

Subject Matter Jurisdiction

1. The Concept of Subject Matter Jurisdiction

- a. **Source and Limits of Federal Subject Matter Jurisdiction**
 - i. SMJ deals with institutional rather than individual concerns
 - ii. These rules govern which of two or more courts in same geographic location have the authority to hear the dispute
 - iii. The determination of jurisdiction is as follows
 1. Limited SMJ – Federal Courts
 - a. Federal Question & Diversity
 2. General SMJ – States
 - a. Everything Else
- b. **2 Questions to Ask When Determining Where to File**
 - i. Is this case one which constitutionally may be granted to the federal courts?
 - ii. If the case does fall into one of the categories in Article 3, §2, has Congress actually conveyed jurisdiction over this type of case in a federal statute?
 - iii. A federal court may acquire Federal SMJ either through
 1. Federal Question
 2. Diversity
- c. **Governing Law (US Const. Art 3 § 2 cl. 1, 28 USC § 1331)**
 - i. Art 3 § 2 cl. 1 (Three most important categories covered)
 1. All cases arising under the Constitution, laws of the United States, Treaties
 2. Controversies between citizens of different States
 3. Controversies between a State or the citizens thereof, and foreign States, Citizens, or subjects
 - ii. 28 U.S.C. § 1331 – Federal Question
 1. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the US.

2. Federal Question Jurisdiction

- a. **How to Invoke Federal Question Jurisdiction (Well Pledged Complaint Rule)**
 - i. **The Well-Pledged Complaint Rule** (analysis turns on what plaintiff's alleges in the complaint)
 1. The case must turn on an issue of federal law
 2. The issue of Federal Law must appear in the plaintiff's well-pleaded complaint
 3. The rule allows courts at the outset whether it has jurisdiction, based on the claims, without having to wait for and answer from the defense
 - ii. § 1331 only applies if the plaintiff's claim requires proof of federal law
 1. **THE STATUTE DOES NOT GRANT JURISDICTION ON THE FEDERAL DISTRICT COURTS OVER CASE THAT INVOLVE FEDERAL LAW UNLES THE FEDERAL ISSUE IS NECESSARY TO THE PROOF OF THE PLAINTIFF'S CLAIM**
 - iii. The Federal Ingredient

1. The federal aspect of the case must come from the complaint of the plaintiff, it cannot be based upon an anticipated federal defense.
- iv. Holmes Test (Is not as encompassing as Well-Pleaded Complaint Rule)
 1. There is jurisdiction under § 1331 if the source of the plaintiff's enforceable legal right against the defendant is federal law
- v. Louisville v Nashville RR
- b. What types of Claims Present a Federal Question**
 - i. US Constitution
 1. Constitution does not explicitly give people the right to sue in court, but court have held that people may allow federal courts to hear claims asserting rights provided by the Constitution
 - ii. Treaties
 1. Main issue to consider when treaties are involved is whether the treaty itself creates a legally enforceable claim
 - iii. International Law
 1. International law is treated as federal law for purposes of federal question jurisdiction, thus a claim arising under international law qualifies as a federal question under § 1331
 - iv. Federal Common Law
 1. Federal judge made procedural rules
 - v. Problematic Federal Statutes
 1. Some situations where a case does not present a federal question even though it clearly arises under a federal statute
 2. Claims arising under federal statutes for Washington DC are not considered federal questions
 - vi. State Law
 1. There are situations were a case that turns exclusively on state law may involve a federal question
 - a. Ie. Congress will borrow state law as Federal, the borrowed rules become Federal, and are subject to jurisdiction of the Federal Courts.
 2. "A state-law" claim may be a federal question because it has been completely preempted by federal law
 3. "A state-law claim will be treated as a federal question because it involves a federal element"
 4. Smith v. Kansas City
 5. Grable v Darue
- c. Examples and Illustrations (PG 77-88 in E & E)**

3. Diversity Jurisdiction

- a. Governing Law § 1332**
 - i. District Courts have original jurisdiction over all civil actions exceeding \$75,000, separate from interest/costs and includes disputes:
 1. Citizens of different states
 2. Citizens of US and foreign citizens
 3. Citizens of different states and in which citizens of different states are additional parties

- ii. An alien admitted to the US for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.
 - iii. Unless a statute provides otherwise, when a case falls below the \$75,000 mark after the case has been heard in Federal Court (they lied about amount in controversy), the court may deny costs to the plaintiff, and impose additional costs to the plaintiff
 - iv. For purposes of this section
 - 1. Corporations are citizens of:
 - a. State of incorporation
 - b. State of principle place of business (nerve center)
 - c. Insurance companies are citizens of states where the claimant is
 - 2. Legal representatives of estates are citizens of same state as deceased
 - a. Same theory applies for guardians of infants or invalids
 - 3. In class action suits the plaintiffs may aggregate to attain the \$75,000 minimum
 - v. Removal to federal court is a one-way street
 - vi. Limitations period on claims in mass action removed to federal court run while the action is pending in federal court
- b. Policy Underlying Diversity Jurisdiction**
- i. Diversity is the 2nd main branch of SMJ
 - ii. Diversity is not concerned with the legal source of the plaintiff's claim, it instead looks to the citizenship of the parties
 - iii. It exists for the historical reason of "home-court" bias
 - 1. This is largely a non-factor anymore
 - iv. Diversity is also distinguished from 'Federal Question' by its amount in controversy
- c. Determining Diversity**
- i. Steps to Determine Diversity
 - 1. Must ensure the litigants are of diverse citizenship
 - 2. You must determine that the amount in controversy exceeds \$75,000
 - 3. Determining Domicile for People
 - a. Must be a place where he has taken up residence with the intent to reside indefinitely
 - i. Residence is not the equivalent to domicile
 - b. Major problem in determining state of mind to stay
 - i. Not necessary to make an irrevocable commitment to stay permanently
 - ii. It means stay is open ended, that he has no intent to leave to live somewhere else
 - iii. Subjective intent to stay indefinitely is necessary but not sufficient
 - 1. Must coincide with physical presence within the new domicile

2. Circumstantial evidence such as tax payment, voting, property, and social activities may be weighed
4. Determining Domicile for Corporations
 - a. Corporations are citizens of the state of their incorporation and principle place of business
 - b. Principle Place of Business Tests
 - i. Muscle/Place of Ops/Bulk of Activity Test
 1. The majority of manufacturing, productive activities take place
 - ii. Nerve Center
 1. Where the corporate offices and executive structure are located
 - iii. Total Activity Test
 1. Considers both the Nerve Center and Muscle Test
 - a. Makes sense but does not take into account for instances where HQ are in one state, but most operations are in another
- ii. *Linguist v. Precision Valley*
- iii. *Hertz v Friend*
- d. **Amount in Controversy**
 - i. What amounts are considered?
 1. Claims for both compensatory and punitive damages are counted in the total
 2. Other payments that one side may be required to make to the other following the case may not count
 3. § 1332 – Exclusive of interest and costs
 - a. Means the various expenses charged by the judicial system
 - b. Not all interest is excluded from the equation
 - i. The purpose of excluding interest is to prevent the delaying of a suit merely to accumulate the necessary amount for federal jurisdiction
 1. Thus the interest is not counted if it was an incident arising solely by virtue of a delay in payment
 - ii. **Claims for relief other than money**
 1. Courts will try to approximate the monetary value
 - iii. **Evidence the court considers concerning the amount**
 1. Court usually looks solely to the face of the complaint
 - a. Even if P's demand seems high, court will accept it unless it appears to a legal certainty that the P cannot recover that amount
 - iv. **The party need only show that the amount in controversy is satisfied on the date the case is filed**

v. **Aggregation**

1. Plaintiff may aggregate all claims against a single defendant to meet the \$75,000
2. Single plaintiff cannot aggregate amounts sought from different defendants. He must meet the amount requirement against each individually
3. Plaintiffs may not add their claims together to meet the amount requirement where individually they do not meet the \$75,000
 - a. 2 Ps that have 50K each in claim cannot aggregate to meet the \$75K, at least 1 of them must meet the \$75,001 floor
4. Two or more plaintiffs may not ordinarily aggregate their claims
 - a. 2 Exceptions
 - i. P may join with another by virtue of Supplemental Jurisdiction
 - ii. If 2 or more plaintiffs hold a joint and undivided interest in property that has value in excess of \$75,000 and the claim involves that property
5. A P may aggregate claims against multiple D's only if the total injury exceeds \$75,000, and under governing law D's can be held jointly liable for entire injury
6. Although courts generally only consider the complaint in this regard; several courts have held that the requirement may also be met if D asserts a compulsory counter claim that when added to the P's exceeds \$75,000
7. As long as 1 plaintiff makes the \$75,000 mark others may join even though they are seeking less
 - a. However, when a plaintiff seeks more than \$75,000 from one defendant and less from another, the amount requirement is not met against the second defendant

e. **Additional Issues in Diversity Jurisdiction**

- i. Alienage Jurisdiction
 1. § 1332 does not apply only to US Citizens
 2. When a US citizen is domiciled abroad she may not avail herself to diversity jurisdiction
 - a. She has no domicile in any state in the US
 3. As far as dual citizenship is concerned only the American Citizenship is taken into account
- ii. Time for Determining Diversity
 1. The jurisdiction of the court depends upon the state of things at the time of which the action was brought
- iii. Manipulating § 1332
 1. A federal court may avail itself of several different tools to deal with attempts to evade the requirements of § 1332
 2. Nominal Parties

- a. The easiest way for a party to prevent a federal court from exercising diversity jurisdiction is to make sure that at least one of the P's is from the same state as one of the D's
 - i. However, if the additional party is merely nominal with no real claim or liability, the court may ignore that party in the diversity calculation
 - 3. Realignment of Parties
 - a. Where a party is wrongly joined, a court has considerable power to realign the parties, putting them into their proper role
 - 4. Collusive Joinder
 - a. § 1359
 - i. A federal court cannot exercise diversity jurisdiction over a case in which any party, by assignment or otherwise, has been improperly or collusively joined to invoke the jurisdiction of such court
 - 5. Legal Representatives
 - a. A party could create or destroy diversity by simply appointing legal representative who is from a different state than the represented party (§ 1332 curtails this back door way)
 - i. Under that § the legal representative of an infant, incompetent, and estate of decedent is treated as having the same citizenship of the person they rep.
 - 6. Insurance
 - a. If a P brings direct action against an insurance company, the insurance company will be a citizen of its incorporation, principle place of business, and the state of the P.
- iv. States
 - 1. The states subject to § 1332 include the territories, D.C., P.R.
- v. Exceptions to Diversity Jurisdiction
 - 1. Federal Courts sitting in diversity may hear any claim regardless of the dispute
 - a. There are exceptions to this rule
 - i. Domestic relations and probate cases (wills and estates)
 - 1. Although a Fed. Court may not adjudicate a divorce, it may hear a breach of contract or a tort suit between spouses connected to a divorce proceeding
 - ii. Abstention
 - 1. Situations where the federal courts must abstain from exercising jurisdiction (Where underlying state law is unclear and where there are important state interests at stake)
- vi. Other Diversity Statutes
 - 1. § 1335 - Interpleader Actions
 - 2. § 1348 – Actions involving national banks; bank deemed a citizen of a state where it is located

3. § 1354 – Actions between citizens of the same state involving grants to the same land from more than one state

f. **Examples and Illustrations (PG 99-109 in E & E)**

4. Supplemental Jurisdiction

a. **Governing Law** § 1331 (above), § 1332 (above), § 1367 (below)

