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SELECTING THE FORUM

Steps (for both State and Federal Jurisdiction)

- Step 1 - Does a state statute reach Def
- Step 2 - Is personal jurisdiction over Def Constitutional
- Step 3 - Does the federal/state court have subject matter jurisdiction

I. Personal Jurisdiction

- Basic question - in which states can PL sue Def? = geography
 - same analysis in federal and state court - same inquiry
 - interlocutory order → not final judgement on the merits (pre-trial appeal allowed in some states)
 - court must have power over either
 - Def self
 - Def property
- As a defense - **may be waived**
 - must be raised before any pleadings/motions (not including removal)→ or deemed waived
 - may be appealed (if timely raised) after defending on the merits
- Default judgement - (*Glannon 41*)

- Def loses ability to defend on merits
- only defense = home state finds no personal jurisdiction in foreign forum and refuses full faith and credit
- PL will attempt to domesticate foreign judgement in Def home state
- Types of jurisdiction
 - in personam - power over Def self
 - in rem - power over Def property
 - quasi in rem - power over Def property

Due process clause -

- establishes boundary of state's jurisdiction
- if beyond due process clause → not entitled to full faith and credit
- State statute authorizes extent of jurisdiction (w/i due process)

A. In Personam Jurisdiction

- **general jurisdiction** - Def sued in forum for claim arising anywhere else
 - individuals - where domiciled
 - corporations - state where incorporated (*Glannon 115*) + systematic/continuous activities (see below)
- **specific jurisdiction** - Def sued for claim arising in forum

Specific Jurisdiction

- **Pennoyer v. Neff** (1877)
 - power theory - jurisdiction over everybody/thing w/i state's boundary
 - most important point - traditional basis for in personam
 1. **"presence"** - Def served w/ process in forum (creates general jurisdiction)
 2. **agency** - serve Def's agent in forum
 3. **domicile** - Def domiciled in forum
 4. **consent** - Def consents to jurisdiction in forum
 - difficult to get in personam jurisdiction unless Def domiciled in forum (due to mobility)
- **Hess v. Pawloski** () - PA driver = car accident in MA
 - MA long arm statute - driving in state = appointing state officer as agent for service to process/consenting to jurisdiction for claims re: car accidents
 - **essential elements = agent + consent**
- **International Shoe** (1945)
 - new doctrinal formula
 - **test** (if Def not present in forum) = jurisdiction where Def has minimum contacts such exercise of jurisdiction does not offend traditional notions of fair play and substantial justice
 - **minimum contacts**
 - **reasonableness**
 - amorphous doctrine - not rigid like Pennoyer
 - Note

1. in personam available even w/o serving Def in forum - service of process reaches beyond state
 2. two elements - contacts + fairness
 3. does not over rule Pennoyer
- case implies that minimum contacts = alternative to traditional basis of Pennoyer → only applies if Def not in forum
- **McGee v. Int'l Life** (1957) - TX insurance Co sold one (1) K to CA; PL sued thereon in CA
 - jurisdiction allowed (Def failed to defend on merits in CA)
 - factors
 1. Def **solicited K** from CA - did Def deliberately reach into forum/take advantage of forum benefit
 2. **relatedness** - does PL claim arise from Def contact w/ forum
 3. **state's interest** - CA had expressed an interest in providing a forum for its citizens
 - **Hanson v. Denkla** (1958) - PA principal establishes DE trust and principal dies in FL
 - question is DE bank subject to jurisdiction in FL → Supreme Court = no
 - Bank's contact w/ FL (doing business w/ FL principal) was not relevant
 - purposeful availment - must have a relevant contact
 - **contact must result from Def's purposeful availment of formula**
 - only reason Def contacted FL was due to 3rd party activity (principal moved to FL)
 - **Worldwide VW** (1980) - no jurisdiction b/c no relevant contact
 - NY PL driving to AZ in accident in OK - sue in OK for car defect
 - issues
 - clear = jurisdiction over mfr/NA importer
 - unclear = jurisdiction over regional distributor (NY, NJ, CT)/Seaway Motors (Audi dealer in Messina NY)
 - Court - no jurisdiction b/c Def did not reach out to forum (no **purposeful availment**)
 - **minimum contacts**
 - Def activity such that Def reasonably foresees being brought into forum state court
 - Def **purposefully avails** self of privilege of conducting activity in state
 - Def **realizes benefits of forum** - Def delivers goods into "**stream of commerce**" w/ expectation that will be purchased in forum state
 - foreseeability - not relevant if Def product might end up in forum (*chattel* <> *agent for service of process*)
 - **reasonableness** - exists if Def serves directly/indirectly market for product in forum
 - **Burger King v. Radzynski** () - franchisees in MI breach K; BK sues in FL
 - Court = jurisdiction exists
 - 2 parts to Int'l Shoe test - contact + fairness
 - must have contact before fairness = relevant issue
 - fairness = irrelevant if no contacts
 - **minimum contacts** - Def had reached out to FL
 - **reasonableness** -
 - reasonable where Def enjoys benefits/protections of state → should expect to defend suits from forum state customers

