I. Personal jurisdiction

- Note: the court must have personal jurisdiction and subject matter jurisdiction over all of the parties, and the suit must be properly venued. Always make sure that these three requirements are satisfied.

i. In rem

- An *in rem* proceeding is one in which the court has **jurisdiction over property**, as opposed to a person. The court attaches the property to assert its power over it. Attaching a property requires an attachment statute; make sure that it does not violate due process (see: "Pretrial seizure").
- An *in rem* judgment can't be enforced in other states under Full Faith and Credit. P can recover up to the value of the property at auction. If there is a remainder, it is returned to D. Under *Balk*, **property can be intangible**, such as stock, money in a bank account, or debt. Types of actions:
    - *In rem* / *quasi in rem 1* actions concern the ownership of the attached property in the forum.
    - *Quasi in rem 2* actions concern something other than ownership of the attached property.
- *Shaffer* holds that **minimum contacts must be established** in *in rem* actions. For *in rem* and *quasi in rem – 1*, minimum contacts are presumed, as the disputed property is in the forum. But for *quasi in rem – 2*, you must conduct a minimum contacts analysis.
    - Minimum contacts are likely when the dispute arises from the property.
    - **Status issues**, such as marriage, do not require a minimum contacts analysis.
- A party can dispute liability in an *in rem* proceeding with a **limited appearance**. In doing so, one is not exposed to *in personam* jurisdiction.

ii. In personam

- *In personam* is **jurisdiction over a person**. Under Full Faith and Credit, a judgment in one state can be enforced in other states.
- The court always has jurisdiction over all Ps (except in class actions).
- D may **contest the court's jurisdiction** by making a **special appearance** or 12(b)(2) motion before defending on the merits. However, if the court upholds jurisdiction, the only route is appeal; the issue is precluded in the enforcing court.
    - A P who fails to raise a challenge to jurisdiction, or raises it after defending on the merits or filing other Rule 12 defenses, has waived their objection.
    - Alternatively, you could default and collaterally attack the judgment in the enforcing court. This precludes P from enforcing in other states as well.
- As a matter of constitutional power, federal courts can exercise broad *in personam* jurisdiction. Congress can authorize nationwide jurisdiction if it wishes (see: "Interpleader"). But under Rule 4, federal courts can exercise jurisdiction only to the territorial limits that the courts of the state where the federal court sits

can, outside of a few exceptions.

iii. Traditional bases of jurisdiction

- There are three "traditional" bases of *in personam* jurisdiction (*Pennoyer*). These bases establish general jurisdiction, meaning the court has personal jurisdiction regardless of whether the claim arises from D's contacts with the state.
- Bases for natural persons:
    - (1) **Domicile**: *Milliken* held that the court has general jurisdiction over persons domiciled in the forum, regardless of where they're served.
    - (2) **Consent**: three forms
        - Genuine: true, actual consent.
        - Coerced: privileges may be limited until consent is given. (*Kane*)
        - Implied: consent is implied, as in non-resident motor statutes. (*Hess*)
    - (3) **Personal service in the forum**
- Bases for corporations:
    - (1) **Consent**
    - (2) **Home**: Home is the "domicile" of a corporation. Under *Perkins*, the inquiry was whether contacts were continuous and systematic. Under *Daimler*, a corporation is at home **where it is headquartered or incorporated**. However, the court leaves a crack open for "exceptional" cases, where contacts are so extensive and of such a nature as to render them at home in the forum.
- Is a minimum contacts analysis required? The court was split in *Burnham*. Scalia argued that personal service in the forum requires no minimum contacts analysis. Brennan, citing *Shaffer*, argued that jurisdiction based on service in the forum results from minimum contacts.

iv. Minimum contacts

- Under *International Shoe*, D's contacts with the forum can establish specific jurisdiction, meaning jurisdiction over any claims arising from D's contact with the forum.
- (1) Look for a **long-arm statute**. If it's too narrow to apply, recommend a *QIR-2* action. If the claim arises under federal law and no state court has jurisdiction, 4(k)(2) establishes jurisdiction through service. If there's no long-arm, proceed under the assumption that one exists, authorizing jurisdiction not inconsistent with the State and Federal Constitutions.
- (2) Did D have **minimum contacts** with the forum state? There must be an intentional **"reaching out"** to the state.
    - (a) Did D **"purposefully avail"** herself of the benefits of the state? (*Denckla*)
        - **Scope**: Purposeful availment might include using a state's roads, selling a product to a state's consumers, or entering into a bilateral contract with a citizen of the state (*Burger King*). Even a **single contact** can constitute purposeful availment (the offer to reinsure

in CA, *McGee*).
        - **Stream of commerce, the *American Radiator* approach**: in *American Radiator*, a company was subject to jurisdiction in IL due to their producing a valve **"in contemplation of use"** in IL. Brennan's concurrence in *Asahi* follows this logic: he argues that a company with **regular and anticipated flows** to the forum cannot claim to have not foreseen the possibility of litigation. In *Nicastro*, Ginsberg argues that **general foreseeability** (targeting of the U.S.) would establish contacts, while Breyer argued that contacts would kick in at a certain volume without specific targeting of the forum. 5 justices leave open the possibility of J without specific targeting.
        - **O'Connor's approach**: In *Asahi*, O'Connor argues that there must be clear evidence that D seeks to serve the market of a state. Kennedy's plurality decision in *Nicastro* follows suit, arguing that volume is irrelevant; there must be **conscious volitional targeting** (*specific* targeting of the forum) to establish contacts. However, note that in both *Asahi* and *Nicastro*, the defendant was a foreign corporation; it's unclear if these holdings apply to American corporations.
        - While it isn't clear whether there will be jurisdiction over a manufacturer where a distributor resells, there will certainly be jurisdiction where a manufacturer sells directly.
        - **Upstream manufacturers**: See *American Radiator* (a manufacturing defect in PA was considered a tort in IL, where the good was sold). Courts draw a **bright line at the end of the manufacturing process**, and will not find liability for companies upstream when a consumer takes a product into another state.
    - (b) If there was no purposeful availment, were D's actions **"aimed" at the state**? In *Calder*, the court held that D's tort, targeting a CA citizen, established personal jurisdiction in CA.
    - (c) Finally, are one's contacts with the forum such that it was **reasonably foreseeable** she would be haled into court?
        - **Mere contact** with someone from the forum state does not establish minimum contacts. In *Walden*, the court rejected the notion that a false affidavit regarding an interaction with a NV citizen was a tort aimed at NV.
        - Selling a product that, through the **consumer's unilateral action**, lands in the forum does not establish contacts. The court in *World-Wide Volkswagen*: "Every seller of chattels would in effect appoint the chattel his agent for service of process". However, contacts can still be found if D targeted the forum.
        - **"Three lug/Four lug"** problem: would it be fair, or even possible, to force a manufacturer to account for each state's idiosyncratic regulations?
- **Fairness**: does exercising jurisdiction comport with fair play and substantial justice? This is known as Brennan's "Fairness test" in *Burger King*, adopted by

O'Connor in *Asahi*. However, in *Nicastro*'s plurality opinion, Kennedy concludes that jurisdiction is in the first instance a question of authority rather than fairness. And in *Burnham*, Scalia argued that because service in the forum constitutes a traditional base of jurisdiction, no minimum contacts analysis (and therefore no fairness analysis) was required.

- Is there an **unconstitutionally grave burden on D**, putting her at a *severe* disadvantage in litigation?
- Does the forum **state have an interest**? In *Asahi*, the two litigants were non-citizens; CA had little interest.
- Does this forum serve P's interest in convenient and effective relief?
- Does this forum serve the interstate judicial system's interest in obtaining the most efficient resolution of controversies?
- Does this forum serve the shared interests of the several states in furthering substantive social policies?

v. Jurisdiction by necessity

- If there is nowhere else to litigate an important claim, an equitable doctrine kicks in to prevent the dispute from falling through the cracks. *Perkins* may fall under this umbrella (foreign corporation had "continuous and systematic" contacts with OH, establishing general jurisdiction during WWII).
- Rule 4(k)(2) (see above) establishes jurisdiction through service in federal claims where no state court has jurisdiction.

II. Federal question jurisdiction

- Federal question jurisdiction is one of two grounds for **subject matter jurisdiction**. The other ground is diversity jurisdiction. You can't consent to subject matter jurisdiction.
- Patent claims fall under federal question jurisdiction.

i. Federal causes of action

- Constitutional authority for federal courts to hear claims arising under the Constitution or federal law derives from Art. III § 2. This authority is broad; under *Osborne's* "ingredient test", virtually anything involving federal law arises under it.
  - Remember, state courts have concurrent jurisdiction unless Congress gives the federal courts exclusive jurisdiction for a cause of action.
- However, federal courts only have the judicial power Congress entrusts to them. §1331 has been construed *more narrowly* than Art. III, even though the language is the same.
- *Mottley* establishes the **well-pleaded complaint** rule: the part of P's complaint supporting her right to relief must raise a federal issue (unless the state claim is completely preempted by a federal cause of action). The court does not consider any anticipated federal defenses or counterclaims.
  - Holmes' creation test: a suit arises under the law creating the cause of

action. If you can draw a ladder from the face of P's complaint to a federal cause of action, the suit arises under federal law.

