

JENNER & BLOCK

*Practice Series*

# Federal Subject Matter Jurisdiction Outline

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## **INTRODUCTORY NOTE**

This outline discusses subject matter jurisdiction in federal courts and was prepared as part of the Litigation Specialization project at Jenner & Block, LLP. We have divided the outline into four main subject areas: I. Introduction to Federal Subject Matter Jurisdiction; II. Federal Question Jurisdiction; III. Diversity of Citizenship Jurisdiction; and IV. Supplemental Jurisdiction.

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## I. Introduction to Federal Jurisdiction

### A. Constitution Creates Federal Courts of Limited Jurisdiction

The Constitution creates the federal judicial power and defines the maximum extent of that power:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

...

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects..

U.S. Const. art. III, §2.

The constitutional limitations on federal jurisdiction make federal courts “courts of limited jurisdiction,” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) (jurisdiction lacking), as opposed to state courts, which are generally presumed to have subject matter jurisdiction over a case. See 13 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Richard D. Freer, *Federal Practice and Procedure* § 3522, p. 100 (3d ed. 2008) [hereinafter 13 Wright & Miller].

- Jurisdiction Upheld

*Gottlieb v. Carnival Corp.*, 436 F.3d 335 (2d Cir. 2006) (citation omitted) (“[S]tate courts are courts of general jurisdiction, and therefore no express grant of jurisdiction is required to confer concurrent jurisdiction on state and federal courts. By contrast, federal courts are courts of limited jurisdiction which thus require a specific grant of jurisdiction.”).

- Jurisdiction Lacking

*Foxhall Realty Law Offices, Inc. v. Telecomm. Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998) (citation omitted) (“[S]tate courts are courts of general jurisdiction and are accordingly presumed to have jurisdiction over federally-created causes of action unless Congress indicates otherwise, whereas federal courts are courts of limited jurisdiction

which thus require a specific grant of jurisdiction.”), *abrogated on other grounds by Grable & Sons Metal Products, Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005).

*Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 679 (7th Cir. 2006) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)) (“Federal courts are courts of limited jurisdiction . . .”).

*Lowdermilk v. United States Bank Nat’l Assoc.*, 479 F.3d 994, 998 (9th Cir. 2007) (“[A]s federal courts, we are courts of limited jurisdiction and we will strictly construe our jurisdiction.”).

- See also

13 Wright & Miller § 3522, p. 100.

- 1. Within the limits provided in the Constitution, Congress controls the types of cases that federal courts have jurisdiction to consider.**

The Constitution “authorizes Congress . . . to determine the scope of federal courts’ jurisdiction within constitutional limits.” *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010) (reversing district court’s finding that jurisdiction was lacking).

Although the Constitution defines the maximum extent of judicial power, the Constitution gives Congress the authority, “[w]ithin constitutional bounds, [to] decide[] what cases the federal courts have jurisdiction to consider.” *Bowles v. Russell*, 551 U.S. 205, 212 (2007) (jurisdiction lacking).

The Supreme Court has held that a court should not treat a statutory limitation on a cause of action as a limitation on jurisdiction unless Congress “‘clearly states’ that [the] requirement is ‘jurisdictional.’” *Reed Elsevier v. Muchnick*, 130 S. Ct. 1237, 2010 WL 693679, \*8 (2010) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006) (jurisdiction upheld)) (jurisdiction upheld); *see also Morrison v. Nat’l Australia Bank*, 599 U.S. \_\_\_\_ (2010) (holding that § 10(b) is a merits issue and not a jurisdictional issue).

In summary: federal courts are “empowered to hear only those cases that (1) are within the judicial power of the United States, as defined in the Constitution, and (2) that have been entrusted to them by a jurisdictional grant by Congress.” 13 Wright & Miller § 3522, p. 100; *see generally* 13 Wright & Miller § 3521.

- Jurisdiction Upheld

*Teamsters Nat’l Auto. Transporters Indus. Negotiating Comm. v. Thora*, 328 F.3d 325, 327 (7th Cir. 2003) (“Federal courts are courts of limited jurisdiction and may only exercise jurisdiction where it is specifically authorized by federal statute.”).

*Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328 (2d Cir. 2006) (citations and internal quotation omitted) (“The power of the inferior federal courts is limited to those subject encompassed within a statutory grant of jurisdiction.”).

- Jurisdiction Lacking

*Evers v. Astrue*, 536 F.3d 651, 657 (7th Cir. 2008) (citation and internal quotation omitted) (“Federal courts are courts of limited jurisdiction and may only exercise jurisdiction where it is specifically authorized by federal statute.”).

- See also

13 Wright & Miller § 3525, Congressional Control of Supreme Court Jurisdiction.

13 Wright & Miller § 3526, Congressional Control of Lower Federal Court Jurisdiction.

15 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 100.20[2] (3d ed. 2010) (“Only Congress can delineate the subject matter jurisdiction of the lower federal courts.”) [hereinafter 15 *Moore’s Federal Practice*].

15 *Moore’s Federal Practice* ¶ 100.20[5] (noting that “Congress’ authority to regulate the jurisdiction of federal courts includes the authority to impose jurisdictional prerequisites” and discussing jurisdictional prerequisites).

**2. A federal court always has the authority to determine its own jurisdiction.**

A federal court has the authority to determine whether it has jurisdiction to hear a particular case. *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. Mine Workers of Am.*, 330 U.S. 258, 291 (1947)).

- See also

*In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 374 (2d Cir. 2005) (quoting *United States v. United Mine Workers of Am.*, 330 U.S. 258, 292 (1947) (“[A] court has jurisdiction to determine its own jurisdiction.”)).

*Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 808 (7th Cir. 2005) (quoting *United States v. Ruiz*, 536 U.S. 622, 628 (2002)) (“[A] federal court always has jurisdiction to determine its own jurisdiction.”).

*In re Bunyan*, 354 F.3d 1149, 1152 (9th Cir. 2004) (citing *United States v. Ruiz*, 536 U.S. 622, 628 (2002)) (“A federal court always has jurisdiction to determine its own jurisdiction.”).

13D Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Richard D. Freer, *Federal Practice and Procedure* § 3536, p. 1 (“Jurisdiction to determine jurisdiction’ refers to the power of a court to determine whether it has authority over the parties to and the subject matter of a suit.”) [hereinafter 13D Wright & Miller].

## B. Unique Aspects of Jurisdiction in Practice

The issue of federal subject matter jurisdiction “concerns the fundamental constitutional question of the allocation of judicial power between the federal and state governments.” 13 Wright & Miller § 3522, p. 125.

Because of these weighty concerns, jurisdiction is a unique issue in the federal courts. Below, this outline notes five ways that adjudication of jurisdiction is different than adjudication of substantive issues.

### 1. A federal court must generally determine whether it has jurisdiction at the outset of litigation and must always make this determination before deciding the merits of a particular case.

A court “generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in the suit (subject-matter jurisdiction) . . . .” *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430–31 (2007) (declining to address jurisdiction and holding that district court had authority to dismiss action on *forum non conveniens* grounds before considering the merits) (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93–102 (1998) (rejecting doctrine of “hypothetical jurisdiction” that would allow a court to rule on issues of law before adjudicating jurisdiction)).

- Jurisdiction Upheld

*Toeller v. Wis. Dep’t of Corrections*, 461 F.3d 871, 873 (7th Cir. 2006) (“Before considering the merits of [the] appeal, we must resolve a preliminary question of appellate jurisdiction.”).

- Jurisdiction Lacking

*Morrison v. Nat’l Australia Bank Ltd.*, 547 F.3d 167 (2d Cir. 2008), *aff’d* 130 S. Ct. 2869 (2010) (quoting *Arar v. Ashcroft*, 532 F.3d 157, 168 (2d Cir.2008)) (“Determining the existence of subject matter jurisdiction is a threshold inquiry and a claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.”).

*Marley v. United States*, 567 F.3d 1030, 1034 (9th Cir. 2008) (“As a threshold matter, we must decide whether we have jurisdiction . . . .”).

- See also

13 Wright & Miller § 3522, p. 147.

#### a. Exception: In some circumstances (lack of personal jurisdiction and *forum non conveniens*) a court can dismiss a case on non-merits grounds before deciding whether jurisdiction exists.

Although courts must generally decide a jurisdictional issue before deciding the merits of a case, “a federal court has leeway ‘to choose among threshold grounds for denying audience to

a case on the merits.” *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ruhgras AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)). So, while a court cannot consider the merits of a case before deciding a jurisdictional issue, a court can decide a case on non-merits grounds before deciding whether jurisdiction exists. *Id.*

The Supreme Court has recognized two “threshold grounds” on which a court can resolve a case without addressing subject matter jurisdiction: (1) personal jurisdiction and (2) *forum non conveniens*. *Ruhgras AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (“Customarily, a federal court first resolves doubts about its jurisdiction over the subject matter, but there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry.”); *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007) (applying exception to *forum non conveniens*).

The Ninth Circuit has held that the personal-jurisdiction exception to the jurisdiction-first rule is limited to cases where deciding the personal jurisdiction issue would result in the end of the case. *Special Invs., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 994–95 (9th Cir. 2004). In *Special Investments*, the court held that it was improper for the district court to dismiss an action against a defendant when other defendants remained without first deciding whether it had subject matter jurisdiction. *Id.*

The D.C. Circuit has provided a test to determine when a court can decide an issue before adjudicating jurisdiction: a court can decide an issue before jurisdiction if the issue does not involve “an exercise of a court’s law-declaring power . . . .” See *Kramer v. Gates*, 481 F.3d 788 (D.C. Cir. 2007). A court exercises its law-declaring power when a ruling has an effect on “primary conduct.” See *id.* (citing *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) (classifying rules affecting “primary decisions respecting human conduct” as substantive for purposes of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938))).

- See also

*Public Citizen v. United States District Court, District of Columbia*, 486 F.3d 1342, 1348 (2d Cir. 2007) (citing *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422 (2007)) (“[C]ertain non-merits, nonjurisdictional issues may be addressed preliminarily, because jurisdiction is vital only if the court proposes to issue a judgment on the merits.”) (internal quotations omitted).

*In re LimitNone, LLC*, 551 F.3d 572 (7th Cir. 2008) (holding that a court can, in certain circumstances, transfer venue under 28 U.S.C. § 1404(a) before deciding whether jurisdiction exists).

*Potter v. Hughes*, 546 F.3d 1051, 1055 (9th Cir. 2008) (deciding to consider whether appropriate demand was made under Rule 23.1 before determining jurisdiction).

13 Wright & Miller § 3522, p. 147 (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 572 (1999)).

**2. A federal court is presumed to lack subject matter jurisdiction and the party invoking federal jurisdiction bears the burden of persuasion on jurisdiction.**

“It is to be presumed that a cause lies outside [of federal courts’] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted) (jurisdiction lacking).

- Jurisdiction Upheld

*Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447 (7th Cir. 2005) (“That the proponent of jurisdiction bears the risk of non-persuasion is well established.”) (citations omitted).

- Jurisdiction Lacking

*Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 679 (7th Cir. 2006) (“In general, of course, the party invoking federal jurisdiction bears the burden of demonstrating its existence.”) (citations omitted).

*Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 682–83 (9th Cir. 2006) (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992)) (“In cases removed from state court, the removing defendant has ‘always’ borne the burden of establishing federal jurisdiction, including any applicable amount in controversy requirement.”).

- See also

13D Wright & Miller § 3522, pp. 103–05 (“[T]here is a presumption that a federal court lacks subject matter jurisdiction, and the party seeking to invoke federal jurisdiction must affirmatively allege the facts supporting it.”).

13D Wright & Miller § 3522, pp. 104–07 (“If these facts are challenged, the burden is on the party claiming jurisdiction to prove that the court has jurisdiction over the subject matter. . . . This showing must be made by a preponderance of the evidence.”).

15 *Moore’s Federal Practice* ¶ 102.14 (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178, 189 (1936) (“The burden of proving all jurisdictional facts is on the party asserting jurisdiction.”))

**3. The principles of waiver, consent, and estoppel do not apply to jurisdictional issues—the actions of the litigants cannot vest a district court with jurisdiction above the limitations provided by the Constitution and Congress.**

In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), the Supreme Court noted that

Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain

legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, *California v. LaRue*, 409 U. S. 109 (1972), principles of estoppel do not apply, *Am. Fire & Casualty Co. v. Finn*, 341 U. S. 6, 17-18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.

*Id.* at 702. See also *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) (jurisdiction upheld).

- Jurisdiction Upheld

*Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373 (9th Cir. 1997) (“This is not to say that a defect in jurisdiction can be avoided by waiver or stipulation to submit to federal jurisdiction. It cannot.”).

*Richmond v. Chater*, 94 F.3d 263, 267 (7th Cir. 1996) (“Jurisdiction cannot be stipulated.”).

- Jurisdiction Lacking

*ER Squibb & Sons v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 929 (2d Cir. 1998) (expressing concerns about whether court had jurisdiction and remanding for further adjudication of jurisdiction issues) (“[N]o amount of agreement by the parties can create jurisdiction where none exists.”).

- See also

13 Wright & Miller § 3522, p. 115 (noting that the actions of a party cannot vest a court with jurisdiction outside of the constitutional and congressional grants of jurisdiction).

**4. A federal court has the obligation to determine jurisdiction on its own even if the parties do not raise the issue.**

All courts have an “independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citing *Ruhgras AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)) (jurisdiction upheld).

- Jurisdiction Upheld

*Sharkey v. Quartantillo*, 541 F.3d 75, 87–88 (2d Cir. 2008) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 361 (2d Cir.2000)) (“To the extent the threshold limitations are jurisdictional, we are required to raise them *sua sponte*.”).

*Camico Mut. Ins. Co. v. Citizens Bank*, 474 F.3d 989, 992 (7th Cir. 2007) (citing *St. Paul Mercury & Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 287 n.10 (1938); *Andrews v. E.I. Du Pont De Nemours and Co.*, 447 F.3d 510, 514 (7th Cir. 2006)) (“While neither party

raised the matter of jurisdiction, we have an independent obligation to ensure that jurisdiction exists.”).

*Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 184 (9th Cir. 2006) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)) (“Of course, we have an independent obligation to satisfy ourselves that we have jurisdiction.”).

- See also

13 Wright & Miller § 3522, p. 126 (“Even if the parties remain silent, a federal court, whether trial or appellate, is obliged to notice on its own motion its lack of subject matter jurisdiction, or the lower court’s lack of subject matter jurisdiction when a case is on appeal.”).

**5. A litigant or the court can raise a defect in jurisdiction at any time, even after a court has entered judgment.**

Federal Rule 12(h)(3) states that, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3).

“The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (citations omitted) (jurisdiction upheld); *see also Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”) (jurisdiction upheld).

On appeal—even for the first time at the Supreme Court—a party may attack jurisdiction after the entry of judgment in the district court. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

Even the party that had invoked the district court’s jurisdiction can argue on appeal, to avoid an adverse judgment, that the district court lacked jurisdiction. 13 Wright & Miller § 3522, pp. 122–23 (“Indeed, the independent establishment of subject matter jurisdiction is so important that a party ostensibly invoking federal jurisdiction may later challenge it as a means of avoiding an adverse result on the merits.”).

