

# PLEADING

## I. STATING A CLAIM

## 8(a) + Burden of Pleading + Answers

### A. Fed. R. Civ. P. 7(a)

1. Lists which filings count as pleadings & which pleadings are permitted.

### B. Fed. R. Civ. P. 8

1. Rule 8(a) requires pleadings that contain claims (claims, counter-claims, cross-claims) to have 3 elements:

- Short and plain statement of grounds for **jurisdiction**.
- Short and plain statement of the **claim** demonstrating entitlement to relief.
- Demand for judgment for the **relief** sought.

Gillispie: woman claims some guys from Goodyear came on her property, embarrassed her, hauled her off somewhere, and subjected her to public ridicule; court holds that b/c complaint neglects to include what happened, when it happened, who did what, etc., the **complaint does not satisfy the pleading standard** (factual insufficiency) and gives  $\Delta$  no notice what to defend against.

Dioguardi: **complaint was sufficiently “short and plain”** showing entitlement to relief;

2. Rule 8(b) requires short and plain statements of **defenses**; admissions, denials or “knowledge insufficient” responses to allegations.

3. Denials:

- General denials
- Specific denials
- Qualified denials

4. Improper Denials:

- **Negative pregnant** denials:
  - P: you owe me \$100
  - D: I deny the allegation
  - Court may conclude: Oh, so you admit owing him \$99.
- **Conjunctive denials**:
  - P: You stole money, you beat me, and you are a Martian.
  - D: I deny the allegation.

- Because one part of the allegation is false, you can deny all of it generally, but courts find this evasive. Should not make conjunctive denials.
  - Zielinski: defendant presented a conjunctive denial, and **court ordered an admitted allegation which in reality wasn't true, to be deemed true** because of poor answering. Also turns on the issue of notice.
- 4. Rule 8(c) permits **affirmative defenses** to be raised in an Answer (duress, assumption of risk, fraud, laches, etc.)
  - a. Ingraham: US (o/b/o negligent surgeons) moves to introduce a damages cap after never pleading it nor raising it during trial, and argues that since it's not included in 8(c), it's not an affirmative defense. Ingraham argues that **this is an avoidance under 8(c)'s residuary clause**, and b/c it was never pleaded nor argued at trial, it is waived. Court agrees, emphasizing notion of surprise.
  - b. But see Taylor: here, **the damage cap law was not an affirmative defense** (if plaintiff doesn't have to specify amount of damages, why should Δ have to plead the limit of damages?)
- 5. Rule 8(e) permits **inconsistent pleading** of claims.
  - a. Claims may be stated in the alternative.
  - b. You can plead mutually exclusive claims.

#### C. Fed. R. Civ. P. 10

1. Deals with form: captions, separate numbered paragraphs.

#### D. Burden of Pleading

1. Plaintiff must plead the matters he must prove later on.
2. Plaintiff usually doesn't have to plead matters on which defendant must introduce proof (plaintiff can't know what the defenses might be in advance & often lacks knowledge peculiar to defendant – how can plaintiff know whether an action was taken in good or bad faith?)
3. Plaintiff sometimes has to plead the non-existence of certain defenses.
  - i. Example: P alleges D owes him money. D's defense is going to be, "No, I paid it." But, P must in his complaint, allege that D did not pay it (it's like preempting the defense), because otherwise, there is no substantive claim of breach.
4. CHECK THE LANGUAGE OF THE STATUTE TO TRY TO DETERMINE WHETHER PLAINTIFF HAS BURDEN TO PLEAD, SAY, THE ABSENCE OF AN AGGRATING FACTOR OR

WHETHER DEFENDANT MUST PLEAD THE PRESENCE OF AGGRAVATING FACTOR. Parse the statute to try to match it to Gutman's examples. Try to see what plaintiff must show to have a claim (plaintiff's burden) versus what defendant might say to absolve itself of liability (defendant's burden).

- i. Gomez: question was whether Gomez had to allege that official acted in bad faith or whether the official had say he acted in good faith as an affirmative defense. USSC held that plaintiff Gomez did not need to plead that the official acted in "bad faith" when he fired Gomez, but rather, **that Δ had burden to plead that he had a good faith belief that what he was doing was lawful and that that belief was objectively reasonable.**

1. Qualified immunity:

- a. Defendant's defense which must show that Δ, in good faith, believed his actions were lawful, and
- b. That that subjective belief was objectively reasonable.
- c. It's a defense: plaintiff should not bear the burden of anticipating it and trying to preempt it by alleging that Δ acted in "bad faith."

- ii. Garcia: court denies 12(b)(6) motion, but grants 12(e) and 12(f) for certain paragraphs; "inference of publication from the allegations;" conditional privilege is an affirmative defense to which plaintiff gets to respond and possibly allege malice; absolute privilege bars recovery entirely; for slander re: his firing – factual insufficiency (did not allege publication) + too vague; absolute privilege protected Hilton from liability at the admin hearing (court dismissed that claim by plaintiff). Note: sometimes a plaintiff won't have all the facts and will be unable to meet the higher 12(e) pleading level.

## II. DETERRING FRIVOLOUS PLEADINGS

## RULE 11

### A. Fed. R. Civ. P. 11

1. 11(a): signature = allegations and claims have merit
2. 11(b) requires that prior to submitting a pleading with the court, a party has taken a reasonable inquiry under the circumstances to insure that the pleading is/has:
  - (1) **proper** (can't harass or increase cost of litigation)
    - do you consider intent or not? (courts split)
    - mixed motives? (courts split)

-sometimes, non-frivolous complaints are allowed even if the purpose of the pleader is improper.

- (2) **legally viable** (or assert to modify/reverse existing law)
  - Rule 11 may not apply when you try to advance a new law (recall 2004 midterm law review article)
- (3) **evidentiary support** for its allegations,
  - legal aid attorneys, when pressed for time and unable to gather evidence from their clients prior to filing may make allegations w/o taking the inquiry but he has to identify those allegations as possibly lack evidentiary support.
- (4) **defenses be “warranted on the evidence”**

3. Court evaluations of Rule 11 motions:

- (1) need not find bad faith (no “pure heart empty head” defense)
- (2) standard is **objective reasonableness** (reasonable under the circumstances)
- (3) **Two-prong test:** first, court objectively determines if complaint is legally or factually baseless, and second, has the atty conducted a reasonable and competent inquiry?
- (4) Legal assertions
  1. must be objectively baseless
  2. atty failed to undertake reasonable inquiry before making the legal assertion
- (5) Factual assertions
  1. was there time to investigate?
  2. how much was atty required to rely on the client (legal aid)?
  3. was the case handed off by another atty?
  4. complexity of the issues

4. Rule 11(c) Sanctions for violations:

- (1) Discretionary now, previously mandatory (1993 amendments)
- (2) Considerations when deciding whether to sanction:
  1. was conduct willful or negligent?
  2. was it a first-time for this atty? Or a pattern?
  3. did it infect the whole pleading? Or just one part?
  4. was it intended to injure?
  5. was it costly in terms of time and money?
  6. how much of a penalty will deter this atty from recidivism?
    - a. Bridges: court **did not issue sanctions** because atty immediately acknowledged his mistake (failure to file EEOC claim / failure to exhaust admin remedies) and atty attempted to rectify it ASAP. Atty is not likely to

reoffend in the future; he has learned his lesson and sanctions won't be needed.

- b. Norwest: court **affirms issuance of monetary sanctions** where plaintiff's atty fails to learn all  $\Delta$ s citizenships, as is his burden, but files a diversity suit anyway. Plaintiff's atty had said it would be too much trouble to learn all citizenships, and money damages were inappropriate b/c it would thwart "novel legal arguments." Court rejects this, finding diversity SMJ cases to be well-settled by statute.
- c. Mattel: plaintiff's complaint was meritless under Rule 11, but **sanctions may or may not have been appropriately** levied (courts may only issue sanctions based on the filed document, not what happens at depositions).