- **Protective jurisdiction**: A federal cause of action is formed directly from the Constitution when the federal interest is strong enough. In *Bivens*, the court applied this when an agent of the federal government acted in violation of the Fourth Amendment.
- **Federal law borrowing state law**: A statute may implement local laws or customs. In these cases, jurisdiction is best left in the hands of state courts, which have more familiarity with those issues. (*Shoshone*)
- Though a 12(b)(1) dismissal for lack of jurisdiction *is not* on the merits, once a court has exercised jurisdiction, a later dismissal based on the court finding no federal issue applies *is* on the merits.

ii. State causes of action

- Under *Smith*, if the vindication of P's right under state law turns on some construction of federal law, the case arises under federal law.
    - Is there a controversy of law? If so, federal courts may be more inclined to hear the case, as in *Smith*.
    - If Congress has not created a private federal remedy, it weighs against federal question jurisdiction. As the court in *Merrell Dow* explained, this suggests Congress never intended the law to be used in court between private litigants. However, this is tempered by *Grable*.
    - In *Grable*, the court asked: (1) Is there a strong federal interest in the dispute? (2) Does the claim necessarily raise a disputed and substantial federal issue? (3) Would granting federal question jurisdiction upset the judiciary balance by shifting a large load of cases into federal court?

III. Diversity jurisdiction

- Diversity jurisdiction is another ground for establishing federal subject matter jurisdiction. Look for federal question jurisdiction first.
- Do not forget the amount in controversy requirement.

i. Diversity jurisdiction basics

- Diversity jurisdiction is jurisdiction over claims between **litigants from different states**. Authority comes from Art. III § 2 of the Constitution. However, federal courts only have the judicial power Congress entrusts to them. The statutory grant (§1332) is narrower; it includes an amount in controversy requirement and requires complete diversity (*Strawbridge*), with a few exceptions.
- Because there is no federal question, **state law is applied**.
- Rationale: to prevent bias in state courts against out-of-state litigants, and to encourage competition and cross-pollination between courts.
- **Diversity is tested** on the date the complaint is filed or, if removed to federal court, on the date the removal petition is filed.

ii. Citizenship

- *Strawbridge* held that **complete diversity** is required – no P shares citizenship with any D. A court can drop a non-diverse party through Rule 21.
    - Exceptions to complete diversity: CAFA, accidents involving 75 or more people, and statutory interpleader.
- **Natural persons** are citizens of the state they are **domiciled** in. A domicile is the center of one's life; it is manifested in an intent to stay, and to return to the state when one leaves it. Until a new domicile is established (one has arrived and intends to stay), the old one remains intact. When **domiciled abroad**, U.S. citizens are not citizens of any state, therefore, they do not fall under diversity (or alienage) jurisdiction.
- A **corporation's citizenship** is judged by the location of its principal place of business, which in *Hertz* is defined as its **"nerve center"** (normally a headquarters, where officers control the corporation's activities). A corporation is also a citizen of any states in which it is **incorporated**. In a shareholder derivative action, the corporation is put on the side of the D for purposes of citizenship.
- **Unincorporated associations** take on the citizenship of all of its members.
- A **fiduciary** takes on the citizenship of the decedent, infant, or incapacitated party they represent. However, an insurer does not take on the citizenship of a party they insure.

iii. Amount in controversy

- A diversity suit must meet the minimum amount in controversy, which is set in statute and subject to change. The current minimum amount in controversy is **$75,000.01**.
- If both sides agree a party is liable for damages but disagree on the amount, the amount in controversy is the difference between the two amounts.
- The amount in controversy is based on P's claim **made in good faith**. To override it, it must appear to be a legal certainty that the actual amount is less.
- Aggregation to meet the amount in controversy:
    - **Multiple claims against the same D**: Aggregate.
    - **Claims against multiple Ds**: Don't aggregate unless Ds are jointly liable. If P claims that one or the other of two parties is liable for damages meeting the amount in controversy requirement, the requirement is met for both parties.
    - **Multiple Ps**: don't aggregate unless Ps have a single and undivided interest. However, under *Allapattah*, supplemental jurisdiction allows you to ride the coattails if one P meets the amount in controversy (unless D is joined under Rules 14, 19, 20, or 24).
        - Aggregation is allowed under CAFA.

iv. Alienage jurisdiction

- Alienage jurisdiction is jurisdiction over claims **between an alien and a U.S. citizen**. This extends to aliens with temporary or permanent U.S. residency. If an

alien is a permanent U.S. resident, normal diversity requirements apply.

- Rationale: Alienage jurisdiction signals the importance of these cases to the U.S., and prevents state interference with foreign policy matters.
- There is no alienage jurisdiction between two aliens, between citizens and stateless aliens, or between citizens and aliens that are permanently residing in the same state. In the case of U.S. citizens who have dual citizenship, only the U.S. citizenship is considered.
- Normal amount in controversy requirements apply.
- A U.S. citizen domiciled abroad cannot invoke diversity or alienage jurisdiction.

v. Exceptions to jurisdiction

- Federal courts generally decline to hear **domestic cases**, such as those involving divorce, alimony, or custody. However, they will hear intra-familial tort cases. (*Ankenbrandt*)
- Federal courts generally do not interfere with **state probate proceedings**. However, assuming it doesn't interfere with those proceedings, federal courts may adjudicate disputes over torts relating to probate claims. (*Marshall*)
- When a claim has been **assigned** to a party in order to manufacture diversity, the court may look to the citizenship of the actual P to determine diversity. When parties have been **collusively joined** to defeat diversity or add a home-state D, the court may sever the misjoined parties under Rule 21.

IV. Removal jurisdiction

i. Removing to federal court

- When P files in state court, **D can remove** the entire case to the federal court embracing the state court if the case could have been brought there in the first place. In federal question cases, removed state claims are within the federal court's supplemental jurisdiction.
- **D cannot remove on a federal defense or counter-claim**.
- All Ds must agree to removal.
- State court proceedings are then "frozen". If there is no objection, the case will proceed in federal court. If P does object, she can file a motion to remand.
- Special rules for diversity cases:
    - **No removal if any D is a citizen of the forum state.**
    - Diversity between P and an out-of-state D and amount in controversy are tested on the date the removal petition is filed.
    - CAFA allows you to remove with minimal diversity if the amount in controversy exceeds $5mm in aggregate.

ii. Preventing removal

- By (1) excluding federal questions in the pleading and (2) busting diversity, naming a home-state D, or limiting the amount in controversy, P can "pin" D in

(often P-friendly) state court.

- In response, D can argue that a federal issue was obscured or omitted through artful pleading, that a party was misjoined (and should be severed under Rule 21), or that the actual amount in controversy is higher.
- If a class has not been certified, a promise that the proposed class will not exceed a $5mm amount in controversy will not keep a class action in state court.

V. Supplemental jurisdiction

i. Basics of supplemental jurisdiction

- Art. III § 2 of the Constitution gives federal courts the power to hear **"cases or controversies"** over which they have subject matter jurisdiction. Supplemental jurisdiction allows a federal court to hear an entire case, even if some of the causes of action lack federal subject matter jurisdiction. It is codified in USC §1367.
- Whether claims are part of the same case or controversy is determined by asking whether the claims share a **"common nucleus of operative fact"**.
- Courts may decline to exercise supplemental jurisdiction when Congress signals a contrary intention.
- Settlement: In a federal question case, the hook that a pendent claim latches onto disappears with a settlement. Breach is therefore handled in state court, not federal (*Kokkonen* problem). This can be avoided by including a "retention of jurisdiction" clause.

ii. Claims invoking supplemental jurisdiction

- For federal question cases (§1367(a)):
    - Pendent claims: a claim without federal subject matter jurisdiction "pendents" onto a claim with federal subject matter jurisdiction, because they share a common nucleus of operative fact.
    - Pendent party claims: a claim without federal subject matter jurisdiction against one D "pendents" onto a claim with federal question jurisdiction against another D, because they share a common nucleus of operative fact.
- Impleader claims (and resulting compulsory counterclaims)
    - However, no supplemental jurisdiction for claims by the original P against third party Ds. It does an end run around diversity. (*Kroger*)
- Compulsory counter-claims
- Cross-claims
- Ps who join under Rule 20: supplemental jurisdiction allows riding the coattails for the amount in controversy, but does not obviate the diversity requirement.
- Ps who join under Rule 23: unnamed Ps do not need to meet diversity requirements provided the named plaintiffs do, and do not need to meet amount in controversy requirements provided at least one named plaintiff does.
- Or any other claims sharing a common nucleus of operative fact with a claim the court has subject matter jurisdiction over.

iii. Special restrictions for diversity cases:

- §1367(b): **No supplemental jurisdiction** in diversity cases **for claims by original P** *against* people named parties under Rule 14 (**third party D**), Rule 19 (**compulsory joinder**), Rule 20 (**permissive joinder**), or Rule 24 (**intervention**). The general rule in diversity cases is that supplemental jurisdiction applies where the claimant is in a defensive posture. We don't want to allow P to do an end run around diversity.
- Also in §1367(b): **No supplemental jurisdiction** in diversity cases for parties **proposed to be joined as Ps** under Rule 19 (compulsory joinder) or Rule 24 (intervention).
- There is a hole for parties proposed as Ps under Rule 20 and 23. The amount in controversy may fall under the court's supplemental jurisdiction, but the diversity requirement is not waived, as that would overrule *Strawbridge*.

iv. Court's discretion

- §1367(c) provides that the court may decline to exercise supplemental jurisdiction when:
    - A claim raises a **novel or complex issue of state law**.
    - The **state claim predominates** over the claim with federal subject matter jurisdiction.
    - The court **dismisses all claims** over which it has federal subject matter jurisdiction. However, if the federal claim falls out late in the litigation, the court may allow the non-federal claim to proceed.
    - There are other compelling reasons to decline.
- When a court uses its discretion and declines to exercise supplemental jurisdiction:
    - The original claim stays in federal court.
    - The state claim is dismissed without prejudice; it is not precluded under *res judicata*.
    - The statute of limitations is tolled while the case is pending and for 30 days after dismissal.