- Jurisdiction Lacking

*City of Rome, NY v. Verizon Commc’ns Inc.*, 362 F.3d 168, 174 (2d Cir. 2004) (quoting *United States v. Leon*, 203 F.3d 162, 164 n.2 (2d Cir. 2000)) (“As we have often observed, ‘it is well settled that lack of federal jurisdiction may be raised for the first time on appeal, even by a party who originally asserted that jurisdiction existed, or by the Court *sua sponte*.’”).

*Levin v. ARDC*, 74 F.3d 763, 766 (7th Cir. 1996) (“Subject-matter jurisdiction cannot be waived and may be contested by a party or raised *sua sponte* at any point in the proceedings.”).

*Detabali v. St. Luke's Hosp.*, 482 F.3d 1199, 1202 (9th Cir. 2007) (citing *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Galvez v. Kuhn*, 933 F.2d 773, 775 n. 4 (9th Cir. 1991)) (“Defects in subject matter jurisdiction are nonwaivable and may be raised at any time, including on appeal.”).

- See also

13 Wright & Miller § 3522, pp. 122–26.

**a. But note: A party usually cannot collaterally attack a federal court judgment by arguing that the court entering judgment lacked subject matter jurisdiction.**

The ability to attack jurisdiction ends when judgment has been entered and no appeal is currently pending. *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000) (citing *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9 (1982)) (“[I]n unexceptional circumstances, a party that has had an opportunity to litigate the question of subject matter jurisdiction may not reopen that question in a collateral attack following an adverse judgment.”).

This prohibition on collateral attack applies even when a court did not explicitly rule on subject-matter jurisdiction. 13D Wright & Miller § 3536, pp. 8–9 (citing *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 271, 376–77 (1940)).

A party can only collaterally attack a judgment for lack of jurisdiction in accordance with Federal Rule of Civil Procedure 60(b)(4). *Tittjung*, 235 F.3d. at 335 (“The exception to the general rule barring collateral attacks on subject matter jurisdiction flows from Fed. R. Civ. P. 60(b)(4).”).

Under Rule 60(b)(4), a court will only allow a collateral attack when the jurisdictional error was “egregious”: “the error must involve a clear usurpation of judicial power, where the court wrongfully extends its jurisdiction beyond the scope of its authority.” *Id.* at 335 (citing *O'Rourke Bros., Inc. v. Nesbitt Burns, Inc.*, 201 F.3d 948, 951 (7th Cir.2000); *In re Edwards*, 962 F.2d 641, 644 (7th cir. 1992); *Kansas City S. Ry. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir.1980)).

In *Tittjung*, the court held that it would not allow a collateral attack on jurisdiction because the district court’s exercise of jurisdiction was not egregious. *Id.* at 342.

- See also

*In re Am. Preferred Prescription, Inc.*, 255 F.3d 87, 94 (2d Cir. 2001) (citing *Ins. Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 702 n.9 (1982)) (“[T]he absence of [jurisdiction] can be raised at any time, although not on a collateral attack by a party with a prior opportunity to litigate the issue.”) (noting that issue was not jurisdictional).

*City of S. Pasadena v. Mineta*, 284 F.3d 1154, 1157 (9th Cir. 2002) (quoting *Ins. Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 702 n.9 (1982)) (“Even objections to

subject-matter jurisdiction—which may be raised at any time, even on appeal—must be raised while the lawsuit is still pending; they may not be raised for the first time by way of collateral challenge in a subsequent action. A party that ‘had an opportunity to litigate the question of subject-matter jurisdiction’ in the original proceeding ‘may not ... reopen that question in a collateral attack.’”) (analyzing issue that was not jurisdictional).

13D Wright & Miller § 3536, pp. 5, 8–9.

## II. Federal Question Jurisdiction

This section will contain an introduction to federal question jurisdiction followed by a summary of the three limitations the Supreme Court has placed on federal courts’ exercise of federal question jurisdiction.

The “primary purpose” of federal question jurisdiction “is to ensure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally created rights.” 15 *Moore’s Federal Practice* ¶ 103.03.

Despite this purpose, state courts are generally competent to adjudicate federal law. 15 *Moore’s Federal Practice* ¶ 103.04; *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990) (noting a “deeply rooted presumption in favor of concurrent state court jurisdiction”).

### A. Constitutional and Statutory Basis for Federal Question Jurisdiction

#### 1. The Constitution and 28 U.S.C. § 1332 vest federal courts with jurisdiction to hear cases that “arise under” federal law.

The Constitution vests federal courts with the authority to hear cases “arising under th[e] Constitution [or] the Laws of the United States.” U.S. Const. art III, § 2.

Congress vests federal district courts with subject-matter jurisdiction over cases involving questions of federal law: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

- See also

15 *Moore’s Federal Practice* ¶ 103.02 (noting the Article III and statutory requirements).

#### 2. The Supreme Court has interpreted the statutory “arising under” language in 28 U.S.C. § 1331 more narrowly than the constitutional “arising under” language.

Both the Constitution and § 1331 use the same “arising under” language. The Supreme Court has interpreted the constitutional use of “arising under” differently than the congressional use of “arising under”: “Article III ‘arising under’ jurisdiction is broader than federal question jurisdiction under § 1331.” *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 495 (1983) (holding that the Foreign Sovereign Immunities Act of 1976 does not violate Article III of the Constitution).

- Jurisdiction Upheld

*Int'l Union Operating Eng'rs v. Ward*, 563 F.3d 276, 281 (7th Cir. 2009) (citing *Verlinden*, 461 U.S. at 494–95) (“Although the language of § 1331 is similar to that of Article III, courts have interpreted § 1331 much more narrowly than its constitutional counterpart.”).

- Jurisdiction Lacking

*Patrickson v. Dole Food Co.*, 251 F.3d 795, 799 (9th Cir. 2001) (citing *Verlinden*, 461 U.S. at 495) (“Although any federal ingredient may be sufficient to satisfy Article III, the statutory grant of jurisdiction under 28 U.S.C. § 1331 requires more.”).

- See also

13D Wright & Miller § 3562, p. 174 (“The Supreme Court has interpreted the constitutional language broadly and the statutory language narrowly, thereby affording Congress great leeway in determining how much of the constitutional federal question power to grant to the federal courts.”).

15 Moore’s Federal Practice ¶ 103.30 (“It is now universally understood that Congress did not intend to exercise the full potential of its power in enacting the general federal question statute.”).

## **B. Definition of Federal Law**

### **1. Federal law generally includes any constitutional provision, act of Congress, administrative regulation, executive order, or federal common law provision.**

Federal law includes an act of Congress or a regulation issued under an act of Congress. *See Verizon Md. Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 643 (2002) (noting that the plaintiff’s claim “turns on whether the Act, or an FCC ruling issued thereunder [and therefore] falls with 28 U.S.C. § 1331’s general grant of jurisdiction”) (jurisdiction upheld).

“Federal common law as articulated in rules that are fashioned by court decisions are ‘laws’ as that term is used in § 1331.” *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (jurisdiction upheld).

Federal law generally includes an Act of Congress, an administrative regulation, or an executive order made pursuant to an Act of Congress. 13D Wright & Miller § 3563, pp. 217–218.

Federal law, for the purposes of § 1331, does not include the All Writs Act, the Parental Kidnapping Prevention Act, the local laws of the District of Columbia, or the Federal Rules of Civil Procedure. *See* 13D Wright & Miller § 3563, pp. 220–22.

- See also

13D Wright & Miller § 3563, pp. 217–18, 231–32.

15 Moore’s Federal Practice ¶¶ 103.32[1]–[6].

### C. Three Limitations on a Court's Exercise of Federal Question Jurisdiction

The Supreme Court has construed § 1331 narrowly, and has interpreted § 1331 to include three requirements before a court will exercise jurisdiction: (1) the well-pleaded complaint requirement; (2) the substantiality requirement; and (3) the centrality requirement. 13D Wright & Miller § 3562, p. 174.

#### 1. Well-pleaded complaint requirement: A federal court lacks jurisdiction over a federal question unless the plaintiff's well-pleaded complaint raises the issue.

When determining whether a claim arises under federal law, a court will “examine the ‘well pleaded’ allegations of the complaint and ignore potential defenses: ‘[A] suit arises under the Constitution and laws of the United States only when the plaintiff’s statement of his own cause of action shows that it is based upon those laws or that Constitution.’” *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 6 (2003) (jurisdiction upheld) (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (jurisdiction lacking)).

Jurisdiction will not be supported by a federal question in a counterclaim (even if the counterclaim is compulsory). *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (citations omitted) (“[A] counterclaim—which appears as part of the defendant’s answer, not as part of the plaintiff’s complaint—cannot serve as the basis for ‘arising under’ jurisdiction.”).

Jurisdiction will not be support by a federal question raised by “allegations to support [the plaintiff’s] own case that are not required by pleading rules.” 13D Wright & Miller § 3566, p. 272 (discussing superfluous allegations with example of the different allegations necessary in an action to clear a cloud on title versus an action to quiet title).

- Jurisdiction Upheld

*Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 317 (2d Cir. 2000) (noting that “a state law complaint, filed in a state trial court, that tries to anticipate a defense of federal preemption will not support federal question removal jurisdiction unless the limited doctrine of complete preemption applies”) (citations and internal quotations omitted).

*Hall v. North Am. Van Lines, Inc.*, 476 F.3d 683, 687–89 (9th Cir. 2007) (discussing well-pleaded complaint rule and complete preemption).

- Jurisdiction Lacking

*Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 271 (2d Cir. 2005) (citing *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998)) (“The well-pleaded-complaint rule mandates that in assessing subject-matter jurisdiction, a federal court must disregard allegations that a well-pleaded complaint would not include—e.g., allegations about anticipated defenses.”).

*Hays v. Bryan Cave LLP*, 446 F.3d 712, 713 (7th Cir. 2006) (“Yet with immaterial exceptions, a case filed in state court under state law cannot be removed to federal court on the basis that there are defenses based on federal law.”).

*Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1183 (9th Cir. 2002) (citing *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10-12 (1983)) (“[T]he existence of a defense based upon federal law is insufficient to support jurisdiction.”).

- See also

*Salton, Inc. v. Philips Domestic Appliances and Personal Care*, 391 F.3d 871, 875 (7th Cir. 2004) (“[B]ut claims in a counterclaim cannot confer federal jurisdiction over a case.”).

13D Wright & Miller § 3566, pp. 262, 267–72 (“[T]he court, in determining whether the case arises under federal law, will look only to the claim itself and ignore any extraneous material.”).

15 *Moore’s Federal Practice* ¶ 103.40 (discussing the well-pleaded complaint rule);

15 *Moore’s Federal Practice* ¶ 103.41 (discussing the rationale for the well-pleaded complaint rule).

**a. Artful pleading: A court will have federal question jurisdiction over a plaintiff’s claim that turns on an issue of federal law even if the plaintiff did not explicitly plead the federal issue in the complaint.**

“A plaintiff cannot avoid federal court simply by omitting a necessary federal question in the complaint; in such a case the necessary federal question will be deemed to be alleged in the complaint.” 15 *Moore’s Federal Practice* ¶ 103.43.

Complete preemption is “a specific application of the artful pleading doctrine.” 15 *Moore’s Federal Practice* ¶ 103.43.

Complete preemption arises when congressional legislation so completely preempts state law cause of action that “any complaint that comes within the scope of these laws must be considered ‘necessarily federal’ in character, even if the plaintiff does not show a federal cause of action on the face of the complaint.” 13 Wright & Miller § 3522, p. 150 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 22–23 (1983) (jurisdiction lacking)).

Under the complete-preemption doctrine, even if a plaintiff seeks “a remedy available *only* under state law,” the complaint will still raise a federal question for any cause of action that “comes within the scope” of the preempting federal cause of action. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23–24 (1983) (citing *Avco Corp. v. Aero Lodge No. 735, Int’l Assn. of Machinists*, 290 U.S. 557 (1968) (jurisdiction upheld)).

Labor Management Relations Act § 301 completely preempts state law causes of action. *See id.*

ERISA § 502(a) preempts state common law contract and tort claims. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 207–09 (2004) (jurisdiction upheld).

The National Bank Act completely preempts state law claims that fall within the scope of certain sections. *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 7–9 (2003) (jurisdiction upheld).

Certain Indian tribal claims are completely preempted. *Oneida Indian Nation of N.Y. State v. Oneida County, N.Y.*, 414 U.S. 661 (1974).

Circuit courts have recognized the narrowness of this exception and have held that various federal statutes do not completely preempt an area of state law. *See* 13D Wright & Miller § 3566, p. 306 n.90 (providing extensive list of cases holding that a particular federal statute does not completely preempt state law).

- Jurisdiction Upheld

*Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 317 (2d Cir. 2000) (discussing complete preemption in Second Circuit).

- Jurisdiction Lacking

*Hays v. Bryan Cave LLP*, 446 F.3d 712, 713 (7th Cir. 2006) (citations omitted) (“So for example if a suit is filed in state court charging a fiduciary with a breach of his fiduciary duty, and the defendant is an ERISA fiduciary, the case is removable to federal court even if the complaint does not mention ERISA.”).

*Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272 (2005) (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987) (“Under the complete-preemption doctrine, certain federal statutes are construed to have such ‘extraordinary’ preemptive force that state-law claims coming within the scope of the federal statute are transformed, for jurisdictional purposes, into federal claims—i.e., completely preempted.”)).

*Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1183 (9th Cir. 2002) (discussing complete preemption in Ninth Circuit).

- See also

13D Wright & Miller § 3566, pp. 296–313.

13D Wright & Miller § 3566, pp. 302–310 (discussing complete preemption).

15 *Moore’s Federal Practice* ¶ 103.45[1] (discussing well-pleaded complaint rule and complete preemption).

15 *Moore’s Federal Practice* ¶ 103.45[3][g] (discussing laws that various circuit courts have examined for complete preemption).

**b. Declaratory Judgments: A declaratory judgment action satisfies the well-pleaded complaint rule only if a well-pleaded coercive action would raise the federal issue.**

The general rule “is that an action for a declaratory judgment will invoke federal question jurisdiction only if the coercive action that would have been brought (were declaratory judgments not available) would have been within that jurisdiction.” 13D Wright & Miller § 3566, pp. 275–76; *see also Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1893) (jurisdiction lacking); *Skelly Oil Co. v. Phillips Petrol. Co.*, 339 U.S. 667, 673–74 (1950) (jurisdiction lacking).

The declaratory-judgment seeking plaintiff should not be able to file a complaint that anticipates a federal defense of the coercive action. *Ne. Ill. Reg’l Commuter R.R. Corp. v. Hoey Farina & Downes*, 212 F.3d 1010, 1014 (7th Cir. 2000) (jurisdiction lacking) (“[I]f the plaintiff cannot get into federal court by anticipating what amounts to a federal defense to a state-law cause of action, he also should not be able to use the Declaratory Judgment Act to do so by asserting what is really a preemptive federal defense as the basis of his complaint.”).

- Jurisdiction Upheld

*Ameritech Benefits Plan Comm. v. Comm’n Workers of Am.*, 220 F.3d 814, 818 (7th Cir. 2000).

- Jurisdiction Lacking

*City of Rome, N.Y. v. Verizon Comm’n*, 362 F.3d 168, 182 (2d Cir. 2004) (quoting *Franchise Tax Bd.*, 463 U.S. at 16) (“It is well established that, in a declaratory judgment action, federal jurisdiction does not lie ‘if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action.’”).

*Republican Party of Guam v. Gutierrez*, 277 F.3d 1086 (9th Cir. 2002) (discussing well-pleaded complaint rule and declaratory judgments).

