

# Civil Procedure Outline

## Institutional Values of the Procedural Systems

- **Fairness**
- **Accuracy**
- **Cost**
- **Equality (Money, Rules, etc.)**
- **Efficiency**
- **Finality**
- **Participation/Dignity**

### Fundamental Question that Arises at the Beginning of Every Lawsuit:

- In which court should a lawyer file a case

### **3 Requirements:**

- **SMJ:** does the court have the authority to hear the type of dispute at issue?
- **Personal Jx:** Power of the court over the *parties* in the case
- **Authorized Venue:** Defines which court in a court system can hear a particular suit

**Pleadings:** documents by which parties commence a case and state their positions on the issues in dispute

**Joinder:** the rules governing who can be made parties to a single case and the scope of claims that may be asserted in a single action

**Article III of the Constitution → empowered Congress to establish a separate system of Federal courts to co-exist with the states**

**What is civil litigation?**

- **Using the law to enforce one's rights and get relief**

**Damages, injunction, etc.**

## Lifecycle of the Lawsuit

**State Courts:** Each legislature prescribes the structure of its own state courts & determines subject matter jx for each court within the state

- **California**

- Trial courts → Superior Court → Original Jx
  - 58 Counties
- Appellate Courts → CA Courts of Appeal
  - San Jose = 6<sup>th</sup> District
- California Supreme Court
  
- **Pleading Phase:**
  - **Complaint** → asserts legal claims, sets forth the facts, must serve process on D with court summons
  - **Answer** → Admits truths, denies what is untrue + affirmative defenses
    - **Affirmative Defenses** = Even though the claim is true, they are still not liable for other reasons
    - Can file MTD before answer
  - **Discovery Phase** →
    - **Production of evidence**
    - **Scope of Discovery:**
      - Judge can limit discovery
      - Parties may object and seek a protective order
    - **Methods of Discovery:**
      - Automatic disclosures of certain documents regulated by Federal Rules
      - Interrogatories (questions) to other party
      - Requests for production of documents
      - Depositions
  - **Pre-Trial:**
    - Judicial conferences: scheduling, deadlines
    - Final pretrial conference → Final pretrial order.
    - Motions for Summary Judgment: Put up or Shut up!
  - **Trial:**
    - Most civil cases → Bench Trials
    - Jury Trial
      - Voir dire...
      - After closing statements → may move for *judgment as a matter of law*
  - **Post-Trial:**
    - Can move for a re-trial because of errors/jury's ruling

- After motions → Entry of Judgment on court docket
- **Appeal:**
  - Usually short period of time in which to file
  - Appeal courts do not hear the entire case- don't reconsider factual issues—only consider errors of law
  - Heard by panel of 3-7 judges
  - *En Banc Hearing*: Your case is heard by *all 7 judges*, except in CA because there are too many judges
  - *Writ of Mandate* → Asking a higher court to tell lower court what to do about an issue
- **Effect of a Judgment on Later Litigation:**
  - Claim Preclusion (res judicata): bars a party who has sued a defendant on a claim from suing that defendant again on the same claim
  - Issue Preclusion (collateral estoppel): precludes parties from relitigating issues that were litigated, decided, and necessary to the judgment in a prior action between the parties (subletting ex)

## **Federal Court**

- Judiciary Act of 1789: created lower Federal Courts
- Federal Trial Courts = Federal *District Courts*
  - **94 Federal Districts** → CA has 4
    - Santa Clara = Northern District of California
    - Each district has a varying # of judges depending on caseload
    - Courts of original Jx
  - **11 Appellate Districts** + DC → usually the ending point
    - CA = 9<sup>th</sup> Circuit
    - US Courts of Appeal
  - **Very low % granted cert from Supreme Court**
    - 9 Supreme Ct. Justices
    - Cases usually involve important federal issues or conflicts in lower courts' interpretation of Federal law
    - Has original Jx over a few special cases

## **Sources of Procedural Law (Hierarchy of Authority)**

## Constitution

- **Article 3:** Basic provisions containing the structure and jurisdiction of the Federal Courts
- **Article 1, Section 8, Clause 18-** make laws “necessary and proper” to implement federal judicial power
- **5<sup>th</sup> and 14<sup>th</sup> Amendment-** due process
- **6<sup>th</sup> Amendment-** guarantees jury trial, RTC, etc.
- **7<sup>th</sup> Amendment-** right to jury trial

## Federal Statutes

- **“Necessary and Proper” Clause** → Congress regulates particulars of practice based on Constitution’s broad outline
- **Title 28: Governs Federal court procedure**
  - **28 USC §133:** Appointment & Number of Federal District Judges
  - **28 USC §1251-1257:** Jurisdiction of the US Supreme Court
  - **28 USC §1291-1292:** Jx of the Federal Ct of Appeals
  - **28 USC §1331-1369:** Jx of the Federal District Cts
  - **28 USC §1441-1453:** Removal of cases from state to federal court
  - **28 USC §1861-1875:** Jury Selection in Federal Cases

## Federal Rules of Civil Procedure (FRCP)

- USSC has power to enact court rules governing matters of procedure in the federal courts that are not prescribed by statute
- **Rule Enabling Act:** Authorizes SC to adopt general rules for practices in the Federal DCs and Ct of Appeals
- **Judicial Conference** → does rule-making

## Local Rules of Federal DCs

- **Federal Rule 83** → Each DC can adopt local rules
  - Has to follow the hierarchy above it
  - **Standing orders:** Individual judges can issue these to specify certain procedures they will use in their individual courtroom

## Federal Subject Matter Jurisdiction

### Subject Matter Jx General Principles:

- State courts → BROAD SMJx
- Federal courts → Limited SMJx (fewer judges)
  - State courts existed first—assumed that most matters would be dealt with in state courts
  - Fed courts intended to hear cases that implicate national interests
  - **Art. III Sec. 2 Par. 2: gives Fed courts SMJx**
  - Can hear:
    - Cases in law and equity
    - Cases affecting ambassadors
    - Public ministers & consuls
    - Admiralty & Maritime
    - Controversies where the US is a party
    - **Diversity Jx**
    - **Federal Question Jx**
- **Concurrent Jx**= Cases that can be brought in both courts
- **Exclusive Jx**= *Has* to be heard in federal court (i.e. Patent, Maritime)

### Choosing a Court/Forum Shopping:

- Convenience
- Familiarity
- Speed: Federal is quicker
- Jury Pools: Avoid overly biased juries
- Case Assignment to one judge: political/popular cases → Fed court → Life tenures
  - Fed court → Case stays with one judge the whole process
- Attorney control: State → more control to attys
- Out-of-state litigants: State Ct → bias to in-state litigant
- Expertise
- Other factors: rules of evidence/discovery, etc. differ

## Power & Authorization

- **2 Requirements:**
  - (1) **POWER:** Constitution must confer the Federal court with subject matter Jx (Article III Section 2)
    - Much broader

- No money requirement, more issues allowed
  - (2) **AUTHORIZATION**: Congress must allow the Federal Courts subject matter jurisdiction by passing a statute—they do not *have to* give SMJx to the full extent the Constitution allows
    - Ex. Excluded abortion issue from Federal Court system
- **Hypo**: Congress passes statute allowing fed courts to hear breach of contract claims between two citizens between the same state
  - Does this work?
    - NO—this subject matter jurisdiction is not granted under Article 3 & would be giving more jurisdiction to the Fed Courts than is allowed by the Constitution

## Diversity Jurisdiction (1332)

- **Article III Sec. 2**: Fed courts can hear “cases between citizens of different states”
- **28 USC §1332 (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”
  - Provides neutral forum for cases involving risk of local bias
  - *Kline*→ Gives Congress power to authorize Federal District courts to hear some diversity cases but NOT others
- **Gordon v. Steele** (1954) Federal District Court of PA
  - Gordon wanted to claim residency in Idaho, had moved for college, for purpose of DJx
    - Gordon raised in PA, received treatment in PA, Doctor resident of PA
    - Suit brought after Gordon moved to ID for college
    - Gordon had intent to remain
  - Injured wrist, claiming misdiagnosis by Doctor→ injury
  - **Rule**→ Statements made by a party reflecting a **subjective intent** to remain in a state can establish domicile
    - Domicile established at **time of filing**
    - **2-Prong rule**: PRESENT IN THE STATE & INTENT TO REMAIN

- **A person does not lose their old domicile until they acquire a new one**
  - Gordon won—established domicile in Idaho—MTD for lack of DJx denied.
- How to apply the Gordon v. Steele Domicile Test
  - Meaning of indefinite intent= person has no present intention of going elsewhere to live

## Complete Diversity

### How courts should assess diversity in a case with multiple Plaintiffs or Defendants

#### 28 USC 1332

- 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—
- (c) For the purposes of this section and section [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,

#### Strawbridge v. Curtiss

- Complete diversity required-- No plaintiff can be a citizen in the same state as any defendant
- Must be present at the time the complaint is filed (BOP → the party invoking federal jurisdiction)

#### Mas v. Perry(1974) 5<sup>th</sup> Circuit of Appeals

- Landlord peeping through 2-way mirror, complaint seeking \$100K filed in LA D.C.
  - Mr. Mas= Citizen of France
  - Mrs. Mas=?? (Court→ Mississippi)
    - Mases lived in LA for school, but did not lose her Mississippi domicile because she had no intent to remain indefinitely in LA
  - Perry=Citizen of LA

- Perry appealed for lack of DJx
- **Rule**→ Original jx provided by Const. in Fed D.C.'s for all actions that are between citizens of different states, or citizens of a state and citizens of foreign states, and in which the AIC exceeds \$10,000 (→ now \$75K)
  - **Strawbridge Rule**→ Must have COMPLETE diversity

**Hypo:**

What if Mr. & Mrs. Mas moved to France, then filed suit against Perry?

- No Diversity jurisdiction → Mrs. Perry is no longer a citizen of a state, and she is not a citizen of France

\*Note: DJx does not authorize jx over domestic relations cases (*Marshall v. Marshall*)

**Corporations & State Citizenship:**

- Corporation= Intangible, legal entity created under state incorporation laws
- Test:
  - Changed from State in which they were incorporated → **Principle Place of Business**
  - **28 USC §1332(c)(1)**: corporation is a citizen of every state by which it has:
    - Been **incorporated** AND
    - Where it has its **principal place of business**
      - **Principle Place of Business (PPoB)**= Makes corporations local in the state where their principle place of business is located
        - Can only have one for DJx purposes
        - “Nerve Center”→Corporate HQ = Principal PoB
  - Also determined at time of filing
  - AIC determined on the face of complaint

**Hertz Corp v. Friend (2010) SCOTUS**

- Friend filed class action in state court—Hertz sought removal to Fed Court citing DJx because their HQ/ PPoB was in NJ
  - Claiming violations of CA wage & hour law
- Friend raised objection that CA was the principle source of revenue for Hertz
  - D.C. agreed—remanded to State court. Hertz appealed remand.
- **Rule**→



- **PPoB (§1332)**= location where the major activities of the corporation are directed, coordinated, and controlled by the high level officers of the corporation
  - Corporation can change HQ to create diversity—that is okay as long as the change is real. Courts don't usually look at motivation of move
- **Nerve Center Test** (*Scot Typewriter Co.*) → PPoB → HQ
  - Not just where the board meets
  - Rejects Business activity test (which had been the precedent) & Gravity/Total Activity tests
- **Timing:**
  - Citizenship determined at the time of filing (date of complaint)
  - Amount in Controversy is also determined on the face of the Complaint
  - Subject matter jx cannot be waived and can be raised at any time through the end of appeals
  - Thus FRCP requires the Complaint to state the basis for subject matter Jx

### **Unincorporated Associations:**

- Citizens of every state in which their members (or partners) are domiciled
  - §1332 (c)(1)
- Treated as groups of individual litigants, not corporations
- Consider the group under its state law
- Limited Partnership has general partners & limited partners—court held that the citizenship of the limited partners has to be considered along with general partners

### **Perfecting Diversity→ You can drop a non-diverse defendant to achieve diversity**

- Have 30 days after dropping them to remove to Fed Court

### **Hypo:**

- **NY** Citizen sues Twins, Inc. on a state law breach of contract arising from a malfunction of Twins new app. Twins is incorporated in Delaware, it has no

physical plant, and its 2 directors live in TX and **NY**. They meet and make all decision via telephone & email. Is there DJx?