VI. Venue

i. Basics of venue

- **P chooses the venue**, subject to statutory limitations. D must raise objections to venue in a timely manner or they will be waived.
- State courts are laid out in political subdivisions, like counties. In **local actions** (actions pertaining to real property), venue is only proper in the counties in which the land is located. In **transitory actions**, consult the state statute for the "laundry list" of factors (e.g., residence, employment).
- Federal courts are laid out in federal districts. There is no distinction in the federal

system between local and transitory actions.
- Venue can be waived by failure to raise it or by forum selection clause.

ii. USC §1391 rules of venue

- §1391(b)(1): **If all Ds are in one state**, venue is any district a D resides in.
    - **Natural persons** reside where they are domiciled.
    - **Non-residents** reside in any judicial district.
    - **Business associations** reside where they are subject to a court's jurisdiction with respect to the claim – where they are incorporated, headquartered, or have minimum contacts. However, if there are **multiple districts in a state**, each district is treated like a state and tested for minimum contacts; proper venue is any district with sufficient contacts for jurisdiction. If no such district exists, the business resides where it has its most significant contacts.
- §1391(b)(2): Venue is proper in any district **where substantial parts of the act or omission** giving rise to the claim occurred (for example, where a defective product was manufactured or caused injury).
- §1391(b)(3): Only if there are no districts that are a proper venue under (b)(1) or (b)(2): venue is proper in any court with personal jurisdiction with respect to the action.
- **In the case of removal, proper venue is the federal district embracing the state court.**

iii. Transfer

- Cases can be transferred **within the same system**. The burden to show transfer should be granted falls on the party requesting transfer. The court is more likely to grant transfer early on in a case.
- Transfer is granted by the transferor court. The transferee court must be a court where the action could have been brought. **Personal jurisdiction and venue must be established**, not merely consented to.

iv. Transfers when the current venue is proper

- §1404 transfer: the current venue is proper. Transfer is for purposes of **convenience**. The court tries to determine the case's **center of gravity** based on the *Gilbert* factors:
    - Public factors
        - Administrative difficulties (such as overloaded dockets)
        - Local interest in the dispute
        - Court's familiarity with applicable law
    - Private factors
        - Ease of access to evidence
        - Convenience of the parties
        - Convenience of the witnesses
        - Possibility of view of the action

- In a diversity case, the transferee court must **apply the same choice of law rules** (which may include statute of limitations) as the transferor court (*Van Dusen*). There is a change of venue, but not of law. This prevents D from transfer forum shopping. In *John Deere*, P was granted transfer to PA, trapping the choice of law rules (and therefore the statute of limitations) of MS.

v. Transfers when the current venue is improper

- §1406 transfer: the current venue is improper. **Choice of law and statute of limitation rules don't transfer over**.
- §1631 transfer: a court transfers for lack of jurisdiction. Likely refers to subject matter jurisdiction.
- *Goldlawr* transfer: the transferor court **lacks personal jurisdiction**.

vi. Forum selection clauses

- Forum selection clauses are enforced under §1404; they do not make a venue improper – venue is determined by §1391.
- **Forum selection clauses are given controlling weight** in all but the most exceptional circumstances.
- If the clause specifies a state or foreign court, a federal court should dismiss on *forum non conveniens* grounds.
- **Law does not transfer**.
- A forum selection clause may serve as a waiver of objection to **personal jurisdiction**.

vii. Forum non conveniens

- A case may be dismissed so that it can be tried in a more appropriate forum that is in a **different judicial system**.
- **P's choice of venue is given deference**. But P cannot vex D with an unfavorable forum. Much less deference is given if P is foreign and taking advantage of favorable tort laws (*Piper*).
- D must show the **alternative forum is clearly more appropriate**. The court considers the *Gilbert* factors:
    - Public factors
        - Administrative difficulties (such as overloaded dockets)
        - Local interest in the dispute
        - Court's familiarity with applicable law
    - Private factors
        - Ease of access to evidence
        - Convenience of the parties
        - Convenience of the witnesses
        - Possibility of view of the action
- In *Piper*, the court also considered the convenience of having a single case and whether the complexity of such a case would confuse jurors.
- **Inadequate remedy** in the alternative forum does not prevent dismissal unless

the remedy is so inadequate that it is no remedy at all. (*Piper*)

viii. Multidistrict litigation §1407

- When several cases have common questions of fact and law, they may be transferred to one venue for convenience, efficiency, and fairness/justice.
- The Judicial Panel on Multidistrict Litigation decides on the transfer.
- The venue is used for pretrial purposes and coordinated discovery.
- Presence of disparate legal theories does not prevent consolidation.
- Mandatory remand: the court cannot assign the case back to itself; it must go to the original court for trial.

VII. Notice

i. Service of process

- D must be given notice of a pending suit through service of process.
    - (1) D must be served process (the complaint and summons)
    - (2) by a person at least 18 years old and not a party
    - (3) within 120 days of the complaint being filed
    - (4) and must have adequate time to respond.
        - In *Roller*, the court held that five days wasn't adequate time for an out-of-state D; in *War Eagle*, the court held that a week wasn't adequate time for an eviction proceeding.
- Special cases:
    - **Extreme inconvenience**: notice must also be given of the right to change venue or appear in writing. (*Aguchuk*)
    - Rationale must be given for **federal benefits** being cut off. (*Finberg*)
    - Special rules may require postponing or suspending hearings if the person being served is a **military servicemember**.
- Exceptions:
    - **D may waive formal service** in some jurisdictions. D may do so because she may have to bear the expense of formal service otherwise.
    - **Cognovit note**: a debtor waives service, consents to jurisdiction, and a creditor may enter a confession on behalf of the debtor allowing for judgment, all without notice. This is not a *per se* violation of due process; it's decided on a case by case basis and depends on the equality of bargaining power. (*Overmyer*)
- In NY, a lawyer can issue a summons and serve it prior to filing a complaint. In the federal system, a complaint is filed and a summons granted, then both are served simultaneously.
- If D **contests service**, the burden is on P to prove service occurred. However, if P filed "proof of service", it is prima facie evidence that service occurred, and the burden shifts to D to prove that service did not occur.

ii. Best notice practicable

- *Mullane*: service must be **reasonably calculated, under all the circumstances, to apprise interested parties**. The **best notice practicable** is required.
    - **Actual notice is not required**. In *Dusenbery*, the court held that sending notice to a prison was sufficient even though notice never actually made it to the prisoner.
    - If mailed notice is returned as undeliverable, additional practicable steps must be taken. (*Flowers*)
    - Independent notice is insufficient, though notice by the court may be.
    - Eviction or foreclosure: in *Greene*, the court held that notice posted conspicuously on the premises was not sufficient. Many states required "nail and mail" service. In *Mennonite*, the court held that posting on the premises plus constructive notice was not sufficient.
    - Classes: see “Class Actions”.
- **Constructive notice**: if you know D's name and address, constructive notice will not suffice.
    - Constructive notice may be used when **all other means are impracticable**. For example, when parties can only be ascertained through great expense, or are speculative (*Mullane*), or when P has diligently tried, but failed, to notify with mail or personal service. In *Dobkin*, D could not be located; constructive notice plus notice by mail to the last known address was permissible.
    - Appointment of *guardian ad litem* may be required.

iii. Notice under Rule 4

- Service under 4(e)(2):
    - **Personal service in the forum**: best efforts count; **drop serving** is allowable. However, tricking D into the forum doesn't count, nor is service when D is in the state to attend another case.
    - **Substituted service**: service on a person of suitable age and discretion residing at D's current dwelling.
    - **Service on an agent** by appointment or law.
- Service under 4(e)(1):
    - Service is proper by any methods used by the courts of (a) the state where service occurs or (b) the state in which the federal court is located.
- **Corporations**: service on agent/officer of corporation or under 4(e)(1).
- ***In rem*:** 4(n) requires notice to claimants of attached property.
- **International parties**: under 4(f), any internationally agreed upon means of service reasonably calculated to give notice is sufficient.

iv. Notice and jurisdiction

- A federal court can establish personal jurisdiction through service of process in the following ways:
    - Personal service in the forum.

