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    - 28 USC 1332
        - Need COMPLETE diversity
            - All Ps from different states as all D's (*Strawbridge v. Curtiss*)

- Can't have any same locations on BOTH sides of the "v"
- Ex. A (NY) and B (NY) v. C (MN) and D (MN)

- Citizenship: calculated at tiem of suit
  - Individual: where-ever domiciled
    - Presence in jurisdiction, intent to make that jurisdiction your home indefinitely
- Amendment 14, Section 1
  - All persons born or naturalized in the US and subject to the jurisdiction thereof, are citizens of the US and of the State wherein they reside
    - = Even if not a citizen of US, court will treat you as a citizen of where you are domiciled if you are a permanent resident
- If from territories, DC, Puerto Rico, then word "state" includes those areas for purposes of jurisdiction
  - 1332 (e)
  - Constitution says states, but court interpreted to mean dc can have diversity jurisdiction and then congress made it official with US statute
- Domiciled where your parents are domiciled until both 1 AND 2 are satisfied
- Keep your old domicile until you get a new domicile, never in limbo
- If person is dead (decedent), then you go with whatever state the dead person was in
  - NOT wherever the person in charge of estate is domiciled, what matters is dead person
- Corporations
  - 28 USC 1332: a corporation shall be deemed to be a citizen of any state by which it is incorporated and of the state where it has its principal place of business
  - *Hertz v. Friend* et al
  - Principal place of business=nerve center: "nerve center rule": where-ever the nerve center of a corporation is, that is where the corporation has its principle place of business
    - Generally, the headquarters
    - Advancement of rule
      1. Shareholder are from different states, so diversity
      2. Matters where company is artificial person of the state which is had been created, where it is incorporated
      3. Principle place of business
         - Plurality
         - Nerve center
         - Center of gravity
      4. NEW rule-principle place of business: nerve center
  - Law Firm: Partnerships
    - Treated different from other companies
    - For a partnership need to say where all partners are citizens, look at each of their states

        - When suing insurance company via direct action (not through insured) then need to include place where insured person is a citizen
            - USC 1332 (c)(1)
            - Why direct action? If not direct action, then you will include the person already, don't need to add extra label
            - Why use? Don't want to have ppl use suing the insurance company as a direction action for a run around

- Amount in controversy has to EXCEED $75,000
    - 28 USC 1332
    - How do courts determine this?
        - *St. Paul Mercury Test*
            - Appears to a "legal certainty" that you can or cannot receive 75K
        - *Diefenthal v. C.A.B.*
            - Couple sues airline and everybody involved for humiliation after they were told they couldn't sit in smoking section of first class and flight attendant told them this information brusquely. Court upheld that Diefenthal's lacked diversity jurisdiction
            - Uses legal certainty test
                - If non crazy jury could give you that much money, there is no legal certainty that you won't get that much money
                - If we know you can't get that much money, then there's no point in going to trial
                - Law + facts = answer
            - Good faith isn't enough
            - You need to put forward some fact to show why there is 50K negligence
        - Burden of showing whether you're over or not is on the party seeking jurisdiction
        - Plaintiff can combine claims to reach 75K threshold
            - Plaintiff sues Defendant
                - Combines three claims if they are all on the same suit between plaintiff and defendant
            - Cant combine for two different defendants (different claims)
            - Common undivided interest: OK
                - Plaintiff 1 and plaintiff 2 sue defendant for 100K

Federal Question Jurisdiction

- Article III
    - Osborne Test: If federal law is involved in any way, then you have federal question jurisdiction
- Statutes:
    - USC 1331
        - General federal question jurisdiction
        - "arising under"
    - Well-pleaded complaint rule
        - *Holmes Test*
            - Arises under = what law creates the cause of action

- Federal law creates the cause of action
  - Cause of action: the law that gives you something to sue about
- What law gives you something to sue about
- Often but not always used
- Narrow framing of arising

- *Grable Test*
  - embedded federal issue
  - is the issue:

    Necessarily raised
    - Can plaintiff tell the story about why they win without federal law?