- Not enough facts to determine PPOB—would have to inquire more as to where the most decisions are made/chain of command

**Hypo:**

- A labor union with members from NY, PA, NJ, and **DE** sues a corporation for \$1mil. The D has HQ in MA, its main manufacturing/distribution plant in MI, a secondary manufacturing plant in NJ, and is **incorporated in DE**. Is there DJx?
  - No—because both the union has members from DE and the corporation is incorporated in DE.

## **Amount-in-Controversy**

- **28 USC §1332 (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
  - **\$75K + ONE PENNY**
- **Rule for assessing the amount:** *St. Paul Mercury Indemnity Co. v. Red Cab Co.*
  - The plaintiff's claim for more than the required amount will be accepted if it appears to be made in **good faith—unless a legal certainty** shows that the claim is actually for less than the requirement
  - Gives plaintiff the benefit of the doubt
  - If judge is convinced the claim is worth less than \$75K (+1 penny) then the claim will be dismissed

## **Diefenthal v. C.A.B. (1982) 5<sup>th</sup> District Court of Louisiana (Federal)**

- Diefenthals reserved smoking section seats in 1<sup>st</sup> class, arrived at flight & attendant told them there were only non-smoking available
- Brought suit for breaching contract & claimed attendant treated them “brusquely” and caused them embarrassment & emotional distress
- Causes of Action= breach of contract & embarrassment tort
- Diefenthals sued for \$50K—min. requirement was \$10 for §1332 DJx

- Court → No conceivable way their causes of action were worth more than \$10K (let alone \$50)
- **Rule** → Must appear to a legal certainty that the claim is really far less than the jurisdictional amount to justify dismissal
  - May amend pleadings—but Diefenthals still failed to provide evidence
- This is an example of the type of petty controversy the AIC is trying to avoid bringing to Fed Courts

### **Diefenthal Notes:**

- Hindsight is 20/20: If they had gone through trial and then found that the airline owed them nothing, they could not dismiss for lack of diversity because they already satisfied the amount requirement.
  - Ex. *Mas v. Perry*: Mases recovered less than the required amount but a reasonable jury *could* have awarded more
- Federal Rule of Civil Procedure 11(b)(3): factual allegations in a complaint must have “evidentiary support”
- *Kahn v. Hotel Ramada*:
  - Sued for \$50K, but NV statute prevents suits against innkeepers for more than \$750. Obviously less than AIC, cannot be brought to Fed. Court.
- To show AIC → must support claim with evidence
  - I.e. amend allegations, affidavits, medical bills, etc.

### **Aggregating Claims to Meet the AIC**

- A single plaintiff may aggregate any separate claims they have against a single defendant to meet the requirement *even if they are unrelated*
- BUT--Co-plaintiffs cannot add together their claims to reach the requirement, or add different amounts demanded from different defendants
- **Tag-Along EXCEPTION**: When P1 is suing D for more than the required amount, then P2 can join as a co-plaintiff even if they are suing for less than the required amount
  - *Zahn v. International Paper Co* → **28 USC §1367 Supplemental Jx Statute**
  - Only works for multiple PLAINTIFFS, not multiple DEFENDANTS

### **Common Undivided Interests**

- Plaintiffs may sue on a joint interest or a claim that is “indivisible”
- The amount might be split between multiple P’s, but the full amount is what is considered for AIC
  - Ex. *Hyde* → 2 men are beneficiaries of the same trust that was mishandled

### **Determining the Amount in Controversy when either or both defendants are liable**

- Ex. Car accident, injuries worth \$100,000—both drivers are negligent & could potentially each be liable for more than \$75,000 if they are found to be solely liable
- Cant collect \$100K from *both* –just the one that is found to be liable

### **Counterclaims**

- Can’t be aggregated with the main claim to reach the amount in controversy

### **HYPOTHESIS:**

- P sues D for intentional infliction of emotional distress, and also negligent infliction of emotional distress after D ran over her dog. P claims \$70K in damages. They are citizens of different states.
  - NO. You can’t intentionally *and* negligently inflict emotional distress—contradictory legal claims
  - \$70K < \$75K Requirement
  - **Claims have to be possible at the same time.**

### **Constitutional Scope**

- The broad scope of powers is created by the Constitution, but Congress can create statutes actually conveying the jx over the case for federal district courts
- If the case is within a category of Art. III SMJx, a federal court will not *always* have the authority to hear it.
- Determining Jx:
  - (1) Is the case within the Constitutional grant of SMJx in Art. III Sec. 2?
  - (2) Has Congress passed a statute actually conveying jx over the case to the Fed D.C.’s

- Ex. Constitution allows minimal diversity to be heard. §1332 allows only complete div. *Strawbridge* interprets §1332.

**Exceptions:** Congress has allowed fed courts to hear some minimal diversity cases

- **Ie. Class Action Fairness Act** → class actions can be brought in fed court if ANY member of the Plaintiff class is diverse from ANY Defendant and the AIC exceeds \$5million
- **Federal Interpleader Act** → Authorizes jx over certain cases involving multiple claimants to the same property, allows fed D.C.s to hear actions as long as at least 2 of the claimants are diverse

## Federal Question Jurisdiction (1331)

- **Generally:**
  - **State causes of action include:** Contract breaches, Torts, Property Disputes, most criminal cases
  - **Federal causes of action include:** Labor laws, Environmental Laws, Federal tax, Patent Law, Securities law
- **Constitutional Scope:** *Osborn v. Bank of the US*
  - When the question arises as an **ingredient** of the original cause whether it be from the P or the D → In the power of Congress to give Federal Question Jx.
- **Statutory Scope:** 28 USC §1331
  - The district courts shall have original jurisdiction of all civil actions **arising under** the Constitution, laws, or treaties of the United States.”
  - \*\*Easier to prove than §1332 Diversity Jx
    - HYPO → P wants to bring a **federal** claim, both P & D are MA citizens. Which courts have SMJx?
      - §1331 → Both Federal & State courts.

## Well-Pleaded Complaint Rule

### Louisville & Nashville Railroad Co. v. Mottley (1908) SCOTUS

- Mottleys denied railroad passes because of an Act of Congress (Hepburn Act)

- Sued for breach of contract (KY Contract Law)
- SCOTUS raised issue of Fed Question Jx *sua sponte* (=spontaneously)
- Claimed Fed Question Jx because the Railroad based their defense on a Federal Law
  - If the court found that they shouldn't receive passes—would be in violation of 5<sup>th</sup> Amendment
- **Rule→ Well-Pleaded Complaint**
  - The federal question has to appear *on the face of the well-pleaded complaint* by the Plaintiff
    - Can't anticipate defenses to be made
  - **Holmes Test**→ suit has to “arise under” a Federal cause of action
- Tempers lawyers' creativity in filing complaints/answers
- **Creative Re-Drafting:**
  - There is no way the Mottleys could have re-drafted their complaint to assert a Federal cause of action

SMJx can be raised at *any point in the case* & the court can/must dismiss it at any point in the case if it lacks SMJx

### **Counter Claims:**

- *Holmes Group, Inc. v. Vornado*→ Counter claims cannot be the basis for “arising under” jx
- Exception: patents, plant variety protection, copyrights can always be brought to Federal court even if brought in counter-claims→ **§1454(a)**

### **Declaratory Judgment:**

- Allows a party, before an alleged violation of rights has actually taken place, to bring suit and ask the court to “declare” the rights of the parties→ **28 USC §2201-2202**
  - Ex. Railroad could have brought a declaratory judgment action against the Mottleys seeking a declaration that it is barred from renewing the Mottleys' passes by the new federal statute
- **Inverting the Parties doesn't make the case arise under Federal Law:**
  - You have to ask whether the case would arise under federal law if brought by the party who would ordinarily be the plaintiff

## Substantial Questions of Federal Law

- State law claims involving substantial question of Federal law:
  - If a case asserts a state law claim it can still satisfy the federal question jx requirement if, in order to decide the state law claim, **the court will have to resolve a substantial issue of federal law**
  - Only if the state law claim “necessarily depends” on the decision of an issue of federal law
- **Grable & Gunn-- If the Federal Issue is:**
  - (1) Necessarily raised
  - (2) Actually disputed
  - (3) Substantial (importance of the federal issue to the development of federal law)
  - (4) Capable of resolution in federal court without disrupting the federal-state balance approved by Congress (clearly implicated when involving matters generally reserved to the states—such as the regulation of lawyers)
  - **\*Highly discretionary & rare!!!**

### \*\*Note: Original v. Appellate Jurisdiction

- Ex. Mottley II
- Fed court does not have original jurisdiction over non-Federal claims or Non-diverse parties, etc
- BUT—have appellate jurisdiction once the case has reached the State’s highest court
- **Constitutional Grant (Article III):**
  - Original jurisdiction: Doesn’t matter if the federal issue is raised by Plaintiff or Defendant
  - Appellate Jurisdiction: Doesn’t matter
- **Statutory Grant (§1331):**
  - Original Jurisdiction: Issue has to “arise under” a Federal Question from P
  - Appellate Jurisdiction: Authorized Supreme court to review cases that turn on Federal Issues—regardless of whether it rose from the original claim or as a defense

# Removal Jurisdiction

## Intro:

- State & Federal courts have *concurrent Jx*
  - Just because it *can* be heard in Fed court doesn't mean it *must be*
- **Federal removal statutes:** authorize Defendants sued in state courts to remove certain cases to federal court
  - Rationale: they should have the same option as the Plaintiff
- If P wants to take the case back from Fed court → State court it is called *remand*

## Stretching the Concepts of Personal Jurisdiction Over Time

- Interstate businesses
  - Consent/Property (*Pennoyer*) → “Carrying on business” → Instate “Presence” Contacts
- Mobile Public
  - Hess
    - **Implied consent theory** → using a privilege of a state (i.e. highways) implies consent to their laws
    - Old rule → had to serve them in the state in person → appoint registrar as agent →
    - New rule → Proper Service is a separate issue (can still serve in any state)
- Other Modifications
  - Ex: *Pennoyer* → domicile is alternative basis for court to exercise PJx over an individual
- **RULE** → **if the D was domiciled in (Milliken) or had implicitly consented to PJx (Hess) then they are subject to PJx even if not served in the state borders**
  - Modern Era

## I. Standard for Removal

- **28 USC §1441(a):** basic removal provision, basic equal access premise



- If the case could have initially been filed in Fed Court by P → then D can remove

### **Avitts v. Amoco Production Co. (1995) 5<sup>th</sup> Circuit of Appeals (Federal)**

- Filed suit in a Texas court to recover damages to their property
- D filed notice of removal to Federal DC → DC entered Preliminary Injunction—interim costs & environmental study → D appealed P.I, costs, *and* Federal SMJx (Interlocutory)
  - **Interlocutory Appeal:** an immediate appeal even though the cases is still pending in trial court
- **Rule → If no federal cause of action has been asserted then the case cannot be removed to Federal Court → 28 USC §1441**
  - Jurisdiction upon removal turns on *original* federal jx
  - Must remove within 30 days

### Notes & Questions

- **In-State-Defendant Rule/Forum:**
  - Bars removal of a diversity case if the defendant (the one seeking removal) is from the state in which the action is brought because they are not at risk for prejudice → **28 USC §1441 (b)(2)**
- **Ways to structure a case to avoid removal:**
  - Omit the federal issue, focus on state issues
  - Sue D in their forum state
  - Join a non-diverse D
  - Limit the amount requested (<\$75K)
  - **Fraudulent Joinder** → If a D thinks that the p has fraudulently joined another D *only* to prevent removal—they can argue that the case actually is a proper diversity case because the other D has been fraudulently joined
- **\*\*This is another form of forum shopping → No legal rules against it, only ethical rules**

