CIVIL PROCEDURE OUTLINE

§1: JURISDICTION

§1.1: Analytical Framework

A. Analytical Framework for Jurisdiction Problem: there are seven questions on a jurisdiction final exam question:

1. **Does the Court have subject-matter jurisdiction**? *Always* the first question to ask because it goes to the very heart of the subject: does the court have the power to hear the case [§1.2].
2. **Does the Court have personal jurisdiction?** Discusses power of the court over the defendant. Goes to questions of due process power over the defendant [§2].
3. **Has the defendant been given Notice and Opportunity to be Heard?** Goes to due process also because it would be a basic violation of due process if the defendant was not afforded an opportunity to be heard [§3].

**These first three questions are the big three because they all involve constitutional questions.

4. **Has the defendant been served with process properly** [§3.2]**?**
5. **Does the Court have venue?** [§4]
6. **Can the case be Removed?** If the action has been commenced in a state court can it be removed to a federal court? [If the action began in a federal court then removal is not a question because the defendant cannot remove the case to state court]. [§5]
7. **Have ANY of the preceding six questions been waived?** Questions of waiver have to be looked for, always remember to ask yourself if any of the jurisdictional issues or questions have been waived. [§6]

§1.2: Subject Matter Jurisdiction

I. Analytical Framework

A. Questions: to ask yourself to determine if subject matter jurisdiction has been satisfied:

1. **Is there Federal Question Jurisdiction?**
    a. If Yes, then there is subject matter jurisdiction.
    b. If, NO, go to question #2.
2. **Is there Diversity Jurisdiction?**
    a. Is there complete diversity?
    b. Has the amount in controversy been satisfied?
    c. If YES, to all of the above then there is subject matter jurisdiction.
    d. If NO, go to question #3.
3. **Is there supplemental jurisdiction?**

a. (There has to be diversity or federal question jurisdiction before there can be supplemental jurisdiction) Is there pendant or ancillary jurisdiction?
b. If YES, then there is subject matter jurisdiction.
c. If NO, then the court does not have the power to hear the case.

4. **Note:** Subject matter jurisdiction CANNOT BE WAIVED; if the court does not have subject matter jurisdiction, it cannot hear the case.

B. **US Constitution Article III:** Constitutional Basis for Jurisdiction: All subject matter jurisdiction of the federal courts is laid out in Article III of the Constitution. Article III provides several different types of subject matter jurisdiction:

1. Federal Question Jurisdiction;
2. Diversity jurisdiction;
3. Alienage jurisdiction;
4. Admiralty jurisdiction; and
5. Jurisdiction for disputes between states, counsels, and ambassadors.

*Always start any answer with this premise.

II. Federal Question Jurisdiction

A. **G/R:** 28 U.S.C. §1331: the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

1. There is NOT a jurisdictional amount for federal question cases.

B. **G/R:** there are two forms of federal question jurisdiction:

1. Exclusive Federal Question Jurisdiction: certain federal claims (such as copyright [28 U.S.C. §1338(a) or patent claims) MUST be brought in federal court because Congress has decided that they want national uniformity throughout the federal courts. There are five main areas in which federal courts have exclusive jurisdiction:
    a. bankruptcy;
    b. patents and copyrights;
    c. actions against foreign counsels;
    d. actions to recover a fine, penalty or forfeiture under federal law; and
    e. actions involving certain seizures.
2. Concurrent Federal Question Jurisdiction: some federal question cases (such as Federal Employers Liability Act (FELA) claims or civil rights cases) can be brought either in state court or a federal court. Congress has given the plaintiff the right to choose whether to bring the case in federal or state court, subject to the right of removal.

C. **G/R:** for federal question jurisdiction, the plaintiff's cause of action *arises under* the constitution, treaties, or laws of the United States (if there is a federal question jurisdiction problem on the exam always start with this premise).

1. Arising Under: are the main words, they mean that the federal courts are courts of *limited jurisdiction*. As limited jurisdiction courts, the plaintiff's cause of action must arise under the constitution, treaties, or laws of the United States.

D. **G/R:** Ingredient Test: (constitutional maximum): "Arising Under" confers jurisdiction to the federal courts that grant is extended to every case in which federal law furnishes a necessary ingredient of the claim even thought is was antecedent and uncontested [Osborn v. Bank of U.S.].

1. The Supreme Court and Congress, while acknowledging that this test represents the maximum allowed under the constitution to bring federal question cases have circumscribed the rule and interpreted their own subject matter jurisdiction very restrictively because the constitution is a balance of power between the federal government and the state.

E. **G/R:** Well-Pleaded Complaint Rule: (modern test): a suit "Arises Under" the constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or the Constitution.

1. It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that defense is invalidated by some provision of the Constitution.

a. A suggestion of one party, that the other will or may set up a claim under the constitution or the laws of the US, does not make the suit one arising under the constitution or those laws.

2. To show that a federal question might or probably would arise in the course of a case, that is, to allege such a defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading and is improper.
*[Louisville & Nashville RR Co. v. Mottley].

F. **G/R:** Arising Under Test: when a claim, although created by state law, "Arises Under" a law of the United States by requires a determination of the meaning or application of such law. The general rule is that where it appears from the bill or statement of the plaintiff (well pleaded complaint) that the right to relief depends upon the construction or application of the constitution or laws of the US and that such a federal claim is not merely colorable, and rests upon a reasonable foundation, the district court has jurisdiction [Smith v. Kansas City Title and Trust Co.].

G. **G/R:** Express and Implied Causes of Action: legislation creating an enforceable private right of action may do so either expressly or by implication:

1. **Express:** Creation Test: the vast majority of cases that come within federal question jurisdiction are covered by the creation test which states that a suit arises under the law that creates the cause of action [T.B. Harms Co. v. Eliscu].

a. Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action.

b. A case may also arise under the federal law where the vindication of a right under state law necessarily turns on some construction of federal law [see infra §1.2, II, Rule G, 3].

2. **Implied** [from federal created right]: The most important inquiry in determining if there is an implied federal cause of action is whether Congress intended to create a private right of action. There are four factors the Court looks at for determining whether a private right of action should be implied from a federal statute that does not expressly provide for a private remedy:

a. the plaintiff must be a member of the class for whose *special* benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff?;
b. is there any indication of legislative intent, explicit or implicit, either to create or deny a remedy?;
c. is it consistent with the underlying purposes of the legislative scheme to imply a remedy for the plaintiff?
d. is the cause of action one traditionally delegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?
[Cort v. Ash].

3. **Implied** [federal cause of action from state created right]: the mere presence of a federal issue in a state cause of action does automatically confer federal question jurisdiction. Federal question jurisdiction is appropriate when it appears that some *substantial undisputed* question of federal law is a necessary element of one of the *well-pleaded state claims*. There are four factors in determining whether a federal cause of action lies:

a. the plaintiffs are part of the class for whose special benefit the statute was passed;
b. the indicia of legislative intent reveals a congressional purpose to provide a private cause of action;
c. a federal cause of action would further the underlying purpose of the legislative scheme; and
d. the cause of action is not a subject traditionally relegated to state law.
*[Merril Dow v. Thompson].

H. **G/R:** Artful Pleading Rule: (reverse well-pleaded complaint rule): the plaintiff (would be defendant) may not seek a declaratory judgment action if the federal issue would not be satisfied if the defendant to the declaratory action (would be plaintiff) brought suit in federal court.

1. That is, the party raising the federal defense, instead of waiting to be sued goes to court seeking a declaratory statement on whether it has violated the other parties rights when it is merely raising a federal defense to the other parties claim is not allowed.
2. To sanction suits for declaratory relief as within the jurisdiction of the district courts merely because artful pleading anticipates a defense based on federal law

would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purposes for the declaratory judgment act.
*[Skelly Oil Co. v. Phillips].

I. **G/R:** Dismissal: a federal court must dismiss a claim arising under federal law for want of subject-matter jurisdiction if the claim is so attenuated and unsubstantial as to be absolutely devoid of merit and if the claim is clearly foreclosed by prior decisions of the Supreme Court.

III. Diversity Jurisdiction

A. **G/R:** Constitutional Authority: Article III, §2, extends the judicial power of the United States to controversies "arising between citizens of different states…and between a state, or citizens thereof, and foreign states, citizens, or subjects.

B. **G/R:** 28 U.S.C. §1332: provides that the district courts shall have original jurisdiction in all civil actions arising between citizens of the different states and citizens of foreign states or any combination thereof.

1. **Policy:** the usual justification for creating diversity jurisdiction is to afford an alternative forum to those who might be victims of local prejudice against outsiders.

C. **G/R:** Complete Diversity Rule: there must be complete diversity of citizenship [Strawbridge v. Curtiss]. Complete diversity exists when everyone to the left of the "v." in action came from a different state form the person on the right of the "v." in an action. This means one person or group of persons from one state can *only* sue under diversity of citizenship in federal court if they are suing one person or group of persons from another state.

1. The complete diversity rule provides, in effect, that there is no diversity jurisdiction if an plaintiff is a citizen from any state as any defendant, no many how many parties may be involved in the litigation.
2. Don't be tricked on the exam if the there is a lot of parties to the same suit:
    a. Ex: The plaintiff's to an action are from Wyoming, Montana, Colorado, and Utah and the defendants are from South Dakota, Vermont, Texas, Alaska and Utah. Because a plaintiff and defendant are both from Utah, that destroys diversity. There is no such thing as almost complete diversity; you either have it or you don't.
    b. Rule: if there are a lot of parties to a problem on an exam question, list all of the plaintiff's on the left of the "v." and all the defendants on the right of the "v." and if there are two parties form the same state on the right and left of the "v." THERE IS NO DIVERSITY OF CITIZENSHIP.
3. **Exceptions:** 28 U.S.C. §1332 provides two exceptions to the complete diversity rule. In (a) probate matters; and (b) domestic relations, the federal courts will not act even though diversity is present.

D. **G/R:** Determining Diversity: diversity of citizenship (not residence) is determined for each party on the day the *action was instituted* (not on the day the action accrued, not on the day trial started, not on the day final judgment was entered).

1. Even if a person has residences in different states, for the purposes of diversity, each person can only be a citizen of one state.
2. The determination of one's states citizenship for diversity purposes is controlled by federal law, and not by the law of any state.
3. Diversity jurisdiction is determined at the time the action was instituted and jurisdiction is unaffected by subsequent changes in the citizenship of the parties.

E. **G/R:** Determining Citizenship of Particular Parties: Each party can only have one citizenship. There are four main types of parties:

1. Nature People (human beings): nature people have domicile. Domicile is equivalent of citizenship, each person is born with domicile, which typically the domicile of our parents. That domicile can stay with us for life or we change it. The *critical point* is: an individual's citizenship or domicile is the domicile of birth continued through life, which is presumed to continue through life unless two things occur:
    a. The individual physically changes his or her state; and
    b. The individual does that with the intention of remaining in the new state for the indefinite future.

**On exam, if prof gives you a migratory party, for example someone who has a residence in New York, a summer home in Martha's Vineyard, spends a winter a Florida or someone who lives in one state and works in another state: the issue then is where is that person's center of gravity; that is, where is that person's citizenship as determined by the center of gravity of that life. Inquire into facts such as, (a) where does person live, (b) where is the family, (c) where does that person pay taxes, (d) where does that person work, (e) where are the cars licensed, (f) where does the person vote. Then you have to make a factual determination of where that person's citizenship is, and that is his domicile.

2. Corporations: Corporations are schizoid and have two states of citizenship. (a) Corporations are treated as citizens of the state of its birth, just like humans. A corporation is born in the state in which it is incorporated (very often New Jersey and Delaware). That determines one state of citizenship. (b) The second state of citizenship is the state in which the corporation has its *principle* place of business (not the state in which does business). The principle place of business is a unitary concept (usually where the corporate head quarters are located. (c) For diversity purposes, a corporation is a citizen of two states (unless the principle place of business and the place where the corporation was born is the same state).
    a. As result, if the other party to the litigation is from any other state than the corporation's principle place of business or the place where it was incorporated, then there is diversity.

b(1). Determining a corporation's principle place of business: Two Federal Court Rules (there is a split of authority, two different rules):

a. Nerve Center Test: a corporation's principle place of business is where it makes its executive decisions. Where are its brains (nerve center) and decisions made.

b. Plurality (Muscle) Test: a corporation's principle place of business is where that corporation does a plurality of its thing, where it does a plurality of its manufacturing or service providing.

c. Ex: (for exam) The Dingbat Corp. is incorporated in Delaware, has its headquarters in New York, and has its manufacturing plant if New Jersey. If you use a Nerve Center Test, Dingbat is a Delaware/New York Corp. If you use the Muscle Test, Dingbat is a Delaware/New Jersey Corp. On the exam other party will likely be from New York or New Jersey. If the other party is from New York, say there is NO diversity if you use the Nerve Center Test, and there is complete diversity if you use the Muscle Test; and, vice versa with New Jersey.

3. Unincorporated Associations: [i.e. labor unions, partnerships]: With an unincorporated association you cumulate the states of all of the members of the unincorporated association. If a member of that association is from the state in which the other party is a member, then there is no diversity of citizenship jurisdiction.

a. For example, with a labor union you literally add up all the states of its members. That literally means if you have a national labor (like the teamsters) union in which there is a member in every state, then by definition the other party has to come from one of those states and the federal courts lack diversity jurisdiction.

b. The Supreme Court has consistently upheld this rule [Cardona v. Arcoma].

4. Parties in Representative Actions: Actions brought by or against a representative. Representatives of a deceased estate, a child, an incompetent person, and the big two: a shareholder derivative suit and class action suit.

a. Classical Rule: The historical rule has always been when an action is brought by a representative or against a representative diversity of citizenship is based upon the citizenship of the *representative* and NOT the *represented*. This is still the rule for shareholder derivative suits and class action suits.

b. Modern Rule: [based on Congressional legislation]: In actions involving children, incompetents, and estates, the rule now is that in actions involving those types of representatives diversity of citizenship is tested in terms of the citizenship of the *represented* (the child, the incompetent, the decedent) NOT the citizenship of the *representative.* This is not the rule for shareholder derivative suits or class action suits.

E. **G/R:** 28 U.S.C. §1359: any assignment that is improperly or collusively made to establish jurisdiction in federal court is unlawful.

F. **G/R:** Burden of Proof: the burden of pleading diversity of citizenship is upon the party invoking federal jurisdiction and if the diversity jurisdiction is properly challenged, that party also bears the burden of proof.

G. **G/R:** 28 U.S.C. §1489: an American women is not deemed to have lost her U.S. citizenship solely be reason of her marriage to an alien.

F. **G/R:** Fictitious Defendants: the citizenship of fictitious defendants shall be disregarded when determining whether diversity jurisdiction exists.

IV. Diversity of Citizenship: Amount in Controversy

A. **G/R:** Amount in Controversy: the federal district courts have jurisdiction over civil diversity suits where the amount in controversy exceeds the sum of $75,000 *EXCLUSIVE* (not counting) of interest and costs.

1. There is no such thing as a $75,000 diversity action. It has to be *more* than $75,000; so only $75,000.01 or more can satisfy the diversity requirement [a common professor trick on exams].
2. Ex: [another common professor trick]: plaintiff sued the defendant in federal court based on diversity for $70,000 plus $3,000 accrued interest, plus $3,000 in costs. This equals $76,000 but does not satisfy the amount in controversy rule because it is only for $70,000 and that amount is *exclusive* of interest and costs.
3. Punitive damages are part of the amount you consider in computing the amount in controversy. Statutory attorney fees are probably within the amount you can compute in determining the amount in controversy.

B. **G/R:** the courts look at the amount in controversy when filed, not at the end of the case.

1. The plaintiff is required to assert his jurisdictional amount in good faith.
2. §1332(b): if the plaintiff brings a diversity case in federal court and the jury award is less then the amount in controversy; then the plaintiff may have to pay for the other party's court costs.
    a. Provides a disincentive for plaintiff's that are bringing suits that are not really in good faith but have stretched the amount in controversy.
        (i) §1920 defines what costs are (does not include other parties attorneys fees).

C. **G/R:** Test for Determining Amount in Controversy: the rule governing dismissal for want of jurisdiction in cases brought in federal court is that, *unless* the law gives a different rule, the sum claimed by the plaintiff is apparently made in good faith.

1. It must appear *to a legal certainty* that the claim is really for less than the jurisdictional amount to justify a dismissal.

D. **G/R:** Injunctions: where a plaintiff seeks injunctive relief, the value of his claim is generally assessed with reference to the right he seeks to protect and measured by the extent of the impairment to be prevented by the injunction. In calculating the impairment, the court may not only look to past losses, but also potential harm.l

E. **G/R:** Aggregation Rules:

1. Single Parties: if a single plaintiff sues a single defendant on multiple claims, the plaintiff can aggregate the claims (add them up), even if the individual claims have nothing to do with each other.
    a. Ex: P sues D for 50K for defamation; 10K for trespassing, and 20K for battery, then P has satisfied the amount in controversy (i.e. $80K).
2. Multiple Parties: the rule is exactly the reverse when tying to add up claims of two or more plaintiffs against a single defendant, or single plaintiff against multiple defendants. In other words, in multi-party cases you cannot aggregate the amount in controversy.
    a. Caveat: if the claims are really joint claims, rather then undivided interests then they can be aggregated.

V. Supplemental Jurisdiction

A. **G/R:** Pendant Jurisdiction: exists where a plaintiff has both a federal and nonfederal claims against a non-diverse defendant arising from the same event. The federal court was said to have jurisdiction over the state law claims, which are appended to the federal claim.

1. State law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law [Hurn v. Oursler].
2. Pendant jurisdiction, in the sense of judicial power, exists whenever there is claim arising under the Constitution, the laws of the US, and treaties and the relationship between that claim and the state claims made in the complaint permits the conclusion that the entire action before the court compromises but one constitutional case [Gibbs].

B. **G/R:** Ancillary Jurisdiction: exists when either a plaintiff or a defendant injects a claim lacking an independent basis for jurisdiction by of counterclaim, cross-claim, or third party complaint.

1. The doctrine expanded greatly, and generally, ancillary jurisdiction involved an assertion of a claim by a *party other than the plaintiff* that was related to the claim made by the plaintiff; such as, counterclaims made by the defendant arising from the same set of facts and third party impleader [under Rule 14].

C. Ancillary and Pendant jurisdiction are referred to as supplemental jurisdiction.

D. **G/R:** Test for Supplement Jurisdiction in Federal Question Cases: the standard three prong test used to determine whether a federal court has the power to entertain pedant claims is:

1. *Substantial Federal Claim:* the federal claim must be sufficiently substantial to support federal question jurisdiction;
2. *Common Nucleus of Operative Facts:* the federal and non-federal claims must derive from a common nucleus of operative facts; and
3. *One Judicial Proceeding:* the federal and non-federal claims must be such that the plaintiff would ordinarily be expected to try them in one judicial proceeding. *[Gibbs].
4. **Policy:** the justification for the rule lies in considerations for (a) judicial economy; (b) convenience and fairness to the litigants.