- (3) Purpose of sanctions is deterrence, not compensation (non-monetary sanctions include: reprimand, censure, CLE)
- (4) Courts may sanction **both** attys and/or their clients.
- (5) 21-day "safe harbor" period: if you want to motion to sanction the other side, you have to write to tell them it's coming and then give them 21 days to correct (withdraw or amend) the filing. If they don't, you can motion for sanctions at the end of 21 days.  
Purpose: to decrease volume of Rule 11 motions.
- (6) Court may sanction either by motion of opposing party, or *sua sponte*, but only after it gives the potential offender a chance to "show cause why the sanction should not be issued."
- (7) Courts may fear a "chilling effect" in issuing sanctions (noted in Bridges) and often chooses to issue sanctions only when claims are patently frivolous or without merit.

### III. SPECIAL PLEADING RULES

### Fraud/Mistake, Particularity

#### A. Fed. R. Civ. P. 9

- 1. 9(b) requires special pleadings for certain matters.
  - (1) Fraud and mistake must be pleaded with particularity
  - (2) Malice, intent, knowledge, or other conditions of the mind may be pleaded generally. A claimant doesn't have access to the other party's subjective intent and therefore can't plead it w/particularity.
  - (3) Why do we have this particularity rule? Perhaps a holdover from history: you're accusing them of lying in bad faith, which runs counter

to how we hope people do business. By alleging fraud, you chip away at the bedrock of good faith.

- i. Stradford v. Zurich Insurance: alleged facts may give rise to a strong inference of fraud, but you also have to plead time, place, and nature of the alleged misrepresentations. Insurance company's **claim against the dentist was not particular enough**: are you claiming dentist is lying because (1) the office never flooded? (2) because it flooded when he wasn't covered? or (3) that his losses are inflated? Court allowed insurance company to amend and replead w/particularity, which they did.
2. 9(g) requires particular pleading of "special damages."

#### IV. RESPONDING TO THE COMPLAINT: MOTIONS TO DISMISS 12(b)(6)

##### A. Fed. R. Civ. P. 12

1. 12(a) requires respondent to file an Answer within 20 days of receipt of a complaint.
  - a. unless service is waived under 4(d), in which case it's 60 days).
2. 12(b) motions to dismiss assume that the factual allegations in the complaint are true, and are thus premised on one of two possibilities (or both):
  - a. That the claim is **FACTUALLY INSUFFICIENT**
    - (1) you allege slander, but you fail to allege publication which is a key ingredient in slander, and you fail to allege any underlying facts)(Garcia)
      - i. When dismissed, it is often dismissed **WITHOUT PREJUDICE** (permits plaintiff to plead again).
  - b. That the claim is **LEGALLY INSUFFICIENT**
    - (1) you allege slander; well, even if we did slander you, you can't recover because we are protected by absolute privilege)(Garcia)
      - i. When dismissed, it is often dismissed **WITH PREJUDICE**.
3. What are the 12(b) motions?
  - 12(b)(1) – SMJ

- 12(b)(2) – PJ
- 12(b)(3) – Venue
- 12(b)(4) – insufficient process
- 12(b)(5) – insufficient service of process
- 12(b)(6) – failure to state a claim upon which relief can be granted
- 12(b)(7) – failure to join an indispensable party

Why are 2-5 the “disfavored defenses?” They all suggest that  $\Delta$  has been disadvantaged somehow, and if they’re not bothered enough to raise one as a defense, it will be waived.

- 4. 12(e): motion for a more definite statement.
  - a. In case we can’t defend on conditional privilege, let’s just say the guy’s claims are not clear enough)(Garcia).
  - b. Rule 12(e) standard is a higher one than Rule 12(b)(6).
    - (1) A claim may be sufficient to survive a 12(b)(6) motion, but get sent back to be re-written under 12(e).
- 5. 12(g), (h): when presenting defenses under 12(b), if you don’t raise (2 – 5) immediately, you waive your right to raise them later.

B. 12(b)(6 & 7) may be raised in any pleading at any time.

## VI. AMENDING THE COMPLAINT

- a. Fed. R. Civ. P. 15
  - i. 15(a): Plaintiff may amend once as a matter of right anytime prior to a responsive pleading.
    - 1. Why?
      - a. Maybe new information comes to light,
      - b. new claims,
      - c. to correct mistakes.
    - 2. Underlying policy:
      - a. maximum opportunity to have case decided on the merits (“freely given”).
  - ii. 15(a): After first responsive pleading, plaintiff can amend w/opposing party’s permission or from leave of court, which is “freely given when justice so requires.”
    - 1. When does “justice” not require?
      - a. If doing so would prejudice  $\Delta$  in some way, or
      - b. If there is undue delay, or
      - c. if the amendment appeared to be in bad faith.

2. Beeck: investigation reveals slide to be Aquaslide product, so Δ answers complaint admitting it designed and manufactured the slide; President looks at it, says otherwise, seeks leave to amend Answer; Δ did not act in bad faith when the three insurance companies misidentified the slide; no prejudice to Beecks because if they lost on the “who manufactured this slide” trial, court would permit them to go after the pirate and would hold the SOL. **Amendment is permitted.**
  - a. Prejudice *must be shown*. The party opposing the amendment has burden to demonstrate prejudice.
- iii. 15(b): allows for amendment to conform pleadings to the evidence at any time, even after the judgment.
  1. Moore: child custody case; were issues presented during trial tried with “implied consent” of both parties? Test: did anyone object? Turns on notice and surprise. **Amendments conforming to evidence were permitted** because father had notice & never objected.
- iv. 15(c): “relation back doctrine”
  1. When do amendments “relate back” to the original pleading?
    - a. 15(c)(2): When the claim in the amended pleading arose out of the conduct, transaction/occurrence set forth in original pleading.
    - b. 15(c)(3): deals with changing the party of renaming the party.
      - i. Worthington: when changing name of a party in an amendment, if the claim arises out of same T/O as original + party gets notice within 120 days of filing original complaint, it relates back; but improper naming originally must be due to a mistake, not a lack of information; **court held amended complaint did not relate back.**

## VII. RANDOM NOTES ON PLEADING

1. Notice pleading (FRCP, e.g.)
  - a. defendants need notice in order to respond.
  - b. requires fewer facts
2. Code pleading (CA, e.g.)
  - a. requires more facts to survive a motion to dismiss.

## PERSONAL JURISDICTION

- In what state(s) may plaintiff sue?
- That is, under what circumstances does the forum state have power over  $\Delta$  domiciled in a different state?
- What is the relationship among  $\Delta$ , the litigation, and the forum?
- Court must have power over something for its decision to be binding.
  - Power over the person (in personam)
  - Power of the person's property (in rem)
  - Power of the person by virtue of property (quasi in rem)
- Two-step process
  - (1) Is there a statutory long-arm provision allowing PJ?
  - (2) Would allowing PJ violate DP?