- i. In any civil action where the district court have original jurisdiction they also have claim over subject matter jurisdiction over related claims that share the same case or controversy under Article 3
 1. These claims include joinder or intervention of additional parties
- ii. In any civil action where district court has original jurisdiction founded on §1332 alone the district courts do not have supplemental jurisdiction over claims by plaintiffs against person's made parties under Rules 14,19, 20, 24, or over claims by persons proposed to be joined as plaintiffs under Rule 19
- iii. The district court may decline to exercise Supplemental Jurisdiction over a claim if:
 1. Claim raises a novel or complex issue of State law- Abstention
 2. Claim predominates over a claim or claims which the district court has original jurisdiction – Just how serious is Fed. Jurisdiction
 3. District court has dismissed all claims over which it has original jurisdiction- Federal question has dried up and blown away, so there is a take it or leave state question
 4. Other compelling reasons for declining – Discretion

b. **Theoretical Bases for Supplemental Jurisdiction**

- i. Supplemental Jurisdiction supplements federal question an diversity jurisdiction
 1. In order for it to be applicable there must be at least one claim by one plaintiff that independently qualifies for federal question or diversity jurisdiction
- ii. Pendent Jurisdiction
 1. Where a plaintiff asserted a jurisdictionally proper claim against a non-diverse party and added on a related state law claim
 - a. United Mine Workers v. Gibbs
- iii. Ancillary Jurisdiction
 1. Where claims which were related were asserted by defendants or other additional parties after the initial complaint

c. **The Supplemental Jurisdiction Statute**

- i. If such a claim exists the court may be able to use supplemental jurisdiction to hear other claims that do not by themselves qualify for federal SMJ.
- ii. Supplemental jurisdiction will never be the sole basis for jurisdiction, it must always be used in conjunction with the other types
- iii. The main goal for enacting § 1367 was to unify and simplify the court's jurisdiction over pendent and ancillary claims
- iv. The 3 Part Test
 1. **(Court must determine whether there is a constitutional power under Article III, §2 to hear the supplemental claim.)** The court

asks whether the claim in question, and another claim in the case that the federal court can hear, form part of the same case or controversy under Article III

2. **(The court must determine whether there is a statutory grant of jurisdiction over the related claim)** The court asks whether the case falls into one of the exceptions listed in § 1367

a. (b) – The drafters tried catalog various joinder possibilities under the Rules that would allow the plaintiff to circumvent the limits of the Strawbridge Rule, and specified that supplemental jurisdiction would not extend to joinder in those circumstances if it allows an end run around to those limits

i. An issue of power, and only applies to multi-party cases

b. (c) Authorizes the court to decline jurisdiction over supplemental claims for any four reasons, similar to but not quite the same as those in Gibbs.

i. If the court determines that the state law claim is the heart and soul of the case the federal court may refuse to hear the state-law claim

3. **(Once the court determines that it has constitutional and statutory authority to hear the related claims, it must decide, based on the various discretionary factors in that section, whether to do so.)**

v. If the plaintiff brings a proper federal claim or diversity claim, so that the federal court has original jurisdiction, the court may hear all the claims that are part of the same case or controversy under Article III

1. **Common Nucleus**

a. § 1367 allows a court to hear all claims that arise out of the same nucleus of operative facts as the proper federal claim

i. This includes additional claims asserted by the plaintiff, but also those asserted by other parties as well, such as cross-claims and counterclaims

d. **Supplemental Jurisdiction and Joinder of Parties**

i. § 1367 also makes it possible to join additional parties to the case even in the absence of a federal claim against those parties, or allow defendants, third-party defendants and others to file their own non-federal claims as part of the action

ii. § 1367(b) uses a 3-step analysis to determine if a claim is barred

1. Precludes supplemental jurisdiction only if the sole basis for federal jurisdiction over the original claim is diversity jurisdiction

a. If the claim is a federal question § 1367(b) does not apply

2. The claim must be a claim by a plaintiff

3. The claim must be brought against a party joined under the listed rules

iii. § 1367 does not allow plaintiff to bring claims against a non-diverse defendant

iv. Joinder Rules

1. If a joinder rule conditions joinder on satisfying the same transaction or occurrence test, the claims in question will ordinarily satisfy § 1367(a)

- a. Exception is Exxon v Allapattah, where jurisdiction is based solely on diversity but complete diversity is lacking
- 2. § 1367(a) will be satisfied for all of the following claims
 - a. Joinder under Rule 20, when jurisdiction is based on Federal Question or there is complete diversity
 - b. Compulsory counterclaims
 - c. Cross-claims that arise from the same transaction or occurrence as Plaintiff's claim
 - d. Parties joined to counter claims or cross claims under Rule 13(h)
 - e. Claims by a 3rd party D against P and by P against 3rd party D under Rule 14(a)
- 3. 3 caveats in mind
 - a. First, do not assume all courts equate 'same transaction and occurrence' with the § 1367 'common nucleus' test
 - b. Second, do not assume that supplemental jurisdiction is the only way for a court to obtain jurisdiction over a joined claim
 - c. Third, it is essential to analyze whether the case satisfies §§ 1367(b) and (c)

v. Exxon Mobil v Allapattah

e. **Examples and Illustrations (E & E PG 318-331)**

5. Removal

- a. **General Rules Governing Removal** (28 USC § 1441, § 1442, §1442a, § 1443, § 1445, § 1446, § 1447, § 1453)
 - i. § 1441 – Removal (The Threshold Test)
 - 1. Defendant only may remove when:
 - a. Except when Congress specifically says otherwise action brought in State courts may be removed by the defendant to the federal courts
 - i. Removal turns on whether court be brought in Federal court in the first place
 - ii. If it could be brought in Federal Court it can be removed by D
 - iii. **Provides the possibility that Congress may enact exceptions to its general rule**
 - b. Any action that arises from a federal question is removable, regardless of diversity of citizenship. Any other action is removable only if neither of the parties are from the state where action is brought
 - i. **Prevents removal of a case based on diversity if any of the defendants is a citizen of the state where the state court action is pending**
 - ii. **One year bar applies**
 - c. When action brought under a federal question is joined with a non-removable claim, the whole case may be removed to federal court

- i. Or it can remand all state matters
 - ii. Defendant may remove separate or independent claims as long as one claim comes from Federal law
 - iii. **This §§ gives the court the discretion to remand the state-law claims**
 - d. An action brought in state court against a foreign state can be removed by the foreign state and the time limitations ay be expanded
 - e. Despite (#2 above) Defendant may remove if:
 - i. Action could have been brought in US District Court under § 1369 or
 - f. The court to which the action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim
 - i. **Allows removal regardless of whether the state court has jurisdiction**
- ii. § 1442 Federal Officers or Agencies & Removal (Diversity/Fed? Don't matter)
 - 1. Civil action may be removed where action is pending based on:
 - a. US or any official acting on is behalf is sued in an official capacity
 - b. Property hold whose title comes from officer where action affects the law
 - c. Any officer for performance of duties
 - d. Any member of Congress for their official actions
 - 2. Any action brought by an alien is brought against a member of the armed forces on official actions or under actions of war
- iii. § 1442A – Special Removal for Military Officers
 - 1. Action may be removed when brought against member of armed forces exercising official actions or actions of war
- iv. § 1443 – Special Removal for Civil Rights
 - 1. Any action arising under civil rights may be removed regarding:
 - a. A right denied providing for civil equality
 - b. An act that comes from a law providing for equal rights, or refusing to act on grounds that action would be inconsistent with the law
- v. § 1445 – Non Removable Actions
 - 1. Any civil action brought in a State Court against a railroad, its receivers, or trustees, under § 1-4 5-10
 - 2. Action against a carrier, it receivers, its trustees for delay, loss or injury of shipments unless matter exceeds \$10,000
 - 3. A civil action in a State Court arising under the Workman's Compensation laws
- vi. § 1446 – Procedure for Removal in General

1. Defendant desiring to remove shall file in district court for the division within such action is pending pursuant to Rule 11. It should also contain short and plain statement detailing the grounds for removal with a copy of all process, pleadings, and orders served upon defendant.
 2. Notice of removal shall be filed within 30 days after defendant receives a copy of the initial pleading which claim is based on, or within 30 days after defendant has been served, whichever period is shorter
 - a. **Most important limit of time (D has 30 days following service to remove a case.**
 - i. **This 30 days only begins to run when the D receives a pleading that indicates that a case may be removed**
 - ii. **If a non-diverse P drops out of the case, and an amended complaint is served that does not name the dropped P, D's 30 days period begins to run with service of the amended complaint**
 - b. **No action may be removed based on diversity after one year following filing of the original complaint**
 - i. **Therefore a plaintiff in a diversity case may defeat removal by joining both a diverse and a non-diverse defendant**
 - c. If case is not removable, notice of removal may be filed within 30 days after defendant gets it through service, copy of amended pleading, motion, or order or something that shows case has become removable.
 - i. Except a case can't be removed on the basis of Diversity/Amount in Controversy jurisdiction more than 1 year after action starts
 - ii. District Court where notice is filed shall examine the notice promptly. If it is on the face of the notice and exhibits that removal should not be permitted, court shall order summary remand
 - iii. After filing notice of removal defendant shall give notice to all adverse parties and shall send notice to clerk, and that is when removal is effected, and State Court goes no further unless until case is remanded
- vii. § 1447 – Procedure After Removal Generally
1. A court may
 - a. Issue all orders and process to bring parties whether they were served or otherwise before the court
 - b. Require removing party to file with clerk copies of records, proceedings, or may cause same through writ of cert.
 - c. Motion to remand on basis of defect other than subject matter jurisdiction must be made within 30 days after filing under 1446(a).

- i. If at any time before final judgment appears DC lacks SJ case shall be remanded
- ii. Order remanding may require payment of all fees encountered as a result of removal
- d. Order remanding case to the State Court is not reviewable on appeal
 - i. Except if the case is sent back to the court it was removed from
- e. If after the case is removed the plaintiff wants to enjoin other defendants who would wreck the Subject Matter Jurisdiction, the court may deny joinder or admit it and remand back to the state court

viii. Caterpillar v Williams

b. Removal in General

- i. Only a defendant may remove a case after the plaintiff has chosen a state court
- ii. The rationale for removal is that the defendants as well as the plaintiffs should have the option to choose federal court for cases within the federal jurisdiction, primarily to strategically avoid prejudice
- iii. § 1441(a) only authorizes removal of state court actions of which the district courts of the United States have original jurisdiction
 - 1. If the P could not have brought the case in that federal court it was removed to, it cannot be removed by the defendant
- iv. Some cases are not removable even though the P could have brought them in that federal court anyway
 - 1. A diversity case is only removable if ‘none of the parties in interest properly joined and served as Ds is a citizen of the State in which such action is brought’
- v. § 1441(f) provides that the federal court is not precluded from hearing the case simply because the state court lacked jurisdiction over it
 - 1. This does not change the requirement that the case be within federal jurisdiction to be removable
- vi. There are limits to which court a case may be removed to
 - 1. The only one court that can host a removed action
 - a. The federal district court for the district and division embracing the place where such action is pending [in the state court]
- vii. General removal applies to cases, not claims
 - 1. When a case is removed all related claims that the federal court has the power to hear under supplemental jurisdiction come with it
- viii. Removal is a one-way street

c. Removal in Diversity Cases

- i. A D who claims the right to remove on the ground of diversity may have to ascertain the citizenship of the P and allege in his notice of removal that diversity already exists
- ii. When a P files diversity case originally in a federal court, all that matters is that the parties are diverse on the date the case was filed
 - 1. Post filing acts do not affect jurisdiction