## II. Procedures for Removal

## The Who, When Where, and How of Removal

- **Who may remove?**
  - Only a defendant may remove
  - Multiple defendants→ all defendants must agree
    - *Chicago, Rock Island & Pacific Railway Co. v. Martin (1900)*
    - 28 U.S.C § 1446 (b)(2)(A)
- **When must the case be removed?**
  - Within 30 days of receiving the initial pleading/being served with the process and the action
  - 28 U.S.C. § 1446 (b)(1)
    - If they don't file within 30 days, they **waive their right** to remove→ 28 U.S.C § 1446(a)
  - Note: **1 year limit on 1332 cases**→28 U.S.C § 1446(c)
  - **Exception:**
    - IF the case is not initially removable, *but becomes removable by the addition of a federal claim or dropping of a non-diverse party*, you can file for removal within 30 days of the amended pleading→ 28 U.S.C § 1446(b)(3)
- **Requirements for Removal of the Case**
  - It is filed in the Fed. District Court
  - Filed within 30 days of receipt of summons and complaint
  - Complete diversity among the parties
  - AIC is met
  - Fed court has original Jx and removal Jx over the case based on diversity
  - All docs filed in the state court are provided with the notice for removal
  - P in state court will be notified of removal
  - All D's consent to removal
- **Where should the case be removed to?**
  - Must be removed to the district court of the United States for the district and division embracing the place where such action is pending
    - 28 U.S.C § 1441(a)
- **Process of Removal**

- Defendant files a notice of removal in the federal court and notifies the plaintiff and the state court that she has done so
  - 28 U.S.C § 1446(a) - (d)
- Notice should specify the ground on which the case is removable and include a copy of the state court complaint and summons
  - Had to be able to file in the first place
- When the notice of removal is filed and the state court notified, the state court loses all power to proceed with the case
  - 28 U.S.C §1446(d)
- **Motions to Remand**
  - Any party may to move to remand for lack of FSMJx→ 28 U.S.C §1447(c)
  - If the P thinks the case isn't removable or the D didn't use proper procedure to remove, she should move in Fed court to remand the action to the state court
    - Then the fed court will decide if it was properly removed
      - 28 U.S.C §1447(c)

### Notes and Questions

- The 30-day period in § 1447(c) is different from that in §1446(b)(1).
  - *§ 1446(b)(1) = 30 days of receiving the initial pleading of the case*
  - *§ 1447(c) = 30 days after removal*
- Congress may make federal jurisdiction over particular claims exclusive
  - 28 U.S.C § 1338(a)→ Ex. Patent Claims
- **Derivative Jx**
  - 28 U.S.C § 1441 (f)
  - Provides that such an action may be removed to federal court even though the state court where it was filed lacked jurisdiction over it
  - This wasn't always allowed
- **Forum Defendant Rule**
  - Bars removal of a diversity case if any D resides in the state in which the suit is brought
  - 28 U.S.C §1441(b)(2)
- **Is removal ever mandatory?**
  - **NO**

- You *can* remove if Congress has exclusive claim, but not mandatory to do so
  - Ex. Patent cases

## Personal Jurisdiction

### Specific PJx v General PJx

- Specific: Forum has Jx power over D only for claims arising from D's purposeful contacts with forum (minimum contacts)
  - Minimum contacts
  - Arose out of those contacts
  - Fairness/Reasonableness
- General: Forum has Jx power over D for any claim, even if unrelated
  - Enough contacts to be "at home"
  - Only get to general Jx if you have a problem with Specific Jx—much harder to prove
- When looking at a hypo & Looking for personal jx...
  - If you don't find anything easy (waiver, domicile, etc), then you go to Specific Jx *first*
  - If that fails, then you can try for general Jx

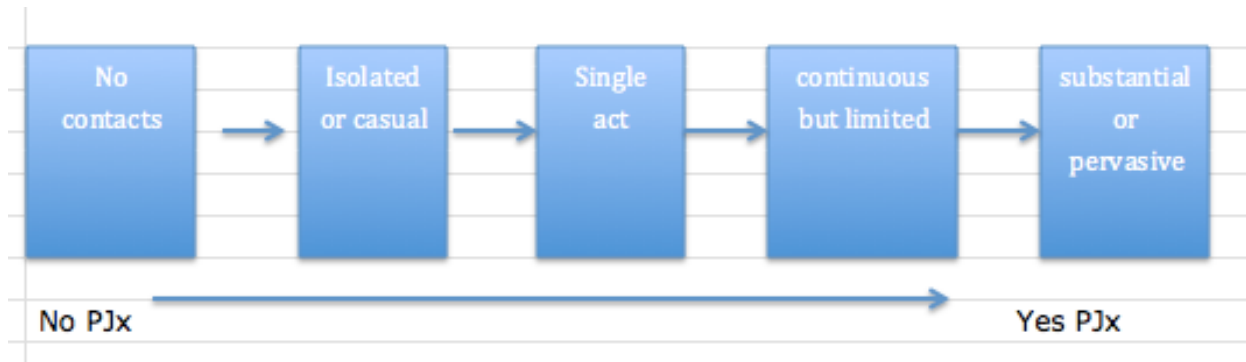
### A. Introduction: Sources of authority and early history

- **Personal jurisdiction**
  - The court must have authority to require the D to appear in the forum and defend the action there
  - U.S Constitution imposes important restrictions on court's authority over D's
    - 14<sup>th</sup> amendment due process of law
- **Types of PJx**
  - In personam
    - Jx over the person
      - Party, individual, corp
      - Judgment is against the person and/or assets wherever they are
  - In rem

- Over property itself to declare interests in it with respect to the world
    - Probate
    - Condemnation
  - Quasi in rem
    - Jx over property to assert power over its owner on a related/unrelated matter
- **Evolution of PJx**
  - Geographic power
    - Service on the D while D is in forum state—“capias ad respondendum” → Power over them
  - “Attachment” of D’s property in the state before asserting Jx over the person (up to value of the property) (Quasi in rem)
    - Property can be unrelated
    - If you have their property, they can have a claim against the owner of the property up to the value of the property
    - *Shaffer*—decided this is unfair
  - “Presence” In-State service → Presence; Sufficient but not Necessary Requirement
    - *Burnham*
  - Consent
  - Domicile → “At Home”
- Legal predictability matters!

## **B. Specific personal jurisdiction**

- Specific v. General
  - Specific → Claim *arises out of* D’s deliberate contact with the state
    - Ex: Hess → claim arose out of his decision to drive in the state
  - General → Ongoing contacts with the state or at home (domicile), even if claim doesn’t arise under in-state contacts
    - Minimum contacts, Ex. *Int’l Shoe*
    - This is important because it implies that the D has taken advantage of the benefits and protections of the state’s laws



#### **D. Statutory requirements**

- State “long arm” statutes + FRCP (see below)
  - Constitution does not confer PJx on the courts of the state, *the state legislature does*
  - Specify contacts with the state to allow their courts to assert Jx over the D
  - Have to have both long arm statute and Constitution for it to be allowed
- Types of Long Arm Statutes
  - Enumerated Long Arm Statutes – contains a list of common in-state contacts that give rise to PJx in the forum.
  - States also confer PJx in other statutes that govern a particular substantive area of law.
    - Ex. Business Registration Statutes...
  - A few states have adopted long arm provisions that confer on courts as much authority to exercise PJx as the Constitution allows.
    - Ex. CA
  - Specialized provisions that are designed to deal with a relatively narrow range of cases.
    - Ex. Hess Case
- Common Law PJx
  - There is some support for the notion that a court has inherent common law authority to exercise “tag” jurisdiction even if a statute or rule does not authorize it.
    - Tag Jx – Jx based on service of process
- Interpreting Long Arm Statutes

- Federal District Court usually applies the long arm statute of the state in which that district court sits.

### **Bensusan Restaurant Corp. v. King (Second Circuit COA – 1997) – The Blue Note**

- Facts:
  - Two restaurants called “The Blue Note”
    - One in MS, one in NYC
    - NYC one has the trademark
  - No conflict until D posted a disclaimer and hyperlink to P’s website on his website and P objected – D reworded the disclaimer and removed the hyperlink
- RULE→ NY court may exercise PJx over a non-domiciliary who “in person or through an agent” commits a tortious act within the state.
  - Often observe that a tort does not exist until there is an injury, so the site of the injury is the location where the “tortious act” occurred.

### Long Arm Provisions in Federal Courts

- 5<sup>th</sup> Amendment, like the 14<sup>th</sup> Amendment, does not automatically confer on a court the power to exercise PJx. Typically; a long arm provision must confer that authority.

### FRCP Rule 4

- PJx exists over a D who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.
- Broader Authority
  - A federal court may exercise broader Jx whenever the court is authorized to do so under a federal statute.
    - Ex. Bankruptcy Cases
- 4(k)(2)
  - In other words, PJx is proper in federal question cases involving foreign D’s when no state can exercise PJx, but only if the federal court’s exercise of PJx is consistent with the 5<sup>th</sup> amendment, aka only if the D has a sufficient contact with the US.
- 4(k)(1)(B)
  - Bulge Rule

- D has been joined pursuant to Rule 14 (third-party claim) or Rule 19 (for necessary and indispensable parties) the D is subject to PJx in federal court as long as the D is served within one hundred miles of the federal courthouse.
  - Jx exists even if the services occurs in another state and even if the applicable state long arm statute would not otherwise reach that D.
- In General - Serving a summons or filing a waiver of service establishes PJx over a D.

### Challenging Personal Jurisdiction

- **Direct Challenges**→
  - Special Appearance
    - Appearing in court + raising *any issue other than PJx*→ Waiving objection to personal Jx
    - Have special appearance strictly to object to PJx
      - Ex: International Shoe
    - If you appear in a special appearance just to object to PJx, you have not waived the issue
  - MTD// objecting to the jurisdiction in the answer to the complaint
  - Note: raise PJx early in the case in order to preserve the issue
- **Collateral Attack**→ Risky! Give up all opportunity to argue the claim on the merits—only on the basis of PJx
  - First → D fails to appear in the court where the P filed the original lawsuit
  - Results in a default judgment against D, don't pay up
  - P would then take that judgment to a state where D resides or has assets and can ask the court in that state to enforce the judgment under the full faith and credit clause
  - They can only enforce it if the judgment was *valid*—so you could then argue PJx and render the judgment *invalid*
  - Only used when:
    - The D has no defense to the P's claims on the merits
    - The amount at issue is small, relative to the amount it was cost to mount a defense



- The argument against PJx is particularly strong

### ***International Shoe Co. v. Washington* (U.S.S.C 1945) → Minimum Contacts**

- **Facts:**
  - International Shoe Co., Defendant, was a Delaware corporation with its principal place of business in St. Louis, Missouri, and has many places of business in several states, other than Washington
  - No office in Washington
  - Giving merch to salesman in Wash to sell, but maintained no stock of merch there
  - Salesman limited to *exhibiting samples and soliciting orders*, but no authority to enter into contracts or make collections
  - *Shoe* didn't pay unemployment tax; Washington enforced statute saying they had to contribute to the state's unemployment fund
  - *Shoe* refused
  - WA sued
- **RULE**→ In order for a state to exercise personal jurisdiction over a defendant, **the defendant must have such minimum contacts with the state** so that exercising jurisdiction over the defendant **would not offend “traditional notions of fair play and substantial justice.**
  - Sometimes suffices, but is not always necessary
- Black, Dissenting→ The state's power to tax should not be qualified by an ambiguous statement regarding fair play and substantial justice—allows state courts to enforce obligations just because *they* think it is reasonable

### ***McGee v. International Life Insurance Co.* (U.S.S.C 1957) → Defining Contacts**

- **Facts:**
  - P's son had a life insurance policy for which she was the beneficiary
  - P died; they refused to pay because they said he committed suicide
  - Empire Mutual never had any office or agent in CA
  - Long Arm statute in CA authorized this claim even when they couldn't be served within CA borders—determining whether the statute had Constitutional authorization

- **RULE**→ A state court's jurisdiction satisfies due process when it is **based on a contract with substantial connection** with that state.
  - This is specific jurisdiction
  - Suit was based on a contract that had a substantial connection with that state
  - ***Contacts is just one factor to consider—Shoe had left it unclear whether or not they were always necessary, McGee clarified***