- Serving a party joined under Rules 14 or 19 within 100 miles of the federal courthouse.
- Serving a party outside of the forum in an interpleader or jurisdiction out of necessity case.
- In federal question cases where no state has jurisdiction, service outside of the forum.

VIII. Pretrial seizure

i. Basics of pretrial seizure

- There must be an **opportunity for D to be heard** in the event of pretrial seizure. (*Sniadach*) Seizure before an opportunity to be heard is only appropriate when protective seizure is needed, or in rare cases in which seizure is needed to secure a governmental or public interest.
- *Lis pendens*: alerts potential buyers of real property that litigation is pending, without opportunity for D to contest. Upheld in *Diaz v. Patterson*.
- One's interest in a property may be forfeited through the use of the property, even if one is unaware of that use. (*Bennis*)
- *Doehr* adopted the *Matthews* tripartite test to determine whether there was sufficient opportunity to be heard:
  - (1) **What is the private interest affected?**
    - How great was the hardship on D?
    - How long does D have to wait to be heard and have an opportunity to reclaim the property?
  - (2) **What are the risks of erroneous deprivation?**
    - Was seizure granted by a judicial officer or a clerk?
    - Was the seizure pre or post hearing?
    - How specific were P's facts? What was the nature of her burden? Was P under oath?
    - Is the alleged offense amenable to documentary evidence?
    - Was a bond required by either party?
  - (3) **What are the interests of the party seeking seizure and the government?**
    - Does the party have a pre-existing interest in the property?
    - Is there a need for protective seizure?

ii. Cases for comparison – no pre-seizure hearing

- **Seizure was found to violate due process:**
  - *Sniadach*: P had no interest in the property.
  - *Fuentes*: Seizure was authorized by a clerk, not a judge.
    - However, there was a bond requirement, opportunity to reclaim, and an interest in the property.
  - *Doehr*: P had no interest in the property. There was no need for protective seizure. No bond requirements. Evidence of hardship. No evidence of

need for protective seizure. No P bond requirement. Minimal pleading requirements. Clam wasn't amenable to documentary evidence.
    - *Goldberg*: Extreme hardship created by rescission of government benefits.
    - *North GA Finishing*: No speed post-seizure hearing. Authorized by a clerk, not a judge.
        - However, there was a bond requirement.
- **Cases where seizure was not found to violate due process:**
    - *W.T. Grant*: Evidence of need for a protective seizure. P had a shared interest in the property. Granted by a judge, not a clerk. Detailed pleading requirements. Speedy reclamation.
    - *Shaumyan*: P had an interest in the property. Claim was amenable to documentary evidence.
    - *Eldridge*: Hardship created by rescission of government benefits, but not to the extent in *Goldberg*. *Eldridge* establishes a three-factor test for cases involving the revocation of government benefits:
        - (1) What is the private interest that will be affected?
        - (2) What is the risk of erroneous deprivation?
        - (3) What are the government's interests?

IX. Pleading

i. Framing the issue

- There are several points in a case where the judge has discretion to decide on a case. The judge may decide on a motion for summary judgment, direct a verdict, or overrule a verdict with Jury NOV. How onerous should the requirements be just to get in the door?
- In an information asymmetric setting, D may have information P needs for her claim. Allowing discovery to proceed evens the playing field. However, we want to avoid discovery being used as a fishing expedition, or as mere leverage for a settlement.

ii. Basics

- Under Rule 8(a)(2), the complaint must have a **short and plain statement of a claim for which relief can be granted**.
- D can challenge the pleading under a motion to dismiss for failure to state a claim (Rule 12(b)(6)). This alleges that, even if everything P says is true and **the facts are viewed in a light most favorable to P**, she still hasn't alleged facts that establish a legally recognizable claim for which relief can be granted.

iii. Two ways to argue pleading

- (1) *Conley* stands for the proposition that a judge must make sure there is **no set of facts** that could support the claim before it's thrown out. The purpose of pleading is simply to **give fair notice to D** of the claim and the grounds for it ("notice pleading"). There are plenty of other points at which a judge can decide a

case. The pleading stage just allows P to get her foot in the door; merits can be sorted out later. Don't shut out D prematurely, especially in information asymmetric settings.
    - *Twombly*: in antitrust, conscious parallelism alone isn't enough evidence of collusion. Court is trying to prevent **"inference creep"** by the jury.
    - *Iqbal*: limited to qualified immunity cases (respondeat superior doesn't apply). We don't want to needlessly encumber public officials trying to do their jobs.
    - *Bell* and *Iqbal* are context-specific; the court heightened pleading requirements because it was necessary to do so under the circumstances, to preclude intuitive processes ("**inference creep**") a jury may be subject to.
- (2) *Twombly* and *Iqbal* **overruled *Conley***. Pleading requirements have been heightened; P must raise the right to relief beyond a speculative level, **from possibility to plausibility**.
    - Mere restatements of elements are legal conclusions, not facts. They are not entitled to the presumption of truth
    - The pleading must raise a reasonable expectation that discovery will reveal evidence of the claim. Plausibility may be determined in light of reasonable **competing explanations**.
    - Case management will not suffice to weed out bad claims and prevent abuse of discovery process.
    - *Twiqbal* is **transsubstantive**.
- So which is it? In *City of Shelby*, the Supreme Court stated that the requirements of *Twombly* and *Iqbal* were met when "petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." The court is indicating that **it does not intend for *Twombly* and *Iqbal* to heighten pleading requirements in general**. Like *Pardus*, this is a warning label affixed to *Twiqbal*, urging restraint upon the lower courts. The language of *Conley* "earned its retirement", but the underlying principles remain operative.
- Remember to recommend a **limited, phased discovery** to prevent discovery abuse while still giving P access to needed facts.
- *Swierkiewicz*: **No heightened pleading requirements in Title VII cases**; no need to establish prima facie case, which is an evidentiary standard. *City of Shelby* affirms there is no heightened pleading requirement, and failure to invoke §1983 in a pleading is not grounds for dismissal.

iv. Fraud and misrepresentation

- When a complaint alleges fraud or misrepresentation, there are heightened pleading requirements under Rule 9. Under *Makor*, P's evidence must show a **strong inference of scienter**. The strength of such evidence must be at least as compelling as any opposing evidence of an innocent alternate explanation.
    - Scalia argues for comparison against the presumption of innocence, in other words, P's evidence must outweigh alternate explanations.
- Under *Iqbal*, the court need not credit conclusory statements without reference to

factual content.

X. Vertical choice of law

- The question is whether a state rule should apply in a ***federal diversity court***. The **Rules of Decision Act** establishes the general principle: **state law applies absent a federal provision**. Before *Erie*, federal courts recognized state statutory law, but not state case law. *Erie* interprets the RDA to **include state case law**. States have the authority to determine substantive rights in that state. Federal law must defer to state law except for procedural matters.

i. When there is a federal provision

- When there is a **federal procedural provision** from the Constitution, statute, or Federal Rules of Civil Procedure, it is **"presumptively procedural"** (*Hanna*)
- First, determine if the federal provision **"on point"**.
    - The provision must be broad enough to control the issue, causing a conflict with state law. If the state and federal laws can exist side-by-side, there's no reason to knock out the State rule.
        - Though the plain text of the federal and state provisions may not collide, a narrow federal provision may still be found to comprehensively address an issue. In *Crawford Fittings*, the court held that a federal statute that specified items that may be recovered as costs in a trial implicitly rejected recovery for other items recoverable under a state provision.
    - In *Gasperini*, the court found there was no collision between Rule 59 and a NY law creating a de facto damage cap. However, they did hold that applying the rule in federal Courts of Appeal would be a violation of the 7th Amendment. Finding the state law to be substantive, the court upheld the rule, but shifted it into trial court. This balanced approach accommodated the state interest.
    - In *Shady Grove*, the court found the meaning of Rule 23 was on point and not open to construction. Therefore, there was no need to go into the "swamp of Erie", even if the state rule was substantive. However, Ginsberg argued that the collision was manufactured by construing the rule broadly.
- Then ask if it is **valid constitutionally** ("really procedural") and under statute.
    - ***Specifically for FRCP:*** this is the same test. Federal rules were created under statute (§2072, the codification of the REA), and the §2072 tests whether the provision is procedural.
        - §2072(a): is the rule **rationally capable of classification as procedural?** For example, statute of limitations. Note that SCOTUS has never struck down a rule on these grounds, citing oversight in creating rules.
        - §2072(b) Does it **abridge/enlarge/modify any substantive right?** Scalia's plurality opinion in *Shady Grove* felt this was answered by asking whether a rule is "really procedural". But Stevens argues for

considering the state's interests. He says that if the federal rule displaces a state rule bound up in substantive right or remedy, the federal rule must give way.
        - When in doubt, the court has tended to assume a narrower interpretation to avoid a rule being held invalid under §2072.
- If the answer to both questions is "yes", apply the federal directive.

