**CIVIL　PROCEDURE**

**SUBJECT MATTER JURISDICTION** (Power over the CASE)

**1 Diversity of Citizenship**

要件1 Any P can’t be from same state as any D (Complete Diversity）

※ Complete Diversityは憲法上の要請ではない. could be changed by Congress

※ Determined at the time of filing – citizenship before or after doesn’t matter.

例外: If lineup of parties changes, the time of filing rule doesn’t apply.

例: A州のP1とB州のP2がB州のDに訴訟提起。P2が取下げすれば，complete

diversityありとして訴訟は継続する。

**Citizenship**

① Natural Person

→ Based on State of Domicile

Domicile– 1) **Physical** presence 2) with subjective **intent** to remain **indefinitely**

※２つはない。ハワイから二度と戻らないつもりでアリゾナに移住したものの。アリゾナには

２年しかいないことを決めていればindefiniteではないのでアリゾナになく,まだハワイ

※ 外国人はどの州のcitizenでもない。NY住民がNYにdomicileを置くフランス人をNY

連邦裁で訴えること可能 (永住権を持つ外国人は例外)

② Corporations – Up to 2 citizenships

→ 1) State of **incorporation**

and 2) **Principle place of business** (ONLY 1)

= the state of its headquarterで画一的判断**Herts Corp. v. Friend (2010)**

③ Unincorporated Associations – (Partnership, **LLC**)

→ citizenship of EVERY member, the principal place of business is irrelevant

④ Legal Representative of Decedents, Minors, Incompetents ※decedent=被相続人⇔descendant

→ citizenship of the incapacitated person = the person in interest,

NOT the citizenship of the representative.

要件2　Amount in Controversy Must EXCEED $75,000. (憲法上の要請ではない)

1) Good Faith Test – Based on the good faith allegations of the P

unless it appears to a legal certainty that she cannot recover more than $75,000.

＝ whether reasonable jury could award more than $75,000

※ not including interest or cost of litigation (i.e. statutory ceiling on recovery)

※ What the P actually wins is irrelevant to determine jurisdiction.

→ However, if the P wins $75,000 or less the P may have to pay D’s

litigation costs (Not including attorney’s fees)

2) Aggregation

1P v. 1D – Can aggregate ANY claims related or unrelated

If an action involves one plaintiff and one defendant, the total value

of the P’s claims must exceeds $75,000. 当然反訴請求は合算されない

Multiple P or D – Ps Cannot aggregate multiple Ps’ claims against a single D

(can aggregate claims if defendants are jointly liable) .

Ps Cannot aggregate claims against multiple Ds

例１：甲80,000＄,乙10,000＄をYに損害賠償請求。乙の請求は併合不可

（ただし，密接に関連していればsupplement jurisdictionの可能性はある。

　甲乙が同一事故の加害者なら〇，交通事故加害者とその後の医療ミス加害者なら×）

例２：甲がＡに名誉棄損で8万＄,自動車事故で1万＄,Ｂに同一事故で8,000＄

請求→Ｂへの請求は併合不可∵合算できない

Joint Claims – Ps Can aggregate claims against multiple Ds if they are joint

tortfeasors. Use the total value of the claim.

Ex. P1 & P2 bring suit alleging that D set fire to the house that P1&P2 owned

jointly. The house, worth $100,000. P1’s claim for $50,000 and P2’s claim for

$50,000 can be aggregated.

3) Equitable relief – Jurisdictional amount is satisfied if either **the gain to P** or **the**

**cost to D** exceeds $75,000 (2 viewpoint tests) .

4) exclusions 　　 – Federal courts will NOT hear cases involving divorce, alimony,

child custody, or probate.

例：州籍が相違し連邦法の解釈が重要でも, 財産分与請求を連邦裁に提訴不可

**2 Federal Question**

1) arises **UNDER** a federal law

The claim which

a) **“arises under” a federal law** or

※violation of Federal Toxic Transportation Actで訴訟提起。同法の適用に争いはなく，争点

が毒物をこぼしたかだけでもOK（連邦法解釈の争いは不要）

MBE: state lawに基づき床屋のライセンス失い州を提訴，連邦に管轄ある？

　　 →ある ∵憲法問題を提起できればすべてfederal question

b) P’s right to relief must require a resolution of **a substantial question of federal law**.

(should ignore on MBE)

1) federal law is in dispute 2) demands expertise and need to be resolved as uniformity等要件

Gunn v. Minton, (2013)

　　　　　　特許侵害訴訟で敗訴した原告が弁護士を特許法に関する主張を怠ったmalpracticeで提訴⇒Resolution of a federal patent question is “necessary“だがis important merely to the parties to the case not “substantial” federal issuesとしてSMP認めず

2) Well pleaded complaint rule

The federal question **must appear on the face of P’s "well pleaded complaint**.”

(= NOT in a defense or counter claim)

Louisville & NashvilleRailroad Company v. Mottley*,* (1908)

Ps were injured in a railway accident. To settle their claims, D gave them a lifetime pass for free transportation. Several decades later Congress made free passes unlawful. Ps sued seeking specific performance of the contract. →federal issueがdefenseに出ること明らかだがThe federal question arises in the plaintiff's well-pleaded complaint. が必要としてSMJを否定

**3 Supplemental Jurisdiction** **: §1367** (Test every claim – Counterclaim, Crossclaim, etc...)

In any civil action of which the [district courts](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=28-USC-197249415-2029586402&term_occur=404&term_src=title:28:part:IV:chapter:85:section:1367) have original jurisdiction, the [district courts](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=28-USC-197249415-2029586402&term_occur=405&term_src=title:28:part:IV:chapter:85:section:1367)

shall have supplemental jurisdiction over all other claims that are

※**Must establish original subject matter jurisdiction before you can establish**

**supplemental jurisdiction!**

1. 原則-Common Nucleus Test

**so related to claims** in the action within such original jurisdiction **that they form part of the same case or controversy** under Article III of the United [States](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=28-USC-80204913-1053560320&term_occur=1&term_src=title:28:part:IV:chapter:85:section:1367) Constitution.

Such supplemental jurisdiction shall include claims that involve the joinder or intervention

of additional parties.

**United Mine Workers of America v. Gibbs** (1966)

The claim must share a **common nucleus** of operative fact with the anchor claim.

**=** out of the same transaction or occurrenceは当然OK，それより広い。

substantially related to the original claimと考えてよい。

例 ：Ｘが請負人Ｙ１，下請Ｙ２に庭工事の瑕疵に基づき損害賠償訴訟提起。Ｙ１はＹ２にcross claim

for contribution and for damages of anther work → 前者はＯＫ，後者はcommon nucleusが

ないので不可 (後者の請求が同一工事内の話であればＯＫ)

2. 　However, if the case is brought as **a diversity action**, P may not use supplemental jurisdiction if it would violate complete diversity.

⇔ D is always possible (counterclaims, crossclaims, and impleaders).

(b) In any civil action of which the [district courts](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=28-USC-197249415-2029586402&term_occur=406&term_src=title:28:part:IV:chapter:85:section:1367) have original jurisdiction founded solely on [section 1332 of this title](https://www.law.cornell.edu/uscode/text/28/1332) (on diversity jurisdiction),

The district courts shall not have supplemental jurisdiction …

i)　　　　　over claims **by plaintiffs against persons** made parties under Rule 14, 19, 20, or 24..

Rule 14=third party plaintiff and defendant, 19, 20=joinder of parties, 24=intervention

ii) over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules,

when exercising supplemental jurisdiction over such claims **would be inconsistent with**

**the jurisdictional requirements** of section 1332 (on diversity jurisdiction)

例 ： A州のＸがＢ州のＹ１に名誉棄損で損害賠償訴訟提起，Ｙ1はＡ州の監督者Ｙ２を引き込

みclaim for contribution. XがＹ２にも損害賠償請求を追加。

→ 前者はＯＫ∵ by plaintiffでないのでdiversityを壊してもＯＫ

後者は不可 ∵ by plaintiffなのでdiversityを壊せない

(anchor claimが名誉毀損でなく特許権侵害であれば後者もＯＫ∵not diversity case)

例 ：A州のＸがＢ州のＹに名誉棄損で損害賠償訴訟提起，Ｙは特許権侵害で60,000＄のcounter

claim → 後者の請求はcommon nucleusがないのでsupplement jurisdictionはない。しかし，

federal questionとしてsubject matter jurisdictionがあるので請求可能

例 : A州のＸがＢ州のＹ1に損害賠償訴訟提起, Ｙ1は同一案件でXに40,000＄のcounter

claim。ＸがA州のＹ2をimplead for indemnification

→ 後者は不可 ∵by plaintiff（結論不当であり起草のミスと言われているが，条文に従うのが通説）

\*D can violate diversity. Y1 can implead Y2 as a third-party defendant.

例 :Ｂ州のＹに，A州のＸ1が100,000＄，A州のＸ2が60,000＄を同一事故に基づき損害賠償

請求→ 別原告の訴額合算不可が原則だが, 一人が訴額要件満たしていればsupplement

jurisdictionを認めるのが判例 (前者が5万＄であればanchor claimがないので不可)

3. さらにDiscretion – Court has discretion NOT to hear the supplemental claim if:

1) The federal question is **dismissed early** in the proceedings

2) The state law claim is **complex**

3) State law issues would **predominate**

※ 逆のdiscretionはない。連邦差別禁止法事件に関連の損害賠償が併合されれば後者はremandしかない。

**REMOVAL** – Allows D to remove (“transfer”) a case from state to federal court.

1. Rule: A defendant sued in state court may remove a case to federal court if it could have been filed

originally in federal court　 ※もともと管轄なければremovalもできない

① Only D’s can remove (**ALL Ds MUST agree:** 同意書添付不要,申立後同意する旨の手紙でもOK)

② In Diversity cases NO removal if D is a local D. (citizen of the forum)

③ D who files a permissive counterclaim in state court waives his right to remove.

(NOT for compulsory claims)

④ Must have original subject matter jurisdiction for the Federal Court

Which court?

Can only be removed to the federal district court embracing the state court which the case was originally filed.

When?

1) D has **30 days** from service of the document that first made the case removable, (Usually

service of process, amend the complaint to assert a federal claim, 被告が減りcomplete

diversityになったといった場合ならそこから３０日)

2) In **diversity cases** NO removal more than **1 year** after the case was filed.

２. 手続: Procedure

1) D files Notice of removal in federal court stating: Grounds for removal,

a) Signed by the parties under Rule 11,

b) Attach all documents served on D in state action,

2) Copy to ALL adverse parties.

3) Then file copy of notice in State Court.

※ removal does not waive the defendant’s right to object to personal jurisdiction.

Once he waive the right, Removal will not revive it.

３. 差戻: **Remand** – If removal is improper, federal court can remand to state court.

1) P must move to remand within **30 days** of removal. (district courtに提出)

2) but if there is **no SMJ**, then the P can remand **anytime.**

When a removable claim is joined with one or more non-removable claims,

→the entire case may be removed.

The federal court in its discretion, may remand all matters in which state law predominates.

**※** 差戻決定には原則上訴不可（裁量に基づく差戻しの時は可）**28 U.S. Code § 1447**

**※** anchor claimが却下されれば管轄がなくなったsupplemental claimは差し戻される。

**PERSONAL JURISDICTION**

**CA: PJは州として管轄をもつかという問題。CA特別の問題は生じない。**

– **Personal jurisdiction refers to the ability of a court to exercise power over a particular**

**defendant.** Same analysis in California State Court

To determine whether a court has personal jurisdiction, it must meet state and constitutional

requirement (=Must satisfy a state statute and due process under the constitution.)

**１　In Personam** – Jurisdiction over the person based on contacts with the forum state

※ in personam personal jurisdictionという言い方もあるが，通常はpersonal jurisdiction = in personam

jurisdiction, 使うとしてもpersonal jurisdiction はin personam jurisdictionとin rem jurisdictionがあ

る・・・というように用いる (essayでin rem jurisdictionが問われた例は見たこと無い)

Traditional Basis

Traditionally, courts have personal jurisdiction if they

1) are **Domiciled** within the state. (つまり現在州にいなくても本籍あればOK)

　　　 ※ Corp.については, incorporated states だけ

2) are **Personally Served** with process within the state,

× tricked or forced into forum　× while appearing in a judicial proceeding.

100 mile bulge provision: Third Party Defendant may be personally served anywhere

within 100 miles of the court. → 事実上PJが広がる

3) **Consent (普通はspecial appearanceの問題)**

1) Appearing in the action; 2) By contract or 3) Appointment of agent for service.

Modern Basis

1) state **long arm statutes**

**Long Arm Statutes** – Used to assert a state's jurisdiction over non-residents.

General – Permit a state court to exercise jurisdiction over any party so long as it is

constitutionally permissible (CA – has a general statute)

Numerated – Narrow and provide that only certain acts will warrant jurisdiction.

2) **constitutional** limitations

D must have such minimal contacts with the forum so that exercise of jurisdiction does

not offend "**traditional notions of fair play and substantial justice**."

**International Shoe Co. v. Washington, (1945)**

a) A court may assert general (in personam) jurisdiction when there are so **systematic and continuous** activity of D in the state as to render D **essentially at home** in the forum state.

（General jurisdictionはactivityと関連無し）※ 昔はsystematic and continuousで広く認めていた

or b) A court may assert specific (in personam) jurisdiction when the events underlying the lawsuit **arise out of** or **relate to** the **defendant's contact** with the forum state.