### *Hanson v. Denckla*—1958

- Moved away from multi-factored analysis in *McGee*
- Focused on D's deliberate in-state contact from *Shoe*—It is essential in each case that there be some act by which the D **purposefully availed itself of the privilege of conducting activities within the forum state**, thus invoking the benefits and protections of its laws

### **World Wide Volkswagen v Woodson (SCOTUS –1980) → Reasonableness of Contacts/Foreseeability**

- **Facts:**
  - Robinsons (P) bought car in NY
  - Then moved to AZ—while driving through OK they were rear-ended, causing a fire which severely burned Mrs. Robinson & 2 children
  - Woodson= Trial Court judge
- **Rule**→ PJx is allowed only if the D's conduct and connection to the forum state are such that he should reasonably anticipate being haled into court there
  - Has to be foreseeable—not just a mere likelihood that a product will end up there
  - VW did not purposefully avail itself to the privilege of conducting business in OK
  - When a consumer unilaterally transports a product to a forum state → NOT a contact
- **Reaffirming threshold requirement of contacts**
  - Must have deliberate, voluntary contacts with forum state
  - Contacts are a necessary but not sufficient requirement

- **Rule**→ Exercise of Specific Jx is only constitutional when...
  - (1) The D has had contacts with the forum state
  - (2) The contacts were **purposeful or deliberate**
  - (3) The P's claim arose out of those contacts
  - (4) PJx is reasonable based on a consideration of the factors mentioned above
- \*Have to have some minimum contacts with the state—even if the claim arose out of the forum state
- Dissent:
  - Majority is according too little weight to the strength of the state's interests in the case & fail to explore whether there would be any *actual inconvenience* to the D
    - Interest is strong
    - Petitioners are not unconnected with the forum
    - Cars are intended to move around—not just foreseeable it is *intended*
  - “Burden” on defense not referring to distance to travel—only on the mobility of the D's *defense* (ie. witnesses are immobile, evidence has to travel, etc.)

### **Burger King v Rudzewicz (SCOTUS—1985) → Contracts as Contacts**

- **Facts**:
  - Rudzewicz, Michigan citizen, opened a franchise there
  - BK: FLA corporation, PPop in FLA
    - Over 3,000 outlets in 50 states
  - Contract→ Franchise relationship was established in Miami and governed by FLA law
  - Contract required all fees and monthly payments to be sent to FLA, although BK's Michigan district office conducted day-to-day oversight of operations
  - D fell behind on royalty payments, BK terminated franchise
  - D kept operating, suing over continued use of BK trademarks
- **RULE**→ A party to a contract is not necessarily subject to PJx in a state where one of the parties to the contract resides

- Rather, a court must look to the circumstances of the commercial relationship—the negotiation of the contract, the provisions in the contract, ensuring experience under the contract—to assess jx
- **Relevant factors include:**
  - Whether negotiations were directed to the forum state
  - Whether the contract required fulfillment of contractual obligations in the forum state
  - The duration of the contractual relationship
  - Others.
- Dissent:
  - Appellee had no place of business, employees, licenses, etc in forum state
  - Lacked notice of possibility of suit in FLA
  - Huge burden on defense

Notes:

- Choice of Law Provisions v Forum Selection Clauses
  - **Choice of law Clause** → Chooses a body of state contract law to govern the interpretation of a contract
  - **Forum Selection Clause** → Require that any dispute arising out of the contract be litigated in a particular state

**Minimum Contacts Progression**

- **Shoe:** Quality/nature, Quantity, Time
- **McGee:** Contacts → One of many factors
- **Hanson:** essential to have “some act by which D purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws
- **WWVW:** Has to be *foreseeable* & have some minimum contacts with the state—Specific Jx not enough unless D has had deliberate, voluntary contacts with the state—Contacts are a necessary, but not sufficient requirement
- **Burger King:** Contract not necessarily a sufficient contact
- **Moving from Factors → Elements**

**Specific Jx requires:**

- The D had minimum contacts with the forum (purposefully availed itself of the forum)
- The claim arose out of those contacts
  - But-for Test
  - Evidence Test
- Fairness/Reasonableness: PJx is consistent with notions of fair play and substantial justice (use factors)

## **Stream of Commerce**

*Stream of Commerce Problem: A manufacturer makes a component part in one state and sells it to a company in another. A latter company then incorporates the component into a larger product and distributes (or sells to a wholesaler who redistributes) the final product in another state.*

- When a product moves through the supply chain (SOC), the manufacturer of the product has more control over where the product ends up, as opposed to the unilateral actions of a 3rd party
- Stream of Commerce ends when the ultimate product is sold.
- Unilateral Act of a Third Party (ex. Taking Water Heater with you when you move to another state)

## **Asahi Metal Industry Co. v. Superior Court of California (SCOTUS – 1987)** **STREAM OF COMMERCE**

Facts:

- Zurcher severely injured and wife killed when he lost control of motorcycle.
- Products liability suit against Cheng Shin claiming sudden loss of air and an explosion in the rear tire of the motorcycle was the cause of the accident.
- Cheng Shin indemnity suit against Asahi (the manufacturer of the tube's valve assembly).
- Zurcher settled laving CS and Asahi.
- Shipments from Asahi to Cheng Shin were sent from Japan to Taiwan.
- Asahi tried to quash summons Cheng Shin's service of summons, arguing that the State could not exert Jx over it consistent with the Due Process Clause of the 14<sup>th</sup> Amendment.

### O'Connor Opinion (SOC)

- A company's *mere awareness* that the components it manufactures will reach the forum state through the stream of commerce does *not constitute minimum contacts* such that would not offend the traditional notions of fair play and substantial justice.
- **Rule**→ **The substantial connection between the Defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the Defendant *purposefully directed* toward the forum state.**
  - Court applied each of the reasonableness elements from WWVW.

**Brennan Opinion (SOC +)**, in which he was joined by Justices White, Marshall, and Blackmun.

- **Rule**→ As long as D is aware that the final product is being marketed in the forum state, Jx is okay, don't need to show add'l conduct
- However, despite finding sufficient minimum contacts, Justice Brennan *still found jurisdiction improper* because fair play and substantial justice would not be achieved.
  - Reasonableness/Fairness Trump

**Stevens Opinion (Middle Ground)**, in which he was joined by Justices White and Blackmun.

- Specifically, he found that minimum contacts are not always necessary for a state court to invoke jurisdiction, because they already determined it would be unreasonable.
- Even if they were to look at minimum contacts, the court misapplied the test to the facts—
  - No line can be drawn between mere awareness and purposeful availment.
  - Have to look at

<b>Justice</b> →	<b>O'Connor</b> Rehnquist	<b>Brennan</b> White	<b>Stevens</b> White
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<b>Issues</b>	Powell Scalia	Marshall Blackmun	Blackmun
I. Procedural History & Facts of Case	9-0 (Majority— obviously)	Agreed	Agreed
II.A Minimum Contacts “Arises Under”	4-5 (No majority— Plurality) <b>Stream of Commerce +</b>	Disagreed—As long as D is aware that the final product is being marketed in the forum state, Jx is okay, don’t need to show add’l conduct <b>Stream of Commerce is enough</b>	Disagreed— 1. Minimum Contacts not necessary—we already determined its unreasonable 2. Even if we did look @ them, court misapplies the test to the facts— shouldn’t be a bright line between purposeful availment & mere awareness—volume, value, character → Availment
<b>II.B Reasonableness for Asahi to be in CA</b>	<b>8-1 (Majority) Unreasonable</b>	<b>Agreed with Majority – Unreasonable</b>	<b>Agreed with Majority – Unreasonable</b>
III.	4-5 (Plurality)		

<b>Judgment (No PJx)</b>	9-0 Justified because there wasn't reasonableness— contacts don't get a majority vote	9-0	9-0
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**SCOTUS has left it unresolved—no opinion on the minimum contacts requirement received a majority vote—only agreed on the judgment because of the reasonableness trump.**

- Note—this is very rare—it is the only case in which the reasonableness factors trump
- Rarely even looked at if you satisfy the first 2 specific Jx requirements

Reasonableness Factors:

- **Burden on D:** Severe-foreign legal system, foreign language
- **Forum State's Interest:** Low—all that is left is a Chinese company suing a Japanese company—Zurcher already got paid off
- **P's Interest in Convenient & Effective Relief:** Cheng Shin now the “P”—definitely not convenient to be in CA
- **Interstate Judicial System Interest in Efficient Resolution:** Wont go anywhere else in the US anyways, system benefits by dismissing the case because it will go away
- **Shared Interest of States in Policies:** Low
- **CONCLUSION**→ Not reasonable—exercise over Asahi would be unreasonable & unfair

McIntyre Machinery Ltd. V. Nicastro (2011)

- Shearing machine from distributor in OH to a company in NJ, employee of company in NJ severed four fingers while operating the machine.
- SCOTUS granted certiorari and **REVERSED**.
- Did not resolve SOC issue, just said D must direct some kind of activity to the forum.
- Ginsburg Dissent – company should be subject to suit in any of those states if its allegedly defective product has there been the source of its injury.



- McIntyre treated US as a single market, which included NJ.
- Therefore PJx proper in NJ.

### The “Arises Out of” Element

#### 2 Ambiguities

- How a court determines whether a particular claim arises out of a contact.
  - Evidence Test
    - D’s forum contact provides evidence of one or more elements of the underlying claim.
  - But For Test
    - If the claim would not have arisen but for the D’s contact with the state.
  - Neither test → assesses the relationship between the contact and the claim under a more flexible standard and decide whether the claim is sufficiently related to the contact to support Jx.

A court must have PJx over each individual claim.

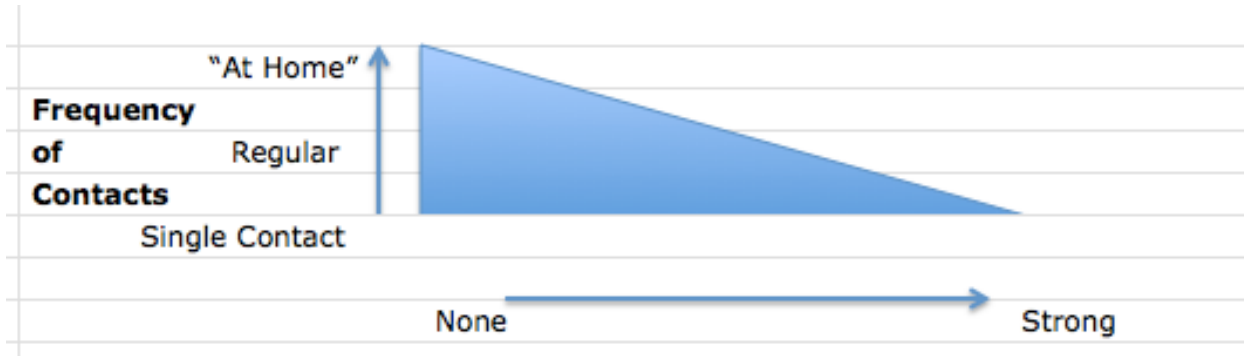
### Other Constitutional Bases for Personal Jurisdiction....

#### **General In Personam Jurisdiction**

- General Jx allows courts to exercise PJx over a D for claims having nothing to do with the D’s contacts in the forum.
  - Catch → D’s must have much more extensive contacts in the Forum State – minimum contacts do not suffice.
- For Corporate D’s → the contacts must be sufficient, extensive enough that the D is *essentially at home* in the Forum State.
  - Automatically “At home” where they are incorporated & where their PPOB is (*Daimler*)
- Individual D → the requisite contacts exist (at home) wherever the individual is *domiciled*.
- Note → A company may be subject to GJx in several different states simultaneously, but individuals have only one domicile for purposes of personal jurisdiction.