- See also

15 *Moore’s Federal Practice* ¶¶ 103.44[1]–[3] (discussing well-pleaded complaint rule and declaratory judgment).

**2. Substantiality requirement: A federal court lacks jurisdiction over a claim based on federal law when the claim is completely frivolous.**

A federal court lacks jurisdiction over a claim involving federal law “only when the claim is ‘so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as to not involve a federal controversy.’” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (jurisdiction lacking on standing grounds) (citing *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974) (jurisdiction upheld)).

“The test for dismissal is a rigorous one and if there is any foundation or plausibility to the claim, federal jurisdiction exists.” 13D Wright & Miller § 3564, pp. 244–45.

- Jurisdiction Lacking

*Perpetual Secs., Inc. v. Tang*, 290 F.3d 132, 137–39 (2d Cir. 2002) (affirming dismissal of plaintiff’s complaint because it failed to raise a substantial issue of federal law).

*Oak Park Trust and Sav. Bank v. Therkildsen*, 209 F.3d 648, 651 (7th Cir. 2000) (holding that jurisdiction did not exist under § 1331 because the a claim “[wa]s so feeble, so transparent an attempt to move a state-law dispute to federal court and avoid the state statute of limitations, that it d[id] not arise under federal law at all”) (emphasis in original).

*Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 952 (9th Cir. 2004) (holding that district court “correctly dismissed th[e] case for lack of subject matter jurisdiction because [the] complaint did not present a substantial question of federal law”).

- See also

13 Wright & Miller § 3522, pp. 140–41.

13D Wright & Miller § 3564, p. 243.

15 *Moore’s Federal Practice* ¶ 103.33 (discussing substantiality requirement).

- a. The Supreme Court has articulated the test for substantiality in multiple ways.**

The Supreme Court has stated this test in multiple ways and in *Hagans v. Lavine* collected several of the various statements for this test:

Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are “so attenuated and unsubstantial as to be absolutely devoid of merit,” *Newburyport Water Co. v. Newburyport*, 537 U.S. 561, 579 (1904); “wholly insubstantial,” *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); “obviously frivolous,” *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910); “plainly unsubstantial,” *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933); or “no longer open to discussion,” *McGivra v. Ross*, 215 U.S. 70, 80 (1909).

415 U.S. 528, 536–37 (1974).

- b. But note: Although the substantiality requirement implicates the merits of an action (and courts are not supposed to consider the merits of a claim in assessing jurisdiction) it remains the federal rule.**

“The substantiality requirement seems to conflate, or perhaps to confuse, the jurisdictional inquiry and the determination of the merits. . . . But the Court has said, ‘it remains

the federal rule . . . .” 13D Wright & Miller § 3564, p. 247 (quoting *Hagans v. Lavine*, 415 U.S. 528, 538 (1974)).

**3. Centrality requirement: A federal court lacks federal question jurisdiction if the federal question raised in the complaint is not sufficiently central to the plaintiff’s claim.**

Wright & Miller calls this the “most difficult problem in determining whether a case arises under federal law for statutory purposes.” 13D Wright & Miller § 3562, p. 175.

“[T]he federal law injected by the plaintiff’s well-pleaded complaint [must] be sufficiently central to the dispute to support federal question jurisdiction.” 13D Wright & Miller § 3562, p. 174. Stated more simply, “centrality is concerned with ‘how federal’ the claim must be.” *Id.* at 174–75.

A case generally arises under federal law when federal law creates the cause of action. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005) (jurisdiction upheld); *see also Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 690 (2006) (jurisdiction lacking) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983) (jurisdiction lacking)) (“A case ‘aris[es] under’ federal law within the meaning of § 1331 . . . if ‘a well-pleaded complaint establishes either that federal law creates the cause of action . . . .’”).

The Supreme Court has also recognized that a case will arise under federal law in “certain . . . state-law claims that implicate significant federal issues.” *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005). Under this second test for arising under, “the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Id.* at 314.

Wright & Miller has summarized the lack of clarity associated with this second test for “arising under” jurisdiction: “no single rationalizing principle will explain all of the decisions on centrality.” 13D Wright & Miller § 3562, pp. 175–76. This issue, however, does not often arise. *Id.* at 177 (noting that “cases raising a serious question whether jurisdiction exists are comparatively rare”).

• **Jurisdiction Lacking**

*Bay Shore Union Free School Dist. v. Kain*, 485 F.3d 730 (2d Cir. 2007) (citations omitted) (“The Supreme Court generally has followed Justice Holmes’ classic formulation that, ‘A suit arises under the law that creates the cause of action.’ . . . However, the Supreme Court has recognized a narrow exception to Justice Holmes’ formulation where a formally federal cause of action does not create *ipso facto* a federal question ‘because of the overwhelming predominance of state-law issues.’”).

*Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 909 (7th Cir. 2007) (citations omitted) (“In the main, a claim “arises under” the law that creates the cause of action. The Court has ruled, however, that this is a sufficient rather than a necessary condition of the arising-under

jurisdiction and by holding out the possibility (realized in *Grable*) that a contested federal issue in a state-law suit may allow jurisdiction under § 1331 the Court has greatly complicated the analysis. For the Court has also held that a federal issue, even an important one, usually is insufficient for § 1331 jurisdiction.”) (emphasis in original).

*Armstrong v. N. Mariana Islands*, 576 F.3d 950, 954–55 (9th Cir. 2009) (citations and internal quotations omitted) (“The Court has consistently interpreted jurisdictional statutes with an ‘arising under’ qualification, including § 1331, as giv[ing] the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that [1] federal law creates the cause of action or that [2] the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.”).

- See also

13D Wright & Miller § 3562, pp. 175–209 (discussing historical developments of centrality requirement).

15 *Moore’s Federal Practice* ¶ 103.31[4][e] (discussing *Grable & Sons* case).

### III. Diversity of Citizenship Jurisdiction

#### A. Purpose of Diversity Jurisdiction

The traditional justification for diversity jurisdiction is to “open[] the federal courts’ doors to those who might otherwise suffer from local prejudice against out-of-state parties.” *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010) (citations omitted) (reversing district court’s finding that jurisdiction was lacking).

- Jurisdiction Upheld

*Firststar Bank, N.A. v. Faul*, 253 F.3d 982, 991 (7th Cir. 2001) (citing *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 111 (1945); *Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 382 (7th Cir.1990)) (“[T]he traditional justification for diversity jurisdiction is to minimize potential bias against out-of-state parties.”).

*Lee v. Am. Nat’l Ins. Co.*, 260 F.3d 997, 1005 (9th Cir. 2001) (citations omitted) (“Traditionally, diversity jurisdiction has been viewed as serving the interest in protecting out-of-state defendants from potential state-court biases in favor of local plaintiffs.”).

- See also

13E Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3601, p. 15 (3d ed. 2009) [hereinafter 13E Wright & Miller].

15 *Moore’s Federal Practice* ¶ 102.02 (“It has often been suggested that the provision’s purpose was to avoid potential prejudice against citizens of one state in another state’s courts.”).

## **B. Constitutional and Statutory Basis for Diversity Jurisdiction**

The Constitution allows the judicial power of the United States to extend to cases involving “Controversies . . . between Citizens of different States.” U.S. Const. art III, § 2.

Congress effectuated this provision in 28 U.S.C. § 1332:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States.

28 U.S.C. § 1332(a)(1).

But note: Courts generally will not exercise diversity jurisdiction over family law and probate cases. See 13E Wright & Miller §§ 3609–3610; 15 *Moore’s Federal Practice* ¶¶ 102.90–102.92.

## **C. Complete Diversity Requirement**

Complete diversity among the parties is not a constitutional requirement. Rather, the complete diversity rule is the result of a Supreme Court interpretation of the statutory grant of diversity jurisdiction. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967) (jurisdiction upheld); 13E Wright & Miller § 3605, p. 227 (noting that the Supreme Court in *Tashire* “held that minimal diversity is sufficient to meet the requirement of the Constitution and that the rule of [complete diversity] is merely a construction of the general diversity statute”).

Alien citizenship “destroys diversity if there is an alien on the other side of the case and there are not citizens of states on both sides.” 15 *Moore’s Federal Practice* ¶ 102.55[1] (citing 28 U.S.C. § 1332(a)(2)–(4)).

- Jurisdiction Lacking

*Universal Licensing Corp. v. Paola del Lungo, S.p.A.*, 293 F.3d 579, 581–82 (2d Cir. 2002) (“[T]he district court correctly determined that this action was solely between foreign parties and that diversity was lacking.”).

- Jurisdiction Upheld

*Israel Aircraft Indus. v. Sanwa Bus. Credit Corp.*, 16 F.3d 198, 202 (7th Cir. 1994) (“A foreign corporation has sued another foreign corporation plus a domestic corporation, but the statute creating the diversity jurisdiction does not contemplate an alignment of alien versus citizen plus alien.”).

- See also

*Cheng v. Boeing Co.*, 708 F.2d 1406, 1412 (9th Cir. 1983) (“Diversity jurisdiction does not encompass foreign plaintiffs suing foreign defendants.”).

**1. A court will not have diversity jurisdiction if any plaintiff and any defendant are citizens of the same state.**

“A case falls within the federal district court’s ‘original’ diversity ‘jurisdiction’ only if diversity of citizenship among the parties is complete, i.e., only if there is no plaintiff and no defendant who are citizens of the same state.” *Wis. Dep’t of Corrections v. Schacht*, 524 U.S. 381, 388 (1998) (holding that court lacked jurisdiction to hear claims barred by Eleventh Amendment but upholding jurisdiction over other claims within same lawsuit that were not barred).

The term “States” includes territories, the District of Columbia and Puerto Rico. 15 *Moore’s Federal Practice* ¶ 102.11.

- Jurisdiction Upheld

*Lee v. Am. Nat’l Ins. Co.*, 260 F.3d 997, 1005 (9th Cir. 2001) (citing *Schacht*, 524 U.S. at 388; *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)) (“The diversity jurisdiction statute, as construed for nearly 200 years, requires that to bring a diversity case in federal court against multiple defendants, each plaintiff must be diverse from each defendant.”).

- Jurisdiction Lacking

*Herrick Co., Inc. v. SCS Commc’ns, Inc.*, 251 F.3d 315, 322 (2d Cir. 2001) (citations omitted) (“We begin . . . with the axiomatic observation that diversity jurisdiction is available only when all adverse parties to a litigation are completely diverse in their citizenships.”).

*Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675 (7th Cir. 2007) (citations and internal quotations omitted) (“[Section] 1332 requires complete diversity, meaning that no plaintiff may be from the same state as any defendant . . .”).

- See also

13E Wright & Miller § 3605, p. 187 (citing *Strawbridge*, 7 U.S. 267).

**2. There are three statutory exceptions to complete diversity rule: the Interpleader Act; the Multiparty, Multiforum Jurisdiction Act; and the Class Action Fairness Act.**

Because the complete-diversity requirement is not constitutional, Congress is free to make exceptions to it. 15 *Moore’s Federal Practice* ¶ 102.12[1] (citing *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) (holding that interpleader statute required only minimal diversity)).

Three exceptions are the Interpleader Act, the Multiparty, Multiforum Jurisdiction Act; and the Class Action Fairness Act. An extended discussion of these exceptions is outside of the scope of this outline. The Class Action Fairness Act is covered within the Litigation Specialization project by a separate group.

## D. Pleading Diversity

### 1. A plaintiff must plead the citizenship of the parties in the complaint.

If a plaintiff sues in federal court, the plaintiff must include in the complaint “a short and plain statement of the grounds for the court’s jurisdiction . . . .” Fed. R. Civ. P. 8(a)(1).

If one of the parties is a corporation, “the plaintiff must allege both the state of incorporation and the principal place of business for each corporation.” *Casino, Inc. v. S.M. & R. Co., Inc.*, 755 F.2d 528, 529 (7th Cir. 1985) (citations omitted).

- Jurisdiction Lacking

*Advani Enters., Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 160 (2d Cir. 1998) (“[W]e find that the district court lacked subject-matter jurisdiction over this case under 28 U.S.C. § 1332 because [plaintiff]’s pleadings do not demonstrate that the parties are completely diverse.”).

- See also

*Wise v. Wachovia Secs., LLC*, 450 F.3d 265, 267 (7th Cir. 2006) (noting that the statement that the parties “are citizens of different states” does not satisfy 7th Cir. R. 28).

*Hicklin Eng’g, LC v. Bartell*, 439 F.3d 346, 347 (7th Cir. 2006) (ordering “counsel to file a supplemental statement detailing [LLC-plaintiff]’s members and the citizenships”).

*Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147–48 (9th Cir. 1998) (citations omitted) (finding pleadings were deficient because “there was no allegation of the citizenship of the decedent . . . or of the representative of his estate . . .”).

13E Wright & Miller § 3602.1, pp. 77–79 (citations omitted) (“[T]he essential elements of diversity of citizenship jurisdiction must be alleged in any pleading asserting a claim for relief, and that proposition is now prescribed in Federal Rule of Civil Procedure 8(a)(1) and enforced by the courts.”).

#### a. A court will generally forgive a plaintiff’s failure to allege the citizenship of the parties if the complaint makes citizenship clear in other parts of the complaint.

“[N]oncompliance with the pleading requirement or a defective allegation of subject matter jurisdiction may be corrected by an amendment under the liberal provisions of Federal Rule 15.” 13E Wright & Miller § 3602.1, pp. 86–87.

“When diversity jurisdiction is not properly alleged, typically we would allow a plaintiff to amend his complaint to cure the deficiency or to supplement his brief to provide clarification.” *McCready v. eBay, Inc.*, 453 F.3d 882, 891 (7th Cir. 2006).

“Technical defects and minor mistakes will be overlooked and the requirement will be considered satisfied when the existence of complete diversity is apparent from other parts of the complaint.” 13E Wright & Miller § 3602.1, pp. 81–86.

A court can allow an amendment to a complaint to support a new theory of jurisdiction if the “pleadings and judicial economy support it.” *Advani Enters., Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 161–62 (2d Cir. 1998) (allowing plaintiff to amend complaint to assert admiralty jurisdiction even though plaintiff initially had asserted diversity of citizenship jurisdiction).

- See also

*McCready*, 453 F.3d at 91 (declining to allow plaintiff to supplement pleadings when “no good purpose would be served by allowing the action to continue”).

*Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147–48 (9th Cir. 1998) (citations omitted) (finding pleadings were deficient because “there was no allegation of the citizenship of the decedent . . . or of the representative of his estate . . .” and directing parties to supplement the record on citizenship).

## **2. A party can submit and a court can examine materials outside of the pleadings to adjudicate the citizenship of the parties.**

To determine diversity of citizenship, a court can examine materials outside the pleadings. 13E Wright & Miller § 3602.1, p. 111.

A court can conduct a limited evidentiary hearing to determine its own jurisdiction. *Id.* § 3602.1 at 107–18.

- Jurisdiction Upheld

*Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 728 (9th Cir. 1997) (holding that district court did not err in considering declaration outside of pleadings, and that district courts have broad discretion to find facts pertinent to jurisdiction).

- Jurisdiction Lacking

*St. Paul Fire and Marine Ins. Co. v. Universal Builders Supply*, 409 F.3d 73 (2d Cir. 2005) (citations omitted) (“It is also well established that when the question is subject matter jurisdiction, the court is permitted to rely on information beyond the face of the complaint.”). Here, the court held that jurisdiction over the claim was lacking because the parties were not completely diverse. In the interest of judicial economy, however, the court dismissed the nondiverse parties to preserve jurisdiction. *Id.* at 82.