ii. When there is no valid federal provision

- **Neuborne has emphasized "Deep Erie"**, and has not treated any of these tests as subsidiaries of any others.
- *Erie* holds that laws concerning the **state's definition of rights or obligations**, such as elements of a claim or defense, are substantive. In such cases, the RDA governs, and the state law must be applied.
- Is the rule **bound up** with the state's definition of rights or obligations? This includes choice of law rules (*Klaxon*) and burden of proof rules (*Cohen*). Apply the state law.
- Frankfurter's **outcome-determinative** test (*York*): a federal court in diversity is merely an extension of the state court. Outcomes should be substantially the same. It may be helpful to consider "wholesale", as opposed to "retail" outcomes.
    - Critique: everything is outcome determinative at some point; in *York*, a state statute of limitations rule applied despite being procedural. The "triple play" cases demonstrate that this approach, followed to its logical conclusion, endangers the federal rules.
- *Hanna* (part 1): Would vertical disuniformity **encourage forum shopping or promote litigant inequality?** This is sometimes called the *twin aims* test; it's another perspective on outcome-determination.
    - However, this again may not be responsive enough to the procedural-substantive divide.
- *Byrd* balancing test: **weigh the state and federal interests**. If there is a strong federal judiciary interest and a weak state interest, the federal rule can be applied. The federal judiciary has an interest in preserving its essential character and function. In *Byrd*, the question was distribution of trial functions between judge and jury; the state law went against the influence, if not the command, of the 7th Amendment.
- Deep Erie (Harlan's test): **will this rule affect primary (pre-event) behavior?** If so, the rule is substantive, and state law should be applied.
    - Gets to the heart of the *Erie* substantive-procedural distinction. Best if viewed in context; doesn't address procedural rules "bound up" in substantive rights.
- Does the rule have **democratic imprimatur?** Rules codified by legislature tend to outweigh judge-made rules.

iii. Conflicts of law

- In *Klaxon*, the court held that federal courts must **apply the choice-of-law rules of the states in which they sit**, in order to promote uniform application of

substantive law within a state.

- *Allstate*: the state whose laws apply must have **significant contacts or an aggregation of contacts** with the parties and transaction, creating a state interest.
- *Van Dusen*: Choice of law transfers with §1404 transfer; change of court, not of law. See "Venue".
- Classes: see "Class actions".

XI. Preclusion

i. Claim preclusion

- **Two parties cannot relitigate the same claim**. When P wins a judgment, the claim is **"merged"**; when P loses, the claim is **"barred"**. This rule increases judicial efficiency, and avoids the burdens of expensive, long, and vexatious suits. It serves to preserve the integrity of judgments and promote stability.
- A claim encompasses **a single transaction**; they involve a common nucleus, a bundle of linked issues.
    - Neuborne's test: do the same underlying facts of Case 1 control Case 2? In other words, does Case 1 make Case 2 a mere formality?
- **You can't split a transaction up**, even if there are multiple causes of action or theories of recovery. Failure to raise part of a claim will result in the remainder being precluded in future actions.
- However, two claims relating to the same subject are not necessarily part of the same transaction. In *Linderman*, a party sued to recover damages from a contract the defendant argued was obtained through fraud. Later, the defendant brought suit for the fraud. The court held that the breach claim and the fraud claim were driven by different facts; the transactional line into compulsory counterclaim was not crossed.

ii. Adjudication on the merits

- If adjudication is not on the merits, there will be no bar to future claims. If an adjudication is on the merits, courts will *usually* bar future claims, depending on state rules.
- Under Rule 41(b), dismissal for lack of jurisdiction, improper venue, failure to join an indispensable party, or any other reason the court specifies, is not adjudication on the merits.
- Dismissal due to statute of limitations is not an adjudication on the merits.
- A 12(b)(6) dismissal is an adjudication on the merits, since the court must evaluate the pleading. (*Rinehart*) However, when a court expressly states that a dismissal is without prejudice, it is not on the merits.
- Summary judgments are on the merits.

iii. Counterclaims

- If D has a counterclaim arising from the same transaction as P's claim, she must

raise it. This is a **compulsory counterclaim**. Failure to raise a compulsory counterclaim results in D being barred from raising the issue in a later action.

- You can't use a counterclaim to offset damages, then sue on the remainder. The court in *Mitchell* stated that **you cannot use the same defense, first as a shield, and then as a sword**.
- NY has no compulsory counterclaim and it has a very generous D preclusion rule. However, in federal courts, Rule 13 is much more stringent. (See: "Joinder")

iv. Other cases of claim preclusion

- **Acceleration clauses**: In *Jones*, a clause made the entire balance of a car due upon default, but the bank sued for only two months' payment. The court found there was a single, indivisible transaction that was now settled by the payment.
- A judgment pertaining to conduct does not preclude a future claim when said **conduct is continuous or renewed**.
- **Changes in law** will not prevent res judicata from operating once final judgment has been rendered. A failure to appeal a court's judgment means you are bound by it, regardless of intervening changes. (*Moitie*)
- When a legal theory cannot be joined due to **jurisdictional restrictions**, it will not be precluded.
- Failure to assert a supplemental claim may preclude, but won't preclude if the court uses its discretion not to exercise supplemental jurisdiction.

v. Issue preclusion

- Issue preclusion: **a party cannot relitigate the same issue** (a definition of law or finding of fact). If two claims raise the same issue, the second court must apply the findings of the first court with respect to that issue. For example, in *Outram*, D was estopped from averring title to a mine in a trespass action because he had been unsuccessful in making the same defense regarding the same mine before.
- There are three requirements for an issue to be precluded:
    - (1) The issue must be **actually litigated and decided**, in a full and fair proceeding.
        - **Settlement** of an action has no issue preclusive effect.
        - **Default judgments** are not litigated (though the 11th Circuit held that default judgment as sanction for refusal to participate in discovery is preclusive).
        - In a **specific verdict**, the jury decides on a number of specific issues. Those necessary to the verdict are precluded (this may not be explicit). But in a **general verdict**, it may be unclear which issues are decided on. In *Russell*, the court decided the record was too unclear on what issues were raised, and would not apply issue preclusion unless extrinsic evidence clarified the record.
        - R2 says that if there are **alternative grounds** in a general verdict, none of them should preclude. Some courts allow issue preclusion in these circumstances when the same set of issues are being decided in the same circumstances. However, if D raises two

defenses, both of which fail, she is precluded from raising either one again, as both were decided on, and doing so was necessary to finding her liable.
    - (2) The issue must have been **necessary to the judgment**.
        - In *Rios*, the plaintiff wanted to preclude the finding of his negligence, which was determined in an earlier suit. The court sustained, holding that the earlier finding was **not essential nor material**. Also, when **one is bound by a judgment they cannot appeal** because they suffered no legal consequences, courts are more likely to make an exception to issue preclusion.
        - **Holding**: The narrowest theory that resolves this case. Departing from a holding retroactively (rejecting stare decisis) is a big deal; it changes the law.
        - **Dictum**: judicial discussion, addresses how other cases might turn out. A signal as to how the court is thinking. Less binding.
- (3) Quality of adjudication: administrative proceedings are given deference under full faith and credit, but not if the tribunal isn't serious. There must be a court-like atmosphere of procedural fairness and careful rules that give its findings credibility.

vi. Other exceptions to issue preclusion

- Relitigation is permitted if it was **not sufficiently foreseeable** that a precluded issue would arise later, causing a party not to fully litigate. Hand: "a trivial controversy might bring utter disaster in its train."
- Differences in allocation of burden of proof in the first trial may give a court reason not to issue preclude.
- Cases of fraud.
- *Nolo contendere*.
- Claims are extremely unrelated or there has been a change in the applicable legal context.
- Separate negotiable interests, such as bond coupons, are separate claims/issues; claims about one don't preclude future claims about others. (*Cromwell*)

vii. Parties bound by issue preclusion

- Only the parties to the first suit are bound by issue preclusion. *Taylor* ended the virtual issue or claim preclusion, in which one party was estopped if their interests were represented by a party in an earlier suit. However, the court did lay out six exceptions:
    - (1) The new party **agrees to be bound**.
    - (2) The parties have a substantive legal relationship (they are **"in privity"** with the first party). This is sometimes arises in cases involving inheritance, succession, or purchase.
    - (3) The new party was **adequately represented** in the first suit (such as class action or suits by trustees or guardians). This is narrow. In *Lynch*, P elected not to participate in a consolidated trial raising identical claims

against a drug company. The court held that she was issue precluded.
    - (4) The **new party assumed control** of the first litigation. In *Montana*, a contractor, financially backed and directed by the U.S., challenged the constitutionality of a tax rule. The U.S. took a separate action challenging the practice. The Montana S Ct upheld the practice in the contractor case. U.S. was estopped in their case: "Although not a party, the United States plainly had a sufficient laboring oar in the conduct of the state-court litigation to actuate principles of estoppel."
    - (5) The new party is a proxy for the first party (**agency**). However: "A mere whiff of tactical maneuvering will not suffice".
    - (6) Under a **special statutory scheme**, such as bankruptcy or probate.