### Scholarly Take on Specific/General Jx: Sliding Scale

- Courts should require more contacts as the relationship between the claim & contacts becomes distanced
- Difficult to apply, but it might do a better job of achieving fairness



### General Jx Case Law:

- Perkins v. Benguet Consol. Mining Co.
  - Philippines Company had office in OH, okay for Jx because OH was corporation's principal, *temporary* place of business.
- Helicopteros (Helicopter Crash in Peru)
  - Had contacts in TX, but not continuous or systematic...
  - Mere purchases, even if in regular intervals not enough.
- Goodyear (Bus Accident outside of Paris)
  - Foreign subsidiaries lacked any connection with NC, not at home there.
  - Introduced notion of "at home"
- Daimler
  - Defined what "At home" meant
  - PPOB & state of Incorporation
  - Some exceptions → ex. When their contacts in that state are greater than that anywhere else

### **Daimler AG v. Bauman (SCOTUS – 2014) Mercedes & Argentina**

- **Facts:**
  - 22 Argentinian residents filed a complaint in USDC for the Northern District of California against Daimler, a German public stock company, headquartered in Germany, makes Mercedes Benz vehicles in Germany.

- Complaint alleged that during Argentina’s Dirty War – Daimler’s Argentinian subsidiary, MB Argentina collaborated with state security forces to kidnap, detain, torture and kill certain MB Argentina workers – among them – P’s or persons closely related to the P’s.
- Jx – CA contacts of Mercedes-Benz USA, LLC (MBUSA) a subsidiary of Daimler was incorporated in Delaware, with its principal place of business in New Jersey. They distribute Daimler-manufactured vehicles to independent dealerships throughout the US, including CA.
- **RULE→ A corp is at home wherever it has its principal place of business or place of incorporation**

NOTE: The “at home” test is narrower and more difficult to satisfy.

- Ex. Wal-Mart has thousands of retail stores in many states but is not “at home” in all these states...
- May still be subject to SJx but GJx harder to establish.

### **In Rem/Quasi In Rem Jurisdiction**

- **In personam**—power to require a D to pay a money judgment
  - Can declare which of the *litigants* has the better claim to the property without determining whether the winner is the true owner relative to the rest of the world
- **In rem/Quasi in rem**—much narrower authority—power to control & determine the ownership of specific property (land, bank acct)
- Can declare the true owner of the property relative to the world
  - **Attachment is an important pre-requisite**—have to issue an attachment order to give notice to potential buyers that P has a claim pending that might affect the property

### Quasi In Rem Jx

- Jx over property to assert power over its owner on a related or unrelated matter.
  - Type 1
    - The Property Itself
      - Ex. Foreclosure Action
  - Type 2
    - Anything that is a claim against the absent D



## **Transient Presence Jurisdiction**

- Based on the notion that service in a state constitutes presence in that state
- **Individuals:** Personal service is sufficient, not necessary element.
- **Corporations:** *Can't* obtain PJx through serving an officer of the company who happened to be in the forum state—their legal status as an individual is different than the corporation
- **Partnerships:** *Can* obtain PJx through serving one partner in the forum state because they have the same legal status as the partnership itself.

**\*\*Note** → PJx is not legitimate if they are served while brought into the state by **fraud or duress**

- Ex. Giving tix to a Broadway Play

## **Burnham v Superior Court (SCOTUS – 1990) → Personal Service/Divorce**

- **Facts:**
  - Divorce dispute, wife moved to California, filed against him in CA court
  - Francie demanded he submit an irreconcilable differences divorce, he refused, she brought suit in **CA state court**
  - Dennis went to CA on business, went to visit his kids, she served him with CA court summons, he went back to NJ
- **Rule** → **Personal service in a forum state is a *sufficient* basis for conferring PJx, but not a *necessary* element.**
  - Based on continuing legal traditions
- **Rule** → Only need to look at *Shoe* minimum contact requirements as a *substitute* for physical presence—if you have in-state service you have physical presence, no need for minimum contacts.
  - Rejected *Shaffer* analysis—not looking at the fairness of the long arm statute
- **Brennan, Concurring:**
  - Undertaking a *fairness* argument, not a *tradition* argument.
  - Analyzing In-State service rule according to *Shoe* rule (*Shaffer*)
  - History is only important because it is well-known that if you enter a state you can be served there, therefore D's have “clear notice that he is subject to suit in the forum,” therefore he purposefully availed himself.

- Why doesn't he write about Burnham's kids as being the most significant contact? Then it could discourage parents from visiting kids in another state in fear of establishing a contact and being subject to PJx
- *Shaffer*—Does *Shoe* apply to all assertions of state-court jurisdiction?
  - **Scalia** (+3)→ really only meant assertions of *in personam*, *quasi in rem*, and *in rem* jurisdiction had to meet *Shoe* standard, not other basis like transient Jx
  - **Brennan** (+3) → meant what it said—“all” assertions of PJx, including transient presence, had to be analyzed using the *Shoe* standard (still was satisfied because Burnham had contacts with CA-visiting kids, using roads)
  - **Stevens**→ No need to decide between rationales in this case
  - **Shaffer effectively turns quasi in rem into Shoe minimum contacts test for PJx.**

### **Consent & Waiver**

- Consent→ Affirmatively decide not to raise the issue through their conduct
  - Ex. Filing a claim, showing up in court (not in special appearance)
  - Can consent before a lawsuit occurs (ie. forum selection clause)
- Waiver→ Typically results from a party's failure to raise an issue within a specified time or in a proper manner
  - FRCP Rules 12(g)-(h): Procedure to avoid waiving a PJx defense
  - Courts can waive PJx as a sanction
  - Some states require special appearance

### **Internet Based PJx**

#### **Zippo Test (*Zippo Manufacturing Co. v Zippo Dot Com, Inc*)**

- Proposed 3 categories of Internet postings:
  - (1) **Interactive Website:** Subject to Specific Jx anywhere it is used
    - Ie. selling things
  - (2) **Some Interactivity:** Visitors exchange info, but interactivity falls short of a purchase (*Jackson*)

- (3) **Purely Passive:** No PJx, even in states where people view the website
  - Merely conveying info

**Jackson v California Newspapers Partnership (Ill. District Ct.—2005) → Steroid Accusations**

- **Facts:**
  - Sports editor wrote article, then was posted on the Internet
  - Article referenced a speech made by Coleman saying “Bo Jackson lost his hip because of anabolic abuse.”
  - Jackson lived in Illinois, newspaper was published in CA
  - Jackson was a national figure
- **Rule**→ PJx is controlled by defamation effects test *Calder v Jones*, underscored by the sliding scale Internet analysis in *Zippo*
  - *Calder*— Need to have focused or aimed activities at the state.
  - Doesn't matter if there were Illinois subscribers, or if they knew the subject lived in the state
- **NOTE**→ **Internet is not threatening the *Shoe* rule**—Analyzed *Calder*, *Zippo*, and other Internet-based considerations in the *Shoe* context.
- **Rule**→ The key is whether the website owner intentionally directed electronic activity into the state, and whether that activity gave rise to the cause of action (*Shoe* context)

**Pavlovich v Superior Court (SC of California—2002) → Posted Codes Online**

- **Facts:**
  - P posted a trade secret on his website while in Illinois without obtaining a license from the licensing agent.
    - Website= passive, only provided information
  - Pavlovich didn't know they had their PPOB in CA at the time.
  - DVD CCA sued Pavlovich
    - Had a monopoly
  - Harmed movie industry, tech industry—all located primarily in CA

- **Rule**→ D has to “expressly aim” the intentional tortious conduct at the forum state, in addition to the knowledge that his intentional conduct would cause harm there
  - Knowledge that one’s actions would cause harm in the state is insufficient to create PJx as required by the effects test
  - Just because he can’t be sued in CA, doesn’t mean he can’t be sued elsewhere
  - Quality/Quantity of these contacts
- **Baxter, Dissenting**
  - D knew that he was targeting two industries centered in CA—not just foreseeable that it would harm them it was *intended*
  - Result shouldn’t be different because they were industries, not individuals

Be Your Justice Context/SCOTUS Context

**Michael H. v Gerald D. (SCOTUS –1989) → Paternity Dispute/Parental Rights**

- **Facts:**
  - Gerald thought his wife’s child was his, 3 years later found out she was Michael’s
  - Michael filed to establish paternity & right to visitation
  - Victoria filed saying she was entitled to maintain relationships with both men
  - Court denied both motions
- **Scalia (Plurality):**
  - No established tradition of allowing a unitary family to be dissolved by a third party, judicially, without their consent
  - Sanctity of family argument
  - Relationship between Victoria & Michael is not one that has been historically protected or treated as a protected family unit
  - Footnote 6 Criticizes Brennan’s Concurrence
- **Brennan:**
  - Reality argument—shouldn’t look at tradition
  - Requiring *specific* approval from history before protecting anything in the name of liberty is squashing freedom to act as we want
  - Ignoring contemporary society’s values



## Notice/Service of Process

### Constitutional Requirements (5<sup>th</sup> and 14<sup>th</sup> Amendments – DPC)

Even if a D's contacts in a state suffice to subject her to personal jurisdiction there, the court must assert Jx over her by an order to appear and defend the action.

Delivery to the D of the initial papers in the action...

Fulfills 2 functions

- Formally asserts the court's authority over the D
- Informs her of the case so she can prepare to defend it

The Relation of Service of Process to PJx

- **Does not follow that if a D is properly served, the court will have PJx.**
- **SOP fulfills a separate due process requirement, providing notice of the suit to the D so she can appear and defend...**

Specific methods that statutes and courts rules authorize litigants to use to inform D's that they have been sued...

Must be authorized by the applicable statute or rule governing service **AND** meet constitutional standards.

If you could have reasonably done more then you should have.

### FRCP 4

- Federal Rule 4(e)(2)(B) allows service by leaving the summons and complaint (if the D is a person) at the D's dwelling house with a person of suitable age and discretion residing therein.

"Last and usual place of abode" without the additional requirement of leaving them with a person residing there...NOT constitutional under Mullane.

### *Mere Gesture*

- When notice is a person's due process, a mere gesture, is not due process. The means employed must be such as one desirous of actually informing the absentee, must reasonably adopt measures to accomplish it.
  - Reasonable Investigation

**As a working rule, service by mail and personal delivery are constitutionally acceptable, by publication notice is not, unless other means have failed.**

### Who/What/Where/When

- What
  - Under Federal Rule 4(c)(1) the complaint and a summons must be served together on the D.
  - Complaint=P's initial pleading, setting forth her claims against the D.
  - Summons=official order of the court, commanding the D to appear and defend the action or suffer default.
- Who
  - Duty to serve process is delegated to the P
    - Rule 4(c)(1)
  - P does not serve it herself however...
    - Rule 4(c)(2)
    - Any person who is at least 18 years old and not a party may serve a summons and complaint.
- When
  - The complaint and summons must be served after the complaint is filed...
    - Rule 4(b)
  - Rule 4(m) provides that the court must dismiss an action if service is not made on the D within 120 days after filing, or order service to be made within a specified time...
    - Can extend for goof cause
  - Dismissal for failure to make timely service would not bar the P from filing a new action, but the P would have to pay a new filing fee and would risk statute of limitations problems in refiling.

### FRCP 4 (e)(1)

- Can follow state law where District Court is
  - **OR**
- Where service is made...

#### RULE – 4(e) – Serving Natural Persons

- **Federal Rule 4(e) provides four methods to serve the summons and complaint on an individual D.**
  - Deliver the papers to the D personally (“in-hand service”) wherever she can find the D.
    - Fed. R. Civ. P. 4(e)(2)(A)
  - Leave the summons and complaint at the D’s dwelling or usual place of abode with someone of suitable age and discretion who resides there.
    - Fed. R. Civ. P. 4(e)(2)(B)
  - Deliver the summons and complaint to an agent of the D authorized by appointment or by law to receive the service of process.
    - Fed. R. Civ. P. 4(e)(2)(C)
  - Follow the rules for service of process of the state where the federal court sits or of the state in which service of process is made.
    - Fed. R. Civ. P. 4(e)(1)

#### RULE – 4(H) – Serving Corporations

- Rule 4(h) prescribes methods for serving a “corporation, partnership or association.”
- 3 Methods
  - Delivering a copy of the summons and complaint to an officer, a managing agent, or a general agent of the entity.
    - Fed. R. Civ. P. 4(h)(1)(B)
  - Delivering the papers to an agent authorized by law or by appointment to receive service of process.
    - Fed. R. Civ. P. 4(h)(1)(B)
  - Serving process under state rules for serving corporations, in either the state where the federal court sits or in the state where service is made.
    - Fed. R. Civ. P. 4(h)(1)(A)
- *Rule does not require that the officer be in any particular place when she receives service.*

Service of Parties Outside the US – 4(f) – DIFFERENT.