*Bowyer v. U.S. Dep’t of Air Force*, 875 F.2d 632, 635–36 (7th Cir. 1989) (noting that “[d]istrict courts properly may look beyond the complaint’s jurisdictional allegations and view whatever evidence has been submitted to determine whether in fact subject matter jurisdiction exists” and that district courts are required to weigh and resolve this factual evidence).

## E. Court Adjustment of the Plaintiff's Alignment of the Parties

### 1. To preserve diversity jurisdiction, district and appellate courts have the authority to sever a non-essential party.

Federal Rule of Civil Procedure 21 gives a district judge discretion to dismiss parties that are non-essential under Rule 19. Fed. R. Civ. P. 21 (“On motion or on its own, the court may at any time, on just terms, add or drop a party.”); *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 582 (2004) (citation and internal quotation marks omitted) (“[I]t is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered.”).

The Supreme Court has held that an appellate court also has authority to dismiss non-essential parties to preserve jurisdiction. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837–38 (1989) (“[W]e hold that the courts of appeals have the authority to dismiss a dispensable nondiverse party . . .”). The Supreme Court cautioned that “such authority should be exercised sparingly[ and i]n each case, the appellate court should carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation.” *Id.* *But see Ferry v. Bekum Am. Corp.*, 185 F. Supp. 2d 1285 (M.D. Fla. 2002) (noting that the cases do not “support dropping a nondiverse *plaintiff*, over the *plaintiff’s* objection, in order to retain (or create) subject matter jurisdiction”).

But note: A court can cure a jurisdiction defect by dropping a party, but a party cannot cure a jurisdiction defect by changing its citizenship. *See Grupo Dataflux*, 541 U.S. at 582; 13 Wright & Miller § 3522, p. 142 (“[J]urisdiction is assessed as of the time the case is commenced, and thus cannot be ousted by post-filing changes of citizenship.”); 13E Wright & Miller § 3608, pp. 353–54 (discussing the *Grupo Dataflux* case).

- See also

*Tutur v. Rothschild Registry Int’l, Inc.*, 26 F.3d 304, 307–09 (2d Cir. 1994) (dismissing dispensable limited liability partner from action to preserve jurisdiction).

*Harbor Ins. Co. v. Cont’l Bank Corp.*, 922 F.2d 357 (7th Cir. 1990) (noting that, after *Newman-Green*, appellate courts can dismiss a nondiverse party even on appeal).

15 *Moore’s Federal Practice* ¶ 102.18[1] (noting that, under Rule 21, “[a] court may drop a party by order of the court on motion by any party, or of its own initiative, at any stage of the action and on any terms that are just”).

15 *Moore’s Federal Practice* ¶ 102.18[2] (noting that “[f]ederal courts of appeal have the authority, in the first instance, to dismiss a dispensable nondiverse party in order to preserve deferral jurisdiction”).

**2. The plaintiff’s formal alignment of the parties is not conclusive for the purposes of testing complete diversity; a court will realign parties based on their ultimate interests.**

A court must “look beyond the pleadings, and arrange the parties according to their sides in the dispute . . . .” *Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co.*, 197 U.S. 178 (1905) (jurisdiction lacking).

A court must align parties based on their “ultimate interests . . . .” *Hamer v. N.Y. Rys. Co.*, 244 U.S. 266 (1917) (jurisdiction lacking). In *Indianapolis v. Chase National Bank*, 314 U.S. 63, 69 (1941) the Supreme Court held that

It is our duty, as it is that of the lower federal courts, to look beyond the pleadings and arrange the parties according to their sides in the dispute. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary collision of interests exists, is therefore not to be determined by mechanical rules. It must be ascertained from the principal purpose of the suit, and the primary and controlling matter in dispute.

*Id.* at 69 (internal citations and quotations omitted) (jurisdiction lacking).

Circuit courts have developed three different tests for realignment: (1) the collision of interests test, (2) the substantial conflict test, and (3) the primary purpose test.

- See also

13E Wright & Miller § 3607, pp. 303–05, 312.

15 *Moore’s Federal Practice* ¶ 102.20[1] (“The courts, not the parties, are responsible for aligning the parties according to their interests in the litigation.”).

**a. The Second Circuit follows the collision of interests test.**

The Second Circuit follows the collision-of-interests test. “Under this test courts require the existence of an actual, substantial controversy, or a collision of interests, but the conflict may in some cases concern an issue other than the so-called primary issue in dispute.” *Md. Cas. Co. v. W.R. Grace & Co.*, 23 F.3d 617, 622 (2d Cir. 1993) (jurisdiction upheld) (citing *U.S.I. Props. Corp. v. M.D. Constr. Co.*, 860 F.2d 1, 4–5 (1st Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989); *Zurn Indus., Inc. v. Acton Constr. Co.*, 847 F.2d 234, 237–38 (5th Cir. 1988); *Am. Motorists Ins. Co. v. Trane Co.*, 657 F.2d 146, 151 (7th Cir. 1981); *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1387 (10th Cir. 1978), *cert. denied*, 439 U.S. 826 (1978); *Universal Underwriters Ins. Co. v. Wagner*, 367 F.2d 866, 870-71 (8th Cir. 1966)).

**b. The Seventh Circuit follows the substantial conflict test.**

The Seventh, Eighth, and Tenth Circuits follow the “substantial conflict” test. 15 *Moore’s Federal Practice* ¶ 102.20[4]–[5].

“Realignment is proper when the court finds that no actual, substantial controversy exists between parties on one side of the dispute and their named opponents, although realignment may destroy diversity and deprive the court of jurisdiction.” *Am. Motorists Ins. Co. v. Trane Co.*, 657 F.2d 146 (7th Cir. 1981) (jurisdiction upheld) (citing *Indianapolis v. Chase Nat’l Bank*, 314 U.S. 63 (1941)).

“[I]t is the points of substantial antagonism, not agreement, on which the realignment question must turn.” *Id.* at 151 (citing *Reed v. Robilio*, 376 F.2d 392 (6th Cir. 1967); *C.Y. Thomason v. Lumbermen’s Mut. Cas. Co.*, 183 F.2d 729 (4th Cir. 1950); *Till v. Hartford Accident and Indem. Co.*, 124 F.2d 405 (10th Cir. 1942)).

The purpose of the ultimate interests test is “to ensure that there is an actual, substantial controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side.” 13E Wright & Miller § 3607, p. 313 (internal quotation omitted).

In testing for the “parties’ real interests,” a court should test the interests from the start of the action: “the facts which form the basis for realignment must have been in existence at the time the action was commenced.” *Am. Motorists*, 657 F.2d at 149 (citing 3A *Moore’s Federal Practice* ¶ 19.03[1] (2d ed. 1980)).

“[F]ederal courts will not realign parties who are citizens of the same state simply to preserve jurisdiction if they actually belong on opposite sides of the case.” *Krueger v. Cartwright*, 996 F.2d 928, 932 n.6 (7th Cir. 1993).

- See also

*Wolf v. Kennelly*, 574 F.3d 406, 412–14 (7th Cir. 2009) (reaffirming *Am. Motorists’* holding).

### **c. The Ninth Circuit follows the primary purpose test.**

The primary purposes test requires a court to determine the primary purpose of a lawsuit and then to “align for jurisdictional purposes those parties whose interests coincide respecting the ‘primary matter in dispute.’” *Prudential Real Estate Affiliates v. PPR Realty*, 204 F.3d 867, 873 (9th Cir. 2000) (jurisdiction upheld) (quoting *Cont’l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1522–23 (9th Cir. 1987)).

### **3. Shareholder derivative suit: Even though a plaintiff in a shareholder derivative suit is suing on behalf of the corporation, a court will treat the plaintiff and the corporation as antagonistic parties.**

“[I]n stockholder derivative actions, the test usually applied is that antagonistic parties are aligned on opposite sides.” 13E Wright & Miller § 3607, p. 327 (citing *Smith v. Sperling*, 354 U.S. 91 (1957)).

A corporation should not be aligned as a plaintiff in a shareholder derivative suit “when the corporation’s officers or directors are antagonistic to the interests of the shareholder plaintiff.” 15 *Moore’s Federal Practice* ¶ 102.20[6].

Generally, an allegation of fraud or malfeasance against the corporation’s directors is sufficient to demonstrate that the corporation should be aligned as a defendant in a shareholder derivative suit. *Gabriel v. Preble*, 396 F.3d 10, 14, 15 (1st Cir. 2005) (jurisdiction lacking) (citations omitted) (noting that “[a] corporation is deemed adverse to a derivative suit when, regardless of the reason, the corporation’s management opposes the maintenance of the action” and that “courts [should] attempt to determine whether the corporation is adverse from the face of the pleadings, as opposed to launching an extended evidentiary inquiry”).

But a court can consider evidence outside of the allegations in the complaint to determine whether the corporation should be aligned as a plaintiff. *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1235–36 (9th Cir. 2008) (jurisdiction upheld). This determination, however, should only be made based on the facts as they existed at the time the complaint was filed—a court should not consider post-filing developments. *Id.* at 1236.

## **F. Time for Testing Citizenship**

### **1. In actions originally brought in federal court, a court tests citizenship of the parties for diversity as of when the plaintiff commences the action.**

“It has long been the case that the jurisdiction of the court depends upon the state of things at the time of the action brought.” *Grupo Dataflux v. Atlas Global Group, LP*, 541 U.S. 567, 570 (citation and internal quotation omitted).

- Jurisdiction Upheld

*LeBlanc v. Cleveland*, 248 F.3d 95, 100 (2d Cir. 2001) (“The fact that [plaintiff] has become a citizen of New York for diversity purposes since filing this lawsuit does not destroy diversity jurisdiction; her status at the time she filed her complaint is controlling.”)

*Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1025 (7th Cir. 2006) (noting the “rule that federal jurisdiction is (with immaterial exceptions) determined as of the date the complaint is filed”).

- See also

13E Wright & Miller § 3608, p. 340 (“It has long been hornbook law, applied by courts at all levels of the federal judicial throughout the nation, that whether federal diversity of citizenship jurisdiction exists is determined by examining the citizenship of the parties at the time the action is commenced by filing the complaint with the court as prescribed by Federal Rule of Civil Procedure 3.”)

15 *Moore’s Federal Practice* ¶ 102.32[1] (“If diversity jurisdiction is established when the complaint is filed, a subsequent change in citizenship rendering the parties nondiverse does not cause a loss of diversity for purposes of federal jurisdiction.”).

15 *Moore’s Federal Practice* ¶ 102.16[1] (noting that a post-filing change in citizenship cannot cure a defect in jurisdiction and cannot strip a court of proper jurisdiction).

**a. Rule 3 provides that a plaintiff’s filing of the complaint commences the action.**

Commencement of the action is measured, in accordance with Federal Rule 3, from the time when the complaint is filed. 13E Wright & Miller § 3608, p. 355.

This rule applies even if the jurisdiction in which the plaintiff files measures commencement from some other time. *Id.*

**2. In actions removed from state court, courts have split on when to test citizenship.**

It is an “unresolved issue . . . whether diversity of citizenship at the time the original action is filed is relevant in removal situations.” 13E Wright & Miller § 3608, p. 357. Wright & Miller and *Moore’s Federal Practice* state different rules on this issue.

Wright & Miller states that the majority of courts test for diversity only at the time when the defendant files the removal petition without consideration of the parties’ citizenship at the time the plaintiff filed in state court. 13E Wright & Miller § 3608, pp. 356–58; *see also id.* at 357–58 (“A large minority of courts require compete diversity not only when removal is sought, but also when the original action is filed in the state court.”).

*Moore’s Federal Practice*, however, states that “diversity generally must exist both when the state suit is filed and when the petition for removal is filed.” 15 *Moore’s Federal Practice* ¶ 102.16[1].

• Jurisdiction Upheld

*Spencer v. U.S. Dist. Court for the N. Dis. of Cal.*, 393 F.3d 867, 871 (9th Cir. 2004) (“Challenges to removal jurisdiction require an inquiry into the circumstances at the time the notice of removal is filed.”). Note, however, that the Ninth Circuit reviewed the district court’s finding that it had jurisdiction under the deferential “clear error” standard of review. *Id.* at 869.

• Jurisdiction Lacking

*Kanzelberger v. Kanzelberger*, 782 F.2d 774, 776–77 (7th Cir. 1986) (citations omitted) (“[T]he required diversity must exist both when the suit is filed . . . and when it is removed.”).

*But see MAS Capital, Inc. v. Biodelivery Sciences Int’l, Inc.* 524 F.3d 831, 832 (7th Cir. 2008) (jurisdiction upheld) (citing *Gibson v. Bruce*, 108 U.S. 561 (1883) (noting that time of filing notice of removal was “the time that matters” for purposes of determining diversity-of-citizenship jurisdiction).

**G. The Complete Diversity Requirement and Rule 19**

Rule 19 requires a court to join an absentee party that is indispensable to the litigation. Fed. R. Civ. P. 19(a). But a court is not required to join an indispensable party if joining that

party would destroy subject matter jurisdiction. *Id.* In such a situation, a court “must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.” *Id.* at 19(b).

- See also

13E Wright & Miller § 3608, pp. 372–73.

**1. Rule 19 indispensable party: A nondiverse, indispensable party cannot be joined or intervene.**

“The addition of an indispensable, nondiverse party defeats jurisdiction.” 15 *Moore’s Federal Practice* ¶ 102.16[2][b][i]; *Takeda v. Northwestern Nat’l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985) (jurisdiction lacking) (noting that intervention destroys diversity if the intervening party is indispensable).

**2. Rule 19 dispensable party: A dispensable, nondiverse party seeking to intervene as a defendant can intervene without destroying diversity.**

A party to be joined or seeking to intervene as a defendant, regardless of citizenship, can participate without destroying diversity. *Mattel, Inc. v. Bryant*, 446 F.3d 1011, 1014 (9th Cir. 2006) (jurisdiction upheld) (“Neither § 1332 nor § 1367 upset the long-established judge-made rule that the presence of a nondiverse and not indispensable defendant intervenor does not destroy complete diversity.”).

**3. Rule 19 dispensable party: A nondiverse, dispensable party to participate as a plaintiff can only join or intervene if that party’s interest in the litigation arose after the commencement of the action.**

Generally, a would-be intervenor plaintiff seeking to intervene in a case where jurisdiction is supported by diversity of citizenship must be diverse to all defendants. *See* 13E Wright & Miller § 3608, pp. 369–71 (“The supplemental jurisdiction statute effectively eliminates ancillary jurisdiction over claims by intervenors as of right seeking to be joined as plaintiffs; as a result, their citizenship becomes relevant in redetermining diversity of citizenship jurisdiction.”).

There is an exception to this rule. Consistent with the notion that courts are seeking to prevent jurisdictional manipulation, courts have allowed the joinder or intervention of a party whose interest in the litigation arose after the commencement of the action. *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1025 (7th Cir. 2006) (jurisdiction upheld) (allowing dispensable nondiverse party to intervene “to protect an interest that arose during the course of a federal litigation in which [it] had no stake at the outset”); *see also Burka v. Aetna Life Ins. Co.*, 87 F.3d 478, 482–83 (D.C. Cir. 1996) (jurisdiction upheld) (allowing addition of dispensable, nondiverse party as defendant under Rule 25(c) because an interest was transferred to the party after the action was commenced). *But see Griffin v. Lee*, 621 F.3d 380, 387 & n.2 (5th Cir. 2010) (not allowing would-be intervenor plaintiff to assert claim below the jurisdictional amount when would-be intervenor plaintiff could assert claim in separate action and would therefore “would not have been bereft of a remedy absent such intervention”).