- iii. In removal cases, by contrast, diversity must be present both on the date the case filed and the date on which removal occurs
 - 1. The only exception is a voluntary act by the plaintiff that creates diversity
- iv. Many states do not allow a P to state a specific amount of damages in the complaint, instead many courts will determine the actual damages based on evidence
 - 1. The purpose of this rule is to prevent unlawful jury persuasion
 - 2. So many courts presume the amount in controversy requirement is satisfied unless the P demonstrates that he cannot recover more than \$75,000

d. Procedure for Removal

- i. D files a notice of removal in the appropriate federal district court with all pleadings, process, and other papers in the action
 - 1. This notice must be filed within 30 days of receiving the plaintiff's pleading in the state suit
 - 2. Once the notice is filed the state court is notified, and that court loses control of the case automatically (stops dead in its tracks)
 - 3. Removal is not irrevocable
 - a. If P contends there is not proper SMJ for the Federal court
 - i. May be made at any time prior to final judgment
 - b. D has not properly followed the requirements of removal procedure (ie. failure of all Ds to join in notice)
 - 4. Any remand must be made within 30 days after removal, or the objection is waived
- ii. § 1441 provides that an action may be removed by the defendant or defendants
 - 1. Court have held that in a case involving multiple defendants, all defendants must join in the removal
 - a. However you do not need the consent of everyone named as a defendant in the complaint
- iii. Although removal gives the D the option of moving the case to federal court, it does not give the D any choice as to which federal court will hear the case
 - 1. § 1441 is clear that the case is removed to the 'district and division embracing the place where the state action is pending.

6. Challenging Subject Matter Jurisdiction

a. Governing Rule

- i. Rule 12(h) – Waiving and Preserving Certain Defenses
 - 1. When Some are Waived
 - a. A party waives any defense of
 - i. Lack of personal jurisdiction
 - ii. Improper venue
 - iii. Insufficient process
 - iv. Insufficient service of process

- b. By:
 - i. Omitting it from the motion in the circumstances described in Rule 12(g)(2) or
 - ii. Failing to either
 - 1. Make it by motion under this rule; or
 - 2. Include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course
- 2. When to Raise Others
 - a. Failure to state a claim upon which relief may be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:
 - i. In any pleading allowed or order under Rule 7(a)
 - ii. By motion under Rule 12©
 - iii. At trial
- 3. Lack of Subject Matter Jurisdiction
 - a. If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action
- b. Challenging in General by the Plaintiff to SMJ**
 - i. P may challenge SMJ even in cases where he has chosen federal court
 - ii. The P may challenge SMJ at any time
 - 1. Rule 12(h)(3) allows the issue of lack of SMJ to be raised at any time and by either of the parties or the court itself
 - iii. Diversity jurisdiction exists not to ensure the supremacy of federal law, but because the framers feared state court bias
 - iv. A challenge made while the case in question is still pending is a direct attack
 - v. A situation where a person challenges a prior case in a separate and distinct case is referred to as a collateral attack
- c. North Central v. Brown

7. Special Issues in Federal Court – ERIE Doctrine

- a. Governing Rules (28 USC § 1331 and 1441)
- b. Advanced Issues in Federal Question Jurisdiction**
 - i. Grable v Darue
 - ii. Beneficial v Anderson
- c. The Erie Doctrine – When it Easily Applies**
 - i. Genesis of the Doctrine**
 - 1. Rules of Decision Act**
 - a. The laws of the states, except where the constitution, treaties, or statutes of the US shall otherwise require or provide, shall be regarded as rules of decisions in trial at common law in the courts of the US in cases where they apply
 - 2. Swift v Tyson**
 - a. J. Story believed that the law of the several states in the Rules of Decisions Act (RDA) referred only to the statutes and certain established local usages of the state, not to judicial decisions interpreting general principles of common law

- b. Effectually it is up to the judges in Federal Courts to interpret law as they see fit from law from other states, federal courts, English Courts, and views of respected commentators, disregarding at times, the state common law. Federal Judges under this holding had power to create state common law.

3. Erie v. Tompkins

- a. This decision overruled Swift v. Tyson (Why Swift was wrong)
 - i. Swift failed to achieve its goal of gradual accumulation of general common law that would induce state judges to recognize the 'rightness' of those decisions and fall into line
 - 1. What actually happened after Swift was the formulation of a multiplicity of rules on recurrent issues from different state courts and federal and state courts within a state
 - ii. The federal practice of making common law had led to a grave discrimination in the administration of justice – (Out of Stater was favored)
 - iii. It unconstitutionally allowed Federal judges to make law in areas in which the federal gov't had no delegated powers
 - 1. Invaded the reserved rights of the States in the 10th Amendments

d. The Erie Doctrine

- i. In Diversity cases the Federal courts must apply the substantive law that would be applied by the courts of the state in which they sit
 - 1. They are not free to decide for themselves the right rule of consideration for instance, their job is to simply apply substantive state law
- ii. The toughest part about Erie is determining which issues are governed by Erie
 - 1. Guaranty Trust v. York
 - a. Issue was whether a federal diversity court must apply the state statute of limitations to a claim or whether it was free to apply its own more flexible doctrine to the case
 - i. The court held that the state limitations statute must be applied as per the:
 - ii. **Outcome Determinate Test**
 - 1. If following a federal practice that differed from state procedure might 'significantly affect the result of litigation, the court must apply the state rule instead, to prevent diverse parties from gaining an unfair advantage just because they picked a Federal Court
 - b. There was constitutional authority to create federal procedural rules, even for diversity cases

- c. The Outcome Determinant Test required federal courts to apply state law, as a matter of policy, not constitutional compulsion, where using a federal rule could lead to a different outcome
 - d. The main thing to take from Guaranty v. York is the precedent, “follow state law, even where there can be a federal law, if it will further the policy of uniform outcomes in state and federal court in diversity cases
2. Byrd v. Blue Ridge Rural
- a. This case was a bit of a step back in the development of the Erie Doctrine
 - i. It reaffirmed that under York, Federal courts should apply Outcome-Determinative state law even on procedural issues as to which there is a federal constitutional authority to make its own rule
 - ii. Also that a federal court must consider not only the York policy of uniform outcomes in diversity cases, but also any countervailing federal policies that arise from the federal court’s status as an independent judicial system
 - iii. Ultimately that Erie policy of maximizing uniformity of outcome should yield to the federal policy of broad availability of jury trial
3. Hanna v. Plummer
- a. The issue was whether the service of process rule should be the state or federal rule. The outcome would be different depending on which rule was applied in the federal court
 - b. The court analyzed the issue through the lens of a:
 - c. **Modified Outcome Determinate Test**
 - i. Whether a federal procedure is outcome determinative must be views in light of the policies underlying Erie to prevent forum shopping and inequitable administration of laws
 - d. The court concluded that the outcome determinate test, viewed in the light of the aims of the Erie Doctrine, did not require the federal court to substitute the state rule for its own
 - e. Hanna upheld the constitutional authority for the courts to create a body of Federal Common ‘arguable’ Procedural Law
 - i. A rule though procedural under the first subsection of REA is invalid under the second if it impinges on substantive rights
- iii. **Applying Erie When the Shit Hits the Fan**
- 1. **Four Types of Federal Provisions that Make the Shit Hit the Fan**
 - a. Conflicts Between a Federal Constitutional Provision and State Law
 - i. If the Constitution mandates a practice different from state law the constitutional requirement prevails

- b. Conflicts Between a Federal Statute and State Law
 - i. Federal law is the supreme law of the land
 - ii. If arguably procedural test is met, the statute must be applied if it conflicts with state practice because Congress has the authority to enact the statute, and valid federal statutes are Supreme Biotch
 - iii. Stewart Organization v. Ricoh Corp.
- c. Conflicts Between a Federal Rule and State Law
 - i. The Federal Rule applies if valid unless it abridges, enlarges, or modifies a substantive right
- d. Conflicts Between a Federal Judicial Practice and State Law
 - i. Such federal judicial practices are invalid if they purport to establish rules of primary behavior which there is no federal constitutional power to make

2. **Hard Questions of Erie**

- a. When is there a direct conflict between a federal statute or Rule and State law?
 - i. Use Hanna analysis
- b. When does a Federal Rule, which is constitutional and procedural violate the second §§ because it abridges, enlarges, or modifies substantive rights?
 - i. Seldom, The federal rule will have to have a substantial impact on a state policy unrelated to litigation to be declared invalid under the second paragraph of the REA
- c. What differences are sufficient to lead to inequitable administration of the laws?
 - i. Probably such inequitable administration will be found where using the federal approach instead of the state rule would open up a significant difference in litigation opportunity

3. **Choice of Laws Problem**

- a. Courts for various reasons have not opted to apply their own substantive law in all cases
 - i. This approach would encourage forum shopping
 - ii. Where the case has little connection to the forum state but strong connections to another, many state would choose to apply the substantive law of the law of the other state
- b. Courts therefore develop choice of law rules for deciding when they will choose the law of another state instead
- c. Different approaches exist in determining which law to choose
- d. Erie comes into play when a plaintiff chooses the state court, and at the same time the respective federal courts
 - i. Under Klaxon, the federal court must do whatever the state court within the state would do

1. If there is a choice of laws rule that would be applicable the federal courts may use it, and apply different state law
- ii. The federal courts act as state courts and are free to use their choice of laws rules, more or less circumventing Erie, a little

4. Examples and Illustrations (PG 215-229, 235-250 in E & E)

Chapter 4- personal jurisdiction and venue

Exercising jurisdiction over defendants

1. By filing a lawsuit, YOUR client has consented to the power of the court to issue binding orders and judgments. But, usually, the defendant has not consented to being sued in a particular state. The goal is to file the lawsuit in a court that can exercise power over the defendant.
2. All civil litigation broke into types:
 - a. In personam: court must have jurisdiction over the person. A court has authority to enter a judgment against a defendant that is personally binding and which can be taken to other parts of the same state, or to another state to be enforced. [If in courts in equity, then it is in personam.]
 - b. In rem: the object of litigation is to define the interests in whatever the thing is. In order for court to exercise jurisdiction over the thing, the thing must be within the confines of the state. A court has the power to determine the rights of the parties in specific property within the state's boundary
 - c. Quasi in rem: if the defendant is OUT of the state, but owns property IN the state, can sue based on the property, BUT can ONLY recover damages up to the value of the property. Enables a court to exercise power of a defendant's property by attachment, and use it to satisfy a plaintiff's personal claim against the defendant.
3. The courts ability to adjudicate cannot exceed it's jurisdiction
 - a. EX: jurisdiction cannot exceed 'the thing,' so if all you have is a book, you cannot get more than what the book it worth.
4. When a court had personal jurisdiction over a defendant, its judgment in the case is valid and is enforceable locally, OR in another state by virtue of the full faith and credit clause of the constitution.
 - a. Conversely, a judgment made from a court lacking personal jurisdiction is invalid and cannot be enforced in the place where the issuing court sits, another part of the same state, or another state.
5. The defendant must bring the issue that the court has no right to authority over him because there is no jurisdiction unless he is physically in the state.
 - a. It must be the very first thing a defendant does—unlike subject matter jurisdiction, it CANNOT be raised at any time.