E. **G/R:** Pendant Party Jurisdiction: the Supreme Court refused to apply pendant jurisdiction to an additional party with respect to whom no independent basis of federal jurisdiction existed. Thus, the courts cannot permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis for federal jurisdiction, simply because his claim against the second defendant arose from the same nucleus of operative facts [Aldinger v. Howard].

1. Pendant party jurisdiction does not apply in diversity cases because to do so would allow the plaintiff to manipulate the complete diversity rule.

F. **G/R:** §28 U.S.C. §1367: codified pendant and ancillary jurisdiction.

1. §1367(a): supplemental jurisdiction in now recognized over everything within a "case and controversy" as those words are used in Article III of the Constitution. Codified the notion that a "case and controversy" includes everything that originates from a common nucleus of operative facts.

a. §1367(a) makes it clear that federal courts have authority to hear supplemental claims that involve joinder or intervention of additional parties.
b. §1367(a) also overrules the *Finely* decision and allows for pendant party jurisdiction in *federal question cases.*

2. §1367(b): restricts the federal courts' exercise of supplemental jurisdiction in *diversity* cases, by in effect, codifying the *Kroger* decision (when jurisdiction rests solely on the general diversity statute, no supplement jurisdiction exists for a plaintiff's claim against a non-diverse third party defendant because to allow supplemental jurisdiction in this circumstance would encourage plaintiff's to evade the complete diversity requirement by naming initially only defendants of diverse citizenship and waiting for them to implead non-diverse defendants).

a. §1367(b) prohibits the use of supplemental jurisdiction when the case is based soley on diversity jurisdiction and the juridictionally insufficient claim is one by the plaintiff under FRCP:
   (i) Rule 14 [third party practice (impleader)];
   (ii) Rule 19 and 20 [permissive and compulsory joinder]; and
   (iii) Rule 24 [intervention].
   When joining any of these parties would be inconsistent with the jurisdictional requirements of §1332 (Diversity).

3. §1367(c): provides the federal courts with discretion in some circumstances to decline to exercise supplemental jurisdiction when:

a. the claim raises a complex or novel issue of state law;
b. the state law claim substantially predominates over the federal claim;
c. the district court has dismissed all the federal claims; or
d. in *exceptional* circumstances there other compelling reasons for declining jurisdiction.

4. §1367(d): provides that if the case is dismissed in federal court, and the state statute of limitations has run, the statute of limitations defense will be waived by the defendant.

G. **G/R:** Dismissal: once it is determined that the assertion of supplemental jurisdiction is permissible under §§1367(a) or (b); §1367(c) provides the *only* valid basis upon which the district court may decline jurisdiction and remand pendant claims.

1. §1367(c) is the exclusive means by which supplemental jurisdiction can be declined by a court.

F. **G/R:** Compulsory Counterclaims: if the compulsory counterclaim [Rule 13(a)] arises from the same transaction or common nucleus of operative facts as the plaintiff's then the defendant can bring the state law counterclaim even if lacks federal question or diversity jurisdiction.

H. **G/R:** Permissive Counterclaims: if the permissive counterclaim [Rule 13(b)] does not arise from the common nucleus of operative facts ancillary jurisdiction will not be permitted.

I. **G/R:** Impleader Claims: generally, ancillary jurisdiction is available for all impleader claims under Rule 14(a).

K. **G/R:** Generally: A party can bring a suit under 1367(a) with multiple defendants, plaintiffs in a federal question cases but not in diversity cases.

VI. Challenging the Subject Matter Jurisdiction of a Court

A. **G/Rs:** Direct Attack on a Court's Lack of Subject-Matter Jurisdiction:

1. Applicable Statutes: (a) Rule 8(a)(1); (b) Rule 12(b)(1) and (h)(3); Rule 60(b)(4); Official Form 2; and 28 U.S.C. §1653.

2. **G/R:** In the federal courts a lack of subject-matter jurisdiction may be asserted at any time by any interested party, either in the answer, or in the form of a suggestion to the court prior to final judgment, or on appeal.

1. The parties may not create the jurisdiction of a federal court by agreement or by consent.

2. Caveat: A temporary restraining order has to be obeyed until set aside, and the defendant cannot raise the asserted lack of jurisdiction as a defense to contempt charges for violating the restraining order [US v. United Mine Workers].

a. Obedience to a temporary restraining order is required, even though the issuing court may lack subject-matter jurisdiction or otherwise may have based its decision on an incorrect view of the law, unless there is no opportunity for effective appellate review of the decree.

B. **G/Rs:** Collateral Attack on a Judgment for Lack of Subject Matter Jurisdiction:

1. Applicable Statutes: [see supra §1.2, VI, Rule A(1)].

2. **G/R:** If neither of the parties nor the court notice the absence of subject matter jurisdiction at any time during the original proceeding, the defendant may still be able to successfully raise the lack of jurisdiction as a defense to a subsequent proceeding by the plaintiff to enforce the decree because of the maxim that a judgment rendered by a court that lacked jurisdiction over the subject matter is void and a nullity [Des Moines Navigation and R. Co. v. Iowa Homestead Co (see brief illustrative cases)].

3. **G/R:** If a court in the original action determined that it had subject matter jurisdiction, the permissibility of a collateral attack depends on weighing five non-exclusive factors:

1. The lack of jurisdiction over the subject matter was clear;
2. The determination as to jurisdiction depended upon a question of law rather than fact;
3. The court was one of limited and not general jurisdiction;
4. The question jurisdiction was not actually litigated;
5. The policy against the court's action beyond its jurisdiction is strong.

[Rst. (1) Judgments § 10].

4. **G/R:** A judgment in a contested action, whether or not the question of subject matter jurisdiction actually was litigated, is beyond collateral attack unless there are no justifiable interests of reliance that must be protected, and

1. The subject matter of the action was so plainly beyond the courts jurisdiction that entertaining the action was a manifest abuse of authority; or
2. Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
3. the judgment was rendered by a court lacking the capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity to belatedly to attack the court's subject matter jurisdiction.

[Rst. (2) Judgments §§ 12, 69].

5. **G/R:** A judgment is entitled to full faith and credit even as to questions of jurisdiction when the second court's inquiry discloses that those questions have been fully and fairly

litigated and finally decided in the court which rendered the original judgment when the first judgment is collaterally attacked [Durfee v. Duke].

§2: JURISDICTION OVER THE PERSON

§2.1: Analytical Framework

I. Approaching the Problem

A. Once it has been determined that the court has subject matter jurisdiction you must determine whether it also has personal jurisdiction and three more questions must be answered:

1. **Is there a traditional bases of jurisdiction?**
    a. If YES, then the court has personal jurisdiction;
    b. If NO, go to question #2.
2. **If there is no traditional base, does the long arm statute apply?**
    a. If NO, then there is not personal jurisdiction;
    b. If YES, then go to question #3.
3. **If there is no traditional base, and the long arm statute applies, is the long arm statute constitutional?**

§2.2: Traditional Bases of Personal Jurisdiction

I. Question #1: Is there a traditional bases of jurisdiction

A. **G/R:** Traditional Bases of Jurisdiction: there are five traditional bases of jurisdiction:

1. Territoriality: the rule of physical presence [see infra §2.2, I, Rule F] is the first, and most traditional basis of jurisdiction, that is, a state can assert jurisdiction over anyone within its borders, even if they are only in the state on a transitory basis, and cannot assert jurisdiction over anyone outside its borders.

2. Domicile: the a citizen of a state is a domicile of that state; thus, a domicile of a state owes that the state a duty of loyalty; thus, it does not matter where the domicile of that state is, the state has power over its domiciles.

a. Domicile is determined by two factors:
    (i) the intent of an individual to make a particular location a permanent home; and
    (ii) facts indicating that the part had physically been located there.
b. The court can enter a personal judgment against a domiciliary who is absent from the jurisdiction.
c. The availability of defendant's domicile as a proper forum assures that there is one place in which a defendant always may be sued.
d. Domicile is determined at the time the suit was instituted and is not changed if the defendant moves before or during suit

3. Consent: jurisdiction can always be based on consent, that is, if the defendant agrees to jurisdiction in the case, then the court has the power to hear it (if there is subject matter jurisdiction). There are three basic types of consent:

a. *Express Consent:* consent is often express (in contracts there are often express consent to jurisdiction clauses). Almost all modern contracts contain express jurisdictional consent clauses.

b. *Implied Consent:* a defendant's activities in the forum state are sufficient, in some instances, to justify the service of process for suits related to the activity [Hess v. Pawloski] (under *Hess* the statute stated that if you drive on the highways of the state you are appointing the registrar of motor vehicles as your agent and the plaintiff can serve process to them).

(i) Implied consent is a legal fiction used to recognize state police powers and adjudicate events and accidents that occur within its borders and make the non-resident vulnerable if they are in an accident.

(ii) The implied consent doctrine applies to highways, motorbikes, aircraft, stock fraud, and may others.

(iii) In most states, a foreign corporation that registers as a condition of doing business in the state is regarded as having consented to suit in the courts of that state even as to actions unconnected with the corporation's activities in the forum.

c. *Waiver:* the defendant can consent by not asserting a jurisdictional defense, that is, this consent can arise when the defendant fails to assert a jurisdictional defense which amounts to a waiver of jurisdiction.

(i) **Rule 12(h)(1):** provides that a defendant who fails to raise an objection to personal jurisdiction in the answer or in an initial motion under Rule 12 is subsequently precluded from raising the issue.

(ii) Caveat: by submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction and the manner in which the court determines whether it has personal jurisdiction may include a variety of legal rules and presumptions, as well as straightforward fact finding.

d. Choice of Law Clauses: when parties consent, in the contract, to a forum selection clause by express agreement it will generally be upheld.

(i) Domestically, forum selection clauses have been upheld [Carnival Cruise Lines v. Shute]; and

(ii) even international forum selection clauses have been upheld [Insurance Co. of Ireland v. Des Bauxites Co.].

4. Corporate Presence: corporate presence is like territoriality applied to entities. The law treats corporations as people. When a corporation is doing business in a state, in effect, it is present in the state and if it is present in a state the state can assert jurisdiction over the corporation even though it is a foreign corporation.

5. Agency: one can assert jurisdiction based on agency, the plaintiff can serve process on the defendant's agent, whether it is a corporate agent, a partnership agent, or an

individual citizen agent. Agents, when they are acting for a party are, in effect, jurisdictional carriers. If you can serve the defendant's agent, it is just as good as serving the individual himself.

B. **G/R:** In Personam Jurisdiction: permits the court to enter a judgment that is personally binding on the defendant, either ordering him to refrain from doing a certain act (equitable or injunctive relief) or decreeing that the plaintiff may collect a certain amount of damages from the defendant (legal relief).

C. **G/R:** In Rem Jurisdiction: in rem jurisdiction permits a court to adjudicate the rights of the claimants to a specific piece of property [see infra §2.5, I, Rule A].

D. **G/R:** Quasi In Rem Jurisdiction: in cases in which the court lacks personal jurisdiction over the defendant, but has jurisdiction over property belonging to the defendant, that property will be seized by the plaintiff and used to satisfy the claim if the plaintiff prevails [see infra §2.5, I, Rule B].

E. **G/R:** there are two traditional ways in which a court could assert jurisdiction over a defendant:

1. Serve the defendant with process in the state where the plaintiff is asserting jurisdiction; or
2. Attach the defendant's property (if there is any) in the state where the plaintiff is asserting jurisdiction.

*[Pennoyer v. Neff].

F. **G/R:** Rule of Physical Presence: Every state possess exclusive jurisdiction and sovereignty over persons and property within its territory, that is, a state is all powerful within its borders. A state has complete and total territorial power within its boundaries.

1. Conversely, no state can exercise direct jurisdiction and authority over persons or property outside its territory. In other words, a state is completely helpless; it is impotent outside its borders.

*[Pennoyer v. Neff].

G. **G/R:** Transient Jurisdiction: a state can assert territorial jurisdiction within its borders even when the defendant is simply in the state on a transitory basis [Pennoyer v. Neff].

H. **G/R:** Lack of Jurisdiction: if the court does not have jurisdiction to hear the case the plaintiff cannot prevail on the merits because:

1. The due process clause (14th Amendment) prohibits a court asserting jurisdiction over the defendant; and
2. The full faith and credit clause (Article IV, §1) does not require other states or courts to enforce or hear the case. In other words, the full faith and credit clause requires another state to respect the decisions of another court in a different state *unless* the court lacked personal jurisdiction or in rem jurisdiction.

§2.3: Long Arm Statutes

I. Question #2: Is there a Long Arm Statute on which jurisdiction can be based?

A. **G/R:** Long Arm Statutes: [sometimes called single act statutes]: are statutes which seek to provide personal jurisdiction over nonresidents who cannot be found and served in the forum.

1. These statutes predicate jurisdiction over non-residents upon the defendant's general activity the state, or the commission of any one of a series of enumerated acts within the jurisdiction, or, in some cases, the commission of a certain act outside the jurisdiction causing consequences within it.

B. The long arm statute should be given to you on the test, or there are some in the supplement (pp.283).

II. Question #(3): is the Long Arm statute Constitutional?

**Note, the constitutionality of the long arm statute will turn on whether it comports with the requirements of the due process clause of the Fourteenth Amendment.

A. **Analytical Framework:** Constitutional Analysis of a Long Arm Statute: the constitutional analysis of a long arm statute requires a two-prong anaysis:

1. **Prong 1:** Minimum Contacts and Purposeful Availment Rules: the constitutional touchstone is whether the defendant purposefully established minimum contacts in the forum state.

a. Purposeful availment [foreseeability test]: the foreseeability that is critical for exercising due process analysis is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.

(i) This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely on the result of random, fortuitous, or attenuated contacts or by the unilateral activity of another party or third person.

(ii) Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a **substantial connection** with the forum state.

b. Substantial Connection Test: where the defendant has deliberately engaged in significant activities within a state, or has created continuing obligations between himself and the residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the "benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in the forum as well.

2. **Prong 2:** Determining Fair Play and Substantial Justice: once it has been decided that the defendant purposefully established minimum contacts with the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.

a. Factors in determining fair play and substantial justice:

(i) the burden on the defendant;
(ii) the forum state's interest in adjudicating the dispute;
(iii) the plaintiff's interest in obtaining convenient and effective relief;
(iv) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and
(v) the shared interest of the several states in furthering substantive social policies.
*These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts then would otherwise be required.

B. **G/R:** Minimum Contacts Test: to subject a defendant to personal jurisdiction, due process only requires certain minimum contacts with the forum state such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice.

1. In other words, a state can assert jurisdiction over a non-resident, if the non-resident has *minimum contacts* with the forum so that is fair play and substantial justice to say to the non-resident you must stand and defend in this court.
2. *Minimum Contacts:* some relationship with the forum, some activity in the forum and the activity in the forum must be enough so that it is fair play (reasonable) to say to the defendant stand and defend. That is Due Process.
****The **critical element in understanding all long arm statutes is that eh cause of action, the minimum contact, must be related to the forum.** It cannot be a situation in which the defendant was harmed in another forum.
*[International Shoe]
3. The minimum contacts test focuses on reasonableness rather than state sovereign power over individuals. Some facts that court considers are:

a. the plaintiff's interest;
b. the forum's interest;
c. the defendant's interest and expectations; and
d. purposeful availment, that is, whether the state afforded the defendant the protection of its laws.

C. **G/R:** Due Process Test: whether due process is satisfied must depend upon the quality and nature of the activity in relation to the fair and orderly adiministration of the law which it was the purpose of the due process clause to ensure.

1. The due process clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contracts, ties, or relations.
*[International Shoe].

D. **G/R:** Volitional Test: minimum contacts must be volitional, beneficial, and cognitive. The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state.

1. The of this rule will vary with the quality and nature of the defendant's activity, but it is essential in each that be some act by which the defendant purposefully avail itself of the privilege of conducting activities within the forum state, thus, invoking the benefits and protections if its laws.

*[Hanson v. Denckla].

E. **G/R:** Purposeful Availment Rule: for personal jurisdiction to be asserted over an individual or corporation, the defendant must purposely avail itself of the protection of the forum (i.e. the defendant must take advantage, or benefit, formt he laws and protections of the state).

1. When a defendant (individual or corporation) purposefully avails itself of the privilege of conducting activities within the forum state, the defendant has clear notice that it is subject to suit there, that is, it is foreseeable.
2. *Foreseeability Factor:* the test for foreseeablility is *not* whether is not whether it is foreseeable that a product may end up in a forum state, rather, it is whether the defendant could foresee being haled into court in the forum state (i.e. whether they have any contacts with the forum state and whether they benefit from the forum state).
3. It is **always a relevant factor** of who brought the chattel or product into the forum.
    a. Generally, if the product was brought into the state by the manufacturer or distributor, then the corporation can be sued in the forum state (i.e. the product entered the state through the stream of commerce); however, if the *consumer* brought the product into the forum state and the defendant has no contacts with the forum state then personal jurisdiction cannot be asserted.

*[World Wide VW v. Woodson].

F. **G/R:** Single Contact Rule: a single act seeking to serve the forum market has been held to suffice to support personal jurisdiction in an action asserting a claim growing out of that act [McGee v. International Life Insurance Co.].

1. Ex: D (non-resident) sends a contract by mail to P (resident of forum state) and if the contract has a *substantial connection* with the state such as insurance coverage, then P can assert person jurisdiction over D without violating due process and the minimum contacts requirement is satisfied.

G. **G/R:** Substantial Connection Rule: jurisdiction is proper where the contacts (even a single contact) proximately result from actions by the DEFENDANT HIMSELF that create a *substantial connection* with the forum state.

H. **G/R:** Unilateral Act of the Plaintiff: the unilateral act of the plaintiff in bringing a product into the forum state, or relocating in the forum is insufficient to establish a

requisite connection for jurisdiction and thus fails to satisfy the requirement of contact with the forum state [World Wide Volkswagen].

1. Ex: P buys a car in NY, drives the car to Oklahoma, and then tries to sue D (the car manufacturer) in Oklahoma. There is no jurisdiction because D did not have any contacts with Oklahoma and did not try and reach the market in Oklahoma.
2. Financial benefits accruing to the defendant from collateral relation to the forum state will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that state.
3. The unilateral activity of those who claim some relationship with the non-resident defendant cannot satisfy the requirement of contact with the forum state.
4. A *consumer's* unilateral act of bringing the defendant's product into the forum state is an insufficient constitutional basis for personal jurisdiction over the defendant [Asahi Metal Co.].

I. **G/R:** Purchased Products in the Forum State: the forum state does not exceed its jurisdictional powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products in the stream of commerce with expectation that they will be *purchased* by consumers in the forum state [Gray v. American Radiator].

