

CLUSTER ONE: JURISDICTION AND RELATED MATTERS...

There are seven questions in this cluster. The first three are biggies b/c they have Constitutional dimension:

1. Does the court have **SMJ** (power over the dispute)?
 - a. Fed Q? Diversity?
 2. Does the court have **personal jx** (power over the D)?
 - a. State assertion? Constitutional (MC/PA & FPSJ)?
 - b. Don't forget to talk about general after specific!
 3. Has the D been given **notice and an opportunity to be heard**?
 4. Has the D been properly **served with process**?
 5. Does the court have **venue**?
 6. If commenced in state court, deal with **removal**: can the case be removed?
 7. Has anything in Qs 1-6 been **waived/consented to**? ****LOOK for this****
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QUESTION #1: DOES THE COURT HAVE SUBJECT MATTER JURISDICTION?

1. For a court properly to undertake a civil adjudication, the court must have, under applicable constitutional and statutory provisions, authority to adjudicate the type of controversy before the court (*ie*, it must have subject matter jx). The federal courts are courts of **LIMITED JURISDICTION**. Can have federal SMJ by:
 - a. Original Jurisdiction, usually through:
 - i. Federal-Question Jurisdiction (§1331)
 - ii. Diversity Jurisdiction (Diversity of Citizenship + Amount in Controversy: §1332)
 - b. Removal Jurisdiction
 - c. Supplemental Jurisdiction (§1367)
 2. SMJ is either:
 - a. Concurrent (suit can be filed in either state or federal court) or
 - b. Exclusive (Congress may explicitly give federal courts exclusive jx over certain issues arising under federal law that can only be heard in federal court, *eg*, admiralty/maritime: §1333, bankruptcy: §1334, patents/©/trademark: §1338). Federal courts do NOT hear probate/domestic relations questions.
 3. Article III § 2: Federal Jurisdiction:
 - a. The federal courts shall have jx over cases:
 - i. arising under the Constitution, the laws of the U.S., and treaties made by U.S.
 - ii. where the U.S. is a party
 - iii. between two or more states
 - iv. between a state and citizens of another state
 - v. between citizens of different states
 - vi. between states (or citizens of a state) and foreign states (or citizens of foreign states)
 - b. Article III § 2 of the Constitution does not grant the *courts* the powers enumerated therein. Rather, it grants *Congress* the power to give the courts jx up to the limits of Article III § 2. Thus, Congress may allocate whatever power it decides up to the limits of the Constitution. Therefore, it is necessary to look to the Federal Rules of Civil Procedure (FRCP) that have granted the courts certain types of SMJ.
 4. Why do you want to be in federal court? Courts less clogged, more efficient. Ds usually want federal court but Ps want their money faster so they want it too.
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A. DIVERSITY JURISDICTION

28 U.S.C. § 1332: Diversity of citizenship; amount in controversy; costs

“(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive interest and costs, and is between: (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different states and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state as P and citizens of a state or of different States.”

Application of § 1332

1. COMPLETE DIVERSITY

- a. Must be completely diverse among parties on opposite sides (**Strawbridge**); NO diversity when any P and D are from the same state, regardless of how many parties are involved in the litigation (*nb*: with corporations, cannot be same as EITHER domicile!).
- b. Citizenship is **determined when the suit is filed**, NOT when the incident occurred!
- c. **When is a person a citizen of a state?**
 - i. A person is a citizen of a state for purposes of § 1332 if they are **DOMICILED** there. A person can only have ONE domicile. A domicile is a person’s **fixed, permanent home, where he intends to return**. (Mas v. Perry 1974: not changed by marriage alone).
 - ii. Domicile (only one) is NOT the same as residence (can have several). A person’s residence is wherever he is living at any particular time. This residence may or may not be the person’s domicile, which is more permanent. For example, a college student who goes away to school in a different state resides in that new state. His domicile, however, is still where he grew up. **To change domicile** a person must (1) take up residence in a new state, and (2) have the intention to remain there indefinitely.
 - iii. The party invoking diversity jurisdiction bears the burden of pleading the diverse relationship and the burden of proof if challenged.
 - iv. NOTE: Permanent residents (aliens) of the US are considered citizens of the state in which they are domiciled (§1332(a)). The legal representative of the estate of a decedent (or rep of an infant) is a citizen of wherever decedent/infant was/is a citizen (§1332(c)(2)).
- d. **Where is a corporation domiciled?**
 - i. A corporation’s domicile(s), for purposes of § 1332, are (1) the **state where it is incorporated** AND (2) its **principal place of business** (a corporation is generally said to only have one principal place of business) under § 1332(c)(1). A corporation’s PPOB (can only have one) may be determined by any one of three tests (from White v. Halstead Industries):
 1. **Brains**: “nerve center” (wherever the decisions are made and control is exerted; headquarters)
 2. **Brawn**: “corporate activities”(wherever most production is carried out and operating assets are located; *eg*, mfring and warehousing)
 3. **Hybrid**: “total activities” test (measures both the “brains” and the “brawn” of a corporation to determine where the business is located)
 - ii. Unincorporated associations have the citizenship of all the members (US Steel Workers)
 - iii. Limited partnerships have the citizenship of each partner (Carden v. Arkoma Assoc)
- e. **Invalid Creation/Destruction of Diversity is Bad**: A party may not manipulate jurisdiction by (improperly) assigning interest in a suit to another party to create or destroy diversity. Jurisdiction will be based on the citizenship of the real parties to a suit, thus disregarding the formal parties to a suit.
 - i. Cannot assign (sell) case just to create diversity (§1359; Kramer v. Caribbean Mills: no jurisdiction over action btw two foreign parties even though P brought in TX attorney).
 - ii. Administrator of estate = same state as decedent per §1332(c)
 - iii. Only look at “real parties in interest,” not “nominal parties,” for diversity (Pete v. Rose, Bart v. Giamatti)
 - iv. Don’t look at fictitious names, *eg*, “John Doe’s” (§1441(a))

2. AMOUNT IN CONTROVERSY

- a. **Must exceed \$75K** EXCLUDING interest and costs per §1332(a).
- b. Sum brought by P controls. P only needs a **GOOD-FAITH CLAIM** that the amount sought is sufficient (AFA Tours v. Whitchurch).
- c. **To dismiss** for failure to meet the amount in controversy requirement, there must be a **LEGAL CERTAINTY** on the part of the court that the amount in controversy will not be met (D bears BOP).
- d. **How is the amount in controversy calculated?**
 - i. The amount in controversy may include compensatory damages + punitive damages (when allowed) + injunctive relief (for future loss) - AFA
 1. Injunctive relief is usually measured in terms of its benefit to the P, not its detriment to the D (McCarty v. Amoco) but varies by jx (some value to P, some value to D, others say either fine; weird b/c possible to be remanded to state when viewed from one perspective then removed to federal again though other perspective).
- e. Only look at P's claims, not third-party or counter-claims!
- f. Aggregation of Multiple Claims:
 - i. A P may aggregate claims against a **single** D (whether related or not) to satisfy the amount in controversy.
 1. BUT a P may NOT combine claims against **separate** Ds to reach the magic number
 2. UNLESS the claims represent a common and undivided interest.
 - a. *Example*: Partners with a common interest in a piece of land may combine their prospective recovery.
 - ii. If a claim is dismissed and the amount in controversy falls below \$75K, court may dismiss (at its discretion). Shanaghan
- g. Aggregation of Multiple Ps against one D:
 - i. Separate Ps generally may NOT combine complaints to meet the amount in controversy requirement (unless there was a single and indivisible harm).
 1. The majority of courts will dismiss the claim of any P who does not meet the amount in controversy requirement, even if another P does meet that requirement. In Zahn v. Int'l Paper (US 1973), the SC held that in a class action, each P must meet the amount individually.
 2. However, the minority of courts WILL allow claims not satisfying the amount in controversy requirement, as long as at least ONE P's claim is for more than \$75,000. See Stromberg Metal Works (7th Cir 1996) following In re Abbott Labs (5th Cir. 1995), which held that only the "named" representatives of a class must meet the jurisdictional amount. Both cases held that reading §1367(b) on its face effectively overruled Zahn. However, Congressional intent for §1367 does NOT support this reading, and because the Supreme Court did not grant certiorari to Abbott, it is difficult to know how a court in an unknown circuit (not 5/7) would decide the issue. Regardless, *at least one* P needs \$75,000.01 or more in controversy.

3. Arguments for and against Diversity Jx:

- a. FOR: possible prejudice against foreign Ds (weak); equality among states; federal courts qualitatively superior to state; competition btw fed and state leads to higher stds of justice in each
 - b. AGAINST: congestion of federal courts; application of state law makes federal jx unnecessary; interference with state autonomy; could retard development of state law; could decrease incentive for state court reform
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B. FEDERAL-QUESTION JURISDICTION

- “For a federal court to have federal-question jurisdiction, the plaintiff’s cause of action must **ARISE UNDER the Constitution, laws, or treaties of the US.**”
 - Article III, § 2: “The judicial Power shall extend to **all Cases...arising under** this Constitution, the Laws of the United States, and treaties made...under their authority”
 - 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”

Application of § 1331:

1. **Step one:** Look at the **WELL-PLEADED COMPLAINT RULE** (*only look at P’s claim*): The federal question must be *integral* to the P’s cause of action, as revealed by the P’s “well-pleaded complaint,” established in Louisville & Nashville Co v. MOTTLEY, which states that to determine whether a complaint **arises under** the Constitution, laws, or treaties of the U.S., the court must look **ONLY** at the P’s claim, **not the potential defenses** to that claim (*ie*, the court may NOT anticipate federal questions that may come down the road if the D chooses to raise them; a suit satisfies §1331 only when the **P’s** cause of action arises under the Constitution, laws, or treaties of the US). [Look at what *should* be in P’s complaint as filed, not necessarily what actually says (if mistakes)?]
2. **Step two:** Look at **HOLMES’ CREATION TEST**: “**a suit arises under the law that creates the cause of action**” (need to look at the law that CREATED the P’s claim).
 - a. Just b/c the outcome may *involve* or even *depend upon* federal law does NOT necessarily mean that the cause of action “*arises under*” federal law (a fuzzy area).
 - i. T.B. Harms v. Eliscu: assignment of music copyrights does NOT “arise under” federal © law b/c main issue contractual (t/f outcome depends on state law).
 - b. Must look at the **strength of the federal issues and policies favoring a federal forum** for each case:
 - i. Is the P part of the class meant to be protected by the statute (class for whose benefit enacted)?
 - ii. Is there specific/implicit legislative intent to deny remedy?
 - iii. Are remedies consistent with the statutory scheme?
 - iv. Traditionally regulated by state law?
 1. Shoshone Mining Co. v. Rutter: COA created by federal law (patents for mines) BUT doesn’t fall under Fed-Q jx b/c turns on state issues re: local customs/rules (inappropriate for federal courts).
 - a. NOTE: Shoshone and Smith are two extremes
 - c. Not all federal laws give rise to a private action. The major question is whether Congress intended to provide for private remedies. Causes of action arising out of state laws may require the **interpretation** of a federal law or the Constitution to determine the outcome. In such cases there is probably NOT Fed-Q jx even though federal laws play an important role in determining liability. It is NOT enough that P asserts a state claim that requires federal-law **interpretation**:
 - i. Merrell Dow Pharmaceuticals
 1. No private federal COA intended by Congress for FDCA violations (should be FDA-enforced) and don’t want to preempt Congress. The strong federal interest in uniform interpretation not good enough reason to hear. There was the novelty of a federal issue in an otherwise state claim, but just b/c a **state adds federal elements into a state law is not enough** for jx.
 - ii. Moore v. Chesapeake & Ohio RR Co
 1. A state-law private COA but federal statute also involved (emp’ee sued emp’er under state act that dealt w/ emp’er not following federal act). Federal statute not violated (and no diversity jx) so no SMJ.
 - iii. BUT see Smith...
3. **Step three:** IF the case involves a Constitutional challenge to a Federal statute ITSELF (NOT an interpretation thereof) can get into federal court [this is VERY UNUSUAL and not going to happen often].
 - a. The court in Smith v. Kansas City Title (state action by stockholder to enjoin corporation from buying bonds b/c issued under an unconstitutional statute) held that where it appears from the bill or statement

of the P that the right to relief depends upon the **construction/application** of the US Constitution/laws and rests upon rsbl foundation, there is federal SMJ. That is, if the issue is with the constitutionality (not the violation) of a statute, it “arises under” b/c it is NOT a question of interpretation, but a questioning of Congress itself (and thus a preemption of Congressional intent).