Jurisdiction over defendants: the early decisions

1. Pennoyer v. Neff
 - a. The personal judgment recovered in the State court of Oregon against the plaintiff, then a non-resident of the state, was without an validity, and did not authorize a sale of the property in controversy
 - i. In personam: the assertion of this jurisdiction did not succeed because judgments in personam without personal service of process will not be upheld in state court
 - b. Pennoyer protected a non-resident defendant from being sued in a state where he could not be served and owned no property.

2. After Pennoyer, state could exercise personal jurisdiction over any defendant served while present in the state where a claim was filed. [Defendant must be in the geographical confines]
 - a. Grace v. MacArther: defendant was served on a airplane while flying over the state. The court upheld jurisdiction because it had occurred when the defendant was within the territorial limits of the forum state.
3. International shoe v. Washington
 - a. Issue: whether within the limitations of the due process clause of the 14th amendment, appellant, a Delaware Corp., has by its activities in the state of Washington rendered itself amenable to proceeding in the courts of that state... where the state has the power to tax defendant
 - b. Due process requires only that in order to subject a D to a judgment in personam, if he not be present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the sui does not offend traditional notions of fair play and substantial justice.
 - i. Must have minimum contacts with the FORUM state and the suit in question AROSE out of conduct with the state. That's enough for limited personal jurisdiction.
 - ii. D came in with salesmen and did business in the state. This is sufficient contact with the forum state and the suit arose out of these contacts with the forum
 - c. Could have gotten general jurisdiction with "systematic and continuous" contacts with the forum state—if have systematic and continuous contacts within the forum, then the suit does NOT have to arise out of these contacts
 - d. What is a contact?
 - i. Some states have a laundry list statute
 - ii. Some states have statutes say "we have as much jurisdiction as the constitution allows us.
 - e. To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of these benefits may give rise to obligations, and so far as those obligations are connected with the activities within the state, a procedure which require the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

Jurisdiction over nonresident defendants

1. As interstate travel expanded and as corporations from other states increased, legislators decided that it was important to exercise state authority over the nonresident person or entity causing harm to their citizens.
2. Fifty years after Pennoyer, the court extended the explicit, knowing appointment of an agent within a state for business dealings to the implicit appointment of an agent within the state resulting from a nonresident driving in another state [driving in the state was implied consent to being sued there]
3. When the defendant's domicile is in the forum state, the state has power to decide all claims of whatever nature against him.
4. If the defendant consents to being sued in the forum, then there is jurisdiction
 - a. Implied consent [i.e. the state where the defendant drives]
 - b. Explicit consent [i.e. a contract between entities with a forum selection clause; appointing a local agent to accept service of process; waive service of process to reduce the cost of litigation]

Specific jurisdiction

1. Used to exercise authority over a plaintiff's claim that arises out of or relates to a nonresident defendant's activities within a state.
2. Plaintiff must show

- a. Her claim arises from the defendant's conduct, which fits the language of the state's long arm statute
 - b. The exercise of jurisdiction by the court over the nonresident defendant does not offend the due process clause of the 14th amendment
3. Long arm statute- state statute that allows a plaintiff to achieve service of process over a nonresident defendant who may not be physically present in the forum state
- a. Two types:
 - i. Laundry list- lists the types of particular activity by the defendant which the legislature has decided justifies subjecting the nonresident defendant to jurisdiction there. P must match the legislative language with the defendant's conduct within the state
 - ii. Due process long arm- the statute merely states that the particular state can exercise personal jurisdiction over a non resident to the extent permitted by due process
4. **Michigan's long arm statutes:**
- a. **Individuals; general personal jurisdiction** [*general personal jurisdiction-doesn't matter what is giving rise to the action*]
 - i. Existence of any of the following relationships will constitute a sufficient basis for jurisdiction
 - 1. Presence in the state at the time when process is served
 - 2. Domicile in the state at the time when process is served
 - 3. Consent
 - b. **Limited personal jurisdiction over individuals** [*specific jurisdiction*]
 - i. The existence of the following relationships enables a court to exercise limited personal jurisdiction
 - 1. The transaction of any business within the state
 - 2. The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort
 - 3. The ownership, use, or possession of real or tangible property situated within the state
 - 4. Contracting to insure a person, property, or risk located within this state at the time of contracting
 - 5. Entering into a contract for services to be rendered or for materials to be furnished in the state by the defendant
 - 6. Acting as a director, manager, trustee, or other officer or a corporation incorporated under the laws of, or having its principle place of business within this state
 - 7. Maintaining a domicile in this state while subject to a marital or family relationship which is the basis of the claim for divorce, alimony, separate maintenance, property settlement, child support, or child custody.
 - ii. ****Defendant's relationship with the STATE not the plaintiff*
 - c. **Corporations; general personal jurisdiction**
 - i. Existence of the following relationships between a corp. and the state will enable the court to exercise general personal jurisdiction over the corporation and to enable such courts to render personal judgments against the corporation
 - 1. Incorporation under the laws of this state
 - 2. Consent
 - 3. The carrying on of a continuous and systematic part of its general business within the state.
 - d. **Corporations; limited personal jurisdiction**
 - i. Existence of the following relationships will enable the court to exercise limited personal jurisdiction over such corporations

1. The transaction of any business within the state
 2. The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort
 3. The ownership, use, or possession of any real or tangible personal property situated within the state
 4. Contracting to insure any person, property, or risk located within this state at the time of contracting
 5. Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant
5. Even if a defendant's activities satisfy the long arm statute, it is still possible that exercising jurisdiction over the nonresident defendant will fail because of a due process violation.
 6. Limited/specific
 - a. If you can't get general jurisdiction, you are dealing with a non-domiciliary
 - b. That non-domiciliary had a relationship with the forum state, and the suit arises out of that relationship
 - c. EX: D comes into state and commits tort on P. it is not offensive to say that the non-resident must come and defend himself in the forum state, if he does not defend himself--default judgment for plaintiff.

General jurisdiction

1. Look for general jurisdiction first—if don't have THEN go to limited/specific
2. Three main principles of general [doesn't matter where the law suit arose]
 - a. Present in forum state and personally served,
 - b. Domiciled in forum state, or
 - c. Consent to giving forum state court personal jurisdiction over himself.
3. The claim does NOT have to arise out of the defendant's activities in the forum state.
4. Due to D's continuous and systematic contacts with the jurisdiction, states use the normal service of process rules to notify the defendant within the state.
5. The due process trade off is that P must prove more than minimum contacts; the P must prove that the defendant's contacts with the forum state are continuous and systematic
6. Even if the requisite contacts with the forum state have been shown by P, the defendant can still TRY to prove that exercising jurisdiction over him is nonetheless constitutionally unreasonable—that it VIOLATES fair play and substantial justice to exert authority over the nonresident defendant
7. Five factors relevant to the fair play analysis:
 - a. The burden on the defendant
 - b. The plaintiff's interest
 - c. The forum state's interest
 - d. The international judicial system's interest in obtaining the most efficient resolution of controversies; and
 - e. The common interests of the states in promoting substantive social policies.

Emerging personal jurisdiction principles

1. FIRST look to see if have general jurisdiction:
 - a. Domiciled in the forum?
 - b. Consenting?
 - c. Systematic and continuous relations?
2. If do NOT have general, next look to see if have specific
 - a. Minimum contacts with the forum state AND the cause of action arose out of the contacts
3. McGee v. International life

- a. D sold a policy by mail to a California resident; this was D's only contact in California. P got a default judgment and had to go to Texas courts to enforce
 - b. Could Texas courts enforce a California judgment?
 - i. Yes, the insurer's isolated contact through the sale of the policy was sufficient contact with California [policy was delivered there, premiums were mailed there, and the insured was a California resident] to subject the insurer to the authority of the Californian courts [minimum contacts and the suit arose out of those contacts]
 - ii. In addition, it was much more convenient for D to go to California than for P to go to Texas
4. Hanson v. Denckla
- a. Woman executed a trust with a Delaware bank as trustee and THEN moved to Florida.
 - b. Supreme court ruled that the Delaware trustee lacked the necessary minimum contact with Florida, so Delaware court was under no obligation to give full faith and credit to the Florida judgment because it was invalid under the due process clause of the 14th amendment.
 - c. The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state...it is essential in each case that there be some act by which the defendant PURPOSELY AVAILS itself of the privilege of conducting activities within the forum state, thus invoking the privileges and protecting of its laws
5. Difference between Hanson and McGee: McGee D solicited the insured by sending an offer to insure him in California. Hanson trustee did not seek business in Florida and the trustee's contact with Florida began when the customer moved there.
6. Shaffer v. Heitner
- a. ISSUE: can Delaware exercise personal jurisdiction over the non-resident directors?
 - b. Cannot get general jurisdiction because
 - i. Not domiciled in Delaware
 - ii. Not consenting
 - iii. They are not present for a personal service
 - c. Limited jurisdiction?
 - i. Suit did not arise out of minimum contacts with the forum state
 - d. The course of action proceeded quasi in rem
 - i. Get court to seize nonresident defendant's stocks; the shares had NOTHING to do with the underlying complaint
 - e. Supreme court: raw in rem [quasi in rem], where the res has nothing to do with the underlying claim, IS NOW UNCONSTITUTIONAL
 - i. Presence of property alone will not support the state's jurisdiction.
 - ii. All assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny
 - f. Although the presence of the defendant's property in a state might suggest the existence of other ties among defendant, the state, and the litigation, the presence of the property alone would not support the state's jurisdiction
7. Quasi in rem is not dead, as long as the "res" is part of the underlying thing
- a. One remaining benefit of quasi in rem and its accompanying attachment of property is the pressure placed on a defendant to settle that results from "tying up" the attached property
 - b. But an in personam claim is more attractive because the plaintiff's recovery is not limited to the value of property that was attached.
8. After Shaffer, an in rem claim is no longer about the property, instead the jurisdictional inquiry addresses whether the court has jurisdiction over the person who owns the property
9. World-wide Volkswagen corp. v. Woodson
- a. Plaintiffs bought car from defendant in NY; they moved to AZ and while driving there, they got into an accident in OK.