- See also

15 *Moore's Federal Practice* ¶ 102.16[2][b][ii] (“The addition of a dispensable, nondiverse party who did not have an interest in the original complaint at the time it was filed does not destroy diversity jurisdiction.”).

## **H. Parties Whose Citizenship a Court Must Test**

### **1. A court will only consider the named parties with a real interest in the litigation.**

“[A] federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.” *Navarro Savs. Ass'n v. Lee*, 446 U.S. 458, 461 (1980) (jurisdiction upheld).

“A real-party-in-interest defendant is one who, according to applicable substantive law, has the duty sought to be enforced or enjoined.” 15 *Moore's Federal Practice* ¶ 102.15.

- Jurisdiction Upheld

*Prudential Real Estate Affiliates v. PPR Realty*, 204 F.3d 867, 873 (9th Cir. 2000) (citations and internal quotations omitted) (“We will ignore the citizenship of nominal or formal parties who have no interest in the action, and are merely joined to perform the ministerial act of conveying the title if adjudged to the complaint.”).

- See also

*St. Paul Fire & Marine Ins. Co v. Universal Builders Supply*, 409 F.3d 73, 80 (2d Cir. 2005) (dismissing nondiverse party to preserve jurisdiction) (citing *Navarro*, 446 U.S. at 460).

*Matchett v. Wold*, 818 F.2d 574, 576 (7th Cir. 1987) (remanding to district court to determine jurisdiction) (“The addition to a lawsuit of a purely nominal party—the holder of the stakes of the dispute between the plaintiff and the original defendant—does not affect diversity jurisdiction.”).

13E Wright & Miller § 3606, p. 231.

15 *Moore's Federal Practice* ¶ 102.15 (“As a matter of federal law, a plaintiff must base diversity jurisdiction on the citizenship of real and substantial parties to the controversy.”).

### **2. An absentee party that is indispensable under Rule 19 must be considered.**

Rule 19(a) requires a court to join a party that is necessary to “accord complete relief among existing parties.” Fed. R. Civ. P. 19(a)(1). “The complete diversity requirement applies fully to parties joined under Rule 19.” *Sta-Rite Indus., Inc. v. Allstate Ins. Co.*, 96 F.3d 281, 285 (7th Cir. 1996) (jurisdiction lacking) (citations and internal quotations omitted). Therefore, a party that is necessary to an action and joined under Rule 19(a) can destroy complete diversity.

If a party to be joined under Rule 19(a) would destroy complete diversity, Rule 19(b) requires the court to determine whether “in equity and good conscience, the action should proceed among the existing parties or should be dismissed.” Fed. R. Civ. P. 19(b).

- See also

13E Wright & Miller § 3606, pp. 256, 262.

### **3. A court will not consider the citizenship of unnamed class members.**

“Under current doctrine, if one member of a class is of diverse citizenship from the class’ opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State.” *Snyder v. Harris*, 394 U.S. 332, 340 (1969) (jurisdiction lacking).

But Note: Although not covered here, the Class Action Fairness Act has special rules for jurisdiction in class actions.

### **4. In a removal action, a court will not consider the citizenship of a nondiverse defendant who was made party to the action by the plaintiff’s “fraudulent or collusive joinder.”**

“[I]t is well-settled by a very large number of cases decided throughout the federal judicial system that the fraudulent or collusive joinder of a defendant of the same citizenship as the plaintiff in a state court action—as determined by a standard described in terms of there being no reasonable basis on which to believe recovery against the nondiverse opponent could be secured—will not defeat removal of an action.” 13E Wright & Miller § 3606, p. 243; *see also* 13F Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3641.1 (comprehensive discussion of fraudulent joinder) [hereinafter, 13F Wright & Miller].

To show fraudulent joinder, “a removing defendant must prove either that (1) there is no possibility that the plaintiff will be able to establish a cause of action against the nondiverse defendant in state court, or (2) there has been outright fraud in the plaintiff’s pleadings of jurisdictional facts.” 15 *Moore’s Federal Practice* ¶ 102.21[5][a].

Additionally, some courts have recognized that a nondiverse defendant may be fraudulently joined when the claims against a nondiverse defendant lack a sufficient connection to the claims against the diverse defendant. 15 *Moore’s Federal Practice* ¶ 102.21[5][a]. Courts refer to this as “fraudulent misjoinder.” *Fed. Ins. Co. v. Tyco Int’l*, 422 F. Supp. 2d 357, 378–79 (S.D.N.Y. 2006) (jurisdiction lacking).

- Jurisdiction Upheld

*Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001) (citation and internal quotations omitted) (noting that a “plaintiff may not defeat a federal court’s diversity jurisdiction and a defendant’s right of removal by merely joining as defendants parties with no real connection with the controversy”).

*Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998) (“The defendant seeking removal bears a heavy burden of proving fraudulent joinder, and all factual and legal issues must be resolved in favor of the plaintiff.”).

*Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993) (citations omitted) (noting, in adjudicating motion for sanctions, that “[i]n determining whether there is diversity of citizenship, parties fraudulently joined are disregarded”)

*Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) (citing *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) (internal quotation omitted) (noting that “[j]oinder of a non-diverse defendant is deemed fraudulent, and the defendant’s presence in the lawsuit is ignored for purposes of determining diversity, if the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state”).

## **I. Determining the Citizenship of Natural Persons**

### **1. A natural person is considered a citizen of his or her state of domicile.**

“[A] person is considered a citizen of a state if that person is domiciled within that state and is a citizen of the United States.” 13E Wright & Miller § 3611, pp. 465–67; *Gilbert v. Davis*, 235 U.S. 561, 569 (1915) (jurisdiction lacking) (“If the plaintiff was domiciled in the State of Michigan when this suit was begun, he was a citizen of that state within the meaning of the Judicial Code.”); *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983) (jurisdiction lacking) (citations omitted) (“To show state citizenship for diversity purposes under federal common law a party must (1) be a citizen of the United States, and (2) be domiciled in the state.”).

- Jurisdiction Upheld

*Galva Foundry Co. v. Heiden*, 924 F.2d 729, 730 (7th Cir. 1991) (internal citations omitted) (“[T]here is no statutory definition of an individual’s state of citizenship. But the courts have held that it is the state of the individual’s domicile—the state he considers his permanent home.”).

- See also

*Durant, Nichols, Houston, Hodgson & Cortese-Costa, P.C. v. Dupont*, 565 F.3d 56, 63 (2d Cir. 2009) (remanded to state court for further fact finding on jurisdiction) (“[I]t must be determined whether at the time the present action was commenced there was diversity jurisdiction, that is, whether Dupont was a citizen of . . . a state other than the state in which Durant–Nichols was incorporated and the state in which it had its principal place of business.”).

13E Wright & Miller § 3611, p. 465 (citing *Gilbert v. David*, 235 U.S. 561 (1915)).

15 *Moore’s Federal Practice* ¶ 102.34[1]–[2].

**2. A domicile (1) is where a person has a fixed home and, when away, plans on returning; and (2) continues until a new one is acquired.**

An individual establishes a domicile “by physical presence in a place in connection with a certain state of mind concerning one’s intent to remain there.” *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

A person has only one domicile at any time. *See Williamson v. Osenton*, 232 U.S. 619, 625 (1914) (“The very meaning of domicil[e] is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined.”).

Courts consider multiple factors in determining a natural person’s domicile. Factors relevant to a natural person’s domicile include: “the party’s current residence; voter registration and voting practices; situs of personal and real property; location of brokerage and bank accounts; membership in unions, fraternal organizations, churches, clubs, and other associations; place of employment or business; driver’s license and automobile registration; payment of taxes; as well as several other aspects of human life and activity.” 13E Wright & Miller § 3612, pp. 536–541.

A person only acquires a new domicile with physical presence in a new location and intent to remain there. *Sun Printing and Publ’g Ass’n. v. Edwards*, 194 U.S. 377, 383 (1904) (“[I]t is elementary that, to effect a change of one’s legal domicil[e], two things are indispensable: First, residence in a new domicil[e]; and, second, the intention to remain there.”).

An executor or a guardian is considered to be a citizen only of the state of the individual the executor or guardian represents in the litigation. 28 U.S.C. § 1332(c)(2) (“[T]he legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.”).

- See also

13E Wright & Miller § 3612, p. 559 (noting that “a domicile once established continues unless and until a new one is shown by clear and convincing evidence to have been acquired”).

13E Wright & Miller § 3613, p. 573 (discussing the test for a change in domicile).

13E Wright & Miller § 3606, p. 280 (discussing the citizenship of an executor of an estate and a guardian).

15 *Moore’s Federal Practice* ¶ 102.34[8] (noting that residence in a place is not sufficient to establish a domicile).

15 *Moore’s Federal Practice* ¶ 102.34[7] (noting that a domicile continues until it is changed).

15 *Moore’s Federal Practice* ¶ 102.34[10] (noting that there is no minimal residency time requirement for a domicile).

## J. Unincorporated Associations

### 1. A court will consider the citizenship of all the members of an unincorporated association and will deem the unincorporated association a citizen of every state that a member is a citizen.

The Supreme Court has held that, for artificial entities that are not corporations, “diversity jurisdiction in a suit by or against the entity depends on the citizenship of all the members.” *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195–96 (1990) (citations and internal quotation omitted) (holding that a court must consider the citizenship of all of the members).

This includes limited liability companies. *Wise v. Wachovia Secs., LLC*, 450 F.3d 265, 267 (7th Cir. 2006) (citations omitted) (jurisdiction upheld) (“The citizenship for diversity purposes of a limited liability company, however, despite the resemblance of such a company to a corporation (the hallmark of both being limited liability), is the citizenship of each of its members.”).

But a professional corporation is treated as a corporation. *Hoagland v. Sandberg, Phoenix & Von Gontard, P.C.*, 385 F.3d 737, 741 (7th Cir. 2004) (jurisdiction upheld) (noting that “a judicial consensus has . . . emerged that all corporations are to be treated the same way in determining citizenship for diversity purposes”); *see also Saxe, Bacon & Bolan, P.C. v. Martindale–Hubbell, Inc.*, 710 F.2d 87, 89–90 (2d Cir. 1983).

When a party that is an unincorporated association is itself composed of unincorporated associations, the citizenships of those members is considered. *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) (jurisdiction upheld) (examining the citizenship of the members that made up two LLCs to determine the citizenship of the LP that was a party).

But note: Whether to treat a corporation that has lost its corporate charter as a corporation or an unincorporated business firm will depend on state law. *Wild v. Subscription Plus, Inc.*, 292 F.3d 526 (7th Cir. 2002).

In *Wild*, the plaintiff brought suit against several defendants in federal court asserting that diversity of citizenship supported jurisdiction. *Id.* at 527–28. Before the plaintiff had filed the suit, however, one of the defendant corporations had had its corporate charter revoked. *Id.* at 528. Because a business firm lacking corporate status is a citizen of the states of all of its members, the court needed to determine whether a defendant that had lost its corporate charter prior to the plaintiff’s filing of the suit should be treated as a corporate entity for the purposes of diversity-of-citizenship jurisdiction. In holding that the defendant should be treated as an incorporated entity, the court noted that state law (1) allowed a corporation that lost its charter to continue to sue and be sued as a corporation and (2) made reinstatement of a corporation’s charter retroactive. *Id.* at 528–29.

- Jurisdiction Lacking

*Handlesman v. Bedford Village Assocs. Ltd. P’ship*, 213 F.3d 48, 52 (citations omitted) (2d Cir. 2000) (“Similarly, defendants Bedford Partnership and Bedford LLC are, for diversity purposes, citizens of Florida because both entities have Florida members.”).

- See also

13F Wright & Miller § 3630, pp. 207–08.

13F Wright & Miller § 3630.1, pp. 223–37 (noting that this general rule requiring consideration of all members’ citizenship applies to a “partnership, a limited partnership, a joint venture, a joint stock company, a labor union, a religious or charitable organization, a governing board of an unincorporated institution, or a similar association”).

13F Wright & Miller § 3630.1, p. 241 (discussing limited liability companies).

15 *Moore’s Federal Practice* ¶ 102.56[11] (discussing professional corporations).

**a. Business Trust: The Seventh and Ninth Circuits consider the citizenship of the trustees to determine citizenship of a business trust.**

“[T]he Sixth, Seventh, Ninth, and Tenth Circuits have [held] that a trust’s citizenship is determined by the citizenship of the trustees.” 13F Wright & Miller § 3630.1, p. 249.

- Jurisdiction Upheld

*Hicklin Eng’g, LC v. Bartell*, 439 F.3d 346 (7th Cir. 2006) (“The citizenship of a trust is that of the trustee.”).

*Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (“A trust has the citizenship of its trustee or trustees.”).

## **K. Corporate Citizenship**

“[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .” 28 U.S.C. § 1332(c)(1).

### **1. A corporation is a citizen in its state of incorporation.**

The Supreme Court has held that a court must “conclusively (and artificially) presume that a corporation’s shareholders were citizens of the State of incorporation.” *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1188 (2010) (citations omitted).

This presumption allows courts to “consider[] a corporation to be a citizen of the State of its incorporation.” *Id.* (citing 13F Wright & Miller § 3623, pp. 1–7).

But note: This presumption of shareholder citizenship does not apply to plaintiffs in shareholder derivative suits. A court must test the individual plaintiffs to determine their actual citizenship. 13F Wright & Miller § 3623, p. 22 (citing *Doctor v. Harrington*, 196 U.S. 579 (1905)).

- See also

13F Wright & Miller § 3623, p. 6 (noting that Supreme Court has established “conclusive presumption that all of the stockholders of a corporation are citizens of the state of incorporation”).

**a. When a corporation is incorporated in multiple states, most courts hold that the corporation is a citizen of each state of incorporation.**

Most courts will treat a corporation that is incorporated in multiple states as a corporation of each state of incorporation. For example, “if a citizen of Massachusetts sues a company incorporated in New York and Massachusetts, there is no subject matter jurisdiction . . . . This is the rule applied by most federal courts.” 13F Wright & Miller § 3626, p. 145.

“[A] multi-state corporation is deemed a citizen of every state in which it has been incorporated.” *Yancoskie v. Del. River Port Auth.*, 528 F.2d 722, 727 n.17 (3d Cir. 1975).

When a state requires a corporation to incorporate in that state to do business, i.e., when this incorporation acts as a license to do business, a court will not consider the corporation a citizen of that state for the purposes of diversity jurisdiction. 15 *Moore’s Federal Practice* ¶ 102.53[3].

Deeming a corporation to be a citizen of every state in which it is incorporated is contrary to the old “forum doctrine” approach. Under the “forum doctrine” approach, “if suit was brought by or against a corporation with multiple states of incorporation in one of its states of incorporation, for diversity purposes the company would be treated as if it were only a citizen of the forum state.” 13F Wright & Miller § 3626, p. 146.

For example, under the “forum doctrine”:

[I]f a Massachusetts citizen had sued a Delaware and Massachusetts corporation in a federal court in Delaware, diversity would have existed because the corporation would have been considered a citizen solely of Delaware; however, if the action had been brought in a Massachusetts federal court, there would have been no diversity because the suit would have been treated as one between two Massachusetts citizens.