1. If a product is purchased in the state, that state can assert jurisdiction over the defendant without violating the due process clause.
2. **Policy:** if the court did not institute this rule, then the manufacturer of products could be sued in almost any state in which a product ended up.

J. **G/R:** Stream of Commerce Tests: there are two tests that are applied for determining whether a manufacturer who puts products in the stream of commerce is jurisdictionally vulnerable wherever the product ends up.

1. *Steam of Commerce **Plus** Test:* [four justices of the supreme court]: the due process clause requires something more than the defendant being aware of its product entry into the forum state through the stream of commerce in order for the state to exert jurisdiction over the defendant. The *substantial connection* between the defendant and the forum state is necessary for a finding of minimum contacts come about by some action of the defendant purposely directed at the forum state.

a. The placement of a product into the stream of commerce without more is NOT an act by the defendant purposefully directed toward the forum state.
b. Factors in determining a "substantial connection" under the stream of commerce plus test:

a. designing the product in the forum state;
b. establishing channels for providing regular advice to customers in the forum state;
c. advertising in the forum state; or
d. marketing the product through a distributor who as agreed to serve as the sales agent in the forum state.

2. *Steam of Commerce Test:* [four justices of the supreme court]: jurisdiction premised on the placement of a product into the stream of commerce is consistent with the due process

clause, and there is no requirement of showing additional conduct because as tlong as a participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit cannot come as a surprise.

1. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically form the retail sale of the product in the forum state and indirectly benefits form the state's laws that regulate and facilitate commercial activity; therefore, the defendant has purposefully availed himself of a benefit from the forum state.

**Circuit courts are split on which test to use; however, the stream of commerce rule may be better reasoned because it essentially follows *World-Wide V.W.* which endorses the "substantial connection" of *American Radiator Co. v. Gray* which the stream of commerce plus test seems to rely on and therefore because *World Wide* supported both decisions it is better.

K. **G/R:** Contracts as Contacts Rule: Under the due process clause, an individual's contract with an out-of-state party *alone cannot* automatically establish sufficient minimum contacts in the other party's home forum.

1. Factors in Determining if a Contract satisfies the minimum contacts requirement:
    a. prior negotiations;
    b. contemplated future consequences;
    c. terms of the contract; and
    d. the parties actual course of dealing must be evaluated in determining whether the defendant purposefully established minimum contacts with the forum.

*[Burger King].

2. The *Burger King* decision essentially mandates a *contracts PLUS test* for determining minimum contacts. A court is to look at all of the communications and transactions between the parties, before, during, and after, the consummation of the contract to determine the degree and type of contacts the defendant has with the forum, apart from the contract alone.

3. The *Burger King* decision does not mean that a corporation can exercise jurisdiction over out-of-state consumers to collect on modest debts.

L. **G/R:** A corporation using the telephone and mail (and presumptively the internet) to solicit or negotiate a contract of a large size is, in effect, the same as sending an agent into the forum state, and therefore, in some circumstances that alone is sufficient to establish minimum contacts [Alchemie International v. Metal World Inc.].

§2.4: Personal Jurisdiction: Specific Jurisdiction and General Jurisdiction

I. Specific Jurisdiction

A. **G/R:** Specific Jurisdiction: specific jurisdiction gives rise to jurisdiction only for claims related to the jurisdictional contact with the state. The lawsuit must "*arise out of*" an activity related to the cause of action.

1. Long arm jurisdiction is specific jurisdiction, that is, jurisdiction that arises out of a particular connection between the outside defendant and the forum—the contract, the tort, the breach of contract, or the broken marriage.

B. Generally: Specific jurisdiction can be asserted in the following contexts:

1. If the defendant's actions in the forum state are continuous and systematic and the cause of action arises out of those activities, then the assertion of specific jurisdiction is usually constitutional.
    a. Ex: International Shoe.
2. If the defendant's action which created the cause of action arose out of a single or isolated event, then the determination of specific jurisdiction is case specific depending on the facts (minimum contacts rules).

II. General Jurisdiction

A. **G/R:** General Jurisdiction: jurisdiction that is based on the fact that the defendant has a *continuous and systematic association* with the forum—an ongoing intense relationship, so it is not unfair or unreasonable to say to the defendant "stand here and defend here in the forum" even over disputes that have nothing to do with the forum, unlike specific jurisdiction where the subject matter of the action must relate to the state.

1. General jurisdiction is a higher quantum to satisfy then specific jurisdiction.
2. General jurisdiction encompasses all assertions of jurisdiction that do not qualify as assertions of specific jurisdiction.

B. Generally: General jurisdiction can be asserted in the following contexts:

1. If the defendant's actions in the forum state are continuous and systematic and the cause of action did *not* arise out of the those actions; the determination of jurisdiction and its constitutionality is usually case specific depending on its facts.
    a. Ex: *Shriver v. Alice Charmer:* P got his arms torn off by D's rotatiller in Kansas, then sued in Mississippi [not D's domicile or principle place of business] and court allowed general jurisdiction because D's continuous and systematic association with the state (i.e. selling rotatillers).
2. If the defendant's action in the forum state are single and isolated and the cause of action did *not* arise out its actions; the determination of jurisdiction is usually found to be unconstitutional.
    a. Ex: Helicol case.

C. **G/R:** in general jurisdiction cases, the plaintiff always has the option of suing the defendant wherever the defendant corporations headquarters are, that is, the plaintiff can always sue the defendant where it is domiciled.

§2.5: Jurisdiction Based on Property

A. **G/R:** In Rem Jurisdiction: permits a court to adjudicate the rights of all claimants to a specific piece of property. In rem jurisdiction means that a state through its courts may render a valid judgment affecting the interests of all persons *in property* where it has jurisdiction over the property, even though it may not have jurisdiction over the person whose interest is being affected.

1. This authority originated from a state's power to determine controversies regarding real property within its borders [Pennoyer]. A state is all powerful within its boundaries and can adjudicate title and interest in any piece of property within it boundaries not matter where the claimants are.
2. The power over property gives the state the power to adjudicate anything about the property.

B. **G/R:** Quasi In Rem Jurisdiction: quasi in rem jurisdiction can be used in two types of cases: (a) cases involving disputes related to the property under the court's control (i.e. such as actions for specific performance of a contract to purchase land) and this type of jurisdiction continues to provide a constitutional basis for exercise of jurisdiction; and (b) cases involving personal disputes where the court lacks personal jurisdiction over the defendant, but has jurisdiction over property belonging to the defendant. That property can be seized by the plaintiff and used to satisfy his judgment if the plaintiff prevails.

1. Quasi in rem jurisdiction is a legal fiction created by the courts to assert personal jurisdiction.
    a. The defendant has property in the forum state, the defendant is not in the state, the cause of action has nothing to do with the state, but the state has power over the property (real property: a bank account, securities, machinery, etc…) enabling the court to assert jurisdiction.
    b. In effect, the quasi in rem jurisdiction allows the state to seize the property and treat that property as the defendant.
    c. The court is extracting jurisdiction and asserting power over the defendant based on the fact they have their property [it was validated in Pennoyer].
2. Quasi in rem jurisdiction was allowed to exist because quasi in rem cases did not get full faith and credit. If the jurisdictional basis was the property, then the jurisdictional power exhausted itself when the property was exhausted. In other words, the plaintiff could not take the judgment to another state and have it enforced beyond the value in the rendering state.
3. Quasi in rem jurisdiction basically means that the state, through its courts, may render a valid judgment affecting the interests of a particular person in a thing when even though it may not have personal jurisdiction over the person whose interests are affected.
4. Rule: property cannot be subjected to a court's judgment unless reasonable and appropriate efforts were made to give the property owner notice of the action.

C. **G/R:** Minimum Contacts and Quasi In Rem Jurisdiction: all *quasi in rem* assertions of state court jurisdiction must be evaluated according to the standards of the minimum contacts test set forth in *International Shoe* and its progeny.

1. In other words, now you need minimum contacts, fair play, and substantial justice for a quasi in rem cases.
    a. Basically eliminates quais in rem jurisdiction because if you have minimum contacts, fair play, and substantial justice, you can assert personal jurisdiction which means you would sue under in personum jurisdiction because you would get full faith and credit across the country.l
2. The Supreme court did not declare quasi in rem jurisdiction unconstitutional, only knocked most of the utility out of it. However, because in most states the long arm statute does not go to the constitutional limits, you can still sue for some actions under quasi in rem jurisdiction.
3. There must be a relationship between the attached property and the cause of action to support in rem jurisdiction; that is, you cannot get general jurisdiction based on the property in the state, you can only get specific jurisdiction in the state with relation to the property.
*[Shaffer v. Heitner].

D. **G/R:** Territorial Jurisdiction: territorial jurisdiction and transitory jurisdiction are still constitutionally permissible means of asserting jurisdiction over a person because territorial and transitory jurisdiction are among the most firmly established principles of personal jurisdiction in America. The states have the power to hale before it any individual who could be founding within its borders, and once having acquired jurisdiction over him by properly serving process, the state can retain jurisdiction to enter a judgment against him, no matter how fleeting the visit [Burnham v. Superior Court].

§2.6: Federal Court Jurisdiction: the reach of the federal district courts

A. **G/R:** Federal Court Jurisdiction: federal courts typically use the long arm statute of the forum state in which they are sitting, they certainly do that in diversity cases and do it in federal question cases when the federal statute that is at issued does not have a jurisdiction provision in it.

1. The standard a federal court uses in a federal question case when there is no federal long arm state is believed to be the constitutional standard of *International Shoe* and its progeny (because they deal with state court jurisdiction).
2. The question then is what constitutes a minimum contact with the United States. No one really knows, but the court will use fair play and substantial justice standards to make sure it is reasonable.

B. **Rule 4:** The US has by statute or rule imposed a number of territorial limits upon the exercise of personal jurisdiction by the federal courts. Rule 4 was amended to broaden substantially the reach of the federal judicial process.

1. **Rule 4(k)(1)(A):** provides that in actions other than federal question and interpleader cases, the federal court may assert jurisdiction over a defendant only when the forum state would be empowered to do so; subject to three major exceptions:

a. **Rule 4(k)(1)(B):** permits service outside the forum state (but within 100 miles of the court where the action is commenced or is to be tried) if such service is necessary to add a third party under **Rule 14**, or to join, under **Rule 19**, an indispensable party to an action or a counterclaim or cross-claim.
b. **Rule 4(k)(1)(C):** permits service on a defendant who is subject to feral interpleader jurisdiction under 28 U.S.C. §1335.
c. **Rule 4(k)(1)(D):** recognizes that Congress in some instances expressly has authorized nationwide, or even worldwide service of process.

2. **Rule 4(k)(2):** is another exception in the nature of a general federal long-arm provision. The rule allows federal courts to exercise jurisdiction over all defendants against whom federal law claims are made in cases in which the defendant is not subject to the jurisdiction of any single state but the Constitution of the US would permit jurisdiction.

3. Federal court jurisdiction is based on the 5th Amendment Due Process Clause (rather than the 14th because the 14th Amendment only applies to the states).

4. The Minimum Contacts Test of *International Shoe* applies when a federal court pursuant to **Rule 4(k)(1)** resorts to the law of the forum state to serve process on an out-of-state defendant. The rule authorizes service to establish in personam jurisdiction over a defendant who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located. This means that the federal court can use the forum state's long-arm statute only to reach those parties whom a court of the state could also reach. The apparent intent of the draftsmen of **Rule 4(k)** was to use state provisions for service in order to permit the federal courts in a state to hear those case that could be brought in the state's own courts when a basis for asserting federal subject matter jurisdiction exists.

§2.7: Direct and Collateral Attacks on Jurisdiction: Challenging the Court's Jurisdiction

A. **G/R:** Direct Attack on Jurisdiction: the defendant attacks the court's power to hear the case, or jurisdiction, in the court which asserting jurisdiction over him.

1. Special Appearances: the term special appearance refers to the procedure at common law by which a defendant presented a challenge to the courts exercise of personal jurisdiction without submitting to the court's jurisdiction for any other purpose.
a. Generally, a defendant had to designate the appearance "special" and limit himself to raising only a jurisdictional defense. If the defendant did anything else, such as argue the merits in any way, the defendant would be deemed to have made a "general appearance" constituting a voluntary submission to the court's jurisdiction and a waiver of any defects in the court's jurisdiction.

b. Under **Rule 12(b)(2)** a plaintiff must make only a prima facie showing of jurisdictional facts through the submitted materials in order to avoid a defendant's motion to dismiss. Thus, a plaintiff could not meet a burden of proof requiring a preponderance of evidence without going beyond the written materials. Accordingly, if a plaintiff's proof is limited to written materials, it is necessary only for these materials to demonstrate facts, which support a finding of jurisdiction in order to avoid a motion to dismiss [Data Disc. Inc. v. Systems Technology Associates, Inc.].

B. **G/R:** Collateral Attacks on Jurisdiction: the defendant attacks the court's power to hear the case, or jurisdiction, in a court other than the one that was asserting jurisdiction over him (usually after defaulting in the first action).

1. **G/R:** If a defendant contests a court's exercise of personal jurisdiction and loses, he may *not* challenge jurisdiction in a later action to enforce the judgment because public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between parties [Baldwin v. Iowa State Traveling Men's Ass'n].

a. However, the *Baldwin* opinion repeats the persisting rule that a defendant who makes no appearance whatsoever remains free to challenge a default judgment for want of personal jurisdiction.

C. **G/R:** Limited Appearance Problem: generally, a defendant in an action commenced on a quasi in rem basis has to appear for the limited purpose of defending his interest in the attached property with the potential hazard that the court may find in personam jurisdiction over him. This leaves the defendant in such an action with the choice to appear, and thereby risking the possibility of an in personam judgment in excess of the value of the property attached; or not appearing and thereby as a practical matter forfeiting his property.

1. The trend to solve this dilemma has been toward permitting defendants the right of "limited appearance."

2. Limited Appearance Procedure: the limited appearance procedure allows the defendant to go to the court and challenge its jurisdiction over him without litigation on the merits. If the defendant wins, he can go home. If the defendant loses, he has to choose between having judgment entered against him and appealing or defending on the merits and waiving his jurisdictional argument.

§3: NOTICE AND OPPORTUNITY TO BE HEARD

I. Question #3: Has the Defendant been given notice and opportunity to be heard?

A. **Analytical Framework:** there are three main questions that need to be answered in determining if the defendant has been given notice and an opportunity to be heard:

1. **Has the defendant been given reasonable notice?** [§3.1]
2. **Has the plaintiff complied with the service of process rules, and if so, has this given the defendant reasonable notice?** [§3.2]

3. **Has the defendant been given an opportunity to be heard?** [§3.3]

§3.1: Requirement of Reasonable Notice

I. General Notice Principles

A. **G/R:** Reasonable Notice: within the limits of practicability, notice must be such as reasonably calculated to reach the interested parties. The constitution requires that notice *must be reasonably calculated under the circumstances* to give actual notice. That is the constitutional threshold.

B. **G/R:** Due Process Clause: the due process clause of the 14th Amendment requires, at a minimum, that depravation of life, liberty, or property by adjudication *must* be preceded by notice and an opportunity for hearing appropriate to the nature of the case.

1. Due process requires that reasonable efforts to provide notice be made with regard to persons whose interests are to be determined.

C. **G/R:** Personal Service: personal service of written notice within the jurisdiction is the classical form of notice and always adequate in any type of proceeding.

1. Personal service, however, has not in all circumstances been regarded as indispensable to due process to residents, and it has more often been held unnecessary to nonresidents.

D. **G/R:** Service of Process: a fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to be heard.

1. Notice must be of the nature, as reasonably as can be, to convey the required information and it must afford a reasonable time for those interested to make their appearance.

E. **G/R:** Test for Reasonableness: the reasonableness, and hence constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other feasible and customary substitutes.

F. **G/R:** Method of Giving Notice: the method of giving notice must have a reasonable prospect of giving actual notice to the defendant himself. Most forms of process, in and of themselves, provide notice:

1. in hand delivery;
2. delivery by certified mail or ordinary mail;
3. service of process on a person the defendant is living with;
4. service of process on an agent who will transmit the service of process to the defendant;
5. all of these methods satisfy the requirements of due process and notice.

G. **G/R:** Notice by Publication: notice in a newspaper is not reasonably calculated under the circumstances to give actual notice because no one reads those notices in the newspaper [Mullane v. Central Hanover Bank].

1. The other forms of notice (see supra §3.1, I, Rule F) make the constitutional grade, thus, the notice issue requires that you spot the publication form and make sure it is reasonably calculated under the circumstances to give actual notice.
2. Sometimes the circumstances are such that there is no way of giving notice other than by publication; but those circumstances are relatively rare instances. They exist, usually, only when there is a class of people so huge, and the plaintiff does not know their addresses and the best the plaintiff can do under the circumstances is to use effective media notice, which is a form of publication.

***If you see notice in any form of publication on the exam, you know that you are being tested about notice and opportunity to be heard. You must analyze the facts on the exam and determine if notice is *reasonably calculated under the circumstances* to give actual notice.

F. **G/R:** Notice to the Insane: notice by mail, although ordinarily sufficient, does not satisfy the due process clause when it is mailed to someone known to have been adjudged insane and committed to a hospital, and who is without the protection of a guardian [Covey v. Town of Sommers].

G. **G/R:** Notice to the Incarcerated: notice by mail, although ordinarily sufficient, does not satisfy the due process clause when it is mailed to a person known to be incarcerated home address [Robins v. Hammerhand].

H. **G/R:** Notice by Posting: notice by posting summons on an apartment door does not satisfy the minimum standards of due process because if often results in failure to provide actual notice to the tenant concerned [Greene v. Lindsey].

1. Test: notice must be a reliable means of acquainting interested parties of the fact that their rights are before the courts.

§3.2: Service of Process

I. Mechanics and Rules for Giving Notice: Service of Process

A. **Federal Rule 4:** Notice of a suit is given by the service of process upon the defendant. Traditionally, process consists of a copy of the plaintiff's complaint, together with a summons directing the defendant to answer. Service of process is made by personal delivery of the summons and complaint to the defendant. Other methods of service, such as delivery by mail, have assumed greater importance since the advent of long arm statutes and a generally held to be constitutional.

1. **Rule 4(a):** general summons requirements: (a) name and address of the plaintiff's party; (b) time within which the defendant must appear and defend; (c) notice that failure to comply will result in default judgment.

2. **Rule 4(c):** service of process must be served with a copy of the complaint and may be served by anyone who is not a party and 18-years of age or older.