### A. In personam jurisdiction

- a. **General jurisdiction** ( $\Delta$ 's contacts with forum state are so systematic and continuous, Helicopteros, that even if the claim against him arises from his contact in some other state or country, the forum state will have PJ)
  - i. Home state jurisdiction is the most common kind of GJ. You can always sue  $\Delta$  in his home state (see Perkins: post-WWII Ohio-based company no longer able to work in Phillipine mines?)
- b. **Specific jurisdiction** ( $\Delta$  is being sued on a claim that arose or is connected to his contacts with the forum state)

### How to answer the question, "does the court have PJ over this $\Delta$ ?"

1. Is there a traditional basis for jurisdiction?
  - a. Consent
  - b. Presence
  - c. Domiciled in the forum
2. If there is, that alone might be enough, but Brennan said Shoe test must be applied (Burnham).
3. If there is not a traditional basis for jurisdiction, we look to long-arms and the Shoe test:
  - a. Does  $\Delta$  have minimum contacts with the forum?
    - i. Was there purposeful availment? Did  $\Delta$  reach out to the forum for commercial opportunities? Did  $\Delta$  purposefully benefit from protections of laws of the forum?
    - ii. Was it foreseeable that  $\Delta$  would be sued in the forum?
      1. Notion of "surprise," and that it seems unfair to hale a foreign  $\Delta$  into the forum.
    - iii. Volume of contacts?

- iv. Nature or quality of contacts?
- b. Will jurisdiction offend traditional notions of FP&SJ?
  - i. Does the claim arise from  $\Delta$ 's contact with forum? If so, this may make up for relatively few # of contacts. (McGee)
  - ii. Does  $\Delta$  have continuous and systematic contacts with forum? If so, this may make up for the fact that the claim did not arise or relate to the contacts with the forum.
  - iii. 5 fairness factors
    - 1. Will it be inconvenient for  $\Delta$  and witnesses and evidence (BK:  $\Delta$  has burden to show that it will be so gravely inconvenient and burdensome as to be unconstitutional)
    - 2. Does the forum have an interest (McGee: we want to provide a forum for our citizens to litigate their rights)
    - 3. What are the plaintiff's interests?
    - 4. Judicial efficiency
    - 5. Interstate interest in shared substantive policies
- c. General jurisdiction (continuous and systematic contacts)
- d. Specific jurisdiction (contacts give rise to the claim)

## IN PERSONAM JURISDICTION

### 1. Statutory Analysis

- a. Does the state have a statute that allows for PJ? (long-arm)
  - i. Most states have statutes that mirror the traditional bases for jd
  - ii. Most states have long-arms and "implied consent statutes" (Hess: implied consent to jd for out-of-state motorists passing through)
- b. Long-arms (2 types)
  - i. Those that extend to the full reach of DP ("to the full extent permitted by DP")
  - ii. "Laundry-list long-arms" (courts may differ on their interpretation of long-arm statutes)
    - 1. Specifies when certain out-of-state defendant's actions statutorily allow for jd
      - a. E.g., when  $\Delta$  enters a k in the forum
      - b. E.g., when  $\Delta$  commits a tort in the forum
        - i. Some states define "committing a tort" where the injury occurs, others do not. (Gray).

If this comes up, it must be argued both ways. Indicate that interpretation may differ as to where the tort was committed →

### 2. Constitutional Analysis (does the long-arm violate DP?)

- a. Traditional bases for jurisdiction
  - i. Pennoyer: state has power over people within its boundaries

1. **Presence** ( $\Delta$  or his agent was served w/process while in the forum)(GJ)
    - a. Burnham:  $\Delta$  might have argued that he lacked min. contacts and was not in-state continuously or systematically. Plaintiff counters with: Pennoyer was never overruled. Court: min. contacts is a substitute when  $\Delta$  is *out-of-state*. Presence remains a basis for PJ.
  2. **Domiciled** / Citizen of the forum
  3. **Consent** ( $\Delta$  consents to jd)
    - a. Hess expanded “consent” to include “implied consent” under out-of-state motorist statutes
    - b. Carnival Cruise Lines: Contract’s forum-selection clause was enforceable. Some of the following might make such clauses unenforceable, though the burden of proof is high:
      - i. Fraud or overreaching
      - ii. Grave inconvenience of selected forum
      - iii. Plaintiff deprived of a remedy b/c of choice of law
      - iv. Enforcement contravenes public policy of forum
- b. International Shoe
- i.  $\Delta$  has such minimum contacts with the forum that the exercise of jd does not offend traditional notions of fair play and substantial justice
    1. flexible and amorphous (unlike Pennoyer’s rigid rules)
    2. Shoe does not overrule Pennoyer
    3. Focus is on:
      - a. Sufficient minimum contacts
        - i. Frequency of contact
        - ii. Nature (quality of contact)
        - iii. Volume of contacts
        - iv. Does claim relate to contacts?
        - v. Did party receive benefits/protections of the forum?
        - vi. Convenience
          1. Where is the evidence?
          2. Where is the plaintiff?
      - b. Traditional notions of fair play and substantial justice (fairness)
      - c. Relationship among  $\Delta$ , the claim, and the forum state
- c. McGee (PJ despite 1 contact with forum; International Life defaulted by not showing up in CA, plaintiff tries to get order enforced in TX, which was not afforded “full faith and credit,” and then it went to the USSC)

- i.  $\Delta$  reached out (solicited) for the life insurance k
  - ii. Plaintiff's claim arose from  $\Delta$ 's contact with forum (relatedness)
  - iii. Emphasis on state interest
    - 1. California had an interest to protect its citizens
- d. Hanson (no PJ b/c no relevant contact w/forum)
  - i. "Purposeful availment"
    - 1.  $\Delta$  must take an action that is intended, directed, or meant to involve the forum state in some way.
  - ii.  $\Delta$  didn't reach out to Florida at all (and therefore different from McGee)
    - 1. If  $\Delta$  has not done something deliberately in the forum state,  $\Delta$  has not sought any benefits from the forum state.
  - iii. The move to Florida was a unilateral activity.
- e. WWVW (no PJ b/c no purposeful availment)
  - i. Regional / local auto dealers didn't reach out to Oklahoma at all.
  - ii. The car wound up in Oklahoma through the unilateral act of the plaintiff.
  - iii. Foreseeability matters, but it's not whether it was foreseeable that the car would end up in Oklahoma, but rather, whether it was foreseeable that the defendant would be haled into court in Oklahoma.
  - iv. WWVW seems to say:
    - 1. Injury in the forum state, alone, is not enough.
    - 2. Foreseeable that car would end up in Oklahoma is not enough.
    - 3. "Unilateral activities" of third parties is not enough.
- f. Calder (Florida-based Enquirer journalists slander CA-based actress)
  - i. You can have contacts with the forum even if you don't enter the forum
  - ii. Causing an "effect" in the forum
  - iii. Targeted, intended effects.
- g. Burger King (Florida does have PJ over Michigan franchisees)
  - i. Remember Shoe has 2 parts, contacts and fairness.
  - ii. "Are there min. contacts?" is a threshold question, then you look at fairness.
  - iii. Definitely contacts here (franchisees reached out to Florida to get the contract, availing themselves of the protection of Florida's laws and thus probably no "surprise."). Plus, contracts, unlike torts, envision long-standing relationship (here, it was a 20-year franchise agreement, and there can't really be surprise when the contacts were connected to the claim).
  - iv. The idea is that if a  $\Delta$  thinks he might get haled into court, he could alter his behavior to avoid it.