13F Wright & Miller § 3626, p. 147.

Wright & Miller states that “it may be argued rather forcefully . . . that a corporation is to be deemed a citizen of every state by which it has been incorporated for diversity of citizenship

purposes.” *Id.* at 158 (citing *Delphi Auto. Sys., LLC v. Segway, Inc.*, 519 F. Supp. 2d 662 (E.D. Mich. 2007)).

*Moore’s Federal Practice* states that the “forum doctrine” has been abrogated:

Today, although the Supreme Court has never addressed the issue, it is clear that the forum doctrine was abrogated by the 1958 amendments [to § 1332]. Although the matter was seriously debated for a number of years, and an occasional district court held to the contrary, the universal view over recent years has been to find abrogation.

15 *Moore’s Federal Practice* ¶ 102.53[2].

**b. When corporations merge, a court will treat the merged corporation as a citizen of the surviving entity’s state of incorporation.**

When two corporations merge, courts have held that citizenship of the corporation extinguished by the merger does not affect the diversity determination—*i.e.*, only the citizenship of the surviving entity needs to be diverse. *Hoefflerle Truck Sales, Inc. v. Divco-Wayne Corp.*, 523 F.2d 543, 549 (7th Cir. 1975) (jurisdiction upheld).

- See also

3F Wright & Miller § 3623, p. 33.

**c. A court will treat an unincorporated division as a citizen of the same state as the corporation.**

The citizenship of an unincorporated division is determined by the citizenship of the owning corporation. *Wis. Knife Works v. Nat’l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986) (jurisdiction upheld) (citation omitted) (“Although a division may, if state law permits, sue and be sued in its own name, the state of which it is a citizen for purposes of determining diversity is the state of which the corporation that owns the division is a citizen.”).

- See also

*United Computer Capital Corp. v. Secure Prods., L.P.*, 218 F. Supp. 2d 273, 279 (N.D.N.Y. 2002) (“The state of citizenship of which an unincorporated division of a corporation is a citizen for the purposes of determining diversity is the state of which the corporation that owns the division is a citizen.”).

13F Wright & Miller § 3624, p. 61.

**2. A corporation is also a citizen of the state where it has its principal place of business—its “nerve center.”**

Under 28 U.S.C. § 1332(c)(1), a corporation “shall be deemed to be a citizen of . . . the State where it has its principal place of business.” 28 U.S.C. § 1332(c)(1).

The principal-place-of-business citizenship is intended to ensure that a corporation that operates locally cannot remove to federal court—a corporation that operates locally has no reason to fear local prejudice. 15 *Moore’s Federal Practice* ¶ 102.50.

In 2010, the Supreme Court held that a corporation’s principal place of business is its “nerve center”: “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities.” *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010). This will usually be “the place where the corporation maintains its headquarters.” *Id.* The Supreme Court emphasized that this rule was justified on “administrative simplicity.” *Id.* at 1193.

- See also

13F Wright & Miller § 3624, p. 38.

**a. The principal-place-of-business citizenship means that most corporations will have dual citizenship.**

As noted above, § 1332(c)(1) establishes that “a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .” 28 U.S.C. § 1332(c)(1).

This means that “most corporations” will have “dual citizenship.” 13F Wright & Miller § 3624, p. 45.

The party invoking federal jurisdiction cannot choose between the two citizenships. 13F Wright & Miller § 3624, p. 58.

Because § 1332(c)(1) implies that a corporation will always have a “State” as its principal place of business, it has been argued that a corporation with a foreign principal place of business should not be treated as a “corporation” under § 1332. This argument has been rejected. *MAS Capital, Inc. v. Biodelivery Sciences Int’l*, 524 F.3d 831, 832–33 (7th Cir. 2008) (citing *Torres v. S. Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553 (11th Cir. 1989)). In *MAS Capital*, the court explained the reason for this rule: “[I]t seems to us more compatible with the structure of § 1332 to treat corporations as corporations, and then track down as many citizenships as each has, rather than to treat entities organized as corporations as if they were something else.” *Id.* at 833 (citations omitted).

- Jurisdiction Upheld

*Smoot v. Mazda Motors of Am., Inc.*, 469 F.3d 675, 676 (7th Cir. 2006) (“A corporation . . . has two places of citizenship: where it is incorporated, and where it has its principal place of business.”).

*United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 763 (9th Cir. 2002) (citations and internal quotations omitted) (“[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.”).

- Jurisdiction Lacking

*Universal Licensing Corp. v. Paola del Lungo*, 293 F.3d 579, 581 (2d Cir. 2002) (“For diversity purposes, a corporation is deemed to be a citizen both of the state in which it has its principal place of business and of any state in which it is incorporated.”).

- See also

13F Wright & Miller § 3624, p. 45.

15 *Moore’s Federal Practice* ¶ 102.50 (“Section 1332(c) does not give a party the option of treating a corporation as a citizen of *either* the state of incorporation or the state where its principal place of business is located. Rather, the statute treats a corporation as a citizen of *both* states.”).

**b. Incorporated subsidiary: A court will deem an incorporated subsidiary to be a citizen of the state where it has its own state of incorporation and own principal place of business unless the incorporated subsidiary is the alter ego or agent of the parent corporation.**

When a subsidiary is formally separated from its parent, a court will treat the subsidiary as a separate entity for the purposes of diversity jurisdiction: “When formal separation is maintained between a corporate parent and its corporate subsidiary, federal court jurisdiction over the subsidiary is determined by that corporation’s citizenship, not the citizenship of the parent.” *Schwartz v. Elec. Data Sys., Inc.*, 913 F.2d 279, 283 (6th Cir. 1990) (jurisdiction upheld).

This rule applies “even if the parent corporation exerts a high degree of control through ownership or otherwise, and even if the separateness is perhaps only formal.” *U.S.I. Props. Corp. v. M.D. Constr. Co., Inc.*, 860 F.2d 1, 7 (1st Cir. 1988) (jurisdiction upheld) (citing *Topp v. Compare, Inc.*, 814 F.2d 830, 835 (1st Cir. 1987)).

A subsidiary will not be treated separately for the purposes of diversity jurisdiction if it is merely the “alter ego” of the corporate parent and not in fact a separate corporate entity. *U.S.I. Props.*, 860 F.2d at 7 (noting that the subsidiary is treated separately “if the corporate separation is real and carefully maintained”).

Courts generally will not attribute the citizenship of a subsidiary to the parent, even when (1) the subsidiary is the parent’s alter ego and (2) the “parent’s liability arises from acts of a subsidiary.” *Pyramid Secs. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1120 (D.C. Cir. 1991) (jurisdiction upheld); *Danjaq, SA v. Pathe Commc’ns Corp.*, 979 F.2d 772, 775 (9th Cir. 1992) (diversity lacking) (holding that “the citizenship of a parent is distinct from its subsidiary where . . . there is no evidence of an alter ego relationship”); *but see Nauru Phosphate Royalties, Inc. v.*

*Drago Diac Interests, Inc.*, 138 F.3d 160, 164 (5th Cir. 1998) (jurisdiction upheld) (citing *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 290–91 (5th Cir. 1989)) (noting that the Fifth Circuit has “attributed a subsidiary’s citizenship to its parent company in *alter ego* situations where the subsidiary’s wrongful conduct is at issue”).

The “alter ego” doctrine does not “supplant” the citizenship of a parent or a subsidiary’s state of incorporation; rather, the “alter ego” doctrine will expand a corporation’s citizenships. 15 *Moore’s Federal Practice* ¶ 102.56[7][b].

- See also

13F Wright & Miller § 3625, pp. 127–31 (discussing incorporated subsidiaries).

15 *Moore’s Federal Practice* ¶ 102.56[7][a] (“As a general rule . . . , for the purposes of diversity jurisdiction, a subsidiary maintains a separate corporate character and does not adopt the citizenship of its parent corporation.”).

**c. Courts have not reached a consensus on the “principal place of business” citizenship of a dissolved corporation.**

“When a corporation is dissolved, the federal courts look to state law to determine which claims and remedies survive against the corporation.” 13F Wright & Miller § 3623, p. 30.

When state law provides that the dissolved corporation will continue as a corporation for the purposes of suing and being sued, a court will continue to treat that dissolved corporation as a corporation. *Ripalda v. Am. Operations Corp.*, 977 F.2d 1464, 1468 (D.C. Cir. 1992) (vacating district court’s ruling that it lacked jurisdiction and remanding for further consideration). The *Ripalda* court collected cases supporting this holding. *See id.* Under this approach, the dissolved corporation is still a citizen where it has its principal place of business. *See id.* at 1469.

This treatment is not uniform, however, and at least one court has held that a dissolved corporation’s citizenship must be determined by the citizenship of its trustees. *See Am. Nat’l Bank of Jacksonville v. Jennings Dev’t, Inc.*, 432 F. Supp. 141 (M.D. Fla. 1977) (jurisdiction upheld). “The case law on this subject as of 2009 was still evolving and federal courts have reached different decisions.” 13F Wright & Miller § 3623, p. 31.

One federal district court in Illinois has combined the two approaches:

First, if the law under which a dissolved corporation was incorporated permits the corporation, after dissolution, to sue and be sued in its own name, the dissolved corporation’s citizenship is determined by the state where the corporation was incorporated and the state where the corporation maintained its principal place of business.

Second, if the law under which a dissolved corporation was incorporated does not permit the corporation to sue and be sued in its own name after dissolution, then the citizenship of the dissolved

corporation for diversity purposes is the citizenship of the trustee or trustees of the dissolved corporation.

*Colon v. SmithKline Beecham Corp.*, Civil No. 09-1073-GPM, 2010 WL 46523, \*3 (S.D. Ill. Jan. 5, 2010) (emphasis and spacing added, internal citations omitted) (jurisdiction lacking) (corporate status under Delaware statutes).

**d. Courts have not reached a consensus on the “principal place of business” citizenship of an inactive corporation.**

Courts have not reached a consensus on the citizenship of inactive corporations. 13F Wright & Miller § 3624, pp. 54–58; *see also* 15 *Moore’s Federal Practice* ¶ 102.56[3].

The Second Circuit holds that an inactive corporation is a citizen where it last transacted business and its state of incorporation. *William Passalacqua Builders v. Resnick Developers*, 933 F.2d 131 (2d Cir. 1991).

Other circuits have held that a corporation is only a citizen of its state of incorporation. *See, e.g., Midlantic Nat’l Bank v. Hansen*, 48 F.3d 693, 696 (3rd Cir. 1995) (jurisdiction upheld) (“[W]e conclude that as a general matter, an ‘inactive’ corporation (that is, a corporation conducting no business activities) has no principal place of business, and is instead a citizen of its state of incorporation only.”).

District courts within the Ninth Circuit are split on whether an inactive corporation has “principal place of business” citizenship. 15 *Moore’s Federal Practice* ¶ 102.56[3][f].

- Jurisdiction Upheld

*O’very v. Sepctratek Techs., Inc.*, No. CV 03-0540 CBM (PJWx), 2003 WL 25781232 \* 2 (C.D. Cal. Aug. 7, 2003). In *O’very*, the court noted that the Ninth Circuit had “not addressed the issue of a dissolved corporation’s citizenship for diversity purposes.” *Id.* The court cited *Ripalda*, and relying on Utah state law, held that the dissolved corporation was a citizen of its state of incorporation. *Id.* at \*3.

- Jurisdiction Lacking

*Muro v. Abel Freight Lines, Inc.*, No. 91 C 6893, 1992 WL 67816 \*1 (N.D. Ill. Mar. 26, 1992) (citations omitted) (dissolved corporate status under Illinois statutes) (noting that “[o]ther courts have agreed that dissolving corporations which are suing or being sued in their own names are deemed citizens of the state in which they had been incorporated for purposes of determining whether diversity jurisdiction exists”).

- See also

13F Wright & Miller § 3623, p. 33 n.51 and accompanying text (noting that several courts have held that a corporation retains its principle place of business for some time after it is dissolved).

13F Wright & Miller § 3623, pp. 31–33 (noting that courts have not yet conclusively determined whether a dissolved corporation should be considered a citizen of its original state of incorporation).

- e. Alien corporation: no clear rule, but a court will generally deem an alien corporation to be a citizen of a state in the United States only if that state is the corporation’s worldwide principal place of business.**

Section 1332(c), which creates dual citizenship for a corporation, creates principal-place-of-business citizenship for a firm incorporated outside of the United States. *Jerguson v. Blue Dot Inv., Inc.*, 659 F.2d 31, 35 (5th Cir. 1981) (jurisdiction lacking) (“We . . . hold that a foreign corporation is a citizen for diversity jurisdiction purposes of a state where it has its principal place of business.”).

Most courts will hold that a corporation only has “principal place of business” citizenship in the United States if a state within the United States is the corporation’s worldwide principal place of business. *See, e.g., Bailey v. Grand Trunk Lines New England*, 805 F.2d 1097, 1100–01 (2d Cir. 1986).

Similarly, a domestically incorporated corporation does not lose its domestic citizenship if its principal place of business is outside the United States. *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989) (jurisdiction upheld) (“We . . . find that [a party’s] possible [foreign] principal place of business would not destroy diversity jurisdiction.”).

- Jurisdiction Upheld

*MAS Capital v. Biodelivery Sciences Int’l*, 524 F.3d 831 (7th Cir. 2008).

- See also

13F Wright & Miller § 3628 (discussing alien corporations generally).

13F Wright & Miller § 3625, p. 138.

13F Wright & Miller § 3627, p. 170.

13F Wright & Miller § 3630.1, pp. 247–251.

15 *Moore’s Federal Practice* ¶ 102.50 (“[A] corporation incorporated in the United States with a principal place of business abroad is a citizen solely of the state of incorporation.”).

15 *Moore’s Federal Practice* ¶ 102.55[1] (discussing the applicability of § 1332(c)’s dual citizenship to corporations incorporated in a foreign country).

## **L. Amount in Controversy**

In addition to the requirement of complete diversity, 28 U.S.C. § 1332 also requires an amount in controversy above \$75,000: “The district courts shall have original jurisdiction of all

civil actions where the matter in controversy exceeds the sum or value of \$75,000 . . . .” 28 U.S.C. § 1332.

### **1. The party invoking federal jurisdiction has the burden of proving that jurisdictional requirements have been met.**

As is true with other jurisdictional requirements, the burden of demonstrating that the amount in controversy is above the jurisdictional threshold rests on the party asserting federal jurisdiction. 15 *Moore’s Federal Practice* ¶ 102.107[1].

The defendant or the court on its own can challenge the sufficiency of the plaintiff’s statement of the jurisdictional amount. 14AA Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3702, p. 317 (4th ed. 2011) [hereinafter 14AA Wright & Miller].

The parties “are not free simply to agree that the jurisdictional amount requirement has been satisfied, since parties cannot by stipulation or any other mechanism confer subject matter jurisdiction on the federal courts. . . .” 14AA Wright & Miller § 3702, p. 320.

- Jurisdiction Lacking

*Tongkook Am., Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 784 (2d Cir. 1994) (citation and internal quotation omitted) (“A party invoking the jurisdiction of the federal court has the burden of proving that it appears to a reasonable probability that the claim is in excess of the statutory jurisdictional amount.”).