- burden on Def to show that forum = so gravely inconvenient that Def at severe disadvantage in litigation
 - Def argued that inconvenient - Court says irrelevant
 - almost impossible to meet standard
 - relative wealth = irrelevant
 - Brennan rights opinion - usually sticks up for little guy
- **Asahi** (1987) - Def product gets to forum which Def did not ship to
 - **minimum contacts (stream of commerce) - no law** b/c court split 4/4
 - **Brennan (+ 3)** - minimum contact exists if
 - *stream of commerce* - Def puts product into stream of commerce and
 - *foreseeability* - Def reasonably anticipates that product will reach a forum
 - **O'Connor (+ 3)** - minimum contact exists if
 - *stream of commerce* - Def puts product into stream of commerce and
 - *foreseeability* - Def reasonably anticipates that product will reach a forum PLUS
 - *purposeful availment* - Def has an intent or purpose (and reaches out) to serve such forum (e.g., advertising/customer service in forum)
 - **Stevens** - minimum requirements of fair play/substantial justice → may trump minimum contacts
 - **reasonableness** (good law) - factors considered =
 - burden on Def
 - interests of forum state
 - PL interest in obtaining relief
 - Stevens = no position
- **Burnham** (1990) - NJ Def sued in CA for claim arising in NJ
 - claim requires general jurisdiction b/c claim not arising in CA
 - Issue - does Pennoyer basis of presence still exist?
 - **no law** b/c court split 4/4
 - **Scalia** - presence when served is enough b/c historically has always been enough (minimum contacts analysis not required) (pedigree argument)
 - **Brennan** - must apply minimum contacts test of Int'l Shoe even though traditional basis exists
 - 3 days in CA = enough to establish minimum contacts
 - nobody knows how to apply Brennan's reasoning
 - Stevens = no position
 - **tag jurisdiction** - both rulings find general jurisdiction exists for individuals
 - corporations - not subject to tag jurisdiction (Glannon 128)

ADD SHAEFFER - MINIMUM CONTACTS REQUIRED FOR TRANSIENT STOCK FOR QUASI IN REM JURISDICTION (MAY NOT EXTEND TO REAL PROPERTY)

- **Helicopteros**
ADD BRENNAN'S DISSENT RE: LIBERAL INTERPRETATION OF "RELATED TO"
ADD ISSUE OF ARISING OF (IN MAJORITY?)

General Jurisdiction

- **Policy Concern** - are activities so substantial/continuous as to make fair subjecting Def to all claims
- **Perkins**
 - general jurisdiction if substantial or systematic and continuous ties w/ state
 -
- general jurisdiction - easy situations
 - domicile in state
 - corporation located in state

Constitutional Limits Summary - do this on exam

- flag whether
 - involves a traditional basis (see 4 basis in Pennoyer)
 - note Burnham → 4 justices = traditional basis is enough; 4 justices = need more than traditional basis
 - involves no traditional basis → Int'l Shoe = applicable
- applying Int'l Shoe analysis
 - must be **relevant contact** b/w Def and forum where being sued
 1. contact must result from Def's purposeful avilment (reaching out)
 2. foreseeability - must be foreseeable that Def could get sued in forum (Burger King + WWVW)
 - **fairness**
 - relatedness - does PL claim arise from Def contact w/ forum (if so → helpful - e.g., McGee one contact) - **Maybe an element of contact**
 - relatedness not required for general jurisdiction
 - 5 factors to consider
 - i) convenience - Burger King - burden on Def to show that convenience = gross/difficult to prove
 - ii) state's interest - McGee
 - iii) PL interest -
 - iv) legal system's interest in efficiency
 - v) interstate interest in shared substantive policies

Statutory Issues

- must be statute triggering jurisdiction
- Jurisdictional statute
 - N/R motorist statute = specific jurisdiction statute
 - **long arm statute** - reach N/R - usually specific jurisdiction -
 - differ in language from state to state
 - often have statute which reaches N/R tortfeasor
 - ⊂ Grey v. American Standard Radiator (Illinois read) - looks to where injury occurred
 - ⊂ Feathers v. McLucas (NY CA) - looks to where negligence (mfr?) occurred
 - ⊂ no Supreme Court reconciliation → both still relevant

- **Hypothetical** - PL (WA resident) trip to OR buys clock in OR and returns to WA → clock injures PL
 1. mention no traditional basis for jurisdiction
 2. look for WA long arm statute
 3. does statute reach Def? (if tort → consider
 4. Constitutional analysis
 - mention no traditional basis
 - mention Int'l Shoe elements
 - i) is there contact b/w Def and forum
 - ⊂ did Def purposefully avail self of forum?
 - ⊂ argue both ways
 - ⊂ consider facts - closer to McGee or Hanson/WWVW
 - ii) is foreseeable that Def could be sued in WA - argue both ways
 - iii) is jurisdiction fairness -
 - ⊂ relatedness - is claim related to contact
 - ⊂ see 5 factors above

B. In rem/Quasi in Rem

- In rem = dispute re: who owns property
- Quasi in Rem (2) = dispute <> re: ownership of property; = dispute w/h/b in personam if could have done so
 - good example = Pennoyer v. Neff
- **Steps**
 1. is there a statute - must allow attachment of property
 2. Constitutional analysis
 - Pennoyer - attachment must occur at initiation of action
 - Pennoyer expanded by Harris v. Balk to intangible property
 - Shaefer v. Heitner (19) - Def must have minimum contacts w/ forum
 - Court hints that In Rem case → presence of property in state (especially land) may satisfy minimum contacts

II. Notice

- must give notice to Def allowing to respond

A. Service of Process

FRCP 4

- governed by FRCP 4
- Six sub-rules
 1. process consists of summons + copy of complaint
 - summons - from court = symbol of court's power; formal document; easy to obtain (4-a)