- v. Δ's intentional acts in Michigan (breaking the contract) will be felt in Florida and have "effects" in Florida (like Calder).
- vi. What about fairness?
  - 1. Burden is on the Δ to show that the forum's exercise of jd would be unconstitutional, not merely "inconvenient." "So gravely inconvenient that you are at a severe disadvantage in the litigation."
    - a. Recall Gutman's Wyoming creditor / DC debtor example. When we talked about fairness, we said that since the DC debtor probably was poor (defaulting on loan payments), maybe it is unreasonable to make him trek to Wyoming?
- vii. The dissent refers to "bargaining power inequality," and how it was unfair b/c BK was a huge business while the franchisees were small nobodies. On the other hand, these guys negotiated the contract and were probably sophisticated businessmen.
- h. Asahi: 2 theories on "stream of commerce" cases
  - i. Brennan: If you put a product into the stream of commerce and you reasonably anticipate it will get to a particular state, you have a contact. Stream of commerce + knowledge of endpoint is enough.
    - 1. You can look at volume of commerce, in part, to try to figure out whether a company has knowledge of the endpoint.
  - ii. O'Connor: If you put a product into the stream of commerce and you reasonably anticipate it will get into a particular state AND THEN YOU DO SOMETHING MORE, like advertise or maintain customer service centers, tailor a product specific to that market, or something that shows an intent to serve that state and benefit from its market and laws, you have a contact.
- i. Burnham: will service of process in the forum still satisfy PJ? Yes, but...
  - i. Scalia: Pennoyer was never overruled, and in-state SOP grants GJ b/c of its historical pedigree.
  - ii. Brennan: a Shoe analysis is necessary despite in-state SOP
  - iii. Transient, "tag" jurisdiction.
  - iv. Although Shaffer ended Pennoyer's QIR fiction, the "presence" basis for jurisdiction never changed. Shouldn't come as a surprise to Δ. This has been the law since the 1870's!
- j. Contacts in Cyberspace (Bellino v. Simon)
  - i. Zippo: "sliding scale" test widely adopted
    - 1. Websites are either:
      - a. Passive (PJ is uncommon here)
      - b. Active (PJ is more common here)
      - c. Interactive (difficult factual analysis)

Must argue both sides of the Asahi split

Must argue both sides of Burnham

2. Some courts have questioned this scale, what with websites changing all the time.
- ii. What to think about in cyberspace PJ cases:
  1. Were products pushed into the stream of commerce? Was there purposeful availment to sell to a particular state and receive benefits and protections of that state's laws?
  2. When products are sent out, is it known where they end up?
  3. Is a website "advertising to everyone, everywhere?"
    - a. Courts usually say "no" to this one. Consumers have to seek out the website, it's not advertised in their face.
  4. Was there an intent to cause an "effect?" (as in Calder)
- iii. Bellino court focused on who initiated the phone calls, e-mails.

<u>Cases that support PJ</u>	<u>Cases that support NO PJ</u>
International Shoe, McGee, Gray Calder, Keeton, Burger King Bellino (Simon)	Hanson, WWVW, Kulko, Asahi Helicopteros, Bellino (Spence)

### QUASI IN REM JURISDICTION

1. Use the attachment of the land to go after the person. Interested less in the property dispute (as in *in rem*) and more in getting at the person through his property.
2. Under Pennoyer one could only recover up to the value of the land in the forum had it been properly attached at the beginning of the civil action.
3. This is how Shaffer began. Plaintiff attached the shares of stock (located in DE) to get personal jurisdiction over Arizona Δs. Same thing with debt in Balk.
  - a. The Δs in Shaffer complained that they were not afforded DP b/c they never had a chance to come into court to challenge the attachment. They felt as though property had been taken without DP.
  - b. Plaintiff responded: Look, Pennoyer's fiction doesn't apply. Your property, and not YOU is at stake here. There's no DP for your property!
  - c. Court sides with Δs. "There are people behind the property. You can't distinguish between the two and those people's DP rights have been violated. Shoe must be applied."
  - d. The Shoe standard now applies to in rem and quasi in rem cases.
    - i. Which means you have to ask whether the Arizona Δs have min. contacts with DE.
    - ii. E.g.: DC resident gets land in ME. Neighboring farmer has a dispute over the property line. He sues DC resident in ME. Is there jurisdiction? YES, the claim arose from the contacts. Are there min. contacts in ME? Yes, because even though DC resident hasn't been to ME, his land ownership in ME gives rise to the claim. But if a DC resident, while driving, hits a driver from ME, and the DC resident

happens to have land in ME, the guy from ME can't sue in ME b/c the land (the "contact") had nothing to do with the claim (negligent driving).

- e. "It's fictional to regard these cases as only against property." "There are people connected to the property and it would be unfair to  $\Delta$  if property was taken w/o DP."
- f. Having property alone in some state is NOT ENOUGH of a contact.
- g. Since QIR jurisdiction is now no easier for plaintiffs and the potential recovery possibly less than the judgment, this form of jurisdiction has almost completely lost its appeal.

### IN REM JURISDICTION

1. Resolutions of controversies involving property (in rem, res) disputes (over land, domain names, whatever) impact "the whole world," not just the two parties.

review Pennoyer notes for some more detail on QIR and in rem jd)

### **NOTICE & OPPORTUNITY TO BE HEARD**

- DP requires that:
  - Court have PJ over  $\Delta$ , AND
  - $\Delta$  must receive **notice** of the lawsuit against him and an **opportunity to be heard**
- **NOTICE**
- Mullane: notice must be reasonably calculated under all the circumstances to apprise parties of pendency of action and afford opportunity to present objections" regardless if proceeding is in rem or in personam
  - Balance **burden of locating individuals** (siblings in Gutman's beneficiary example) with their inherent interest in receiving notice, their being further removed than the direct beneficiaries. Publication would be OK for them. Direct mail would be needed for direct beneficiaries.
  - First-class mail is usually acceptable.
  - Mullane (class of people) and Flowers (a guy) may have differed
  - E-mail notice not permitted under FRCP yet
  - Szukhent: SOP clause in k, signed by  $\Delta$ , was OK
- **Rule 4 (Service of Process)**

- SOP requirements differ based on who the  $\Delta$  is (corporation, individual)
- SOP = summons + complaint
- 4(1): proof of service is required
- 4(c)(1)(2): anyone can serve process (over 18, not party to action)
- 4(m): SOP must be within 120 days of complaint being filed
- 4(d): Waiver of service
  - $\Delta$  has 30 days to return waiver of service form
  - If  $\Delta$  does, he has more time to answer (60 days instead of 20)
  - If  $\Delta$  does not waive service, he has to pay for service
  - Waiver of service is entirely at the discretion of the plaintiff

- **OPPORTUNITY TO BE HEARD**

- What does DP require in terms of the opportunity to be heard?
  - DP requires that prior to depriving someone of property, even temporarily, that that person have an opportunity to speak, object.
    - Fuentes: Firestone seized goods that Fuentes hadn't fully paid for, fearing she would trash them once she rec'd SOP that action was being brought against her (fear she would be judgment-proof). Court concludes that there must be an opportunity to be heard, but leaves it to the legislature to decide what form it will take
- Under what circumstances will it be OK for there NOT to be an opportunity to be heard prior to depriving someone of property?
  - Exigent circumstances
  - Procedural safeguards to offset risk of erroneous deprivation:
    - Posting a bond
    - Prompt post-deprivation hearing?
    - Detailed pleading demonstrating great likelihood that deprivation is OK on the merits
    - Judge, not a clerk, could issue writ of replevin
    - Double damages? (p. 237)
  - There is a higher chance of an erroneous deprivation when the underlying question is one of FACT (?)