- b. Smith violates Holmes’ creation test (Holmes dissented here b/c saw no “arising under”) and looks more broadly BUT even a court like in Smith would NEVER go so far as to say that an anticipated defense was a basis for jx (*ie*, they wouldn’t go against Mottley). Smith is the EXCEPTION not the rule. Here, needed to grant federal jx b/c otherwise state courts would be determining whether what Congress did was constitutional (problematic), yet don’t want to completely strip courts of the ability to determine whether Congress’ act of passing a particular bill was constitutional.
 4. As a response to the well-pleaded complaint rule (or to take advantage of it), Ps may try “**artful pleading**” and either (1) state a federal claim where none exists or (2) not directly state a federal claim in order to avoid federal jx. The courts have held, however, that a P may NOT conceal the true nature of the complaint through artful pleading (see Skelly Oil, Bright v Bechtel).
 5. NOTE: If a claim arises under federal law, it qualifies for federal jx even if the claim is invalid on the merits. Must, in that case, dismiss per Rule 12(b)(6), failure to state a claim upon which relief may be granted, NOT for lack of SMJ.
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C. CHALLENGING SUBJECT MATTER JURISDICTION

1. Federal SMJ CANNOT be waived or consented to.
2. Rule 12(h)(3): whenever it appears by suggestion of the parties or otherwise [*eg, sua sponte*] that the court lacks SMJ, the court shall dismiss
3. **Direct attacks** on subject matter jurisdiction: challenge in the rendering state
 - a. Lack of SMJ may be asserted at any time and by any interested party, either in the answer, or in the form of a suggestion to the court prior to judgment or on appeal. Even non-party witnesses are allowed to challenge a court’s lack of SMJ.
 - b. Unlike personal jx, a party may not consent to/waive SMJ.
 - c. If a D tries to deceive the courts into believing that there is SMJ until the statute of limitations has run and THEN try to directly challenge SMJ, the court can retain jx in the interest of justice.
 - i. Di Frischia: A D may not “play fast and loose with the judicial machinery and deceive the court” (by waiting for SOL to run before claiming lack of SMJ)
 - d. A party MUST obey the orders of a court even if he believes that the court lacks SMJ. This means that a party may not ignore court orders (unless there is no opportunity for effective appellate review of the decree?).
 - i. United Mine Workers: D had restraining order from the Federal Court and enforcement not obeyed b/c lack of SMJ; cannot disobey court (even if you disagree) and must obey orders until set aside; lack of jx not a defense here (to contempt charges).
 - e. A court may even impose sanctions in a case where it lacks SMJ (b/c such orders are collateral to the merits of the case; no constitutional-concern implications b/c not an adjudication/assessment of the legal merits of the complaint).
 - i. Willy: P brought a claim in state court and removed to federal court, which said no claim for relief stated and imposed Rule 11 sanctions; P’s defense was lack of SMJ, but courts can impose sanctions even w/o SMJ b/c not based on legal claims.
4. **Collateral attacks** on subject matter jurisdiction: challenge in the enforcing court
 - a. A D may challenge SMJ collaterally only when:
 - i. The P has not relied on the jx (thus has not allowed the statute of limitations to run, etc.); AND the subject matter of the action was so plainly beyond the court’s jx that its entertaining the action was a manifest abuse of authority; OR
 - ii. Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; OR
 - iii. The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jx and as a matter of procedural fairness the

party seeking to avoid the judgment should have the opportunity belatedly to attack the court's SMJ.

- b. Collateral challenges to SMJ are infrequent. Challenges are more successful against prior defaults than against prior contested actions. Rest.2d says collateral challenge only okay when a contested action is (1) plainly out of the court's power and manifests abuse of authority, (2) would substantially infringe the authority of another tribunal, (3) court lacked capability to make an informed judgment.
- c. As with issues of personal jx, a judgment is entitled to full faith and credit (even re: questions of jx) when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court that rendered the original judgment. However, there are a few exceptions to the finality of decisions, especially where there are issues of federal preemption or sovereign immunity.
 - i. Chico: District court acted as bankruptcy court. Ds had notice but didn't appear and later attacked collaterally, saying no SMJ. SC would NOT allow b/c D didn't show.
 - ii. Kalb: State court entered judgment for against Ds and collateral attack based on fact that state court lacked bankruptcy court's consent for jx. SC allowed the attack (Congressional exception) b/c didn't want to infringe on other courts. [EXCEPTION]

5. Remand of a case to state court

- a. § 1441(c): Fed Ct can remand claims where state law predominates
- b. Court can remand/dismiss at any time b/c motion to remand for lack of SMJ can be made at any time before the final judgment: 12(h)
- c. Remand is UNREVIEWABLE per §1447(d) and cannot be appealed (would be unmanageable) UNLESS:
 - i. Not properly made under §1441(c), *ie*, not remanded for cause OR
 - 1. Thermatron (judge remanded b/c docket was full/court over-loaded)
 - ii. Civil Rights case (under §1443)
- d. If the P seeks to join additional Ds whose joinder would destroy SMJ, the court may deny joinder, or permit joinder and remand the action to state court (*nb*: if started in federal, case is dismissed; if started at state, case is remanded).
- e. Did the P manipulate the system to get the case remanded?
 - i. District court can consider whether P has engaged in manipulative tactics when it decides whether to remand a case. If the P has attempted to manipulate the forum, the court should take this behavior into account in determining whether the balance of factors to be considered under the supplemental jx doctrine support a remand in the case. District courts thus can guard against forum manipulation without a blanket rule that would prohibit the remand of all cases involving pendent state-law claims.
 - 1. Carnegie-Mellon: P had both state and federal claims in original suit and D removed to federal court. Manipulation test: P CAN take out federal claim to remand to state IF
 - a. federal claim not more substantial and
 - b. there is no common nucleus of operative fact

QUESTION #2: DOES THE COURT HAVE PERSONAL JURISDICTION? (JX OVER THE PARTIES TO THE ACTION)

- Two questions for personal jurisdiction (ask every time!):
 - i. **Can the forum state assert jx over the D (by traditional basis or long-arm)?**
 - ii. **If so, is that jx Constitutional (does it meet the minimum contacts test)?**
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A. THE TRADITIONAL APPROACH

1. Traditional Basis of Jurisdiction

- a. **DOMICILE (or residence or citizenship)** of the D is the forum state (domicile as “state which accord privileges and affords protection”)
 - i. Milliken v Meyer (US 1940): Meyer had domicile in WY but not physically present (in CO). To serve him in CO (under WY statute). Constitutional b/c a state always has personal jx over its citizens (even if domicile without residence).
 - b. **PRESENCE:** D is found within the forum state’s borders and **served with process** while there
 - c. **CONSENT:** D voluntarily appears before the forum court
 - i. can be express (eg, where person has an agent who can receive process if an action arises) or **IMPLIED:**
 - i. D files a suit in the state and can then be counterclaimed
 - ii. D appears in court without challenging personal jx only
 - ii. **Non-resident motorist** (like Hess) and other “dangerous instrumentalities”
 1. Hess v. Pawloski (US 1927): An early recognition of the right of states to regulate certain activities that take place within their borders by non-residents. Under this theory, non-residents consent to the forum state’s jx by performing certain acts within the borders of the state. As part of their consent (fictional, really), they appoint an agent to represent them inside of the state.
 - a. *“Motorists who use the roads of a state ought to realize that this purposeful activity subjects others to serious risks (ie, that people may be injured and sue). The quality and nature of this single, purposeful act (and the consequences that may predictably result) are so serious as to make it rsbl for a driver to have to return to defend a suit that arises from an accident.”*
 2. Importance (of being able to gain jx over transient Ds): recognized the need for expanded jx b/c of new advancements in travel which allowed people to visit foreign states more easily; showed new confidence in the ability to serve notice on non-residents; showed growing feeling that the states were part of a larger nation, rather than autonomous entities. Limitations: limited only to dangerous activities that the states had a special interest in regulating.
 - d. **PROPERTY:** but only now for “true” in rem cases <quasi-in-rem is gone>
2. Pennoyer v. Neff (US 1877): “Persons & Property” Standard (traditionally, it was thought that a state could only have jx if the D or D’s property could be taken into possession within the state’s territorial boundaries). In Pennoyer, the D, a non-resident, was not within the state (so no in personam) and did not own land at time of judgment (so no in rem). **RULE** (after Pennoyer):
 - a. Every state possesses exclusive jx and sovereignty over persons and property within its borders.
 - b. No state may exercise direct jx and authority over persons and property outside of its territory.
 3. Rationale for traditional rules:
 - a. State sovereignty and ideal of each state more as foreign country than part of the same country.
 - b. Inadequate methods of serving notice to out-of-state Ds
 - c. Burden of travel to D
 - d. FF&C already awarded to decisions made outside of a particular state (Article IV, §2: “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state”).

4. MODERN APPROACHES TO TRADITIONAL BASIS FOR JURISDICTION

1. **In rem**: traditionally, as explained in Pennoyer, a P could proceed against a piece of real property found within the forum state. These actions were limited to those claims that were against the property, such as ownership. The court now uses the minimum contacts test, but the result is the same. Generally, if a D owns property in a state and the P has a claim against that property, then there will be enough contacts to establish specific jx.
 2. **Quasi-in-rem** (the traditional approach; NOW GONE): as explained in Pennoyer, a P could establish jx over a nonresident by attaching any property that the D owned within the state. Although quasi-in-rem jx allowed Ps to bring suits that would otherwise never be heard (advantage), a P could only collect up to the amount of the attached property (disadvantage). If a P had a claim for \$10,000, and he attached the land of the D worth \$5,000 and proceeded quasi-in-rem, eventually, if he won the suit, he would only be able to collect the value of the property (\$5,000) and would have no claim to the rest of the money sought.
 - a. **MODERN rule of quasi-in-rem cases: Shaffer v. Heitner** (1977): The Supreme Court rejects the legal fiction of quasi-in-rem jx and established the minimum contacts test for all actions heretofore called quasi-in-rem. In reality, old quasi-in-rem cases were cases seeking to establish general jx, since they were cases that sought jx over land unrelated to the suit. Therefore Ps must now meet the standard test of minimum contacts for general jx (including consideration of fair play and substantial justice) if there is a quasi-in-rem statute still on the books.
 - i. Other info: Heitner owned 1 share of DE Greyhound stock, which was not the subject of the litigation. Brennan's dissent: The minimum contacts std is appropriate BUT the Court went too far in deciding that contacts were insufficient in the case (should have left that to the state).
 3. **In personam**: In personam cases were those that established jx based on a person's presence within a state. It has always been true that residents of a state are subject to general jx in that state. Also, nonresidents not present within a state may still be subject to either specific or general jx there, depending on their contacts with the state. The only remaining issue for in personam jx is what to do with **nonresidents who are found within the state and served notice there**:
 - a. In Burnham v. Superior Court (US 1990: D in CA on business is served with divorce papers while there), the Supreme Court reaffirmed (from Pennoyer v. Neff) that the traditional notion ("Tradition!" – Scalia) that states have absolute authority over any person found within their borders is the basis for in personam jx (even if there only briefly; b/c jx is expanded out, by analogy, from presence, don't want to gut the core). Thus, the court rejects a minimum contacts test b/c in personam jx already comports with "traditional notions of fair play." In addition, the court worried that a minimum contacts test would deny jx over Ds found within a state's borders simply b/c they had not benefited from the laws and protections of the state.
 - i. Brennan concurred that there was PJ, but said that minimum contacts should be the test (and a person found within a state's borders would almost always have minimum contacts anyway). Scalia pointed out that by Brennan's std anyone who had ever visited any state would be subject to jx there for any matter b/c they had at one time enjoyed the benefits of the state.
 - b. In any case, **personal service while in a state is still grounds for jx**.
 - i. Would be problematic, however, if D in the forum state involuntarily (b/c pure territoriality would be thin at best).
 4. SO, Pennoyer's quasi-in-rem legal fiction is DEAD (killed by Shaffer) but Pennoyer's territoriality is ALIVE (with Burnham).
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B. MODERNIZATION OF THE TRADITIONAL APPROACH TO PERSONAL JURISDICTION

Step One: If no traditional basis, Long-Arm Statute?