3. **Rule 4(d):** In 1993, Congress adopted Rule 4(d), which strongly encourages waiver of formal service (rather than response by mail under the old rule).

a. Under Rule 4(d) an action commences when the plaintiff sends a form entitled "Notice of Lawsuit and Request for Waiver of Service of Summons" or similar document by mail or some other "reliable" means.

b. Domestic defendants have 30 days form the date on which the waiver was sent to return the waiver; otherwise they will be charged with the costs associated with providing formal service.

i. Along with the threat of paying the costs of service, defendants receive a positive incentive in that they are allowed 60 days after the date on which the waiver was sent to answer the complaint if the waiver is returned in a timely fashion.

ii. This procedure facilitates service by mail.

4. **Rule 4(h):** The specific means of making personal service on, among others, individuals, corporations, and partnerships, and other associations subject to suit under a common name are set out in Rule 4(h).

a. Rule 4(h) has been liberally construed by the courts and, as interpreted, does not require rigid formalism. To be valid, service of process is not limited solely to officially designated officers, managing agents or agents appointed by law for the receipt of process. Rather, rules governing service of process are to be construed in a manner reasonably calculated to effectuate their primary purpose: to give defendant adequate notice that an action is pending. The rule does not require that service be made solely on a restricted class of formally titled officials, but rather persists it to made upon a representative so integrated with the organization that he will know what to do with the papers. Generally, service is sufficient when made upon an individual who stands in such a position as to render I fair, reasonable and just to imply the authority on his part to receive services [Insurance Co. of North America v. S/S Hellenic Challenger].

5. **Rule 4(e)(1)**: provides an alternative to these methods by broadly authorizing the sue in federal courts of the procedures governing the manner of service prescribed by the law of the state in which the district court is setting.

a. **Rule 4(e)**: specifically provides for the use of state procedures to effect service on a party "may be effected in any judicial district in the US," thus enabling federal courts to take advantage of the state long-arm statutes.

6. **Rule 4(i):** Rule 4(i) provides for service of process in a foreign country.

7. **Rule 4(f):** Rule 4(f) specifically provides that "any international agreed means" reasonably calculated to give notice may be used to effect service on persons outside of the US.

8. **Rule 55(a):** It is axiomatic that service of process must be effective under Rule 55(a) [requiring entry of default when a defendant has "failed to plead or otherwise defend as provided by these rules] before a default or default judgment may be entered against the defendant.

9. **Personal Delivery of Summons:** "Place and Leave" is the legal phrase for what a process-sever must do with a summons when he goes out to serve papers on a defendant. Personal delivery of summons left with the defendant is always a proper method of notice.

10. **Rule 4(e)(2):** Service on a Person Residing in the Defendant's Dwelling House of or Usual Place of Abode: As an alternative to personal delivery, Rule 4(e)(2) permits service of process to be made upon an individual by leaving a copy of the summons and complaint at his "dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."

B. **G/R:** Service of Agents: parties to a contract may agree in advance to submit to a jurisdiction of a given court, to permit notice to be served by the opposing party on an agent within that jurisdiction, or even to waive jurisdiction altogether.

1. A party to a contract may appoint an agent to receive service of process within the meaning of **Rule 4(e)(2)** where the agent is not personally known to the party, if the agent transmits the notice promptly to the defendant.
*[National Equipment Rental v. Szukhent].

C. **G/R:** Cognovit Clauses (or notes): typically by a cognovit note, the debtor waives objection to jurisdiction, notice, service of process, and may even empower the creditor or any attorney to appear in the debtor's suit and confess judgment. The Supreme Court ruled that cognovit notes were not per se violations of the due process clause but noted that they should be judged on a case-by-case basis with particular sensitivity to whether there was inequality of bargaining power of lack of consideration [D.H. Overmyer v. Frick].

D. **G/R:** Improper Service: a plaintiff who improperly serves notice to the defendant under **Rule 4(d)(2)** cannot obtain a default judgment against the plaintiff if he fails to answer, even if he had actual knowledge of the suit [Maryland Fireman's Ass'n v. Chaves].

II. Immunity From Process

A. **G/R:** Immunity from Process: for reasons of public policy (promotes administration of justice and is more fair to the plaintiff), judicial convenience, and general fairness, certain persons are immune from service of process while in the forum state.

1. This immunity extends to witnesses at other litigation, counsel for the parties at other litigation, the parties to another litigation, and certain persons acting in some

official capacity within the forum state (marshals, officers of the court, governmental officials, or investigators of the government).
2. Some states have statutes requiring that service of process cannot be served on Sunday or someone's Sabbath day.
3. **Purpose:** the underlying public policy for the privilege of immunity from civil process of a non-resident charged with a crime is not to deter the appearance of the non-resident before the courts by the threat of civil or other process.

B. **G/R:** a nonresident of the forum state, who voluntarily and without compulsion of law, submits himself to the jurisdiction of the State court, in answer to an indictment against him, and who is not at the time a fugitive of justice, is privileged with immunity while attending the court from service of process [State ex. rel. v. Duffield].

C. **G/R:** a person confined in jail or prison on a criminal charge or imprisoned on conviction for such a charge is subject to the service of process, irrespective of the question of residence, at least if he was voluntarily in the jurisdiction at the time of the arrest and confinement [State ex. rel. v. Duffield].

D. **G/R:** Diplomatic Immunity: 22 U.S.C. §§254a-d and 288(b) grant immunity to foreign diplomats and other representatives of foreign governments, their families, and members of their households.

III. Etiquette of Service

A. **G/R:** Etiquette of Service: the plaintiff cannot trick or entice the defendant into the jurisdiction to serve process on him; on the other hand, if someone is in the jurisdiction and is hiding they can be flushed out.
1. In other words, you cannot entice someone from outside the state into the state, in order to serve process but if they're already in the state then they are fair game. You cannot lie, defraud, or cheat.

B. **G/R:** Service of Process by Fraud: service of process by fraud will be quashed if the defendant was induced into the forum state by fraud, force, or involuntary entry into the jurisdiction of the court against his will or knowledge.
1. A judgment procured fraudulently lacks jurisdiction and is null and void.
2. A fraud affecting the jurisdiction is equivalent to lack of jurisdiction.

§3.3: Opportunity to Be Heard

I. Creditor/ Debtor Problems

A. Generally: the normal context for an opportunity to be hear problem is in a creditor/ debtor situation. Someone borrows money and doesn't repay it. The creditor uses one of a series of very powerful remedies: (a) wage garnishment; (b) property will be attached; or (c) the property will be reposed. All of these creditor remedies were never questioned until the 1960s when the Supreme Court in a series of decisions (Shevin, Mitchell,

Doehr) tried to breath some due process balancing into the creditor/ debtor problem by trying to assure that the debtor would have an opportunity to be heard.

1. In almost all cases, the debtor owes the money, cannot pay the money, and the system does not want to create too many procedural barriers to the creditors for enforcement of the debt. Otherwise the whole system breaks down and people won't lend money and the cost of credit goes up.

B. **G/R:** Basic Due Process Protections: the Supreme Court basically held that opportunity to be heard requires certain due process protections:

1. The decision to issue the writ of garnishment, attachment, repossession, or replevin must be a decision of a *judge* and not some clerk or sheriff.
    a. The judge must make that decision based on a full presentation by the creditor of why that creditor believes it has the right to immediate possession.
    b. That basically entails a fact-based statement of the right to the debt or the property under oath.
    c. The creditor has to post a bond to protect the debtor in case of wrongful attachment or replevin AND the *debtor* must be given an immediate right to a hearing on the merits.
2. This means that the property can be seized, but not disposed of, at least for some period of time during which the debtor can come in and make his case. **That is the due process balance that has been struck.
3. Due process in a balancing act, and what will be constitutionally acceptable really depends at what is at stake and the legitimate interests on both sides of the equation.

C. **G/R:** Opportunity to Be Heard: in addition to establishing a constitutionally sufficient basis for jurisdiction over the person property involved, and showing that the court in which the action is filed has subject matter jurisdiction, it must also appear that reasonable steps were taken to give each defendant notice of the proceedings and an opportunity to be heard and to defend.

1. This is a fundamental requirement of due process.
2. Test: a defendant has an adequate opportunity to be heard when—in light of the interests at stake in the litigation—he is able to develop the facts and legal issues in the case.
    a. Depending on the issues at stake, a proper hearing may suffice, or a full trial may be required, or something in between may pass muster.
    b. One common requirement is that the defendant must be informed of the action (that is, receive notice) long enough in advance of the time when he is required to respond so as to allow him to obtain counsel and prepare a defense.
3. Whatever its form, opportunity to be heard must occur before the deprivation at issue takes *effect*. That hearing is subject to waiver, and is not fixed in form. *[Fuentes v. Shevin].

D. **G/R:** Procedural Due Process: the central meaning of procedural due process gives parties whose rights are to affected the right to be heard, and in order that they may enjoy that right they must be notified.

1. It is an equally fundamental right that notice and opportunity to be heard must be granted at a meaningful time and in a meaningful manner. The constitutional right to be heard is basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions.
2. **Policy:** the purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose is to protect his use and possession of his property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivation of property, a danger that is especially great when the state seizes goods simply upon the application of and for the benefit of private parties.
*[Fuentes v. Shevin].

E. **G/R:** Test for Determining if the Due Process is Satisfied when a Defendant is Deprived of his Property: prejudgment remedy statutes that apply between private parties rather than the government must satisfy a three prong test to comport with the due process clause:

1. Private Interest: a private interest will be affected by prejudgment attachment;
2. Risk of Erroneous Deprivation: the risk of erroneous deprivation through the procedure under attack and the probable value of additional or alternative safeguards must be assessed; and
3. Governmental Interest: the interest of the party seeking the prejudgment remedy, giving such due regard to the burdens on the government is providing the additional procedure.
*[Connecticut v. Doehr].

§4: VENUE, TRANSFER, AND FORUM NON CONVENIENS

I. Venue

A. **G/R:** Venue: venue is a rule of administration, a set of principles designed to allocate the cases among different courts within a judicial system, the judicial system of the states or federal courts. Venue simply means location.

B. **G/R:** Venue Rules: [see infra also]: every system in the country has a different system of rules for venue because every system in the country has different notions of where the convenient forum is located. The federal venue system is governed by **28 U.S.C. §1391.**

C. **28 U.S.C. §1391: Venue Generally**

1. **§1391(a):** Venue in Diversity Cases: in a civil action founded SOLELY on diversity there can be three types of venue:

a. *Defendant Residential Venue:* the action can be brought in the district in which the defendant resides; or

b. *Substantial Part of the Claim Venue:* the action can be brought in the judicial district in which a substantial part of the events giving rise to the claim; or
c. *Personal Jurisdiction Venue:* the action can be brought in a judicial district in which *any* defendant is subject to personal jurisdiction at the time the action commenced **[the third option is a default principle and can only be used if there is no district in which the action may otherwise by brought].

2. **§1391(b):** Venue in Federal Question Cases and all other cases:
a. §*1391(b)(1):* says that venue is proper where any of the defendants reside, any district in which any of the defendants reside, but all of the defendants must reside in a single state. In other words, you can have defendants spread over all four of the judicial districts in New York, but you can't have those four defendants and fifth defendant from Connecticut because they all don't reside in the same state.
b. § *1391(b)(2):* says venue is proper in a judicial district in which a substantial part of the events giving rise to the claim is situated. In other words, where the tort occurred, where the contract was breached, were the property in litigation is located. This is an *alternative* place of venue. You can place venue were the defendant resides *or* where a substantial part of the claim arose.
c. § *1391(b)(3):* venue can be located in the judicial district in which the defendant may be found. The probably means wherever the defendant can be found in jurisdictional terms.
(i) This is a default provision, if the other two can be met on of those must be used. In other words, you can always used defendant residential venue, you can always use substantial part of the claim venue, BUT you can only use the found venue when neither of the other two are available.
**This statute applies to federal question cases or mixed federal question cases and diversity cases.

3. **§1391(c):** Venue for Corporations: a defendant that is a corporation is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.
1. In other words, venue for a corporation is anywhere it is subject to personal jurisdiction.
2. This rule also applies to unincorporated associations [Denver RR v. Brotherhood of Railroad Trainmen].

4. **§1391(d):** Alien Venue: an alien may be sued in any district.

**§1391 is a *general venue* statute, there are also *special venue* statutes.

D. **G/R:** §1391(b)(2) does not, as a general matter, require the district court to determine the best venue, these factors will be of less significance; rather, the statutory standard of venue focuses not on whether a defendant has made a deliberate contact (a factor relevant in personal jurisdiction) but on the location where the events occurred.

1. Under §1391(b)(2) the court must determine only whether a substantial part of the events giving rise to the claim occurred in the district where venue is asserted. If so, then venue is proper in that district.

E. **G/R:** Venue in Property Actions: **Local Action Venue:** in an action concerning land, the action must be brought in the jurisdiction in which the land is situated [Reasor Hill v. Harrison].

1. The real problem with the local action rule is defining what constitutes a local action. Disputes over titles to land are local actions, and possibly the destruction of property on the land. Much more difficult are the questions of trespassing or stealing natural resources from land.
2. A few states have done away with the local action rule, but it is still the majority view.
3. Transitory actions can be brought in different venues.

F. **G/R:** Venue in Federal Courts: Although venue in federal courts is determined by federal law, the federal court will apply the law of the state in which it is sitting to determine whether the action is local or transitory for venue purposes.

1. Venue in Local Actions: venue in local actions is only proper in the district where the property that is the subject of the action is located. If the property is located in more than one district of the same state, the action may be brought in either district.
2. Venue in Transitory Claims:
    a. **Defendant's residence:** whether federal subject matter jurisdiction is based on diversity or federal question, venue is proper in the district where *ANY* defendant resides, if all of the defendants reside in the same state.
    b. **Substantial part of events, omissions, or property:** whether federal subject matter jurisdiction is based on diversity or federal question, venue is proper in a "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is subject of the action is situated.

G. **G/R:** Determining Residence: "Residence" as a particular meaning for venue purposes:

1. Natural Persons: the residence of a natural person who is a citizen of his domicile—the place where he resides with the intent to remain indefinitely.
2. Aliens: an alien defendant is not deemed to have a residence and hence may be sued in any district in the country.
3. Corporate Defendant: a corporate defendant is deemed a resident of each judicial district in which it is incorporated, licensed to do business, or engaged in doing business.

H. **G/R:** Venue is purely statutory within a court system. Modern venue statutes usually try to incorporate and balance one of several of the following considerations:

1. Local Action Rule: Many statutes try and preserve the idea that "local actions" should be tried locally, where particular environmental considerations will be

known to the court. There is, however, considerable difference of opinion was to which type of actions are local. Almost all courts agree that that actions in which legal title to a tract of real property is in question are local actions; beyond this, there is rarely agreement.

2. Convenience of the Witnesses: Many venue statutes try to accommodate the witnesses to the litigation. These statutes prescribe as proper venue for such actions the place of the accrual of the cause of action, which is where most witnesses will probably reside.

3. Protection of the Defendant: to avoid vexatious suits costing innocent defendants great sums of money, some venue statutes prescribe as proper venue the place where one or more of the defendants reside. Such statutes are designed to deter fraudulent causes of action where plaintiffs must undertake the expense of traveling to defendant's residence.

a. Similar statutes also prescribe as the proper venue for an action defendant's place of doing business or the place of the defendant's incorporation.

I. **G/R:** Venue: Venue does not refer to jurisdiction at all. Questions of venue, as a matter of procedure, do not arise until the standard jurisdictional questions have all been answered in the affirmative.

1. Jurisdiction of the court means the inherent power to decide a case, whereas venue designates the particular district, county, or city court among a set of courts with jurisdiction that may hear and decide a case.

2. The doctrine of venue is that set of rules which allows counsel to isolate one particular court, out of the entire set of courts with jurisdiction, in which to bring the action.

J. **G/R:** State Venue Statutes: There are thirteen different fact situations upon which state venue statutes are predicated:

1. Where the subject of action or part thereof is situated.
2. Where the cause of action, or part thereof, arose or accrued.
3. Where some fact is present or happened.
4. Where the defendant resides.
5. Where the defendant is doing business.
6. Where the defendant has a place of business, office, or an agent or representative, or where an agent or officer of defendant resides.
7. Where the plaintiff resides.
8. Where the plaintiff is doing business.
9. Where the defendant may be found.
10. Where the defendant may be summoned or served.
11. In the county designated in the plaintiff's complaint.
12. In any county.
13. Where the seat of government is located.

K. **G/R:** Residents and Non-residents: Venue rules generally reflect equity or expediency in resolving disparate interests of parties to a lawsuit in the place of trial. A State would

act within its constitutional prerogatives if it were to give so much weight to the interest of plaintiffs as to allow them to sue in the counties of their choice under all circumstances. It is equally clear that a State might temper such an "any county" rule to the extent a reasonable assessment of defendant's interest so justified [Burlington Northern R.R. v. Ford].

1. In other words, a state may have different venue rules for residents and non-residents and not be in violation of the equal protection clause of the fourteenth amendment.

L. **G/R:** Waiver of Venue: venue, like personal jurisdiction, may be waived. A defendant served with process by a court having proper subject matter jurisdiction, waives venue by failing to seasonably assert it, or by simply defaulting [Hoffman v. Blaski].

II. Transfer of Venue

A. **G/R:** Transfer of Venue: every judicial district in the country has a transfer of venue provision. Every system uses approximately the same standard for transfer. Almost every system, if not every system, says a party can transfer in the interest of justice.

1. *Interest of Justice:* the "interest of justice provision" is really completely textual and fact dependant. The "interest of justice" means where the events occurred, where the parties are, where the witnesses are, where the records are, or some combination of those factors would say that the suit was instituted in the wrong place, and lets transfer it to another district in the interests of justice.

B. **G/R:** Federal Transfer of Venue: **28 U.S.C. §1404(a)** is the federal venue transfer statute. §1404(a) speaks of the interests of justice but then says the action can only be transferred to a place where it could have been commenced or initiated.

1. The Supreme Court said they must interpret the statute literally so a party can only transfer in the federal system to a court that would have *original subject matter jurisdiction, original personal jurisdiction,* and *original venue.* In other words, the court is not going to the look for the perfect court. The court is going to limit the transferability capability to those courts in which the action could have been brought.
2. The power of a district court under §1404(a) to transfer an action to another district court is made not to depend upon the wish or waiver of the defendant, but rather, upon whether the transferee district court was one in which the action might have been brought.
3. The phrase "in the interests of justice" in §1404(a) does not mean that the defendant may transfer a case to a venue where the plaintiff himself could not have brought it.

*[Hoffman v. Blaski].

C. **G/R:** Van Dusen Rule: in diversity cases, the law applicable in the transferor forum follows the transfer [Van Dusen v. Barrack].

III. Forum Non Conveniens

A. **G/R:** Forum Non Conveniens: simply means this is not a convenient place for the action to be brought. Transfer of venue cannot be used in certain situations and this why the doctrine of forum non conveniens exists.