- b. ISSUE: does OK have personal jurisdiction over defendants?
 - c. The defendant should have some sort of foreseeability that they could be haled into court in the forum state, and therefore, it would be a deprivation of due process for OK court to exercise personal jurisdiction over defendant.
 - i. NOT the mere likelihood, but that the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court
 - d. The concept of minimum contacts protects the defendant against burdens of litigating in a distant or inconvenient forum AND to ensure the states do not reach out beyond the limits imposed on them.
 - e. The forum state does not exceed its powers under Due Process if it asserts personal jurisdiction over a corp. that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.
 - f. DISSENTING: automobile is NOT a stationary object, so difficult to see why the constitution should distinguish between a case involving goods which reach a distant state through a chain of distribution and a case involving goods which reach the same state because s consumer, using them as the dealer knew he would, took them there.
10. Relevant criteria for evaluating fair play
- a. Burden on the defendant of litigating the claim in a place removed from its principal place of business [When an alternative forum within the federal court system would not constitute a burden, a change of venue to another trial court accommodates the interest]
 - b. The forum state's interest in deciding the case [i.e. providing a place for remedy to its residents for injuries caused by nonresidents]
 - c. The plaintiff's interest in obtaining convenient and effective relief [i.e. if chances for recovery would be greatly reduced if litigated somewhere else]
 - d. The interstate judicial system's interest in obtaining the most efficient resolution of controversies [where the witnesses and evidence are located]
 - e. The shared interest of the several states in furthering fundamental substantive social policies [when the subject of litigation is conduct of foreign defendants so that foreign law would apply, this factor works against invoking the jurisdiction of the court]
11. Calder v. Jones
- a. C published a story about J; J resident of California; C resident of Florida
 - b. Valid basis for jurisdiction because C intended to and did cause tortious injury to J in California. The facts that the actions causing the effects were outside of the state did not prevent the state from asserting jurisdiction over a cause of action arising out of those effects
 - c. C had a reasonable foreseeability that they might be haled to court in California; California is both the focal point of the story and the harm suffered.
 - d. FACTORS:
 - i. D committed an intentional tort
 - ii. P must show that P felt the brunt (or effects) of the harm from the defendant's tortious behavior in the forum state.
 - iii. Must show that D expressly aimed its tortious conduct at the forum state.
12. IMPORTANT element in Calder is the defendant must have committed an intentional tort. D knowingly directed his actions towards a resident of the foreign state. Therefore, it was foreseeable that his tortious acts would conceivably result in D being haled into court there.
13. Keeton v. Hustler Magazine
- a. D's regular monthly sales in the foreign states were not random, isolated, fortuitous, and were more than sufficient to satisfy the minimum contacts requirement.
 - b. Do not have to bring in the state where the most sales are—as long as D had minimum contacts and the action arose out of those contacts [*therefore, in Jones, P could have brought in any state D had contacts with*]
14. Helicopteros Nacionales de Columbia v. Hall

- a. Even when a cause of action does not arise out of or are related to the foreign corps activities in the forum state, due process is not offended by a state's subjecting the corp. to its in personal jurisdiction when there are sufficient contacts between the state and the foreign corp.
- b. Heli has minimum contacts, BUT the cause of action does NOT arise out of these-so cannot have limited
- c. SO, must evaluate Heli's contacts with Texas to determine if the contacts were continuous and systematic to see if have general
- d. The court said the contacts were not continuous and systematic—looked at the purchases of Heli in Texas [if they had looked at the sales, this may have been different]
 - i. Mere purchases are not enough to warrant a state's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions
- e. DISSENT: Heli did avail itself to the benefits of the forum state; the cause of action DID arise out of the minimum contacts [the contract was signed in Texas, the helicopter was purchased in Texas, the pilot was trained in Texas]

15. Burger King v. Rudzewicz

- a. R was resident of MI; BK was incorporated and principle place of business in Florida; suit brought in Florida court—does Florida have jurisdiction?
- b. Need fair warning requirement—if D purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or relates to those activities, the foreseeability that is critical to due process is that the Ds conduct and connection with the forum state are such that he should reasonably anticipate being haled to court there.
- c. Jurisdiction CANNOT be avoided simply because D has not ever physically entered the forum state; so long as a commercial actor's efforts are purposefully directed toward residents of another state, the absence of physical contacts will not defeat personal jurisdiction
- d. Also, choice of law provision in contract for Florida law—so who knows Florida law better than Florida courts?
- e. REJECTS any formulas—the facts of each case must always be weighed in determining whether personal jurisdiction would comport with fair place and substantial justice. The quality and nature of an interstate transaction may sometimes be so random and fortuitous or attenuated that it cannot fairly be said that the potential defendant should reasonably anticipate being haled into court in another jurisdiction.
- f. The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its law
- g. In this case, R had sufficient contacts with the forum state AND the suit arose from those contacts

16. Chronology of Due Process analysis:

- a. Initially, the burden of raising the issue of lack of personal jurisdiction is on the defendant who meets that burden by moving to dismiss the complaint. The burden of proof then moves to the plaintiff to establish that the defendant has the requisite contacts with the forum state that put the defendant on notice about the foreseeability of being sued. If the plaintiff sustains the burden of proof on the minimum contacts issue, the burden on the issue of fair play and substantial justice switches to the defendant.

17. Factors in a contract situation:

- a. Who initiated the business relationship
- b. Prior negotiations

- c. Where did the parties contemplate that performance was to occur
 - d. Parties' course of dealing
 - e. Does the agreement contain a provision that the laws of the forum state would govern the agreement?
18. Federal rule of civil procedure 4: permits a federal court to use the long arm statute of the state in which it is sitting to reach nonresident defendants. Allows a federal court to exercise personal jurisdiction to the extent that state in which the federal court is sitting can exert jurisdiction under its long arm statute.
19. Asahi Metal Industry v. Superior court
- a. The original plaintiff settled, so the only parties left were the two manufacturers-Cheng suing to hold Asahi liable for plaintiff's injuries.
 - b. Supreme court held the court did NOT have personal jurisdiction over Asahi
 - c. Putting a product into the stream of commerce is not purposely directing toward the forum state. Additional conduct may indicate such intent or purpose, such as Ads, designing product for the forum state, etc.
 - i. Stream of commerce standing alone is NOT sufficient
 - d. IF the original plaintiff had not settled, the court might have asserted that the jurisdiction was appropriate; but all that is left is a Japanese and Taiwanese corporation
 - e. Under the FACTS and CIRCUMSTANCES, the traditional notions or fair play and substantial justice would not be supported— goes through the list of factors [burden on defendant, etc.]
20. Burnham v. Superior Court
- a. Raw in rem is not longer permitted [where the res has nothing to do with the underlying claim]
 - b. Divorce preceding is in rem and in personam.
 - i. Res- where it arose
 - ii. Personam- if the mom wants child support, alimony
 - c. D was served in the forum state when he was there on business; his presence had nothing to do with the underlying claim
 - d. Transient rule—physically present and personally served is still applicable; contacts no longer have to arise within the forum state if you are physically present.
 - i. Jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of traditional notions of fair play and substantial justice.
 - e. Restrictions on the rule:
 - i. D is not obligated to defend a lawsuit when she had been fraudulently induced to enter the forum state. A fraud affecting the jurisdiction is equivalent to a lack of jurisdiction
 - ii. Nonresidents who are present in a state in order to participate in a legal proceeding is not subject to the transient rule. Whether the person is a party, a witness, or an attorney, the person is immune from effective service of process from other lawsuits and claims for a reasonable time before and after the actual time of the proceedings.

To the internet-and beyond

1. If the mere development of a Web page constitutes a broadcast, a court may be inclined to regard that creation as a type of contract by the Web creator, thereby subjecting the creator of even a passive site [as opposed to an active site] to personal jurisdiction in a faraway court.
2. Under Calder
 - a. Courts focus on the effects purposely caused within the forum state by D's conduct outside the forum,

- b. The occurrence of some effect or the foreseeability that the D's conduct may have been an effect is outside the meaning in Calder
 - i. Even if the effects of D's conduct are felt in the forum state, the exercise of jurisdiction requires that the defendant direct that conduct at the forum state
 - c. A court may also find satisfaction of the effects test when the D's conduct causes harm to a person known by the defendant to be living there.
3. Young v. New Haven Advocate
- a. In determining if personal jurisdiction exists, traditionally ask
 - i. Whether the defendant purposely availed itself of the privileges of conducting activities in the forum state
 - ii. Whether the plaintiff's claim arises out of the defendant's forum related activities, and
 - iii. Whether the exercise of personal jurisdiction over the defendant would be constitutionally reasonable
 - b. Defendant did NOT direct their activities at the forum state and the forum was not the focal point [unlike in Calder]
 - c. The fact that the newspaper's website could be accessed anywhere, including the forum, does not by itself demonstrate that the defendant was intentionally directing their website content to the forum's audience. Something more than posting and accessibility is needed to indicate that the newspaper purposefully albeit electronically directed their activity in a substantial way to the forum state.
 - d. If there was going to be jurisdiction, would have to be specific [because D not domiciled, did not consent, and no continuous and systematic relations], so there has to be minimum contacts AND the suit has to arise from these.
 - e. In this case, the D's newspaper was aimed at the CN audience, NOT the forum state
 - f. ALS scan test:
 - i. Whether the newspaper manifested an intent to direct their website content at the forum states; and
 - ii. Whether the specific articles were posted on the internet with the intent to target a audience in the forum state.
4. Gator.com Corp. v. L.L. Bean
- a. The court uses the continuous and systematic test
 - i. Looks for some kind of deliberate presence in the forum state, including physical facilities, bank accounts, agents, registration, or incorporation. Also look whether the company has engaged in active solicitation toward and participation in the state's markets [the economic reality of D's activities in the state]
 - b. This is an internet store, BUT could be accessed by California residents, so systematic and continuous
 - c. Court analyses the 7 factors:
 - i. Burden on defendant,
 - ii. Extent of purposeful interjection,
 - iii. Extent of conflict with the sovereignty of the defendant's state,
 - iv. Forum state's interest in dispute,
 - v. Most efficient forum for judicial resolution,
 - vi. Importance of chosen forum for plaintiffs' interest in convenient, and
 - vii. Effective relief, and existence of alternative forum
 - d. The modern business no longer requires an actual physical presence in a state in order to engage in commercial activity there; the concepts of jurisdiction must be flexible enough to respond to the realities of the modern market place. Business who structure their activities to take full advantage of the opportunities that virtual commerce offers can reasonably

anticipate that these same activities will potentially subject them to suit in the locales that they have targeted.

5. Toys R Us v. Step Two
 - a. D is Spain corp.; P is Delaware and NJ
 - b. P failed on the facts established thus far to satisfy the purposeful availment requirement
 - i. D's website was in Spanish, prices in pesetas and Euros, shipped only to Spain addresses, and the only two sales in the US were orchestrated by P
 - c. Any information regarding Ps intent vis-à-vis its internet business and regarding other related contacts is known only by D, and can be learned only through discovery
6. If D's website operator intentionally targets the site to the forum state, and/or knowingly conduct business with forum state residents via the site, then the purposeful availment requirement is satisfied.
7. Jurisdictional test remains whether P had alleged "continuous and systematic" contacts with the forum state.
8. Questions to ask:
 - a. Is the website more passive [merely informational in nature] or more active [actually transacts business of a systematic and continuous nature with customers]
 - b. Question is not whether D CAN transact business with forum state, rather, the question is whether d DOES transactions business with forum state.

Service of process on defendants

Rule 4. Summons.