1. After Shoe, states began to enact new statutes that expanded their jx over nonresident Ds. These “long-arm statutes” sought to assert jx over nonresidents (who couldn’t be found and served personally in the forum state) for:
 - a. their general activity within the state (some states like CA have long-arm statutes that go to the limits of Due Process)
 - b. the commission of any one or series of enumerated acts within the state (some states don’t want to go that far and have produced long-arm statutes that “enumerate certain acts” that can create jx over nonresidents, frequently including the commission of a tortious act), and
 - c. even an act which occurred outside of the state, but which caused consequences inside of the state.
2. Even when an act is sufficient to satisfy the long-arm statute, however, it must still satisfy the Constitutional question of minimum contacts:
 - a. Application of the two-step test to jurisdiction: **Gray v. American Radiator** (IL 1961): Illinois had an early far-reaching long-arm statutes, which stated that any individual or corporation, regardless of citizenship, was “amenable to the jx of the state’s courts” if he committed a tort in the state...
 - i. **Q1: Does the long-arm statute apply?** When is a tortious committed within a state? In Gray, held that a tortious act is not complete until an injury results, otherwise it would not be a tortious act; t/f even if a valve was negligently made in OH, a tortious act still took place in IL where the valve blew-up, injuring the owner, so the long-arm applies (*nb: not all states agree with this interpretation of where a tortious act occurs; see **Feathers v McLucas** [NY 1965], which held that “tortious act” only applies where D’s “tortious conduct” occurred in the state).*
 - ii. **Q2: Is jurisdiction Constitutional?** If a mfr of a component part sends the part to the ultimate mfr, who then sends it to another state where it malfunctions and injures a resident of that third state, can the component mfr be forced to defend in the state where he had no minimum contacts? No. Gray may have satisfied the long-arm requirements, but it was not constitutional.

Step Two: *Minimum Contacts (Is personal jurisdiction Constitutional?)*

1. A court cannot hear a dispute unless it is Constitutionally sufficient.
2. In **International Shoe Co. v. Washington**, the Court broadened the scope of jx, essentially rejecting Pennoyer and thereby forming the basis for the modern view of personal jx by creating the “**minimum contacts**” test. The test was designed to determine whether a state’s assertion of jx was within the Due Process Clause of the Constitution (Amendment XIV) and based on **minimum contacts such that assertion of jx does not offend “traditional notions of fair play and substantial justice”** (sought to allow jx where it would be fair and practical).
3. Minimum Contacts Test:
 - a. **Nonresidents of a state may be subject to jx in that state if they have minimum contacts with the state such that it would not offend traditional notions of fair play and substantial justice to subject them to jx there.**
4. When Minimum Contacts may be found according to Shoe:
 - a. Where “the QUALITY AND NATURE of the contacts” makes it fair to subject the D to jx. When the D takes advantage of the benefits and protection of the laws of a state, sufficient to make the D amenable to suit there (fair), subject to personal jx.
 - b. Enough for minimum contacts? Estimate:
 - i. **Burdens** (to defend in the state)
 - ii. **Benefits** (systematic/continuous activity? Look at quality and quantity)
 - iii. **Conduct related?** (ALWAYS GO FOR SPECIFIC JX FIRST)
 - c. If business is regular and substantial then minimum contacts exist for *at least* specific jx.
 - d. *No contacts: “S has never been to the state, has not formed any deliberate relationship to or performed acts within the state, and has done nothing to derive benefits from the state. Consequently, S has no reason to expect to be sued in the state and has not consented to jx in exchange for benefits of in-state activity.”*
5. Rationale behind Minimum Contacts
 - a. The US has modernized since Pennoyer, and no longer practical to enforce traditional rules of jx alone (especially b/c more mobility, more interstate business).

- b. It is only fair to make a D defend a suit in a state where he has profited from the laws and where he could have brought a suit himself AND it PREVENTS an unfair burden on Ds that have not so done (insures that states do not reach beyond their authority).
 - c. It is no longer such a burden for Ds to travel to foreign states, especially if they have such contacts there that they are already familiar with the state.
6. Shoe divided personal jx into two subcategories: specific and general jurisdiction
- a. **Specific Jurisdiction:** Where the suit arises out of the specific contacts the D has with the state. Requires a low threshold of minimum contacts. Specific jx can only give rise to suits that are based on the D's contacts with the forum state (eg, if a driver of a car enters a state and has an accident in the state he may be sued for damages caused by the accident BUT he is not subject to jx in that state for other activities that had nothing to do with the accident).
 - i. *Contacts unrelated to claim: "International Shoe holds that a D may, by committing limited acts within a state, submit herself to specific personal jx for claims arising out of the in-state acts themselves. Although Y has minimum contacts with the state, they are unrelated to the claim."*

Not enough for Specific Jx	Enough for Specific Jx
<ol style="list-style-type: none"> 1. <u>Hanson v. Denckla</u> (US 1958): D[trust]'s client sent \$ to them but they didn't do anything in state; "mere unilateral activity" doesn't support jx 2. <u>Kulko v. Superior Court</u> (US 1978): D's sent daughter to CA ≠ purposeful availment; D didn't avail self to benefits of CA law (didn't even go there himself); "merely causing an effect within the forum state without purposeful availment will not support jx" 3. <u>WWV</u> (US 1980): likelihood of ending up in OK not enough b/c <i>no expectation</i> that would be there (narrow scope and very limited benefit); car was only in OK b/c of P's unilateral activity (but see <u>Gray & Nelson</u>) 4. <u>Asahi</u> [O'Connor]: need additional deliberate conduct: mere awareness (<i>or even expectation</i>) that its valves would eventually end up in CA not enough 5. <u>Parry v. Ernst Home Center</u> (UT 1989): maul from Japan hurt P in Utah but there was no additional conduct (Japanese co. took no active steps to sell in UT) so no jx (followed O'Connor re: need "stream+") 6. <u>Greene v Advance Ross</u> (distinguished from <u>Gray</u>): act in TX by TX resident (former president of affiliate) re: diminution of funds of company HQ'd in IL; consequences too remote from conduct to assert conclusion that tortious act committed in IL (no jx in IL). 7. Websites/nationally run ads usually NOT enough for personal jx (in every state) unless reaching into particular states specifically. 	<ol style="list-style-type: none"> 1. <u>Mcgee</u> (US 1957): even though D had only one policyholder in CA, received \$ from her and solicited her so had a "substantial connection" to CA (a single contract may be enough of a minimum contact [to support long-arm jx]); to determine whether a K constitutes minimum contacts (<u>BK</u>), look at (1) prior negotiations, (2) expected future consequences, (3) terms of the K, and (4) course of dealings. In <u>Alchemie Int'l v. Metal World</u>, a single-sale K supported NJ long-arm jx where D made calls/sent mail into NJ (even w/o NJ office/staff). 2. <u>Gray v. American Radiator</u> (IL 1961): D <i>expected</i> radiators to be sold in IL, benefited from its laws (<i>nb</i>: same std as WWV but diff. result) 3. <u>Nelson v. Park Industries</u> (7th Cir. 1983): made flammable clothes (at beginning of distribution system) to be sold to Woolworth's; intended to serve and derived benefit from broad market (unlike narrow focus in <u>WWV</u>) 4. <u>Burger King v. Rudzewicz</u> (US 1985): franchise K tied D's business into FL and stream of payments into state deemed to be "purposefully directed" activity; no unfair surprise for D to defend in FL 5. <u>Asahi</u> [Brennan]: steady stream of valves into CA (regular + anticipated) vs. unpredictable eddy [but FP trumped] 6. <u>Asahi</u> [Stevens]: volume, value, hazardous character [but FP trumped] 7. <u>Keaton v. Hustler</u>: subscribers in NH and magazine sent to NH (subject to personal jx anywhere sent); look at D's minimum contacts (doesn't matter if P has no minimum contacts with the forum state); CAN have MC <i>with</i> a state even if never acted <i>within</i> the state; doesn't have to be the MOST contacts (Hustler certainly sent more magazines to other states than NH). 8. Unclear if action "related to," but not "arising out of," purposefully availed contacts would be covered, but Brennan says yes in <u>Helicopteros</u> dissent (if P had arg'd that specific jx b/c pilot trained in and K negotiated in TX then could have arg'd that crash "related to" this activity); the majority said that it didn't matter but didn't say that Brennan was wrong.

- a. **General Jurisdiction:** Where a state asserts jx over a D for activities that are not related to his contacts within the forum state. Based on the idea that certain Ds may have so many contacts (“**continuous and systematic**” contacts) with a state that they are “**there for all purposes.**” General jx allows Ps to bring suits against Ds for activities that occurred outside the territory of the forum state (eg, if the driver mentioned above had so many contacts with the forum state that it had general jx, he could be sued even for claims that did not arise out of the accident); *nb*: try for specific first b/c easier to get.
- b. NOTE: Unlike the specific jx that was the issue in World-Wide, Asahi, and Burger King, general jx will NOT often ask whether there is purposeful availment. Instead, general jx is based on the fact that a D has enough sufficient substantial contacts in a state to give rise to a suit that is not related to those contacts. To satisfy such a test a D must conduct **regular and substantial business** within the forum state. Unclear whether 5-part FPSJ test is part of general-jx analysis (see de Reyes).

Not enough for General Jx	Enough for General Jx
<ol style="list-style-type: none"> 1. <u>Helicopteros v Hall</u> (US 1984): Mere purchases (even though at regular intervals) and related trips (for training, meetings) NOT enough to constitute “continuous and systematic” contacts; accepting checks on TX bank = unilateral activity (so NG: see <u>Kulko & Hanson</u>) 2. <u>Fisher v. Superior Court</u> (CA 1959): Some sales within state not enough for general jx (Iowa co w/ Idaho explosion cannot be served in CA just b/c had made some sales there) 3. <u>Jim Fox v Air France</u>: even if a D’s contacts are sufficient to satisfy the constitutional bounds of general jurisdiction (as here: “minimum contacts galore”) there still must be an applicable long-arm statute. Here, TX statute said “action must <u>arise out of</u> such business” for long-arm jx (b/c a specific, not general, jx statute). 	<ol style="list-style-type: none"> 1. <u>Perkins v. Benguet Mining Co</u> (US 1952): During WW2, D’s president went to OH to run business; OH had general jx b/c D conducted “continuous and systematic” business in OH and not inconvenient for D to defend there 2. <u>Cresswell v. Walt Disney</u> (PA 1987): D advertised, sold, had 800 number, recruited in PA 3. <u>de Reyes v. Marine Mgmt.</u> (LA 1991): D (HKCo) had substantial systematic/continuous contacts with LA (office in, shipping to, mgmt emp’ees in); ct looked at burden to D (not unfair to defend in LA so when Honduran P fell off ship could sue in LA); unclear whether 5-part FPSJ test is part of general jx analysis (SC hasn’t addressed); in <u>de Reyes</u>: low burden to D (in LA already); high interest to P (LA closer to Honduras than HK); high state interest if have LA sailors; high several states’ interest in substantive/procedural justice (don’t want HK company to hide behind HK law if sailing off US).

Step Three: After International Shoe: **Defining and applying minimum contacts**

1. **Stream of Commerce Standard:** A way to determine whether a D has minimum contacts with the forum state. If a D elects to sell its products for ultimate use in another state, it is not unjust to hold it answerable there for any damage caused by defects in those products.
 - a. Rationale behind the Stream of Commerce Standard
 - i. D corporations benefit from the laws and protections provided by the forum state where its products are sold.
 - ii. Corporations may insure against possible suits in states where the products are sold
 - iii. If a corporation sells a product in a certain state, it is not unrsbl that they should have to travel to that familiar state to defend a suit
 - b. Problems with Stream of Commerce Standard
 - i. D may not have directly introduced its product into the market in the forum state and in fact may have no other contact with the state
 - ii. D may not even know or care that the product would eventually end up in the forum state
2. **Purposeful Availment:** D must have “**purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws**” to have minimum contacts (Hanson v. Denckla [US 1958]: DE Trust Company never purposely availed itself of FL, so no min contacts and no jx).
 - a. Affects of Purposeful Availment Standard
 - i. D must have made a **deliberate** choice to relate to the state in some meaningful way before she can be made to bear the burden of defending there (it is *purposeful* activity within the forum state that yields jx [why there was no jx in Hanson]).