(add in Freer's notes, + professor outline notes)

## VENUE

- Where can the  $\Delta$  sue?
  - PJ (in which state?)
  - SMJ (state or federal court?)
  - **Venue (in which DISTRICT of federal court?)**(there are state venue statutes as well, but for our purposes, focus on federal)
- Once PJ is established, then turn to venue

- Venue is NOT constitutional, but rather statutory
- **Federal venue statute: 28 USC § 1391**
  - Purpose: to ensure that the case is heard by a court that is convenient to the parties
    - 1391(a): diversity cases
    - 1391(b): non-diversity cases (like FQ cases)
  - Federal districts are created by Congress (2 judicial districts in VA, 4 in NY, 1 in NH, etc.)
  - 1391(a, b): plaintiff may only lay venue:
    - **(1) “in a judicial district where any  $\Delta$  resides IF all  $\Delta$ s reside in the same state”**
      - What does “reside” mean in 1391?
        - For individuals, it means **domicile**
          - Individuals **MUST** have a domicile and **MAY** only have 1 domicile
            - One’s physical residence and simultaneous
            - Subjective intent to remain indefinitely
        - For corporations, see 1391(c)
          - Corporations reside in any district where it is subject to PJ at time action is commenced.
          - Where there is more than one district in a state, a corporation resides in any district where its contacts alone in that district would be sufficient to subject it to PJ if that district were its own states
    - **(2) “in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated”**
      - Purpose of this provision: proxy of convenience
      - If the action occurred in that district, we’d feel comfortable laying venue there
      - Recall TERRIBLE example of guy who opened loan default letter in NY and how his act of opening the letter in NY gave rise to *his* claim, thus making venue proper in WDNY. “Should have written: Do Not Forward.”
    - **(3) “in a judicial district in which any  $\Delta$  is subject to PJ/”found” [“found means contacts”] IF there is no district where action may otherwise be brought.”**
      - This is 1391’s “fallback provision”
  - 1391(d): “venue is appropriate against an alien in any district” (“found” does not apply to aliens?)

- Dee-K: decision one turned on interpretation of word “found.” Court required a showing of “contacts.” Decision two was about transfer.

## TRANSFER

- When venue is improper, what options does a district court have?
- Dismiss
  - Possible reasons to dismiss:
    - If plaintiff’s choice of venue is seemingly underhanded, some “punishment” is deserved for impropriety
- **Transfer**
  - Possible reasons to transfer:
    - To avoid waste (if much has already happened in the case in terms of pleading, discovery, etc.)
    - SOL may bar re-filing if case is dismissed
    - Courts hesitate to dismiss when it would mean the end of a case forever
  - **28 USC § 1406** (allows transfer when venue is improperly laid)
  - **“court may transfer to any district where it could have been brought”**
    - Note that plaintiffs win more often in non-transferred cases
    - Transferee court must be one in which the case might have been properly filed, i.e., a jurisdiction that had PJ and venue initially (see Blaski)
    - Transfer from one federal district court to another. Not to a state court, and not out of the country.
    - Mandamus: an appellate order that orders a lower court to act in a certain way (order a judge to, say, transfer or dismiss a case)
- When venue is proper, under what circumstances may a court transfer venue?
  - Convenience of parties (there may be a more convenient forum)
  - Interest of justice
  - **28 USC 1404** (allows change of venue despite proper venue initially)
    - **“a district court may transfer any civil action to any other district where it might have been brought”**
- When venue is proper initially, under what circumstances can Δ have the case dismissed?
  - No statute
  - **Forum Non-Conveniens (FNC)**
    - Common law concept that can justify dismissal of a lawsuit that was initially filed in a proper venue
    - To win an FNC motion, moving party must show 2 things:

- (1) That there is indeed an alternative forum available. A dismissal w/o an alternative is unacceptable.
- (2) Certain factors exist to override the plaintiff's choice of forum
  - Foreign law?
  - Are the connections with the forum overwhelming? (private interests of the parties)
  - Different language?
  - 1 judge? No jury?
  - Ease of access to proof (where is the evidence?)
  - Can't subpoena more than 100 miles away (Rule 45)
  - Who has the stronger public interest in hearing the case? (which forum?)(Scotland had a strong public interest in Reyno: Scotch citizens who died, Scotch pilot, crash occurred there).
  - When there is GJ, the venue dismissal might have more bite (?)

## SUBJECT MATTER JURISDICTION

- Once you have PJ over a  $\Delta$  and venue is proper, may/must you sue in state or federal court?
- To find the right court, you must have PJ, venue, and SMJ **all**.
- **Original jurisdiction**
  - The court in which the case may first be filed (usually the lowest level trial court, District in Fedland, Superior in State court)
- **Concurrent jurisdiction**
  - If a case may be filed in either state or federal court, both courts have concurrent jurisdiction.
- **Exclusive jurisdiction**
  - If a case **MUST** be heard in either state or federal court, that court has exclusive jurisdiction.
  - State court jd is broad (and can hear *almost* every case)
  - Federal court jd is narrow
- Which cases **MAY** or **MUST** the federal courts hear?
  - Art. III of US Constitution: Federal courts are of **LIMITED** jurisdiction
  - Section 2's most important categories: diversity and federal question
  - Constitution is not self-executing and requires Congressional statutes to give courts jurisdiction. Congress has vested in the courts **MOST**, but **NOT ALL** of federal jurisdiction permitted by the Constitution

- **DIVERSITY JURISDICTION**

- Underlying policy rationales:
  - Fear that out-of-state Δs could be subjected to local bias, prejudice
  - Question of fairness. Still meaningful today? Who knows?
  - Multi-state disputes should have a federal forum to resolve disputes to apply national, uniform law.
- Only 25% of cases filed in federal court are diversity cases
- Requires diversity of citizenship and minimum amount in controversy
- **Complete Diversity Requirement** (Strawbridge)
  - **28 USC § 1332**
  - (a)(1): “controversy is between citizens of different states.”
  - Where are you a citizen?
    - Citizenship here means US citizenship + “domicile.”
    - Domicile requires physical residence + intention to remain indefinitely (emotional aspect to this)
    - Maybe you never relinquished your original domicile (Mas v. Perry)
    - Objective indicia:
      - Full-time job?
      - Pay local taxes?
      - Driver license?
      - Register one’s car?
      - Register to vote? (seemingly more voluntary)
      - Buy a home?
    - 2 ways of thinking about “intent to remain indefinitely”
      - “Tough rule” (Mas): if you do not plan to stay indefinitely, you are not domiciled
      - “Soft rule” (Glannon): if you have no definite plan to leave, you are domiciled
  - **1332(a)(2)**: US citizen v. alien (diversity exists)
  - **1332(c)(1)**: Citizenship of corporations
    - Citizen of its place of incorporation **AND**
    - Citizen of its principal place of business (PPB)
- **Amount-in-Controversy Requirement**
  - Policy rationale for having this requirement
    - Floodgates issue: Congress decided that those cases worth less than \$75k were too insignificant for the time and attention of federal judges
  - Sum claimed by plaintiff controls if it is made in good faith
  - It must appear to a **legal certainty** that the claim would fall short of the required in order to fail the amount-in-controversy requirement

(see Whitchurch: guy giving tours in Oceania; he *could* have siphoned off \$51k)(“legal certainty rule” developed in St. Paul Mercury Indemnity Co.)