### **Waiver of Service of Process**

- *Federal Rule 4 offers a simple and inexpensive alternative of formal service of process.*
  - Under Fed. R. Civ. P. 4(d) – the P may ask the D to waive formal service.
- P sends the D a notice of the action with two copies of the waiver form, the complaint, and a prepaid envelope for returning the waiver.
  - Fed. R. Civ. P. 4(d)(1)
- D's have the duty to avoid the costs of formal service. If they do not return the waiver, they must pay the costs of formal service, including attorneys' fees for any motion to collect these costs.
  - **60 days to answer instead of the usual 21 days...**
  - Fed. R. Civ. P. 4(d)(3)
- Waiver not returned – serve process through the formal means...
  - D then responsible for the costs of service.
- Under the law of some states, the statute of limitations is satisfied by service of process on the D within the statutory period, rather than by filing the complaint with the court.
- Service is not complete by waiver until it is filed.
- Returning the waiver only waives the duty to serve process under Rule 4 and not any other objection the D may have (i.e. jurisdiction or venue).
- If statute of limitations is about to run out – don't use the waiver procedure since the D might not return the waiver form at all or return it too late to meet the limitations period.

### **Last Resort – All Else Fails**

- If it is clear that the methods available under Rule 4 have not provided notice to the D, the court may authorize notice by publication or other means.
- Allow state court rules and the states courts have provision for this.

### **Actual Notice vs. Proper Service**

Actual Notice, no Proper Service

- Most courts do not view a judgment as valid – enough if the D received actual notice of the suit – if service does not comply with service rules/statutes.

Proper Service, no Actual Notice

- D would move for relief from default judgment, judge usually will grant relief since proper service was followed.

\*NOTE\*

- FRCP 12(g-h)
  - Federal Rules provide that objections to service of process must be raised either by a pre-answer motion or in the answer to the complaint. If not properly raised – waived.

*Mullane established the broadest interpretation of notice as allowed by the Constitution.*

- "Notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Hukill v. ONADVC (10<sup>th</sup> Circuit Court of Appeals – 2008) **SERVICE**

- Facts:
  - P was employed for Spirits of Hope (SOH) until she was fired in 2004.
  - Filed in Federal Court
    - Contacted D's counsel – no service by counsel
  - P decided to serve D's by following state law, pursuant to an OK statute which provides that
    - "service by mail shall be accomplished by mailing a copy of the summons and petition by certified mail, return receipt requested and delivery restricted to the addressee."
  - P mailed both summonses to the Spirits of Hope business address.
    - One addressed to Musgrove – restricted delivery.
    - Other address to Spirits of Hope Coalition c/o Pauline Musgrove and was not marked for restrictive delivery
  - "L. Vollintine" signed and returned both, wasn't authorized to receive service on their behalf.
  - *Defects in Service*
    - Delivery person delivered it to a third party.

- Delivery was not restricted to the coalition and was not served on an officer/employee at the principal office authorized to receive certified mail.
- **RULE**→ Substantial compliance with the law is enough, don't need strict compliance.
  - 3 part test in Graff
    - Is there a statute authorizing the method of service employed?
    - Have the requirements of the statute been observed?
    - Have fundamental due process requirements been met?

## Venue

Venue=particular court within a court system where a P can file a lawsuit.

More populous the state→more federal districts→more than one possible venue.

Purpose of Venue→ Exist to ensure that a case is litigated in a court that is conveniently located and has some connection to the lawsuit or to one or both of the parties.

### General Venue Statute

- 28 U.S.C. § 1391(b)
  - Defines which federal districts are proper venues...
    - A judicial district **in which any D resides**, if all D's are residents of the State in which the district is located;
    - 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.
    - If there is no district in which an action may otherwise be brought as provided in this section, any judicial district in **which any D is subject to the court's PJx with respect to such action.**
      - Only applies if you can't find any venue for (1) or (2)→FALLBACK
      - Usually when the events giving rise to the suit fall outside of the United States

## Meaning of Resident under Subsection (1)

- Individuals
  - Congress amended 28 § 1391(c)(1)
    - “For all venue purposes...a natural person, including an alien lawfully admitted for permanent resident in the United States, shall be deemed to reside in the judicial district in which that person is **domiciled...**”
  - Same domicile as in Diversity Jx
- Corporations/Other Entities
  - § 1391(c)(2) and (d)
    - In any judicial district in **which such D is subject to the court’s PJx** with respect to the civil action in question and if a P – only in the judicial district in which it maintains its **principal place of business.**
    - In states with multiple districts – Deemed to reside in any district in that State within which its contacts would be **sufficient to subject it to PJx if that district were a separate State.**

## Meaning of Substantial under Subsection (2)

- As long as what happened in the forum was an important part of the “**sequence of events**” or “**historical predicates**” giving rise to the case, **venue is proper in that forum.**

*If they waive PJx can you move to dismiss for proper venue?*

- Venue motion turns on § 1391 (c), which requires an **examination of where the corporation would be subject to PJX.**
- Company can still object to venue after waiving PJx.
- The motion concerns venue, with PJx being relevant to determining where venue is proper.

## Specialized Venue Statutes

- § 1391(a)→specifies where venue is proper in all civil actions “**except as otherwise provided by law.**”
- 28 U.S.C. § 1402

- Tort claims against the federal government can be brought where the P resides or where the incident at issue occurred.
- **These replace general venue propositions in § 1391.**
  - Can also be **supplemental**.

## Transfer and Dismissals

### Two-Venue Related Motions

- **28 U.S.C. § 1406: Improper Venue**
  - A D can make a motion that asserts that the case was filed in an improper venue...
  - If this motion has merit → 28 U.S.C. § 1406 authorizes a judge to dismiss the case or transfer it to a federal venue where the suit could have been brought.
  - “In the interest of justice”
  - If court dismisses → P has to refile the case in a proper venue, pay a filing fee, and ensure proper service on the D...
  - Transfer is easier, quicker and less costly...up to judge will more than likely transfer it rather than dismissing it.
  - **A judge only has the authority to transfer cases within the same court system.**
  - State court, therefore is in no position to “transfer” a case to federal court, so the federally controlled process is called “removal” and not “transfer.”
- **28 U.S.C. § 1404: Inconvenient Venue**
  - Although venue is proper in the court where the lawsuit was filed, there is a more appropriate federal district (or division) where the case should be litigated.
  - 28 U.S.C. § 1404 – authorizes the court to transfer the case to that other district.
  - § 1404 (a)
    - For the convenience of parties/witnesses and in the interest of justice...
    - Can also transfer to a district/division in which all parties have consented...



- *Gulf Oil Corp. v. Gilbert* → Private & Public factors
- Either party can move to transfer (even P)

### Forum Non-Conveniens Dismissal

- Common law authority to grant a federal court to dismiss a case that was filed in a proper venue, since no state authorizes this...
- Called *forum non conveniens* dismissal
- Latin phrase meaning “inconvenient forum”
- If a P files a lawsuit in an **improper venue**, a party may move to dismiss the case or transfer it pursuant to § 1406.
- If the case is filed in a **proper venue**, a party can move to transfer it pursuant to § 1404 or dismiss it pursuant to the doctrine of forum non-conveniens.
- If a federal court is a proper venue and concludes that a foreign court is a more convenient location for the suit, the judge’s only option is to dismiss the case...
- Section 1404 does not give a district court the authority to dismiss such a case, so the forum non-conveniens doctrine **fills that gap**.
- Piper
  - A forum non-conveniens dismissal is permissible even when the law of the foreign forum would likely give the P a less desirable remedy that the P could get in federal court...
- **Court ultimately held that a federal court should not deny a FNC dismissal simply because a foreign court would apply law that is less favorable to the P.**
- CaseLaw
  - *Gonzales v. Chrysler Corp.* (2002)
    - FNC appropriate because the private/public interest factors strongly favored litigation in Mexico where the car was purchased and where the accident happened.
  - Might be improper...if remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all...
    - *Rasoulzadeh v. Associated Press* (1983)
      - Court denied a motion to dismiss on forum non-conveniens grounds because the judge believed that if the

P's had to litigate in the alternative foreign forum (Iran), they would probably be murdered...

- Prior to 1948 – no authority to transfer cases, because § 1404 not created yet, therefore only option was a FNC motion/dismissal.
- Although courts now use very similar analyses when considering FNC conveniens dismissals and § 1404 transfers, the analyses are not identical.
  - Congress intended § 1404 transfers to occur more easily.

	<b>Case Filed in the Wrong Venue</b>	<b>Case Filed in the Correct Venue</b>
<b>Motions to Transfer</b>	28 U.S.C. § 1406	28 U.S.C. § 1404
<b>Motions to Dismiss</b>	28 U.S.C. § 1406 and Federal Rule 12(b)(3)	Forum non conveniens (A common law doctrine)

**§1406 → Use Law of Transferee Court**

- Bad Venue

**§1404 → Use Law of Transferor Court**

- Good Venue

**Waiving Objections to Venue**

- PJx can be waived, but SMJx cannot.
- Venue → If P files a case in an improper venue, that mistake does not implicate the court's constitutional authority to hear the matter (as SMJx does).
- The filing of a case in an improper venue means that the case was filed in a court that the legislature has determined to be inconvenient or inefficient to the parties/witnesses (offers protection to the parties, making it more like PJx).

**Transfers/Dismissals – State Court**

- Same as Federal Courts
- Most states also have a provision that resembles § 1404 authorizing the transfer of a case filed in a proper venue to another, more appropriate venue within the state's own court system...
- Also permit FNC Dismissals...

**MacMunn v. Eli Lilly Co. (D.C. District Court – 2008) DES DRUG**

- Facts:
  - P alleges her mother ingested DES while pregnant with her in 1962. Exposure to DES in utero purportedly resulted in uterine and cervical malformations, infertility, physical and mental pain and medical expenses and treatment.
  - D removed the case to federal court based on diversity of citizenship.
  - 4 months after the initial status conference, the D filed a motion to transfer.
- **FACT RULE** → **Because the contacts relevant to this dispute are overwhelmingly focused in MA and because this case is still in its nascent stages, the court grants the D’s motion to transfer...**
  - MA had a stronger interest in resolving this dispute, than DC did.
- **RULE** → 2 showings to justify transfer...
  - ONE
    - D must establish that the P could originally have brought the action in the proposed transferee district.
    - D must demonstrate that consideration of convenience and the interest of justice weigh in favor of transfer to that district.
  - TWO
    - Public/Private Interest Factors

<b>Public</b>	<b>Private</b>
Familiarity with governing laws	P’s choice of forum, unless the balance of convenience is strongly in favor of the D
Relative congestion of courts	D’s choice of forum
Local Interest in Deciding Local Controversies at Home	Whether the claim arose elsewhere
	Convenience of the Parties
	Convenience of the Witnesses
	Ease of access to sources of proof

**Forum Selection Clauses**

- Parties in commercial transactions frequently seek to avoid collateral litigation about forum choice by agreeing in advance that suits involving the transaction may or must be brought in a particular state or court...
- Federal courts will usually give these clauses great weight when deciding which court should hear a case as a matter of venue.
- Courts can enforce these clauses even if they specify a forum where PJx would otherwise be improper.
- **These clauses therefore can constitute to both venue and PJx.**

## Pleading

- **Rule 8: Notice Pleading**
- **Rule 9: Heightened Pleading**

P's 1st Pleading → Complaint

- Rule 8(a) Include:
  - (1) Grounds for *SMJx*
  - (2) A short & plain statement of *claim* showing he is entitled to *relief*, and
    - Clarified by “*Twiqbal*” → must be plausible (advisable to plead facts for every element of a legal claim)
  - (3) A *demand for relief*. (Prayer for relief)
    - Would *help* to explain why the P is asking for certain damages—but not necessary unless it is *special damages*. (something not expected from such an incident)

**Demurrer** → D's often challenge the sufficiency of complaints—can file a motion to dismiss the complaint for failure to state a claim