- ii. The D's conduct and connection with the forum state must make it such that it is reasonable to anticipate the possibility of being hailed into court in there (need purposeful availment).
- iii. "Mere foreseeability" that a product will arrive in a state is NOT enough to subject a D to suit there (Seaway not subject to jx in OK b/c no purposeful availment [car driven from NY to AZ could've ended up in ANY state] t/f no minimum contacts [even though yes long-arm/state assertion of jx]. World-Wide Volkswagen 1980); would create a slippery slope.
 - 1. **The chattel would become the D's "agent for service of process" wherever the buyer took it.** Mere unilateral activity of the buyer in bringing the product to another state is not enough for jx (WWV). A narrow view (focuses on scope of the activity of the seller, rather than on the predictable use of the product by the purchaser).
 - 2. **The D must do more than simply anticipate that her acts will have consequences in another state; she must deliberately set these events in motion by her own in-state act.**
- b. Rationale behind Purposeful Availment: Provides a degree of predictability for manufacturers as to where they might be sued (thus they can get insurance) and protects Ds from the burden of defending a suit in a far-away and unknown state.
- c. Problems with application of Purposeful Availment: Only promotes the interests of the D, not the other parties involved. May restrict the ability of states to assert jx over manufacturers who distribute faulty products through middlemen without knowledge or concern as to where the products will end up.

Step Four: *Influence of Purposeful Availment*

1. Purposeful availment has become the measuring point of whether a court may assert jx. There are, however, some disagreements as to what exactly purposeful availment means. In Asahi Metal Industry Co. v. Superior Court (1987), the Supreme Court split and has left a gap in the law that continues to exist today (8/9 [no Scalia] Justices agrees that personal jx should not be granted b/c not "fair play" b/c severe burden on D, slight interests of P and of forum state, strong interest of the several states in not hearing b/c even though minimum contacts b/c contacts VERY minimal so "unrsbl" to make D defend in the US; 5-to-4 split re: whether there were minimum contacts over D at all).
 - a. Justice O'Connor's View: NO MINIMUM CONTACTS (4). Justice O'Connor (joined by Rehnquist, Scalia, and Powell) held that purposeful availment was more than the "mere awareness" that the stream of commerce would introduce a D's product into the market of the forum state. Even if a company can foresee the product arriving in the forum state, this does not constitute purposeful availment. Rather, a mfr must deliberately direct its product to the forum state (**Stream-of-Commerce-Plus**: requires additional conduct).
 - i. Targeting test (to measure w. purposefully directed substantial connection [the "plus"]):
 1. Intent to serve market (business activities within the state?)
 2. Product designed for or deliberately focused on the market (of the state)
 3. Advertising within the state
 4. Established channels of contact/communication (cultivation of the customers) within the state
 5. Marketing through distributor to state
 - b. Justice Brennan's View: YES MINIMUM CONTACTS (4). Justice Brennan (joined by White, Marshall, and Blackmun) held that the purposeful availment standard is always met when the stream of commerce standard is met. He reasoned that the stream of commerce standard already requires the **regular, anticipated, predictable flow** of products into the marketplace. Therefore, by simply introducing their product into the marketplace, manufacturers are purposefully availing themselves to the benefits of any state where the product is reasonably foreseen to arrive.
 - c. Justice Stevens's View: PROBABLY MINIMUM CONTACTS BUT WE DON'T NEED TO DECIDE (constitutional avoidance). Justice Stevens (joined by White and Blackmun who had also joined Brennan) held that even if purposeful availment isn't equivalent to stream of commerce, sending a large volume of products into a state does establish *at least* specific jx. He held that stream of commerce must be evaluated by looking at the **volume, value, and hazardous** character of the products that are introduced into the market, but that here the minimum contacts issue is overridden by the fair play issue anyway.

2. In Short, there are minimum contacts when:
 - a. **O'Connor: stream of commerce plus** additional contacts proving purposeful availment
 - b. **Brennan:** stream of commerce as a **steady flow** (*ie*, purposeful availment b/c regular and substantial)
 - c. **Stevens: volume, value, hazardous character** = stream of commerce & purposeful availment
3. O'Connor's test is by far the most stringent and would deny jx in instances where Brennan's test would allow it. If O'Connor's test can be satisfied, then there will be jx under Brennan's test. However, none of the sides had a majority, thus leaving the issue open for the lower courts. Supreme Court today would probably follow O'Connor's test b/c Brennan *et al.* no longer on the Court, although hard call b/c keep denying *certiorari* to cases that raise the issue of what to do with Stream of Commerce.

Step Five: The Role of "Fair Play and Substantial Justice"

1. Through the history of cases, the courts have developed the role of fair play when deciding whether jx is appropriate. Although at the time of Int'l Shoe it seemed as if "**fair play and substantial justice**" might play a primary role in deciding jx, it has taken a back seat to minimum contacts. Now, courts consider issues of fair play only after finding whether there are minimum contacts. In this case, **issues of fair play may boost a case for jx over the threshold, and likewise, bump a case below the threshold** (as in Asahi). In other words, if a D does not have quite enough contacts, but the court finds that it would be in the interest of fairness to have the suit, then the D may be forced to stand trial in the forum state. By the same token, if a D was found to have had minimum contacts but the court determines that it would be unfair to assert jx, it may dismiss the suit.
2. Five distinct interests in fairness issues: Burger King v. Rudzewicz (US 1985):
 - a. **D's interest** (not traveling to far away state, burden of presenting case away from home)
 - b. **P's interest** (interest in obtaining convenient relief)
 - c. **Forum state's interest** (interest in protecting its citizens)
 - d. **Several states's (or nation's) interest in procedural justice** (*ie*, the judicial system's interest in obtaining the most efficient resolution to a suit)
 - e. **Several states's (or nation's) interest in substantive justice**
3. If the court were to consider each of these five interests and determine that jx is or is not fair, it could tip the scales one way or the other. However, this rarely would happen and usually would work in favor of denying jx where minimum contacts already exist.
4. Forseeability of being hailed into court in a particular forum state (as in BK) important b/c:
 - a. Gives notice, allows D to weigh benefits and burdens
 - b. Lets Ps hold Ds accountable if they have enjoyed benefits of state law
5. FPSJ factors can be domestic/international as in Asahi: dealt with indemnification claim by a Taiwanese company (D) against a Japanese company (TPD), so P and forum state's claims not very strong. Seemed unfair to drag foreign TPD in when the dispute was with another foreign D (don't want other nations' courts to similarly try to resolve disputes among US entities).

CONSENTING TO AND CHALLENGING PERSONAL JURISDICTION

1. **Consenting:** A D may consent to personal jx by:
 - a. Showing up in the rendering court to argue the merits of a case.
 - b. Through signing a K w/an explicit forum-selection clause (unless clause "unrsbl under the circumstances"): see M/S Bremen (US 1972), BK, Carnival Cruise Lines (US 1991).
 - c. If a D challenges jx, but then fails to follow the judge's orders in the pre-trial hearing to determine jx, it will be considered that that D is admitting that the jurisdictional challenge is baseless and that court will assert jx: Insurance Corp. of Ireland (US 1992).
 - d. Also, remember consent by driving through state: Hess.
 - e. Before a trial, it is the P's responsibility to state a prima facie case that jx is proper. During the trial the P must go on to prove this by a preponderance of the evidence. If a judge decides to have a pre-trial hearing to determine jx, then the P must prove jx beyond a preponderance of the evidence at that time: Data Disc Inc. (9th Cir 1977).
2. **Challenging:** When a suit is brought and a D does not believe that the forum state has jx over her, she has two choices: challenge directly or challenge collaterally (*nb*: a D may only challenge jx ONCE [in one forum]; thus, a D cannot challenge jx in the rendering state and then challenge again in the enforcing state). A D must raise the jurisdictional question immediately or waives the right to do so (unless plans to default and challenge collaterally).

- a. Challenge Jurisdiction Directly in the Rendering State (Forum State) By Answer or Motion**
- i. A D may choose to go (immediately) to the state where the P has filed suit and make a “**special appearance**” to challenge jx there. If D so chooses, must:
 1. Bring the challenge to jx immediately (by motion to dismiss for lack of personal jx: Rule 12(b)(2)), even before arguing the merits of the case. In federal courts, a D may file a motion on the merits at the same time as the objection to jx without waiving his rights to argue for dismissal on grounds of lack of personal jx BUT it is necessary to file the objection to the merits immediately, or the right will be waived forever.
 - a. “**Use it or lose it**”: defense of lack of personal jx waived if omitted from motion (or if not in motion, pleading, amendment): Rule 12(h)
 2. Can consolidate motions but if defense that is permitted by motion is not asserted, then cannot raise it later (“use it or lose it” again): Rule 12(g)
 3. If the objection to jx is overruled, then the D should argue the case on the merits. Such an avenue will not forfeit the D’s right to appeal the jx question if the D should lose.
 - ii. Advantages to Challenging Personal Jurisdiction Directly: (1) Chance to argue the merits of the case if the decision on the jurisdictional question is adverse to the D and (2) Appeal on the jurisdictional question is available.
 - iii. Disadvantages to Challenging Directly: (1) D must travel to foreign state to present the objection and (2) If jx is found, D must defend in the foreign state (exactly what D believes should not have to do)
- b. Collaterally Challenge the Decision in the Enforcing State** (post-judgment: only challenge jx, NOT merits)
- i. If a P brings a suit in a state where the D is *sure* that there is no jx, the D may choose to wait (not appear) and allow a default judgment to be entered in favor of the P, and then try to challenge the jx of the court when the P comes to enforce the decision (in the D’s state). Note: By defaulting in the rendering state, the D is WAIVING the right to argue the merits of the case should jx be proper (the merits CANNOT be relitigated). If a D chooses to follow this route she must:
 1. NOT go to the forum state and argue either the merits or the jurisdictional question (no appearance can be made whatsoever) b/c in either case she would be waiving her right to challenge jx later in the enforcing state (b/c Full Faith and Credit provides that each state has to honor the decisions of the other states). Thus, if the D were to challenge jx in the rendering state and lose, the enforcing state would have to give this decision full faith and credit. Likewise, by showing up in the rendering court and arguing the merits, the D is waiving his objection to jx and this waiver must be honored in the enforcing state). A D may only challenge jx once (and bound to the result).
 2. NOT argue the merits of the case in the enforcing state b/c she has already waived her right to do so by defaulting in the rendering state.
 - ii. Advantages to the Collateral Attack: Saves time, money and effort of traveling to foreign state to present case. Chance to litigate jurisdictional question in home state.
 - iii. Disadvantages to the Collateral Attack: No chance to argue the merits of the case in the event of an adverse jurisdictional opinion.
- c. Conclusion**: If a D is *absolutely* sure that jx is not proper in the forum state, then it is in his best interest to default and collaterally challenge the jurisdiction (to save some time and expense) BUT if the D has *any* doubts as to whether jx is proper, it may be better to travel to the rendering state and challenge directly (b/c it is risky to forfeit the right to defend on the merits of the case if unsure as to the outcome of the jurisdictional question).

MODERN RULE OF PERSONAL JURISDICTION:

- (1) Every state possesses jx and sovereignty over persons and property within its territory OR over persons who have minimum contacts such that traditional notions of fair play and substantial justice are satisfied by establishing either general or specific jurisdiction, so long as there is a long-arm statute that asserts jx.
- (2) No state can exercise direct jx and authority over persons and property outside its territory, unless there are minimum contacts such that this would comport with fair play and substantial justice.

QUESTION #3: HAS THE DEFENDANT BEEN GIVEN NOTICE AND AN OPPORTUNITY TO BE HEARD?