- A plaintiff’s good faith claim for more than the amount required controls, unless it “appear[s] to a legal certainty that the claim is really for less.” That is, if there’s no possible way to meet the \$75k requirement, you fail the amount-in-controversy requirement.
- If, at end of trial, amount does not exceed amount in controversy, court, under 1332(b), may deny costs to the plaintiff (as a penalty for falling short of the amount-in-controversy).
- **Limits to Diversity**
  - Even w/complete diversity and \$75k+, some courts will decline to hear cases, especially Family Law and Probate cases (state courts hear these kinds of cases everyday and are better suited for them)
- **Aggregation**
  - Pre-Exxon, you could only aggregate when there is one  $\pi$  and one  $\Delta$ .
- **FEDERAL QUESTION JURISDICTION**
  - Art. III, s.2 + **28 USC § 1331** “...arising under” jurisdiction
  - Though Art. III and 1331 use the same “arising under” language, they have been interpreted differently
  - Rationale for FQ
    - Uniformity in decisions
    - Avoid state and local politics in the non-political federal courts
    - Federal expertise adjudicating federal law
    - Origin of 1331 (Federal gov’t didn’t trust southern states to enforce civil rights laws)
  - Osborn (defined outer boundary of Art. III)
    - Held that to satisfy constitutional bounds of FQ jd, all that was needed was a federal issue to be an **ingredient** in the case.
    - Very broad interpretation of “arising under.”
  - 1331 is more narrow than Osborn, and limits “arising under” FQ in Constitution in 3 ways:
    - Well pleaded complaint rule
    - Centrality
    - Substantial federal claim
  - Mottley: “**Well pleaded complaint rule**”
    - Free RR passes after injury; federal law voids them, Mottleys claim breach of k
    - State-law breach of k claim + anticipating federal defenses

- Rule: **we only look at what appears in the complaint**, not anticipated defenses. Federal defenses are irrelevant for the purposes of jurisdictional analysis.
  - Why? Court wants to know upfront whether it has jd
  - Downside: sometimes FQs won't wind up in front of a federal judge
- Layne & Bowler / Smith / Moore: Centrality
  - Layne & Bowler: no FQ jd b/c “the suit arises under the law that creates the c/a,” which, here was a state law slander claim.
    - This was Holmes’s restrictive view: “only when the federal law gives rise to the claim” is centrality principle met.
    - Though, the slander dealt with a violation of federal patent. It was a state law claim with an underlying federal issue pivotal in determining whether the state claim would win or lose.
  - Smith v. Kansas City Title: state law claim to enjoin from issuing invalid bonds; only way to prove bonds invalid was to show that the federal statute authorizing them was unconstitutional
    - Yes, there IS FQ jd here
    - Court was uncomfortable with a state judge interpreting a “real important” federal statute
    - When there is a state law claim requiring an important federal issue to decide it, there may be FQ SMJ.
  - Moore: No FQ jd
  - Merrell Dow: 1 negligence claim under state law premised on the resolution of a federal claim
    - No federal private right of action
    - Statute wasn't meant to be enforced by individuals suing under the labeling requirements of the Act. Left to FDA for enforcement instead
    - Reconcile with Smith?
      - Maybe in Merrell, the one claim which involved federal law, out of a total of 6, wasn't as central to the case the way Smith required federal law to prove the state c/a?
      - Will the state law claim TURN ON a question of federal law?
      - **See Glannon for a better explanation than what we got in class**
  - Grable & Sons:
    - State law “quiet title action.” Issue was whether notice was proper under a federal tax/notice law. Was there FQ jd? **YES.**
    - Central issue is what does the federal tax law say?
    - Factors:

- Is the federal issue actually disputed? Is it pivotal?
- Is the federal issue substantial enough to warrant a substantial interest in having a federal court hear the case?
- How often will this federal issue surface? What effect will permitting FQ jd have on the normal currents of federal jurisdiction?

## REMOVAL

- Plaintiff is ordinarily master of the choice of forum, and is limited by PJ, SMJ, and venue.
- Removal gives Δ certain rights to override plaintiff's choice and strategically forum-shop.
  - Why? To avoid local bias. Same rationale as diversity jd.
  - Sort of levels the playing field between plaintiff and Δ.
  - Maybe procedural rules are advantageous to Δ in federal court?
  - Maybe the jury pool will be culled from a larger geography and this will be an advantage.
  - Maybe it's a "rocket docket."
- If plaintiff files in state court, Δ may file a "notice of removal" to remove the case to federal court.
- Removal is purely statutory.
- Removal is a one-way street. State → Federal **ONLY**

**28 USC § 1441 – 1447:** Under what circumstances may Δ remove? When is removal allowed? Removal is a strategic choice. Just because Δ may remove does not mean that he will.

- 1441(a): Δ may only remove if the case could have been brought in federal court originally.
  - E.g., a MD plaintiff suing a VA defendant in MD state court on a state claim for \$40,000 **is not removable**.
  - If the claim were for \$80,000, assuming PJ, **then it would be removable**.
- 1441(a): Where is case removed to?
  - It goes to the federal district court corresponding to where the action had been filed in state court.
- 1441(b): where SMJ is based solely on diversity, Δ may not remove if he is a citizen of the state in which the action is brought.
  - E.g., if MD plaintiff sues VA defendant in VA state court on a state law claim, **Δ cannot remove**.

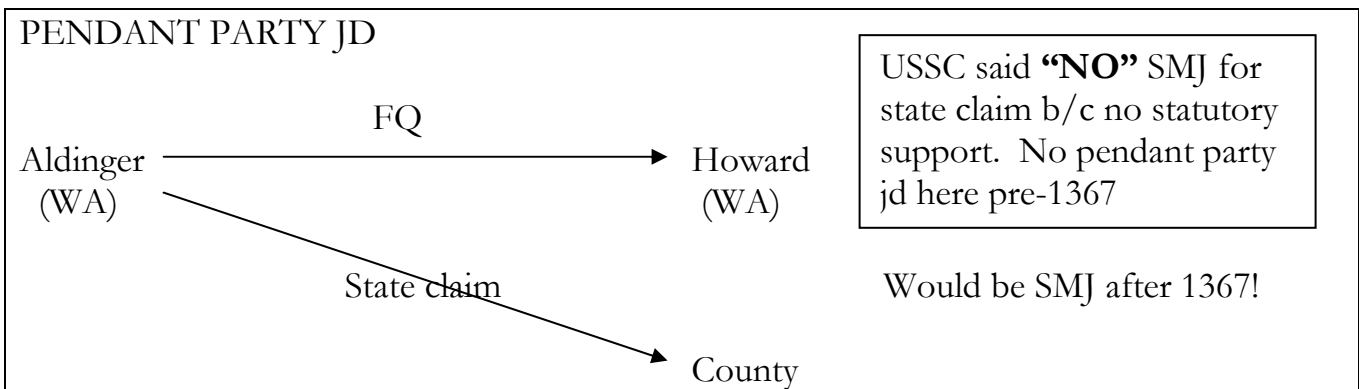
- When SMJ is based on FQ, Δ may remove to federal court if he is a citizen of that state.
- 1441(b): to be removable, there need be at least one claim “arising under.”
  - So, if there is originally a state law claim, and the plaintiff amends the complaint to include a FQ, the case **becomes removable**.
- 1446(a): short and plain statement for grounds of removal. It is a NOTICE, **not** a motion.
- 1446(b): defendant has **30 days** from date he receives a copy of pleading setting forth the claim in which to file a notice of removal and **a case is not removable after one year from date of filing**.
- 1447(c): where a plaintiff requests court to remand a case that a Δ improperly attempts to remove.
  - Plaintiff has 30 days after receiving notice of removal to move the court to remand back to state court **WHEN THE DEFECT IS NOT SMJ**.
    - When the defect is lack of SMJ, that motion may be filed at any time.
- Shamrock Oil and Gas: well pleaded complaint rule applies in removal cases and when determining whether an action might have been brought in federal court, we only look at the plaintiff’s claim (not even at possible defendant counterclaims).
- If plaintiff wants to avoid federal court, he may not intentionally and without legal justification add a diversity-destroying defendant (violating Rule 11) to make removal impossible.
- Lincoln: courts must look at the parties named in the complaint. Δ does not have to identify all possible Δs that might later be added which could destroy diversity. When deciding whether an action “could have been brought in federal court,” diversity only matters for the named parties in the complaint.
- “Time of Filing” Rule: you look at the lineup of parties at the time of filing.
  - Why? So court knows from the start whether there is SMJ. Helps prevent manipulation of citizenship (domicile).
  - Caterpillar: change to party-lineup (that is, when a diversity-destroying party is dropped from a case) can create SMJ.
  - DataFlux: change to a continuing party’s citizenship (by dropping a diversity-destroying partner) does NOT create SMJ.