**(Contact = purposeful availment of the privilege of conducting activities within the**

**forum State** → must be an **intentional** act that is expressly aimed at the forum state）

※ Court Ruleにより同規範が連邦にも原則適用.but, 14th amendmentの要請であり制定法が

impleaderにおいてnationwide jurisdictionを認めているように連邦に憲法上の適用はない。

3) The exercise of PJ must be **fair** under the circumstance.　※ 常に論じる！＝ justice

Fairness is determined by 1) P’s interest 2) D’s burden 3) the forum state’s interest 4) judicial

Efficiency.

①burden on D 　　　　it puts D at a severe disadvantage

②plaintiff's interest　　　 unable to obtain relief in another forum

③forum state's interest 　 in furthering substantive policys(i.e. for its safety & health)

c.f., State has an interest in protecting citizens from traffic accidents

③judicial efficiency 　　　証拠のある場所など

a) general jurisdiction

**Goodyea**r判決 (2011）　**essentially at home基準**

関連会社によるその裁判地向けのわずかな販売があるだけでは足りない

A court may assert general jurisdiction over foreign...corporations when their affiliations with the State are **so ‘continuous and systematic’ as to render them essentially at home** in the forum State.

※ It is very likely that a corporation is subject to general in personam

jurisdiction in the State of incorporation or Principle place of business.

**Daimler**判決 (2014）→ Gucci判決

中国銀行は米国内に４支店のみ。全世界における活動に比べればNYにおける活動はごくわずか

→例外的ケースに該当するほど裁判地との関係を有しないのは明らかであり一般的管

轄権はない (差戻審において、特別管轄権に服しないかを審理すべきことと判示)

※ principal place of business, place of incorporationであればＯＫ．他は非常に困難

b) specific jurisdiction

**Mcgee v. International Life Ins (1957)**

手紙だけで他州の会社がカルフォリニアの住民と保険契約→ＣＡにＰＪあり

＝ A single contract with the forum state maybe provide the basis for specific PJ.

⇒ 類推: 電話で他州民の名誉毀損をすれば電話を受けた人のいる地にPJあり

**World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)**

It was foreseeable by World-Wide and Seaway that a car sold by them could

subsequently lead to an injury in Oklahoma.

→ foreseeabilityだけではPJない。purposeful availmentが必要

**Calder v. Jones (1984)**

カルフォリニア在住の女優が雑誌記者を訴え。女優がアル中と書かれた問題記事はフ

ロリダで書かれ編集された。雑誌はカリフォルニアでも大量販売. 著者と編集者を提訴

The allegedly libelous story concerned the California activities of a California resident,

and that Jones’ television career was based in California. In addition, the alleged injury

to Jones’ career was suffered in California. → Thus, jurisdiction was proper because

of the effects of Calder and South’s Florida activities in California.

・Calder and South allegedly **intentionally directed their actions at California.**

・The Calder Effects Test (ある解釈)

The Calder effects test focuses on harm caused by the defendant.

In order for a defendant to be subject to personal jurisdiction under Calder, a defendant must

(1) commit an **intentional** act (2) that is **expressly aimed** at the forum state and (3) causes

actual harm that the defendant knows is likely to be suffered in the forum state.

**Keeton v. Husler Magagine (1984)　上記と同様の事例，雑誌社を提訴**

Where respondent has continuously and deliberately exploited the New Hampshire

market, it must reasonably anticipate being hauled into court. There is no unfairness

→ 管轄あり

CAの会社の全国販売契約

→ D’s relationships with a third-party, standing alone, is an insufficient basis for PJ

**Burger King Corp. v. Rudzewicz (1985)** → 管轄あり［フランチャイズ契約違反事件］

被告が法廷州内において重要な活動に意図的に携わった場合または自身と法廷州の居住者との

間に継続的な債権債務関係を創設した場合、被告は明らかにその地で営業を行う特権を利用した

ことになる。

**= purposefully avails itself of the privilege of conducting activities within the forum State**

**Asahi Metal Indus. v. Superior Court, 480 (1987)** 日本企業に対するCal州裁の裁判権行使）

バルブ欠陥に基づく製造物責任の請求。Asahiは支店も販売・宣伝活動もしていない。

全世界に販売は認識→ 管轄無し∵ not purposefully avails～, Stream of Commerceで

商品が入り込む認識だけでは不足

**Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County** (2017)

薬害: ＣＡで大量に販売している会社が被告。他州の被害者はＣＡに管轄無し(specificも)

・Specific jurisdiction requires the suit to **arise out of or relate to the defendant’s contacts with the forum**.< Daimler :direct connection between the P’s claim and the D’s conduct in the Forumという趣旨と解されている

・in order for a court to exercise specific jurisdiction over a claim, there must be an affiliation

between the forum and the underlying controversy, principally, **an activity or an occurrence**

**that takes place in the forum state.**　 < Goodyear

the extent of a D’s unconnected activitiesは無関係と明示

　　　　　　 　 注　“arise from or relate to” requirementは1) but for testで足りるのか，2) The

substantive-proximate cause testが必要か争い有り。最高裁は2)に近いと言われる。

**Helicopteros Nacionales de Colombia, S. A. v. Hall (1984)**

A Colombian corporation, purchased a majority of its helicopters and training for said helicopters in Tex. Helicopter crashed killing 4 Americans in Peru. 彼らの代表がテキサスで訴訟提起

→ D’s Texas contact were insufficient to support general jurisdiction.

But for the contracts, No accident.しかしdirect causeではない。

　　 　 (契約条項でペルーを管轄としていたいということでそれ以上の深い判断せず)

**Carnival Cruise Lines v. Shute (1991)**

　 　ワシントン州で見た広告で申し込んだ人がslip and fall

　 　州はthe slip and fall would not have occurred but for the advertisementとしてＰＪ認める

　 　最高裁は契約の管轄条項を “fundamentally fair”で有効として一般問題に踏み込まず

**Piazzo v. Hotele Concorde International (1992 state court)**

ホテルの事故はforum stateのsolicitationからarise fromでないとしてＰＪ否定

※ Case lawではspecifically targeted consumerである必要がありfacebook広告で全

国にPJは生じないとする例が多い。

barbri: interactive websiteでホテルを予約→PJあり，passive website→probably no.

[**Walden v.  Fiore**](https://supreme.justia.com/cases/federal/us/571/12-574/case.pdf) **(2006)**

ネバタへ向かう飛行機に乗るジョージアでunlawful search → This connection must

arise from the contacts that the defendant himself creates; yet all of Walden's conduct

occurred in Georgia. The fact that Fiore and Gibson were injured in Nevada was

insufficient to establish personal jurisdiction over Waldenとしてネバダの管轄否定

**McIntyre Machinery v. Nicastro, (2011) 最新意見**

機械事故で英国会社へ訴訟提起. A British company manufactured the machine and sold it

through its exclusive U.S. distributor.

原審**:** New Jersey's courts can exercise jurisdiction over a foreign manufacturer of a

product so long as the manufacturer "**knows or reasonably should know that its**

**products are distributed through a nationwide distribution system** that might

lead to those products being sold in any of the fifty states."

判示:. As a general rule, the exercise of judicial power is not lawful unless the

defendant "**purposefully avails itself of the privilege of conducting activities**

**within the forum State”** There may be exceptions, say, for instance, in cases

involving an intentional tort. But the general rule is applicable in this products-

liability case, and the so-called "stream-of-commerce" doctrine cannot displace it.

(相対多数意見)→管轄否定

補充: “If there are regular course of sales into New Jersey, or deliberate efforts to cultivate the

New Jersey Market”であれば結論変わる(2 justices)

[**Burdick v. Superior Court**](http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/Burdick.pdf) **(CA 2015)**

The court determined that the Ca district court could not assert personal jurisdiction over an

Illinois citizen, Burdick, for several Facebook postings allegedly defaming two Ca scientists.

→Applying Walden. The court found that evidence was [lacking](http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/Burdick.pdf) that the defendant **“expressly**

**aimed or intentionally targeted** his or her intentional conduct at the forum state.”

**Hypo（Glannon）**

A州で廃棄物を処理 (B州との州境近く). 過失によりB州に入り込み被害発生

**→** mere foreseeabilityで管轄は生じないがVolkswagen判例の結論. しかし不当(判例無し)

**2 In Rem Jurisdiction**

– A court possesses the power to determine the status of property within its state with respect

to all possible interest holders in that property.

“true” in rem 例 an action to clear the title to real property

an action to resolve conflicting claims to the property

“pure” in rem 例 an action to forfeit property imported illegally by the federal government

(property itself is “the defendant”)

**Quasi In Rem** Jurisdiction

– Proceeding against a person based on the presence of that person's property within the state.

（Modernly must meet a minimum contacts analysis.）

例 an action to repossess the crane and obtains a writ from the court attaching the crane

an action for her injuries and obtains a writ of attachment over the property

Shaffer v. Heitner, 433 U.S. 186 (1977)

“All assertions of state-court jurisdiction (including quasi in rem jurisdiction), must be

evaluated according to the standards set forth in International Shoe”

　 ※ the use of quasi in rem jurisdiction based on attachment of assets unrelated to the plaintiff’s claim

　　　 が従前認められていたが，原則としては認めない方向に向かった判例.

(しかし，Feder v*.* Turkish Airlines*,*1977でNY地裁はトルコ航空の事故でattachment of a bank accountのみから管轄を認めており，Shafferの適用範囲は不明確)

MBE: the property has no relationship to the subject matter of the lawsuitなら管轄無し

が正解選択肢

例題: 甲州居住のAが有する乙州の別荘の庭の穴に落ちて怪我. obtaining a writ of attachment on the property on which she is injuredを求める訴訟提起→ this claim arises out of the ownership and maintenance.乙州で訴訟提起可能

　　　　　　 ※ “true” in rem caseではthe claim arises out of a contact of all claimants to the propertyであ

り当然にminimal contactある.

**Challenging Jurisdiction**

1 .Common Law

Special appearance:Appearance for the sole purpose of objecting to the jurisdiction

To raise any issue → waive the right of objection

※ Special appearance後，決定前に別の主張をするだけで異議権喪失

2 .Flexible approach (FRCP)

She may 1) raise her objection before answering the complaint by moving to dismiss

or 2) may raise the objection in her answer with or without another objection

But, she may not respond first by moving to dismiss for failure to state a claim, and later move

to dismiss for a lack of personal jurisdiction.

⇒motionの却下についてthe decision is interlocutoryとして即時appealを認める州もあるが連邦はfinal judgement後しかappealできない。

※ 異議を述べずにdefault judgementをもらう方法もある。同判決を他州で執行するに

は“judgement on judgement”が必要になるが同訴訟で争うことはOK

**VENUE** – Determines which district court is proper (CA – determines which county is proper)

**Local Action** – Actions regarding ownership, possession, or injury to LAND MUST be filed in the

district where the land lies.

**Transitory Action 28 U.S. Code § 1391**

原則は日本と同じ，被告住所地又は事象発生地 (被告複数のときは州を越えた移動を被告にはさせない)

→被告が同一州であれば被告住所地又は事象発生地。被告が複数州にまたがっていれば事象発生地

A civil action may be brought in

(1) a [judicial district](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=28-USC-1281333587-2029586402&term_occur=170&term_src=title:28:part:IV:chapter:87:section:1391) in which **any defendant resides, if all defendants are residents** of the State in

which the district is located; (同一州の数か所に分れて居住していれば,その内のどこでもよい）

(2) **a** [**judicial district**](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=28-USC-1281333587-2029586402&term_occur=171&term_src=title:28:part:IV:chapter:87:section:1391) **in which a substantial part of claims (events or omissions) occurred,**

or a substantial part of property that is the subject of the action is situated; or

(3) if there is no [district](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=28-USC-288961422-2029586402&term_occur=1201&term_src=title:28:part:IV:chapter:87:section:1391) in which an action may otherwise be brought as provided in this section, **any**

[**judicial district**](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=28-USC-1281333587-2029586402&term_occur=172&term_src=title:28:part:IV:chapter:87:section:1391) **in which any defendant is subject to the court’s personal jurisdiction** with

respect to such action　　1)2)がない時

※ 2)のvenueは複数あり得る。most substantial partでなくても複数から選択可能

1)のvenueと2)のvenueの両方OKということもある。

※ 3)は1)2)が他州にあってもダメ。甲州のAと乙州のBを訴えるとき, substantial eventが丙州

で起こっていれば，Aのresidenceのdistrictにvenueなし。

※ 2)の後段は, 不動産所在地等に基づきvenueが認められる場合 ＝ Local Acton

※ 外国人については全米中にvenueあり(明文規定あり)

※ Pendant venueは明文ないが多くの裁判所認める (主請求にvenueあるときに関連請求OK)

例題: Ａ州の原告がＢ州の被告をＣ州で起こった事故につき提訴。被告はＤ州で送達を受けた。Ｄ

州地裁に提訴可能？

⇒ダメ。ＰＪがあってもvenueがない。venueはＰＪとは別に検討が必要。

例題: A州の原告がＢ州北部地区で主に事業をする被告１とＢ州南部地区で主に事業をする被

告を提訴 ⇒ Ｂ州のどの裁判所にも提訴可能

∵ 被告1,2とも法人なのでresidenceはＢ州，1)が適用されＢ州のどの裁判所もvenueあり

例題: A州の原告がＢ州の被告１をB州地裁に提訴。被告１のmotionに基づく裁判所の決定にし

たがい原告がC州の被告２を追加。問題の不法行為発生地はD州。

⇒追加により被告両名は違う州になったのでB州地裁はimproper venue.その後のmotion OK

例題: Xは，丙州東部地区で起こった交通事故の損害賠償の訴え運転手Y1(甲州北部地区)と雇用主

会社Y2(乙州南部地区)を相手にし，乙州南部地区連邦裁判所に提起。Y１がmotion to dismiss

→1)は，被告らは同一州に居住していないので適用無し。

2)からvenueは丙州東部地区のみ。

⇒裁判所は裁量で却下又は移送。

例題:インディアナ州の南部地区に住む甲がオハイオ州の南部地区に建設計画中建物への融資の取

引から生じた損害賠償を求めてケンタッキー州の西部地区の乙１，テネシー州の西部地区の

乙２に訴えを提起。乙１に対する請求は詐欺、乙２に対する請求は連邦貸付真実法違反に基

づく。交渉はテネシー州の西部地区で行われた。

→1)は被告らは同一州に住んでいないので適用無し。

　 2)は建物の建築がなされたという主要な出来事が起こったオハイオ州南部地区。

3)は2)があるので検討不要

　　　 ※ This is doubtful, since the action is for fraud, not to establish an interest in the real estate, However, venue is proper anyway, since a substantial part of the events giving rise to P’ claim took place there.