2. service can be made by any non-party who is at least age 18 (4-c-2)
3. **servicing an individual** (4-e-2) - three alternatives
 - **personal service** - walk and hand it to person anywhere
 - **agent** - serve Def agent (appointed by Def/operation of law)
 - **substituted service** - must occur at Def usual abode and must be made on someone of suitable age and discretion who resides there
 - usual abode - common sense
 - suitable age/discretion - no magic rule but must reside there
 - state law methods for service of process (4-e-1) - can be used for service of process under FRCP
 - may use 2 states methods - state where federal court sits and state where process effected
4. service on a corporation (4-h) - serve an officer or a managing/general agent of corporation
 - incorporates state methods for service of process (4-e-1)
5. method for getting Def to waive formal service of process(4-d)
 - cannot have service of process by mail
6. process can be served throughout state in which federal court sits (4-k-1-a)
 - service out of state only if state law allows (state where federal court sits)
 - exceptions
 - **Bulge rule** (4-k-1-b) - allows service of process out of state even if no state long arm that would reach out of state BUT must be w/i 100 miles of federal court house
 - ⊂ DOES NOT APPLY TO ORIGINAL DEFENDANTS - only available for Def brought under FRCP 19 & ??
 - if **federal statute** otherwise allows

B. Constitutional Analysis

- Mullane v. Central Bank of Hanover - notice must be reasonably calculated under all circumstances to apprise the Def of the suit
- beware publication notice - almost never constitutional
- Mullane - upheld publication notice over individuals who could not be identified involving very rare circumstances
- if satisfy FRCP 4 → most likely constitutional

C. Opportunity to be Heard

- issue often involves commercial transactions
- series of cases give factors/protections - not clear how many factors required in a given case
 1. affidavit - PL must give affidavit (sworn under penalty of perjury)
 2. PL must state specifics (exactly why do have right to repossess)
 3. PL must post bond - in case PL wrong
 4. repossession order must come from judicial officer - involves judicial system
 5. Def gets hearing - either pre/post possession to allow Def opportunity to be heard

- Sniddach v.

III. Subject Matter Jurisdiction

- Question 1 - personal jurisdiction (see above) - only means that PL can sue Def in particular state
- Question 2 - which court can we go to (state v. federal)
- Question 3 - which venue is appropriate
- federal courts = limited SMJ
 - diversity of citizenship
 - federal question
- state courts = general SMJ - can hear any claim
 - narrow exception - where federal question = exclusive for federal court (patent, anti-trust, etc.)
- federal subject matter jurisdiction must exist for each Def (from PL) ????? (based on either FQ or Div)

A. Diversity of Citizenship

- U.S.C. 28 §1332(a)(1) = statute
- requirements -

Citizens of Different States

1. complete diversity rule - no diversity if any PL citizen of same state as any Def (Strawbridge v. Curtis (1802))
2. relevant date = when case is filed - subsequent change of citizenship = irrelevant
3. individual = state where domiciled (<> residence)
 - **U.S. citizen domiciled abroad** = not citizen in any U.S. state (no diversity jurisdiction possible)
 - **foreign citizen** domiciled in U.S. = not U.S. citizen of any state (§ 1332(a)(3) allows diversity for aliens)
 - only one domicile at a time
 - **domicile retained until** changed =
 - i) change physical residence
 - ii) form subjective intent to make new residence = permanent
4. corporation - FRCP 1332-c-1
 - corps - do not have domicile
 - states where incorporated - usually only one state but could be multiple
 - state where principal place of business located - only in one state
 - **nerve center test** - where decisions are made (usually = headquarters)
 - **muscle center test** - where majority of activity occurs

- **total activities test** - most courts use nerve center unless all activities in a single state
- cannot have more than one principal place of business
- 5. unincorporated businesses = every state in which associates/members are citizens
 - no applicable law
- 6. decedents/minors/incompetents (§1332-c-2) - use their citizenship ≠ representative's citizenship
 - exception - not applicable to class action → look to citizenship of representative

Amount in Controversy

1. must **exceed** \$75,000 not including interest and costs
2. PL complaint governs unless clear to a legal certainty that PL cannot recover that amount
3. PL ultimate recovery = irrelevant to subject matter jurisdiction (§ 1332-b)
4. **aggregation** -
 - claims - can aggregate if one PL v. one Def (all case made - no statute) - **claims may be unrelated**
 - not separate theories under same claim
 - parties (e.g., class action) -
 - historically not allowed → all parties must meet requirement or be dismissed (Zahn v. Int'l Paper)
 - § 1367 (supplemental jurisdiction) - some courts interpret as overriding Zahn
 - Bar Bri exception - joint claims (one PL sues multiple Def) - use total value of claim

B. Federal Question

- statute = § 1331
- citizenship = irrelevant
- no amount in controversy
- claim must arise under federal law (Constitution, treaties, statutes enacted by U.S. Congress)
 - **"well pleaded complaint"** rule
 - look only at complaint - ignore defenses raised
 - focus only on claim itself - ignore extraneous facts introduced by PL (e.g., anticipating defense)
- **practical application** - look at complaint and ask - "is PL enforcing a federal right?"
- Louisville & Nashville RR v. Mottley - lifetime pass on RR in settlement of personal injury question
 - Congress passed law = RR cannot give away free passes
 - Mottley's claimed that federal statute ≠ apply to them (anticipating defense of RR)
 - Court - no federal question at issue
 - **well pleaded complaint** - federal question raised in Def = irrelevant

C. Supplemental Jurisdiction

- must assess subject matter jurisdiction for all claims raised in a case
- **constitutional authority** = if raised by a single PL and from common nucleus of operative facts/same transaction or occurrence (Gibbs)
- **statutory authority** - § 1367 Test
 1. does 1367(a) grant supplemental jurisdiction? - Yes if arises from same transaction/occurrence as underlying case (codifies Gibbs)
 2. does § 1367(b) destroy supplemental jurisdiction
 - only applies in diversity cases (no applicability to FQ cases)
 - only kills supplemental jurisdiction by PL (not any other party)
- supplemental jurisdiction arises where federal court would otherwise not have subject matter jurisdiction over a claim
- PL must have original claim creating valid subject matter jurisdiction
 - only applies after case in court
- United Mine Workers v. Gibbs
 - Def = TN
 - PL = TN - two claims arising from single dispute
 1. federal question - violation of federal labor law
 2. state law -
 - no federal question & no diversity
 - Supreme Court - federal court can hear claim 2
 - **Rule** - non-federal claim can be heard if arises from **common nucleus of operative fact** w/ the original claim giving rise to federal subject matter jurisdiction
 - common nucleus of operative fact = "same transaction or occurrence"
- **Hypothetical** - Gibbs under § 1367
 1. does § 1367(a) grant supp jur? - Yes b/c same transaction/occurrence
 2. does § 1367(b) destroy? - No b/c FQ not diversity