viii. Parties who can invoke preclusion

- The **doctrine of mutuality** held that a party not bound by an earlier judgment cannot use that judgment to bind her adversary. This was struck down in *Bernhard* on grounds of efficiency and fairness. If the targeted party had their day in court, there is no need to litigate the issue again. *Blonder-Tongue* abrogated the mutuality requirement in the federal system.
- **Non-mutual defensive preclusion** is invoked by a new party D defending against P. **Non-mutual offensive preclusion** is invoked by a new party P against D. Who won the first case is irrelevant in determining preclusion in the second.
    - What if the first trial was a bench trial and the second trial is a **jury trial**? In *Parklane*, Scalia says it will not prevent preclusion.
    - These cases introduce the potential for an **aberration** to preclude future cases. For this reason, some courts will ask for a **bellwether case** to determine whether issue preclusion is appropriate.
    - Use of defensive preclusion from an earlier mandatory class action with no notice requirement may violate due process.
- Some jurisdictions allow only defensive preclusion. However, in the federal system, the Supreme Court gave offensive preclusion its imprimatur in *Parklane*, but gave courts **broad discretion** to apply it. Factors weighing against non-mutual affirmative preclusion:
    - There is a **whiff of P fence sitting**. Offensive issue preclusion creates perverse incentive for P to "wait and see", undermining economy rationale.
    - It may unfair to D if she had **little incentive to defend** the first suit vigorously, or if the estoppel is **inconsistent with prior judgments** in favor of D, or if the second action affords D more **procedural opportunities**.
- **Governments are exempt** from non-mutual collateral estopped (*Mendoza*). To hold otherwise would force them to appeal every decision, undermine the evolution of democratic control, and frustrate the court's determination of certiorari. Though *Mendoza* addresses offensive preclusion, most lower courts have applied it to defensive preclusion as well. However, the government is still bound by mutual preclusion.

ix. Use of criminal convictions for issue preclusion

- In *Allan*, the court held that a state court finding in a criminal case precluded an issue in a subsequent civil suit in federal court.
- A guilty plea is not actually adjudicated under R2. However, some courts do grant allocution preclusive effect, to the extent that it pertains to the essential elements of a crime.

x. Full faith and credit

- **Horizontal**: state courts give full faith and credit to other state court decisions. They apply the preclusion rules of the first court.
- **Vertical**: When a federal suit follows a state suit, §1738 requires federal courts to give the earlier judgment the same preclusive effect it would have in state court unless Congress, in creating a statutory right, makes explicit that it wishes to deny a state judgment res judicata effect (for example, Title VII cases).
    - In *Allan*, a failed constitutional claim precluded the issue in federal court, and in *Migra*, a failure to raise a constitution claim precluded the issue in federal court.
- *Semtek*: When a **state or federal suit follows a federal diversity suit**, the court looks to what preclusive effect the case would have in the first court, which in turn would be determined by the preclusive effect in the state courts in which the federal court sits. This prevents forum shopping and inequitable administration of the law.
    - *Semtek* deals with statues of limitations. Rule 41(a) doesn't specify statues of limitations as being not on the merits. Thus, state courts decide whether or not to give a time-barred dismissal preclusive effect.
- Exception: **collateral attack** – virtually all states have rules prohibiting preclusion of a claim beyond the rendering court's jurisdiction, or when previous judgment is the result of fraud.
- Full faith and credit does not apply to non-US judgments. However, courts may recognize foreign judgments in the interest of comity (*Hilton*).

XII. Joinder

- Joinder is used to promote trial convenience, to expedite proceedings, and to prevent multiplicity of litigation.
- Make sure you have personal jurisdiction, subject matter jurisdiction, and proper venue.

i. Transactions

- **Door-opening** transaction or occurrence: the court should allow claims to be heard together because they have a common nucleus; they're a "bundle of linked issues". For example, in *Tenet*, the court held that joinder of plaintiffs was proper; their common claims based on common facts were held to be part of the same "transaction or occurrence".

- **Door-closing** transaction or occurrence: the cases are driven by the same liability facts, such that the court can apply a preclusion context. For example, in *Heywood*, two separate contracts were made in the same timeframe, between the same parties, insured by the same policy, and listed on the same invoice; they were found to be part of the same "transaction or occurrence".
    - But courts aren't uniform in their determination of the scope. Some read this broadly, encompassing everything within a linking narrative between the parties, even if it's not all part of the same claim. They may look for a logical relationship or overlap of evidence in determining whether there is preclusive effect.

ii. Counterclaims (Rule 13)

- Counterclaims are a claim for affirmative relief. They are not necessarily a denial of liability or a defense.
- Rule 13(a) Compulsory counterclaims must be filed; the claims will be precluded in future proceedings.
    - Exceptions: when the counterclaim was subject to a pending action when the original action commenced, when the original claim is *in rem* or *quasi in rem* (meaning D is not actually under the personal jurisdiction of the court), or when a counterclaim would require adding a party over whom the court can't get jurisdiction.
- Permissive counterclaims do not arise out of the same transaction or occurrence as the original claim.
- **Subject matter jurisdiction**: compulsory counterclaims are within the supplemental jurisdiction of the court. However, permissive counterclaims are not; you must independently satisfy subject matter jurisdiction.
- **A counterclaiming defendant can join parties under Rule 19 and 20.** The court has supplemental jurisdiction under §1367(a) over parties joined due to compulsory counterclaims.

iii. Crossclaims (Rule 13(g))

- Crossclaims are **claims between co-parties** that arise out of the same transaction or occurrence. Co-parties are parties that are not formally opposed on a pleaded claim.
- Crossclaims may generate compulsory counterclaims.
- Crossclaims are permissive, however res judicata may make some crossclaims de facto compulsory.
- **Subject matter jurisdiction**: falls under the supplement jurisdiction of the court.
- *Danner* stood for the proposition that P can assert a crossclaim against another P only if D has asserted a counterclaim against them. This rule was designed to prevent a backdoor around diversity. However, this rule is not in 13(g) and has not been widely adopted.

iv. Impleader (Rule 14)

- Impleader is when D alleges that **a third party is liable to her for all or part of P's claims**. This is *not* D claiming she is not liable and offering up an alternate. D can escape liability by defeating the original claim or the derivative claim.
    - D does not need to wait for a judgment against her to implead a third party. The language in Rule 14 allows impleading if one **"may be liable"**. (*Jeub*)
    - D must implead within 14 days of serving answer; otherwise, court must grant permission based on efficiency or prejudice to P or a third party D.
    - When the original claim is dismissed, a third party claim may continue at the court's discretion.
- A third party D may, under the court's supplemental jurisdiction, assert a compulsory counterclaim, file a cross-claim arising out of the same T/O, or file a claim against the original P arising out of the same T/O (this may generate a counterclaim by P, creating a "Kroger circle").
- A third party D may, if she independently satisfies subject matter jurisdiction, assert a permissive counterclaim.
- The original P may, under the court's supplemental jurisdiction, implead a non-party if a claim is brought against her.
- The original P may, if she independently satisfies subject matter jurisdiction, file a claim against a third party D arising out of the same T/O as the original claim (which may generate compulsory counterclaims, permissive counterclaims, and crossclaims).
- **Subject matter jurisdiction**: impleader claims fall within a court's supplemental jurisdiction.
- **Personal jurisdiction**: the court must have personal jurisdiction over the third party D through a traditional base, long-arm, or 100-mile bulge.

v. Joinder of claims (Rule 18)

- Any party that has already asserted a claim for relief against an opposing party can join an additional claim against that party, no matter how related or unrelated the two claims are. Rule 18 joinder is permissive, but res judicata may make some claims de facto compulsory.
- Rule 42 allows the court to separate claims for convenience, to avoid prejudice, to economize or expedite, or to avoid jury confusion.
- **Subject matter jurisdiction**:
    - Is there an independent base of jurisdiction for the joined claim? If the base of jurisdiction is diversity, you can **ride the coattails** under *Allapattah*. However, if the original claim was under a court's supplemental jurisdiction, you can join the claim only if the claims, in **aggregate**, meet the amount in controversy. Remember that in diversity cases, **the amount in controversy must be met for each individual D**.
    - Does the claim arise from the **same transaction or occurrence** as the first claim? If so, §1367 expressly allows supplemental jurisdiction.
        - For federal question cases, this is "pendent jurisdiction".
    - For diversity cases, remember that there is **no supplemental jurisdiction**

over claims by the original P against persons made parties under Rules 14, 19, 20, or 24. P cannot ride the coattails of another P, nor can P circumvent the amount in controversy requirement due to transaction/occurrence.

vi. Compulsory joinder (Rule 19)