**Resides ?**

Humans 　 – Reside where they are **domiciled**.

Corporations – “corporation shall be deemed to **reside in any district** in that State within which its contacts would be sufficient to subject it to personal jurisdiction”

　　　　　　　(= where its contacts would support personal jurisdiction)

※ Unincorporated Associationsも同じ

例:北部地区に本店があるためPJが認められるのであれば，北部地区がresidence

∵ its contacts would support personal jurisdictionの必要

例:受刑者X(甲州)が甲州の刑務所の代わりに利用されているY病院(乙州)をX州裁

に提訴。Yが移送申立

→ 1) personal jurisdictionあり∵purposefully avail oneself of

2) venue is proper∵1) district where all Ds reside 2) Corporations reside

where they are subject to personal jurisdiction

3) discretion

CA – どのcountyのsuperior courtに訴えるかという問題

Local Action 不動産関係訴訟→ venue is proper in the county where the land lies 不動産所在地

Transitory action　いずれかの被告住所地

→Venue is generally proper in a California Superior Court in any county where any

defendant resides.

a) For contract actions, venue is additionally proper in the county where the contract was

**formed or to be performed.**

b) For tort actions, venue is proper in the county where the act or omission giving rise to

the tort occurred.

Non Resident of CA 　上記に当てはまらなければ,どこでもOK

: If no venue is proper following the application of these rules, then venue is proper in

**any county.**

※ Corporation – resides where the PPB is.

**Transfer of Venue** – In the Interest of Justice, the court MAY transfer to any district in which

the case Could have been filed.

**28 U.S. Code § 1404 : For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented**

1) If venue in original district is proper

→**The court has discretion** to order transfer the venue based on (motionなしに移送可）

Interest of Justice – Court will balance both public and private interests.

Public – a) what community should be burdened by jury service

b) what law should apply

Private – a) convenience of parties, b) location of witness and evidence.

or Impartial trial cannot be had or No judge is qualified.

・当事者が合意すれば, どこにでも移送可能

§1404: Upon…consent…, any action…may be transferred, in the discretion of

the court, from the division … to any other division in the same district.

　 ・venue and forum selection clauseはunreasonable and unjustでなければ有効 (連邦:明文なし)

・移送されても適用法は変わらない: 1404（元の法廷地と同じ法が適用される）

2) If venue in original district is improper

→ court may transfer **in the interests of justice** or dismiss. (時効期間経過から救われる可能性)

・当初訴え提起が可能であった裁判地に移送できる

（1404と異なり当事者が合意した裁判地でも元々不適切な裁判地に移送は不可）

・1404と異なりconvenienceは検討しない, justiceのみ。

only if more just than dismissal.→ 通常はstatute of limitationが問題。

§ 1406: The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district …in which it could have been brought.

**Forum Non Conveniens** (transferは主権が異なるため不可な場合，州裁は他州裁にtransferはできない)

If there is a far more appropriate court elsewhere (within a separate judicial system, foreign country), a court may dismiss the suit without prejudice.

下記のfactorなどから判断

Public – **Burdened** of jury service, what law should apply

Private – **Convenience** of parties and witnesses, location of evidence

　　　　　その他要素・Availability of adequate alternative forums for the plaintiff.

　　　　　　　・　The expeditious use of judicial resources.

　　　　　　　　・　Questions of public policy.

※ Requires a very strong showing of private and public interests to dismiss or stay.

Almost never granted if P is a resident of the present forum.

California Jurisdictional Issues:

California divides cases into 3 types of courts/jurisdictions:

1) Small Claims 　: amount in dispute does not exceed $7500.

2) Limited Case : the demand or the value of property in controversy does not exceed

$25,000. Discovery is limited ※ 同額以上の判決は出せない

3)　　Unlimited Civil Case　: Anything that is not classified as Limited or Small Claims.

※どのケースもsuperior courtが管轄. reclassifyは適宜行われる, aggregate条件はAICとほぼ同じ

原告が２万ドルで提訴，被告が３万ドルで反訴すればreclassify される

**The Erie Doctrine 　 ※ diversityの際のみに問題。federal questionでは無関係**

**Issue　　　 :** the question will be whether the court must apply state law on some issue

**General Rule** **:**  In a diversity case, federal court must apply state substantive law and Federal

procedural law. ※ diversity case only

**Step 1** If there is a federal law **on point**,

→ then federal courts will apply federal law

ex; FRCP→クラスアクションの対象事件を限定する州法はFRCP23に違反し不可

州法がある種の事件の移送を認めていなくても，移送はFRCPが適用

Burlington Northern Railroad Co. v. Woods(1987)

　　　　敗訴上訴者に10％のペナルティー科すアラバマ法⇒裁判官の裁量にゆだねる

federal rules of appellate procedureがbe on point→連邦法適用

Forum selection clause

　　→Federal transfer statute is applicable even in diversity actions. The court

has discretion. (管轄条項の有効性をA州法は否定していても連邦裁は連邦法で判断。

連邦法では，有効性を認めるかは裁量)

**Step 2** 　　 If it has been clearly determined to be substantive

→ then federal courts will apply substantive law

Court has clearly determined four areas to be substantive:

(1) Elements of a claim or defense, negligence standard

(2) Statute of limitations, Rules for tolling statute of limitations (時効の停止),

(3) Conflict or choice of law rules.（訴えられた州の国際私法を適用する）

　　　　　　　　　　　Klaxon Co. v. Stentor Elec. Mfg. Co.(1941)

　　　　　　　　　　　　The court made clear that in a federal diversity action a court must look to the choice-of-law rules of the state in which it sits to determine which of two competing states’ laws should be applied to the action.

(4) Burden of proof

**Step 3**  If NO federal law on point and it has not been clearly determined,

→ apply the following 3 tests and come to a reasonable conclusion.

**test１** outcome determination test

if it **substantially affects the outcome**　→州法適用

例；時効

消費者訴訟で勝訴した消費者に裁判所は弁護士費用の補償を認める州法

Guaranty Trust Co. v. York (1945)

Federal court should defer to state law in a diversity case, even on an issue that is arguably procedural –or, presumably, clearly procedural- if ignoring the state rule would lead to a different outcome.

**test2** balance of interests test

The court **weighs which judicial system has the greater interest** in having its

rule applied.

State interest強い例→① Remittitur ② Notice of claim requirement

MBA: 医療過誤訴訟の前の事前の通知 → 州法適用

**Byrd v. Blue Ridge** (1958)Jury trial (7th Amendment) - apply federal rule

The state policy might be outcome-determinative, but, the federal policy requiring jury trial under 7th Amendment is very strong and could override the state policy; state interest is weak.

結論が変わり得るにしても陪審員審理を先行させるかどうかは連邦法適用

MBA: A州の‟When jury’s award deviates materially, judge should order new

trial”という法律⇒ substantive lawとして連邦でも適用

・remittitur, additurもdiversity caseでは州法を適用（但しadditurは違憲のた

め適用不可）

remittiturの要件が‟excessivee”ならば連邦裁でも同様基準で判断

→但し陪審手続保証の関係で一方的減額は不可。必ずnew trialの機会付

与が必要

**test3 forum shopping deterrence** test

ignoring the state rule will cause forum shopping?

　　　→ If so, apply state law.

　　　　　　　　 例: シートベルト不着用の事実の証拠提出を禁止する法律

**Claim and Issue preclusion**

・The preclusion rule of the first case is applied to the second court.

・Federal common law applies state rules of res judicata (or claim preclusion) to

judgments in diversity cases. Semtek International Inc. v. Lockheed Martin Corp. (2001)

= In diversity cases, federal common law incorporates State A law

例：A連邦地裁の判決につきB州地裁でclaim preclusionが生じる？

⇒ 連邦法により判断される（diversity caseならA州法が連邦法に組みこまれ適用).

A州地裁の判決につきB連邦地裁でclaim preclusionが生じる？

⇒ A州法により判断される

A州でplea bargainにissue preclusionを認めるなら連邦裁も尊重（判例）

**※ Federal common law**

Claim preclusionは制定法がないためfederal common lawという用語が存在。

しかし通常は，federal statuteが連邦裁判所では適用されfederal common law

は出てこない

例外: Federal courts have the authority to create federal common law on

areas of peculiarly strong federal interest. e.g. torts in the army base.

1) maritime law 2) foreign relations 3) commercial rights of the federal

government 4) property rights and liabilities of the federal government

Rule 64. Seizing a Person or Property

Every remedy is available that, under the law of the state where the court is

located, provides for seizing a person or property to secure satisfaction of the

potential judgment. ⇒ 連邦裁の連邦法事件で州法に基づく差押可

**SERVICE OF PROCESS**

Service**–** ANY **non party** over the age of **18**, must **deliver** to D: (2 things)

**① Summons** – formal court **notice of suit** and **time for response**

**② Copy of the Complaint**

※ Serve **within 90 days of filing** the case or case dismissed without prejudice (not dismissed if P shows good cause for delay in serving)

Process

1. Personal Service

– given to D personally ANYWHERE in the forum state Ex. Ballpark, tennis court

　　※ FRCPでは法人に適用無し.社長をテニスコートでみつけて出会い送達は不可

CA – In CA, you can only use substituted service if personal service fails.

※ substituted serviceは通常送達失敗時だけ可能.

2. Substituted Service ※ FRCPでは法人に適用無し

– Delivery to a:1) **Usual place of Abode**,

AND 2)Left with **Competent Person** who **lives** there

※ Competent – suitable age and discretion, 住民なら家族でなくてよい

例題：家人が受領したが誤って捨てた⇒ 送達は有効（relief from judgmentはあり得る）

CA – Must be made at the D’s **usual abode** or mailing address, left with a competent

member of the household at least **18**, must **inform** them of contents, and must

also **mail** process to the D by first class mail with postage prepaid (Service is

deemed effective 10 days after mailing) .

※ that person must be informedとprocess also must mailの要件追加

3.Service on D’s Agent

– Process can be served on D’s agent authorized to receive service of process.

※ 法人では1) officer 2) a managing or general agent

3) other agent authorized to receive service of process　×director

※ 個人事業者でも個人はa person who works for the defendant or general managerに送達不可

4. State Law

– Any methods permitted by state law where the federal court sits or where service is

effected. ※一定要件でservice by mailを認める州も多いが，州でOKなら連邦でも使える。

The constitution requires at least mail notice if you know the name and address.逆に

言えば常に調査義務を課してはいない。Mullane v. Central Hanover Bnak Trust CO.(1950)

5.Waiver by Mail（formal summons signed and sealed by the clerkの送付不要）

– Written waiver is valid if mailed to D by first class mail, postage prepaid,

and the D returns within **30 days**. CA – 20 days

① The D only waives service and nothing else. (i.e. not PJ or venue)

② If the D does not return the waiver form and fails to show good cause to for

failure to return the waiver form, the D must pay the cost of service.

※ Dがいかに訴訟提起を知っていてもfirst class mailで受領することやwaiver form

の利用といった要件を満たさなければwaiverにはならない。

⇒ When P files a waiver with the courtに送達日とみなされる. 4(d)(4)

CA – Service by mail (not waiver)

Copy of summons and complaint are mailed to D with acknowledgement form

Service is deemed complete when D executes a written acknowledgement.

6. Publication

: Only on affidavit from plaintiff’s attorney that D cannot be served, after demonstrating

reasonable diligence to serve D in another way.

※ Out of State – Process delivered out of state is valid if the **forums state law** allows

such service (i.e. long-arm statute)

CA – Can be made out of state

1) in any manner allowed by California law (つまり上記の６種) OR

2) by mail, with postage prepaid and return receipt requested. 後者は書留の意

If mailed, service is complete **10 days** after mailing.

※ acknowledge form ≒ waiver formが不要

※ Immunity from Service

– D is immune from instate personal service if he is in-state to be a witness or

party in another civil case. CA – NO such immunity

※ Other Documents

– For subsequent papers (i.e. answer, motions, discovery) serve the documents by

delivering or mailing the documents to the party’s attorney or pro se party.

If mailed, add **3 days** for any required response. CA – add 5 days

**Rule 11 Sanctions**

1. Certifying

Requires attorney, or pro se party, to SIGN all pleadings, written motions and papers.

(Except discovery documents)

– By signing the person is **certifying** that to the **best of her knowledge or belief**,

after **reasonable inquiry**:

1) The document is not for an **improper purpose**

2) **Legal contentions** are **warranted by law** (or non frivolous arguments

for law change), AND

3) **Factual contentions** and **denials** of factual contentions have

**evidentiary support** (or are likely to after further investigation)

2. Continuing Certification

– The certification is effective every time the position in the document is presented

to the court. (i.e. at signing, filing, and later oral advocating)

3. Discretion

– Court has **discretion** to impose sanctions against the attorney, firm or party

in order to DETER a repeat of bad conduct in the future.