1. In addition to personal jx, Procedural Due Process requires:
 - a. Reasonable Notice and
 - b. Opportunity to be Heard
2. Amendment XIV: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jx the equal protections of the laws.”
3. Use 3-part balancing test for due process:
 - a. strength of private interest
 - b. risk of erroneous deprivation
 - c. strength of gov’t/public interest.
 - d. Must also look at value of additional procedures and cost:
4. In Matthews v. Eldridge (due process does NOT require pre-termination hearing for disability benefits), the importance of the private interest at stake and degree of harm if error were low (they had other money), the probable value of additional procedures such as an oral hearing was low (b/c medical condition, oral testimony not very important), and the cost (gov’t interest) was high (b/c fiscal/administrative burdens).
5. In Connecticut v. Doe (can NOT attach real estate for assault tort action w/o notice, prior hearing, bond, extraordinary circumstances), the private interest was strong (attachment affects loans, credit), the probable value of additional procedures such as an oral hearing was high (cannot prove assault w/ documents alone), and the cost (the P’s and the gov’t interest) was low (no property interest to P, only \$, and no interest to gov’t).
6. **Notice Before Seizing Property:** Due process requires certain procedural protections (notice and opportunity to be heard) before governmental action may unduly impair a person’s possessory interest in property.
 - a. **What type of property is protected?**
 - i. Any item which the possessor has a property interest (Goldberg: welfare benefits; Matthews: disability benefits; Fuentes: rented items; DiChem: bank account)
7. A hearing should at least establish the probable validity of the underlying claim (Fuentes v. Shevin) BUT sequestration procedure constitutional (1) if balances interests of parties and (2) if notice and opportunity to be heard precedes deprivation (Mitchell v. W.T. Grant Co).
8. Prejudgment remedy (eg, attachment) without opportunity to be heard violates due process.
 - a. North Georgia Finishing v. DiChem: Georgia bank-account garnishment procedure struck down b/c no hearing, no notice, and debtor could recover property only by posting bond for the debt amount. D must be able to argue against attachment either before or immediately after it occurs.
 - b. Sniadach v. Family Finance Corp: D’s wages can’t be garnished prejudgment (until D has had chance to show not right). Due Process is Important b/c a person should be given a chance to be heard before a determination is made in their case. What procedures are provided?: (1) witnesses (oral arguments); (2) cross-examination (right to confront accuser); (3) atty (who is knowledgeable about the proceedings); (4) decision based on law and evidence; (5) neutral decision maker.
9. **Must testimony be oral or may it be in writing?**
 - a. Matthews v. Secretary of Health: written arguments good enough when testimony is adequately expressed in writing.
 - b. Goldberg v. Kelly: writing may NOT be good enough if the interested party is not of an educational level appropriate to express arguments in writing. Right to orally cross-examine accusers to adjust to their accusations. Some testimony cannot be adequately expressed in writing.

QUESTION #4: HAS THE D BEEN PROPERLY SERVED WITH PROCESS?

For a court properly to undertake a civil adjudication, the persons whose property or liberty interests are to be significantly affected **MUST** receive **adequate actual rsbl notice so that they have opportunity to be heard**. This notice is provided by **service of process**. Two questions to address: Constitutional? Allowed by FRCP?

1. Step One: *The Constitutional question*

- a. When a P serves a D with notice, it must be **reasonably calculated**, under all the circumstances, to **apprise interested parties (Ds) of the pendency of the action** (against affected ppl and reps) and **afford them an opportunity to be heard** (allow enough time for an appearance). Most importantly, fair notice must be either (1) actual notice or (2) notice that is rsblly calculated to result in actual notice.
 - i. **Mullane v. Central Hanover Bank and Trust** (US 1950): notice by publication violated due process for KNOWN beneficiaries (with known addresses) b/c names not mentioned in ad and many lived outside publication area:
 1. Subtest #1: Feasible? When you know where the Ds are, you have to get notice to them there b/c notice must be rsblly calculated to reach (*eg*, mail if **known** names and addresses).
 2. Subtest #2: Unlikely? When you don't know where the Ds are, must chose means that is no less no less likely to reach them than any other rsbl means (*eg*, publication if **unknown** names and addresses).
 - ii. "Reasonableness under the circumstances" = a **Q for the judge** (no jury on anything but merits). What is rsbl under the circumstances?
 1. If cost to investigate D's location is low, need to investigate. See Menonite Board v. Adams (US 1983): publication not rsbl b/c names of mortgages public record (must look up and mail).
 2. If surrounding circumstances such that notice is unlikely to be rec'd, must use alternate means. See Greene v. Lindsay (US 1982): not rsbl to post summons of tenants in projects b/c children likely to tear down posts (must supplement with mail) [O'Connor dissent: what if mail stolen?]; Covey v. Town of Somers (US 1956): when a person is insane/disabled, mere personal service is not enough (must be sent to a guardian).
 3. Information in the summons must be rsbl. See Aguchak v. Montgomery Ward (Alaska 1974): proper info (that Eskimos could send written pleading and request change of venue) not in summons so Ds didn't respond (b/c \$\$\$ to get there) so notice Constitutionally inadequate (didn't afford opportunity to respond).
 - iii. Service does not have to be effected by the BEST method, only a rsbl method. "To dispense with personal service, the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." - Holmes
 - iv. If the notice is not rsbl, then the judgment is not enforceable (but can re-do and start again).

2. Step Two: The FRCP (Rule 4: Requirements of Notice/Summons)

(a) Form. The summons must be signed, sealed, identify court and parties, be directed to the D, give info re: P's attorney, state time within which the D must appear and defend, and notify D that failure to defend will result in a default judgment. The court may allow the summons to be amended.

(b) Issuance. If clerk okay's (signs and seals), P will be issued one summons for each D.

(c) Service with complaint; by whom made. The P is responsible for the service. **Summons and complaint must be served together within 120 days after filing the complaint** (unless the court extends this period) by a neutral third-party adult (at least 18) BUT P may request that the court order a U.S. marshal (or other appointed official) to serve process. *NOTE: if dismissed (w/o prejudice) b/c 120 days up, can refile complaint and start again (as long as SOL not run).

(d) WAIVER OF SERVICE; duty to save costs of service; request to waive

- A D is required to waive service when so requested by the P. Otherwise, he will be responsible for the costs of the service (this rule encourages waiver).
- Waiver of summons does NOT waive a D's potential objections to venue or personal jx: Rule 4(d)(1).
- If facing a SOL, a P may want to serve formally b/c D could choose not to waive.
- The request for waiver must:
 - 4(d)(2)(a): be **in writing** and addressed to **D**, or, in the case of corporations, to the officer or general agent
 - 4(d)(2)(b): **be sent first-class mail or by other reliable means**
- Service must be Constitutional (rsbly calc to reach D) AND comply with any state-specific statutes (Maryland State Firemen's Assn. v. Chaves: MD statute req'd certified mail and was sent first-class so no good [D can KNOW about service and still dismiss successfully b/c knowing is not enough])
- FedEx usually unacceptable (Audio Enterprises: rejected service by private delivery); e-mail/facsimile no good (b/c can't fax a prepaid means of response).
 - 4(d)(2)(c): contain copy of the complaint identify court where the complaint was filed
 - 4(d)(2)(d): inform D of the consequences of compliance/noncompliance
 - 4(d)(2)(e): indicate the date request was sent
 - 4(d)(2)(f): **allow at least 30 days for the D to respond** to the request (60 days if outside the US) before can serve actual process
 - 4(d)(2)(g): include 2 copies of the notice + request (extras) & a prepaid means to return the request (SASE)
- 4(d)(3): **if D returns timely waiver, gets 60 days to answer** instead of 50 (30+20) (90 if not in US)
- 4(d)(4): if waiver filed, proceed as if summons and complaint had been served
- 4(d)(5): if the D fails to comply w/ waiver request, must pay (costs incurred in effective service including atty's fees, etc) UNLESS can show good cause for the failure to waive service

(e) [ACTUAL] SERVICE upon individuals within the US

- If no waiver rec'd, service may be effected anywhere in the US:
 - 4(e)(1): pursuant to the service-governing laws of the **forum state** (where court is) or of the **D's state of residence**, or
 - 4(e)(2): by delivering a copy of the summons and complaint to the D **personally** [personal service], or by leaving the copies at the D's **dwelling or usual place of abode** with a person of suitable age and discretion who lives there, or by leaving the summons and complaint with an **agent** authorized by the D or by law to receive service of process [substituted service].
 - "Dwelling house or usual place of abode" is flexible/construed liberally: Rovinski v. Rowe (left with mother at address from an affidavit); must be rsbly calculated to reach D (so if D actually gets the notice, usually okay [see also Nat'l]).
 - *Authorized Agent*: Okay to serve agent designated in contract as long as agent promptly notifies D: Nat'l Equipment v. Szukhent (US 1964: sent summons to Flo in NY and notified respondents by certified mail that sent to Flo and she notified them immediately) BUT agent appointed must be impartial, NOT someone who would have an interest in the suit: Budget Marketing v. Toback (cannot

be P's own VP). **If a person has appointed an agent via a contract** upon whom notice may be served, the agent may NOT be required/have a *duty* to forward the notice BUT if notice not forwarded, raises 14th Amendment questions re: whether there was due process (see Szukhent: sneaky way to get NY PJ w/ Flo in NY where Michigan farmers in Midwest; summons/jx proper b/c Ds consented to agency in contract with P; similar to forum-selection clause in Carnival).

- Personal service: **Harry Grossman** can throw a summons in Mrs. Mahoney's potato bowl and tell a multimillionaire to take papers "like a man."

(f) Service upon individuals in a foreign country: If no waiver, service may be effected on a D outside the US: (1) by internationally agreed means (eg, the Hague Convention); or (2) by other means if no internationally agreed means as long as rslly calculated to give notice (in a way prescribed by that country's laws, as directed by a foreign authority, by delivery of the service personally to the D or certified mail [if not prohibited by foreign law]); or (3) by any other means not prohibited by international agreement [provides US atty's flexible framework and avoids violating sovereignty of other nations].

(g) Service Upon Infants and Incompetent Persons: Like anybody else in US but not by mail.

(h) Service upon corporations and associations: (1) by delivering a copy of the process to a managing/general agent, or any other agent appointed or authorized by statute to receive process (when the agent is authorized by statute, the process must also be mailed to the D); (2) when the corporation is in a foreign country, process may be served pursuant to subdivision (f) except for personal delivery provided in that section

- 4(h) liberally construed. Test of reliability of service: (1) Authorized to receive summons and (2) Representative integrated with organization (and rslly calculated to effectuate purpose of proper notice); see Insurance Co. of NA (claims adjuster lost summons; had rec'd service before; was next to manager) and Fashion Page v. Zurich (papers left with receptionist who said "I'll take it"): if it is manifested that a person has authority, then valid; a corporation should set up procedures for receiving process.

(L) Proof of service.

- If not waived, need proof of service.
- Sewer service (when process server makes false affidavits of service) no good (US v Brand Jewelers); per Rule 11, atty's responsibility to see that service is fair and done in good faith

(m) Time limit for service: The service **must be made within 120 days of filing** a complaint. If not, the court may dismiss the complaint or extend the time limit, given that the P can show a good reason why service had not been effected.

Responding to service:

- a. Rule 12(a)(1)(A): D shall serve an answer within 20 days after service with summons + complaint
- b. Rule 12(a)(1)(B): If service waived under Rule 4(d), within 60 days after request for waiver was sent

Challenging (motion to dismiss for insufficient service):

- a. Rule 12(b)(4): insufficiency of process or Rule 12(b)(5): insufficiency of service of process
 - i. must be made in pre-answer motion with the answer or in an amendment to the answer within 20 days per Rule 15(a) OTHERWISE...
- b. Rule 12(h)(1): ("Use it or lose it") consented to (right to object waived) if omitted from motion "not included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course"
- c. NOTE: Cannot move to dismiss if waiver sent and D hasn't responded if P's 120 days aren't up

QUESTION #5: DOES THE COURT HAVE VENUE?

AFTER determining in which state a trial may be held (personal jx) and whether it will be tried in federal or state court (SMJ), the court must still decide where (which **DISTRICT**) the trial may be held. This is the question of venue (which is a question of CONVENIENCE, not of jx). Each state has its own venue rules. The federal courts follow 28 U.S.C. §1391, which establishes where a trial may be held.

1. VENUE OVER INDIVIDUAL Ds IN DIVERSITY AND FEDERAL QUESTION CASES

- a. Venue in diversity cases: §1391(a). Venue in §1332 cases may be decided in one of three ways.

Venue is proper:

- i. **If ALL Ds reside in the same state**, in a judicial district where ANY D resides (domicile), OR
 - ii. In any judicial district where a **substantial part of the events or omissions** giving rise to the claim occurred (or a substantial part of the property that is the subject of the action is situated), OR
 1. Bates v C&S Adjusters: doesn't have to be where the MOST substantial part occurred; doesn't matter if the D *intended* the action to take place in the forum (need not be deliberate), only that it did (P rec'd letter in NY when forwarded from PA; D could've written "do not forward" but otherwise subject to suit for collection process wherever letter is forwarded to); most relevant evidence (the notice) is in NY and *receipt* of the notice is what initiates the harmful effect of abusive debt practices (the actual violation).
 - iii. ONLY if it is NOT POSSIBLE to satisfy (1) or (2) [rare], venue is ok in any district in which a D is subject to personal jx [only if there is NO other place to bring it]
- b. Venue in federal-question cases: §1391(b). In §1331 cases, venue is proper under the same provisions as (1) & (2) in diversity cases. However (3) is a little different:
- i. ONLY if (1) & (2) can NOT be satisfied, venue is proper in any district where a D may be found.
 1. REMEMBER: §1391 (a)(3) is probably NOT satisfied by simply serving a D in the district where the P wants to establish venue (even though that may get you personal jx b/c venue is about convenience). Also remember that (a)(3) and (b)(3) may ONLY be used when (a) & (b) (1) & (2) do not apply. **This will only happen when multiple Ds do not reside in the same state and the events prompting the lawsuit took place outside of the country.**
- c. NOTE: Alien Ds can be sued in ANY district per §1391(d).

