

Civil Procedure

I. Personal Jurisdiction

a. General principals

- i. A defendant is subject to the personal jurisdiction of his home state, wherever he may be served. The defendant's home state is
 1. For individuals, their place of residence, citizenship, or domicile.
 2. For corporations, their state of incorporation or their principle place of business.
- ii. If defendant is served within the borders of the forum state, then that state may exercise personal jurisdiction over him. However, a party may not utilize fraudulent inducement to gain personal jurisdiction.
- iii. Parties may consent to personal jurisdiction, either at the commencement of the suit or contractually in advance of suit.
- iv. Defendant's failure to object to a state's personal jurisdiction over him will result in its being waived.
- v. Defendant's failure to comply with discovery requests pertaining to jurisdiction may result in a presumption of jurisdiction.
- vi. A defendant may contractually agree to an agent for service of process, so long as the agent actually notifies the defendant.
- vii. A defendant may implicitly consent to personal jurisdiction, such as by using the state's highways. However, due process requires that the appointed agent for service of process communicate actual notice.
- viii. Bringing suit in a forum state will subject the plaintiff to personal jurisdiction in that state for the purpose of countersuits.

b. Jurisdiction over nonresidents not served within the forum state

- i. In *Pennoyer v. Neff*, the Supreme Court held that due process prevented suits against nonresidents who could only be found and served elsewhere.
- ii. In *International Shoe v. Washington*, the Supreme Court held that in order for the forum state to exercise personal jurisdiction over defendant, the defendant must have a certain minimum contacts with the forum state, such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." The court identified contacts unrelated to the controversy that are of such a nature as to justify suit against defendant in the current controversy, giving rise to general jurisdiction and contacts related to the controversy, giving rise to specific jurisdiction.
- iii. General jurisdiction: When a nonresident defendant cannot be found and served within the forum state, and when the cause of action arises outside of the forum state, exercise of personal jurisdiction over the defendant requires contacts with the forum state that are "systematic and continuous."
- iv. Specific jurisdiction
 1. Specific jurisdiction allows single and isolated activities related to the cause of action to give rise to personal jurisdiction.

2. In considering whether specific jurisdiction exists, the courts consider:
 - a. Whether the defendant gained benefits and privileges by the contract;
 - b. Whether the party purposefully availed itself to the benefits of the laws of the forum state;
 - c. Whether the cause of action was a foreseeable result of the party's conduct;
 - d. The interest of the forum state;
 - e. The convenience of the defendant in defending the action in the forum state.
 3. The unilateral activity of the plaintiff cannot give rise to personal jurisdiction, even if it would not burden the defendant.
 4. A purposeful act outside the forum state that causes effects within the state is not purposeful availment. It is unreasonable to use effects for minimum contacts when the act was not wrongful.
 5. There may be sufficient contacts related to the controversy for the forum state to assert personal jurisdiction, even if the defendant had never been in the forum state.
 6. Critical to the due process analysis is that the defendant's conduct and connection with the forum state is such that he should reasonably anticipate being haled into court there. Foreseeability is the foundation of the minimum contacts standard.
 7. In *Asahi Metal Industry Co. v. Superior Court*, the Supreme Court discussed the meaning of purposeful availment.
 - a. O'Connor's plurality: In order to purposefully avail itself to the benefits of the forum state, a party must take action purposefully directed toward the forum state. Purposeful availment must be an intentional act. It cannot simply be an expectation.
 - b. Brennan's concurrence: Reasonable expectation is all that is required for purposeful availment.
- v. Notions of fair play and substantial justice
1. The minimum contacts test alone is insufficient to establish personal jurisdiction. The requirements of fair play and substantial justice must also be satisfied.
 2. In determining whether fair play and substantial justice is satisfied, courts will consider:
 - a. The interest of the forum state;
 - b. The plaintiff's interest;
 - c. Interstate efficiency;
 - d. The interest of the other state.
 3. If the defendant's burden of defending outweighs the forum state's interest in hearing the case in its courts, then the exercise

of personal jurisdiction will probably violate the notions of fair play and substantial justice.