4. Inherent Power –the court has **inherent power** to sanction.

5. Monetary and Non-monetary

– Sanctions can be non-monetary. (striking a pleading, reprimanding the attorney)

※ Monetary sanctions are paid to the court, not the other party.

※ Monetary sanctions はLegal contentions not warranted by lawを理由にはかせな

い, また原則として当事者の請求があった場合に限られる 11(c)(5)

6. Procedural Due Process

– Before imposing sanctions, a court must give the party a chance to be heard.

7. Sua Sponte

– Court may raise rule 11 sanctions sua sponte (on its own)

※ Court does not have to provide the 21-day safe harbor provision (only required

if a party is bringing the motion)

8. Objective standard

– An objective standard is used for judging conduct.

A lawyer may not avoid sanctions with a “pure heart and an empty head.”

However, an attorney may rely on the reasonable representations of the client.

9. Safe Harbor Provisions

**–** A Rule 11 motion for sanctions may not be filed until **21 days** following service.

Gives counsel time to withdraw or correct the allegations.

※ If another party violates Rule 11, remember that a party must give this 21 day

to fix the problem before filing the motion. Cannot file immediately.

①serve the motion for sanctions on the opposing party→②file a motion

CA – Safe harbor also applies when the court raises the issue on its own.

CA – Frivolous Litigation

– by statute, the court can order a party or his attorney or both

to pay expenses and attorney’s fees incurred by another party

because of **bad faith or frivolous tactics** in litigation.

1) Frivolous means a) completely without merit or

b) for the sole purpose of harassing an opposing party.

2) There must be a motion by the party or the court and an opportunity to be heard.

※ No safe harbor

**PLEADINGS** – Documents setting forth the claims or defenses. (Federal)

**COMPLAINT** – Principal pleading by the P. Filing commences an action.

1. Requirements (3) rule 8(a)

1) **Demand for the relief sought**

2) **a Short and plain statement** **of the claim showing entitlement of relief**

3) Statement of the grounds for the court’s **jurisdiction**

CA – Statement of SMJ is NOT required

2. Short and plain statement of the claim, showing entitlement to relief

1) Notice Pleading – Need to plead sufficient facts to support a **plausible claim**.

×"he drove his car negligently”だけではさすがに不足

　　　　　　　　　　　 例: (年月日)(場所)で被告は原告に対してdrove car negligently,その

結果原告は身体的な傷害を負い，精神的苦痛を負い，○ドルの

医療費を負担させられた (長々書くと却下される)

CA – Fact Pleading – Must allege the ultimate facts (主要事実) on each element

of each cause of action. (higher standard than Federal)

2) Special Matters – **In alleging fraud or mistake (**or **special damages),**

a party must state **with particularity or specificity.**  rule9(b)

CA – Certain special matters must be pleaded with more particularity

1) fraud, 2) civil conspiracy, 3) tortious breach of K,

4) unfair business practices,

5) products liability claims among multiple D’s resulting

from exposure to toxins.

CA – Damages – Generally must state the amount of damages except in cases for

**Personal Injury**, **Wrongful Death**, or **Punitive Damages**.

・In those cases the D may request a Statement of Damages,

→ and the P must provide it within 15 days.

※ P must serve a statement of damages on D, wrongful death or

punitive damages cases before taking a default judgment.

CA – Fictitious Defendants

– If P is genuinely unaware of the identity of a D,

she may name the D as a **“Doe”** defendant,

if the P: 1) **Alleges that she is unaware** of the D’s true identity, and

2) Must state a **cause of action** against the “Doe” defendant.

※ No provision for Doe D’s in Federal Court

3. Demand for the relief sought

9(g): Special damagesは訴状で特定必要

　　※ そもそも損害額は欠席判決の上限, trialに進めば訴状記載額以上の救済あり得る

　　　　　　 一方で日本法と異なり，一部請求でも，残部を別訴することは不可能

**Defendant’s RESPONSE**

– Rule 12 requires D to respond (1) by **motion**, or (2) by **answer**.

To avoid default, D must do either within **21 days** after being served with process.

**Rule 12 Motions** – a request for a court order.

1. Issues of Form ～除くRule 12(b) Defenses

12(c) – **Motion for judgment on the pleadings**

**例：貸金返還訴訟の答弁書が「学費を支払わないので返せません」だけ記載**

**×**summary judgement ∵= dependent on facts in the records, not solely on the pleadings

12(e) – **Motion for a more definite statement** (answerする前の求釈明が必要)

12(f) – **Motion to strike** (i.e. strike immaterial things in pleadings)

※ Any party can bring a motion to strike

例えばimproper defenseに対して原告もmotion to strikeする

2. Rule 12(b) Defenses

May be raised by **motion** or in the **answer**

①Never waived, and can be raised for the first time after trial or on appeal.

12(b)(1) – Lack of **subject-matter** jurisdiction

**Drainage Dist. v. Baxter State Bank(1940)**

⇒ 敗訴後の別訴で前訴はSMJを欠き無効と原則主張不可。その意味で異議権は喪失

②Waivable before the trail ends

12(b)(6) – Failure to **state a claim upon which relief can be granted.**

(i.e. Even if all you allege in your complaint is true, no legal remedy)

= motion on the grounds that the complaint failed to state a cause

of action. (from essay question)

12(b)(7) – Failure to **join an indispensable party**

③Waived if not in initial response.

They must be put in the FIRST rule 12 response (motion or answer) or else

they are waived.

12(b)(2) – Lack of **personal jurisdiction**

12(b)(3) – Improper **venue**

12(b)(4) – Insufficiency of **process** (problem with summons or complaint)

12(b)(5) – Insufficient **service** of process

例：最初にmotion for improper venueだけを提出すれば，lack of personal

jurisdictionをその後に防御としては使えなくなる

**Answer** – It is a pleading.

Timing – Serve within **21 days** after service of process.

1) If D made a **Rule 12 motion**, and it is **denied**, she must serve her

answer within **14 days** after the court rules on the motion.

2) If D **waived service**, she has **60 days** from the P’s mailing of waiver form.

Respond to Allegations

**1) Admit**

**2) Deny**

**3) Deny on lack of information or belief**

– “without knowledge or information sufficient to form a belief as to the truth”

※ CANNOT deny on lack of information or belief

if the information is **public knowledge** or is in **D’s control**.

※ **Failure to deny** or **improper denials** can constitute an **admission**

on any matter except damages.

Raise Affirmative Defenses

– D **must** include any defense he intends to raise.

(Ex. SOL, Stature of Frauds, res judicata, self-defense, assumption of the risk)

※ **Failure to plead** affirmative defenses **risks waiver** of being able to

raise the defense at trial if proper objection is made.

**Amending the Pleadings** 　rule15

Amendments Before Trial :15a

(1) Amending as a Matter of Course.

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

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after

service of a responsive pleading or 21 days after service of a motion, …

whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only

a) with the opposing party's **written consent** or

b) **the court's leave.** The court should freely give leave **when justice so requires**.

Courts will consider **prejudice, delay** and **futility of amendment**.

※ If P amends, D must respond within **14 days** or the amount of time **remaining** on

his **21 days**, whichever is longer.

　　 例：時効に気づかず答弁書を提出してしまった！

⇒ ① 21日以内であれば訂正OK

② その後でも同意又は裁判所許可で訂正可能（早めなら裁判所は通常許可）

ただしcounter claimをしてしまっているともう訂正できない.

Amendments during and after Trial

(1) Based on an Objection at Trial.

If, at trial, a party objects that evidence is not within the issues raised in the pleadings,

→ the court may permit the pleadings to be amended.

(2) For Issues Tried by Consent.

When an issue not raised by the pleadings is tried by the parties’ express or implied

consent, it must be treated in all respects as if raised in the pleadings.

A party may move—at any time, even after judgment—to amend the pleadings to

conform them to the evidence and to raise an unpleaded issue.

But failure to amend does not affect the result of the trial of that issue.

訴答書面と異なる証拠が提出

→異議がなければ証拠に沿うように訴答が変更されたとみなされる.

異議があった場合には裁量で訴答の変更が許可される.

2) When the evidence at trial does **NOT match** what was pleaded,

P may move to amend the pleadings

after the introduction of the varying evidence or at the end of trial to reflect what was

tried **UNLESS D objects** to the introduction of varying evidence.

1) If D property objects, the varying evidence is inadmissible

because it is at “variance with the pleadings.”

例：甲が乙に損害賠償請求。乙は，反訴せず。しかし，尋問の中で乙は甲が乙に10万＄の損害

を与えたことを立証し，裁判官に同事実が認定できれば甲に10万＄の支払を命じる評決を

するようinstructionを要求⇒ 甲が異議を述べなければ同要求は維持される

例：1000＄を請求する訴訟提起。尋問中に2000＄の損害を立証。2000＄の支払いを命じる判決

を出せる (MBE)

**Relation Back** – Amendment after the SOL has run 15(c)

Join a New Claim – Amended pleadings …relate back to the date of the original pleading

when the amendment asserts a claim or defense that arouse out of the

same **conduct, transaction or occurrence** as the original pleading.

“Relation Back” – means you treat the amended pleading as though it was filed

when the original was filed, so it can avoid the SOL problem.

例：warranty違反の訴え後, 途中で同時点で時効の製造物責任訴訟に変更OK

例：informed consent欠如の訴えから, negligence claimを追加⇒ 説明が4月1

日で手術が一週関後であればnot arise out of the same transaction or

occurrence→ 変更不可 (MBE)

Change a D 　　– Amended pleadings changing D will relate back if:

1) Concerns the **same** **conduct, transaction or occurrence** as the original pleading+

2) if the “new” defendant **got notice of the lawsuit** within the time established by

the rules for serving a complaint (=90 days, good causeで延長ある), that it would

not suffer prejudice in maintaining a defense on the merits

3) The new party knew or should have known that, that the action would have been

brought against it, but for a mistake concerning the proper party's identity.

※ 通常はsue wrong legal entity out of a group of entities等の対応政府機関を

間違えた場合ぐらい

Applies when P sued the wrong D first, but right D knew about it.という例外

※ “Mistake” means the naming of an incorrect party not an unknown party.

・医療過誤訴訟で，医療機器のＰＬを請求するためにメーカー追加はだめ。

∵ Mistake of identityではない。

CA – Relation back for fictitious D’s is OK if:

1) P was genuinely ignorant of the identity

2) P pleaded the ignorance in the original complaint.

※ Then it will relate back if P substitutes the true D for an

unknown pleaded “Doe” within 3 years of filing.

CA **– Answer**

– Must respond in an appropriate way within **30 days**.

If a demurrer or motion fails, D must plead within 10 days after the ruling.

**1. Answer** – Same procedurally with federal law.

General Denial – May make a general denial of ALL allegations in

P’s complaint if it is appropriate.

Affirmative Defenses – Must state facts sufficient to constitute an affirmative defense.

・Cannot include a cross complaint.

・If P filed a verified complaint, D must file a verified answer.

**2. Cross Complaint** – Must be filed in a separate document than the answer.

・In CA, Crossclaims, Counterclaims and Impleaders are called Cross Complaints.

A claim against the plaintiff = counter-claim = cross complaint

A claim against co-defendant = cross-claim = cross complaint

A claim against impleaded third = impleader = cross complaint

・Contain the SAME rules as federal just with a different name.

**3. General Demurrer** – Can be used to assert 2 defenses

1) The D **failed to state facts sufficient to constitute a cause of action.**

2) Lacks **Subject Matter Jurisdiction**

(i.e. exclusive federal jurisdiction＝ほぼない. 特許/破産/連邦証券法等)

※ 後者はほとんどないので，使われるのは「主張自体失当」のとき, テストでは要件が欠けて

いることの実体法上の知識も問われ得る。

※ Can be raised in the **answer** as affirmative defenses, or

can be asserted in a **motion for judgment on the pleadings**.

※ Like the 12(b)(6) motion the court will take all allegations as true and limit

its assessment to the complaint.

※ The demurrer may be aimed at the entire compliant or individual causes of action.

4. **Special Demurrer** – Can be used to assert A LOT of defenses

1) The complaint is **ambiguous and vague**

(unclear about what legal theories of liability are asserted against each D)

2) **Lack of legal capacity**

3) Defect or **misjoinder of parties**

4) Failure to plead whether the **contract is oral or written**

5) Existence of **another case** between the same parties on the same COA

6) Failure to file a **certificate of merit** (required to sue architects, engineers,

or land surveyors for professional negligence)

※ 6)だけCannot be asserted as an affirmative defense

Note – Can be raised in the answer as affirmative defenses.

Waivable – If not raised in a demurrer or answer it is waived

Limited Civil Cases – Special demurrers are NOT available.

ALL Demurrers – sustained or overruled

5. **Motion to Quash Service of Summons**

Used to assert Lack of:

(1) Personal Jurisdiction, (2) Process, (3) Service of Process

・Waivable – This motion must be made BEFORE or WITH a **Demurrer,**

**Answer, or Motion to Strike** or else D waives these defenses.

i.e. Motion to Quash is a **special appearance** and the others are general

appearances which waive these defenses.

PJ欠缺等は答弁書とは別の紙でmotionを出す必要がある。

→ If the court denies the **Motion to Quash**, the moving party can ONLY seek appellate review by **Writ of Mandate** from the Court of Appeal within 10 days of service of the written notice of entry of the order denying the motion. (i.e. cannot be appealed after a final judgment)

6. **Motion to Dismiss for Inconvenient Forum** (Forum non conveniens)

– Waived if raised after a Demurrer or Motion to Strike,

BUT may make after an **Answer**.