- Can file this before filing an answer
- FRCP 12(b)(6)

Development of Pleading

- Common law → Equity Pleading → Code Pleading → **Notice Pleading → Pleading with Plausibility**
- **How to Dispute Factual Allegations:**

- Submit affidavit in support of MTD
  - Turns MTD (rule 12(b)(6))→ MSJ (rule 56)
  - *Any dispute* of facts→ No MSJ
  
- **Inconsistent Pleading:**
  - Can have mutually exclusive contradictory allegations—court must treat them alternatively
  - Rule 8(d)(2): If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient
  - Rule 8(d)(3): Expressly permits inconsistent claims, as long as the pleader reasonably and in good faith believes that either might have evidentiary support
  - Impermissible *if*:
    - P is alleging an alternative they *know* is false
  
- **Form of Pleadings:** Rule 10(b)
  - Numbered Paragraphs
  - Don't *have* to identify claims—but should if it would “promote clarity”
  - Must be construed so as to do justice—shouldn't dismiss a claim for small errors of *form* (Rule 8(e))

## Notice Pleading:

- Abandoned fact pleading—“short & plain statement” of claim, showing pleader is entitled to relief
- Assume the facts as true—not conclusory statements
- Motion for dismissal is decided “within the four corners of the complaint”

### ***Dioguardi v. Durning* (2nd Circuit Ct. of Appeals—1944)**

- \*\*Highwater mark of relaxed pleading
- **Facts:**
  - P was importing tonics—claimed that customs guy either kept it & sold it or threw it away/destroyed it
- **Rule**→ No longer need facts sufficient to constitute a cause of action—only a *short & plain statement of the claim* showing he is entitled to relief

- Entitled if the substantive law would make the D liable on the facts alleged in the complaint
- Court can consider not only the law that the P specifically invokes, but also *any* applicable law that would entitle the P to relief
- **Rule**→ Primary purpose of pleading is to give notice—not to state the facts or screen factually bogus claims short of trial

### ***Conley v. Gibson* → Approved *Dioguardi***

- **Rule**→ A complaint should not be dismissed for failure to state a claim unless it appears BRD that the P can prove no sets of facts in support of his claim which would entitle him to relief

### ***Doe v. Smith* (7th Circuit Ct. of Appeals—2005) → Sex Tape**

- **Facts:**
  - P & D were dating, D recorded them having sex without her permission, they broke up, he showed it to others
- **Rule**→ It is enough to state a *claim* for relief
  - FRCP 8 departs from the old code-pleading practice by enabling Ps to dispense with the need to identify, and plead specifically to, each ingredient of a sound legal theory
- **Rule**→ a complaint suffices if any facts consistent with its allegations, and showing entitlement to prevail, could be established by affidavit or testimony at trial
  - *Conley*
- **Rule**→ Complaint doesn't need to allege facts corresponding to each *element* of a statute
  - Advisable though—but don't plead too much
  - Strategy: Might not be good to tip your hand, or might not be 100% sure yet—but might want to spell it out to scare them into a settlement
- **Rule**→ Complaints need not anticipate or attempt to defuse potential defenses

## **Pleading with Plausibility**

- 2007 SCOTUS decision—broke from *Conley* standard in *Twombly* decision
- More factual content required—don't draw all reasonable inferences

### ***Bell Atlantic Corporation v. Twombly***

- Claim needs to not just be *possible* but *plausible*
  - Ex. Parallel business conduct doesn't show it was *plausible* that they were engaging in illegal trade agreements; could have been a legal venture just as easily
  - Calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement
- Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint

### ***Twombly: Two Pronged Approach***

- **(1) What is entitled to assumption of truth?**
  - Facts—not conclusory statements
  - **Conclusory allegation**=may be an allegation so generic that it could be cut and pasted without modification into any other fact pattern
- **(2) Is what remains enough to plausibly suggest the claim?**
  - Can the court infer from the facts alone that P has stated a claim?
  - Context-specific task
  - Must move beyond possible → *Plausible*
- Dissent:
  - Raised the barrier of complaints to plausible to protect wealthy corporations
  - Obstructing Congressional policy

### ***Ashcroft v. Iqbal (SCOTUS—2009) → 9/11 Aftermath***

- **Facts:**
  - P was Muslim from Pakistan, detained in investigation following 9/11
  - Suing Attorney General & FBI Director for illegal detention based on religion, race, and/or national origin
    - Citing 1st & 5th Amendment rights
- Applying *Twombly* narrowly
- **Fact Rule** → Even if the well-pleaded facts give rise to a plausible *inference* that Respondent's arrest was the result of unconstitutional discrimination, *that inference alone would not entitle respondent to relief.*
  - Would have to show that the FBI Director/Atty Gen adopted this policy *because* of their race/religion/origin

## Sufficiency of Complaints after *Iqbal*

- Set up inquiry
  - What is the substantive law claim?
  - What are the elements?
- What to consider?
  - 1. Are the allegations well pleaded?
  - 2. Are the well-pleaded allegations **plausible**?
    - Don't consider conclusory allegations
- Standard to use
  - Plausibility
    - Has to cross the line *to* plausibility *from* conceivable
- Dissent, Souter:
  - *Twombly* doesn't require a court at the MTD stage consider whether the factual allegations are probably true—must accept them as true
    - Under *Twombly* the relevant question is whether the P has stated a ground for relief that is plausible
  - If you take the complaint as a whole—it gives them fair notice of what the claim is and the grounds on which it rests

## ***Twombly-Iqbal:***

- A. D's make more Rule 12(b)(6) motions
- B. Ps are pleading more specific facts
- C. It is context-specific—the more complex the claim, the higher the plausibility bar. A simple collision can plead fewer facts than a P alleging a complex business tort
- D. Some courts say that the plausibility standard should be applied to the pleadings as a whole and not to each discrete allegation
- E. The cases are hopelessly unclear about what makes an allegation conclusory
- The law is very much unsettled—some judges find *Twombly-Iqbal* signaled a major change in the law of federal pleading, some see it only in certain contexts (& don't agree which ones)

## Lessons to be learned:



- Err on the side of fact pleading
- Avoid bare bones recitation of the elements of the claims
- Ds→ move to dismiss for failure to state a claim in far more cases
  - Liberally cite *Twombly-Iqbal*
  - Target any allegation that is remotely conclusory

### **Heightened Pleading: Rule 9**

- **FRCP 9:** imposes heightened pleading for allegations of fraud & mistake: “A party must state with particularity the circumstances constituting fraud or mistake”
- *Leatherman v. Tarrant County Narcotics*: “Expressio unius est exclusio alterius”→ Things not included in Rule 9 shouldn’t be included (unless Congress says so)
  - Lower courts cannot add to the list
- **Reasons for Heightened Pleading:**
  - Fair Notice
  - Protecting Reputation
  - Protecting the Public’s Money
- **Special Damages:**
  - Rule 9(g)→ Special Damages must be specifically stated for *any* claim—not just fraud & mistake
    - Special damages= damages you wouldn’t normally anticipate;
      - ex. Later miscarriage, or higher blood pressure
    - General damages—damages you would expect from such an event
- Note→ Can separate out claims to use heightened pleading only for a fraud claim, but regular pleading for the other claims in the same complaint

### **Rule 12(b)(6): Dismissals for Failure to State a Claim**

- Gatekeeper→ Rule 12(b)(6)
- Not asking whether the P will ultimately win or lose—just if he has stated a claim sufficient to go forward
- Federal pleading standard no longer a mechanism for dismissing frivolous cases—this is done through other procedural devices
  - Ex. MSJ, Judgment as a matter of law

# Responding to the Complaint

## Three Ways to Respond: Ignore, Defend, Answer

- Ignore → Default Judgment
  - Rule 55
    - Move/ Answer w/in 21 days after service
    - Appearance alone isn't enough → need some other indication of your desire to contest the action
  - Default
    - Admits all facts alleged in the complaint
  - Entry of Default
    - P makes a motion → Clerk enters in docket
      - Rule 55(a)
        - Need an affidavit/some type of proof
      - Rule 55(c) is motion to set aside entry of default
  - Default Judgment
    - An official notation that D has failed to respond
    - Court must find as a matter of law if the complaint establishes D liability (states a claim for relief)
    - Rule 55(b)
    - If D has appeared AT ALL → 7 days notice of default judgment hearing
      - Move to set aside default judgment → Rule 60(b)
    - Record must show proper service was made, as well as PJx
  - Courts refuse default judgment →
    - Large \$\$\$\$
    - Issue of public importance
    - Technical error/good faith mistake/excusable neglect by D
    - Little prejudice to P
    - In general → default is disfavored
      - Rule 55(c) → can set aside entry of default for good cause
  - Damages
    - Must be fixed before default judgment is entered
    - Need an affidavit/hold a hearing to determine
      - 55(b)(2)

- Defend → File MTD
  - Lack of SMJx; Lack of PJx; Improper Venue; Insufficient Process; failure to state a claim
- Answer → Admit/Deny
  - Assert counter/cross claims
  - Rule 8 → sets out the requirement for affirmative defenses and admissions/denials

## Rule 12 Motions

- 12(b) → most common defenses raised by a MTD
- 12(b)(5) → Insufficient service of process
- 12(b)(6) → failure to state a claim
- 4 Corners of a Complaint
  - It takes the well-pleaded allegations of the complaint as true, and only those, not looking beyond the pleading to outside materials or the Internet for additional facts

### Matos v. Nextran, Inc. (Virgin Islands District Court; 2009)

- **Facts** → P is suing for 6 causes of action
  - D moves to dismiss complaint for failure to state a claim 12(b)(6)
  - Also → Strike certain allegations 12(f); Definite statement 12(e)
- **12(b)(6) Rule** → To survive a **MTD for failure to state** a claim a P must allege facts that “raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true
  - Draw all reasonable inferences in favor of the non-moving party
  - Need direct/inferential allegations for all the material elements
- **12(f) Rule** → In order to **strike an allegation** from a pleading, you must show that no evidence in support of the allegation would be admissible
  - Repugnant, superfluous descriptions → not substantive elements
- **12(e) Rule** → To move for a more **definite statement**, the motion must point out the defects and the details desired

### Rule 12 Waiver Trap

- Mandated joinder of available defenses and objections in 1 pre-answer motion or in your answer

- Have to include in first responsive pleading
- If you leave out ANY defenses → you waive them
- Rule 12(g) → “Omnibus Motion Rule”
  - Requires a party to consolidate all of the Rule 12 defenses and objections then available to it in a single omnibus pre-answer motion
  - Only applies to defenses that are available at the time if they become available later → not waived
- Waivable Defenses
  - Only the four listed in 12(b)(2)-(5) are waived by omission
    - They are evident at the beginning of the lawsuit
- Unwaivable Defenses
  - Rule 12(h)(2)
    - File a post-answer motion/pleading for failure to state a claim at any time before end of trial
  - Rule 12(h)(3)
    - SMJx can be raised at any time

### **Hunter v. Serv-Tech, Inc. (LA District Court; 2009)**

- **Facts** → D filed MTD for insufficiency of service of process BUT specifically wrote “D’s expressly reserve all rights to challenge SMJx and/or PJx of the court”
  - This was denied
  - Later tried to dismiss for lack of PJx
- **Rule** → A party cannot simply “assert” or “reserve” the defense, but must actually *argue* that defense in a motion that prays the Court to enter a ruling or order
- Policy of promoting judicial efficiency by avoiding piecemeal pre-answer litigation of 12(b) defenses

### Answering the Complaint

- Rule 12(a)(4)(A)
  - Defendant must file an answer within 14 days after notice of the court’s action on the motion
- 4 Kinds of Matter in an Answer
  - (1) assert the “leftover” Rule 12(b) defenses

- any defense the party has not waived by omitting it from a pre-answer motion
    - Short and plain terms
  - (2) Rule 8(b)(1)(B) → admit or deny the factual allegations of the complaint
    - 8(b)(4)→ requires D to admit part of an allegation and deny the rest
    - Language must be unequivocal in denying/admitting
    - 8(b)(5)→ If you don't know→ say it, acts as denial
  - (3) Even if defendant admits the facts, it may have some reason why Plaintiff should not recover anyways
  - (4) Defendant may have counterclaims against Plaintiff or cross-claims against fellow defendant
- General Denials
  - 8(b)(3)
    - Only permitted when a party intends in good faith to deny *ALL* the allegations of a pleading