B. VENUE IN CASES WITH CORPORATE Ds

- a. Residence of corporate Ds: §1391(c). In suits against corporate Ds, §1391(a) and (b) apply, but for reasons of defining the residence needed in (a)(1)&(b)(1), Congress defined residence for purposes of venue in §1391(c): the residence of a corporation for venue is defined as any district where the D would be subject to personal jx if that district was a separate state. If no such district exists, venue may be found in the district in a state where personal jx is proper where the corporation has the most significant contacts.
- b. The most important thing to remember about §1391(c) is that it does NOT replace (a) and (b). Rather, it simply defines what residence means for corporate Ds. Therefore, a corporation may still be sued in a district where a substantial portion of the events or omissions took place.

C. CHANGING VENUE (INTRA-FEDERAL-SYSTEM)

- a. **Proper venue (but inconvenient): §1404**. When the venue is proper, the court may still change (transfer) the venue *in the interests of fairness and convenience* BUT ONLY to a "district or division **where it might have been brought**" originally.
- i. Venue cannot be transferred to a forum where no personal jx/proper venue would have existed (this is WITHOUT reference to whether these would have been waived if brought there originally: Hoffman v. Blaski).
 - ii. Choice of law: In transferred diversity cases, use transferor-state's law (Van Dusen v. Barrack) even if P transferred (Ferens v. John Deere); to avoid "forum shopping." In transferred federal-Q cases, use transferee's law (all federal courts *should* interpret the same way).
 - iii. Look at witness convenience, local-action rule, D protection

- b. **Improper venue: §1406.** When venue is improper, the court may either **transfer** the suit (to a venue where it might have originally been brought) or **dismiss** it to be re-filed, whatever is **in the interest of justice**.
 - i. **BUT** defense of improper venue **MUST** be raised either in a pre-answer motion or with the answer (or w/ amendment to answer within 20 days) per Rule 15(a) b/c OTHERWISE Rule 12(h)(1) says you've consented (waived)
 - 1. **WAIVER:** Venue (like personal jx) may be consented to and must t/f be objected to at the beginning of a suit. A court generally may not dismiss an action for lack of venue on its own. Many contracts contain "forum selection clauses," which will designate a forum usually not proper otherwise (but these clauses are generally upheld). Be aware: certain statutes also specify special venue rules, such as patent and ©.
 - ii. **REMEMBER:** Doesn't have to be the **BEST** venue to be proper (C&S Adjusters).
 - iii. **NOTE:** Even if the court had no power to hear the case to begin with (*ie*, no personal jx), it **CAN** transfer the case to a proper court "in the interest of justice"
 - 1. Goldlawr: PA court, which didn't have personal jx/venue, read §1406 broadly to allow for interstate transfer to NY, instead of dismissing, b/c SOL run, filed in good faith, and dismissal would have destroyed the action; NY dismissed on the ground that PA couldn't transfer but SC overruled.

D. FORUM NON CONVENIENS (INTER-FEDERAL-SYSTEM)

- 1. Because of §1404(a), use FNC only if more convenient forum is in a foreign country, OR from one state court to another. Harsh on P b/c complete dismissal. FNC like safety valve on the long-arm (b/c far-reaching jxs). Use FNC when want to kick the case out of the system altogether (on the basis of inconvenient forum), dismiss (usually after opposing party consents to jx in other, usually foreign, forum; if no other forum available, unlikely to succeed).
 - a. Gilbert test (pro-D factors that can override P's choice of venue if strong):
 - i. **PRIVATE** interests (convenience of parties/witnesses, access to evidence, more expeditious/less money)
 - ii. **PUBLIC** interests (administrative difficulties/burden on the court/jury, local interest in keeping localized controversies, familiarity with applicable law [forum v. transferee's interests]).
 - b. Piper Aircraft: should be in Scotland (UK plane wreckage, witnesses) and chose US for wrong reason (favorable laws re: liability, better damages); change in substantive law should not give substantial weight in FNC inquiry UNLESS there is NO remedy elsewhere (*eg*, if SOL run in alternate forum and D won't agree to waive SOL defense; not the case here); this case was removed, transferred, and kicked for FNC.
 - i. **BUT** court has discretionary powers to grant FNC motion even then (**VERY** unusual):
 - 1. Islamic Republic of Iran: dismissed even though no alternative forum b/c NY's courts not required to entertain litigation with NO connection with the state, especially when the burden to the state so great

QUESTION #6: IF COMMENCED IN STATE CT, CAN THE CASE BE REMOVED?

Federal Courts have ****LIMITED JURISDICTION**** but removal allows the D as much of a chance to get into federal court as the P had in filing the suit. Traditionally, removal based on diversity was to protect the D.

NOTE: A state MAY hear any federal claim (UNLESS Congress granted exclusive jx to the federal courts).

Removal to Federal Court by a D or Multiple Ds per 28 USC §1441

1. A D has the power to remove **federal-question cases** “to the district court of the United States for the district and division embracing the place where such action is pending” (only one option: moves up but not over) if the case could have been brought **ORIGINALLY** in federal court (cannot base removal on a federal defense) per §1441(a). Federal-question removal is automatic (§1441(b)).
 - a. A P may NEVER remove a case to federal court, even if the D raises a federal-Q counter-claim (b/c P’s access to the federal courts is based on the well-pleaded complaint rule; if P wants into federal court, it must be determined by the substance of P’s claim). See Shamrock Oil v. Sheets: Removal under §1441 is only for the original D (not a P who becomes a D b/c counterclaimed against).
2. A D may remove a case to the federal court based on complete **diversity**, UNLESS the case is in the state court of ANY of the Ds’ home states (b/c diversity jx traditionally rested on the belief that out-of-state parties must be protected from potential prejudices of foreign courts so if D is in home-state court, no worry re: prejudices) per §1441(b).
 - a. If diversity case, “the citizenship of Ds sued under fictitious names shall be disregarded” (see Bryant v. Ford Motor Co)

Procedure for Removal:

SEE §1446 in the FRCP BOOK!

1. D files notice of removal w/ Fed Dist Ct where state claim pending (a)
2. Within 30 days of Ds receipt of initial pleading in the state action (b)
3. D must give/file notice (d)

JOINDER OF PARTIES AND CLAIMS

A. History

1. Rules of civil procedure were based on the common law, which tried to put all causes on action into pre-defined categories of suits. The common law was gradually replaced by codes, which sought to state general rules governing civil procedure. The codes were finally replaced by the Federal Rules of Civil Procedure (FRCP).
2. Joining of claims is thought to be desirable b/c it avoids the multiplicity of suits. Takes the whole transaction that gives rise to the legal occurrence and bring it all in at once for expediency, efficiency, cost, saves time of multiple litigation (judicial economy), and gives consistency of relief.
 - a. Disadvantage: may confuse jury (BUT see Rule 42(b), which allows court to separate if confusing)

B. Two Questions to ask with Multiple Claims and Parties:

- b. **PERMISSION:** Are extras (claims/parties) allowed to be joined under FRCP? Is there a logical relationship btw the claims?
 - i. **RULES 14(A), 20(A), AND 13(H) ATTACH:** Don't use Rules 18(a) and 13(a)/(b)/(g) until AFTER a party is connected.
- c. **POWER:** Is there federal SMJ over additional claims/parties? Every joinder rule implies "if there is SMJ" (either independent/supplemental per §1367)

C. **PERMISSION [JOINDER]: The FRCP**

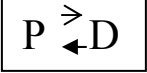
The first step in adding parties and claims to a suit is to determine whether the court has permission to do so under the FRCP, which are made by the Supreme Court to determine when joinder is proper.

1. **JOINDER OF CLAIMS against the same party: FRCP 18(a)**

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1. A party in a suit **MAY** (never compulsory) assert **ANY** additional claims (as many as they want) against parties who are already the subject of other properly joined claims *by that party*. This claim that already exists may either be the original claim, or one that has been joined according to one of the other FRCP rules.
2. Under 18(a) there are **no restrictions** ("bring it on") as to what type of additional claims may be made. The claims may be related to the original claim or completely unrelated. If a party has a related claim, however, he may be required to bring it at the time of the suit in the interest of economy or forfeit his chance to deal with it later (*res judicata*). The logic behind allowing unrelated claims is to let the parties completely litigate whatever claims they have while they are already in front of the court.
 - a. BUT remember that per Rule 42(b) a court can split if confusing AND remember that there may not be power to hear all of the claims joined.
3. The party asserting the claim under 18(a) may be the original P, a D who has already joined a proper counterclaim or cross-claim, a third-party D who has asserted a proper counterclaim or cross-claim, and so on...
4. *Permission* to join a claim under 18(a) (or under any of the joinder rules for that matter), does not necessarily mean that the court has the *power* to hear the claim.
 - a. Need SMJ: If no independent basis (federal Q/diversity), must be "same C/C" per §1367(a).
 - b. No personal jx concern (b/c additional claim should have already established).

2. COUNTERCLAIMS: FRCP 13(a)&(b)

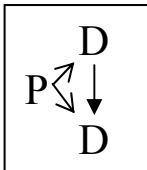


- a. **Compulsory Counterclaims:** 13(a): Compulsory counterclaims “**arise out of the same transaction or occurrence**” as the original claim. These claims **MUST** be brought in the original suit, otherwise the party wishing to assert the claim may lose the right to litigate the claim in a future suit (*res judicata* issues).
 - i. *Permission* to join a claim does not always mean that there is *power* to hear the claim:
 1. No SMJ concern: b/c same T/O will be same C/C for §1367(a) (don’t need independent basis; will have supplemental jx).
 2. No personal jx concern (b/c going against the original P).
- b. **Permissive Counterclaims:** 13(b): (1) A party **MAY** also assert counterclaims against an opposing party at the time of the original suit that **do NOT arise out of the same T/O** as the original claim (no restrictions). These claims need not be brought during the original suit if the party wishes to wait and bring them later on.
 - i. *Permission* to join a claim does not always mean that there is *power* to hear the claim:
 1. NEED independent basis for SMJ b/c not the “same case or controversy” per §1367(a).
 2. No personal jx concern (b/c going against the original P).
- c. **Application of Rule 13 (a)-(f)**
 - i. Whether a claim arises out of the same T/O can be measured by the logical relationship between the claims. Transaction is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much on the immediateness of their connection as upon their logical relationship.
 - ii. A claim is NOT compulsory if it deals ONLY with the same underlying business transaction, but involves entirely distinct legal issues.

3. COUNTER-CLAIMS MATURING/ACQUIRED AFTER PLEADING: FRCP 13(e)

“A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counter-claim by supplemental pleading.”

4. CROSSCLAIMS: FRCP 13(g)



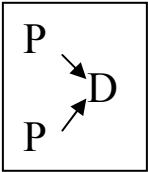
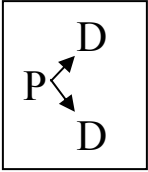
- a. A cross-claim is a claim by one party against a co-party (D v. co-D, or P v. co-P). These claims **MAY** (optional, never compulsory) be asserted only if they **arise out of the same T/O** as the original action or counterclaim (includes “is/may be liable”) or relates to any property of original SMJ.
 - i. Depends on how broadly particular court interprets “**T/O**” (court in LASA thought “T/O” should be **liberally/broadly interpreted** to encompass/permit cross claims with legal theories distinct from the original claim that arose out of **related, but not identical, transactions**).
- b. *Permission* to join a claim does not always mean that there is *power* to hear the claim:
 - i. No SMJ concern b/c T/O will be same C/C per §1367(a).
 - ii. No personal jx concern (will have already been dealt with).
- c. Once a co-party has asserted a proper cross-claim, additional (unrelated/related) claims may be asserted by the party per Rule 18(a).

5. JOINDER OF ADDITIONAL PARTIES: FRCP 13(h)

“Persons other than those made parties to the original action may be made parties to the counter-claim or cross-claim in accordance with the provisions of...**Rule 20**.” ALTERNATIVE standard to join party to a counter-claim. No §1367 loophole b/c like Rule 20 (Rule 20 referenced through Rule 13(h)).