1. Assuming a court has proper jurisdiction and venue over a cause of action, that court retains the power to refuse to hear the case anyway if, in the opinion of the court, justice would be better served were it to be tried in another venue.
    a. This doctrine of discretionary abstention is the doctrine of forum non conveniens, literally, inconvenient forum. Today, some version of this doctrine is standard practice in the federal courts and perhaps half of the state courts.

B. **G/R:** in forum non convenien issues, the courts should look at the factors in determining whether forum non convenien should be applied:

1. private factors relating to the convenience of the litigants;
2. litigation elements such as the availability of witnesses and documents and the convenience in obtaining them; and
3. public factors such as whose interests are served by adjudicating the dispute.

*The forum non conveniens principle really acts as a check, or a safety valve, on the American jurisdictional principles.

**[Piper Aircraft v. Reno].

C. **G/R:** Dismissal in the Interests of Justice: at the outset of any forum non conveniens inquiry the court must first determine:

1. whether an alternative forum exists;
2. and if the defendant is amendable to process in the other forum and if so and the factors discussed above indicate that justice will be served by dismissal then the court can dismiss the action.

D. **G/R:** Comparative Law: the doctrine of forum non conveniens is designed in part to help courts avoid conducting complex issues in comparative law. The public interest factors point toward dismissal where the court would be required to untangle problems in conflict of laws and in a law foreign to itself.

E. **G/R:** Affect on Plaintiff: very often the effect of a forum non conveniens grant is very harsh on the plaintiff. Transfer simply moves the action form one court to another court. The forum non conveniens principle causes an actual dismissal of the action, so the plaintiff must initiate it againt.

1. Initiating another action is sometimes difficult because as statute of limitations may have run between the institution of the first action and dismissal. It may also be hard on the plaintiff because it may be more difficult to get personal jurisdiction over the defendant in the second forum.
2. However, because the defendant usually makes the forum non conveniens motion, courts usually do not grant the motion unless the courts:
    a. know there is another alternative forum;
    b. the defendant agrees to waive any statute of limitations defense that has accrued since the institution of the first action; and

c. the defendant also agrees to stand and defend in the alternative forum; that is, the defendant must also consent to jurisdiction in the alternative forum.

F. Potential Problem: a motion for removal has to be filed within 30-days after the action was instituted [§1446(b)]; so filing a forum non conveniens motion could cost the defendant his chance at removal if the forum non motion fails.

§5: Removal

I. If the case was commenced in state court, can it be removed to federal court?

A. **Generally:** Removal allows the defendant to shift a case from state court to federal court when the plaintiff has chosen to sue in state court. Although there is no express mention of removal in the constitution, some removal jurisdiction has existed since the judiciary act of 1789.

B. **G/R:** Removal from State to Federal Court: Removal is a one way street, the defendant can only remove from a state court to a federal court, and not vice-versa. If removal is improper, the action will be remanded but there is simply no mechanism in the procedural system that can send a federal action to a state court on its own terms.

C. **G/R:** Counterclaims: A plaintiff cannot remove a state-court action to federal court because the defendant interposed a counterclaim [Shamrock Oil & Gas Co. v. Sheets].

1. In other words, the fact that the defendant has interposed a counterclaim asserting a federal claim does not provide a basis for removal on federal question grounds.
2. Even if the third party defendant (plaintiff) files a compulsory counter-claim that satisfies all jurisdictional requirements the case cannot be removed to federal court because the federal court must have original jurisdiction.

D. **G/R:** Remand: A district court has discretion to remand a case to state court after determining that retaining jurisdiction over the case would be inappropriate.

1. Remand will generally be preferable to dismissal when the statute of limitations on the plaintiff's state-law claims has expired before the federal court has determined that it should relinquish jurisdiction over the case. Even when the applicable statute of limitations has not expired, a remand may best promote the values of economy, convenience, fairness, and comity.
**[Carnegie-Mellon University v. Cohill].

E. **28 U.S.C. §1441** is the federal removal statute.

1. Grounds for Removal: In general, an action that the plaintiff could have originally filed in federal court can be removed there by the defendant [§1441(a)].
    a. The defendant can remove when the action is a federal question case.
2. If a case is removed erroneously, a federal court must remand it to the state court [§1447(c)].

F. Rules Under 28 U.S.C. §1441:

1. **G/R:** A party can only remove an action that courl have brought in a federal court originally. In other words, you can only remove an action whern there is a federal question, diversity of citizenship, and amount in controversy.

**THERE MUST BE ORIGINAL JURISDICTION IN THE FEDERAL COURT TO TAKE THE CASE BY WAY OF REMOVAL!

2. **G/R:** Only the *DEFENDANT* can remove.
   a. This is because the plaintiff has the original choice of forum in deciding where the case is brought and it is fair to give the defendant his chance to use a federally mandated forum.
   b. Removal is a way of protecting the congressionally mandated federal forum choice, but sine the plaintiff ahs exercised his choice originally removal is only needed by the defendant.
   c. "Defendant" only means the ORIGINAL defendant, counterclaim defendants (the original plaintiff) cannot remove.

3. **G/R:** In a case based on federal question the action is removable by the defendant with regard to the citizenship of the parties. In other words, an in state defendant or out of state defendant can remove a federal question case.
   a. However, when the action is based only diversity of citizenship then the only defendant that can remove is a defendant who is not a citizen of the state in which the action was brought. In other words, an in state defendant cannot remove. As a matter of fact, if there are multiple defendants, none of the defendants can be in-state defendants.

4. **G/R:** §1441(a) A party that removes a case from a state court to the federal court covering the geographical area embraced by the state court. If there is more than one judicial district in a state the defendant must remove the case to the federal court over the state court.
   1. Ex: if you have a state court in Wyoming, it is removed to the Federal District of Wyoming.
   2. If there is more than one defendant, they all have to consent to removal and if there is not complete consent then the case cannot be removed.

5. **G/R:** §1441(c): if there is a completely separate federal question in the action, this only applies to federal questions, and it has been joined with a completely state claim—that is non-removable.
   a. In order to prevent plaintiffs from defeating the removal right by joining something that would otherwise be removable with something that is not removable, Congress has said when you have a separate and independent federal question claim that is joined onto a state action you can take the separate and independent claim and remove it.

b. §1441(c) enables the defendant to not only remove the federal question but also the otherwise un-removable state matter. Almost like a form of supplemental jurisdiction. The defendant can remove them both up and it is the discretion of the federal court to keep the entire case or sent the entire case back—whatever makes sense.

G. **G/R:** Procedure: §1446 dictates the procedure the defendant must follow in filing a motion to removal which basically says that (a) the defendant files the motion of removal; (b) once the motion is filed the case *automatically* goes to federal court; and (c) the plaintiff then goes to federal court and if he doesn't want to be in federal court he has to persuade the court to remand the cases [§1446(b)] tells the courts when it is proper to remand a case].

§6: Waiver of Defenses

I. Have any of the preceding Defenses been Waived?

A. **G/R:** Waiver of Subject Matter Jurisdiction: subject matter jurisdiction in never waived because it is one of the most important matters of jurisdiction. The parties cannot consent to waiver of subject matter jurisdiction; the court can raise the issue on its own motion if it feels it does not have subject matter jurisdiction.

1. Reasons: subject matter jurisdiction is not a personal matter; it is not anything the parties can dispute. It is a systematic issue, the power of the court is something that is constitutionally based in the federal system and it implicates matters of federalism; therefore, the Courts are free to raise the issue any time.

B. **G/R:** Waiver of Anything Else: personal jurisdiction, notice, service of process, and venue can all be waived; every system in the U.S. has rules stating that the parties can waive these defenses. Every system today says personal jurisdiction, notice, service of process, and venue are all threshold matters. If want to raise any of these issues, you must do it before the trial begins.

1. Judicial systems today that personal jurisdiction, notice, service of process, and venue must be raised by a *pre-answer* motion or asserted in the answer or they are WAIVED.

C. **G/R:** Waiver in the Federal System: the federal system requires that the defendant consolidate his defenses [Fed. R. 12(g) and 12(h)].

1. Rules 12(g) and 12(h) basically say: all of these threshold defenses must be made by pre-answer motions, or put in the answer. But if the defendant is going to make a pre-answer motion, he can only make ONE pre-answer motion consolidating all of the defenses.

D. **G/R:** in most modern jurisdictions if the defendant makes a motion for lack of personal jurisdiction, venue or any threshold defense and lost it, he must argue the case on the merits knowing that the issue is preserved for appeal.

ASCERTAINING THE APPLICABLE LAW: THE LAW THAT GOVERNS IN A DIVERSITY ACTION

§1: ANALYTICAL FRAMEWORK

I. Ascertaining the Applicable Law in a Diversity Action

A. There are a Four Main Questions that Need to Be Answered in Determining the Applicable Law:

1. **Is the case a Federal Diversity action?**
   a. If NO, the case is a probably a federal question case and this analysis does not apply.
   b. If YES, go to question #2.

2. **Is the Law that is being sought to be applied Substantive or Procedural?**
   a. Substantive Law: substantive law is a system of rules of rights and duties that run between people and institutions in society. Substantive law is torts, contracts, property, corporations, constitutional law, etc…that does not deal with court rules PLUS the statute of limitations.
   b. Procedural Law: is all law that is not substantive, such as civil procedure, criminal procedure, rules of evidence, court rules, appellate procedure, etc…
   c. Test: the test for determining federal or procedural law is whether a rule really regulates procedure, the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction to them, and if so, the law is procedural.
   d. If the law is **substantive go to question #3.**
   e. If the law is **procedural go to question #4.**

3. **If the Law is substantive, should state law apply?**
   a. Erie Analysis: if the law is purely substantive, and is not governed by the federal constitution or by Acts of Congress, then the federal courts should apply state law in which they are sitting.
   a. Caveat: *Countervailing Federal Interest:* if state law is to apply, it must first be balanced against the deprivation of federal rights resulting from the application of state law and if the federal interest outweighs the state interest, federal law will be applied in lieu of state law [Byrd v. Blue Ridge].

3(A): IF state law is to be applied, which state law governs [choice of law]?
   a. Klaxon Rule: federal courts must apply the conflicts-of-laws rules of the states in which they sit. In other words, when a federal court in diversity looks to the substantive law of the forum state, it embraces the forum states conflict principles. That is, a federal court in diversity cannot make up its own conflicts rules.

4. **If the Law is Procedural, Does it conflict with a Source (Constitution, Congressional Act, or FRCP) of Federal Law?**

4(A): If the state procedural law conflicts the federal constitution then the constitution trumps and it applies.

4(B): If the state procedural law **conflicts** with a Federal Rule of Civil Procedure and the FRCP is **valid** and **applicable** then the Federal Rule of Procedure **applies** [Hanna v. Plummer].

a. Test for Applicability: the FRCP must be sufficiently broad to cover the issue.
   (i) If the FRCP is not sufficiently broad to cover the issue, then it is not in *direct conflict* with the state law; therefore, *Erie* analysis applies [Walker v. Armco Steel].

b. Test for Validity: the FRCP is valid
   (i) Unless it abridges, modifies, or enlarges a state substantive right (i.e. violates the Rules and Enabling Act); and therefore it must be a rule of procedure because the Supreme Court only has the power to promulgate procedural rules under the Rules and Enabling Act; or
   (ii) Unless the FRCP is unconstitutional (which it presumably is not since the Supreme Court promulgated it).

4(C): If the state procedural law conflicts with a Congressional Act then the Congressional state **applies** if:

a. the congressional statute is broad enough to control the issue before the court;
   (i) this involves straightforward statutory interpretation.

b. if the congressional statute is broad enough to control the issue before the court and is a valid exercise of Congressional authority; then the federal courts are bound by the Supremacy clause to apply the rules enacted by Congress.

***__If the answer to either of these questions are "no," then Erie analysis applies.__**

*[Stewart Organization v. Ricoh].

§1.2: Erie Doctrine

A(1): **Rules and Enabling Act:** [28 U.S.C. §2072]: (a) The supreme court shall have the power to proscribe general rules of practice and procedure and rules of evidence for cases in the US District courts. (b) Such rules shall not abridge, enlarge, or modify any substantive right.

A. **G/R:** Rule of Swift v. Tyson: [overruled, no longer good law]: Absent statutory law, federal courts may apply a "general law" based on their notions of general principles and doctrines of law. Upon questions of general law the federal courts are free, in the absence of a local statue, to exercise their independent judgment as to what the law is. Federal courts exercising jurisdiction on the ground of diversity need not, in matters of general jurisprudence, apply the unwritten law of the state.

B. **G/R:** Erie Rule: [overruled Swift Rule]: Except in matters governed by the federal constitution, or by acts of Congress, the law to be applied in any case in the law of the state.

1. The law of the state includes all *positive law* (i.e. constitutions, statutes, and common law as declared by the states highest court).
2. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," such as, commercial law or torts.
3. The essence of the *Erie* rule is that, while federal courts are free to apply their own rules of procedure, any issue of "substantive law" (other than a federal question) must be determined according to the laws of the state in which the federal court is located.
4. The twin aims of the *Erie* rule are (a) discouragement of forum shopping; and (b) avoidance of inequitable administration of the laws.

C. **G/R:** Erie Doctrine: the *Erie doctrine* expressed a policy that touches vitally the proper distribution of judicial power between the federal and state courts. In essence, the intent of the decision was to insure that, in all cases where a federal court should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in a state court.

1. The nub of policy that underlies *Erie* is that for the same transaction the accident of a suit by a non-resident litigation in a federal instead of in a State court a block away should not lead to a *substantially different* result.
2. The federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts.
    a. The federal courts should conform, as near as may be, in the absence of other considerations, to the state rules even of form and mode where the state rules may bear substanitially on the question whether litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular rule.

D. **G/R:** Choice of Law: if the federal court sitting in diversity determines it must apply state law, the next logical question it must apply is what state law to apply. The federal courts must apply the conflicts of laws rules of the state in which they sit.

1. The standard conflict of laws rule is that the court will apply the law of the state in which the accident occurred or the action accrued (i.e. substantive law); and
2. The court will apply the procedural law of the forum state in which it is sitting.
    a. Ex: Lance (from Wyoming) rapes Andrea (from Utah) in Colorado, but is acquitted, however she brings suit for emotional distress in Wyoming District Court. The Wyoming Federal District Court will apply Colorado tort law (emotional distress) and Wyoming procedural law.

*[Klaxon v. Stentor].

E. **G/R:** Outcome Determinative Test: The court will only apply state law if it is substantive. The test for whether state law should be regarded as substantive (as opposed

to procedural) for *Erie* purposes is: will the application of federal law instead of state law significantly affect the outcome of the litigation.

1. Statutes of limitations are regarded as substantive law because they significantly affect the outcome of the litigation.
2. This promotes vertical uniformity throughout the court systems (i.e. state—to federal uniformity).

*[Guaranty Trust v. York].

F. **G/R:** Balancing Interests Test: Every substantive state law will not necessarily be applied in federal court (the outcome determinative test created practical problems in the courts). After determining that the law to be applied is substantive, it must be balanced against a *countervailing federal interest*.

1. The preference for state law must be balanced against the deprivation of federal rights resulting from the application of state law (incorporates the outcome determinative test). There are three main factors that can bear on the choice between state and federal rules:
    a. the relation between the state rule in question and underlying state right;
        (i) the aim of the inquiry is to determine whether the state procedural practice is bound up or an integral part of the state substantive right or if it is a internal housekeeping rule and therefore may have less reason to be followed in federal court.
    b. the countervailing interests of the federal judicial system;
        (i) if the countervailing federal interest is premised on a constitutional right, and the state law is apt to disrupt that right, then federal law has more weight.
    c. the likelihood of effect on outcome (i.e. outcome determinative test).
2. This promotes horizontal uniformity (i.e. uniformity among the federal courts).

*[Byrd v. Blue Ridge].

G. **G/R:** Hanna Test: if a Federal Rule of Civil Procedure and a state procedural law are in direct *CONFLICT* then the FRCP applies if it is valid and applicable because such matters are presumptively procedural.

1. Test for Validity: a federal rule is valid unless it abridges, modifies, or enlarges a state substantive right and it is rule of procedure (i.e. cannot violate the Rules and Enabling Act) or unless it is unconstitutional.
2. Test for Applicability: if the federal rule is broad enough in scope to control the issue then it is applicable (if it is not applicable there is no conflict).

*The *Erie Test* is not used when a state law is conflict with a Federal Rule of Civil Procedure.

**If there is no conflict (that is, if the federal rule is not applicable [i.e. like statute of limitations problems] then state law can be applied if it satisfies the *Erie Test.*

***A FRCP represents a federal policy; therefore it will trump even if applying it is outcome determinative.

****It can usually be presumed that a FRCP is valid because the Supreme Court promulgates the rules.

[Hanna v. Plummer].

G. **G/R:** Direct Conflict: Application of the *Hanna* analysis is premised upon a *direct conflict* between a FRCP and state law. The first question must therefore be:

1. Whether the scope of the federal rule is, in fact, sufficiently broad to control the issue before the court;
2. It is only if that question is answered affirmatively that the *Hannah* analysis applies.
3. If the scope of the Federal Rule does not cover that point in dispute, then *Erie* commands the enforcement of state law.

*[Walker v. Armco Steel Corp].

H. **G/R:** Walker Rule: if there is no conflict between the federal and state laws, and the scope of the federal rule does not cover the issue at bar, then *Erie* commands the enforcement of state law, and the *Hanna* analysis is immaterial [Walker v. Armco Steel Corp].

I. **G/R:** Service of Process: service of process is governed by the state summons statute because it is an integral part of the state statute of limitations and the statute of limitations is part of a state law cause of action (i.e. substantive law) [Regan v. Merchants Transfer].

**The only reason this is in here is because like the statute of limitations, service of process seems procedural, but is deemed substantive because Federal Rule 3 only measures time frames from the commencement of the action forward (like when a response to a pleading can be served or when summary judgment can be entered).

K. **G/R:** Congressional Acts: a district court sitting in diversity must apply a federal statute that controls the issue before the court that represents a valid exercise of Congress' constitutional powers.

1. **Analysis:** If a state law is in conflict with a Congressional Statute (such as a venue statute) then use the following analysis:
    a. Whether the congressional statute is sufficiently broad to control the issue before the court; (this involves a straightforward exercise of statutory interpretation to determine if the statute covers the point in dispute);
    b. If **YES**, the federal statute covers the point in dispute, then proceed to determine if the statute represents a valid exercise of Congress' power under the Constitution.
        (i) If the statute is constitutional and Congress intended to cover the point in dispute, then the analysis is over because federal courts are bound to apply rules enacted by congress with respect to matters over which they have legislative control.
    c. If **NO**, the federal statute does not cover the rule or statute in dispute, the district court applies the *Erie* analysis and if there is no countervailing federal interest that outweighs the state law, the state law is applied.