- c. Long-Arm statutes: In response to *International Shoe* and its progeny, most states have enacted long-arm statutes, authorizing out-of-state service on defendants who otherwise could not be served. Long-arm statutes vary greatly from state to state, but there are three basic types:
 - i. Conferring jurisdiction to the full extent permitted by the Fourteenth Amendment right to due process (Arkansas' approach);
 - ii. Listing specific instances under which the state can exercise jurisdiction;
 - iii. An intermediate type listing specific instances but authorizing court discretion in interpreting the instances.
- d. Personal jurisdiction in federal courts is the same as personal jurisdiction in state courts with a few exceptions. If a federal statute authorizes jurisdiction, the federal statute controls, not the state long arm statute. If the defendant is foreigner, then the court can exercise jurisdiction if the defendant is amenable to the jurisdiction of the United States.
- e. Attacking personal jurisdiction
 - i. Direct attack
 - 1. A direct attack involves the defendant's participation in the lawsuit in order to attempt to prevent the court from reaching the merits of the case. The jurisdictional challenge may be joined with other arguments in support of dismissal.
 - 2. Most states follow the federal rule, which allows a party to challenge personal jurisdiction in the answer or through a Rule 12(b) motion, so that the party is not required to appear in state court. If the state does not allow for this, however, the party may contest personal jurisdiction by making a special appearance, during which time he is not subject to service of process. The making of a general appearance, however, will subject the defendant to personal jurisdiction.
 - ii. Collateral attack: A defendant who objects to a court's personal jurisdiction over him and defaults in an action may subsequently bring a collateral attack against the judgment. However, if the defendant participated in the case without objecting to the court's personal jurisdiction, he cures any defect by waiver.

II. Jurisdiction Based Upon Power Over Property

- a. In rem jurisdiction
 - i. Distinct from personal and quasi in rem jurisdiction—both of which support claims against a defendant for personal obligations—in rem jurisdiction focuses on property within the forum and can only be used to adjudicate claims regarding such property. In rem jurisdiction may also attach to “status,” such as marital status in a divorce action.
 - ii. In rem jurisdiction is proper if the party has property in the forum state that is the subject of the litigation, even if the court does not have personal jurisdiction over the party.
 - iii. There are three basic requirements for in rem jurisdiction:

1. the property must be within the borders of the forum state;
 2. the property must be seized; and
 3. there must be an opportunity to contest the action.
- b. Quasi in rem jurisdiction
- i. Quasi in rem jurisdiction is another method of exercising jurisdiction over a defendant, albeit in a limited manner, based on the defendant's property located within the forum state. Quasi in rem jurisdiction can be used to adjudicate personal obligations, not merely rights in the res (thing). However, it binds the defendant only with respect to his interest in the res upon which jurisdiction is based, and thus, the value of a quasi in rem judgment cannot exceed the value of the res.
 - ii. A debt is property for the purpose of quasi in rem jurisdiction.
 - iii. A debt is property in the state in which it is owed, and it also follows a debtor wherever he goes. Therefore, if personal jurisdiction can be acquired over the debtor, his wages may be garnished to satisfy the debt.
 - iv. Minimum contacts are necessary to establish quasi in rem jurisdiction. While having property within the jurisdiction may satisfy the minimum contacts requirement, if the property is not related or only tangentially related to the cause of action, then a more thorough test of minimum contacts is required.

III. Providing Notice and an Opportunity to be Heard

- a. The requirement of reasonable notice
- i. Due process denies effect to adjudications unless the parties to be bound were given prior notice and an opportunity to participate. Proper service of process is necessary to satisfy due process, unless the defendant waives service.
 - ii. Reasonableness is the foundation of notice. Notice must be reasonably calculated under all the circumstances to apprise interested parties of the action and give them the opportunity to raise their objections. The cost of notice must be weighed against the effectiveness of notice. Publication will only satisfy due process where individual notice is impractical and the party seeking to bypass individual notice demonstrates that (1) the suit is in the interest of the absentees; (2) the absentees will be adequately represented before the court; and (3) the value of their individual interest is not too great. However, where the identities and location of the parties can be reasonably ascertained, individual notice is required.
 - iii. The law does not require actual notice, but only constructive notice, which is a reasonable likelihood that notice will be given.
- b. The mechanics of giving notice
- i. In federal actions, a plaintiff may serve process upon an individual, corporation or association by
 1. delivering service upon a person pursuant to the law of the state in which the district is located (Rule 4(e)(1));
 2. delivering a copy of the summons and of the complaint to the individual personally or leaving copies thereof at the individual's