- Jurisdiction Found

*Scherer v. The Equitable Life Assurance Society of the United States*, 347 F.3d 394, 397 (2d Cir. 2003) (citation and internal quotation omitted) (“A party invoking the jurisdiction of the federal court has the burden of proving that it appears to a reasonable probability that the claim is in excess of the statutory jurisdictional amount.”).

- See also

14AA Wright & Miller § 3702.2, pp. 340 (“Once the propriety of the amount in controversy is challenged, the party seeking to invoke the subject matter jurisdiction of the federal courts, either as an original action or by way of removal, has the burden of proving its existence under the [legal certainty test] . . . .”).

### **2. Legal Certainty Test**

- a. In actions filed in federal court, a plaintiff generally satisfies the amount-in-controversy requirement by pleading, in good faith, an amount above the jurisdictional threshold.**

When a plaintiff pleads, in good faith, a particular amount above the jurisdictional threshold, a court will recognize a rebuttable presumption that the amount-in-controversy

requirement has been satisfied. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89 (1938) (“[U]nless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith.”) (jurisdiction upheld); *Scherer v. The Equitable Life Assurance Society of the United States*, 347 F.3d 394, 397 (2d Cir. 2003) (jurisdiction upheld).

To overcome this rebuttable presumption, the defendant must show “to a legal certainty that the amount recoverable does not meet the jurisdictional threshold.” *Scherer*, 347 F.3d at 397 (citation and internal quotation omitted).

- Jurisdiction Upheld

*Meridian Secs. Ins. Co. v. Sadowski*, 441 F.3d 536, 541 (7th Cir. 2006).

*Scherer*, 347 F.3d at 397 (2d Cir. 2003) (quoting *Wolde-Meskel v. Vocational Instruction Project Cmty. Servs., Inc.*, 166 F.3d 59, 63 (2d Cir. 1999) (“This burden is hardly onerous, however, for we recognize a ‘rebuttable presumption that the face of the complaint is a good faith representation of the actual amount in controversy.’”)).

- Jurisdiction Lacking

*Pachinger v. MGM Grand Hotel*. 802 F.2d 362, 363 (9th Cir. 1986) (“The amount in controversy is normally determined from the face of the pleadings.”).

### **b. Application of the “legal certainty” test.**

The Seventh Circuit has summarized how this test works in practice:

[A] proponent of federal jurisdiction must, if material factual allegations are contested, prove those jurisdictional facts by a preponderance of the evidence. Once the facts have been established, uncertainty about whether the plaintiff can prove its substantive claim, and whether damages (if the plaintiff prevails on the merits) will exceed the threshold, does not justify dismissal. Only if it is “legally certain” that the recovery (from plaintiff’s perspective) or cost of complying with the judgment (from defendant’s) will be less than the jurisdictional floor may the case be dismissed.

*Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 543 (7th Cir. 2006) (citations omitted).

“[O]nly three situations clearly meet the legal certainty standard for purposes of defeating the court’s subject matter jurisdiction on that basis: (1) when the terms of a contract limit the plaintiff’s possible recovery to less than the jurisdictional amount; (2) when a specific rule of substantive law or measure of damages limits the amount of money recoverable by the plaintiff to less than the necessary number of dollars to satisfy the requirement; and (3) when independent

facts show that the amount of damages claimed has been inflated by the plaintiff merely to secure federal court jurisdiction.” 14AA Wright & Miller § 3702, pp. 822-28.

In the Second Circuit, “the legal impossibility of recovery must be so certain as virtually to negate the plaintiff’s good faith in asserting the claim.” *Scherer*, 347 F.3d 397, 402 (citation and internal quotation omitted) (jurisdiction found); *see also Tongkook Am., Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 785–86 (2d Cir. 1994).

- Jurisdiction Upheld

*Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961) (citation and internal quotation omitted) (“The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed in good faith.”).

- See also

*United Food, Local 919 v. CenterMark Props. Meriden Square, Inc.*, 30 F.3d 298, 304–06 (2d Cir. 1994) (holding that court lacked diversity jurisdiction but remanding to district court for further proceedings on federal question jurisdiction).

15 *Moore’s Federal Practice* ¶ 102.106[1] (“Under this rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. A rebuttable presumption exists that the face of the complaint is a good faith representation of the actual amount in controversy.”).

15 *Moore’s Federal Practice* ¶ 102.107[1]. Once a defendant or the court challenges the plaintiff’s invocation of federal jurisdiction, the plaintiff must satisfy the legal certainty test described above. “[T]he plaintiff must demonstrate that there is a *possibility* of recovering more than the jurisdictional minimum, and must do so by a preponderance of the evidence supported by competent proof.” *Id.* at 102-186 to 102-187.

### **3. The amount in controversy is tested at the time when the complaint is filed.**

“Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.” *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 290–91 (1938) (jurisdiction found).

Further, “[t]he inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction.” *Id.* at 289.

But note: A court can assess costs if the actual recovery is below the jurisdictional threshold. Section 1332 states that, “where the plaintiff who files the case originally in the Federal Courts is finally adjudged to be entitled to recover less than the sum or value of \$75,000 . . . the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.” 28 U.S.C. § 1332(b); *Fischer v. First Chicago Capital Mkts., Inc.*, 195 F.3d 279, 285 (7th Cir. 1999) (noting the possibility of shifting costs for a failure to meet the jurisdictional threshold).

But note: When a court dismisses one claim that is a part of the case, the total amount in controversy for the case may be lowered. There is a division of authority whether a court has discretion to dismiss an entire case after the amount in controversy is lowered by the court's dismissing of a claim that is a part of the larger case.

The D.C. Circuit and the Fourth Circuit have held that, in certain circumstances, a court has discretion to dismiss an entire action after the court has dismissed a claim when dismissing that claim causes the amount in controversy to fall below the jurisdictional threshold. *Shanaghan v. Cahill*, 58 F.3d 106, 112–13 (4th Cir. 1995) (“[W]e leave it to the sound judgment of the district court to decide whether to exercise jurisdiction over residual liquidated claims under \$50,000, so long as it was not a legal certainty from the outset that the plaintiff had no business being in federal court.”); *Stevenson v. Severs*, 158 F.3d 1332, 1334 (D.C. Cir. 1998).

The Second Circuit has held that the *Shanaghan* court was incorrect, *Wolde-Meskel v. Vocational Instruction Project Cmty. Sers.*, 166 F.3d 59, 64–65 (2d Cir. 1999), and the Seventh Circuit has questioned the *Shanaghan* decision, *Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118, 1121 (7th Cir. 1998) (in dicta) (“We doubt that [*Shanaghan*] comports with the diversity statute and the cases that interpret to permit aggregation of claims.”).

- Jurisdiction Upheld

*Wolde-Meskel*, 166 F.3d at 62 (“Satisfaction of the § 1332(a) diversity requirements (amount in controversy and citizenship) is determined as of the date that suit is filed—the ‘time-of-filing’ rule.”).

*Grinnell Mut. Reinsurance Co. v. Shierk*, 121 F.3d 1114, 1116 (7th Cir. 1997) (citations omitted) (“[I]f the amount in controversy exceeds the jurisdictional amount when a suit is filed in federal court, the fact that subsequent events reduce the total amount in controversy will not divest the court of diversity jurisdiction.”).

- Jurisdiction Lacking

*Tongkook Am., Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 784 (2d Cir. 1994) (citation omitted) (“The amount in controversy is determined at the time the action is commenced.”).

*Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955, 958 (7th Cir. 1998) (“Unless the amount in controversy was present on the date the case began, the suit must be dismissed for want of jurisdiction.”).

- See also

14AA Wright & Miller § 3702.4, pp. 457 (“[T]he existence or nonexistence of the amount in controversy required for subject matter jurisdiction is determined on the basis of the facts and circumstances as of the time that an action is commenced in a federal court . . .”).

15 *Moore’s Federal Practice* ¶ 102.104.

#### **4. Courts have split on whether to assess the amount in controversy from the plaintiff's or the defendant's viewpoints.**

In most cases, the relief sought by the plaintiff will be worth as much to the plaintiff as it costs the defendant. In some cases, for example in a case for injunctive relief, the relief sought will be worth less to the plaintiff than it will cost the defendant to comply. 14AA Wright & Miller § 3703, p. 538.

The Seventh and Ninth Circuits follow the either-viewpoint rule. *In re Brand Name Prescription Drugs*, 123 F.3d 599, 610 (7th Cir. 1997) (jurisdiction lacking); *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 405 (jurisdiction lacking).

This means that a case can satisfy the amount-in-controversy requirement (1) if the plaintiff seeks to recover an amount above the jurisdictional threshold or (2) if the recovery the plaintiff seeks will cost the defendant more than the jurisdictional threshold.

Conversely, the Second Circuit follows the plaintiff's viewpoint rule. *Kheel v. Port of N.Y. Auth.*, 457 F.2d 46, 49 (2d Cir. 1972) (jurisdiction lacking) (citation and internal quotation omitted) (“Generally, for this reason, the amount in controversy is calculated from the plaintiff's standpoint; the value of the suit's intended benefit or the value of the right being protected or the injury being averted constitutes the amount in controversy when damages are not requested.”).

#### **5. Aggregating damages to meet the amount in controversy—rules for multiple plaintiffs and multiple defendants.**

A single plaintiff can aggregate all of its claims against a single defendant to arrive at the threshold amount in controversy. 15 *Moore's Federal Practice* ¶ 102.108[1].

A single plaintiff may not aggregate claims against multiple defendants that are unrelated. 15 *Moore's Federal Practice* ¶ 102.108[2].

Multiple plaintiffs can aggregate their claims against a single defendant only when “several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest.” *Gilman v. BHC Secs., Inc.*, 104 F.3d 1418, 1422 (2d Cir. 1997) (citation and internal quotation omitted).

- Jurisdiction Upheld

*Budget Rent-A-Car, Inc. v. Higashiguchi*, 109 F.3d 1471, 1474 (9th Cir. 1997) (“A declaratory judgment plaintiff may reach the jurisdictional amount by aggregating its multiple claims against a single defendant.”).

- Jurisdiction Lacking

*Anthony v. Sec. Pac. Fin. Servs., Inc.*, 75 F.3d 311, 315 (7th Cir. 1996) (citations and internal quotation omitted) (“It is a familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must

be of the requisite amount to be within the jurisdiction of the district court, and that those amounts cannot be added together to satisfy jurisdictional requirements.”).

*Griffith v. Sealtite Corp.*, 903 F.2d 495, 498 (7th Cir. 1990) (citations and internal quotations omitted) (“Multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount; they cannot aggregate claims where none of the claimants satisfies the jurisdictional amount.”).

*Gilman*, 104 F.3d at 1431 (“We hold, therefore, that punitive damages asserted on behalf of a class may not be aggregated for jurisdictional purposes where, as here, the underlying cause of action asserted on behalf of the class is *not* based upon a title or right in which the plaintiffs share, and as to which they claim, a common interest.”).

**6. When damages can be aggregated, a court will aggregate those damages available under state law, including punitive damages and attorney’s fees (when allowed by law or contract).**

Determining the amount in controversy is a question of federal law, but a federal court sitting in diversity must look to state law to determine the availability and measure of damages. 14AA Wright & Miller § 3702, pp. 268–73.

**a. A court will include punitive damages as “in controversy” to reach the jurisdictional threshold.**

If punitive damages are available as a matter of law, a court must aggregate punitive and actual damages to determine whether an action meets the requisite amount in controversy. *Bell v. Preferred Life Assurance Soc.*, 320 U.S. 238, 240 (1943) (reversing dismissal for lack of jurisdiction that failed to consider punitive damages) (“Where both actual and punitive damages are recoverable under a complaint each must be considered to the extent claimed in determining jurisdictional amount.”).

In determining whether to count punitive damages a court should: (1) determine, as a matter of law, whether punitive damages are recoverable; and (2) determine whether the plaintiff is entitled to punitive damages under the legal certainty test. 15 *Moore’s Federal Practice* ¶ 102.106[4].

• Jurisdiction Upheld

*LM Ins. Corp v. Spaulding Enters. Inc.*, 533 F.3d 542, 551 (7th Cir. 2008) (citation omitted) (“In cases such as this, where punitive damages are relied upon to satisfy the amount in controversy requirement, the court must first determine whether punitive damages are recoverable under state law.”).

• Jurisdiction Lacking

*Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001) (citations omitted) (“It is well established that punitive damages are part of the amount in controversy in a civil action.”).

- See also

14AA Wright & Miller § 3702, p. 518 (“A long line of decisions . . . clearly establishes the proposition that exemplary or punitive damages, when they are permitted to be awarded under the governing substantive law for the claim being asserted by the plaintiff, can be included in determining whether the jurisdictional amount in controversy requirement has been met.”).

**b. If allowed by law or contract, a court will include attorney’s fees as “in controversy” to reach the jurisdictional threshold.**

“Legal fees may count toward the amount in controversy when the prevailing party is entitled to recover them as part of damages.” *Gardynski-Leschuk v. Ford Motor Co.*, 142 F.3d 955, 958 (7th Cir. 1998) (jurisdiction lacking).

Courts are split on whether attorney’s fees should be calculated at the time that the complaint was filed or should be estimated at the total amount that will be recoverable. 15 *Moore’s Federal Practice* ¶ 102.106[6][a].

The Seventh Circuit has held that “legal expenses that lie in the future and can be avoided by the defendant’s prompt satisfaction of the plaintiff’s demand are not an amount ‘in controversy’ when the suit is filed.” *Gardynski-Leschuk*, 142 F.3d at 959; *but see Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1340 (10th Cir. 1998) (“Considering the realities of modern law practice and the complexities of this case, we cannot say that, viewed as of the date of removal, it would be unreasonable to expect plaintiff to incur an additional \$2,117.50 in attorney’s fees.”).

- See also

14AA Wright & Miller § 3702, pp. 529 (“[A]ttorney fees are includible in computing the jurisdictional amount if the plaintiff may recover them as an element of damages as a matter of right, either pursuant to a governing statute, contract, or under the district court’s equitable power to award fees.”).

14AA Wright & Miller § 3712, pp. 806-12 (“The law is now quite settled . . . that the amount expended for attorney’s fees are a part of the matter in controversy for subject matter jurisdiction purposes when they are provided for by contract or by state statute or otherwise as a matter of right . . . [b]ut . . . only reasonable attorney’s fees may be included in measuring the amount in controversy.”)

15 *Moore’s Federal Practice* ¶ 102.106[6][a] (noting that a court can include attorney’s fees in the amount in controversy if a contract or statute provides a right to attorneys fees).

#### **IV. Supplemental Jurisdiction**

Supplemental jurisdiction allows a court to adjudicate a claim or proceeding that has no independent basis for federal jurisdiction. 13 Wright & Miller § 3532, p. 154. The claim or

proceeding must be sufficiently related to a separate claim over which the court has original jurisdiction (e.g., jurisdiction supported by § 1331 or § 1332).

Stated another way, supplemental jurisdiction cannot give a court jurisdiction over a case; it can only give a court jurisdiction over a claim related to a case that is already properly in federal court. 13D Wright & Miller § 3567, p. 314. This outline will refer to the claim over which a district court has original jurisdiction as the “jurisdiction-invoking claim.” See 13D Wright & Miller § 3567, p. 316.