D. Removal (has own venue rule)

- removal - from state trial court to federal court
- six sub-rules (§ 1441, 1446, 1447)
 1. one way action - only from state to federal (not possible to remove from federal to state court)
 - remand - federal court may remand to state court where
 - removal found to be improper or
 - federal subject matter jurisdiction is destroyed
 - subsequently served Def <> consent to removal and requests remand
 2. only Def can remove - PL can never remove a case even if counter claim filed by Def against PL
 3. all Def must agree to removal
 4. remove to federal district embracing the state court - only one federal district in country to which case may be removed
 5. must remove w/i 30 days of case becoming removable - usually at outset
 - *whether Def knows case removable or not AND even where Def subsequently added late*

- Murphy Brothers - 30 days runs from date of service of process even if PL otherwise notified Def of action
- 6. remove if case has federal subject matter jurisdiction (invokes FQ or diversity)
 - Def may include info necessary to support removal (e.g., amt in controversy) (§ 1446(a))
 - exceptions - apply only in diversity cases (not FQ)
 - i) no removal if any Def is a citizen of the forum
 - **hypothetical** - PL = TX; Def1 = AR; Def2 = TN; suit filed in TN state court → no removal allowed
 - ii) no removal more than one year after case filed in state court
 - **hypothetical** - PL = TX; Def1 = AR; Def2 = TN is dismissed; suit filed in TN state court → no removal after 1 yr from
 - **allows PL to limit Def ability to remove** (sue non-diverse party then dismiss after 1 yr)

IV. Venue

- Question - which federal district can action be filed in?
- does not apply to removal
- only applies to cases where Def sued in federal court
- § 1391 - (a) = diversity; (b) = FQ

A. Determining Proper Venue

cases commenced in federal court

- PL generally has two choices for laying venue (**consider special rules for federal laws**)
 1. any district where **all Defs "reside"** (not citizenship) (see **exception**)
 - **exception** - if all Def reside in same state → venue in any district where a Def resides
 - **residence** -
 - individual = domicile
 - corporation = all districts where subject to personal jurisdiction (§ 1391(c)) for the claim at issue → treat each district as a different state
 2. any district where substantial part of **claim arose** (*look to claim rather than acts of individual Def*)
 - may result in multiple districts being appropriate venues
 3. if no district arises under 1 or 2 -
 - **diversity action** (§ 1391(a)(3)) - any district where any Def subject to personal jurisdiction at time action commenced
 - **federal question** (§ 1391(b)(3)) - where any Def may be found
- sua sponte transfer - possibly → § 1404(a) allows venue transfer "in the interest of justice"

cases removed from state court

- removal statute (§ 1441(a)) governs - removal allowed to district court embracing original state court

B. Transfer of Venue

- limitations
 - only allowed to a court which could have heard originally
 - transfer from one trial court to another trial court w/i same system (federal or state)
 - cannot transfer to court in another judicial system (e.g., foreign jurisdiction)
- transferor = original court transferring court away
- transferee = receiving transferred case
- 2 statutes governing transfer
 - transferee must have personal jurisdiction and must be proper venue (absent waiver by Def)
 - § 1404 - look at convenience and interest of justice (from proper venue to another proper venue)
 - § 1406 - defective venue
 - can dismiss case or transfer in interest of justice
- Forum non-conveniens - court dismisses case b/c another court = much more appropriate
 - dismissed b/c transfer = impossible b/c better court in a different judicial system
 - Piper v. Reno - Supreme Court - factors = same as § 1404 transfer
 - **ADD FACTORS - SEE FOOTNOTE 6 OF CASE**
 - usually conditioned on Def waiver of certain factors

V. Challenging (Forum) Jurisdiction

- special appearance - allows challenging specific personal jurisdiction
- Warning - if combine defense along w/ personal jurisdiction → may waive personal jurisdiction depending on state RCP
- FRCP 12 - Def has 2 options after being sued w/i 20 days after service of process (to avoid default)
 4. answer = pleading
 5. bring a motion = requesting a court order (<> a pleading)
- FRCP 12 (b) defenses - can be raised in either answer or motion
 1. subject matter jurisdiction
 2. personal jurisdiction
 3. venue
 4. insufficient process - rarely applies
 5. insufficient service of process - more frequent than (4)
 6. failure to state a claim
 7. indispensable parties - PL failed to join
- FRCP 12 (g) & (h) - say three things
 1. FRCP 12(b)(2-5) = least favored defenses - must be included in **first FRCP 12 response - irrespective of whether response = motion or answer** (or treated as waived)
 2. FRCP 12(b)(6/7) - can be raised at any time through trial
 3. FRCP 12 (b)(1) - can be raised any time - even after verdict

- Hypothetical - Def moves for FRCP 12(b)(3) venue dismissal → fails → subsequently files answer including raising personal jurisdiction → no basis b/c waived w/ first motion