- dwelling house or usual place of residence with some person of suitable age and discretion residing therein (Rule 4(e)(2));
3. serving an agent of a corporation capable of effectuating service (Rule 4(h)).
- ii. After service has been made, the process server must file a return setting forth the facts and circumstances of the service (Rule 4(1)).
 - iii. Rule 4(d)(2) provides incentives for a defendant to agree to waive formal service and accept the service by mail. Upon notice of the commencement of the action and request for waiver of service from the plaintiff, a defendant who so agrees is granted an extended time within which to answer—60 days instead of 20. If the defendant refuses, he will be subject to liability for costs of services as well as attorney fees incurred in any motion to collect the costs of service.
- c. Many states have a common law immunity from process doctrine. If an individual is in a state for the purpose of facilitating court proceedings, then while he is in that state, he is immune from service of process for other actions.
- d. Opportunity to be heard:
- i. A prehearing seizure usually violates the due process clause. Only in certain extraordinary circumstances, such as a time of war, certain economic crises, and in cases of contaminated food or misbranded drugs, will a prehearing seizure be justified. However, when there are several safeguards for a debtor, then due process does not require prior notice or a hearing before seizure of property. The determining factor as to whether or not due process was met may be the presence, or lack thereof, of a judge's oversight.
 - ii. Due process requires the consideration of
 1. the interest affected;
 2. the risk of erroneous deprivation and the probable value of additional safeguards;
 3. the applicant's interest and fiscal and administrative burdens to the state.

IV. Subject Matter Jurisdiction

- a. General
 - i. Subject matter jurisdiction refers to a court's authority to decide a particular kind of controversy.
 - ii. Article III, § 2 of the Constitution authorizes federal courts to hear cases arising under federal law. However, Article III is not self-executing.
 - iii. 28 U.S.C. § 1331: Federal courts have subject matter jurisdiction over all civil actions arising under federal law.
- b. Federal question jurisdiction
 - i. In order to establish federal question jurisdiction, a right or immunity created by the Constitution or a federal law must be an essential element of the plaintiff's cause of action. Even where a cause of action arises under state law, a federal court may have jurisdiction if it appears that the right to relief rests on the construction or application of federal law. The Supreme Court has determined that "arising under" is very broad,

requiring only that some essential ingredient of the case bear on federal law. However, the mere presence of a federal issue in a state law created cause of action does not automatically confer federal question jurisdiction.

- ii. The well pleaded complaint rule: only allegations that are material and give rise to the plaintiff's claim will be evaluated in determining federal law jurisdiction under § 1331. Nothing the defendant does may contribute. However, a plaintiff may not invoke the original jurisdiction of the federal courts either by anticipating a federal defense or otherwise importing a federal question into his complaint that is not essential to his case.
 - iii. Unless Congress specifies an issue of the case—such as the statute of limitations—as jurisdictional, then the courts will generally consider it a part of the claim. Courts are reluctant to declare there to be no subject matter jurisdiction when it would unravel the finality of judgment.
- c. Diversity jurisdiction
- i. General rule
 1. 28 U.S.C. § 1332 requires complete diversity and a minimum \$75,000—including punitive damages and excluding costs and interest—in controversy.
 2. Joinder may destroy diversity jurisdiction.
 3. Diversity does not require that the case be heard in federal court.
 4. Citizenship for diversity purposes requires a party to be a citizen of both the United States and of a state. Citizenship for diversity jurisdiction means domicile, which is a subjective intent to reside in the state permanently or indefinitely plus some physical presence in that state. Although an individual may have more than one residence at a time, he can only have one domicile at a time.
 5. Corporations are citizens of its state of incorporation and the state of its principle place of business.
 6. Unincorporated associations, such as partnerships and labor unions, take the citizenship of each of its members.
 7. Limited exceptions to the complete diversity requirement apply where specifically created by Congress, such as in interpleader actions, when there must be diversity of only two adverse claimants.
 - ii. Limitations
 1. Deferring to state courts, federal courts have traditionally declined to exercise jurisdiction in certain in rem cases, probate cases, and domestic relations cases, even when the parties satisfy the requirements for diversity jurisdiction.
 2. Courts are obliged by statute to deny jurisdiction that has been improperly or collusively made.
 - iii. Amount in controversy.