- (a) Contents; amendments.
 - 1) Contents. A summons must
 - (A) Name the court and the parties;
 - (B) Be directed to the defendant
 - (C) State the name and address of the plaintiff's attorney or-if unrepresented-of the plaintiff
 - (D) State the time within which the defendant must appear and defend
 - (E) Notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint
 - (F) Be signed by the clerk; and
 - (G) Bear the court's seal
 - 2) Amendments. The court may permit a summons to be amended
- (b) Issuance. The plaintiff may present a summons to the clerk for signature and seal. The clerk must sign, seal and issue it to the plaintiff for service on the defendant. A summons must be issued for each defendant to be served
- (c) Service
 - 1) In general. Must be served with a copy of the complaint.
 - 2) By whom. Any person who is at least 18 years old and not a party may serve a summons and complaint
 - 3) By a marshal or someone specially appointed. At the plaintiff's request, the court may order that service be made by a US marshal or deputy marshal or by a person specifically appointed by the court.
- (d) Waiving service
 - 1) Requesting a waiver. The plaintiff may notify such a defendant that an action has been commenced and requested that the defendant waive service of a summons. The notice and request must
 - (A) Be in writing and be addressed
 1. To the individual defendant, or

2. For a defendant subject to service under rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process
 - (B) Name the court where the complaint was filed
 - (C) Accompanied by a copy of the complaint
 - (D) Inform defendant of the consequences of waiving and not waiving service
 - (E) State the date when the request is sent
 - (F) Give D a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the D outside of any judicial district in the US—to return the waiver
 - (G) Be sent by first class mail
- 2) Failure to waive. If D fails, without good cause, to sign and return a waiver requested by P, the court must impose on the D
 - (A) The expenses later incurred in making the service and
 - (B) The reasonable expenses, including attorney fees, of any motion required to collect those service expenses
- 3) Time to answer after a waiver. D, who returns a waiver, need not serve an answer to the complaint under 60 days after the request was sent—or 90 days after it was sent to any D outside the US
- 4) Results of filing a waiver. Proof of service is not required
- 5) Jurisdiction and venue not waived. Waiving service of summons does NOT waive any objection to personal jurisdiction or to venue
- (e) Serving an individual within a judicial district of the US. May be served by:
 - 1) Following the state law for serving a summons
 - 2) Doing any of the following
 - (A) Delivering a copy of the summons and of the complaint to the individual personally
 - (B) Leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there, or
 - (C) Delivering a copy of each to an agent authorized by appointment or by law to receive service of process
- (f) Serving a corporation, partnership, or association. Must be served
 - 1) In a judicial district of the US
 - (A) In a manner prescribed by rule 4(e)(1)
 - (B) By delivering a copy of the summons and of the complaint to an officer, managing or general agent, or any other agent authorized by appointment or by law to receive service of process
- (g) Serving the US and its agencies, corp., officers, or employees
 - 1) To serve the US, a party must
 - (A) Deliver a copy of the summons and the complaint to the US attorney for the district where the action is brought
 - (B) Send a copy of each by registered or certified mail to attorney general of the US
 - 2) To serve an US agency or corp., officer or employee, must serve the US and send a copy of the summons and complaint by registered mail to the agency, corp, officer or employee
- (h) Providing service
 - 1) Affidavit required. Proof of the service must be made to the court
- (i) Time limit for service. If D is not served within 120 days after complaint is filed, the court must dismiss the action without prejudice against that D or order that service be made within a

specified time. If P shows a good cause for the failure, the court must extend that time for service for an appropriate period.

Service of process relates to the notice a defendant receives about the filing of the lawsuit.

Constitutional standards

1. Mullane v. Central Hanover Bank & Trust
 - a. Served summons through a newspaper ad
 - b. Whether in rem or in personam, your service must be reasonably calculated under the circumstances to give notice and an opportunity to be heard so D can present any objections
 - c. For those who whereabouts are known, you must give reasonable notice [try to contact them]
 - i. For those who whereabouts are not known, it would not disrupt due process to publish in newspaper
 - ii. UNDER SOME CIRCUMSTANCES, publishing notice may be the best way to provide service. must use reasonable resources to try and serve a defendant. Does not say that notice by publication is against the law.
 - d. Notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interest of all since any objections sustained would inure the benefit of all.
 - i. EX: if W's husband drops off the face of the earth and she wants a divorce, notice like this would be acceptable because she cannot find him. It is the best means available.

Procedural standards for service of process

1. An objection to the method of service and/or to the process itself can occur in two contexts
 - a. A motion can be made to dismiss the complaint due to insufficient service of process or insufficient service of process or insufficient process per Federal Rule 12(b)(4)-(5)
 - b. A plaintiff often obtains a default judgment against a defendant who never answered the complaint. After the plaintiff tries to enforce the judgment [i.e. by garnishing the defendant's wages] the defendant may learn about the lawsuit for the first time and file a motion with the court to vacate the default judgment. The premise for the motion is that default judgment was improper because the court lacked jurisdiction over the defendant due to the improper service of process.
2. The formal requirements of rule 4 for proper service must be satisfied, AND actual knowledge of the lawsuit does not cure a defective service of process.
3. Summons requirements:
 - a. Issued by the clerk of court, bearing the court's seal and the clerk's signature
 - b. Identify the district court, name the parties, and list the name and address of the plaintiff or this plaintiff's attorney
 - c. Be directed to the specific defendant
 - d. State the time within which the defendant must appear and defend the lawsuit, and caution about the consequences of the defendant's failure to appear
4. Rule 4(d) imposes a duty on D to avoid unnecessary costs of formal service of process
5. Non-economic inducement if D waives:
 - a. He gets 60 days instead of 20
 - b. If he doesn't waive, he may be obliged to pay for the service of summons
6. Larsen v. Mayo Medical Center
 - a. Service of process rules determine the various timing requirements but do not affect the commencement of the law suit
 - b. D did not waive the service of process because knew the statute of limitations was running out
 - c. Under Minnesota rules of civil procedure, a civil action is commenced:

- i. When the summons is served upon that D, or
 - ii. At the date of acknowledgement of service is made by mail, or
 - iii. When the summons is delivered to the sheriff in the county where D resides
 - d. If D refuses to waive service of process under rule 4(d), P must proceed with normal service of process using rules 4(3), (f), and (h). rule 4(m)'s 120 day period for completing service is running while the waiver of service request is made.
 - i. When D has agreed to waive service and returns the waiver form, the date of service is deemed the date when P files the form with the court. Regardless of which procedure is used, the waiver of service or formal service must occur within the 120 day period after filing the complaint.
- 7. The most desirable method for service is to personally serve D
 - a. It is sufficient that the process server touches the party to be served with the papers, or if touching is impossible, leaves the papers in D's physical proximity. The D does not have to possess the papers for effective service.
- 8. The federal rules clearly indicate that service on defendants may be effected by the law of the state in which the federal district court is held or in which service occurs.
- 9. The federal rules also permit substituted service of process alternatives to personal delivery. One option for the process server under federal rule 4(e)(2) is to leave the papers at the defendant's dwelling or usual place of abode with someone of suitable age and discretion who resides there.
- 10. Cox v. Quigley
 - a. D was in the military; P served papers at D's parents house.
 - b. ISSUE: whether D's parents house was D's "usual place of abode"
 - c. D's parents house was no longer his place of abode—he graduate from college, left home, found a job, obtained a new tax residence, voted in a different state, and maintained employment records in Florida. Although he used his parent's address for financial matters and his driver's license was NY until he lost it, these factors are not sufficient to show he was dwelling or maintaining a place of abode at his parents'.
- 11. For purposes for effectuating rule 4(e) [to leave at place of abode], an individual can have multiple dwelling houses or usual places of abode, provided each contains sufficient indicia of permanence. Numerous representations that the location was his address estop him from challenging service there.
- 12. Rule 4(e)(2)(B): "resides there" has been held to require the recipient of the papers to actually be living in the same place as D. thus, service on an employee of D who spends only part of his time at D's residence is defective. However, some courts have found that point of living there to be a minor point.
- 13. Rule 4(e)(2)(C): there must be evidence that D intended to confer authority to receive process on an agent. The rule also permits service on an agent authorized by law.
 - a. EX: long arm statutes may designate Secretary of state as agent. Additionally, if a non-resident corporation hasn't appointed an agent to receive service, the state may appoint an agent for it.
- 14. Rule 4(h): cannot merely address the papers to the corporation generally. They must be delivered to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process
 - a. Whether a person is regarded as managing or general agent depends on person's duties and authority rather than the name of the office
 - b. The governing principle is that service is to be made on someone who realizes her responsibilities to the corporation and knows what to do with the legal papers
- 15. For service upon corporations, some courts use redelivery
 - a. Service on a corporation is upheld if
 - i. The process server acts with due diligence in trying to meet the statutory requirements by establishing that the recipient is a company employee;
 - ii. The process server nevertheless servers a person not authorized to accept service; and

- iii. The recipient then redelivers the papers to one who IS authorized to accept service. The redelivery must be close in time and space so that it can be classified as part of the same act.
16. To the extent that notice has taken place, courts will give the rules liberal interpretation. They cannot ignore the rule, but they will liberally interpret the rule IF notice has been given.

VENUE

1. VENUE (only statutory)

1. Determines what district in the state– like PJ it determines where litigation will take place
2. Solely based on statutory sources rather than constitutional sources (unlike PJ which also has const)
 - a. Because it is statutory, Congress could take it away trmw – and all we would have is PJ
 - b. Law typically tries to place suits in areas that are connected either to the parties or to the events that gave rise to the action
3. Venue isn't meant to hinder litigants, which is why 1391(a)(3) is so broad – you can always probably find a venue in the U.S.
 - a. 1391(a) applies to diversity only cases
 - b. 1391(b) applies to cases not based solely on diversity (e.g., federal question cases)
4. **State Court** – look to state venue statute
5. **Federal Court** – look to **28 U.S.C. § 1391**
 - a. Diversity jurisdiction – An action may be brought only in:
 - i. a district where any defendant resides, if all defendants reside in the same state; or
 - ii. a district in which a substantial part of the events giving rise to the claim occurred; or
 - iii. Last resort: If there is no district in which the action may otherwise be brought, any district in which any defendant is subject to PJ at the time the action is commenced
 - b. Non-diversity jurisdiction – An action may be brought in:
 - i. a district where any defendant resides, if all defendants reside in the same state; or
 - ii. a district in which a substantial part of the events giving rise to the claim occurred; or
 - iii. Last resort: If there is no district in which the action may otherwise be brought, a district in which any defendant may be found
 1. “Found” – similar to minimum contacts, but less stringent (*Dee-K*)
 - c. Corporate D deemed to reside in any judicial district in which subject to PJ - 1391(c)
 - d. Alien sued in any district - 1391(d)
6. **TRANSFER AND FORUM NON-CONVENIENS** – more convenient forum somewhere else?
 - a. State/fed courts possess the power to decline to exercise jurisdiction even though they possess it if it would be more convenient for the case to be heard elsewhere– or for reasons of justice or efficiency
 - i. Used when there is proper PJ and venue – but for convenience forum should change

b. Transfer – 28 U.S.C. § 1404

i. EITHER PARTY CAN MOVE FOR A TRANSFER

1. It is assumed P brought case where she wanted to – but things might have come to light later in the suit making either side wanting the case to be transferred
- ii. Transfers gives the federal courts the ability to move cases within the system without the necessity for dismissal and refilling (like forum non conveniens)
 1. When venue is improper the court may dismiss or transfer
- iii. Although similar to FNC there is a lesser of a showing required, cts look at:
 1. Convenience of the parties and witnesses
 2. Interests of justice
 3. If the transfer is to a district where case might have been brought
 4. Law of transferor court governs - changing court not the law
 - a. The new court sits as if “they were the old court.”
 5. Forum selection clause significant, but not controlling
- iv. If the first court lacks personal jurisdiction, the transferee’s court’s law will cover
 1. Changing courts not law – benefit of convinces, but no benefit of different law
- v. State court – transfer to another county within the same state
- vi. Federal court – transfer to another judicial district
 1. § 1404
 - a. Either party may seek transfer
 - b. Factors (Lesser showing on inconvenience than forum non conveniens)

For a Ct to hear a case, you need:

- Personal jurisdiction
- Notice/Service
- Venue
- Subject matter jurisdiction

- i. Convenience of parties
- ii. Place where operative facts occurred
- iii. Access to sources of proof, evidence, and ability to compel witnesses
- iv. Convenience of witnesses
- v. Plaintiff’s choice of forum
- vi. Forum familiarity with governing law
- vii. Trial efficiency
- viii. Interests of justice
- ix. In a case involving a contract, any forum selection clause in the contract will be considered as evidence of what the parties thought would be a convenient forum.