VI. Erie Doctrine

- Issue = clear - which law to apply by Federal court in state action (i.e., usually diversity issue)
- Law = clear - must apply state substantive law
- Question - how to apply
- diversity case - in federal court solely b/c diversity of citizens → not b/c of presence of federal issue
- substance v. procedure
 - procedure - Federal court may apply federal procedure
 - substance - Federal court must apply state rules
- Steps
 1. is there an FRCP on point which directly clashes with state law
 - Walker - interpret FRCP from its plain meaning; can plain meaning be interpreted so as to coexist w/ state statute
 2. if 1=yes → apply FRCP so long as FRCP = arguably procedural and consonant w/ Rules Enabling Act
 - constitutional - if arguably procedural (rather than a substantive issue)
 - Hannah - service of process - followed FRCP rather than state law
 3. if no FRCP directly on point - Supreme Court cases → never told by Supreme Court how to integrate
 - Guarantee Trust v. York (1945) - **outcome determinative test**
 - substantive if Federal procedure would significantly affect outcome of a case
 - problem - Supreme Court never explained what it means
 - Byrd v. Blue Ridge (1958) - **balance the interests**
 - issue in case = deciding
 - federal interest in jury trial = very important
 - state interest in judge deciding = not even articulated by state law
 - problem - SC never explained basis for rulings
 - Hanna v. Plummer (1965)- **twin aims of Erie** - want to avoid forum shopping
 - **avoid forum shopping** - if federal judge ignores state law on issue → will lead to forum shopping (e.g., causing people to flock to federal court)
 - **avoid inequitable administration of law** - b/c only out of state citizens can invoke diversity
 - **Hypothetical** - FRCP 23 - would allow class action; H/E - state class action would not
 - answer federal rule must be applied as long as FRCP = arguably procedural
 - **Hypothetical** -

- state concern w/ medical malpractice insurance rates → state passes statute requiring case to be heard by arbitration panel (no jury trial) w/ follow-up in court (w/ arbitration decision admitted into evidence)
- question - is arbitration panel substance or procedure
- step 1 - no FRCP on point
- step 3 -
 - ◻ outcome determinative - probably not b/c jury could come out same way as arbitration panel
 - ◻ balance the interests - state has huge interest in controlling medical costs; federal interest of jury trial not eviscerated b/c jury trial preserved
 - ◻ twin aims of Erie - if judge ignores state law - will lead to forum shopping? Absolutely b/c get jury trial immediately = unfair b/c only out of state PL can get
- Gasperini - most recent Supreme Court case - not much help
 - involved NY tort reform statute with 2 issues
 - ◻ i) set a standard for ordering a new trial (e.g., if damage award out of whack) and
 - ◻ ii) appellate court to apply standard de novo
 - Supreme Court - i) = substantive; ii) = balancing federal procedural issue w/ state substantive concern

VII. Pleadings

A. FRCP 11

- requires atty to sign all documents except discovery documents
- when atty signs = certifying
 - **ADD Representations in 11(b)**
- 3 other relevant factors
 1. continuing certification - re-certifying every time advocate a position contained in that document
 2. sanctions are discretionary and aimed at deterrence
 3. 21 day safe harbor - motion for sanctions = served but cannot be filed for 21 days - allows party to fix deficiency

B. Complaint

- starts the law suit
- FRCP 8(a) - elements required in complaint
 2. **statement of subject matter jurisdiction** - tell court why in federal court
 3. **short and plain statement of claim**
 - notice pleading - don't need a lot of detail - just have to put other side on notice
 - Connelly v. Gibson
 - **exceptions** - where need to plead specifics
 - ◻ Rule 9(b) - circumstances of fraud/mistake must be plead w/ particularity
 - ◻ Rule 9(g) - special damages (not normally flowing from an event) must be plead w/ specificity

4. **demand for judgement** - have to tell court what you want

C. Defendant's Response

- FRCP 12 - have to respond by answer or motion w/i 20 days after service of process
- answer = pleading
- motion <> a pleading
- elements
 1. **respond to allegations** in complaint - Rule 8(b) - three forms of response
 - admit
 - deny - failure to deny can be treated as admission for anything except damages
 - lack sufficient information
 -
 2. **raise affirmative defenses** (Rule 8-c) - different from denial b/c injecting a new fact

D. Amending Pleadings - FRCP 15

- FRCP 15(a) = three basic rules (**pleading stage**)
 2. PL = right to amend once before Def serves answer (remember - motion <> an answer)
 3. Def = right to amend once w/i 20 days of serving answer
 4. if no right to amend - court may grant permission to amend (permission freely given as justice is required)
- FRCP 15(b) - regards variance = evidence at trial does not match what was pleaded (**at trial**)
 - no objection - → treat case as if pleadings comported with evidence presented
 - objection → evidence excluded from trial (other party can attempt to amend but will be difficult)
- FRCP 15(c) - amendment after SOL has run - relation back
 - **relation back** -
 - joining a new claim - amended pleading relates back if concerns same conduct, transaction, or occurrence as original pleading (FRCP 15-c-2)
 - joining a new party - FRCP 15-c-3 **Add mechanics**
 - court must assess doctrine of relation back
 - relation back = way around SOL
 - **hypothetical** - case initiated on July 1; SOL runs on July 10; leave to amend on July 15 to add new claim → court will consider if new claim relates to same conduct, transaction, or occurrence as original pleading

VIII. Joinder

A. Claim Joinder by PL

- FRCP 18(a) - PL may assert any and all claims against a single Def
- must still consider subject matter jurisdiction