1. Jurisdictional amount is ordinarily computed from the plaintiff's viewpoint by measuring plaintiff's losses or defendant's gains, without regard to possible defenses. The measurement is determined by whatever law is controlling in that jurisdiction and determined for jurisdictional purposes at filing.
 2. A plaintiff's good faith pleading controls unless the court concludes to a legal certainty that he cannot recover the amount pleaded.
 3. Individual claims that do not alone satisfy the jurisdictional amount may aggregate in the following circumstances:
 - a. Plaintiff asserts multiple claims against a single defendant, whether or not they are transactionally related.
 - b. Plaintiff joins several defendants to the same claim pursuant to Rule 20 if the several defendants have a common undivided interest or title in the claim.
 - c. Several plaintiffs join in the same claim against one or more defendants pursuant to Rule 20 when the several plaintiffs have a common undivided interest or title in the claim.
- d. Supplement jurisdiction
- i. When a federal court possesses subject matter jurisdiction over a matter, it may exercise supplemental jurisdiction over one or more related claims that would not independently satisfy subject matter jurisdiction requirements. There are two types of supplemental jurisdiction:
 1. Pendent jurisdiction refers to the court's extension of jurisdiction from a free standing (usually a federal question) claim to an otherwise jurisdictionally insufficient pendent (usually a state law) claim by a plaintiff or plaintiffs.
 2. Ancillary jurisdiction extends jurisdiction from a freestanding (often diversity) claim to an otherwise jurisdictionally insufficient claim by the defendant(s) or similarly situated parties, such as interveners as of right. Ancillary jurisdiction supports compulsory counterclaims or cross-claims for less than the jurisdictional amount and the impleader of non-diverse parties.
 - ii. The Supreme Court held in *United Mine Workers v. Gibbs* that federal courts have jurisdiction over a state claim in the absence of diversity whenever it is so related to the federal claim that they comprise one constitutional case. The Court suggested a three-part test:
 1. plaintiff must assert a federal claim that has "substance sufficient to confer subject matter jurisdiction on the court;"
 2. freestanding and pendent claims "must derive from a common nucleus of operative fact;"
 3. the federal and nonfederal claims must be such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding."

iii. 28 U.S.C. § 1367 codified *Gibbs*

1. § 1367(a): there is no distinction between parties and claims, as long as the claims are related, that is, as long as there is at least one claim dealing with a federal question; allows for federal jurisdiction from freestanding claims within the original jurisdiction of the federal court to supplement claims that are “so related to the freestanding claims that they form part of the same case or controversy under Article III of the United States Constitution”; expressly provides that “supplemental jurisdiction shall include claims that involve joinder or intervention of parties.” Most courts have found that claims which satisfy the same transaction or occurrence standard for compulsory counterclaims (Rule 13(a)), crossclaims (Rule 13(g)), or joinder of parties (Rule 20) will also qualify for supplemental jurisdiction.
2. § 1367(b): Carves out exceptions to supplement jurisdiction cases when claims would destroy diversity. In diversity only cases the courts do not have supplemental jurisdiction over claims by plaintiffs against persons made parties by Rule 14 (impleader), Rule 19 (compulsory joinder of parties), Rule 20 (permissive joinder of parties) or Rule 24 (intervention), when exercising such jurisdiction would be inconsistent with the jurisdictional requirements of the diversity statute. Thus, a plaintiff may not assert claims against parties in a diversity action if supplemental jurisdiction would negate complete diversity.
3. § 1367(c): If the district court determines that there is diversity jurisdiction under (a) and the claims are not excluded under (b), then the court has the discretion to refuse jurisdiction when it believes, in the interests of judicial economy, convenience, fairness, and comity, that supplemental claims would more appropriately be decided by state courts. There are four guideposts to assist the court in making this determination:
 - a. If the claims raise a novel or complex issue of state law where the state court would be better suited to decide the issue;
 - b. If the claims predominate claims over which the federal court has jurisdiction;
 - c. If the district court has dismissed all claims over which it had original jurisdiction, then the court has the discretion to dismiss the state law claim for no other reason than that it should be heard in state court;
 - d. There are exceptional circumstances, or other compelling circumstances, for declining jurisdiction.