**7. Motion to Strike**

– A party can file this to strike ALL or part of a pleading.

The court may strike irrelevant, false, or improper matter.

※ A motion to strike does not extend the time to demur.

8. **Anti SLAPP Motion to Strike**

– **Strategic lawsuits against public participation** (SLAPP) which are suits

brought to chill the valid exercise of free speech and petition.

Use – When P sues D for an act D took in furtherance of her **free speech** right

or **right to petition the government** on a public issue, D can make an

anti-SLAPP motion to strike.

※　Not available if the P’s case is truly in the public interest or on behalf of

the general public.

※　Burden Shifts – If D shows that P’s COA arises from protected activity,

the burden shifts to P to show a probability of wining on the merits.

SLAPP back Suit – If D wins, she may sue P for malicious prosecution.

**DISCOVERY**

**1. Scope rule26(b)**

Standard –Parties may obtain discovery regarding any nonprivileged matter that is

1) **relevant to any party’s claim or defense** and

2) **proportional to the needs of the case.** [standard as of December 2015]

1) Relevant ≒ to prove or disprove material facts

Relevant information can include inadmissible evidence if the discovery

appears reasonably calculated to lead to the discovery of admissible evidence.

※ broader than admissible, it includes things that are “reasonably

calculated to lead to the discovery of admissible evidence”

※ before 2002は“relevant to subject matter of the pending action”で今より広かった

例: 性差別に基づく医師の不当解雇に対する損害賠償請求事件。病院はミスが多かったためと主張

① 過去３年分の税務申告書

→ discoverable ∵ to prove lost income (そのために不要部分も多いが限定の許可を裁

判所からもらう必要がある)

　　　　　　　　　　　② 原告の過去３年分のカルテが保管されているコンピュータのアクセス方法

→ discoverable ∵ 関連情報の存在場所，保管方法などは明文で許容

③ 原告が医院に送った給与への不満を述べた手紙

→ 2000年以降基準では厳しい ∵ 不満を理由の解雇は請求原因にも抗弁にも関連なし

例: 事故の被害者がむち打ち損傷を訴え

① psychiatric records (精神科通院歴) → OK to prove that the pain may be psychosomatic

② 過去5年の稼働成績 → discoverable based on the theory that job stress is real source

2) Proportionality

**Rule 26. Duty to Disclose; General Provisions Governing Discovery**

(b) Discovery Scope and Limits.

(1) *Scope in General*

…Parties may obtain discovery regarding any nonprivileged matter that

is relevant to any party's claim or defense and proportional to the needs of the case,

considering 1) the importance of the issues at stake in the action, 2) the amount in

controversy, 3) the parties’ relative access to relevant information, 4) the parties’

resources, 5) the importance of the discovery in resolving the issues and 6) whether

**the burden or expense of the proposed discovery outweighs its likely benefit**.

Information within this scope of discovery need not be admissible in evidence

ESI = electronic stored informationで特に重要になる条項

CA – Anything **relevant to the subject matter involved** (slightly broader than federal)

Privilege – Privileged evidence is NOT discoverable.

(Must **object** to discovery request with particularity stating privilege)

Work Product – 1) Material

2) prepared in anticipation of litigation

3) by or for a **party** or a party’s representative. by attorney or his agent

is generally NOT discoverable.

Rule 26.(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not

discover documents and tangible things that are prepared in

anticipation of litigation or for trial by or for another party or its

representative (including the other party’s attorney, consultant,

...insurer or agent.)

※ The rule makes it clear that documents produced by non-

attorneys may also enjoy work product privilege.

× if they were prepared **in the ordinary course of business**.

× investigatorが見つけた，運転手の「飲酒ナウ」というfacebook投稿

・保険会社の事故調査報告書→具体的に訴訟を予期していないかぎり開示対象とする裁判例が多い　∵in the ordinary course of business

・弁護士秘密特権と異なり開示しても当該資料だけの保護が解除

Exception **rule26 (b)(3)(A)(ii)**

May be discoverable when there is 1) **substantial need**, and 2) inability to

obtain it without undue hardship.

**(ii)** the party shows that it has substantial need for the materials to prepare its

case and cannot, without undue hardship, obtain their substantial equivalent

by other means.

Absolute Protection–

Attorney’s 1) mental impressions 2) opinions,

3) conclusions, 　4) legal theories.

**Rule26 (b)(3)(B)**

the court …must protect against disclosure of the mental impressions,

conclusions, opinions, or legal theories of **a party's attorney**.

CA – Must be generated by an **attorney or his agent** ONLY.

※ 法律上は不明確. but伝統的には弁護士だけに認められてきた特権.

CA – Right to Privacy – Courts will balance the need for discovery with

the right to privacy interest invaded.

**Rule26 (b)(4) comment**

Rule 26(b)(4) is amended to provide work-product protection against

discovery regarding draft expert disclosures or reports and

communications between expert witnesses and counsel.

CA discoverable

※ Consulting experts names and opinions are not discoverable absent

exceptional need. (i.e. expert retained in anticipation of litigation but will not testify)

**Rule26 (b)(4)(d)** Ordinarily, a party **may not**, by interrogatories or deposition, **discover** facts known or opinions held by an expert who has been retained … by another party in anticipation of litigation … and who is not expected to be called as a witness at trial.

But a party may do so only:…(ii) on **showing exceptional circumstances** under which it is impracticable …to obtain facts or opinions on the same subject by other means.

**2. Required Disclosures**

Initial Disclosures

– Must be made within **14 days** after the parties’ [Rule 26(f)](https://www.law.cornell.edu/rules/frcp/rule_26#rule_26_f) conference

① **Documents** and **electronically stored info** used to support a claim,

② Computation of **Damages**, **③ Insurance**, **④ Names** of witnesses,

⑤ **Expert witnesses** who may be used at trial and their **reports**

・Reports containing compensation, opinions, data used, qualifications.

CA – NO initial disclosures

– Any party may request simultaneous exchange of expert witness info.

・If not disclosed, the court can exclude the expert from testifying.

・Cannot depose until exchange.

Pretrial Disclosure

– No later than **30 days** before trial, must give **detailed information** about trial evidence,

including 1) documents 2) ID of witnesses to testify (either live or by deposition)

**3. Discovery Devices** – May not be used until after the [Rule 26(f)](https://www.law.cornell.edu/rules/frcp/rule_26#rule_26_f) conference

unless court order or stipulation allows.

**①Depositions** = an **oral proceeding** permitting **an attorney** to examine **any person**

under oath regarding the **subject matter of the lawsuit.**

Parties **–** Notice of the deposition properly served is sufficient to compel attendance.

・If requested to produce documents, a **30 day** notice is required.

Nonparties **–** must be **subpoenaed** to be compelled to attend. A **subpoena duces tecum**

will compel a nonparty witness to bring documents with her.

※ Non party cannot be compelled to travel more than 100 miles.

Business – May require a business to designate a **person most qualified** for the

deposition.

・10 Deposition Limit per “side” even if there are multiple Ds.

CA – Not presumptive limit on the number of depositions in an Unlimited

Civil Case (Limit of 1 in a Limited Civil Case).

・One day of Seven hourslimitation per deposition witness

※May not depose the **same person twice** without court approval

CA – Not presumptive limit on the time limit on depositions

・Phone and Videodepositions are permitted.

※Use at Trial

・The deposition of any **party** may be used for ANY purpose by any adverse party.

・The deposition of a **nonparty** may be used if the witnesses is **unavailable** at trial.

**② Interrogatories**

**–Written questions** to a **PARTY** to be answered in **writing under oath.**

Timing **–** A party has **30 days** to respond with answers or objections.

25 Interrogatory limit **–** Absent a stipulation or court order.

CA – Limit 35 in Unlimited Civil Cases

CA – can serve more with a declaration supporting the need

for more. Responding party can seek a protective order.

Duty to Investigate

**–** Can say you don’t know the answer only after a reasonable investigation.

Option to Produce Records

**–** When answer could be found in business records and it would be

equally burdensome to find it.

→ specifying the records & giving a reasonable opportunity

to examine the records and to make copies OK

※ production of documentsには適用ない。文書提出を求められた場合に,

特定せずにコピーを渡すことは不可.

Use at Trial – May be used **against** the **answering party** but **NOT** by the

answering party as this would be self‑serving. 証拠法通り

CA – Form Interrogatories

– Forms approved by Judicial Council.

NO limit on the number of form interrogatories that can be served.

**③ Production of Documents or Things**

– Request to **party** (or non-party with subpoena duces tecum)

that she makes available for review and copying,

various **documents or things**, including **electronically stored information**,

or **permit entry onto designated property** for inspection.

Timing – Must respond within **30 days** of service

→stating that the material **will be produced** or **objection**.

※ Subpoena duces tecum – used to obtain documents from non-parties.

Obtain subpoena and serve it to the third person.

In general, the subpoena orders the third to produce the document to the

deposition and examined.

= つまり第三者にはdeposition with request for the production of documents

だけできる。実務上はそのためよくpermissive joinderが用いられる

**④ Physical or Mental Examination**

– Only available through **court order** on a showing that a PARTY’s health is

1) in **actual controversy**, and 2) **Good cause** (i.e. you can’t get it elsewhere).

**※** May also order an exam of a person in party’s control. e.g. child

CA – D has a right to demand one physical examination of the P in a personal injury case.

CA – The lawyer has a right to attend the physical exam.

If it is mental exam, the lawyer can attend only if there is a court order allowing it.

Exchange of Written Reports

**–** The party who moved for the examination must, on request, deliver to the requester a

copy of the examiner's report, together with like reports of all earlier examinations of

the same condition. 35(b)(1)

**⑤ Request for Admission**

– A request by one PARTY to another PARTY to **admit the truth** of matters relating to A) facts, the application of law to fact, or opinions about either; and

B) the genuineness of any described documents (authenticate documents).

Timing – Must respond within **30 days** of service.

Failure to Deny or Respond

– Automatic Admission from failure to deny or respond.

(Can amend if failure is NOT in bad faith)

Response – may admit, deny, or indicate a lack of information

only if you indicate you’ve made a reasonable inquiry.

CA **has limit of 35 requests**

NO limit on the number of requests to admit the genuineness of documents.

**4. Rule 26 Certification** ※ rule 11 does NOT apply to discovery.

Every discovery request, response, or objection must be signed.

By signing, an attorney or party certifies

1) It is **warranted**, 2) Not imposed for an **improper purpose**, AND

3) Not **unduly burdensome.**

**5. Duty to Supplement** 補足義務

A party who has made a disclosure or who has responded

to a) an interrogatory, b) request for production, or c) request for admission

⇒has the duty to **amend an incomplete or incorrect response** or amend **an originally correct**

**response that has become incorrect** because of newly discovered information.

CA – **No duty to supplement** discovery responses

as long as the information given was accurate and complete when given.

※ The requesting party may propound Supplemental Interrogatories which elicit **later acquired**

information bearing on answers previously made. Can also be used for production of documents.

**6. Discovery SANCTIONS**

**Protective Order**

– Permits the court to **limit, condition, or delay** discovery upon a showing of

**"good cause"** to protect a party from **annoyance, embarrassment, oppression**

**or undue burden or expense.** (通常は任意でNDAが締結される)

**Partial Violation** (3 steps to sanctions)

1) Meet and Confer – Parties have a duty to “meet and confer” in order to try to

resolve the dispute before seeking court orders.

※ demurrerの前に必要

2) Motion to Compel – May get an order compelling the party to answer the

unanswered questions plus costs (including attorney’s fees)

for bringing the motion.

3) Sanctions – If the party violates the order to compel, the party may bring

a motion for **sanctions**, AND the party could be held in

**contempt** for violating the order (except no contempt for

violating an order for a medical exam).

**Total Violation** – Fails completely to respond to a discovery request or attend a

deposition. May immediately bring a motion for **sanctions**.

No need to file a motion to **compel.**

CA – prohibits “misuse” of discovery (i.e. making unjustified objections, abusive

motions, failing to confer, refusal to respond, etc.). A court may sanction a

party or attorney for misusing the discovery process.

Must be given a notice and chance to be heard.

・A party may seek a protective order to protect against unwarranted annoyance, embarrassment, oppression, burden or expense.

**Available Sanctions** – A party seeking sanctions must certify to the court that he tried

in good faith to get the information without court involvement.

1) **Monetary Sanctions** 2) Issue **Establishment** order or Issue **Preclusion**

3) **Striking** the pleadings of disobedient party

4) **Dismissal**, or **Default** (ONLY if bad faith shown)

5) **Expenses** and **Fees** (including attorney’s fees) for bringing the motion

CA – A party seeking sanctions for discovery abuse must indicate what type

of sanction she seeks. (Court will start monetary sanctions)

**COMPLEX CASES**

**・opposing party**には，どのようなclaimも併合可能（日本と同じ）。

**・**同一サイドの当事者への請求**cross claim**では同一事象が必要。

**・**第三者を併合する請求は, 同一事象, 同一争点が必要（ただし**impleader**は特別ルール）。

**・**自主的な参加は適切に代表されてなくて, 権利が侵害されているときに可能

※ いずれも管轄は別途検討必要。同一事象であればsupplement jurisdictionはあるがPJは問題になる

**Joinder of claims** rule18(a)

A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as

independent or alternative claims, as many claims as it has against an opposing party.