B. Claim Joinder by Def

Counter claim

- counter claim = claim against an opposing party
 - **compulsory** (FRCP 13-a) - arises from transaction or occurrence as PL claim (would be barred by res judicata)
 - use it or lose it - if don't bring it will lose it
 - hypothetical - PL sues Def; case resolved; Def files subsequent action against PL from same occurrence → 2nd claim dismissed
 - **permissive** (FRCP 13-b) - does not arise from the same transaction or occurrence as the PL case
- must assess subject matter jurisdiction
- may be asserted against non-parties (FRCP 13(h))
- **hypothetical** - PL = NC; Def = SC; claim = \$100k; SC asserts compulsory counter claim against PL (= \$150k); subject matter jurisdiction? → yes b/c diversity jurisdiction exists (NOT supplemental jurisdiction (only applies where no diversity jurisdiction))
- **hypothetical** - PL = NC; Def = SC; claim = \$100k; SC asserts compulsory counter claim against PL (= \$45k); subject matter jurisdiction? → no diversity; supplemental jurisdiction (does 1367(a) grant jurisdiction? Yes - same transaction or occurrence; does 1367(b) limit jurisdiction? No - b/c only applies to claims by PL)
- **Steps**
 1. is it a compulsory counter claim
 2. is there diversity jurisdiction?
 3. is there a federal question?
 4. is there supplemental jurisdiction? - only discuss in exam question if needed

Cross claim (FRCP 13-g)

- against co-party
- must arise from same transaction or occurrence as underlying case
- not compulsory
- supplemental jurisdiction allowed ?
 - § 1367 (a) allows supplemental jurisdiction for all claims arising out of same transaction/occurrence
 - § 1367 (b) only applies to PL

C. Proper Parties (FRCP 20-a)

- parties may be joined where
 1. claim from same transaction or occurrence
 2. claim raises at least one common question

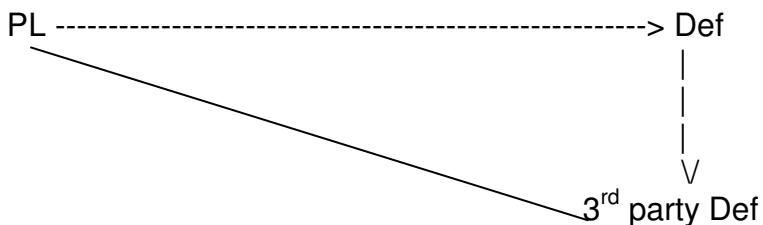
D. Necessary and Indispensable Parties (FRCP 19)

- steps
 1. is absentee party necessary - Yes if meet any of 3 tests

- i) without A → court cannot accord complete relief (court can't resolve issue in one case = efficiency concern)
 - ii) A's interest would be harmed if not joined (19-a-2-i)
 - iii) A's interest may subject to Def to multiple or inconsistent obligations (19-a-2-ii) - want to avoid contrary results b/w courts
 - joint tortfeasors = not necessary parties (per Supreme Court)
 - **hypothetical** - A owns 1000 shs in XYZ stock; PL claims own 1/2 of stock → sues XYZ to have stock cancelled and re-issued in joint names; A = necessary b/c
 - test 1
 - test 2 - easiest b/c A's interest in stock harmed to extent portion cancelled
 - test 3
2. is joinder of absentee party feasible
- personal jurisdiction
 - subject matter jurisdiction - see Owen Equipment v. Kroger
3. if joinder of absentee = not feasible → court must
- i) deny joinder OR
 - ii) permit joinder & remand to state court (§ 1447(e))
 - FRCP 19-b - provides factors to consider in whether to dismiss or proceed w/o absentee party
 - dismiss case if alternative forum exists where everyone can be joined

E. Impleader

- citizenship of impleaded party = irrelevant for diversity/venue = relevant for personal jurisdiction (*Gn231*)
- if claim starts w/ letter "c" = b/w existing parties (cross/counter claims)
- if starts w/ letter "i" = joining someone new
- **Defendant joins 3rd party Def for indemnity or contribution**



- FRCP 14(a) possible claims
 - Def against 3rd party Def
 - PL against 3rd party Def
 - 3rd party Def against PL

F. Intervention (FRCP 24-a-2)

- **intervention of right** - absentee party may intervene if absentee's interest may be harmed and not adequately represented
- **permissive intervention** - absentee must show that claim or defense has one common question with pending case (court may or may not let absentee in)

G. Interpleader

- very specialized - involves fighting over ownership of property
- stakeholder (possessing property) forces all claimants into a single case
- 2 kinds of interpleader
 - **rule interpleader** (FRCP 22) - just a diversity case
 - **statutory interpleader**

factor	rule	statute
to determine diversity	stakeholder must be diverse from every claimant	<ul style="list-style-type: none"> • only need one claimant diverse from one other claimant even if some = non-diverse • stakeholder = irrelevant
amount in controversy	must exceed \$75,000	only need \$500 or more (§ 1335)
venue	regular case - same as any other case	venue where any claimant resides (§ 1397)
service of process	just a regular suit	nationwide service of process never personal jurisdiction problem as long as w/i U.S. (§ 1361)

H. Class Action (FRCP 23)

- must meet all 4 requirements of FRCP 23-a
 - **numerosity** - to numerous for practicable joinder (no magic number)
 - **commonality** - throughout all members of class
 - **typicality** - reps claim must be typical of class members
 - **adequacy** - rep and lawyer have to be adequate
- must meet at least one type of class under FRCP 23-b
 1. (b)(1) - Ortiz case (notice not required)
 2. (b)(2) (notice not required)
 3. (b)(3)
 - required **elements**
 - common questions **predominate** (must be substantial part of claim)
 - class = superior way to resolve dispute
 - notice required to class members (FRCP 23-c-2)
 - members may opt out (members must be notified of ability to opt out)
 - popular in torts - easier in cataclysm (everyone injured at one time); tougher in toxic case (b/c injury in/from from different situations)
- all class members bound by judgement except those who opted out of (b)(3)
- subject matter jurisdiction - could arise from
 - federal question (labor, anti-trust, civil rights, etc.)