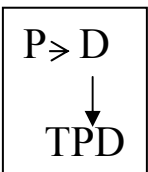
6. JOINDER OF PARTIES: FRCP 20(a) [T/O + CQ]

1. **Joinder of Ds** (Multiple Ds): Rule 20(a) also permits (never compulsory) the joinder of Ds into the same suit if the claim(s) against them arise out of the **same transaction or occurrence** AND involve a **common question of either law or fact**.
 - a. Never really an issue to have one but not the other b/c T/O and CQ so similar
2. *Permission* to join a claim does not always mean that there is *power* to hear the claim:
 - a. Need personal jx over each D.
 - b. Need SMJ: if no FedQ, need complete diversity + amount in controversy per §1332 and §1367(b); cannot aggregate against separate Ds.



- 1) **Joinder of Ps** (Multiple Ps): Rule 20(a) allows Ps to join their claims together in a single suit if their claims arise out of the **same T/O** AND involve a **CQ of law/fact**
- 2) *Permission* to join a claim does not always mean that there is *power* to hear the claim:
 - i) Need personal jx.
 - ii) Need SMJ: if no FedQ, need complete diversity (Strawbridge) + amount in controversy per §1332 to not run afoul of §1367(b) **BUT >>>>>>>>** §1367(b) on its face does NOT say that EVERY P must meet the amount in controversy (as long as one P does; see Stromberg)

7. IMPLEADING THIRD PARTIES: FRCP 14(a)



1. Joining a 3PD by a D:
 - a. D to 3PD: A D **MAY** (never compulsory) implead (join) a 3PD at any time after suit commenced (w/o motion if within 10 days of serving original answer; otherwise by motion) if the third party **“IS OR MAY BE LIABLE to the third-party plaintiff [D] FOR ALL OR PART of the P’s claim”** against the 3PP [D] (eg, by contribution/indemnification). Note: does NOT let D suggest new targets (b/c P is the master of the complaint); only says “if I’m liable to you, TPD is liable to me.”
 - b. 3PD to D: The 3PD must make defenses to the D’s (3PP’s) claim (or original P’s claim) per Rule 12 and may assert ANY counterclaims (against the 3PP/D) or cross-claims (against other Ds) as provided in 13(a)/(b)/(g)/(h) [as referenced by 14(a)].
 - i. Thus if the 3PD has any counterclaims against the 3PP (original D) that **arise from the same T/O** as the original claim, they are compulsory per 13(a) and **MUST** be raised during the trial (or be abandoned).
 - c. 3PD to P: The 3PD may also assert any claim against the original P that **arises out of the same P-to-D T/O** per Rule 14(a). Once this claim is asserted, the 3PD may join unrelated/related claims under 18(a) and the P may counterclaim under 13(a)/(b).
 - d. P to 3PD: The P may assert claims against the 3PD if they **arise out of the same T/O** as the original claim (P-to-D) and the 3PD may defend per Rule 12. Once such a claim is filed, the P may bring additional claims under 18(a) and the 3PD may use 13(a)/(b) to counterclaim.
 - e. Any party may move to strike the third-party claim, or for its severance or separate trial (Rule 14).
 - f. The 3PD can join **other** Ds who “is/may be liable” in the action against the 3PD.
 - g. *Permission* to join a claim does not always mean that there is *power* to hear the claim:
 - i. Need personal jx
 - ii. May need SMJ jx: “D to 3PD” is covered by §1367 b/c T/O = C/C, BUT if original P→D is based on diversity, **P cannot sue** TPD if destroys diversity UNLESS independent federal question: §1367(b) [b/c Ps could play and sue Ds who they knew would implead certain TPDs to get federal jx where otherwise would not be able to].

9. OBJECTIONS to joinder must be at the outset (by proper motion or demurrer)

1. Failure to raise waives right to object later.
2. **FRCP 21: Misjoinder or Non-joinder of Parties** NOT the same as objection, which must be at the start; misjoinder is not ground for dismissal of an action; parties may be dropped/added (by order of the court on motion of any party or of its own initiative) at ANY stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

C. POWER [SUPPLEMENTAL JX]: Federal Jurisdiction over Supplemental Claims & Parties (§1367)

After the court determines that it has **permission** to hear a claim or join a party under the FRCP, the court must decide whether it has the **power** to hear the claim (the court must have jx, which is not provided by the joinder rules). Again, the federal SMJ (including supplemental jx) is limited to the categories of cases enumerated in Article III §2 of the Constitution.

Step One: Is there an independent basis for jurisdiction?

1. Federal Q (§1331) or Diversity (§1332)?
 - a. **Yes?** Go to federal court.
 - b. **No?** Go to step two.

Step Two: The Constitutional question (defines Constitutional power to Federal cts to hear supplemental cases)

1. Do the claims pass the §1367(a) Gibbs test?
 - a. **Yes?** Go to step three.
 - i. Under § 1367(a) Congress provided the courts the power to hear any claims that are part of the same “**constitutional case or controversy**” as outlined in Article III §2 of the Constitution. Federal courts have jx over the cases and controversies (ENTIRE cases) where the original claim arises under federal law (same C/C where “**arises out of a common nucleus of operative fact**” such that it **would be expected that the claims be litigated together** under the pleading rules). Thus, claims that would not ordinarily meet the requirements of federal SMJ (eg, additional state claims that a party wishes to join to the federal claims that established the jx) enjoy supplemental jx.
 - ii. Note: For all practical purposes, the same “C/C” means the same thing as the same “T/O.” If anything, the meaning of the “same C/C” is broader than “T/O”
 1. Compulsory claims will always enjoy SMJ, as will all other claims that were only allowed if they arose out of the same T/O, including per Rule 14(a); SO the only claims NOT automatically allowed are Rule 13(b) permissive counterclaims and Rule 18 unrelated joined claims (b/c not same T/O so not same C/C).
 - b. **No?** Goodbye (no federal court case; *nb*: if get the boot, double-check step one).

Step Three: The Statutory question

1. Has supplemental jurisdiction been granted by the statute? Does §1367(b) exclude the **P**’s joinder claim?
 - a. **Yes?** Goodbye (no federal court case; *nb*: if get the boot, double-check step one).
 - i. One major exception to the court’s ability to hear claims based on supplemental jx is that when the original claim is in federal court based on DIVERSITY JX, an additional claim, even if it is part of the same C/C, may not be added if it would destroy diversity IF it is added BY PLAINTIFFS against those joined under 14 and 20 (and 19 and 24). Thus, a **court may not assert supplemental jx over a non-diverse party in a diversity case (cannot circumvent complete diversity, even for a compulsory counterclaim)**. Therefore, such a claim may NOT enjoy the protection of supplemental jx and must either base jx on a federal question or bring the suit in state court (or forget the additional claim, or bring it separately, if possible, in state court). The drafters FORGOT re: by **Ds** against those joined under 20 and by any under 23 so it is uncertain with those. CANNOT aggregate different claims against different Ds (so need amount in controversy for each).

- ii. NOTE: Does NOT matter for D/TPD claims. If TPD brings 14(a) claim against original P and P counters, doesn't have jx if non-diverse (although initial claim TPD-to-P does) b/c §1367(b) only excludes when Ps join Ds under 14 and 20 (but NOT vice versa).
- iii. NOTE: P CANNOT get supplemental jx over a 13(a) counterclaim against the TPD (even though same T/O) b/c the TPD was JOINED under Rule 14(a).
- c. No? Go to step four.
 - i. Example: if claim NOT part of the same C/C, supplemental jx does not apply; these claims must find other SMJ (§1331/1332) to be heard. This applies mainly to permissive claims brought under 13(b) or 18(a).

Step Four: The Discretion question (public policy considerations, etc)

- 1. May the court use discretion to refuse otherwise proper jx and send out of federal court per §1367(c)?
 - a. No? Go to federal court.
 - b. Yes? Goodbye (no federal court case).
 - i. A court may refuse to hear an additional claim despite the existence of proper jx per §1367(c), which says that courts may use their discretion and deny additional claims if:
 - 1. they raise a novel or complex issue of state law, or
 - 2. the state claim substantially predominates over the federal claim(s), or
 - 3. the court has dismissed all federal claims before trial begins
 - a. Shanaghan v. Cahill: if case based on diversity and non-dismissed claims fall below AC, can dismiss
 - 4. there are exceptional circumstances where there are other compelling reasons for denying jx [“catch-all”], including jury confusion
 - a. Test: MUST show factual predicate exceptional circumstances (that = a compelling reason) and determine whether Gibbs values (economy, fairness, convenience, comity) are best served by declining jx; must be a reason as good as those in §1367(c)(1)-(3).
 - (B) Court must state a reason and “substantial time and effort” is NOT enough: Executive Software (sued b/c fired emp'ee b/c she didn't want to be a Scientologist).

Rule §1367(d): SOL (if federal denies, SOL extended so can go to state court).

FRCP 42(b) gives the courts discretion to divide claims for separate trials when separate trials may be convenient, avoid prejudice, and promote economy and expedition; under 42(a), can order consolidation:

“The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statute of the United States.”

PLEADINGS

1. History

- a. Common-law equity: alternative to writs, which stated facts many times and involved many rounds of pleading.
- b. Codes: Evolved after the common law. Used pleadings to determine the facts of a case, therefore the pleadings were required to state many facts. They were also required to state one legal theory that was unchangeable during the trial.
- c. FRCP: Came after the codes and require only “notice pleading” which was meant simply to give the opponent notice of a suit against him. This modern rule of pleading only requires that the party make a short, clear statement of the claim. Now have discovery to hone case for trial.

2. Notice Pleading: FRCP 8

- a. When pleading, the purpose is to give the opposing party the gist of the suit against him so that he may raise any defenses available to him.
- b. Burden of pleading: P must plead the elements of the suit (establish prima facie case) but doesn't have burden of affirmative defenses.
- c. Ds must plead affirmative defenses, some of which are enumerated in 8(b).
- d. Damages don't have to be set out in the pleading?
- e. Three steps: complaint, answer, reply.

3. THE ADEQUACY OF THE COMPLAINT

- a. FRCP 8(a): A complaint shall contain:
 - i. “a **short, plain statement of the grounds upon which the court's jx depends**, unless the court already has jx and the claim needs no new grounds of jx and the claim needs no new grounds of jx to support it,” and
 - ii. “a **short and plain statement of the claim showing that the pleader is entitled to relief**,” and
 1. How much detail/specificity is needed?
 - a. Do NOT need facts sufficient to constitute a COA
 - i. Dioguardi (Italian tonics imported; intentions clear in complaint, even if poorly articulated, so look at in light favorable to P and let him amend)
 - b. Only need enough to show that D could make out a case at trial entitling D to some relief (so that D notified of claim and can prepare a defense; do need SOME support even though pleading so liberal b/c cannot shoot first and ask Qs later)
 - i. Garcia v. Hilton (“PIMP” defamation action didn't formally allege essential element of publication, but enough b/c clear).
 - c. Complaint should stand unless it can assert no set of facts to support its claim
 - i. American Nurses Assn v IL: Posner warned against putting too much into the pleading b/c a judge may be too quick to dismiss (don't plead yourself out of court b/c claim cannot be dismissed w/12(b)(6) unless it appears beyond a rsbl doubt that the P cannot prove any facts in support of the claim to entitle relief).
 2. OTHERWISE: D can use Rule 12(e) motion to move for a more definite statement, then 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted (only where complaint baseless or unfair to the D) OR Rule 12(f) motion to strike any redundant, immaterial, impertinent, or scandalous matter.
 - iii. “a **demand for judgment for the relief** the pleader seeks”
 1. Relief in the alternative or of several different types may be demanded.

