by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

## RULE 56. SUMMARY JUDGMENT

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declaration (Form Not Substance)s. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant (Burden to Show inability to Access and Ask for More Time). 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) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by [Rule 56(c)](http://www.law.cornell.edu/rules/frcp/rule_56#rule_56_c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney’s fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.