Improper venue will not keep a joinder claim out. Joinder is appropriate, venue is proper. (ソース不明だがそうだろう)

i.e., **opposing party**には, あらゆるclaimも併合可能 (third party defendant = impleaded partyも)

※ XY間の訴訟でYがZをimplead. それが認められればYはZに当初請求と無関係な請求も可

同訴訟にZがco-defendantとしてjoin. YはZに無関係な請求はできない ∵not opposing party

**Counterclaim** – Claim against an **opposing party**

Compulsory – An answer **MUST** state any claim against an opposing party **if** it arises

out of the **same transaction or occurrence** as P’s claim.

※ have supplemental jurisdiction over compulsory counterclaims.

Permissive – An answer **MAY** state any claim against an opposing party even if it does

**NOT** arise out of the **same transaction or occurrence** as P’s claim.

※ Need SMJ

**Crossclaim** – Claim against a **co-party**

A pleading may file a cross claim against ANY party that arise out of the **same**

**transaction or occurrence** as P’s claim.

※ NEVER compulsory crossclaims

※ Need SMJ

**1. Permissive Party Joinder** 当事者の引き込み

A party MAY join a person as a co‑P or co‑D, if: 　**rule 20**

1) the claim **arising out of or relating to the same transaction or occurrence AND**

2) there is at least **one question of law or fact common** to all parties joined.

※ Must have SMJ, PJ, and Venue. SMJ につきsupplementの可能性は大

※　　If some complication arises, the court can always order separate trials. rule42

※　　Rule21: **Misjoinder** of parties is **not a ground for dismissing** an action. On motion or on its own,

the court may at any time…**add or drop a party**. The court may also sever any claim against a party.

**2. Compulsive joinder: Necessary and Indispensable Parties**

1 **Necessary and indispensable party** is required to be joined to the case

1) **Complete relief cannot** be accorded in his absence accord = 与える

or 2) a judgment may impair absentee’s ability to protect that interest (**harm to absentee**)

or 3) a judgment may expose a party to multiple or **inconsistent obligations**.

※　　Must have SMJ and PJ. 通常supplement,しかしcannot destroy diversity.

※ Joint Tortfeasors are NOT necessary parties.

S.C held that tortfeasors facing joint and several liability are not necessary parties.

∵ 被害者は一人からでも完全救済され得る。

共同不法行為者間は別個訴訟できるので共同不法行為者の権利は侵害されない。

同訴訟は別個の訴訟であり矛盾判決のリスクもない。

例：所有権確認訴訟で他州にも所有権を主張している人を知っているならば，同人も

necessary party. destroy diversityなら下記要素を斟酌して判断

2 Effect of failure

If joinder of the necessary party is not feasible the court may either proceed without him or dismiss the case. In making this decision the court will balance:

① Whether there is an **alternative** forum available

② What is the actual likelihood of **prejudice**

③ Whether the court **shape relief** to avoid prejudice

Rule 19 (b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for

non-joinder.

**3. Impleader** (aka Third-Party Practice) rule14

**D, who believes that a third party is liable to him for all or part of the P’s claim,**

**may implead** (=bring in) **such a person as a third party defendant.**

**This means that the basis of the claim must be derivative liability such as indemnity** (liable

for all) **or contribution** (liable for part)**.**

Jurisdiction – Must have PJ over impleaded parties but the court will have SMJ

through supplemental. ※ 完全な州本相違を壊す場合でも, 訴額がごくわずかでもOK

Timing – Right to implead **within 14 days after serving** answer or

afterword **by leave** of the court.

※　　　There are no compulsory impleaders.

※「ぶつけたのは自分じゃない。Aだ」というときには使えない

∵A is not liable to D. A is liable irrespective of D

自動車のPL訴訟で「悪いのは, タイヤメーカーだ」というときには使える

**4. Intervention** – Absentee who wants to join a pending suit must make **a timely application.**

※ Must have proper SMJ, No supplemental jurisdiction.

１. Intervention of right (On timely motion, the court must permit)

1) claims an interest **relating** to the property or transaction that is **the subject** of the action,

2) That interest is NOT **adequately represented** by existing parties.

２. Permissive Intervention (Court has discretion)

1) **Common** question of law or fact

2) Allowing intervention will NOT **unduly delay or prejudice** the original case.

**5. Interpleader** – Stakeholder forces all potential claimants into a single lawsuit **to avoid multiple**

**or inconsistent judgments**. ※ Stakeholder can also be a claimant

rule22 : By a Plaintiff; Persons with claims that may expose a plaintiff to double or

multiple liability may be joined as defendants and required to interplead.

By a Defendant; A defendant exposed to similar liability may seek interpleader

through a crossclaim or counterclaim.

　　　　　　　　　　 例: 被害者多数のバス事故。保険会社が払える保険金に限度あり。

明文ないが通常injunction to other lawsuitsを得て保険金額を全額depositする。

例: 所有権に基づきＡが引渡請求訴訟，Ｂからも訴外で請求されている。

１. Rule 22 Interpleader (Regular)

treated like a regular lawsuit

1) Diversity Requirement – Complete diversity between stakeholder and claimants.

2) Amount in Controversy – Greater than $75,000

3) Service of Process – treated as a regular lawsuit

4) Venue – treated like a regular lawsuit

2. Statutory Interpleader  **28 U.S. Code § 1335**

1) Diversity between ANY two claimants. (上と違いStakeholders citizenship is irrelevant)

2) Amount in Controversy – $500 or more

3) Personal Jurisdiction – **Nationwide** (No minimum contacts required)

4) Venue – Any district where any claimant resides.

**6. Class Action**– Representative sues on behalf of class members

1　Initial Requirements (must meet ALL) Rule 23(a)

1) Numerosity – **So numerous** that joinder of all members would be **impractical.**

2) Commonality – At least one **questions of law or fact are common** to the class.

3) Typicality – Representatives claims / defenses are **typical of** those in the class.

・多くの人の損害が100$で, 1万$の損害を受けた者は代表不適格

4) Representativeness – Representative will **fairly and adequately** protect the class.

・黒人の採用・昇進の差別を一つの訴訟で争うのはダメ　∵採用が増えれば

昇進に悪影響の可能性conflict of interestがグループ内で生じ得る (MBE)

2 Must fit in ONE of three categories Rule 23(b)

b(1) Anti Prejudice Class Action Cannot **OPTOUT**

**※ 義務的当事者併合と要件共通＝矛盾判決防止のため画一的処理が必要な場合**

**to avoid harm either to class members or party opposing class**

= Prosecuting separate actions **would create a risk** of

a) inconsistent adjudications that would establish **different standards** of conduct

for the party opposing the class (i.e. city issued a questionable bond), or

b) adjudications that would **substantially impair** their ability to protect their interests. (e.g. an insurance policy, limited funds)

b(2) Injunction or Declaratory Relief Cannot **OPTOUT　　個別的金銭請求を含めることはできない**

**差止又は宣言判決による救済が適当な場合**

– **the class is treated alike by the party opposing the class** (employment discrimination)

(the party opposing the class has acted or refused to act on grounds that apply generally to

the class, so that **final injunctive relief or corresponding declaratory relief is appropriate**

respecting the class as a whole.)

b(3) Damages = Common question of fact or law

– When there are (i.e. Bus crash / cigarette mass tort)

a) **common** questions of law and fact **predominate** over individual differences,

and b) the class action is **superior** method to handle the dispute. **OPTOUT OK**

※ **４要件にpredominanceとsuperiorityの要件が追加**

3 Opt Out Notification (For a damages class actions)

The court must notify all **reasonably identifiable** class members of their right to:

1) **Opt Out** of the class action, 2) otherwise, they’ll be **bound by the judgment**,

3) They can enter a **separate appearance through counsel.**

**※** damages class actionではmust, それ以外はdiscretion

**※** なおopt outしなくても適切に自己の利益が代理にされなかったので無効という主張だけ可能.

**Rule 26** (c) (2)

(A) For (b)(1) or (b)(2) Classes. For any class certified under [Rule 23(b)(1)](https://www.law.cornell.edu/rules/frcp/rule_23#rule_23_b_1) or [(b)(2)](https://www.law.cornell.edu/rules/frcp/rule_23#rule_23_b_2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under [Rule 23(b)(3)](https://www.law.cornell.edu/rules/frcp/rule_23#rule_23_b_3)…the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

4 Subject Matter Jurisdiction

1) Federal Question or Diversity (**Only focus on the Class Representative**)

・完全な州籍相違や訴額の要件を破る当事者も付加管轄権で併合可能

(但し，クラス構成員の請求合算は不可)

2) Class Action Fairness Act – Valid Jurisdiction if:

a) **100** Class members aggregate their claims to reach **5 million**

b) Any one P is diverse from any one D

※ Red-Carpet Removal – One D can remove, and a local D can remove to the federal court

D全員の合意なく連邦裁判所に移送できる, home stateのＤでもＯＫ

5 Settlement and Dismissal

Settlement and dismissal of class claims in a certified class requires **court approval**.

The court will give **notice** to the class of the potential settlement or dismissal and receive feedback.

※ Damages Class action

– the court may refuse to approve a settlement without a **2nd chance to opt out: (e)3**

**※** Class members can try to collaterally attack a class settlement judgment on due process grounds by alleging that they were not adequately represented. : case law

(他の要件欠缺は基本的に主張不可, 但しnoticeは通知方法が不合理であれば抗弁になる)

CA The statute requires 1) an ascertainable class 2) with a well defined community of interest.

Well Defined Community of Interest –

Courts will consider:

1) Whether Common Questions of law or fact Predominate **Commonality**

2) Whether the Class Representative is Adequate  **Representativeness**

3) Whether certifying the Class will result in a Substantial Benefit to the court and parties.

**Benefits to All**

※ CA does not separate Class Actions into separate classes.

※ Individual notice is NOT required. Notice can be by publication.

Opt Out – The court may allow parties to Opt Out, but those parties who do not opt out are

bound by the judgment.

Dismissal – Settlement or dismissal must be approved by the court.

Jurisdiction – May aggregate all P’s claims to reach the $25,000 threshold for Unlimited Civil cases.

**PRETRIAL ADJUDICATION**

**Voluntary Dismissal**

– P can voluntarily dismiss **as a matter of right** by filing a written notice of dismissal.

before 1) an answer or 2) motion for summary judgment is filed

Only One without prejudice

– A party can dismiss once without prejudice.

A second dismissal operates as an adjudication on the merits (with prejudice).

CA – Can voluntarily dismiss at any time **before trial**

and is up to the court whether it is dismissed with prejudice.

・If P moves for voluntary dismissal **after trial** starts, it may only be granted with prejudice unless parties stipulate otherwise or court finds good cause.

・CA state courts have **discretion** to dismiss if the case has not been brought to trial

or D has not been served with process within **2 years** after filing.

**Involuntary Dismissal**

On the Merits –Final judgement on the merits unless it is based on lack of PJ or

SMJ, improper venue, or failure to join an indispensable party.

CA – Mandatory dismissal if the case is not brought to trial within **5 years** after filing,

or process is not served within **3 years** of filing.

Rule4.1 If the plaintiff fails ① to prosecute or

② to comply with these rules or a court order,

a defendant may move to dismiss the action or any claim against it.

→Unless the dismissal order states otherwise, a dismissal under this subdivision (b)

and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under —operates as an adjudication on the merits.

※ 裁判所の指示に従わない当事者に申立を受けずに課すことも可

例① 事件の長期間放置 (具体的時間制限はなし)

② 無効な請求, 管轄無し, 不適正送達，(答弁書と同時提出が多くで必要)

③ 文書提出命令を無視，指定された期日に連続欠席等

→on the meritsなのでclaim preclusionあり.（例：時効期間経過に基づく却下）

voluntary dismissalと異なり, 一度目からwithout prejudiceにはならない.

**Default / Default Judgment**

Default – Notation by the court clerk on the docket upon a showing that the D **failed to**

**respond** within **21 days** after being served. (60 days if waived)

※　　　途中から応答がなくなった場合にも起こり得る。

↓ make an application to the court by a motion for default judgement

Default Judgment by **Clerk**

– The clerk of the court may enter judgment if:

1) D made **NO response** at all,

2) The claim itself is for a **sum certain in money,** (e.g. suit on a promissory note)

3) Claimant provides an **affidavit** (sworn statement) of the sum owed, and

4) D is NOT a **minor**, **incompetent,** or in the **military.**

Default Judgment by **Judge**

– If any of the 4 elements are not met the judge will hold a hearing to have the

parties **PROVE UP** the damages.

Notice – D will only get a **7 day** notice if he made some appearance in the case.

呼出し無しの欠席判決は違法 ⇒ the default judgement should be set aside

答弁書提出, なんらかのmotionがあればsome appearance

Amount – The default judgment may not exceed the amount in the pleadings.

(This is different if the case goes to trial. more / different OK)

※ 複数被告で一被告が答弁しても他の被告は欠席判決される.

Set Aside Default – The court may set aside a default “for good cause shown”

within **1 year** for excusable **mistake, neglect or fraud**.

**12(b)(6) Failure to State a Claim** = Motion for Judgment on the Pleadings

– Even if everything you allege in your complaint is **true**, no legal liability attaches to the D

**※** will usually be given leave to amend if granted.

CA –This is called a **General Demurrer**

**Summary Judgment** rule56 NOT during trial.

– Summary judgment shall be granted when:

There is **no genuine dispute** as to any **material fact**, and the **moving**

**party is entitled to judgment as a matter of law**.

Time 　 At any time until **30 days after the close of all discovery**

Evidence Motion is based on whole record, but admissible evidence only.

× Unverified Pleadings AND Inadmissible Hearsay.

例: 原告が俺の証言しか証拠がないと言っても普通はsummary judgement不可

原告の訴状に氏名不詳者が聞いたとだけあり, 同人が現在行方不明というので

あれば, summary judgement OK. Pleadings only does not count.