4. DEFENSES AND OBJECTIONS

1. **Responding to a Complaint:** Rule 12(a) lets D respond within 20 days of receipt of the complaint
 - a. Motions or objections to where the suit may be tried (made before pleading)
 - i. Dismissal for SMJ shall be made by motion (whether a claim, counterclaim, cross-claim, third-party claim) at option of the pleader: 12(b)(1)
 1. Court can dismiss for lack of SMJ whenever it is realized: 12(h)(3)
 2. “Defective allegations of jx may be amended, upon terms, in the trial/appellate courts”: §1653
 - ii. Motion to dismiss for lack of personal jx: 12(b)(2)
 - iii. Motion to dismiss for lack of proper venue: 12(b)(3)
 - iv. Motion to dismiss for insufficiency of process: 12(b)(4) or insufficient service of process: 12(b)(5)
 1. REMEMBER: “Use it or lose it” for motions to dismiss for lack of personal jx, venue, sufficient process or service thereof per Rule 12(h). If these defenses are not raised in the D’s first response to the complain (by pre-answer motion or in the answer), they are waived.
 - b. Motions or objections to the adequacy of the complaint:
 - i. Motion for a more definite statement: 12(e)
 1. “If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a move definite statement before interposing a responsive pleading.”
 2. Use 12(e) also if clear but not supported by law (*eg*, “you didn’t invite me to your birthday party”)
 - ii. Motion to dismiss for “failure to state a claim upon which relief can be granted”: 12(b)(6)
 1. Some judges are quicker to dismiss than others, although (per Posner in American Nurses) a judge should give the benefit of the doubt even if doesn’t think P will win on the evidence (as long as a claim is stated).
 - c. Other options on the receipt of the complaint: counterclaims, cross-claims, third-party claims.
 - d. Respond to P’s allegations: Rule 8(b)
 - i. D can admit/deny each claim; if the party doesn’t know the truth of an allegation, the D may plead insufficient information (like a denial).
 - ii. Failure to respond is considered an admission of the P’s allegations.
 - iii. Improper use of general denial:
 1. Zielenski v Phila Piers, D made general denial (all of paragraph 5) instead of a specific denial (the wrong D) and didn’t let P correct his mistake t/f the specific denial was waived (D’s actions positively misled P into sacrificing proper recovery against the real party; cannot manipulate the court, so estopped from denying liability/agency b/c SOL ran and would deprive P of COA; D held as surrogate for the real D).
 - e. Raise affirmative defenses: Rule 8(c)
 - i. Must be set forth in the pleading (if D wants to assert new facts that constitute a defense, they must be affirmatively pleaded; an affirmative defense is waived if not raised in the answer, although inadvertent omission of an important defense can be cured by amendment
 - ii. Different interpretations of 8(c):
 1. Ingrahm (gov’t didn’t plead \$500K damage-cap defense in answer): waived right to raise as an affirmative defense; the court will forgive and accept forgotten defense unless too far along into trial (as here) b/c don’t want to be unfair/surprise the P (if P had known might have acted differently)
 2. Taylor (award to patient’s wife for husband’s brain damage from Army Hospital treatment): Gov’t didn’t bring affirmative defense in time but court held that limitations of liability NOT an affirmative defense so need not plead at beginning (not necessarily an unfair surprise). See also Lucas: no surprise to D so okay to raise affirmative defense at trial.

- a. FRCP 8(b): Defenses: Forms of denials, short and plain terms of the defense to each claim, denying, accepting, or saying don't have enough information to make a decision at the time; D can affirm/deny certain parts instead of the whole.
- b. FRCP 8(c): Affirmative defenses: Must be set forth in the pleading
- c. FRCP 8(d): Effect of failure to deny: (1) Averments in pleading to which responsive pleading is required are admitted when not denied and (2) Averments in pleading to which NO responsive pleading is required or permitted shall be taken as denied or avoided.
- d. FRCP 8(e): Consistency: (1) Claims are to be simple and concise and (2) P can make separate claims in one and if one bad the other can still be valid.
 - i. If complaint alleges several claims, but some are invalid, others are still allowed (American Nurses)

5. Amending a Complaint:

1. **TIME** Rule 15(a): Complaints may be amended (by P or D; very liberal):
 - a. "once as a matter of course" w/o permission (any time before other side's answers are filed), OR
 - b. within 20 days of service of original pleading, OR
 - c. even after an answer is filed, "by written consent of the adverse party; and leave shall be freely given when justice so requires."
 - i. The court WILL freely allow a complaint to be amended during the trial if the opposing party objects BUT cannot prove that the evidence would prejudice them. In such instances that court will also consider whether the evidence will help the presentation of the merits. When granting leave to amend the courts will consider:
 1. whether the parties acted in bad faith, especially to avoid the SOL
 2. whether granting leave will prejudice the opposing party, specifically whether he will have a chance to respond
 3. whether the parties would have other options that would result in justice
 - ii. Beeck v Aquaslide n' Dive (D moved to amend when they realized they didn't mfr slide): no bad faith, no prejudice, fair mistake; can leave to amend and change admission to denial
 1. Different from Zielenski b/c here unsure who made slide but there knew driver was not their emp'ee.
2. **IMPLIED CONSENT** Rule 15(b): When issues not raised in the pleading are tried by express or implied consent of the opposing party, they are treated as if they were raised in the pleading, even if a complaint is not amended (if bring up issue at trial and not objected to then consent implied).
 - a. This is problematic for parties b/c if they do not object to a raised but unpleaded issue (especially if they contest the issue) b/c then consented
 - b. BUT if the party *objects* to an unpleaded issue, the court will grant the opposing party leave to amend the original complaint ("freely given" unless there is prejudice).
 - c. Moore v. Moore: father P sued mother D for custody and D answered; later wanted to amend to include counterclaims; custody and child support allowed (implied consent; no surprise to D/no prejudice) but alimony not (different T/O)
3. Amendments supersede the original pleading (meaning that a new response is required) UNLESS the alterations are so minor that the original will suffice EXCEPT:
 - a. **SOL (RELATION BACK)** Rule 15(c):
 - i. If the content of the amendment arises out of the same T/O as the original and SOL run, the amendment relates back to date of original pleading (deemed filed at original date).
 - ii. Rule 15(c)(3): [new parties rule; very narrow] when a new D is brought in through an amendment, action will be allowed against the new D despite a run SOL if:
 1. party rec'd general notice of lawsuit w/in 120 days of service (Rule 4m; so won't be prejudiced) and before the SOL ran AND
 2. party knew or should have known that but for the mistake, would have been made a party [*unclear what would happen if found out after 120 days but before SOL run].

6. Integrity in Pleading (Ensuring Truthful Allegations):

1. Rule 11: Necessary b/c pleading so liberal. Important b/c American contingency fee system (vs. fee shifting in UK); Ps can bring more claims b/c don't take the same risk. If you shoot first and ask questions later, can be sanctioned. Purpose is to DETER, not to punish.
2. Rule 11: requires that P **act in good faith** and do **rsbl investigation** into the claim, which must have **evidentiary support**, to **avoid frivolous lawsuits** and harassment
 - a. Every pleading, motion, and other paper needs attorney's signature [atty's put head in the noose].
 - b. Signature = certification "that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances" (1) papers not "to harass or cause unnecessary delay or needless increase in the cost of litigation" and (2) the "claims, defenses, and other legal contentions therein are warranted by existing **law**" (or argument for new law) and (3) the allegations and contentions have evidentiary support (or will after discovery) [**facts**] and (4) if D denies in answer what P alleges, must be supported by evidence (unless specifically states that evidence will be there after discovery, *ie*, that there is not enough yet) [**denials**].
 - i. Attorneys MAY reasonably rely on clients' representations in many instances
 1. Hedges [harness racer]: did have some factual evidentiary support and motion not frivolous); should've been given safe harbor period; court will only impose sanctions in extreme situations (not here)
 - ii. See Golden Eagle: counsel must state controlling law fairly and fully (lawyer must not misstate the law, fail to disclose adverse authority, or omit facts critical to the application of the law relied on or will be subject to sanction BUT sanctions reversed here b/c District Court essentially sanctioned this attorney for not *Shepardizing*).
 - iii. BUT see Business Guides v Chromatic: must have rsbl inquiry into facts and law; P didn't make good faith claim when stated 7 out of 10 seed listings; sanctions imposed (*sua sponte*) on firm for not investigating b/c easy (clerk called, couldn't lawyer have?)
 - c. **Sanctions**: Fines parties, attorneys, and their firms as well (more effective deterrence) for violations of Rule 11(b). Discretionary, not mandatory.
 - i. 11(c)(1): By motion (other side has 21-day safe harbor to fix before sanction): court can make offending party pay RSBL filing/atty fees; court can raise *sua sponte*; can be monetary/nonmonetary/reprimand (the latter favored b/c meant to deter not punish and don't want profit-center mentality).
 1. *May not get all fees if "spare no expense."*
 - ii. 11(c)(2): By court on its own initiative (w/o 21-day safe harbor): for outrageous contempt.
 - d. Scope: Not applicable to discovery (disclosures, motions, objections, responses).
 3. HYPQ: Client comes to you and thinks cancer caused by chemical company; wants to sue D and ALL of their customers. No good. Ask: evidentiary support for factual contentions? If no, run afoul of Rule 11(b)(3). Warranted by existing law? For improper purpose?

Class Actions

- A. **Seven Requirements:** P has the burden to establish all seven (Q1-6 answer “when will there be a class?” and Q7 answers “what kind of actions?”)
1. Must be an identifiable class
 - a. Cannot be too vague (“all poor ppl”)
 - b. Cannot be too specific (Tijerna: “ppl w/ Spanish surnames speaking Spanish as first or second language”; membership characteristics too complex)
 2. Class representative must be a member of the class (BUT if class representative’s individual interest expires before case is certified, certified despite mootness of named P’s claim)
 3. “Numerosity” so that joinder is impracticable (prerequisite #1 from Rule 23(a)(1)):
 - a. Usually over 40 and not less than 25 (btw? look at variables, eg, geographic dispersion, claim size...)
 - b. Joinder is more feasible where each P’s claims are large
 4. “Commonality” re: questions of law or fact (prerequisite #2 from Rule 23(a)(2))
 5. “Typicality” of reps’ claims/defenses to class’s (prerequisite #3 from Rule 23(a)(3))
 6. Representative parties fairly and adequately protect class’s interests (prerequisite #4 from Rule 23(a)(4)):
 - a. Representatives must be adequate (have substantial stake)
 - i. In Hansberry, named Ps didn’t represent the interests of the members of the class action.
 - b. Class lawyer must be adequate (no family/financial relationship with the parties)
 - c. No internal antagonism (court may divide into subclasses): Hansberry v. Lee (had no notice/opp to be heard in first case; Due Process issue: everyone should have his/her day in court).
 7. Types of class actions (district judge must find that case in one of three categories):
 - a. Prejudice: where necessary b/c individual actions would cause prejudice to non-class parties (judgment will bind to all class members so non-class will know what to do; don’t want to impose conflicting duties) or potential class members (don’t want first ppl to deplete a potentially limited fund); 23(b)(1)
 - i. No notice required; cannot opt out (court has tremendous discretion re: notice; usually none)
 - ii. Members bound by *res judicata*
 - b. Injunctive/declaratory relief; 23(b)(2): usually emp’t discrimination, environmental, consumer cases; want homogeneous decision; only for a P class, not a D class
 - i. Can request monetary damages also
 - ii. Can still have 23(b)(2) action even if changed conditions obviate the need for injunctive/declaratory relief (Wetzel: would undermine to make it (b)(3) and let ppl opt out; when could be (b)(3) or (b)(2), the latter trumps)
 - iii. No notice required; cannot opt out (court has tremendous discretion re: notice; usually none)
 - iv. Members bound by *res judicata*
 - c. Damages (Mass Torts); 23(b)(3): most prominent now; doesn’t have to be tried together
 - i. Requires (for efficiency and economy):
 1. Common questions of law and fact to “predominate” (over questions affecting only individual members)
 2. Class-action mechanism is “superior” way for fair and efficient adjudication of the controversy
 - ii. Look at:
 1. Members’ interest to bring suit individually (vs. efficiency/economy of common adjudication)
 2. Extent that members have already brought individual suits
 3. Desirability of litigation in the particular forum
 4. Difficulties likely to be encountered in the management of class action
 - a. Rule 23(c)(2): onerous notice requirement
 - iii. Notice IS required. Best notice that is practicable under the circumstances (individual notice to each member who can be rsbly identified); see Mullane (to extent can find, rsbl; to extent cannot, publish, etc).
 - iv. CAN opt out (and then not bound by res judicata): b/c not necessary that they all be there

B. Subject Matter Jx (Diversity)

1. Only class representatives (named Ps) need complete diversity (Ben-Hur): can have 6000 unnamed Ps from every state and still have class-action diversity SMJ
2. Amount in controversy is unclear:
 - a. Snyder (1969) and Zahn (1973): All P’s must meet (individually)
 - b. §1367(b) (1991) on its face: just ONE P needs to meet (b/c excludes Rule 23)
 - c. Abbott Labs (5th Cir 1995): only named reps must meet

C. Personal Jx: Don’t need *Shoe* analysis to get personal jx over P class (Phillips Petroleum v. Shutts: court does not need jx over each unnamed P).