§1.3: Ascertaining the Applicable Law

I. Determining which State Law Governs

A. **G/R:** Choice of Law: if the federal court sitting in diversity determines it must apply state law, the next logical question it must apply is what state law to apply. The federal courts must apply the conflicts of laws rules of the state in which they sit.

1. The standard conflict of laws rule is that the court will apply the law of the state in which the accident occurred or the action accrued (i.e. substantive law); and
2. The court will apply the procedural law of the forum state in which it is sitting.
    a. Ex: Lance (from Wyoming) rapes Andrea (from Utah) in Colorado, but is acquitted, however she brings suit for emotional distress in Wyoming District Court. The Wyoming Federal District Court will apply Colorado tort law (emotional distress) and Wyoming procedural law.

*[Klaxon v. Stentor].

II. Ascertaining the Applicable State Law

A. **G/R:** Applying State Law: a federal court sitting in diversity must apply the law of a state as that law is either:

1. Declared by statute and interpreted by the highest court of the state; or
2. Judicially declared by the highest court of the state.

*[Mason v. American Emory Wheel Works].

B. **G/R:** Limitations: the federal court must refrain from making state law be reinterpreting state opinions or superimposing its own prejudices over those states highest courts.

1. Caveat: when the decisions of that states highest courts are very old or totally nonexistent, the federal court may either turn to lower court decisions (if available) or, as a last resort, try to declare state law as it would be declared by the highest state court if the issue were presently tried before it.

III. Federal Common Law

A. Generally: In *Erie*, the court said there was no such thing as a "federal common law," however, he only meant there was such thing as a *general* federal common law, and not a specific federal common law which still exists.

B. **G/R:** Federal Common Law: the *Erie* mandate did not destroy entirely the concept of a federal common law, separate from the of any state. *Erie* did not affect the present notion that in federal litigation the body of federal law known as the federal decisional common law should be determinative.

1. *Erie* is only applicable to diversity actions and not federal question cases; thus, federal common law is determinative in federal question actions.
2. In the absence of an applicable Act of Congress, it is for the federal courts to fashion the governing rule of law according to their own standards.
3. If the federal interest in the litigations not remote and distinct (i.e. if it affects the government) federal common law will be applied. Conversely, if the federal

interest is remote and distinct (i.e. if the cause of action only affects private individuals) the court will not apply the federal common law.
*[Clearfield Trust v. U.S.].

C. **G/R:** Determining When to Apply Federal Common Law: Determining the appropriate when and what federal law to apply is a two step analysis:

1. *Clearfield* permits courts to develop federal law for questions involving the rights of the US arising under nationwide federal programs;
2. Once it is decided that federal law controls, the court must determine the content of the federal law.
    a. Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy dependant upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.
    b. Federal programs that by their nature are and must be uniform in character throughout the nation necessitate formulation of the controlling federal rules.
    c. Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision.
3. Apart from considerations of uniformity the court must also determine whether the application of state law would frustrate the specific objectives of the federal programs; and if so, the court must fashion special rules for those federal interests [US v. Kimbell Foods Inc].

D **G/R:** federal law does not apply where federal interests in a suit are incidental and where fundamental federal rights or actions are not in question [Bank of America v. Parnell].

E. **G/R:** federal common law may govern even in diversity cases where a uniform national rule is necessary to further the interests of the federal government.

1. Caveat: the application of a federal common law rule cannot be applied where the litigations is among private parties and no substantial rights or duties of the U.S. hinge on the outcome.
*[Miree v. DeKalb County].

IV. Interstitial Federal Common Law

A. **28 U.S.C. §1655:** creates a general statute of limitations (4-years) for federal civil actions which do not contain their own statute of limitations.

1. However, the problem is that the statute only applies to laws enacted after 1991 (for all other laws see rules below).

B. **G/R:** State Borrowing Doctrine: It is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action, a court “borrows” or “absorbs” the local time limitations most analogous to the case at hand.

1. This practice is derived from the Rules of Decision Act [28 U.S.C. §1652] and because of its long history, the court assumes that if Congress is silent it intends by it silence that the courts should borrow state law.
2. Exception: *Federal Borrowing Doctrine:* when an operation of a state limitations period would frustrate the policies embraced by a federal enactment, the Court will look to federal law for a suitable time period.
    a. This exception from the state borrowing doctrine has been motivated by the Court's conclusion that it would be inappropriate to conclude that Congress would choose to adopt state rules at odd with the purpose or operation of federal substantive law.
    b. Federal borrowing is a closely circumscribed exception to made only when a rule form elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making.

C. **G/R:** Hierarchical Inquiry for Ascertaining the Appropriate Limitations Period for a Federal Cause of Action where Congress has not set the time within which such an action must be brought:

1. First, the Court must determine whether a uniform statute of limitations is to be selected.
    a. Where the federal cause of action tends in practice encompass numerous and diverse topics and subtopics, such that a single state limitations period may not be consistently applied within a jurisdiction, the courts have concluded that the federal interests in predictability and judicial economy counsel the adoption of one source, or class of sources, for borrowing purposes.
2. Second, assuming a uniform limitations period is appropriate, the court must decide whether this period should be derived from a state or federal source.
    a. In making that judgment the court should accord particular weight to the geographic character of the claim: the multi-state nature of the federal cause of action at is issue indicates the desirability of a uniform federal statute of limitations.
3. Third, even where geographic considerations counsel for federal borrowing, the presumption of state borrowing requires that a court determine that an analogous federal source truly affords a closer fit with the cause of action at issue than does any available state law source.

D. **G/R:** where the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should first look to the statute of origin to ascertain the proper limitations period.

1. When the statute of origin contains a comparable express remedial provisions, the inquiry is usually at the end.

VI. Federal Law in State Courts

A. **G/R:** Federal Law in State Courts: when state courts are called upon to litigate federal questions, the Supremacy clause requires application of uniform federal law. Since these federal issues may arise in the complaint, or by way of defense, counterclaim, cross-claim, or incidentally to the primary issues of the federal case, the courts must decide which questions are governed by federal rules and which are not.

1. The Supremacy clause says when one of these federal substantive rights are being adjudicated in state court, the state court is obliged to apply federal law.

MODERN PLEADING

§1.1: Pleading Overview

I. Overview

A. **Generally:** in modern procedure pleading is not as impart as it was at common law, which is true in federal and state courts. In the current sociology of litigation, which is opposed to a lot of litigation, one of the ways plaintiffs are screened is by insisting that parties plead with more particularity. In reality, the rules of pleading are not very onerous and not terribly important.

1. Pleadings are not motions, briefs, or anything of the like.

B. **Historically:** at common law the pleading function was to get every case down to one issue and make the pleader state one claim for relief [Gillipisie v. Goodyear Service Stores]. Historically, pleading served three functions:

1. Pleading served as a procedure of notice giving;
2. the pleadings involved the revelation of fact because there was fact pleading; and
3. it served the purpose of issue forming, the pleading system was set up so that the pleading between the plaintiff and the defendant formulated the issues then the case went to trial on those issues.

C. **G/R:** Classical Rule: where the complaint merely alleges conclusions, and not facts, it fails to state a cause of action and is susceptible to a motion for dismissal.

1. Caveat: however, it is well settled that a complaint must be fatally defective before it will be rejected as insufficient.
*[Gillispie v. Goodyear Service Stores].

D. **Jurisdictional Breakdown:** 18 states adhere to the code pleading rules (common law fact pleading); while 32 states (including WY) adhere to notice pleading under the Federal Rules.

§1.2: Modern Pleading

A. **Federal Rules:** the federal rules only assign the first of the three historic functions (notice giving) to the pleadings, in modern procedure, there are thing that were not available historically, such as, massive discovery, joinder, sophisticated motion practice

(summary judgment); so there are other ways to get to fact revelation and issue formulation.

B. **Federal Rule 7(a):** provides that there will be a complaint and an answer; and if necessary:

1. a reply to a counterclaim;
2. an answer to a cross-claim;
3. a third party complaint and answer; and

*No other pleading shall be allowed.

§1.3: Pleading the Complaint

I. Detail Required for the Complaint Under the Federal Rules

A. **Federal Rule 8:** Federal Rule 8(a)(2) says the pleader should simply provide a short and plain statement indicating that the pleader is entitled to relief. Notice Rule 8(a)(2) does not say to plead the facts or a cause of action, just a short and plain statement—it can be narrative, it can be stream of consciousness, and it doesn't have to state a cause of action. It just says claim for relief, legally cognizable claim for relief. VERY LOW PLEADING THRESHOLD.

1. The main function of the rule is to narrow the issues of a claim.
2. The objective in deterring baseless claims can be achieved by requiring a short and plain statement of the claim and a certification that the pleadings are truthful [Rule 11] and by other provisions designed to expressly deter baseless claims [Rule 12 (motion to dismiss) and Rule 56 (summary judgment)].

B. **G/R:** Liberal Construction: the federal courts are supposed to construe the pleadings liberally; to read every conceivable inference into the pleadings so that unless there is a legal certainty that under no construction of the pleadings could the plaintiff recover anything, then a motion to dismiss on the pleadings will be granted.

1. **Federal Rule 12(b)(6):** a motion to dismiss on the pleadings is governed by Rule 12(b)(6): the plaintiff has failed to state a claim upon which relief can be granted, that motion must be denied, if, under any construction the pleading might read to indicate that the pleader is entitled to relief.
    a. Very few motions to dismiss, under Rule 12(b)(6) are granted. Although the federal courts are getting tougher and tougher about not granting motions to dismiss.
2. Ex: A simple statement: On May 12, I was crossing Grand Avenue and the defendant negligently hit me with his car; wherefore I want $125,000. That would satisfy the specificity requirement of Rule 8(a)(2).
    a. See Federal Form #9 (p. 191 supplement).

C. **G/R:** Under the FRCP there is not pleading requirement of stating "facts sufficient to constitute a cause of action" (as formerly required and required by some states); but only that the be a short and plaint statement of the claim showing that the pleader is entitled to

relief [Rule 8(a)(2)] and the motion for dismissal under Rule 12(b)(6) is for failure to state a claim upon which relief can be granted [DioGaurdi v. Durning].

1. **Policy:** give the defendant reasonable notice of the claim; however, it does not need to be long facts because the Rules wanted to eliminate lawyer games and it is more efficient.

D. **G/R:** The FRCP do not require a claimant to set out in detail the facts upon which he basis his claim. To the contrary, all the Rules require is a "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

1. Such a simplified notice pleading is made possible by the liberal opportunity for discovery and other pretrial practices established by the Rules to more precisely define the basis of both claim and defense and to define more narrowly the disputed facts and issues.
*[Conley v. Gibson].

E. **Rule 8(e):** if the pleading is long and complicated, the pleading may be insufficient under Rule 8(e).

F. **Rule 12(e):** Rule 12(e) motions (motions for a more definitive statement by the pleader) are disfavored because of the liberal notice pleading standard of Rule 8(a) and the availability of extensive discovery. Because Rule 12(e) should not be a substitute for discovery, a motion under it will be denied when the information sought by the moving party is available through discovery.

II. <u>Pleading the Right to Relief</u>

A. **Federal Rule 8(a)(2):** provides that a pleading which sets forth a claim for relief shall contain a short and plain statement of the claim showing that the pleader is entitled to relief.

B. **G/R:** it is settled, with respect to motions to dismiss for insufficiency of the statement, that the complaint is to be construed in the light most favorable to the plaintiff with all doubts resolved in his favor and the allegations accepted as true.

1. If, when a complaint is so considered, it reasonably may be anticipated that the plaintiff, on the basis of what has been alleged, could make out a case at trial entitling him to some relief, the complaint should not be dismissed.
*[Garcia v. Hilton Hotels].

C. **G/R:** a motion to dismiss for failure to state a claim must be construed in the light most favorable to the plaintiff with all doubts reserved in his favor and the allegation taken as true [Conley v. Gibson].

D. **Federal Rule 12(b):** requires that every defense in law or fact be asserted in responsive pleading when one is required or permitted under the Rules.

1. The rule, however, enumerates certain defenses which may be asserted by motion to dismiss, all of which go to the jurisdiction except that of failure to state a claim upon which relief can be granted [Rule 12(b)(6)].
2. **Rule 12(b)(6)**: may be asserted successfully by a motion prior to responsive pleading only when it appears to a certainty that the plaintiff would not be entitled to relief under any state of fact which could not be proved in support of the claim asserted by him.

E. **Federal Rule 12(f):** the court may order stricken from the pleading any:
1. insufficient defense; or
2. any redundant, immaterial, impertinent, or scandalous matter.

III. The Burden of Pleading and the Burden of Production

A. **G/R:** Burden of Pleading: the burden of pleading an issue is assigned to the party who has the burden of producing evidence at trial. The plaintiff has the burden of production in two types of issues:
1. Plaintiff must put forth the evidence on certain matters basic to his claim for relief, or he cannot prevail; and
2. If, but only if, the defendant establishes a defense, plaintiff wil then have a second burden of production, this time to introduce evidence as to facts that will avoid defendant's defense.

B. **G/R:** Burden of Pleading Matters basic to the Claim for Relief: the plaintiff has the burden of pleading all matters of the first type in the complaint; that is, he is required to plead those matters on which he must produce evidence at trial.
1. Rationale: if the plaintiff cannot legitimately allege the existence of each of the elements of his claim, it may be assumed that he could not introduce evidence on them at trial. Since the action would have to be dismissed as soon as the plaintiff rested his cases,, it would an idle act to permit the trial to begin, and the action might as well be terminated at the pleading stage.
2. On the other hand, the plaintiff normally does not have to plead matters on which the defendant must introduce proof. Obviously, the plaintiff is not required to plead, in the original complaint, matters to avoid defenses, since he cannot tell which defenses will be raised until the answer is filed.

IV. Pleading Special Matters

A. **G/R:** Disfavored Actions: one finds, by looking at federal decisions, that tougher pleading rules exist in a certain substantive context, the so called disfavored actions where the court is afraid it is just too easy to get into court and harass a defendant and extract a settlement.
1. Ex: RICO actions, securities, wire tap cases, fraud, and mail fraud.
2. The Supreme Court in *Leatherman* made it clear that the way the federal rules are written that there is a uniform standard of particularity: a short and plain statement of the claim indicating the pleader is entitled to relief. Absent a special

pleading rule, one size fits all, the court are not empowered to create high pleading thresholds simply because the do not like the cause of action.

a. The court held that is was wrong to hold civil rights cases to higher threshold of pleading because civil rights cases were not included in Rule 9 and could not be held to higher standard.

B. **Federal Rule 9:** provides that pleading on special matters such as (a) capacity; (b) fraud, mistake, or condition; and (c) conditions precedent must be pleaded more specifically than other claims that fall under Rule 8(a).

C. **Federal Rule 9(b):** Federal Rule 9(b) says the circumstances of fraud must be pleaded with *particularity*. Notice the second sentence of the Rule, it says "condition of the mind" (intent can be plead generally). But fraud has historically been a disfavored action, it is an easy accusation, it involves moral turpitude, it is very had to prove or disprove the elements of fraud. Therefore, it must be pled with particularity.

1. The Federal Courts have raided the level of pleading the circumstances of fraud with *particularity* in many contexts, but with special emphasis in securities to unprecedented heights. To survive a motion to dismiss for non-compliance with the fraud pleading requirement of the Rule 9(b) a plaintiff must plead *facts*—who committed the fraud, when was the fraud committed, where was the fraud committed, where are the documents, and how was the fraud committed. It really has a very high pleading burden.

2. Rule 9(b) [fraud claims] does not insulate professions from claims of fraud where a complaint alleges the fraudulent acts with particularity [Denny v. Carrey].

a. **Policy:** the strict application of Rule 9(b) in a class action securities fraud case could result in substantial unfairness to person who are the victims of the fraudulent action.

D. **G/R:** Defamation Actions: another illustration of a special pleading rule is, in many states, defamation actions which many people consider to be disfavored actions. The rule is, if you are going to plead defamation, you must plead the actual defamatory words and the failure to plead those words means that you are vulnerable to a motion to dismiss.

1. **Policy:** since the pleading is a public document, unless you are serious about suing for defamation, you are not going to repeat the words.

E. **G/R:** Conditions Precedent: a third illustration of a special pleading rule, that is also found in Rule 9, is the pleading of conditions precedent.

1. *Classical Rule:* in a contract breach case, the plaintiff had to identify each of the conditions precedent to the performance and enforcement of the contract—he had to plead each one of them, and then plead that he, the plaintiff, had performed each and every one of the them.

2. **Federal Rule 9:** federal rule 9 reverses the burden. All the plaintiff has to do under Federal Rule 9 is say that all the conditions precedent have been complied with. The burden is then on the *defendant* to identify with *particularity* any condition that the defendant believes has not been performed. If the defendant

fails to do that, then the issues of condition precedents are out of the case. It is a very common sense rule which is probably pragmatically wise after all, because the plaintiff's usually don't sue for breach of contract unless they have performed their side of the bargain, which would include the conditions precedent.

V. Alternative and Inconsistent Allegations

A. **G/R:** In the past, some courts have held pleadings that contain inconsistent allegations as defective, at least if the inconsistency appeared in a single cause of action or defense. However, virtually all courts today permit inconsistent allegations, whether separately pleaded or not, if they are made in good faith.

B. **G/R:** Rules permitting parties to plead in the alternative usually are coupled with provisions requiring each separate cause of action or defense to be separately stated.

1. **Rule 10(b):** does not contain a formal separate statement requirement, although the rule does express hope that as far as practicable, each paragraph will be limited to a statement of a single set of circumstances.
2. When a party violates the separate-statement requirement, the appropriate corrective procedure may be a motion to compel separate statements and the party will usually be allowed to amend his complaint.

VI. Pleading Damages

A. **Federal Rule 9(g):** Special Damage: when items of special damage are claimed, they shall be specifically stated.

1. When items of special damages are claimed, they shall be specifically stated. A specific personal injury which is not the necessary or inevitable result of an injury alleged in the petition constitutes an element of "special damage" which must be specifically pleaded before the evidence is admitted [Ziervogel v. Royal Packing Co].
2. The words of Rule 9(g) are so simple and unambiguous that no one can plead only "general damages" and recover for special damages.
3. The purpose of Rule 9(g) is to prevent the defense from being surprised at trial when the evidence is presented.

B. **G/R:** evidence offered at trial as a result of an injury that was not admitted in the complaint is inadmissible [Ziervogel v. Royal Packing].

C. **G/R:** before a plaintiff can recover for a physical condition claimed to have resulted from the negligence of another, such a condition must be pleaded or the evidence must establish the condition as being the inevitable or necessary result of injuries which are particularly set out in the petition.