※ しかしかなりsummary judgementの幅は広い。信用性はともかく，何ら

かの証拠を提出しなければ判決出させられる。MBEでは迷ったら肯定

Standard = No reasonable trier of fact standard

1) after viewing the evidence in light most favorable to the nonmoving party.

2) the court consider no reasonable trier of fact could find in favor of the

nonmoving party.

※ issueのみのsummary judgmentもある.

A party may move for summary judgment, identifying each claim or defense

— **or the part of each claim or defense**.

CA – Must file and serve a separate statement of undisputed facts that

accompanies the motion for summary judgment.

**Motion for a Judgment on the Pleadings**

1. Either party may make a motion for judgment on the pleading after the **complaint** and

the **answer** have been submitted.

2. Judgment on the pleadings will be granted if the information of the **face of the**

**pleadings** alone reveals that the movant is entitled to a judgment as a **matter of law.**

**CONFERENCES**

**Initial conference (**Rule26(f) conference**)**

timing the parties must confer as soon as practicable, and at least **21 Days** before a

scheduling conference.　 confer= 2)協議する

content to discuss claims and defenses, settlement. and to develop a proposed discovery plan.

after Must form **discovery plan** and present it to the court in writing within **14 Days**.

※ may not seek discovery before the parties have conferred for their initial conference

CA – Not required to discuss discovery plan.

**Scheduling Order** rule 16(b)

The court must issue a scheduling order (A) after receiving the parties’ report under [Rule 26(f)](https://www.law.cornell.edu/rules/frcp/rule_26#rule_26_f); or (B) after consulting with the parties’ attorneys at a scheduling conference.

Time to Issue : the judge must issue it within the earlier of 90 days after any defendant has

been served with the complaint or 60 days after any defendant has appeared.

CA – Case Management Conference – must take place within **180 days** after filing the complaint. Court will review matters such as service, pleadings, discovery issues, and the appropriateness of ADR.

Before the conference, parties must meet and confer and file and serve “Case

Management Statement” addressing such issues.

Court issues the case management order.

“Fast Track” – Cases are actively managed to meet the goals of disposition of the court. (May impose sanction for failure to comply)

**Pretrial Conference**

・The court may hold pretrial conferences **as needed** to expedite the case and foster settlement.

・Final pretrial conference determines issues to be tried and evidence to be proffered.

・Recorded in pretrial conference order that basically supersedes the pleadings.

It may be amended only to prevent manifest injustice.

**A final pretrial order**

**The court should modify a final pretrial order only to prevent manifest injustice**.

　The final pretrial conference order is an important document – it is a roadmap of issue

to be tried, evidence to be presented at trial, witnesses, etc. (allows no surprises at trial)

If no in the final pretrial order – it is not allowed in.

※ final pretrial orderがでたら原則，新証拠を出せない。

**※ Alternative Dispute Resolution** – Each court has an ADR program.

**・** Party who receives an offer to settle and refuses and receives less on the judgment will

have to pay the other parties fees.

**TRIAL**

Right to a Jury Trial – The 7th amendment (which ONLY applies in Federal Court) preserves the right to a jury in civil actions at LAW, but NOT in suits in EQUITY.

・actions that would have been "at law" in 1791, there is a right to a jury

　→新たな訴訟類型で陪審員裁判を認めないことはできる。(認めることもOK)

・陪審員裁判を認めない裁判によって陪審員裁判を認める裁判がclaim preclusion受け

ても合憲 (最高裁) ・ejectmentもlegal remedyなのでright to juryがある

Hybrid Claim – There is a right to a jury trial on all facts underlying the claim at **Law**,

but NO right to a jury trial on the **Equitable** claim.

※ The claim at LAW will **be decided first** and the claim in equity will

be left to the judge.　 ∵ 陪審員審理不可避とする憲法上の要請

・コモンロー上の救済とエクイティ上の救済が求められれば，連邦では当

事者の要求があれば陪審員審理先行 ∵憲法上の要請, 州では通常原告の選択

例：ＡがＢにsought a permanent injunction, BがＡにcounterclaimで損

害賠償請 (arising out of the same common facts）

→ first hold a jury trial of the counterclaim and then a nonjury trial.

CA – Equity claim will be heard first.

但し, injunctionとincidental damagesならばno right to jury

Demand 　　　　　– Must demand in writing, no later than **14 Days** after service of the last

pleading raising issues triable to a jury. CA – Must be made within 5 days

※ last pleadingsまでなので答弁書がこなければいつでも請求可

※ 本請求の遅れに対しては救済する裁量は裁判所にない

Number – Minimum 6 Jurors, maximum of 12 (6 must be unanimous)

No alternate jurors in federal court.

– all participate unless excused for good cause.

※ 病気で欠員が出て12人以下になっても6人以上残っていれば残った人

数で評決を行う。

当事者が合意すれば5人で評決も全員一致でない評決もOK (規則48)

当事者の合意がなければ, 全員一致が要求

Rule 48. Number of Jurors; Verdict; Polling

(a) Number of Jurors. A jury must begin with at least 6 and no more than 12 members

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous

and must be returned by a jury of at least 6 members.

CA – 12 Jurors requiring a ¾ verdict allowing substitutes.

Voir Dire – In the jury selection process (“voir dire”) each side has **Unlimited** strikes

**for cause** (e.g. bias, prejudice, related to the parties).

Stock ownership, or having worked for or having a spouse who worked for one of the litigants, has been found to create a presumption of bias.

Each SIDE also gets **THREE** **peremptory** challenges that may be used

for any reason other than discrimination based on **race** or **gender**.

・差別の疑念が生じた場合は，相手方の申立に基づき裁判所は中立的理由を示す

よう求め, 正当な理由が示されなければ忌避を認めない

・弁護士からの質問を許すかは裁判所の裁量

・原告の株式を持っているjuryに対してはmay strike for cause

CA – Each PARTY gets SIX peremptory challenges that cannot be used

to discriminate for ANY suspect or semi-suspect classification.

Verdict –The verdict can be 1) a general verdict (that states only the P or D win)

2) a special verdict　　　(that answer specific question)

or 3) a general verdict with interrogatories.

rule:49 In General. The court may require a jury to return only a special verdict. The court may submit to the jury forms for **a general verdict, together with written questions** on one or more issues of fact that the jury must decide.

※ pure general verdictは連邦にない。「原告勝ち！」しかない判

決はsummary judgementしかあり得ない (理由記載不要)

・ Objection to a jury instruction must occur before jury deliberation begin.

Party can propose jury instruction, no later than the close of evidence.

Rule51: A party who objects to an instruction or the failure to give an instruction must do so on

the record, stating distinctly the matter objected to and **the grounds for the objection**.

・FRCP49(b) If the verdict and answers are inconsistent, the court may:

(A) approve…, an appropriate judgment according to the answers, notwithstanding

the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

× order an appropriate judgment according to the answers.

Rule 39. Trial by Jury or by the Court

(b) When No Demand Is Made. …But the court may, on motion, order a jury trial on any issue

for which a jury might have been demanded.

※ 裁判所は自らの裁量でjury trialにできる。対象外事件は下記の通り当事者同意必要

(c) Advisory Jury; Jury Trial by Consent. **In an action not triable of right by a jury**, the court,

on motion or on its own:

(1) may try any issue with an advisory jury; or

(2) may, with the parties’ consent, try any issue by a jury whose verdict has the same effect

as if a jury trial had been a matter of right.

対象外事件でも(2)全員同意で実質陪審，(1)同意なくても忠告陪審であればOK

　　　　　・予定証人の退廷は義務的 (在廷を許す裁量はない)

**DISPOSITION Without Trial**

**① Motion for Judgment as a Matter of Law** ONLY during trial!

– The court may grant a JMOL **where reasonable people could not disagree**

**as to the result**.

Effect – takes the case away from the jury

When? – After the other side has been heard at trial.

・D can move twice – once at close of P’s evidence and at close of all evidence.

・P can move only at the close of evidence.

※ Court must consider the evidence in the **light most favorable** to the non-moving party.

CA – This is called a **Motion for Directed Verdict**

CA – When the D moves for this at the end of P’s case, it’s called a **Motion for a Non-Suit**.

**②Renewed Motion for Judgment as a Matter of Law**

– Same standard as JMOL but occurs after the verdict.

i.e. If granted, the jury reached a conclusion reasonable people could not have reached.

Timing – must be made within **28 days** after entry of judgment.

CA – must be filed within **15 days** of mailing or service of notice of entry of judgment,

OR **180 days** after entry of judgment if no notice is received.

Prerequisite – A motion for JMOL made at an appropriate time during trial is a prerequisite

∵陪審判決を覆せないのが憲法上の要請 → 保留されていた判断を後にしたという建前

　　 　原審で申立がなければ，控訴審になって初めてJMOLを行うことはできない

CA – This is called a **Judgment Notwithstanding the Verdict**

(aka. JNOV = judgment non obstante verdict)

CA – No prerequisite requirement as in federal court.

Ruling – 1) allow the verdict to stand 2) enter the opposite verdict 3) order new trial

**③ Motion for a New Trial**

– Judgment entered but serious errors at trial require a new trial.

※ 不当でもfinal judgementではないので上訴不能

Timing – Within **28 days** after entry of judgment.

CA – Must be filed within **60 days** after service of the notice of entry of judgment,

OR **180 days** after entry of judgment if no notice is received.

Grounds

**1) Errors in law** – exclusion of evidence, jury instructions

※ 証拠採用の不当性を争うならRJMOLでない ∵ RJMOLは提出証拠に基づき妥当性を判断

**2) Misconduct** of **Attorney, Third Party or Jury**

1)2)は, objection during the trialとlikely affect the trialが必要

例: ex parte communication with the judge, 弁護士が繰り返し違法な性格証拠に言及

**3) Newly discovered evidence** ※ 再審と違う。30日過ぎれば**relief from a judgement**

–that a) couldn’t have been discovered with due diligence for the original trial.

b) will likely change the outcome.

**4) Verdict is against clear weight of evidence**

※ 再び陪審員が審理するので**RJMOL**より基準は緩和

**5) Excessive Damages (move for a new trialでなくmove to pay lessも可能)**

|  |  |  |
| --- | --- | --- |
|  | **Judgment as a Matter Of Law (Rule 50)** | **Motion for a New Trial (Rule 59)** |
| Timing | 50(a): During trial and before verdict  50(b): After verdict | Can be during trial (mistrial)  More often after verdict |
| Purpose | 50(a): Reasonable jury must find for movant, so no need for a jury  50(b): Reasonable jury must find for movant but did not, so court must reverse verdict | To obtain retrial on an issue, claim, defense, amount of damages, or entire case |
| Standard | **Substantial evidence.**  Used by most federal courts and some state courts.  The court:  ・Considers all evidence & testimony presented to court by either side.  ・Does not weigh evidence  ・Does not determine credibility of  witnesses  ・Gives credence to evidence favoring  non-movant  ・Draws reasonable inferences in favor of non-movant  **Scintilla.(**some state courts)  The court:  Will act similarly to above, except court will look only at evidence & testimony presented by non-movant. | **Weight-of-the-evidence.**  Jury verdict was against great weight of the evidence. The judge may assess witness credibility and weigh evidence.  **Process error.**  This is:  1) an error during trial that is  2) a substantial and not harmless error  which is  3) the subject of a specific and timely  objection  unless 4) the error is plain.  **Examples of errors**  ・erroneous jury instruction  ・erroneous　admission of evidence  ・Lawyer misconduct  ・Juror misconduct |

Rule 50

・The movant may file RJMOL and may include an alternative or joint request for a new trial

In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

・Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a RJMOL, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial

→ if the judgment is reversed, the new trial must proceed unless the appellate court

orders otherwise.

**④ Additur / Remittitur**

– A court may grant a **new trial** unless a party accepts an **additur** or **remittitur**.

Remittitur – When jury awards a **large** **figure that shocks the conscience** the court can

1) order a new trial or 2) offer remittitur which gives the **P** the choice of taking a lesser figure (which the court sets) or go through a new trial.

Additur – When the jury awards a low **figure that shocks the conscience**・・・

※ Additurs are NOT allowed in federal courts because they are considered

unconstitutional as violating a P’s right to a **jury trial** under the 7th amendment.

CA – Additurs are allowed.

**⑤ Motion for relief from a Judgment** = motion to set aside judgment Rule 60

On motion, the court may **relieve a party from judgment** for the following reasons:

1) **Mistake**, Excusable Neglect

2) **Newly discovered evidence** that couldn’t have been discovered with due diligence

in time to move for a new trial motion

3) Fraud, or misconduct by an opposing party ※偽証，重要証拠隠し，証人へ賄賂等

例：重大な後遺症が認定された勝訴した人物が判決後元気に走っているビデオが発見

　　　　　 →2)は無理∵訴訟中に発見できるような証拠である必要⇒しかし，fraudの主張は可能

4) the judgment is void

（i.e. lack of jurisdiction): 典型はPJがないので訴状を無視していたら欠席判決

5) the judgment has been satisfied

6) “Any other reason that justifies relief.”

– Only to be used in extraordinary circumstances, e.g. counsel’s gross negligence

(c) Timing and Effect of the Motion.

(1) Timing. A motion under [Rule 60(b)](https://www.law.cornell.edu/rules/frcp/rule_60#rule_60_b) must be made within a reasonable time—and for reasons (1), (2), and (3) **no more than a year** after the entry of the judgment …

※ 証拠を十分に聞けば裁判官はいつでも予告なく判決可能。当事者に最終陳述権はない。

**APPELLATE REVIEW**

**1. Appeal**

– In Federal Court you appeal from federal district courts to the U.S. Court of Appeals

Timing

– Must file notice of appeal in trial court within **30 days** after entry of final judgment

(or denial of the post-trial motion)

CA – Must be filed within **60 days** after service of the notice of entry of judgment,

OR **180 days** after entry of judgment if no notice is received.