4. § 1367(d): The statute of limitations that run on supplemental claims are put on hold for the time that the case is pending in federal court and for 30 days after it is dismissed.
- iv. 100 mile bulge rule: When supplemental jurisdiction is asserted over third-party defendants and indispensable parties, service may be effectuated by the 100 mile bulge rule, if such parties cannot be served within the state in which the federal court sits. This rule allows service on such added parties anywhere within 100 miles of the federal courthouse in which the action is pending. Rule 4(k)(1)(b).
- e. Removal
 - i. § 1446: A defendant may remove a civil action pending in a state court to a federal court if the federal court would have had original jurisdiction over the plaintiff's claim. The assertion of a defense or counter-claim based on federal law does not convert a nonfederal case into a federal case.
 1. § 1446(a): In order to remove the case, the defendant must only file a notice of removal in district court, pursuant to Rule 11.
 2. § 1446(b): Defendant must file a notice of removal within 30 days of being served with the initial complaint. The filing of an amended complaint does not restart the clock for removal, unless the initial complaint did not contain a basis for removal and the amended complaint does. In such a case, there is a 30-day time limit from the time removal becomes permissible. Cases may not be removed for diversity jurisdiction, however, more than one year after the complaint is filed. Under the forum defendant rule, diversity cases are removal only if none of the defendants is a citizen of the state in which the action is pending.
 3. § 1446(c): When a federal court already has jurisdiction over a claim based on a federal question, it has discretion to remove separate and independent state-law claims in order to adjudicate the entire case if the state law claim is part of the same constitutional case or controversy as the federal question. If such a test is met, the state law claim falls within the supplemental jurisdiction of the federal court and can thus be removed.
 4. § 1446(d): After filing the notice of removal in federal court, the defendant must immediately give notice to the parties and the state court. Once notice is received, the state court is divested of jurisdiction.
 5. The rule of unanimity states that all defendants must consent to the removal in order for it to occur.
 - ii. § 1447
 1. § 1447(a): The district court may issue all necessary orders and processes to bring before it all proper parties.
 2. § 1447(c): A motion to remand the case on the basis of a defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under §

1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. Improper removals may result in attorney fee sanctions.

3. § 1446(d): Any order remanding a case to the state court from which it was removed is not renewable on appeal.

iii. Challenging subject matter jurisdiction

1. Direct attack

a. Any litigant may challenge subject matter jurisdiction at any time prior to the entry of final judgment.

b. There is no rigid jurisdictional hierarchy.

2. Collateral attack

a. According to the Restatement, a collateral attack may not be made on subject matter jurisdiction unless there is no justifiable issue of reliance that must be protected and one of these three facts are present:

i. The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority;

ii. Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency or government; or

iii. The judgment was rendered by a court lacking 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 judgment should have the opportunity belatedly to attack the court's subject matter jurisdiction.

b. Collateral attacks on subject matter jurisdiction are tricky because of finality issues.

V. Venue

a. Venue is not jurisdictional, but rather merely a matter of convenience. Venue is determined by statute, but parties can stipulate or contract to an otherwise improper venue. Objections to venue are waived unless timely asserted. Improper venue does not subject a judgment to a collateral attack.

b. In determining venue, two questions apply:

i. What venue is appropriate?

ii. Should venue be transferred from one appropriate venue to a more appropriate venue?

c. Venue is based on convenience and fairness, and states have broad leeway to set their venue rules as they see fit.

d. Though many states will not enforce forum selection clauses, federal courts presume their validity.

e. The now abandoned local action rule stated that causes of action arising over land disputes must be heard where the land is located.