1. **Policy:** the reason underlying such a rule is that it would be unjust to permit a plaintiff to take advantage of a defendant at the trial by presenting evidence of injuries of which the defendant did not have the kind of notice required by law, namely, through allegations in the plaintiff's petition

*****[Ziervogel v. Royal Packing].

VII. Prayer for Relief

A. **Federal Rule 8(a)(3):** a pleading which sets forth a claim for relief shall contain a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

B. **Federal Rule 54(c):** Demand for Judgment: a judgment by default shall not be different in kind from or exceed the amount that prayed for in the demand for judgment [Rule 8(a)(3)].

1. Exception: Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party whose favor it is rendered is entitled, *even if the party has not demanded such relief in the party's pleading.*
2. The purpose of Rule 54(c) is to allow the courts to do justice and if the litigants are entitled to more relief then they originally requested, they should be awarded that amount.
    a. It is not okay in default judgments because the defendant has not responded, in other words, he has impliedly consented to the amount of judgment requested.

C. **G/R:** Classical Rule: an ad damnum clause in a pleading fixes the amount beyond which a party may not recover on the trial of his action.

D. **G/R:** Modern Rule: the general rule that an amendment may be made to a pleading which did not change the issues or affect the quantum of proof as to a material fact and that not good reason is apparent for not applying this privilege of amendment to the ad damnum clause.

1. There is substantial authority for the proposition that pursuant to Rule 54(c) a claimant may be awarded damages in excess of the amount demanded in his pleadings.
*[Bail v. Cunningham].

§1.4: Responding to the Complaint

I. Time Permitted for Response

A. **Federal Rule 12(a):** Rule 12(a) gives most defendants 20-days from the service of the complaint to respond either by a motion or pursuant to Rule 12 by answering the complaint.

1. **Rule 12(a)(1)(B):** if service of the summons has been timely waived under Rule 4(d) the plaintiff is entitled to 60-days after the waiver (or 90-days if outside the United States).

2. In reality, defendant's routinely request, and plaintiffs usually consent to an extension of the defendant's time to answer. The courts have the power to grant this extension under Rule 6(a).

II. Motions to Dismiss

A. **Federal Rule 12(b)(6):** Rule 12(b)(6) allows the defendant to assert a defense that the plaintiff has failed to state a claim upon which relief can be granted.

1. Because Rule 8(a)(2) only requires that a plaintiff state a plain and short statement of the claim showing the plaintiff is entitled to relief, few pleadings are dismissed under Rule 12(b)(6).

a. However, this does not render the motion useless, it can still be asserted to test pure questions of law.

2. The availability under the Federal Rules of summary judgment and partial summary judgment, directed verdict, and judgment notwithstanding the verdict also diminishes the importance of using Rule 12(b)(6) to screen frivolous cases.

B. **G/R:** the courts should give the plaintiff the most favorable reading of the complaint. A complaint cannot be dismissed because it includes invalid claims along with a valid one [American Nurses Ass'n v. Illinois].

C. **G/R:** when a defendant is unclear about the proper meaning of a particular allegation in the complaint, the proper course of action is not to move to dismiss but to move for a more definitive statement [American Nurses Ass'n v. Illinois].

D. **G/R:** in the system created by the FRCP a complaint should not be dismissed for a mere failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

1. Caveat: this rule should not be taken entirely literally, for if taken literally it would permit dismissal only in frivolous cases. If the plaintiff, though not required to do so, pleads facts, and these facts show that he is entitled to no relief, the complaint should be dismissed.

2. A complaint is not required to allege all, or any, of the facts entailed by the claim.

3. A plaintiff does not have to plead evidence.

4. A complaint does not fail to state a claim merely because it does not set forth a complete and convincing picture of the alleged wrongdoing.

*[American Nurses Ass'n v. Illinois].

E. **G/R:** a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his claim beyond which would entitle him to relief. However, the legal effect ascribed by the pleader is not to be admitted, but is to be determined by its terms, as a matter of law [Hartford Accident v. Merrill Lynch].

F. **G/R:** when a federal court reviews the sufficiency of a complaint the issue is whether the claimant is entitled to offer evidence to support the claims [Scheuer v. Rhodes].

G. **G/R:** A Rule 12(b)(6) motion to dismiss, if granted, constitutes an adjudication on the merits, and all further actions on the same claim are barred based on the principles of res judicata [Shaw . Merrit-Chapmean & Scott Corp.].

H. **Rule 12(b)(1)-(5), (7):** in addition to Rule 12(b)(6), Rule 12(b) provides the pleader with the option of raising six other defenses by motion prior to service of a responsive pleading. The defenses in Rule 12(b)(1)-(5), and 12(b)(7) are essentially the modern the counterparts to the common law pleas of abatement.

I. **Rule 12(f):** in the federal system, a motion to strike, pursuant to Rule 12(f) is the mechanism for challenging substantive sufficiency of defenses raised in an adversary's answer to other responsive pleading.

1. Because striking a portion of the pleading is a drastic remedy and because it often is sought by the movant simply as a dilatory tactic, motions under Rule 12(f) are viewed with disfavor and are infrequently granted.
2. Even when allegations are not related to the subject matter of the case, the general rule is that they will not be stricken form a complaint unless its presence will prejudice the jury.
    a. The question whether allegations really are prejudicial seems to turn on whether the contents of the pleadings will be disclosed to the jury.

III. <u>Answering the Complaint</u>

III(A). *Denials*

A. **Federal Rule 8(b):** Rule 8 requires a defendant to make one of three responses to the contents of a plaintiff's complaint. The defendant may:

1. Admit;
2. Deny, and the denial shall fairly meet the substance of averments denied; or
3. Plead insufficient information in response to each allegation.

B. **Federal Rule 8(d):** Rule 8(d) provides that all averments to which the defendant does not specifically respond are deemed admitted.

1. An ineffective denial is an admission.
2. A defendant, under Rule 8, may also deny generally the entire complaint, but general denials tend to defeat the purpose of pleading as a means of narrowing and focusing the issues in a controversy. For this reason the federal rules discourage the use of the general denial, which is supposed to be made in good faith, only in situations in which everything in the complaint can be denied legitimately.

C. **G/R:** <u>3-Ways to Remedy an Ineffective Denial:</u> (1) the court may assume the allegations as true, that is, an ineffective denial is an admission; (2) Use Federal Rule

15(c) [relation back]; or (3) Equitable Estoppel, that is, allow the plaintiff to remedy the mistake although it may still be barred by the statute of limitations.

III(B) *Affirmative Defenses*

D. **Federal Rule 8(c):** Rule 8(c) lists 19 affirmative defenses that must be specifically raised; this list not exhaustive however and an additional 20 affirmative defenses have identified in case law, which also must be specifically raised.

1. Federal Question Cases: in determining whether a defense must be raised affirmatively courts look to statutes.
2. Diversity Cases: in determining whether a defense must be raised affirmatively courts look to state practice.
3. Rule: in general, defendants must raise affirmative defenses that do not flow logically from the plaintiff's complaint.
4. Function: the function of Rule 8(c) is to provide notice to the plaintiff of the possible existence of the defenses and the defendant's intention to advance them.

E. **Test:** the test for determining whether a defense is affirmative within the ambit of Rule 8(c) is that there must be a logical relationship between the defense and the cause of action asserted by the plaintiff; this inquiry requires a determination of:

1. whether the matter at issue fairly may be said to constitute a necessary or extrinsic element in the plaintiff's cause of action;
2. which party, if either, has better access to the relevant evidence; and
3. policy considerations: should the matter be indulged or disfavored.

*[Ingram v. US].

F. **G/R:** where an affirmative defense is raised in the trial court in a manner that does not result in unfair surprise, technical failure to comply with Rule 8(c) is not fatal [Lucas v. United States].

G. **Rule 8(d):** specifies that averments as to the amount of damage, which the defendant does not deny in his answer are *NOT* deemed admitted. Thus, this provision indicates that the federal rules do not consider limitations of damages affirmative defenses, which by contrast, must be pleaded.

§1.5: Amendments

I. Amendments to the Pleadings

A. **G/R:** Classical Rule: in the old days, a party could not amend the pleadings, the party was stuck with what they said in the first complaint. That is completely reversed in the modern procedural systems.

B. **G/R:** Liberal Amendment Rules: (modern procedural rules) in modern procedural systems, all systems have liberal amendment policies and probably no system is more liberal than the federal system. Federal Rule 15, is the most important.

C. **Federal Rule 15:** (Generally) Federal Rule 15 sets up time frames and establishes slightly different standards for amendment.

1. Before a Responsive Pleading: first, quite logically, Rule 15 says at the first end of the case, before anyone has invested in it, our policy is going to be wide open. The party can amend his pleading before any responsive pleading is served, he can do it once automatically, he doesn't even have to make a motion. During that time frame one amendment is automatic.

2. Pre-Trial Process: second, during the pre-trial process (which can be up to several years) the federal rules say amendments shall be liberally granted. The federal rules make it clear that there are virtually no instances in which the court is going to deny an amendment in during the pre-trial process. The party has to make a motion, but the rule says that they shall be *freely given when justice so requires.*

a. So unless the party seeking the amendment is playing tricks, has been negligent, or should have gotten an amendment several years ago, a motion for an amendment will usually be granted.

3. During Trial: third, there are amendments at trial. A party can amend at trial. Very often what happens is there is that at trial evidence that is either inconsistent or outside the pleadings starts coming in. The other side can ignore it, and it comes in, and what the system says is if the other party doesn't object the pleadings are automatically viewed as being amended, that is the end of the story.

a. More typically, the deviating evidence is proposed and the other side objects and says that it is outside the scope of the pleading. The Rules say that in that type of situation the court *may* allow the pleadings to be amended and *shall* do so freely when the presentation of the merties will be sub-served thereby.

(i) In other words, this is a justice seeking system and if the amendment would further getting it right, grant leave to amend even at trial freely *except* when the objecting party (notice the burden of persuasion there) fails to satisfy the court that the admission of such evidence would prejudice the defense.

(ii) In other words, if the party is going to object to the deviating evidence at trial, he has got to be able to show prejudice or the rule says the court should allow the amendment.

b. Many courts say prejudice or fooling around, or mouse trapping, or being a bad actor will be cause to deny the amendment.

c. That should demonstrate how liberal the amendment procedure is—basically, a court will allow pleading amendments at any time.

D. **Federal Rule 15(a):** parties may amend their complaints before and during trial. Rule 15(a) says a party may amend its pleading any time before a response has been served, or within 20-days of the service of the original pleading if no response is required. After that, an amending party must obtain the leave of the court or the consent of the opposing party.

1. Amendment of pleadings in civil actions is governed by Rule 15(a).

2. Rule 15(a) declares that leave to amend shall be freely given when justice so requires, this mandate is to be heeded.
3. If the underlying facts or circumstances relied upon by a plain tiff may be proper or subject to relief, he ought to be afforded an opportunity to test his claim on the merits.
4. In the absence of an apparent or declared reason—such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, under prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc…the leave should as the rule requires, be freely given. Of course, the grant or denial of an opportunity to amend is within the discretion of the trial court.
5. Rule: prejudice must be shown, the burden is on the party opposing the amendment to show such prejudice. In ruling on a motion for leave to amend, the trial court must inquire into the issue of prejudice to the opposing party, in light of the particular facts of the case.
*[Beeck v. Aquaslide N'Dive Corp.].

E. **Rule 15(b):** during trial, parties may amend their pleading, at the leave of the court, to conform to issues raised by unexpected evidence.

1. Rule 15(b) is an attempt to favor substance over form and thus promote resolution of the cases on their merits by permitting the amendment of the pleadings to reflect the actual litigation which transpired.
    a. If issues not raised in the pleadings are tried by express consent of the parties there can be not question about the proprietary of permitting an amendment.
    b. A party can also give implied consent to an amendment of the pleadings by not objecting.
2. Whether parties impliedly consented a matter, i.e. whether parties recognize that an issue not state by the pleadings entered the case—is determined by searching the trial record for indications that the party contesting the amendment received actual notice of the injection of the un-pleaded matters, as well as an adequate opportunity to litigate such matter and to cure any surprise from their introduction.
    a. The clearest indication of a party's implied consent to try an issue lie in the failure to object to evidence, or in the introduction of evidence which is clearly apposite to the new issue by no other matters specified in the pleadings.
3. Rule 15(b) is a two-way street; if the plaintiff raises an issue and loses he may not object later. The rule is mostly an attempt to eliminate surprise in the defendant at trial.
*[Moore v. Moore].

F. **Rule 15(c):** parties may also add supplemental pleadings to their original pleadings to cover events, which occur after the original pleading. Rule 15(c) mandates that when an original pleading is amended, the new pleadings "relate back" to the original pleading. If

the statute of limitations expired between the original pleading and the amendment the party still may be allowed to raise the claim.

1. Relation back is governed by a modified standard. An amended complaint which changes the mane of the dfednat will relate back to the filing of the oringial ocmplaint if it arises out of the same conduct contained in the original complaint and the new party was aware of the action within 120 days of the filing of the original complaint.
2. An amended complaint, which replaces fictitious with actual names due to an intentional lack of knowledge concerning the proper defendant, does not involve a "mistake" and is therefore not entitled to relation back under Rule 15(c).
3. For relation back to be permitted under Rule 15(c) there must be a *mistake* concerning the identity of the party.
4. Retroactivity: the court is supposed to apply the law as it exists at the time the decision was rendered.

*[Worthington v. Wilson].

G. **G/R:** Variance: if issues are explored at trial that are not raised in the pleadings and the defendant expressly or impliedly consents to trying the issues then the court will not got hung up with amending the pleading.

1. The court will focus on issues not objected to at trial.

H. **Rule 15(d): Supplemental Pleadings:** Upon motion of a party the court may permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

1. In the federal courts there is substantial authority for the proposition that Rule 15(d) permits the bringing of new claims in a supplemental complaint because it promotes judicial economy.

II. Relation Back of Amendments

A. Doctrine of Relation Back of Pleading (amendments): this is very particular phenomenon. A lawsuit is brought, it is brought on a particular theory, such as negligence or trespass or battery or whatever. And as so many lawsuits go (in modern federal practice) it goes on in the pre-trial phase for several years. In the middle of that process, the plaintiff wakes up to the fact that he has a different theory. Not only is there a negligence theory, maybe there is a strict liability or warranty theory. So he seeks to amend the complaint.

1. Now here is the problem: in the time that has transpired since the original origination of the action, and the time that the amendment is to be interposed, the applicable statute of limitations on the new legal theory, the new claim, has run. That is very common in modern litigation because the pre-trial process does take so long.
2. The question now, is not whether you can amend, because the modern amending practice is exceedingly liberal and in the interest of justice the plaintiff will probably be able to add the new claim. The problem is that if this were an

action that were commenced on the day of the amendment, well the new claim would be time barred and would be vulnerable to a statute of limitations defense.
3. So the issue is not is the amendment permissible, the issue is well if you permit the amendment will the new material simply be barred by the statute of limitations.

B. Relation Back of a Newly Added Claim: the doctrine of relation back of amendments says under certain circumstances we will allow the plaintiff to add the new legal theory, the new claim, and instead dating the new claim as of the day it was asserted, which means its time barred, we will relate back to the day of the original interposition of the complaint. We will relate back date and in effect circumvent the statute of limitations. We are doing an end run on the statute of limitations defense.

1. Now the question is, when are you going to allow that to happen?
2. The doctrine of relation back of amendments grew up many years ago and under the code system of procedure you would be allowed to relate back the new material if it arose out of the same cause of action as the original action.
    a. The problem was that "cause of action" was a very vague concept. Cause of action ties you back to the old writ system so that if the original action was negligence and you wanted add strict liability those are different causes of action so you could not relate them back, so the doctrine was a rather restrictive one.
3. Under modern notions of relation back, particularly in the federal courts, the standard is no longer the cause of action because we no longer measure causes of action any more in procedure.

C. **Federal Rule 15(c):** the standard for relation back of amendments as it is set out in federal rule 15(c)(2) is if the new material emanates from the same *transaction or occurrence* as the original material, we will allow it to relate back. Thus, if you buy a car and a part falls off and you have different theories of negligence and strict liability and warranty, and you are trying to relate back, you won't have much difficulty because each of these things arise same transaction or occurrence. And relation back under federal 15(c)(2) will work.

1. As the result of an amendment to federal rule 15(c) a few years ago the doctrine of relation back has been broadened.
2. **Federal Rule 15(c)(1)** also permits you to relate back if it is permitted by the law that provides the statute of limitations that is applicable to the case. Certainly, in all diversity cases, that means relation is allowed whenever the law of the forum state would allow relation back. That broadens relation back and goes beyond the transaction and occurrence test of rule 15(c)(2) because in some states relation back of amendments is broader then transaction and occurrence.
    a. It also solves a series of nasty *Erie* problems that existed prior to the amendment because there were situations in which you would be in a state in which there was no relation back of amendments even though the new material fell within the same transaction or occurrence and a lot of states felt that under *Erie* a federal court in diversity wouldn't be able to apply

the transaction and occurrence standard for relation back because state law didn't permit it.

3. Now with Rule 15(c)(1) and 15(c)(2) you have got the benefit of *Hanna v. Plummer*, if relation back would be permitted either the forum state law or the transaction and occurrence provision, *Hanna* says the federal rule trumps the state practice (or at least we think it does, there is an argument that the amendment to the relation back doctrine violates the rules enabling act and therefore is invalid because it affects a substantive right it affects the length of the applicable statute of limitations, and therefore is not a fit subject for rule making *Hanna* doesn't apply and you're back to *Erie* and if you believe this a matter of state substantive law then you have got to follow limitations on relation back of state law).

D. Relation Back of a Newly Added Party: the problem is a little difficult when the addition of a party is trying to be related back, that is, you suddenly discover that there is somebody out there who you should have sued, and you didn't sue, and you want to add that party.

1. This happens an incredible number of times, people make party decisions that are often inaccurate. One of the most famous cases, involved a party who sues fortune magazine, well the truth is, there is no fortune magazine, fortune magazine is simply a product of time life, and by suing fortune magazine the plaintiff did not sue a proper party defendant and when the plaintiff discovered that he should have sued Time Life, the statute of limitations had run. This kind of problem arises in a dozen different contexts.

2. Relation back involving parties is a more delicate problem than relation back involving claims. When you are relating back on claims, you are doing it against someone who had notice that you are suing them him within the limitations period. But when you're adding a party outside the limitations period, that person has never been notified, and therefore you're undermining the statute of limitations policy which is to make sure people are notice within a certain period of time that they are going to be sued.

3. So **Rule 15(c)(3)** deals with this problem.

E. **Rule 15(c)(3):** deals which relation back of parties is much narrower than relation back of claims. Rule 15(c)(3) says if you want to change a party you have got to satisfy the transaction and occurrence standard set forth for claims in Rule 15(c)(2) AND, in addition, within the limitations period and the service of process period the party that you are now trying to bring in must have received notice of the institution of the action will not be prejudiced in maintaining a defense on the merits and must have known or should have known that except for a mistake concerning the identity of the party who should have been sued the action would have been brought against him.