c. Must transfer to district where case could have orig. been brought - § 1404(a)

c. Forum Non Conveniens

- i. ONLY D CAN MOVE FOR A FORUM NON CONVENIEN
- ii. Forum non convenience is a dismissal – the case ends in one court and

then it has to be moved to a different court and started over

- iii. Applies when:
 - 1. Federal court – Most convenient forum is a foreign country/Foreign plaintiffs
 - 2. State court – Most convenient forum is another country or another state
 - 3. Typically used when leaving 1 court for a federal court, or moving to a diff. state ct
 - iv. Court has discretion to dismiss the action (*Piper*)
 - v. Start with presumption in favor of plaintiff's choice of forum, but lesser presumption if plaintiff has not chosen its home forum. Then consider the interest factors:
 - 1. Less favorable law in alt forum is relevant only if it provides no remedy at all
 - 2. Ps choice of forum should (and rarely is) not be disturbed
 - 3. If P files in home ct and many of the factors point to that court – very hard to switch
 - vi. Consider private and public interests – no guidance if the interests point different directions
 - 1. Private interests
 - a. Access to proof
 - b. Ability to get witnesses into court
 - c. Possibility of viewing premises
 - d. Other practical problems
 - 2. Public interests
 - a. Court congestion
 - b. Local interest
 - c. Trial in place of law
 - d. Unnecessary conflicts of law
 - e. Apply foreign law
 - f. Burden on jurors
 - 3. Less favorable law in alternative forum is relevant only if the alternative forum provides not remedy at all
 - vii. *Piper Aircraft v. Reyno* – Scottish heirs of plane crash victims in Scotland try to sue for wrongful death in American ct because American ct recognize wrongful death as a cause of action and are known generally to be more favorable to Ps than cts in Scotland.
 - 1. Held: Ct granted a forum non convenient when the new ct's law will be less favorable for P. P was the only one/thing in US – rest in Scotland.
 - 2. Applies only in federal court and only in cases where the alternative forum is a foreign country.
 - 3. CA choice of law (original jurisdiction) will still apply after the transfer. You are changing the court but you aren't changing the law.
- d. **Residence for Venue:** Individuals=domicile, Corporations=any district in which

it is subject to personal jurisdiction, Unincorporated=where it does business.

- e. **Improper Venue:** venue is waived unless a timely objection is made.
- f. **Change of Venue:** Even though venue is proper you can change the venue to where the action “might have been brought” by showing the current venue is inconvenient or not in the interest of justice. Forum selection clauses are also taken into account. (it is only possible to transfer within the same system, state or federal)
- g. **To obtain a forum non conveniens dismissal, the) must:**
 - i. Demonstrate that an adequate alternative forum is available.
 - ii. Show that considerations of party and forum convenience override the A’s choice of forum and justify dismissal
- h. **Dismissal:** When the inconvenience or improper venues problem can be solved by transfer to another federal district, the court may not dismiss; but if the proper forum is in another country, the federal court can dismiss.(Piper) Transfer is preferable to dismissal. Also where original court lacks personal jurisdiction the court still has the ability to transfer.

Chapter 5. Pleading

- 1. Philosophy and History of Pleading
 - a. Introduction
 - i. The process by which the litigants advise each other and the court of the claims and defenses they intent to present at trial.
 - ii. The FRCP, require pleadings to be in writing, dictate a certain basic form, and limit the parties’ ability to amend their pleading
 - iii. Pleadings serve two basic functions:
 - 1. They provide information for both the court and the other side.
 - 2. Also serve a constraining function, giving parties a degree of control over their case. EX. If P could recover under theory X, the parties through pleadings could prevent the court from deciding for P under theory X.
 - b. Historical English Pleading
 - i. In England there were two types of courts, “common law,” and the “Chancery” or courts or “Equity.”
 - c. Code Pleading
 - i. Under code pleading the separation of law and equity was abolished, making a blended system known as the civil action.
 - ii. The parties in their pleadings were to state the facts in simple and concise form, i.e. fact pleading.
- 2. Pleading a Claim under the Federal Rules
 - a. The Form of the Complaint
 - i. Federal Rules of Civil Procedure adopted the “notice” pleading system
 - 1. Notice pleading is similar to Code pleading insofar as it concentrates on the facts rather than underlying legal claim.
 - 2. This primary purpose of Federal pleading is to give notice of the claim to the adversary, so that he may make effective discovery request and trial preparation.
 - ii. Motions v. Pleadings

1. Motions are best considered the “silver bullet.” They are both more specific and more immediate than a pleading.
2. Pleadings are comprehensive instrument in which a party lays out all of the claims, defenses, and or objections.
 - a. Pleadings set out the roadmap of the trial
- iii. Rule 10 sets out the basic form that all pleadings must follow:
- iv. **Rule 10. Form of Pleadings:**
 1. **(a) Caption; Names of Parties:** Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.
 2. **(b) Paragraphs; Separate Statements:** A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense.
 3. **(c) Adoption by Reference; Exhibits:** A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.
- b. The Basic Pleading Standard of Federal Rule 8(A)
 - i. All Federal Rule 8(a) requires is that a party put the other side on “notice” of the claim or claims it plans on pursuing.
 - ii. Federal notice pleading requires the claimant to reveal very few facts she has to support her claim.
 - iii. The claimant must only give the other side a rough idea- that is, put the other side “on notice”- of why he is being sued.
- c. Applying the Rule 8(a) Standard
 - i. *Swierkiewicz v. Sorema, N.A. (2002)*
 1. **Rule 8. General Rules of Pleading**
 2. (a) Claims for Relief.
 - a. A pleading that states a claim for relief must contain:
 - i. (1) a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
 - ii. (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
 - iii. (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.
 - b. The Court held that an employment discrimination complaint need not include specific facts establishing a prima facie case and instead must contain only "a short and plain statement of

the claim showing that the pleader is entitled to relief," pursuant to Rule 8(a)(2).

- c. Rule 8 sets out three essential elements, which a complaint must contain that are highlighted above.

ii. *Bell Atlantic Corp. v. Twombly (2007)*

1. Parallel conduct and collusion, that leads to a wrongful agreement in business practice.
2. Plaintiffs allege upon information and belief that ILEC's have entered into a contract, combination, or conspiracy.
3. Claims have not pushed the threshold from conceivable to plausible, therefore the claim must be dismissed.

iii. *Ashcroft v. Iqbal*

1. Did the respondent plead factual matter if taken as true, states a claim that deprived him based on discrimination?
 - a. The supreme court held no, the pleading was too weak. Under 12(b)(6) failure to state a claim upon which relief can be granted.
 - b. Must contain sufficient "factual matter" on the stated claim.
- iv. Rarely will a court throw out a pleading. The complaint can be amended. If D comes forward with a 12(b)(6) failure to state a claim upon which relief can be granted, the court will conditionally grant the motion unless the P within x days amends the complaint.

d. Heightened Pleading Standards (RULE 9)

- i. In a few situations, special matters must be pleaded with particularity if they are to be raised at trial.
 1. These special matters are ones notice of which is thought to be necessary in order for the opponent to be able to prepare for trial.
 2. They are typically claims, which the adversary will not be expecting.

ii. Rule 9. Pleading Special Matters

1. **(a) Capacity or Authority to Sue; Legal Existence.**

- a. **(1) In General.** Except when required to show that the court has jurisdiction, a pleading need not allege:

- i. (A) a party's capacity to sue or be sued;
- ii. (B) a party's authority to sue or be sued in a representative capacity; or
- iii. (C) the legal existence of an organized association of persons that is made a party.

- b. **(2) Raising Those Issues.** To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

2. **(b) Fraud or Mistake; Condition of Mind.**

- a. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

3. **(c) Conditions Precedent.**
 - a. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.
 4. **(d) Official Document or Act.**
 - a. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.
 5. **(e) Judgment.**
 - a. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.
 6. **(f) Time and Place.**
 - a. An allegation of time or place is material when testing the sufficiency of a pleading.
 7. **(g) Special Damages.**
 - a. If an item of special damage is claimed, it must be specifically stated.
 8. **(h) Admiralty or Maritime Claim.**
 - i. Failure to plead a special matter under Rule 9 may prevent him from recovering, or from recovering particular items of damage.
 - ii. *U.S. Ex Rel. Bledsoe v. Community Health Systems, Inc.*
 9. Rule 9(b) Fraud or Mistake; Conditions of the Mind → In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.
 - iii. Special damages have to be specifically pleaded.
 1. General damages- are the damages that naturally and necessarily flow from the injury.
 2. Special damages- unique damages that flow from the specific circumstances of the claimant party. For example a collection for lawn maintenance.
 - iv. *Browning v. Clinton (2002)*-
 1. The plaintiff must allege actual damages with "particularity" and specify "facts showing that such special damages were the natural and direct result" of D's conduct.
 2. Special damages, unlike general damages, are "not the necessary consequence of [the] defendant's conduct, [but] stem from the particular circumstances of the case."
 3. Special damages are natural but not necessarily.
- e. The Prayer for Relief

- i. Rule 8(a)- requires a party to include “ a demand for the relief sought” This gives the pleader the opportunity to inform the court what she hopes to gain from the case, whether it be an award of damages or an injunction.
 - ii. Under Federal Rule 54(c), the court is not limited by the prayer for relief when awarding judgment for a party. Court may grant damages even when the claimant sought only an injunction.
 - iii. In a default judgment situation, the judgment cannot exceed, or be different in kind from, the relief requested in the prayer (pleading).
- 3. Objecting to the Statement of a Claim
 - a. When a Pleading “Fails to State a Claim”
 - i. A 12(b)(6) motion to dismiss for failure to state a claim upon which recovery may be granted can take two forms:
 - 1. The pleading being challenged is missing key language. The claimant may not have provided enough detail, or failed specifically to allege a crucial element of a claim.
 - 2. The pleading may contain ample facts, but those facts do not state a claim recognized at law.
 - ii. The courts treat these two situations quite differently.
 - 1. In the first example the court will generally not dismiss. It will usually give the claimant at least one opportunity to amend the pleading to add missing details.
 - 2. In the second, the court will often dismiss, unless the P can show that the complaint may be modified for recovery under a different legal theory.
 - b. Procedural Aspects of the 12(b)(6) Motion
 - i. This defense can be raised by pre-answer motion just like a motion to dismiss for improper subject matter jurisdiction or improper service.
 - ii. The defendant may also combine the 12(b)(6) motion with any other defenses it can raise by pre-answer motion
 - iii. Rule 12(h)(2) allows the defense of failure to state a claim to be raised at any point in the case, including at the trial itself.
 - iv. A defendant who makes a pre-answer motion based on some other ground, and then later decides to challenge the sufficiency of the complaint, does not make a second pre-answer motion. Instead, he raises, the defense of failure to state a claim in his answer, by a Rule 12(c) motion for judgment on the pleadings (which occurs after pleadings are complete), or by motion at the trial itself.
 - v. A 12(b)(6) motion does not operate as an admission of any facts. If the court finds that the complaint properly states a claim, the D can then deny one or more of the P’s facts in the answer, and force P to prove them at trial.
 - vi. What if the case involves multiple claims, and one or more of the claims is not recognized under governing law, but some claims are?
 - 1. Most jurisdictions would strike the bad claims and keep the good claims.
 - 2. Some jurisdictions interpret 12(b)(6) to require dismissal of the entire case.