- f. Venue in federal courts is controlled by 28 U.S.C. § 1391. The statute provides two grounds for venue and a default position:
 - i. Defendant's residence: In both diversity and federal question cases, venue may be proper in the district where the defendant resides, or if there are multiple defendants, in any district where any defendant resides provided that all defendants reside in the state in which the federal court sits. § 1391(c) defines the residence of a defendant corporation to be any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. This test has been applied to unincorporated associations as well.
 - ii. Locus of substantial part of events or property at issue: venue may be proper in the 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 the subject of the action is situated.
 - iii. Default venue: If, based on the preceding grounds, there is no district in which the action may otherwise be brought:
 - 1. Under 28 U.S.C. § 1391(a)(3), diversity actions may be brought in a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced.
 - 2. Under 28 U.S.C. § 1391(b)(3), federal question cases may be brought in a judicial district in which any defendant may be found. Many courts see this requirement to be synonymous with the diversity requirement.
 - iv. If a state has more than one district court, each district is evaluated as if it were a separate state for the purpose of determining whether personal jurisdiction exists.
 - v. An alien may be sued in any district.
- g. Forum non conveniens: State courts have no power to transfer cases to the courts of other states, and neither state nor federal courts have the power to transfer cases to the courts of foreign countries. In such cases, most judicial systems permit dismissal of suits under the common law doctrine of forum non conveniens in anticipation that the plaintiff will recommence the suit in the alternative foreign venue. (The court may dismiss upon certain conditions.) To obtain a forum non conveniens dismissal, the defendant must:
 - i. demonstrate that an adequate forum is available;
 - ii. show that the considerations of the party and forum convenience override the plaintiff's choice of forum and justify dismissal. Typically such considerations include:
 - 1. relative ease of access to evidence;
 - 2. availability of process for getting witnesses;
 - 3. cost and efficiency;
 - 4. the court may also consider minor factors of public interest and whether the forum would apply its own law or another.
- h. Transfer of venue within the same judicial system
 - i. Intersystem transfer has been codified in many jurisdictions. Under the federal transfer statute, 28 U.S.C. § 1404, both plaintiffs and defendants

may seek transfer to a district where the case could have originally been brought. Transfer is available upon a lesser showing than required for forum non conveniens dismissal, generally, for the convenience of the parties and witnesses, or in the interest of justice. Any contractual choice of forum between the parties is not dispositive but is a factor to be considered.

- ii. 28 U.S.C. § 1406: a district court, even one lacking personal jurisdiction, hearing a case in which there is improper venue shall dismiss the case or, if it is in the interest of justice, transfer the case to any district in which it could have been brought at the time of filing. If plaintiff files in an improper venue, there are no statute of limitations concerns if the case is transferred to a proper venue. Defendant must object to improper venue immediately, or his objection is waived.
- iii. Statutory transfer is intended to change the place of trial, not the applicable law or availability of limitations defenses. Upon transfer, the court must apply the law that would have been applied in the transferor court, whether the movant was the plaintiff or the defendant.

VI. Ascertaining the Applicable Law

a. Rules of Decision Act

- i. “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply.”
- ii. *Swift v. Taylor* interpreted the Rules of Decision Act to require federal courts to apply state constitutional and statutory law as well as local law, but not state general common law. The Swift doctrine permitted federal judges to displace state general common law with federal general common law in diversity cases.

b. The *Erie* Doctrine

- i. In *Erie v. Tompkins*, the Supreme Court overruled *Swift v. Taylor*, stating that “the laws of the several states” includes judge made general common law. Further, federal courts are not authorized to displace state general common law with federal general common law in diversity cases. In diversity case, an issue that clearly addresses legal rights is substantive and is to be resolved according to state law, while issues that clearly pertain to the judicial process alone are procedural and invoke federal law.
- ii. *York* added the outcome-determinative test, which states that the outcome of litigation in the federal court should be substantially the same as if it were tried in state court. Therefore, where the issue is not grounded entirely on substantive or procedural policies but instead derives from both, such as a statute of limitations, the outcome-determinative test should be applied, resulting in state law applying where it serves substantive interests at least in part and where refusal to do so would affect the outcome of the case.