- diversity jurisdiction
 - class rep must be diverse from Def
 - amount in controversy -
 - ⊂ Zahn - Supreme Court → every member of class must claim more than \$75,000
 - ⊂ some argue that supplemental jurisdiction overrules Zahn - only rep must > \$75,000
 - ⊂ 5th & 7th circuits → Zahn = dead
 - ⊂ 3rd & 10th circuits → Zahn = lives
 - ⊂ Supreme Court (spring 2000) - justices split 4/4 (O'Connor withheld self b/c ownership)

IX. Discovery

A. Required Disclosures

- required disclosures (FRCP 26a) - have to give info even tho not requested
 1. initial disclosure
 - parties can avoid disclosure requirement by court order or stipulation BUT not by local rule
 - must identify people and documents with discoverable information the disclosing party may use for claims or defenses (previously - had to provide even more info)
 - certain cases exempt from required disclosures (FRCP 26-a-1-e)
 - **ADD LIST**
 2. experts
 3. pre-trial required disclosures - late in process
 - disclosures must be filed with court (new change)

B. Discovery Devices

- discovery devices - all can be used to get info from a party BUT which devices can be used to obtain info from non party

Device	Party	Non party
Deposition (??) - limited to one 7 hour day unless court orders otherwise or party agrees	yes	yes - if subpoenaed
Interrogatories (33) <ul style="list-style-type: none"> • 30 days to respond • written response 	yes	no
Request to produce (34)	yes	yes - if subpoenaed
Physical/mental exam (35) - <ul style="list-style-type: none"> • only available with court order • only gotten of a party's legal control • "legal control" <ul style="list-style-type: none"> - does not include employee of employer - more like parent/child 	yes	???
Request for admission (36)	yes	no

- FRCP 26(g) lawyer certifies discovery information

C. Scope of Discovery

- standard = 26(b)(1)
- can discover anything relevant to claim or defense of any party (new change - narrower than previously (previously = relevant to case))
- "relevant" = reasonably calculated to lead to admissible evidence
 - broader than admissible (may discover info not admissible as evidence)

X. Pre-trial Adjudication

- 41(a) voluntary dismissal
- attempt to weed out cases where we do not need a trial
- trial - only ever for resolving dispute of fact - if no dispute of fact → can enter judgement as matter of law

A. Motion to dismiss under 12(b)(6) (Failure to state a claim)

- occurs early = at pleading stage
- generally called a "demurrer"
- court <> consider evidence
- court = only consider complaint
- **ask one question - if PL proved all of allegations in complaint would she win a judgement?**
 - if no → action dismissed - 12(b)(6) granted (perhaps w/ leave to amend complaint to state COA)

B. Summary judgement (Rule 56)

- court considers evidence
- parties proffer **written** evidence - does not include pleadings (not signed by parties - only by atty)
 - limited exception = verified pleading
- **standard** (56-c) - moving party must show two things
 1. no dispute on a material issue of fact
 2. moving party entitled to judgement as a matter of law
- summary judgement = discretionary
- courts = reluctant re: granting summary judgement
- Supreme court - decided three cases in one day to send message to courts to grant summary judgement more often
 - Matsushita
 - Anderson
 - Celotex
- Rules of thumb
 - rarely granted for party with burden at trial (i.e., rarely granted for PL)
 - rarer in tort than in K
 - never resolve disputes of fact/credibility on summary judgement
- **hypothetical** - PL sues for Def running red light; Def claims had green light; Def presents affidavit from credible witnesses; PL presents affidavit from uncredible source → court must deny summary judgement

XI. Trials & Motions

A. Right to Jury trial

- 7th Amendment = source of right to jury trial in civil case
 - applies only in Federal courts (not incorporated in state courts thru 14th amendment)
 - preserves jury trial at law but not at equity
 - historical test - whether you get a jury depends on whether you would have gotten a jury at common law in 1791 (when 7th amendment adopted - and actually common law in England)
 - law vs equity
 - merged in federal system
 - possible to have mixed case today
 - largely depends on remedy
 - ⊂ law = money = legal remedy
 - ⊂ equity = different remedies
 - ❖ injunction
 - ❖ specific performance on K
 - ❖ if violate remedy → go to jail
 - prior to 1959 - look at most important part of case → no jury b/c equity = most important
 - post 1959 - Beacon Theatres(1959) & Dairy Queen (1962) - 3 rules
 1. determine right to jury issue by issue
 2. if issue underlies both law and equity → get jury
 3. try jury issues first
 - **hypothetical** - neighbor crosses yard; want injunction to stop and damages for injuries
 - ?? - law = jury
 - damages - law = get jury
 - injunction - equity = no jury

B. Selection of Jury

- strikes allowed to each side
 - unlimited strikes for cause
 - three peremptory strikes - didn't have to explain why striking
 - since 1990's - must be used in a race and gender neutral way
 - selection of jury = state action over which civil rights rules apply

C. Motions

1. motion for judgement as a matter of law (50-a) - "directed verdict"
 - allows judge to take case away from the jury
 - **standard** - granted where reasonable people could not disagree on result
 - **timing** - motion can be made only after other side has been heard
 - Def
 - ⊂ at close of PL case
 - ⊂ at close of all evidence

- PL
 - ⊂ at close of all evidence

2. renewed motion for judgement as matter of law (50-b) - "renewed judgement notwithstanding the verdict"
 - **timing** - after case goes to jury(???)
 - jury reaches decision that reasonable people would not reach
 - **waive right to move for renewed judgement as a matter of law if fail to move for judgement as matter of law at close of all evidence**
 - **hypothetical** - Def moves for JMOL at close of PL case; Def <> move for JMOL at close of evidence; jury returns unreasonable verdict; Def cannot raise renewed motion for JMOL