**Final Judgment Rule** **28 U.S. Code § 1291**

– Can only appeal from final judgments, which means the trial court has made

an ultimate decision **on the merits** of the **entire case**.

＝ nothing is left for the court to do on the merits but execute the judgment.

"one which ends the litigation on the merits and leaves nothing for the

court to do but execute the judgment": 28 USC §1292[a].

Not final judgement: 1) Grant of a motion for new trial.

2) Grant of a motion to transfer the case

3) Grant of a motion to remand

4) Denial of a motion for summary

※ Grant of motion for a new trial is NOT a final judgment

例外1) collateral order**判例原則**

2) certified order **interlocutory decisions § 1292**

**Interlocutory Review**

**Collateral Orders　本案と完全に切り離された重要争点**

– A court order may be appealed if

1) the order is **collateral to merits** of the case,

2) the order conclusively decides a particular issue and

3) it is **too important** to be denied review.

4) deferring appeal prevents effective review.

**例：**適用は稀claim of immunity, double jeopardy程度. denial of the claim of immunityのみ

× order for new trial, political question

[Cohen v. Beneficial Industrial Loan Corp.](http://supreme.justia.com/us/337/541/case.html), (1949).

the Supreme Court held to be appealable those orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

⇒ 学説・判例混乱状態，万が一出たら丁寧に当てはめを行う。結論は非重要。

※ 弁護士秘密特権違反のorderも中間的控訴は難しそう。

**Interlocutory Appeals form Certified Order** (interlocutory appeal=中間的控訴)

1) Trial judge **certifies** that 2) It involves a **controlling issue of law**,

3) As to which there is a **substantial difference of opinion,** and

4) the Court of Appeals **agrees** to hear it.　(控訴受理するかは控訴審の裁量)

CA – Must also direct payment of money or performance of an act.

**Interlocutory Orders Reviewable as of Right**

明文で許容　**Injunctions / Attachments**

**–** May review an order **granting, continuing, modifying,** or **refusing** to

grant an injunction or attachment.

※ permanent injunction含む. しかし, summary judgementが否定されただけではダメ

他法で許容　**Class Action**

– Court of appeals has discretion to review an order granting or denying

certification of class action.

Timing – Must seek review within **14 days** of order.

CA – 1) order granting new trial

2) order directing to pay monetary sanctions of over $ 5.000

28 U.S. Code § 1292 - Interlocutory decisions

**(a). the courts of appeals shall have jurisdiction of appeals from:**

**(1) Interlocutory orders of the district courts …granting, continuing, modifying, refusing**

**or dissolving injunctions,**

**(b) When a district judge… shall be of the opinion that such order involves a controlling**

**question of law as to which there is substantial ground for difference of opinion and**

**that an immediate appeal from the order may materially advance the ultimate**

**termination of the litigation, he shall so state in writing in such order.**

**The Court of Appeals which would have jurisdiction of an appeal of such action may**

**thereupon, in its discretion, permit an appeal to be taken from such order, if application**

**is made to it within ten days after the entry of the order:**

**Extraordinary Writ** ※ Not technically an appeal, 司法権原逸脱といえる特殊状況

– If an order is not otherwise appealed, the aggrieved party may seek a writ

**Writ of Mandamus** to compel a lower court to do something the law requires

**Writ of Prohibition** to stop a lower court from doing something that law does not allow

・Party seeking writ must demonstrate: (他の場合は裁量でマストでない)

1) That she will **suffer irreparable harm** if the writ is not issued

2) The **normal route of appeal** from final judgment is **inadequate**

3) Has a **beneficial interest** in the **outcome** of the writ proceeding

CA – This is the only way to seek review of a denial of a motion

to quash or inconvenient forum.

**※ Multiple Claims and Parties**

Rule 54.(b) the court may direct entry of a partial final judgment only if the

court e**xpressly determines that there is no just reason for delay**.

→ if so, appealable.

MBE: summary judgementを求めたが却下, その後dismissal without

prejudice. 時効期間経過後控訴できるか？

→OK ∵それまではfinal judgementが存在しない

rule52(c) Judgment on Partial Findings.

If a party has been **fully heard** on an issue during a nonjury trial and the court finds against the party on that issue, the court **may enter judgment** against the party on a claim…. The court may, however, decline to render any judgment until the close of the evidence.　　　※ 裁判所は一般的にpartial judgementには消極的

**2. Standards of Review**

The standard of review is the amount of **deference** given by one court

(or some other appellate tribunal) in reviewing a decision of a lower court or tribunal.

1) Abuse of discretion: 例: motion for new trialの不当却下

Where a lower court has made a discretionary ruling, that decision will be

reviewed for abuse of discretion.

It will not be reversed unless the appellate court believes the trial court has

abused discretion.

**Discretionary ruling**

Order for new trial, Motion for Judgment as a Matter of Lawの却下

Many evidentiary rulings.

Whether to allow a party claiming a hardship to file a brief after the deadline.

2) Clearly erroneous:

**The “clearly erroneous” standard applies for question of fact.**

**A Finding of fact by the trial court must not be set aside unless clearly erroneous.**

Under the “clearly erroneous” standard, where a trial court makes **a finding**

**of fact**, such as **in a bench trial**, that finding will not be disturbed unless the

reviewing court is left with a “definite and firm conviction that a mistake has

been committed” by that court

Substantial Evidence: A finding of fact from a jury is upheld on appeal

unless it is unsupported by substantial evidence.

3) De novo:

Under de novo review, the appellate court acts if it were considering the question for the first time, affording no deference to the decisions below.

Applied to **legal decisions of a lower court on questions of law**

**Harmless error**:

Even if the appellate court decides that a particular trial court's ruling was incorrect,

the appellate court will not reverse the trial court's decision if the appellate court

believes that the error was unlikely to have changed the outcome of the trial.

**思考順番**

**1) 無害の手続的瑕疵 (harmless error) → 問題にされない。**

**2) 事実認定→基本的に問題にされない。clearly erroneousに限り破棄事由。（通常は**

**裁判官裁判でのみあり得る。事前異議は不要, 上訴すればよい. )**

**3) 法律問題→多くの手続法上の瑕疵 (特に証拠規則違反) は即時に異議をおべないと**

**破棄事由にならない。**

**※ 伝聞証拠違反も即時に異議を述べないと破棄事由にならない.**

**領域管轄権，裁判地，送達の不適法も同様**

**※ jury instructionの瑕疵→ 即時に異議を述べないと破棄事由にならない。**

**ただし, plain errorは例外　rule51**

**※** 陪審員の事実認定を上訴で争うには，通常JMOL・RJMOLが必要（同判断の裁量逸脱として争う）

**CLAIM / ISSUE PRECLUSION** prior actionのcurrent actionへの影響

　 What Law Applies – The law of the system that decided the **earlier case.** (federal or state)

Affirmative Defenses – Claim and issue preclusion are affirmative defenses, so they should be

raised in your answer or motion or they will be waived.

**CLAIM Preclusion** [aka Res Judicata]

Bars claims that were decided in prior action.

Includes claims arising from same transaction/occurrence, even if they were not asserted in

prior action.

①有効終局判決が②同一当事者間の③同一事件でくだされた場合，実際に争っていない請求に関し

ても生じる。 e.g.交通事故について物損で負ければ人損の請求もprecluded.

Requirements:

① **Same** **Claimant** against the **Same** **Defendant**

–brought by the same **person** against the same **person**.

It also operates in favor of entities that are in privity with the parties.

→運転手相手の訴訟で負けた後に使用者責任追及訴訟はclaim preclusionで不可

∵ the company is in privity with the truck driver.

\*同様に運転手との訴訟に勝った後に回収できないから会社へ訴えも不可

\*利益の喪失約款があると将来分全額を請求しないと, 将来分は追って請求不可

② Judgment was **Valid**, **Final** and **On the Merits**

Final – If the case is being appealed is it a Final Judgment?

→ Federal – YES**,** CA – NO

On the Merits– ALL judgments are on the merits unless based on:

1) lack of Jurisdiction (Personal and Subject Matter)

2) improper Venue 3) defect in process or service

4) failure to join Indispensable Parties

③ **Same Cause of Action** (or **Claim**)

Federal – ALL claims arising out of the same **transaction or occurrence**.

＝新訴訟物理論

CA – **Primary Rights Doctrine**:

A cause of action is defined as an invasion of a single primary right.

You get one cause of action for **each right invaded**.

i.e. You can bring a **separate claim** for property damages and

personal injury arising out of the same occurrence. 旧訴訟物

→i.e., 交通事故で人損を請求して敗訴しても，物損で別訴はclaim preclusionに非該当

**Federal Modern Transaction Approach**

requires P to assert all claims arising out of the same transaction or occurrence that is the subject of P’s claim in the first Case (i.e. P cannot bring up new claim in Case 2 that he should have raised in case 1 relating to the same incident)

※ Contracts Note

– **“Rule of Accumulated Breaches”** All claims that arose prior to the time suit

was brought are precluded. (but NOT for breaches occurring afterwards).

**ISSUE Preclusion** [aka collateral estoppel]

– Precludes re-litigation of a particular **issue** that has been previously **litigated and**

**determined**.

**When an issue of fact or law 1) is actually litigated and determined 2) by a valid and final judgment, and 3) the determination is essential to the judgment,**

**⇒ the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. Restatement 2nd of judgment §68**

Requirements 要件は州でバラバラ。正確に記憶する意義ない

①有効終局判決の際に②同判決に1)不可欠で2)真に争われた争点の決定について③一定範囲

の当事者が争えなくなる。

1) Judgment was **Valid**, **Final** and **On the Merits** in case 1

2) Same issue was **Actually Litigated** **and Determined** in case 1

※ 欠席判決に適用ない∵not actually litigated

3) The Issue was **Essential to the Judgment** in case 1

– Without the issue, the judgment in case 1 would have been different.

例：土地所有者への過失責任追及。Yは土地所有者でもないし過失もないと争われた

ときは，いずれもessentialでないので後訴で再び争える。

病院への責任追及　The doctor is not agent and not negligentでも同様

4) 簡易版

The party against whom preclusion is asserted must have had **a full and fair**

**opportunity as well as incentive** to litigate the issue in case 1

正規版

**Against a Party** (or their privies)

– The issue may only be used against someone who was a **party** to case 1.

(Required by Due Process)

**Mutuality –** Traditional View (Minority)– Only by a **Party** or his privy

**Non-Mutual** – The modern rule is that a **Non-Party** may **preclude** a party

from re-litigating an issue.

**Offensive and Defensive Use of Prior Judgment**

**Defensive**　　　　– When D-2 seeks to prevent P from re-litigating a claim lost to D-1.

**Offensive**　　　　　–　　　When P-2 seeks to prevent D from re-litigating an issue lost to P-1.

Non-parties may use Defensive if:

1) That party had **Full and Fair opportunity** to litigate the issue,

例：債務者に敗訴した金貸しが保証人に請求。保証人は防御として利用可

　　例：複数の会社に特許侵害訴訟を提起し最初の判決で敗訴すれば残る事件の

被告は争点遮断効を援用可能

Non-parties may use Offensive if: (Factors used to determine by court)

1) That party had **Full and Fair opportunity** to litigate the issue,

　(Parklane Hosiery Co. v. Shore, CA最高裁, 1971→broad discretion)

a) **Multiple lawsuits** were **foreseeable**,

b) **could not have been joined easily** in the first action, AND

c) **NO inconsistent judgments** on record.

※ バス事故で一人が勝てば皆が勝てるとなると先に訴訟をする人がいなくな

るので限定が必要

　　　　　　　　　　　※ 前者は，負けた原告が別の被告に対しても負けるのか，後者は負けた被告が別

の原告に対しても負けるのかという問題。逆はdue process違反になる。

例: 債務者に金貸しが勝訴。次に保証人を提訴。同判決効が保証人に及ぶ。

バス事故でバス会社が勝訴。別の客が訴訟提起しても同勝訴判決効が及ぶ。

Who is bound by judgment? 憲法の要請, 各州が憲法上の制限を超えて自由に範囲を決められない

1) Parties

2) 　Privies to parties, including those who control the litigation and will be affected by the outcome.

Privies – successors in interest, class representatives in a class action.

※ privy=利害関係人, privity=当事者関係

3) 　Strangers

原則not bound, if majority view aboveを採用ならmay take advantage of issue preclusion

**Full faith and credit** [Article IV](https://en.wikipedia.org/wiki/Article_Four_of_the_United_States_Constitution), Section 1

The Constitution requires full faith and credit be given to public acts, records, and judicial proceedings of every other states.

・Federal statutes compel recognition of federal court judgments.

・Full faith and credit is only required when the court had personal jurisdiction over the parties

and the court issues a final judgment on the merits.

・Full faith and credit is not required for foreign country judgments.

・Not require to apply procedural rules. e.g. rule of evidence admissibility (1998)

用語比較

　Motion to dismiss based on failure to state claim General Demurrer

Motion to dismiss based on lack of SMJ General Demurrer

Motion to dismiss based on lack of PJ Motion to Quash

Motion for judgment as matter of law Motion for directed verdict

Motion for a Non-Suit (原告立証終了時)

Renewed Judgment as a matter of law 　　　　　　　　　 Judgment not withstanding verdict

※ Motion to dismiss = 訴え却下の申立: 管轄無し,主張自体失当等広く含む