- c. Motion for a More Definite Statement and Motion to Strike
 - i. Rule 12(e)- allows a party against whom a claim has been asserted to move for a more definite statement if the pleading “is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading...”
 - ii. Rule 12(f)- motion to strike, serves two functions.
 - 1. (1) it allows a party to strike specific claims or allegations in a pleading. This often occurs when P want to strike portions of the D’s answer.
 - 2. (2) The rule mentions striking “redundant, immaterial, impertinent, or scandalous matter.” The court may strike particularly inflammatory allegations, or those that intrude too greatly on a party’s privacy.
- 4. Determining the Applicable Law
 - a. Choice of Law
 - i. Paul v. National Life (1986)
 - 1. Lex Loci delicti – law of the place where the “tort” was committed.
 - 2. The court affirmed their adherence to the doctrine of lex loci delicti. The court declared that automobile guest passenger statutes violate the public policy of West Virginia.
 - ii. Choice of law rules are, “procedural.” A court making the choice of law almost always applies its own choice of law rules, and consider only others states’ substantive rules.
 - b. An introduction to Erie
 - i. During a check-up, P allowed the D to perform a second surgery believing that it would be a minor alteration. D instead performed extensive surgery, without consent. Afterward the P experienced nasal problems, D performed additional surgeries. Eventually P went to another doctor where she had to undergo reconstructive surgery on the nose.
 - ii. The D’s answer responded to the complaint in full but did not include a demand for an affidavit or merit from the P.
 - iii. Court found no conflict between the New Jersey affidavit of merit statute and Federal Rules 8 & 9. The Federal Rules and the New Jersey Statute can exist side-by-side, “each controlling its own intended sphere of coverage without conflict.”
- 5. Responding to the Complaint
 - a. Menu of Responses
 - i. The D has a variety of devices to use in answering a complaint. An obvious alternative is for the D to admit each every allegation in the complaint.
 - ii. More likely is the D to deny all or part of the allegations in the complaint.
 - b. **Rule 8 (b) Defenses; Admissions and Denials.**
 - i. **(1) In General.**
 - 1. In responding to a pleading, a party must:
 - a. State in short and plain terms its defenses to each claim asserted against it; and
 - b. Admit or deny the allegations asserted against it by an opposing party.
 - ii. **(2) Denials — Responding to the Substance.**

1. A denial must fairly respond to the substance of the allegation.
- iii. **(3) General and Specific Denials.**
 1. A party that intends in good faith to deny all the allegations of a pleading — including the jurisdictional grounds — may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.
- iv. **(4) Denying Part of an Allegation.**
 1. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.
- v. **(5) Lacking Knowledge or Information.**
 1. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.
- vi. **(6) Effect of Failing to Deny. (snooker rule)**
 1. An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.
- vii. General Denial
 1. When the D denies every one of the allegations in the complaint.
 2. Tactical advantage of general denial is that it forces the P to prove every matter of fact in the complaint.
 3. Must be made in good faith under Rule 11, if the P moves under rule 12(f) to strike the D's answer because D failed to deny the P's allegations in good faith; P only has to show one defect in order for entire answer to be stricken.
- viii. Specific Denial
 1. Rule 8(b) allows the D to specifically deny designated allegations, this is the most common method when all claims in a paragraph can be controverted.
 2. No formula for making a specific denial, other than the D must be clear about which claims are being denied.
 3. EX- "defendant denies all the allegations in Paragraph 3"
- ix. Qualified Denial
 1. D may prefer to admit some of the allegations in a paragraph but deny others.
 2. Rule 8(b) authorizes the D to generally deny all allegations except those specifically admitted.
 3. EX- "Defendant denies all the allegation in paragraph 5, except those relating to identity and residential address."
- x. Denial based on lack of knowledge or information to form a belief
 1. Rule 8(b) states that where a party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the D shall so state and this statement has the effect of a denial.
- xi. Denial based upon information and belief

1. D who lacks first-hand or personal knowledge about the validity of one or more allegations in the complaint, but has sufficient information to form a belief about the truth or falsity of the allegation may assert a denial upon “information and belief”
 2. Most appropriate when denial is based upon information from a third party.
- xii. Negative Pregnant
1. When a denial if read literally and interpreted against the D, actually denies only an immaterial part of the complaint and leaves admitted the key allegation by the P.
 2. EX- P claims the value of the car exceeded \$15,000 and D denies that the value exceeded that sum, taken literally the D denied only the immaterial word “exceeded” but admitted that the value of the car at least equaled \$15,000.
- xiii. Failure to Deny
1. Under Rule 8(b)(6) failure to deny the allegations in the complaint constitutes an admission of the facts alleged.
- c. Affirmative Defenses
- i. An affirmative defense is usually described as an avoidance of the P’s allegations in the complaint.
 - ii. The purpose of requiring an affirmative defense under Rule 8(c) is to give the P notice of the defendant’s intent to introduce new matter as a defense.
 - iii. **Rule 8(c). Affirmative Defenses.**
 - iv. **(1) In General.**
 - v. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:
 1. accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; discharge in bankruptcy; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; and waiver.
 - vi. **(2) Mistaken Designation.**
 - vii. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.
- d. Responding to the Answer
- i. Rule 7(a) require a court order authorizing a reply to any part of an answer other than a counterclaim. Without a court order, a reply to a counterclaim is the only reply authorized.
 - ii. Ordinarily, some unusual reason must be urged, e.g., the complaint and answer with new matter do not cover the issues in the case, or the availability or expense of discovery procedures or the possibility of summary judgment justify a reply.
 - iii. **Rule 7. Pleadings Allowed; Form of Motions and Other Papers**
 1. **(a) Pleadings.**
 2. Only these pleadings are allowed:

- a. (1) a complaint;
- b. (2) an answer to a complaint;
- c. (3) an answer to a counterclaim designated as a counterclaim;
- d. (4) an answer to a cross-claim;
- e. (5) a third-party complaint;
- f. (6) an answer to a third-party complaint; and
- g. (7) if the court orders one, a reply to an answer.

3. **(b) Motions and Other Papers**

a. **(1) In General.**

- b. A request for a court order must be made by motion. The motion must:
 - i. (A) be in writing unless made during a hearing or trial;
 - ii. (B) state w/ particularity the grounds for seeking the order; &
 - iii. (C) state the relief sought.

c. **(2) Form.**

- d. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

6. Veracity Standards for Filed Documents

- a. Rule 11 requires that a document be signed by an attorney or by the party, if there is no attorney.
 - i. If the document is not signed, by Rule 11(a) the court must strike the paper unless the paper is signed promptly after the attorney or party becomes aware of the problem.
- b. The duty of Candor:
 - i. Litigants are subject to sanctions for advocating a position after it is no longer tenable.
 - ii. The rule protects litigants against sanctions if they withdraw or correct contentions after being notified about potential violation.
- c. Are sanctions mandatory?
 - i. Under Rule 11, the trial court has discretion to determine whether to apply sanctions.
 - ii. The rule states that the sanctions should be no more severe than reasonably necessary to deter repetition of the conduct by the offending attorney or party or comparable conduct by similarly situated persons.
- d. Are sanctions imposed automatically?
 - i. Before sanctions are imposed, litigants must receive notice about an alleged violation and a chance to respond.
- e. “Safe Harbor” provision and how it is expressed in Rule 11.
 - i. A motion for sanctions is not to be filed until at least 21 days after the motion is served on the offending person.
 - ii. During that period, if the violation is corrected withdrawing an allegation, the motion should not be filed with the court.
- f. Writings exempt from Rule 11’s coverage?

- i. Rule 11 explicitly is inapplicable to discovery and disclosures requests, responses, objections and motions under the discovery provision in Rules 26-37.
- g. **Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions**
- i. **(a) Signature.**
 - ii. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney or party's attention.
 - iii. **(b) Representations to the Court.**
 - iv. By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an *inquiry reasonable* under the circumstances:
 1. (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
 2. (2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-4 frivolous argument for extending, modifying, or reversing existing law or for establishing new law;
 3. (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
 4. (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.
 - v. **(c) Sanctions.**
 1. **(1) In General.**
 2. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.
 3. **(2) Motion for Sanctions.**
 4. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under [Rule 5](#), but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If

warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

5. **(3) On the Court's Initiative.**

6. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

7. **(4) Nature of a Sanction.**

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

9. **(5) Limitations on Monetary Sanctions.**

10. The court must not impose a monetary sanction:

- a. (A) against a represented party for violating Rule 11(b)(2); or
- b. (B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

11. **(6) Requirements for an Order.**

12. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

7. Amended and Supplemental Pleadings

a. Amending Pleadings with (or without) the Court's Permission

i. FRCP Rule 15(a) imposes a threshold requirement that can be satisfied through any of the following three methods:

1. a pleading may be amended once without leave of court (as a matter of course) at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, within twenty days after the pleading to be amended is served.
2. A pleading may be amended at any time with the consent of the adverse party.
3. An amended pleading may be allowed by leave of the court- and that leave is to be "freely give when justice so requires." Dependent upon two factors:

- a. Length and reason for delay in asserting this claim
- b. Prejudice to the party opposing the new claim as a result.

ii. Rule 15(a) enables a party to assert new information that was overlooked or unknown to the pleader at the time the complaint or answer was filed.

b. Amendments to Add Issues at Trial

i. Rule 15(b) provides for amendments necessary to cause the pleadings to conform to the evidence.

- ii. The Rule provides that if issues not raised by the pleadings are tried by express or implied consent, they are treated as if they had been raised.
- c. Amendments Filed after the Limitations Period has Expired
 - i. If an amendment can be said to “relate back,” it is treated as if it were filed along with the original pleading even though it was actually filed after the limitations period.
 - ii. Rule 15(c)(1)(a): provides that if the statute of limitations governing a claim for relief allow relation back of amended pleadings, relation back is permitted.
 - iii. The point of Rule 15(c)(1)(a) is to ensure that Rule 15 cannot be used to contravene statutes of limitations specifically allowing relation back.
 - iv. Rule 15(c)(3) applies when an amendment adds a party or changes a party’s name. The rule is satisfied if the amendment both fulfills Rule 15(c)(1)(b) and meets the language in Rule 15(c)(1)(C)(i) and (ii).
 - 1. If the P amends to 1) expand or modify the facts alleged in an earlier pleading, 2) cure a defective statement of jurisdiction, 3) reassert a claim that was deficiently stated and dismissed under Rule 12(b)(6), or 4) change the legal theory based on the factual transaction, the amendment may relate back because it satisfies the Rule 15(1)(C) standard.
- d. Supplemental Pleadings
 - i. Rule 15(d) allows a supplemental pleading to set forth transaction or events, which have occurred since the filing of the original pleading, thereby bringing the case up to date.
 - 1. A supplemental pleading may set forth new facts in order to update the earlier pleading or change the amount or nature of the relief sought in the original pleading.
 - ii. A supplemental pleading relates to events, which have occurred subsequent to the pleading to be altered.
 - 1. Unlike an amendment pursuant to Rule 15(a), a supplemental pleading is never allowed as a matter of right, but only by leave of court.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course.

A party may amend its pleading once as a matter of course within:

- (A) 21 days after serving it, or
- (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments.

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

(3) Time to Respond.

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

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial.

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

(2) For Issues Tried by Consent.

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

(c) Relation Back of Amendments (only concerned when dealing with statute of limitations)

(1) When an Amendment Relates Back.

An amendment to a pleading relates back to the date of the original pleading when:

- (A) the law that provides the applicable statute of limitations allows relation back;
- (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or
- (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
 - (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
 - (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the United States.

When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings.

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