Historically, courts separately used the terms “pendant jurisdiction” and “ancillary jurisdiction” to describe what is now referred to as supplemental jurisdiction. Pendant jurisdiction referred to “non-federal non-diversity claims asserted by the plaintiff in a federal question case.” 13 Wright & Miller § 3523, pp. 155–56. Ancillary jurisdiction referred to “non-federal, non-diversity claims asserted in a diversity of citizenship case by parties *other* than the plaintiff.” *Id.* at 156. Currently, “supplemental,” “pendant,” and “ancillary” are generally used interchangeably. *Id.*

The exercise of supplemental jurisdiction over claims with no independent basis of jurisdiction developed in case law but has since been codified by Congress in 28 U.S.C. § 1367. Cases decided before the enactment of § 1367 remain important because Congress attempted, in part, to codify existing case law. See 13 Wright & Miller § 3523, p. 172 (noting the “crucial[] important[ce]” of *United Mine Workers v. Gibbs*, 383 US 715 (1966), which was decided before Congress enacted § 1367).

This codification of supplemental jurisdiction in § 1367 “applies with equal force to cases removed to federal court as to cases initially filed there.” *Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 165 (1997).

In addition to the statutory and case-law-developed requirements for supplemental jurisdiction, a supplemental claim must also satisfy the Article III doctrines of standing, mootness, ripeness, and political question. *DiamlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351–52 (2006) (dismissing case because of lack of standing) (citation and internal quotation omitted) (“What we have never done is apply the rationale of *Gibbs* to permit a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of the Article III inquiry . . . that serve to identify those disputes which are appropriately resolved through the judicial process.”).

Below, this outline will separately address (1) jurisdiction over supplemental claims (governed by 28 U.S.C. § 1367) and (2) jurisdiction over supplemental proceedings (still governed by case law).

- Jurisdiction Upheld

*Voelker v. Porsche Cars N. Am.*, 353 F.3d 516, 521–22 (7th Cir. 2003).

- See also

16 James Wm. Moore et al, *Moore's Federal Practice* ¶ 106.02 (3d ed. 2010) (containing general summary of the history of supplemental jurisdiction).

### **A. Jurisdiction over Supplemental Claims Under § 1367**

Section 1367 has three main provisions.

First, § 1367(a) contains a broad grant of supplemental jurisdiction for claims that “are so related” to a case already properly before a federal court “that [the claims] form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). Claims meet this “so related” requirement when the claims “derive from a common nucleus of operative fact.” *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (jurisdiction upheld); 13D Wright & Miller § 3567, pp. 317–18.

Second, § 1367(b) limits the broad grant of supplemental jurisdiction in § 1367(a). Section 1367(b) prohibits a court from exercising supplemental jurisdiction over claims by an absentee party to be joined as a plaintiff or seeking to intervene as a plaintiff “when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.” 28 U.S.C. § 1367(b).

Third, § 1367(c) allows a court discretion to decline to exercise supplemental jurisdiction in four enumerated circumstances. 28 U.S.C. § 1367(c).

Within this structure, it is important to note that § 1367(a) is a grant of jurisdiction, and therefore can be raised at any time; § 1367(c), however, is discretionary and “is waived if not raised in the district court.” *Houskins v. Sheahan*, 549 F.3d 480, 495 (7th Cir. 2008) (citation omitted) (jurisdiction upheld); *see also Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862, 1867 (2009) (citation and internal quotation omitted) (noting that decision to decline to exercise jurisdiction is not a “jurisdictional matter” and therefore cannot “be raised at any time as a jurisdictional defect”).

#### **1. Section 1367(a): A court can exercise supplemental jurisdiction over a claim that has “some loose factual connection” to a claim already properly in federal court.**

Section 1367(a) states

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are 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 Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a).

Courts have interpreted the “so related” language to be satisfied when both the jurisdiction-invoking claim and the supplemental claim derive from a common nucleus of operative fact. 13D Wright & Miller § 3567.1, p. 337.

The “common nucleus” test “requires only that the jurisdiction-invoking claim and the supplemental claim have some loose factual connection.” *Id.* at 349. “This standard is broad and fact-specific, and should be applied with a pragmatic appreciation of the efficiency promoted by supplemental jurisdiction.” *Id.* at 349–50; *but see* 16 *Moore’s Federal Practice* ¶ 106.24[1] (noting that courts disagree as to whether a loose factual connection is sufficient to satisfy the “common nucleus” test).

- Jurisdiction Upheld

*Cicio v. Does*, 321 F.3d 83, 97 (2d Cir. 2003).

*Ammerman v. Sween*, 54 F.3d 423, 424–25 (7th Cir. 1995) (allowing exercise of supplemental jurisdiction when facts underlying the jurisdiction-invoking claim were “highly relevant” to the supplemental claim).

*Hansen v. Board of Trs. of Hamilton*, 551 F.3d 599, 607 (7th Cir. 2008) (noting that “[a]ll claims arose out of the same facts”).

*Houskins v. Sheahan*, 549 F.3d 480, 495 (7th Cir. 2008) (discussing the factual relatedness of the jurisdiction-invoking and supplemental claim).

*Sea-Land Serv., Inc. v. Lozen Int’l, LLC*, 285 F.3d 808, 814 (9th Cir. 2002) (allowing exercise of jurisdiction when facts underlying the jurisdiction-invoking claim “ar[ose] from the same transaction and rel[ied] on identical facts for their resolution” of the supplemental claim).

- Jurisdiction Lacking

*Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 704 (2d Cir. 2000) (noting that a court cannot exercise supplemental jurisdiction when “the federal and state claims rested on essentially unrelated facts”).

- See also

*Cadleway Props., Inc. v. Ossian State Bank*, 478 F.3d 767, 770 (7th Cir. 2007) (remanding to district court because of doubts about jurisdiction under § 1367(a)).

13D Wright & Miller § 3567.1, pp. 343–67 (discussing whether various claims authorized by the Federal Rules of Civil Procedure satisfy the “common nucleus” test).

16 *Moore’s Federal Practice* ¶¶ 106.25–106.47 (discussing whether various claims authorized under the Federal Rules of Civil Procedure satisfy the “common nucleus” test).

16 *Moore’s Federal Practice* ¶¶ 106.24[1]–[9] (discussing the application of the “common nucleus” test in various cases).

**2. Section 1367(b): A court cannot exercise jurisdiction over a claim that satisfies the “common nucleus” test, when exercising jurisdiction would be inconsistent with the requirements of diversity jurisdiction.**

Section 1367(b) limits the broad grant of jurisdiction in subsection 1367(a):

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or 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.

28 U.S.C. § 1367(b).

This limitation only applies when: (1) the jurisdiction-invoking claim is in federal court based on diversity of citizenship jurisdiction; (2) the supplemental claim is being asserted by a plaintiff; and (3) the exercise of jurisdiction over the supplemental claim would be inconsistent with § 1332’s requirements. *See* 13D Wright & Miller § 3567.2, p. 370.

If a court has jurisdiction based on both federal question and diversity of citizenship, § 1367(b)’s limitation does not apply. *Claredon, Ltd. v. State Bank of Saurashtra*, 77 F.3d 631, 637 n.5 (2d Cir. 1996) (jurisdiction upheld).

This limitation does not apply to claims asserted by a defendant or a third-party defendant. 13D Wright & Miller § 3567.2, p. 376; *Viacom Int’l, Inc. v. Kearney*, 212 F.3d 721, 726–27 (2d Cir. 2000) (citations omitted) (jurisdiction upheld) (noting that § 1367 “reflects Congress’ intent to prevent original plaintiffs—but not defendants or third parties—from circumventing the requirements of diversity”).

This limitation does apply to cases brought under § 1332 based on alienage jurisdiction (cases involving a citizen of a state and a citizen of a foreign country). *Extra Equipamentos E Exportacao v. Case Corp.*, 361 F.3d 359, 361 (7th Cir. 2004); *Franceskin v. Credit Suisse*, 214 F.3d 253, 258 n.2 (2d Cir. 2000); *Nike, Inc. v. Commercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 991 (9th Cir. 1994).

As noted above, § 1367(b) prohibits the exercise of supplemental jurisdiction in cases “when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.” 28 U.S.C. § 1367(b). The two main requirements for § 1332 diversity jurisdiction are the “amount in controversy” requirement and the “complete diversity” requirement. In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005) (jurisdiction lacking), the Supreme Court made a distinction between these two requirements. There, the Court held that, assuming that a case is already properly in federal court, (1) a court cannot exercise supplemental jurisdiction over any claim unless there is “complete diversity,”

but (2) assuming that complete diversity exists, a court can exercise supplemental jurisdiction over a claim by a plaintiff that fails to meet the “amount in controversy requirement.” *Id.* at 554 (“Incomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere.”); *id.* at 566 (“[T]he threshold requirement of § 1367(a) is satisfied in cases . . . where some, but not all, of the plaintiffs in a diversity action allege a sufficient amount in controversy.”).

But note: In a diversity case, a plaintiff cannot assert a claim against a party joined as a defendant unless the claim satisfies both the “complete diversity” and “amount in controversy” requirements. 16 *Moore’s Federal Practice* ¶ 106.45[3]; *LM Ins. Corp. v. Spaulding Enters. Inc.*, 533 F.3d 542, 555 n.5 (7th Cir. 2008) (dismissing claims against individual defendant for lack of subject matter jurisdiction).

- Jurisdiction Upheld

*Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006) (citations omitted) (“Once one plaintiff satisfies the amount-in-controversy requirement for diversity jurisdiction, the other plaintiffs come in under the court’s supplemental jurisdiction regardless of whether their individual claims satisfy the requirements of § 1332.”).

- See also

*LM Ins.*, 533 F.3d 542, 555 n.5 (7th Cir. 2008) (noting that district court could not exercise claims over absented party).

**3. Section 1367(c): A court has discretion to decline to exercise supplemental jurisdiction in the four circumstances enumerated in § 1367(c).**

Section 1367(c) states:

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

“With respect to supplemental jurisdiction in particular, a federal court has subject-matter jurisdiction over specified state-law claims, which it may (or may not) choose to exercise. A district court’s decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary.” *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862, 1867 (2009) (citations omitted) (holding that an order remanding a case to state court is unreviewable when the remand was based on discretion to decline jurisdiction under § 1367(c)).

Once a court has found that at least one of the four enumerated factors is present, the court can consider “judicial economy, convenience, fairness, and comity.” 16 *Moore’s Federal Practice* ¶ 106.62; see also *Timm v. Mead Corp.*, 32 F.3d 273, 276–77 (7th Cir. 1994) (jurisdiction lacking) (noting that a district judge has discretion to consider “judicial economy, convenience, fairness, and comity”); *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (reversing district court’s decision to retain jurisdiction) (citations and internal quotation omitted) (“Once a district court’s discretion is triggered under § 167(c)(3), it balances the traditional values of judicial economy, convenience, fairness, and comity.”).

The Seventh Circuit has identified three situations where, if one of the § 1367(c) factors is present, a court should nonetheless retain jurisdiction: “[1] where the statute of limitation would bar the refiling of the supplemental claims in state court . . . ; [2] where substantial federal judicial resources have already been expended on the resolution of the supplemental claims; and [3] where it is obvious how the claims should be decided.” *Williams Elecs. Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007) (citations omitted) (affirming district court’s decision to decline jurisdiction).

- Jurisdiction Upheld

*Itar-Tass Russian News Agency v. Russian Kurier*, 140 F.3d 442, 448 (2d Cir. 1998) (noting that “the discretion to decline supplemental jurisdiction is available only if founded upon an enumerated category of subsection 1367(c)”).

*Treglia v. Town of Manlius*, 313 F.3d 713, 723 (2d Cir. 2002) (noting that “the discretion to decline supplemental jurisdiction is available only if founded upon an enumerated category of [28 U.S.C. § 1367(c)]”).

*Hansen v. Board of Trs. of Hamilton*, 551 F.3d 599, 608 (7th Cir. 2008) (“While a district court may relinquish its supplemental jurisdiction if one of the conditions of § 1367(c) is satisfied, it is not required to do so.”).

*Satey v. JPMorgan Chase & Co.*, 521 F.3d 1087, 1091 (9th Cir. 2008) (noting that district court’s decision to retain jurisdiction was supported by “[j]udicial economy and convenience to the parties”).

- See also

*Exec. Software v. United States District Court*, 24 F.3d 1545, 1555–56 (9th Cir. 1994), *overruled on other grounds by Cal. Dep’t of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1092–93 (9th Cir. 2008) (“By use of the word ‘shall,’ the statute makes clear that if power is

conferred under section 1367(a), and its exercise is not prohibited by section 1367(b), a court can decline to assert supplemental jurisdiction over a pendant claim if one of the four categories specifically enumerated in section 1367(c) applies.”)

16 *Moore’s Federal Practice* ¶¶ 106.60–106.63 (discussing the § 1367(c) factors and the factors discussed in the *Gibbs* case).

## **B. Jurisdiction over Supplemental Proceedings**

Although § 1367 governs jurisdiction over claims that do not have an independent basis for jurisdiction, jurisdiction over *proceedings* that do not have an independent basis for jurisdiction is still governed by case law. 13 Wright & Miller § 3523.2, p. 213; *see also* 16 *Moore’s Federal Practice* ¶ 106.05[9][c] (noting that “there is some indication that the Supreme Court considers ancillary jurisdiction with regard to postjudgment proceedings to survive as a continuing nonstatutory concept . . .”).

“Under this concept, a district court acquires jurisdiction of a case or controversy in its entirety, and, as an incident to the full disposition of the matter, may hear collateral proceedings when necessary to allow it to vindicate its role as a tribunal.” 13 Wright & Miller § 3523.2, p. 213. The purpose of this type of jurisdiction is to “enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994) (citations omitted).

A court can exercise this jurisdiction to enjoin an action that threatens a previously entered order. 13 Wright & Miller § 3523.2, p. 214 (citing *Fafel v. DiPaola*, 399 F.3d 403, 411–15 (1st Cir. 2005)).

A court can exercise this jurisdiction to impose sanctions even in a case where the court lacked subject matter jurisdiction. 13 Wright & Miller § 3523.2, p. 215 (citing *Willy v. Coastal Corp.*, 503 U.S. 131, 138–39 (1992) (noting that a court has authority to issue Rule 11 sanctions even though it lacks subject matter jurisdiction but does not have authority to order civil contempt if it lacks subject matter jurisdiction)).

A court can exercise this jurisdiction to impose an award attorneys fees. 13 Wright & Miller § 3523.2, p. 219.

After a court enters a dismissal because of a settlement, a court generally cannot exercise supplemental jurisdiction to enforce that settlement agreement. 13 Wright & Miller § 3523.2, p. 220. A court can, however, exercise jurisdiction to enforce a settlement “by either including a provision explicitly retaining jurisdiction over the settlement agreement or by incorporating the terms of the settlement agreement in the court’s order.” *Lipman v. Dye*, 294 F.3d 17, 20 (1st Cir. 2002).

- Jurisdiction Upheld

*Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 225 (2d Cir. 2004) (citations and internal quotation omitted) (“We have consistently held that whenever a district court has federal

jurisdiction over a case, it retains ancillary jurisdiction after dismissal to adjudicate collateral matters such as attorney's fees.”).

*Epperson v. Entm't Express, Inc.*, 242 F.3d 100, 106 (2d Cir. 2001) (noting that “most courts have continued to draw a distinction between [1] post-judgment proceedings to collect an existing judgment and [2] proceedings, such as claims of alter ego liability and veil-piercing, that raise an independent controversy with a new party in an effort to shift liability”).