- Compulsory joinder is when **a party *must* be joined**. The most common use is by Ds, to get a case dismissed for failure to join such a party. Don't get confused: if P *wants* to join a party, she can use permissive joinder (Rule 20). Make sure you have personal jurisdiction.
- 19(a) **"Necessary parties"** are parties that must be made parties if they can be served and they don't break diversity. The court may compel them to join. Factors:
    - (A) Court can't accord complete relief among existing parties without the person, or...
    - (B) the person has an interest in the action and...
        - (i) disposing of the action will impair the person's ability to protect the interest or...
        - (ii) leave an existing party subject to risk of incurring multiple or inconsistent obligations.
- 19(b) **"Indispensable parties"** are parties that the litigation cannot move forward without. **Equity and good conscience** dictates whether a suit should be dismissed. Factors include:
    - (1) Extent of prejudice to absentee/parties.
        - This on its own may not be enough. In *Provident*, the court, weighing all the factors, decided that although prejudice may occur, it was not weighty enough to dismiss the suit. However, in a limited fund case, the extent of prejudice is more severe.
    - (2) Possibility of framing the judgment to mitigate prejudice.
    - (3) Adequacy of remedy that can be granted in their absence.
        - Public interest in complete, consistent, and efficient settlement of controversies. (*Provident*)
    - (4) Whether P will have adequate remedy if action is dismissed.
        - In interpleader, will party be subject to piecemeal litigation and conflicting judgments? (*Pimentel*)
- **Sovereign immunity**: after *Wichita* and *Pimentel*, commentators note a "near-categorical" rule that a case is to be dismissed under Rule 19 when necessary party cannot be joined due to sovereign immunity.
- **Subject matter jurisdiction**: a party being joined under compulsory joinder must meet amount in controversy requirements and not break complete diversity. You need *in personam* through a traditional base, long-arm or 100-mile bulge.

vii. Permissive joinder (Rule 20)

- Permissive joinder allows P (or counterclaiming D) to join parties **asserting a right arising out of the same transaction or occurrence** as the original claim,

provided there is a question of law or fact common to all Ps. *Tenet* is an example, where each P filed common claims with common allegations under the same law. Ps must join voluntarily.

- It also allows P (or counterclaiming D) to join parties **defending against an assertion of rights arising out of the same transaction or occurrence** as the original claim, **provided there is a question of law or fact common to all Ds**. Make sure you have personal jurisdiction.
- **Subject matter jurisdiction**: if the claim is a diversity action, **diversity must be maintained**. As for the amount in controversy, Ps can ride the coattails provided at least one P has met the amount in controversy. However, **each joined D must independently have the amount in controversy against her met** – there is no supplemental jurisdiction for claims by P against D joined under Rule 20.
    - **Exception**: parties joined due to compulsory counterclaim are within the court's supplemental jurisdiction (§1367(a)).

viii. Adding or dropping parties (Rule 21)

- Rule 21 states that a judge may **add or drop parties at any time, on just terms**.

ix. Interpleader (Rule 22)

- When P owes something to one of multiple parties but isn't sure which one, **interpleader forces the claimants to argue out their claims**, preventing P from having to pay out for the same claim multiple times. Modern courts allow the party bringing the interpleader action to be a claimant. May be a good option when a company has an insurance policy covering a set amount of damages.
- Interpleader is appropriate for **unliquidated tort claims**; the language of §1335 includes "may claim". Rule 22 permits interpleader when plaintiff "may be" exposed to multiple liability. If an insurance company was required to wait for judgment, the first claimant to win a judgment might appropriate to himself a disproportionate amount of the fund ("first mover advantage").
- Court can enjoin other proceedings.
- **Rule interpleader** (only if all claimants are in the same state)
    - **Normal venue, service, and personal and subject matter jurisdiction requirements apply**. No deposit is required. There is no national service of process. In *Dunlevy*, the court established the rule that a claimant over whom the court didn't have jurisdiction could not be bound by the court's decision.
- **Statutory interpleader §1335**:
    - District court has original jurisdiction over interpleader **provided minimum diversity and a $500 AiC.** The property must be **deposited with the court**, establishing the court's *in rem* **jurisdiction**. There is **nationwide service of process**. **Venue** is any judicial district in which one or more of the claimants reside. Court may **enjoin claimants** from starting or continuing any other action affecting the property.
    - In *State Farm*, the court affirmed that the minimum diversity requirement for statutory interpleader is not unconstitutional under Art. III.

        - *Treinies*: co-citizenship between stakeholder and claimant okay; stakeholder shows disinterest through deposit of fund.
    - Interpleader is **not a "bill of peace"**. The court cannot enjoin actions outside of those relating to the fund.

x. Intervention (Rule 24)

- Intervention allows persons who are not initially part of a suit to **enter on their own initiative** in a timely fashion (24(a)). The right to intervene is granted (1) when a party has the right to intervene by statute, or (2) they have an interest in the subject matter, and a judgment in the proceeding would impair their interests, and they are not adequately represented in the proceeding.
- **Permissive intervention** (24(b)) allows a party to assert a claim or defense involving common questions of law or fact with the pending action in a timely fashion that does not unduly delay or prejudice the adjudication of the original parties' rights, subject to the discretion of the court.
- In *Wilks*, the court held that intervention is **never compulsory**. Mere knowledge of a suit does not obligate a party to intervene.
- **Subject matter jurisdiction**: no supplemental jurisdiction.

XIII. Class actions

i. Basics of class actions and jurisdiction

- Class actions afford class members legal redress, even when litigation isn't cost-effective. It avoids the burdens of piecemeal litigation and preserves resources. It's a form of preclusion; all the Ps are bound by the claim and the issues decided by the court.
- Class actions in the federal system are governed by **Rule 23**, which authorizes the district court to regulate and individualize proceedings. District courts have original jurisdiction over claims under CAFA.
- ***Res judicata*** makes a class action judgment binding, but class members may exclude themselves from a (b)(3) class. A claim alleging a **pattern of conduct** doesn't necessarily bar a later individual claim; in *Cooper*, the court allowed an individual claim of discrimination after a pattern of discrimination claim failed.
- **Diversity class actions:**
    - For diversity actions, there must be **complete diversity between the named Ds and named Ps**, though the unnamed parties need not be diverse. (*Ben Hur*)
    - The court in *Allapattah* held that supplemental jurisdiction can be exercised as long as **at least one claim has met the amount in controversy requirement**. There is no aggregation. (*Snyder*)
    - However, if there is at least a $5mm aggregate amount in controversy, the claim may be heard under the **Class Action Fairness Act**, which allows for minimal diversity (at least one D is diverse with at least one P) and aggregation to meet the amount in controversy.

- **Personal jurisdiction and choice of law** (*Phillips Petroleum*):
    - The court held that class members are an exception from the usual requirement of *in personam* jurisdiction. The opt-out procedure and requirements of notice and adequate representation adequately protect Ps interests.
    - Two-prong approach to choice of law:
        - Is there a conflict between the options? If not, there's no issue.
        - Pursuant to *Allstate*, is there **significant contact or an aggregation of contacts creating state interests**, such that the choice of its law is neither arbitrary nor fundamentally unfair?

ii. Prerequisites (Rule 23(a))

- (1) Numerosity: **joinder must be impracticable**. This is usually met when there are more than 40 plaintiffs; it is usually lacking if there are less than 22.
- (2) Commonality: **there are questions of law or fact common to the class.**
    - There must be a common contention, central to the claim, that can be resolved classwide, and that the court has the capacity to provide a common answer for. In *Wal-Mart*, a discrimination case, the court held that showing a pay or promotion pattern isn't enough; Ps must show a common mode of discrimination.
    - This may mean that examination of the merits of the claim may be required.
    - The dissent views this as raising the bar on the commonality requirement, infusing the "superiority requirement" by leading the court to focus on what distinguishes class members, rather than what unites them.
- (3) Typicality: Claims and defenses of representatives must be **typical of those of class**.
    - Rationale: we want to ensure absent members are adequately protected.
    - In service of that aim, issues/claims raised should be precise, ascertainable, and objective.
- (4) Adequate representation: Representative fairly and **adequately protects interests of the class**.
    - **The interests of the class need to be aligned**. In *Amchem*, the court found conflicts of interest in the class; people were exposed to different products over different periods (undermining commonality), some with illnesses, some who were healthy. The class members had sharply varying incentives; some prioritized immediate payments while others wanted an ample inflation-protected future fund.
        - When there are conflicts of interest, 23(c)(5) allows the court to create homogeneous subclasses with separate representation.
    - In *Hansberry*, a class of landowners sued Hansberry, a black man, for violating a racially restrictive covenant allegedly binding 95% of owners. The Illinois Supreme Court held that the stipulation was binding on all class members, including Hansberry and the person who sold him the land. The Supreme Court held that Hansberry's interests were not adequately protected by members of the class. **A class represents all class**

members when the members have a sole and common interest, not when they are in direct conflict on the interest in question.
    - For certain securities actions, the court may appoint a lead plaintiff based on the financial stake they have in the action.

iii. Three types of class actions (Rule 23(b))