    Actually disputed

    Substantial (important)

    Capable of resolution in federal court w/o disrupting the federal-state balance approved by congress
    - If we allowed cases like this in, would it skew the amount of cases between state v. federal?

1331: federal question on the face of a well-pleaded complaint

Well-pleaded complaint: everything you need to win and nothing more

- *Louisville and nashville v. motley*
  - Mottleys sued railroad. They were in railroad accident and given free passes for life. Railroad took away after congress passed statute saying no free passes. Sued in federal court saying the railroad will use congressional statue as a defense and we will use constitution as a way to beat that statute, saying law was unconstitutional based on due process clause. Circuit court: Mottleys win. Railroad Appeals. SCOTUS says lacks jurisdiction
  - For purposes of 1331 the federal question has to appear on the face of a well-pleaded complaint
  - It doesn't matter whether federal issue is what you're fighting over, is it what included in everything you need to win?
  - Analysis: basic complaint was over a contract. Suppose congressional law didn't happen would mottley have a case?
  - If you erased federal stuff would you have a perfectly good lawsuit? Then case DID NOT ARISE under federal law
  - Complaint is the first thing you see, don't know defendant's answer yet. Should be able to know on day 1 which court case is going to

When applying well-pleaded complaint rule whether case "arises under" federal law

- Declaratory judgment
  - When a possible defendant asks for a declaration on the future suit
    - Example

- Standard Suit: I'm going to sue the insurance company to get my money on the fire insurance. Standard suit.
- Declaratory judgment: insurance company sues me. I want a declaration you set that fire yourself. I don't owe you anything. Allows you to prevent a future suit that you know is coming down the pipe
- For purposes of jurisdiction, you look to the mirror image suit. Plaintiff's possible suit is what matters for jurisdiction
- Courts don't want ppl to use declaratory judgment to get things into federal court

- Counter-claim
  - Claim brought by a defendant against the plaintiff in an existing suit
  - CANNOT have federal question jurisdiction on counterclaim
    - EXCEPTIONS
      - Rule 1338

        Rule 1338: types of cases where there is exclusive federal jurisdiction

        Patent
        Plant variety
        Copyrights
        Designs
        Trademarks
      - Rule 1333

        Admiralty, maritime
        Anything related to admiralty gets exclusive federal question jurisdiction

Holmes Test

Post Holmes-Test:

- *Smith v. KC Title and Trust Co.*
  - Background:
    - Missouri law: shareholder can sue to stop a violation of a corporate charter
    - Charter: bank can invest in various kinds of bonds, only valid bonds
    - Federal statute: issues bonds
  - Issue: Smith's claim: US Const says federal law about bonds is void > dispute
  - Under holmes test: MO law creates cause of action so can't go to federal court
  - SCOTUS: could go to federal court because the dispute is over constitutional question
  - 1921: SMJ: okay

Post-Smith: well-pleaded complaint might be law that creates cause of action, might be something else

Grable v. Darue

- IRS takes property from Grable sell it to Darue, Grable sues Darue

- Property law: state law
- Michigan: you can sue to quiet title
- When IRS took land they were supposed to give notice, they didn't do it in the right way
- Federal law: can take law for taxes but also the notice has to be adequate
- Law that is source of cause of action: state law
- People fighting over: whether notice was adequate
    - Yes people agree IRS took the land
- Holmes Test: federal law didn't create cause of action
- Smith: the important issue is federal one, so it's okay
- Court: BALANCE
    - Will this upset the balance between state and federal courts?
- Grable Test: embedded federal issue
    Necessarily raised
    - Can plaintiff tell the story about why they win without federal law?
    Actually disputed
    Substantial (important)
    Capable of resolution in federal court w/o disrupting the federal-state balance approved by congress
    - If we allowed cases like this in, would it skew the amount of cases between state v. federal?
- Court: upheld jurisdiction