- iii. In *Byrd*, the Supreme Court said that when the issue invokes the *Erie* doctrine but is not adequately resolved by the substance-versus-procedure and outcome-determinative tests, the policies underlying both the federal law and state law are examined, with weight given to the policy of greater importance. A countervailing federal interest must be balanced with the interest of the state in having its laws apply.
 - iv. The outcome-determinative tests applies only when it touches upon the two aims of the *Erie* doctrine:
 - 1. the avoidance of forum shopping;
 - 2. reducing the inequitable administration of the laws by having two different laws in the same geographical location.
- c. Federal Rules of Civil Procedure
 - i. Under the Rules Enabling Act, Congress authorized the Supreme Court to propagate rules of civil procedure, as long as such rules do not abridge, enlarge or modify any substantive right. The Supreme Court has determined that rules which incidentally affect a litigant's substantive rights do not violate the Rules Enabling Act if reasonably necessary to maintain the integrity of that system of rules. In fact, the Court has never invalidated any Federal Rules of Civil Procedure. The primary question is therefore not whether the rule is valid, but whether it is applicable.
 - ii. The Supreme Court held in *Hanna v. Plumer* that federal procedural rules, unless found to be invalid under the Rules Enabling Act, are not overridden by state law or policy. Thus, the *Erie* doctrine does not control when there exists an applicable federal rules that conflicts with the state law or policy. Only if there is no federal rule on issue does *Erie* apply.
 - iii. When a federal and state law or policy conflict, *Hannah* applies. When there is no conflict, *Erie* applies. If a court's refuse to apply the federal in favor of the state rule would not thwart some purpose the federal rule was intended to achieve, then there is no conflict between the federal rule and the state law. The court's determination will often depend on how narrowly it construes the federal rule.
 - iv. If an issue is controlled by federal statute, neither *Erie* nor *Hanna* applies. Federal law controls.
- d. Conflict of laws
 - i. When there are parties from different states or the events leading to the cause(s) of action occurred in more than one state, the presiding court must determine which state's substantive laws apply, including which choice-of-law rules apply.
 - ii. The Supreme Court has extended the *Erie* doctrine to conflicts questions and required federal diversity courts to administer the conflicts of law requirements of the states in which they are sitting.
 - iii. A federal court presiding over a diversity action must apply the relevant state law as the highest court of the state whose law is being applied would if it were hearing the case. When the issue has been decided by

the state's highest court, the federal court sitting in diversity must generally follow such precedent, unless the federal court determines that the state high court would not follow their own precedent should they hear the issue again.

- iv. Certification is a way for the federal court to ask the state court to decide a single issue and then send it back. This can only be done, however, if the state has legislatively adopted certification rules, which often only allow for certification requests from certain courts. Further, the state court has the discretion to hear the certification or not.
- e. Federal common law
 - i. Federal common law is that which implements the Constitution and federal statutes and is conditioned by them. Maritime law and to some extent international law are based upon federal common law.
 - ii. A federal court is employed to interpret statutes and to fill in the gaps of a statutory scheme with federal common law, so long as there is a particular statute that governs the area. Federal courts are also empowered to interpret the Constitution through federal common law.
 - iii. If the cause of action is based upon the United States' exercising a Constitutional function, it is the duty of the courts, even state courts, to apply federal law, including federal common law, for the purpose of uniformity.
 - iv. The test for the imposition of federal common law is a flexible two prong test:
 - 1. the need for uniformity
 - 2. the strength of a federal interest
 - v. Federal contracts and contracts to which the United States is a party will be governed by federal common law. However, if a private individual sues another private individual based upon the obligations imposed by a contract with the federal government, then there is not enough of a federal interest to impose federal common law.
 - vi. When determining the preclusive effect of a federal judgment, federal common law applies.