- **"Prejudice class actions"** (b)(1): Individual suits may cause prejudice to...
    - ...a non-class party. Incompatible standards result in uncertainty. For example, conflicting rulings on who an election board can register to vote.
    - ...a class party. Individual actions would substantially impair/impede parties' ability to protect their interests – for example, when there are multiple claimants to a limited fund.
    - 23(b)(1) is a mandatory class action. There is **no notice requirement**.
- **Injunctive/declaratory relief** (b)(2): An action to change D's conduct prospectively.
    - 23(b)(2) is a mandatory class action. There is no notice requirement.
- **Damage class actions** (b)(3): Ps claim to have been injured in the same way and seek monetary relief.
    - **"Superiority requirement"**: Questions of law/fact common to class members must predominate over individual questions. **Factors**: (1) class members' interests in individually controlling prosecution or defense of separate actions, (2) whether there is existing litigation, (3) how desirable it is to concentrate litigation in the forum, and (4) the difficulties of managing class action (size, practicability of providing notice, etc.)
    - Courts generally find **mass tort doesn't meet superiority requirement**.
    - You must show **common injuries and damages** from those injuries that are **measurable on a class-wide basis through a common methodology.** Ps failed to do that in *Comcast*. The methodology showing damages from "clustering" didn't distinguish the specific theory of anti-trust being advanced. It failed to translate a legal theory of event into analysis of the economic impact of that event.
    - If class members cannot be determined, **"fluid class recovery"** may be a solution; D must provide some general benefit.
    - **Monetary damages belong in (b)(3)** (exception for limited funds). The other classes are mandatory, and *res judicata* prevents class members from relitigating claims; therefore, courts are skeptical of **"hybrid class actions"**.

iv. Class action notice requirements

- The **best notice practicable** is required. It must inform of the right of exclusion, binding effect, and right to counsel. Only some persons in a class need to be notified; a class acts as one body, so the interests of some may serve as a proxy for the interests of all. In *Eisen*, the court held that individual notice could be given to the largest potential claimants and to a random sampling of identifiable smaller ones. The rest were to be notified constructively.

- Class members may **opt out**. If they don't respond, they are automatically part of suit.
- **Costs of notice** are borne by the party seeking class treatment. (*Eisen*) May be subtracted from common fund if P obtains recovery.
- Some litigants use **discovery** to obtain list of class members, which shifts portion of cost of notice to D. In *Oppenheimer Fund*, the court disapproved of the practice, but did not prohibit D from requesting records that might aid in preparing class mailing list.
- Notice is now routinely provided through **websites and e-mail**.

v. Settlement and limited funds

- **The court must approve of any decision to settle, dismiss, or compromise**. Settlements can be approved over objections of class members, though they are free to appeal the settlement.
- Settlement-only class actions are controversial; they may be motivated by collusion between lawyers for Ps and Ds, and may short-change future Ps.
- When there is a **limited fund** available to pay clients, later claimants may not be able to recover, so the action impairs the ability of those class members to protect their interests. Such cases may therefore be 23(b)(1) mandatory class actions. In *Ortiz*, the court rejected a limited fund settlement. They stipulated that limited fund settlements require (a) that the fund to be insufficient to meet all claims, (b) that the whole of the fund must be used, and (c) that claimants be treated equitably among themselves. Inclusiveness of potential litigants may also be a requirement of limited fund cases.

vi. Non-class arbitration clauses

- In *Concepcion*, the court held that the **Federal Arbitration Act preempted a state rule barring non-class arbitration clauses**. Class-wide arbitration is fundamentally different than individual arbitration: the process is slower and more costly, it has more procedural formality, higher stakes, and more devastating effects in the event of error. Further, arbitration is a matter of contract, and courts should honor parties' expectations.
- Dissent: this insulates company from liability for its own frauds; the company is secure that customers will not pursue claims due to expense and inconvenience. Powerful entitles impose these clauses on people with no bargaining power through adhesion contracts, and consumers are left remediless.
- In *American Express*, the court affirms that **courts do not have authority under the FAA to invalidate arbitration agreements on the ground they do not permit class action arbitration**. The unaffordability of individual claims is not persuasive; antitrust laws do not guarantee an affordable path. "Effective vindication" is used to strike down clauses that waive the right to pursue statutory remedies. But here, no right is being waived. The issue is mere cost effectiveness.
- Dissent: This is a case of a monopolist uses monopoly power to insist on a K depriving its victims of legal recourse. The effective vindication rule serves to bar clauses that operate to confer immunity from potentially meritorious fed claims.

XIV. Adjudication

i. Defenses (Rule 12)

- Rule 12 offers defenses which may be raised in a motion against P's claim or pleading:
    - (b)(1) lack of subject matter jurisdiction (see: "II. Federal question jurisdiction" and "III. Diversity jurisdiction")
    - (b)(2) lack of personal jurisdiction (see: "I. Personal jurisdiction")
    - (b)(3) improper venue (see: "VI. Venue")
    - (b)(4) insufficient process (see: "VII. Notice")
    - (b)(5) insufficient service (see: "VII. Notice")
    - (b)(6) failure to state a claim (see: "IX. Pleading")
    - (b)(7) failure to join a necessary party (see: "XII. Joinder")

ii. Summary judgment (Rule 56)

- After full discovery, if a party proves there is no genuine dispute as to any material fact and is entitled to judgment as a matter of law, the court can issue summary judgment. In a motion for summary judgment, the question for the court is **whether a jury could reasonably find for P based on the quality and quantity of evidence.**
- In *Celotex*, Brennan clarifies the burden of production: when burden of persuasion is on non-moving party, movant must satisfy burden of production either by...
    - ...**producing affirmative evidence** that negates an essential element of the claim.
        - Evidence must be admissible at trial. 56(c)(4) specifies that **affidavits and declarations must be made on personal knowledge**, set out facts admissible in evidence, and show competency of affiant/declarant to testify. Evidence may include affidavits, depositions, and other materials.
        - In *Adickes*, the movant did not meet the procedural burden of showing the absence of any disputed material fact; they did not foreclose possibilities raised in the initial pleading.
    - ...demonstrating that the nonmoving party's evidence is **insufficient to establish an essential element of the claim**.
        - A conclusory assertion is insufficient. Movant must affirmatively show absence of evidence in the record.
        - On summary judgment, inferences to be drawn from underlying facts contained in movant's materials must be viewed in light most favorable to party opposing the motion.
    - Rationale: if one party can use an unsupported motion to force an opponent to make a substantial showing, it creates a strong incentive to make the filing to harass the other party and raise costs.
- If movant satisfies burden of production showing no genuine material dispute, the party opposing the motion must show a **genuine material dispute in the record**,

or **demonstrate that movant cannot prove the lack of a genuine material dispute** with their evidence.

iii. Discovery (Rule 26)

- The purpose of discovery is to preserve relevant information, ascertain and isolate issues actually in controversy, determine what evidence is available, and promote transparency. **Exchange of information is mandated without the need for a discovery request.**
- The court may limit discovery and impose sanctions on parties who abuse system. **Modes of discovery abuse**: (a) failure to cooperate, (b) seeking unnecessary evidence to drive up costs, (c) fishing expeditions, (d) using discovery requests to cause delay, (e) using discovery requests to drive up fees.
- Critical information is often entirely in the hands of the D. A critique of *Twombly* is that it is futile to tell someone to plead what he or she doesn't know. **Discovery is designed to provide each side with relevant information beyond its reach** so that the playing field is level and more informed settlements and trials are possible.
- A **limited, phased discovery** may be a solution for the problem of asymmetric information.

iv. Damages

- **Compensatory damages** make P "whole" for damage suffered.
- **Punitive damages** are used to "punish" D for extreme wrongdoing.
- **Equitable remedies**: injunctions and specific performance.
    - **Injunctions** prohibit a party from doing something.
    - **Specific performance** orders party to do something affirmative.
    - Equitable relief is awarded only when legal relief is **inadequate in the circumstances**. It may include monetary damages, such as when one is entitled to be reinstated in a job with back pay.
- In a **declaratory judgment**, a court clarifies the rights and legal relations between parties. There must a controversy; advisory opinions aren't allowed. Either side can bring the action.

v. Jury trials

- The **7th Amendment entitles either party to demand a jury trial** in an action for damages. The court in *Curtis* held that it makes no difference whether the action is a result of a new statutory right; however, the right to a jury trial doesn't apply in administrative adjudications or claims for equitable relief.
- Preliminary injunctive relief is available without jury trial even in damages actions. (Curtis)
- Cases often contain both legal and equitable claims.
    - If the issues of fact are particular to each claim, there is no problem trying the equitable claims to a judge and the legal claims to a jury.
    - However, if an issue of fact is common to both the legal and the equitable

claim, a judge's finding of fact in the equitable claim will bind the jury in the legal claim. Therefore, the court in *Beacon* ruled that when such a case arises, **the trial judge must try the legal claims first to a jury, so as to preserve right to jury trial as to those claims**. "Only under the most imperative circumstances can the right to a jury trial of legal issues be lost through prior determination of equitable claims."

- *Tull* established a **two-part test to determine if an action is or isn't entitled to a jury**. First compare the statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, examine the remedy sought and determine whether it is legal or equitable in nature.
- In *Edmonson*, the court held that **excluding jurors on account of race during *voir dire* is unconstitutional**, as it violates the equal protection rights of the jurors. This is in effect a constitutional matter, as it pertains to government: a judge advises and oversees jury selection, which controls representation on a governmental body.