1. So you see those preconditions satisfy the policy of objectives of the statute of limitations but it is a very hard standard to satisfy. The party to be added within the limitations period must have known of the institution of the action, must not be prejudiced in his ability to satisfy the action, and must have known, or should have known, that he was the true defendant and *but for* the mistake would have been sued.

a. It is a rare case that meets all those standards.

F. One Last Point on Relation Back of Amendments: there is an old testing trick, to relate back the added claim must have been time viable on the day the action was instituted. In other words, you can't add a claim by amendment that would have been time barred if it had been asserted when the action was begun. In other words, you can't relate back something that was dead on arrival. WATCH OUT FOR THAT.

1. Profs occasionally try to ask you a relation back problem when what you are really facing is a situation in which the claim to be added was time barred on the day of institution and you simply cannot use relation back to revive that time barred claim.

III. Sanctions

A. **Rule 11:** History: Rule 11 controls the sanctions of parties for improper pleading. This rule has been a major phenomenon since the mid 1980s. The sanction rule was in the Federal Rules since the beginning in 1938. But it was totally ineffectual, it just did not work. But in 1983, the Rule was rewritten to make the sanctions provision much more powerful and an enormous sanction practice developed in the 1980s.

1. Indeed, sanctions became such a cottage industry that the people write the federal rules decided to rewrite the federal rule 11 in 1993 because there was too much activity.
2. Because of all this business about sanctions it is plausible that your professor will ask you something about sanctions on your final exam.

B. **Rule 11:** Things you Should Know: there a several things you should know about Rule 11 and sanctions for the exam:

1. First, in most modern procedural systems it is the lawyer who signs the papers (pleadings, motions, and other papers) it is the lawyer who puts his head in the noose. And when a lawyer signs a paper, at least in federal practice, the signature is a certification. The lawyer is certifying that the paper is not being presented for an improper purpose such as to harass, or to cause unnecessary delay or needless cost. The lawyer is certifying that the contents of the paper or the positions that are being advanced are warranted by existing law, they are not frivolous. The lawyer is warranting that the contentions have evidentiary support and are not simply fabricated. And finally, if the paper is a denial paper, the lawyer is warranting that there is evidence to support them and they are reasonably based on information and belief. That is what certification is.
2. What happens when you have a mal-signature is that the opponent or quite possibly the court, will seek sanctions. Sanctions are designed to *deter* not punish. That is the new philosophy of sanctions under Federal Rule 11.
3. In many cases, sanctions involve monetary sanctions, it can be a flat sum of money, it could be the cost of meeting the improper paper. But a creative court is encouraged to use a non-monetary sanction so you do not create a profit center mentality. The sanction can be anything, an apology, a slap on the wrist, community service, or service in the courts library. Sanctions now are

discretionary, they were mandatory between 1983-1993 if there was mal-signature. Now they are discretionary with the court. There is a desire not to overuse sanctions.

4. Rule 11 also provides what is called a "safe harbor" provision. In other words, if a party puts in a paper that the other party objects to, the objecting party can say "hey withdraw it within 21-days or I'm going to seek sanctions." Within that period there is a safe harbor, the offending paper can be withdrawn and if it is withdrawn then no sanction will befall the party who put the offending paper before the court.

5. Curiously, one aspect of the 1993 amendment to Federal Rule 11, actually increased the burden. Prior to the 1993 amendment, the question of whether the paper was improper or proper was dependant on what was known by the party who put the paper in at the time the paper was put in. And if it subsequently turned out to be an improper paper there was no sanction because on the basis of what the party knew when the paper was put in there was no intent and no reason to believe it was improper.

6. The new federal rule 11 imposes a continuing obligation on every party, which means every lawyer, who puts a paper in, to monitor its continued viability. If it turns out later on in the litigation that the paper really is invalid, that there is no basis for it, the party who put it in is under a continuing obligation to withdraw it and failure to do so can produce the imposition of a sanction.

C. **Federal Rule 11:** attempts to curb abuse of the federal pleading rules by imposing affirmative duties on attorneys and by raising the possibility of sanctions for failure to discharge them.

1. Rule 11 is governed by an objective standard of reasonableness which includes such facts as:

a. how much time for investigation was available to the signer;

b. whether he had to rely on a client for information as to the facts underlying the pleading; or

c. whether he depended on forwarding counsel or another member of the bar.

2. <u>Procedure:</u> the procedure for district courts to follow in analyzing whether an attorney had conducted a reasonable inquiry into the facts underlying a party's position is:

a. In considering sanctions regarding a factual claim, the initial focus of the district court should be on whether an objectively reasonable evidentiary basis for the claim was demonstrated in pretrial proceedings or at trial. Where such a basis was shown, no inquiry into the adequacy of the attorney's pre-filing investigation is necessary.

b. The current version of Rule 11 only requires that an attorney conduct an inquiry reasonable under the circumstances into whether factual contentions have evidentiary support.

3. Rule 11 provides a safe harbor period of 21-days in which the defendant can withdraw or correct the alleged defect in the pleading and thus avoid sanctions.

4. Rule 11 also provides that the court may impose sanctions on its own initiative. If a court wishes to exercise discretion to impose sanctions on its own, it needs to enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.
5. Rule 11(b)(3) compares the plaintiffs and defendants conduct, i.e. Rule 11(b)(3) allows the plaintiff's lawyer to allege certain things even though he doesn't have that information prior to discovery.
    a. This sort of equalizes the plaintiff and defendant position before discovery because defendant can still "deny" in a pleading for insufficient information.
6. Rule 11(c) and 11(c)(2): after notice, sanctions can be imposed discretionarily by the court. Sanctions are limited to deter comparable conduct by other parties and it is not for the purpose of sanctioning the party. Compensatory awards should be limited to unusual situations.
**Rule 11 is not the only exclusive method to control and sanction lawyers, there are lost of congressional acts controlling sanctions [28 U.S.C. §1927 (compensatory damages can be awarded for bad faith)].

D. **Rule 23.1:** after an attorney files a complaint, under Rule 23.1 it must be verified.
1. Verification: is a short affidavit attached to the complaint which the plaintiff is required to sign swearing under oath that the allegations are true.

JOINDER

§1.1: Joinder of Claims

A. **Federal Rule 18(a):** a party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third party claim, may join as *many* claims as that party has against the opposing party.
1. Federal Rule 18 removes all obstacles to joinder of claims and permits the joinder of both legal and equitable actions; the only restriction on the claims that may be joined is imposed by subject matter jurisdiction requirements.
2. Federal Rule 18 only describes claims that a plaintiff may assert against a defendant, it does NOT require the plaintiff to join the claims in a single action.
3. The plaintiff can bring (join) any claim against the defendant, it does not even have to arise out of the same transaction or occurrence. If there is subject matter jurisdiction over the claims, then they can be joined.

B. **Federal Rule 42(b):** if there is perceived to be too much confusion for the jurors, then the judge can order separate trials for the claims in order to avoid jury confusion or prejudice.

C. **Federal Rule 54(b):** allows for the claims joinded in one trial to be appealed separately.

D. **G/R:** Rule 18 is permissive, the plaintiff does not have to bring the separate claims in one action, even if there are transactionally related.

1. Caveat: however, the rule against claim-splitting grounded in res judicata may have the effect of making the plaintiff join the claim. The rule against claim splitting has the effect of making the plaintiff join the claims under Rule 18 because if the claims are transactionally related they must be joined.

E. **G/R:** if the defendant's answer contains a counterclaim, the plaintiff must assert a compulsory counterclaim to the defendant's counterclaim.

1. This is so because, in effect, the plaintiff becomes the defendant and the defendant becomes the plaintiff.
2. In situations like this the plaintiff is treated as the defendant and the defendant is treated as the plaintiff and therefore after the original defendant files a counterclaim the original plaintiff would be forced to file a compulsory counterclaim.

§1.2: Counterclaims

A. **Definition:** a counterclaim is a claim back by the defendant across the "v." against the plaintiff. All systems permit counterclaims. There are two types of counterclaims: (a) permissive counterclaims and (b) compulsory counterclaims.

I. Compulsory Counterclaims

B. **Federal Rule 13(a):** a pleading shall state as a counterclaim any claim which at the time of serving the pleading [the defendant's answer], the pleader has against any opposing party, if it arises out of the *transaction or occurrence* that is the subject matter of the opposing party's claim.

1. **Exceptions:** (a) Federal Rule 13(a)(1): if at the time the action was brought, the claim was subject to another pending action, the defendant does not have to bring it as a compulsory counterclaim; (b) Federal Rule 13(a)(2) if the action is in rem, the defendant's counterclaim is not compulsory because the court would be forcing the defendant to submit to personal jurisdiction even the court does not have personal jurisdiction.
2. **Federal Rule 13(e):** a claim that matures after the pleader served the pleading may be present as a counterclaim by supplemental pleading.

C. **G/R:** Compulsory Counterclaims: in applying Federal Rule 13(a) the critical question is what constitutes a transaction or occurrence? Four tests have been suggested:

1. Are the issues of fact and law raised by the claim and counterclaim largely the same?
2. Would res judicatat bar a subsequent suit on the defendant's claim absent the compulsory counterclaim rule?
3. Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?
**4. Is there any logical relation between the claim and counterclaim?

a. This is the broadest test and the one most commonly used.
b. It is the test used by all federal courts (i.e. the one to know for the test).

D. **G/R:** Transaction: transaction is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.

E. **G/R:** Consequences of Failing to Plead a Counterclaim: Rule 13(a) is silent as to the consequences of failing to raise a compulsory counterclaim. It seems clear, however, that an unasserted compulsory counterclaim cannot be raised again in the same federal court, an different federal court, and probably a state court.

F. **G/R:** Ancillary Jurisdiction and Compulsory Counterclaims: a federal court has ancillary jurisdiction over the subject matter of a counterclaim if it arises out of the same transaction or occurrence that is the subject matter of an opposing party's claim of which the court has jurisdiction.

1. Similarly, a counterclaim that arises out of the transaction or occurrence that is the subject matter of an opposing party's claim is a "compulsory counterclaim" within the meaning of Rule 13(a).
2. It is frequently stated that the determination of ancillary jurisdiction of a counterclaim in a federal court must turn on whether the counterclaim is compulsory within the meaning of Rule 13(a).
*[Great Lakes v. Cooper].
**Ancillary jurisdiction and compulsory counterclaims tests are essentially the same—transactionally related.

G. **G/R:** Test for Compulsory Counterclaims: a counterclaim is compulsory if it bears a *logical relationship* to an opposing party's claim.

1. The phrase logical relationship is given meaning by the purpose of the rule, which it was designed to implement.
2. Thus, a counterclaim is logically related to an opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts.
*[Great Lakes v. Cooper].

II. Permissive Counterclaims

A. **Federal Rule 13(b):** a pleading may state as a counterclaim any claim against an opposing party *not* arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

1. In other words, permissive means permissive, the defendant may assert it but he doesn't have to. Rule 13(b) defines permissive counterclaims literally as any counterclaim that is not a compulsory counterclaim.
**When you put permissive and compulsory counterclaims together, you realized that defendant may assert any claim he has against the plaintiff by way of

counterclaim because permissive and compulsory counterclaims embrace everything a defendant may wish to shoot at the plaintiff.

§1.3: Cross-Claims

A. Cross-claims: a cross-claim is between co-parties. It is one plaintiff against another plaintiff, or it is one defendant against another defendant. Notice the cross-claim does not cross the original "v."

B. **Federal Rule 13(g):** a pleading may state as a cross-claim any claim by one party against a co-party arising out of the same transaction or occurrence or related transaction and occurrences.

1. Cross-claims are all *permissive* and failure to raise them does not bar suit in a subsequent action.
2. **Policy:** the court can do complete justice with respect to plaintiff and original cause of action without hearing cross-claims and that still leaves the defendant with the decision of where he wants to bring his cross-claim action.

C. **G/R:** Cross-claims: in the answer, the defendant may assert not only counterclaims against the plaintiff but also any independent claims that he has against co-defendants when such claims have arisen out of the same transaction or occurrence as that which gave rise to either: (a) the plaintiff's original cause of action; or (b) to a counterclaim against the original plaintiff.

D. **G/R:** under the federal rules the rights of all parties generally should be adjudicated in one action.

1. Rules 13 and 14 (third party practice) are remedial and should be construed liberally.
2. Both Rules 13 and 14 are intended to avoid circuity of action and to dispose of the entire subject matter arising from one set of facts in one action, thus, administering complete and evenhanded justice expeditiously and economically.

E. **G/R:** it is well settled that a grant of jurisdiction over particular subject matter includes the power to adjudicate all matters ancillary to the particular subject matter. Therefore, if either a cross-claim under Rule 13(g) or a third party claim under Rule 14 does arise out of the subject matter of the original action and involves the same persons and issues, the claim is ancillary to the original action.

1. In such cases, if the court has jurisdiction to entertain the original action, no independent basis of jurisdiction for the cross-claim or third party claim need be proved or alleged.

**Notice: the test for ancillary jurisdiction is the same as the test for cross claims without diversity.

F. **G/R:** Under Rule 13(g) cross-claims have to be transactionally related because you don't want the plaintiff to have to watch the defendant join every party he has a cause of action against and make the plaintiff sit there while he argues those claims.

1. The plaintiff has no interest in unrelated third-party claims.

G. **G/R:** Rule 13(g) does not allow a plaintiff to assert a cross-claim against another plaintiff that is transactionally related to the common claim against the defendant if both plaintiff's are from the same state because it would extend federal court jurisdiction, that is, there would not be complete diversity between the two plaintiffs.

H. **G/R:** If the defendant files a counterclaim against the plaintiff (one, the other, or both) then the plaintiff who had the counterclaim filed against him, in effect, becomes a defendant and can then cross-claim against the other plaintiff because he is in a defending position.

§1.6: Identifying the Parties Who May be Sued

A. **G/R:** Real Party in Interest: a civil action may be prosecuted only by the real party in interest and not by another acting in her behalf. The real party in interest in a civil action is that party to whom the substantive law assigns a right to secure a remedy against and offending party.

1. This is not in very case identical with the party who may derive a benefit from the prosecution of the action—it often occurs that the real party in interest secures no benefit from the bringing of the action, although one or more collateral pareis may derive such a benefit.

B. **Federal Rule 17(a):** under Rule 17(a) the following parties have the right to sue on claims, even though they may have no beneficial interest therein:

1. Executor, administrator, guardian, bailee, or trustee of an express trust;
2. A party whom or in whose name a contract has been made for the benefit of another (i.e. principle-agent); and
3. The US government, when expressly authorized by statute to maintain the action for use or benefit of another.

C. **G/R:** the citizenship of the real party in interest governs the action for purposes of diversity of citizenship jurisdiction in the federal courts.

§1.7: Permissive Joinder of Parties

A. **Federal Rule 20(a):** All persons may join in one action any parties whose claims (plaintiff joinder) or whose potential liability (defendant joinder):

1. Stem from the same transaction or occurrence or a series of related transactions and occurrences; AND
2. there is a common question of law OR fact that ties the parties together.

A(1). Rule 20(a) says series or related transactions or occurrences and this has been construed liberally; so even if there is two separate contracts or two separate causes of actions a party could probably be joined under Rule 20 [Akely v. Kinnicut].

A(2). A plaintiff may also join parties under Rule 20 in the alternative; that is, if the plaintiff has one claim against the first defendant, and he loses, he may still be able to recover from the second defendant (or vice versa).

B. **Federal Rule 21:** Misjoinder and Non-Joinder of Parties: the misjoinder of parties is not a ground for dismissal of the action; and parties may be added or dropped on a motion by the court.

C. **Federal Rule 40(b):** failure to join a party under Rule 19 does not give rise to a dismissal of the case and does not act as an adjudication upon the merits.

F. **Federal Rule 42(a):** Consolidation: when common questions of law or fact are pending before the court, it may order the cases consolidated.

1. This is broader than Rule 20 because it only requires a common question of law or fact; and does not require a related transaction or occurrence.
2. This is narrower than Rule 18 [joinder of claims] because is *does* require a common question of law or fact.
3. Consolidation is a housekeeping device used for judicial economy whereby a court can join two or more cases that raise a common question of law or fact
    a. Consolidation means that a case can be tried together or simply pre-tried together, BUT separate judgments are entered and separate verdicts are entered.
        (i) Consolidation does not turn two cases into one, it just deals with cases that are alike for purposes of judicial economy.

E. **Federal Rule 42(b):** the trial court has broad discretion to server the case (the joinder of parties) because of potential prejudice and jury confusion.

§1.7: Compulsory Joinder of Parties

A. **Federal Rule 19:** Basic Framework: (a) *Rule 19(a):* states the criteria for when a party should be joined if feasiable, i.e. a necessary party; (b) *Rule 19(b):* states the criteria for when a party should be joined, but it is not feasible.

1. There are three types of parties that arise in the context of Rule 19:
    a. Permissive parties [Rule 20];
    b. Necessary parties, or parties to be joined if feasible; and
    c. Indispensable parties; parties to be joined but are not feasible.

B. **Federal Rule 19(a):** parties who should be joined if feasible:

1. a person whose absence will cause the other parties not be afforded relief; and
2. a person who claims an interest in the action.

B(1). Necessary Parties: (parties to be joined if feasible) necessary parties are so interested in the controversy that they should normally be made parties in order to enable the court to do complete justice; yet, if their interests are separable from the rest and

particularly where their presence in the suit cannot be obtained, they are not indispensable parties [Bank of California v. Superior Court].

1. These parties fall under Rule 19(a).

B(2). Indispensable Parties: an indispensable party is party who is interested in the controversy and the court cannot do complete justice without; the reason is that judgment in favor of one claimant for part of the property or fun would necessarily determine the amount or extent which remains available to others [Bank of California v. Superior Court].

2. These parties fall under Rule 19(b).

C. **G/R:** joint tortfeasors are not within the purview of Rule 19(a) or 19(b) because of the historic practice of allowing tort victims join which ever parties they want.

1. **Exception:** if there is a limited fund problem (i.e. insurance policy) then the parties must be joined under Rule 19.

D. **G/R:** Equity and Good Conscience Test [in Rule 19(b)]: if in equity and good conscience the court can do justice without joining the indispensable party it may proceed to do so. There are four interests that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without the party whose absence from the litigation is compelled:

1. The plaintiff has an interest in having a forum, if there is no alternative forum available then his interest will be satisfied;
2. the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another;
3. the interest of the outsider whom it would have been desirable to join;
    a. the court will as a practical matter have to determine the outsider's interest;
4. is the interest of the courts and the public in complete, consistent, and efficient settlement of claims.

**Rule 19(b) directs a district court to consider the possibility of shaping relief to accommodate these four interests

§1.8: Impleader (Third Party Claims)

A. see tape outline.