#### Challenging Sufficiency of Defense

- 12(f)
  - P has same opportunity to challenge the legal sufficiency of a defense as D has to challenge a claim
  - Identical standard to 12(b)(6)

#### **Reis Robotics USA, Inc. v. Concept Industries, Inc. (Northern District of IL; 2006)**

- **Facts**→ D answered the complaint asserting 6 defenses and brought 7 counterclaims
  - P now moves to strike and dismiss D's affirmative defenses and strike portions of D's answer, and dismiss D's counterclaims
- **Rule**→ 3 Part Test to determine sufficiency of defense
  - (1) determine whether the matter is appropriately pled as an affirmative defense
  - (2) determine whether the defense is adequately pled under FRCP 8 and 9
  - (3) evaluate the sufficiency of the defense under FRCP 12(b)(6)

- **Rule**→ To strike an affirmative defense, court must be convinced that no questions of facts are unresolved, that questions of law are clear, and under no circumstances could the defense succeed

#### Rule 8(c)

- Omitting affirmative defenses
- Usually allowed to amend the answer to add the defense as long as it would give the P sufficient notice to prepare
- Includes residuary clause
- Identifying affirmative defenses
  - Should be pled if it rests on facts outside the complaint and failure to do so would result in surprise to P if first argued at trial

#### **Ingraham v. United States (5<sup>th</sup> Circuit Court of Appeal 1987)**

- **Facts**→ After judgment, government said there was a federal cap in damages→ failed to raise this as an affirmative defense under 8(c)
  - P's are saying their failure to raise this defense constitutes a waiver
- **Rule**→ Determining when something falls under 8(c) affirmative defenses
  - Issues likely to take the opposite party by surprise
  - Look at relationship between defense and cause of action
    - (1) is the matter necessary in the cause of action
    - (2) which party has better access to relevant evidence
    - (3) policy considerations
  - **Technical failure to comply with 8(c) is not fatal if it didn't result in an unfair surprise**

#### Further Pleading under 7(a)

- If a responsive pleading is not required, an allegation is considered denied or avoided, if not admitted or denied

#### Amending Pleadings: Rule 15

- Procedure should be flexible enough to allow the parties to litigate the entire dispute between them on the merits
- Liberal Amendment
  - A change of original pleading to reflect additional facts, parties, claims, or defenses, or to conform to evidence produced at trial

## 15(a) 2 Types of Amendments before Trial

- **(1) amendments allowed as a matter of course, without needing the court's permission**
  - Allowed in 3 circumstances
    - 15(a)(1)(A) → 21 days of serving the pleading
    - 15(a)(1)(B) → 21 days after responsive pleading to the original is served
    - In response to a 12(b) MTD, or 12(e) motion for more definite statement, or 12(f) motion to strike → amend within 21 days
  - 21 days are NOT cumulative
- **(2) Amendments by leave of court**
  - Judge has to consider a # of factors
    - Stage of litigation
    - Reason for the amendment
    - Viability of the amended claim or defense
    - Reason for *not* including the new allegations in the original pleading
    - Amending party's diligence
    - Prejudice that it may cause the opposing party
      - Merits Prejudice
        - Every amendment gives the amending party some litigation advantage and therefore hurts the opposing party
      - Undue Prejudice (Preparation prejudice)
        - Consists of prejudice to preparing to defend that flows from the lateness of the amendment
        - Not good
    - Is it futile as a matter of law?
      - Futile → failed to state a claim or defense
      - If it won't relate back, it is futile.
    - Amending party's prior amendments, if any

## 15(b)

- Amendments during trial have a less generous standard

## 15(c)

- "Related back" after the statute of limitations has run

### Amendment after Dismissal

- If within 21 days, can amend after dismissal
- If more than 21 days, can't amend without leave

### **Beeck v. Aquaslide 'N' Dive Corp. (8<sup>th</sup> Circuit Ct. of Appeals; 1977)**

- **Facts**→ D originally answered the complaint, but 6 months later after the statute of limitations had run, D discovered they hadn't actually made the slide, moved to amend the answer to deny manufacture
- **Rule**→ Absent an element of bad faith on the part of D, courts will generally grant a D leave to amend its answer to a complaint, unless it will clearly prejudice the P to proceed with the suit
  - Only reviewable by abuse of discretion

### **Amending Claims/Defenses after the Limitation Period**

#### Rule 15(c)(1)(B)

- An amendment which seeks to add a time barred claim would be futile and should not be allowed unless the untimely claim "relates back" to the date of the original pleading.
  - Arose out of the conduct, transactions, occurrences of the original pleading.
  - Look at operational facts in original complaint to determine if D was put on **notice** of the claim that the P later seeks to add.

#### Relation Back

- Can amend a complaint to include a claim that the SOL had run out on if you relate back to the date of the original pleading and bring with it the SOL.
- Depends on when the clock starts...
  - Can "toll" the clock for different reasons

### **Bonerb v. Richard J. Caron Foundation (Western District Court of NY – 1994) REHAB B-BALL**

- Facts:
  - P injured while in rehab during mandatory exercise program on baseball court.



- Complaint was filed within the SOL, 1 year later new counsel, 2 months after wanted to amend the complaint to add another cause of action
- RULE→Rule 15(c)(1)(B)

## **Amending Parties after the Limitation Period**

### Rule 15(c)(1)(C)

- Authorizes relation back of an amendment changing the party against whom the claim is asserted – if several requirements are met...
  - Satisfied if the party to be brought in by the amendment:
    - Receives notice of the action as to not be prejudiced in defending on the merits and
      - Informal notice is enough, don't need to formally serve
    - Knew/should have known that the action would have been brought against it but for a mistake concerning the proper party's identity.

### *Different Kinds of Mistakes:*

- **Misnomer Mistakes**
  - When a P misnames or misidentifies a party in its pleadings but correctly serves the party.
  - Allowed by the Rule.
- **Deliberate Mistakes**
  - Knowing new party and its amenability to suit but deliberately choosing not to name them.
  - Not Allowed by Rule, Cannot Relate Back.
- **Mistakes of Ignorance**
  - P either does not know about a possible D or does not know it might be liable.
  - Must exercise due diligence.
  - Krupski took the more liberal approach.

## **Krupski v. Costa Crociere S.p.A. (SCOTUS – 2010) CRUISE SHIP MISTAKES**

- Facts:
  - P made mistake in naming proper D based on different factors.

- RULE→Information in the P’s possession is only relevant as far as it bears on what the D knew of whether or not the P made a mistake or not about the proper party.
  - Undue delay doesn’t matter in terms of relating back
- RULE→A deliberate but mistaken choice does not foreclose a finding that Rule 15(c)(1)(C) has been satisfied.

## Care and Candor in Pleading

Rule 11 sets out both the standard for **care and candor** in pleading and in filling of other papers before the court and the sanctions for violation of the standard.

*Presenting, signing, filing, submitting or later advocating a paper to the court certifies that the presenter believes after a reasonable inquiry that the paper has...*

- Not presented for an improper purpose
- The claims are warranted by existing law or by a non-frivolous argument for extending the law
  - Rule 11(b)(2)
    - Tolerates non-frivolous argument for extending, modifying or reversing existing law or for establishing new law.
  - Rule 11(b)(3)
    - Tolerates factual contentions that may lack evidentiary support at filing as long as they are specifically identified.
- Factual Contentions of Evidentiary Support
- Denials of factual contentions are warranted on the evidence.

### Reasonable Inquiry

- All of Rule 11’s certifications to the court must be based on a pre-filing “inquiry reasonable under the circumstances.”
  - Factors:
    - Time available for an investigation
    - Complexity of the factual/legal issues in question
    - Extent to which the pertinent facts were under the control of the opponents/third parties
    - Extent to which the lawyer relied on the client for the facts.

- Whether the case was accepted from another lawyer and the extent to which the receiving lawyer relied on the referring lawyer.
- Resources reasonably available to the lawyer to conduct an inquiry and the extent to which the lawyer was on notice that further inquiry might be appropriate.

### Rule 11(c)(2)

Offending lawyer must be given **21 days** to withdraw/correct the paper before the motion is filed but not when the court raises it sua sponte.

Snapshot – presentations made at the time of signing, filing or submitting.

- No duty to withdraw paper on the basis of later acquired information.

### **Hays v. Sony Corp. of America (7<sup>th</sup> Circuit Court – 1988) COPYRIGHT**

- Facts:
  - Small town lawyer didn't know that CL copyright had been abolished and tried to sue for it.
- RULE→Rule 11 establishes a standard for malpractice by which the attorney's inquiry must be **objectively reasonable**.
  - Amount of investigation – depends on circumstances
    - Time
    - Expertise
    - Cost/Benefit
  - No locality rule in legal malpractice
  - Does not require bad faith.
  - A single unsupported allegation does not mean that you will be sanctioned.
    - Unless...the violation effected the entire pleading.

### **Hunter v. Earthgrains Co. Bakery (4<sup>th</sup> Circuit Court – 2002) SANCTIONS**

- Facts:
  - Civil Rights lawyer brought a class action on behalf of minority employees of a bakery that was eventually closed.
  - P asserted that the CBA did not apply to the Title VII claims at issue.
  - Trying to overturn existing caselaw.

- RULE→ Maintaining a legal position to a court is only sanction-able when, “*in applying a standard of objective reasonableness, it can be said that a reasonable attorney in like circumstances could not have believed his actions to be legally justified.*”
  - Must have absolutely no chance of success under existing precedent.
  - Don’t have to prove it before filing.
  - Purpose of Sanctions – deter litigation abuse.
  - Warranted by existing law.
    - Until the SC decides the issue, the law in each circuit is what the circuit’s court of appeals says it is if the court has reached the issue.
  - It is not losing that violates Rule 11, it is why you lose.

### *Proper/Improper Purpose*

- Court may sanction an attorney who files a non-frivolous paper where it is objectively ascertainable that an attorney submitted a paper to the court for an **improper purpose**.
  - Rule 11(b)(1)
  - Such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation...
  - Inferring the presenter’s intent from his/her objective behavior.
- Dismissed without prejudice
  - Court imposed conditions on dismissal to assure P’s the chance to pursue that remedy.
- Can a non-frivolous complaint filed in a non-frivolous choice of venue ever have an improper purpose?
  - COA says no.
  - Objectively reasonable – don’t have to consider the subjective content.

### Inherent power and 28 USC §1927 – Other authorities for imposing sanctions

- Court has the inherent power to supervise and control its own proceedings and to sanction counsel or a litigant for bad-faith conduct.
- *28 USC §1927 – is like Rule 11 in that it focuses on the purpose of the lawyer’s conduct but it is narrower than the Rule in that it applies only to conduct that multiplies proceedings.*

Differs from Rule 11 authority in 2 ways.

- **(1)** Triggered by bad faith conduct, which Rule 11 extends to good heart empty head conduct as well.
- **(2)** Inherent sanctioning power applies to all litigation conduct, including oral representations and behavior in the court, while Rule 11 applies only to PAPERS presented to the court.

#### Procedure for Rule 11 Sanctions

- Ordinarily, a party initiates proceedings for Rule 11 sanctions by filing a motion. Must be made separately from other motions and must be served on the offender **21 days** before it is filed with the court.
  - Gives the offender time to reconsider and withdraw or correct the offending paper.
- Sua Sponte – NO 21 DAYS.
  - Due Process still requires notice and a chance for the offender to explain/defend.
  - Order the offender to show cause why conduct specifically described in the order has not violated Rule 11(b)
  - Court is obliged to use extra care in imposing sanctions.
    - Confine them to situations that are akin to a contempt of court.
  - Can't just withdraw the offending pleading.

#### Appropriate Sanctions

- Can be monetary/non-monetary.
- The sanction must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.
- Objective=**deterrence**
  - Lay Client – unlikely to be sanctioned.
  - Rule 11(c)(5)(A)