3. Motion for new trial (59-a)
 - **timing** - same as renewed JMOL
 - where judge nervous that something not right in trial
 - less radical/severe than renewed motion for JMOL - because same jury decision may be reached again in new trial
 - **conditional new trial** - know Def liable but jury damages calculation is wrong b/c
 - damages too high - new trial unless PL agrees to Judge's proposal to remit some portion of awards (remiteur?)
 - ⊂ Supreme Court - court cannot simply reduce amount of award → must give PL option - less money OR retrial
 - damages too low - new trial unless Def agrees to Judge's proposal to remit some additional amount to jury award (additeur)
 - ⊂ unconstitutional in federal court under 7th amendment since 1935
 - ⊂ constitutional in state court b/c 7th amendment doesn't apply in state court

4. Motion for more definite statement - only allowed if moving party required to respond

XII. Appeals

A. Final Judgement Rule

- cannot appeal until trial court renders final judgement = wrapping up merits of entire case
 - applies in federal court - want appeals court to consider all at once
 - does not apply in NY state courts - can appeal piecemeal appeals of rulings as they arise
 - **Rule** - after making order → does trial judge have anything left to do on the merits of the case
 - **hypothetical** - after judge denies summary judgement → can't appeal
 - **hypothetical** - judge grants motion for new trial → can't appeal (b/c got new trial)

B. Interlocutory - 4 types

- statutory
 4. § 1292(a) - interlocutory appeals by right (e.g., FL injunction to stop hand count)
 5. § 1292(b) - trial judge and court of appeals both agree that should go to appeals
- FRCP
 6. 23(f) - discretionary w/ court of appeals - regarding class action certification orders

7. 54(b) - if multiple parties → may appeal when one party receives a final judgement

C. Collateral Order Rule

- court of appeals has discretion to take appeal if
 1. involves collateral to merits of case
 2. trial court has completely resolved issue
 3. effectively unreviewable if wait until final judgement
- e.g., Puerto Rico Aqueduct case - Def claims 11th Amendment immunity

XIII. Preclusion Doctrines

- always involves effect of finalized judgement in case1 on case2

A. Res Judicata - "Claim preclusion"

- three elements
 4. both cases brought by **same claimant against same defendant** (same parties in same configuration)
 5. earlier case ended in a **valid final judgement on the merits**
 - "on the merits" - FRCP 41(b) - every judgement =on merits unless based on jurisdiction, venue, indispensable parties
 6. both cases **involve same claim**
 - "claim" (majority) = transaction or occurrence
 - "claim" (minority) = **primary rights theory** - separate claims for each right invaded (e.g., property damage separate from personal injury even if arose in same transaction/occurrence)
 - **hypothetical** - Piazza & Clemens collide -
 - Case 1 = Piazza v. Clemens for personal injury
 - Case 2 = Piazza v. Clemens for property damage
 - Test - apply general res judicata tests
 - ⊂ 1 - yes - same claimant against same Def
 - ⊂ 2 - yes valid judgement
 - ⊂ 3 - split authority - depends on whether majority or minority viewed applied in jurisdiction
 - **hypothetical** - Piazza & Clemens collide -
 - Case 1 = Piazza v. Clemens for personal injury
 - Case 2 = Clemens v. Piazza
 - Test
 - ⊂ 1 - no - not same parties
 - still dismissed b/c was Clemens' claim = compulsory counterclaim

B. Collateral Estoppel - "Issue Preclusion"

- focusing on something narrower than res judicata
- involves - issue litigated in case 1 and deemed established in case 2
- required steps (5)
 1. earlier case ended in **valid final judgement on merits** (see above)

2. must show same issue was actually **litigated** and determined in case 1
 - e.g., default judgement = never results in Collateral Estoppel b/c nothing litigated
3. case 2 **issue was essential to judgement in case 1**
4. against whom may be used ? - may only used against someone who was party in case 1 (required by due process) - applies in all jurisdictions
 - "in privity w/" for case 1 may qualify as being a party in case 1
5. by whom may be used? -
 - **mutuality rule** (traditional rule)- may be used only by a party in case 1
 - **non-mutual collateral estoppel** (majority view today) - party using collateral estoppel was not a party in case 1 - may be used in 2 ways
 - **non-mutual defensive** - raised by Def not involved in case 1
 - allowed if party against whom sought had opportunity to litigate in case 1
 - ⊂ **Hypothetical** - Barney driving Aunt B's car in accident w/ Andy; Aunt B vicariously liable; Case 1 (Andy v. barney) → Andy is negligent/Barney wins; Case 2 (Andy v. Aunt B) → Test
 - ❖ 1 - Yes
 - ❖ 2 - yes
 - ❖ 3 - yes
 - ❖ 4 - yes
 - ❖ 5 - no - but majority allows so long as Andy had opportunity to litigate
 - **non-mutual offensive** - majority says no
 - ⊂ minority trend - Park Lane Hosiery - OK as long as fair - factors =
 - ❖ party against whom estoppel sought had full chance to litigate in case 1
 - ❖ party against whom estoppel sought could reasonably foresee collateral action
 - ❖ non-mutual party could not have joined easily in case 1
 - ❖ no inconsistent judgements against party against whom estoppel sought
 - ⊂ **Hypothetical** - Barney driving Aunt B's car in accident w/ Andy; Aunt B vicariously liable; Case 1 (Andy v. barney) → Andy is negligent/Barney wins; Case 2 (Aunt B v. Andy) → Test
 - ❖ 1 - Yes
 - ❖ 2 - yes
 - ❖ 3 - yes
 - ❖ 4 - yes
 - ❖ 5 - no - majority view rejects non-mutual offensive