## COMPLEX LITIGATION

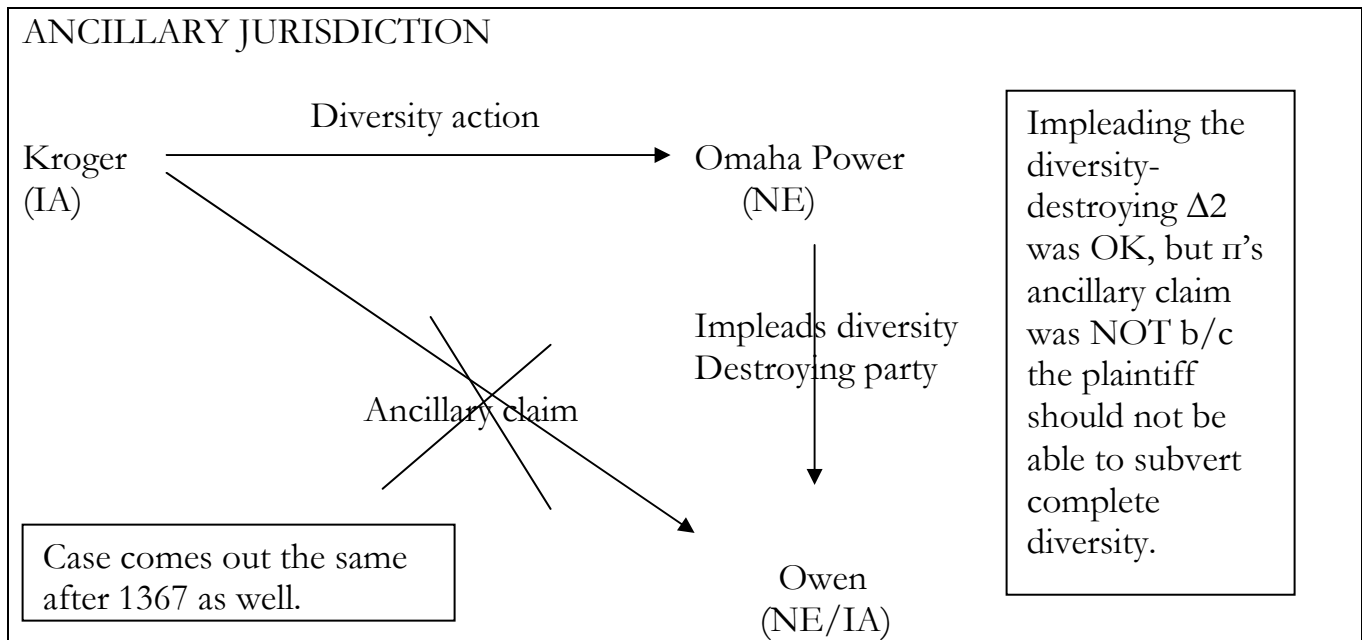
- Multiple plaintiffs, defendants, claims.
- We ask 2 questions:
  - Is joinder (of parties, claims) allowed under FRCP?
  - If it is, is there SMJ over additional claims/parties?

**Supplemental Jurisdiction:** under what circumstances MAY a Federal court exercise SMJ over claims lacking an independent basis of SMJ?

- Gibbs: 1 federal claim and 1 state claim? May the state claim be litigated in state court? Gibbs says, “Yes if...” the two claims derive from a **common nucleus of operative fact**.
  - Whether claims derive from that common nucleus may turn on how broadly or narrowly you define it. Generally, it has been defined pretty loosely.
- Art. III, s.2: “all cases...and controversies.” Constitution does not refer to claims or c/a. Gibbs says that if the claims arise from same case or controversy, then Art. III has been satisfied.
- If the state claim is supplemental to a “federal anchor claim,” the federal court will have jurisdiction over the state claim in the interest of efficient.
- Gibbs’s Discretionary Standards
  - Does the state claim predominate?
  - Will federal court have to decide novel issues of state law?
  - Will hearing the claims together confuse the jury?
  - Will federal issues be resolved early on leaving nothing but the state issues?
- § 1346 requires claims against the US to be brought in Federal Court.
- Aldinger



- Owen



- 1367
  - 1367(a): supplemental jurisdiction may lie where claims arise from the same case or controversy. A civil action over which district court has original jurisdiction.
  - 1367(b): only applies when SMJ is based on diversity and may **remove jurisdiction** of the additional claims (or parties) when joined as defendants under Rules 14, 19, 20, or 24, OR over claims/parties when joined as plaintiffs under Rules 19 or 24.
  - 1367(c): offers discretionary reasons for not allowing SMJ over the supplemental claims, as per Gibbs.
  - 1367(d): when a state law claim is filed, the SOL stops while claim is pending and for 30 days after it is dismissed
- 1367 Analysis:
  - (1) Do claims arise from same case or controversy?
  - (2) If diversity, look to (b) to see if suppl. Jd is denied based on joinder rules
  - (3) Look to (c) for discretionary reasons not to grant suppl. Jd.
- **Tricky:** 1367(b) applies to PLAINTIFFS. So in Owen, Δ2 could have sued π b/c nothing in 1367(b) would have removed supplemental jurisdiction.
- ExxonMobil:
  - In class actions, look at named plaintiffs' citizenship
  - Not all plaintiffs met amount in controversy requirement? Would this prevent SMJ where there is at least one anchor claim of proper SMJ?
  - There IS suppl. Jd over the additional claims by diverse plaintiffs even if they fail to meet minimum amount in controversy requirement.

- There IS NOT suppl. Jd over a claim by a non-diverse 2nd plaintiff.
  - Why? So long as someone meets the min. amount, the case is probably important enough for the federal courts to hear it.
- Exxon holds that “a civil action over which the district court has original jurisdiction” means **at least one federal anchor**.

## JOINDER

- FRCP rules tend to have liberal joinder policy
- Rationale:
  - Judicial efficiency (avoid multiple litigation over same, similar facts)
  - Prevent inconsistent judgments
- Do the FRCP permit / require joinder?
- If so, is the SMJ over the joined claims or parties? (suppl. jd)
- What are the hazards of non-joinder? (claim preclusion, res judicata)

### Joinder of Claims

- Rule 18
  - Party **may** bring **as many claims as one has**.
  - No relationship between claims is needed
    - If claims are unrelated, **Rule 42(b)** allows a judge to order separate trials
  - Wide-open joinder of claims rule
  - Of course, there **must be SMJ for the additional claims**
- Rule 13
  - Counterclaims
    - 13(a) compulsory c/c: **MUST** be brought if same T/O
      - Turns on how you interpret/define T/O
      - Only refers to CLAIMS, not to defenses
    - 13(b) permissive c/c
    - Logical relations test
      - Lasa: all the claims arise out of the Memphis City Hall project
      - Plant: the cross claim arises out of the same loan transaction
  - Cross-claims
    - 13(g): cross-claims against co-parties **may be brought** if arising out of same T/O (how does supplemental jd apply?)
    - There are no compulsory cross-claims
    - **TRICKY**: 1367(b) only refers to plaintiffs, so when a defendant brings a cross-claim, 1367(b) does not take away supplemental jurisdiction.

## Joinder of Parties

- Rule 20
  - Permissive joinder of parties
    - Plaintiff might want to sue multiple parties b/c he is unsure who caused an injury and to maximize relief.
  - Allows for multiple plaintiffs and/or multiple defendants
  - 20(a) has 2 prongs
    - First, must demonstrate that there is an arising out of the same or series of T/O
    - Second, there must be some question of law or fact common to the parties
  - “Policy or practice” seemed to be OK for 20(a) in M.K. and Mosley.
- Rule 19
  - Compulsory joinder rule
  - When there is an absent party out there somewhere, we ask whether that absentee’s absence is harmful?
    - To whom? Plaintiff, Δ, to the absent party, to the justice system
  - 3 levels of analysis
    - (1) **Is the absentee necessary?** 19(a) makes us ask these questions:
      - Does absence hurt plaintiff b/c he can’t get complete relief?
      - Does absence hurt absentee who is unable to protect his interests?
      - Does absence hurt defendants? (multiple or inconsistent judgments)
        - Hypo: bolts on metal spinal plate, patient sues plate manufacturer, not Dr. Court holds that Dr. is NOT a necessary party answering all three above questions as “No.”
        - Hypo: Bank with money belonging either to A or B. A sues for money, B is absent. B is a necessary party b/c defendant Bank is subject to multiple judgments.
    - (2) If the absentee is necessary, we ask, **is joinder feasible?**
      - Yes, if you have SMJ, PJ, and proper venue
      - If joinder IS feasible, the party MUST be joined.
    - (3) If joinder is NOT feasible, we ask, **is the party so necessary as to be indispensable that we should dismiss the case?** “Justice could not be served without them.”
      - Recall 12(b)(7): motion to dismiss for failure to join an indispensable party.
      - If party is indispensable, the case is dismissed.

- Rule 19(b) is the indispensability test:
  - Balancing test factors (how do we balance the hurt)
    - Interest of plaintiff
    - Interest of  $\Delta$
    - Interest of absent party
  - Provident Tradesmen

## Impleader

- Rule 14 (permissive rule)
  - Where a defendant wants to sue a third-party on a theory that if it, the defendant, is liable to the plaintiff, the third-party will be responsible to pay
    - **Derivative Liability**
      - “If we have to pay plaintiff, you have to pay us!”
    - Contribution (joint and several liability in tort)
    - Indemnification (contract)
  - Recall chicken house, nails case. LatCo couldn’t sue NailCo b/c of a breach of k between the two (independent claims are NOT proper under Rule 14), or on the ground that, “you made these rusty nails” (Not us, them!). Rather, only where LatCo sued NailCo on a theory of derivative liability would Rule 14 be proper.
  - Typically, a third-party defendant’s defense is the same as defendant’s defense; both have an interest in beating original plaintiff.
  - If, after serving Answer, 10 days pass, defendant must get leave of court to implead under Rule 14.
  - See Jeub (bad ham, illness, contribution claim by restaurant against ham maker)
    - The impleader will need supplemental jurisdiction
    - 1367(a)’s case or controversy
    - 1367(b) will not apply b/c it is ONLY for plaintiffs
  - PJ, venue, and SMJ (see 1367) over 3d party IS REQUIRED
  - Threshold:
    - (1) Is there a recognized principle of derivative liability?
    - (2) Should the court in its discretion allow the impleader?
      - Weighs judicial economy, prejudice, complicated nature of the litigation

## Intervention

- Rule 24
  - Here, an outsider wants to get into the litigation either as  $\Pi$  or  $\Delta$ .
  - 24(a) intervention of right (judge **must** allow entrance)

- Interest in property or transaction (how do you figure out if there's an interest?)
  - Whether or to what extent the disposition may impair or impede intervenor's ability to protect that interest
  - Whether such interest is adequately represented by the existing parties
- 24(b) permissive intervention (judge **may** allow entrance)
  - Question of law or fact in common
  - NO t/o test here

## Class Actions

- Class actions are representational actions
  - Small number of named plaintiffs who bring the action on behalf of a large number of other plaintiffs, all with some common issue of law/fact.
  - How do we protect the interests of those plaintiffs not named who may not even know they're in the class? (the absent class members)
    - In Hansberry, because there was an internal class conflict, interests were not adequately represented
  - Class definition must appear in the complaint (as specific as possible and demonstrate pre-reqs for certification)
  - Pre-requisites for class certification:
- Rule 23
- 23(a)'s pre-reqs
  - (1) "Numerosity": so large that joinder is impracticable. Generally, when you get above 40 people you have a large enough group for a class action
  - (2) Questions of law or fact common to the class. Must be something make the class cohesive.
  - (3) "Typicality": the claims/defenses must be typical of members of the class
  - (4) The represented parties will protect the interests of the class
- Once all of 23(a)'s requirements are met, you then have to satisfy ONE of the options in 23(b)
  - Least common: 23(b)(1)(a): "what would go wrong if there weren't joinder?" (inconsistent judgments) & 23(b)(1)(b): cases of limited funds (bankruptcy?)
  - More common are 23(b)(2) and (3)
    - (2) involves an attempt to get someone to change his or its behavior (most often in the news)
    - (3) involves the seeking of compensation (most often involving people like us, e.g., my Schwab thing)

### Pleading

8(a)'s "short and plain statement," 8(c)'s affirmative defenses, Gomez's burden of pleading, Rule 11, 9(b)'s particularity, 12(b) MTDs, factual/legal insufficiency, 12(e), Rule 15's amendments

### PJ

Shoe, min. contacts, FP&SJ, "purposeful availment," contacts give rise to claim (SJ), continuous and systematic contacts (GJ), 2-pronged test: long-arm + DP, consent/basis/domicile, fairness factors, surprise to be haled into court, stream of commerce, "effects." QIR's property interest "fiction" (Pennoyer/Shaffer)

### Notice

Mullane, "reasonably calculated to apprise," publication vs. mail, SOP, opportunity to be heard prior to property deprivation

### Venue

1391, convenience, "a district where any reside if all reside," corp./PJ/separate state, where substantial events took place, where  $\Delta$  is found

### Transfer/FNC

1406, "where it could have been brought," 1404 (interest of justice, convenience); dismissal per Reyno factors

### SMJ

Art. III, s. 2, 1332's complete diversity, domicile, amount-in-controversy \$75,000+, 1331's FQ, "arising under," Osborn's ingredient, Mottley's well pleaded complaint, Smith's centrality, Grable's "substantial" factors

### Removal

1441-1447, "could have been brought," not if  $\Delta$  is citizen (diversity), must be within 1 year, time of filing rule

### Supplemental jurisdiction

Gibbs, common nucleus of operative fact, case/controversy, 1367, discretionary, at least one federal anchor

### Joinder

Claims (18), compulsory/permissive counterclaims (13a, b), cross-claims (13g), T/O, logical relations test, parties (20), common law/fact, "policy or practice," indispensable (19), necessary, feasible, indispensable, impleader (14), derivative liability, intervention (24), class action (23)

28 U.S.C. § ...

- 1331 FQ
- 1332 Diversity
- 1346 Claims against US must be in Federal Court
- 1367 Supplemental Jurisdiction
- 1391 Venue
- 1404 Change of Venue when proper
- 1406 Change of Venue when improper
- 1441 Removal
- 1446 Procedure for Removal
- 1447 Procedure after removal

Fed. R. Civ. P. ...

- 4 SOP
- 8 Claims and Defenses
- 9 Special matters (fraud and mistake with particularity)
- 11 Impropriety and Sanctions
- 12 Defenses, MTDs
- 13 C/C, cross-claims
- 14 Impleader
- 15 Amendments
- 18 Joinder of Claims
- 19 Indispensable Parties
- 20 Permissive Joinder of Parties
- 23 Class Actions
- 24 Intervention

Is joinder proper?

When claims are brought against new parties: 14, 19, 20, 24

When claims are brought against existing parties: 13, 18

Is there SMJ over the claim?

Check for independent basis first (1331, 1332)

Check 1367(a) next, (b) if anchor is diversity only, (c) for discretion