Gunn v. Minton

- Minton developed computer program. Sues NSAD for infringing patent (patent is federal law), exclusive federal jurisdiction. He loses. Because his patent is judged to be invalid and the reason its invalid is because he allegedly sold it to another company, allowed it to be used by another company more than 1 year before registering it. Minton's defense to the defense: experimental use argument. This defense to the defense was filed too late. Attorneys didn't file it until too late
- Minton sues Gunn, his lawyer. Texas state court.
- Minton's theory of causation: under federal law: if exp use argument would have been used, I would have won
    Patent law: only federal jurisdiction
- Minton loses, appeals, argues that state didn't have jurisdiction
    Why? Because a judgment without jurisdiction is void
    SMJ: can be raised sua sponte or on appeal
- Texas Supremes: Minton was right, not jurisdiction
- SCOTUS:
    Article III
    - could be federal jurisdiction, yes
    Statute (1331)
    - Holmes Test: doesn't qualify
    - Grable test: embedded federal issue

Necessarily raised? Duty, breach, causation, injured: essential elements

Actually disputed? Yes

Substantial? No

Minton's patent is going to be invalid no matter which way the case goes. Only issue: are we going to move money between Minton and Gunn. Nobody else is going to be effected. No one else cares about the issue

Balance? No

Doesn't want federal courts ruling on attorney malpractice dealing with patents. Don't want cases that don't have important federal patent law.

SCOTUS Subject Matter Jurisdiction

- Article III
- Can't hear cases of impeachment
- Article III, Section 2:

SCOTUS can get original jurisdiction ONLY on this list:

- Ambassadors
- Other public ministers and consults
- Those in which state shall be a party

If not, then SCOTUS has appellate jurisdiction (goes elsewhere first)

- Under regulations and rules Congress makes

Didn't lay out any jurisdiction for lower courts, didn't know if there were going to be lower courts

- Section 1257

Ex. Mottley v. RR goes to SCOTUS after going through state courts and appeal from Kentucky Supreme Court

Section 1257: lets you go to scotus after a state supreme court rules against you on SOME federal issue (some federal issue as defined by Article III, broad)

Removal

- if case started out in State Court, how do you get it into federal court?

Takes everything about getting into federal court (above) as a given

1441: when you can remove from state to federal court

- Allows for any case if you could have gone to federal court originally
- 1441(a): defendant or the defendants

All of them have to agree

- 1441 (b)(1): citizens under fictitious names should be disregarded

It's about if you don't know their real names ex. John Doe

- 1441 (b)(2): if defendant is a citizen of the state where suit is filed, can't bring it federal district court

Only applies to 1332 diversity jurisdiction

Whole pt. of diversity: things will be unfair if not fair forum

Doesn't apply to fed. q. jurisdiction, have fed. q. cases regardless of where you're from

1446: how you can remove

- File notice of removal in Fed. District Court
- Give copy of that notice to plaintiff and clerk of the state court
- When you give the state court a copy, shizzam the case is removed, state court shall proceed no further
- Federal court has to deal with it, state court doesn't do it
- 1446(b): have 30 days to file notice of removal

    Get a new 30 days from amendment if amendment makes it possible to go to federal court when that wasn't possible before
- 1446(2)(a): all defendants needs to agree

1447: what to do once things have been taken up

- (c): 30 days to ask for a remand (to send back to state court)
- If SMJ: raised at any time because court cannot proceed w/o SMJ
- (e): if plaintiff adds def to avoid SMJ, court can deny attempt to add def or can send it to state court, it gets to decide
- (d): if remanded, and that wasn't right, too bad.

    In general, can't appeal a remand even if a remand shouldn't have happened

    Why? States can always take jurisdiction, no harm no foul. Problem is if fed court takes cases and it doesn't have jurisdiction

2. Service of Process

- Service of Process
  - In order for service to be effective, legally valid and binding, need to satisfy the rules and statutes AND Due Process Clause (5th federal, 14th: states) have to check both boxes.
  - Process: something like an order or a command
    - Initial order to a defendant: show up in court
    - Initial process - initiation of case -summons: show up in court: Rule 4
    - Intermediate process - middle of case - subpoena to a witness, discovery order - Rule 4.1
    - Final Process - end of case - what happens at the end: issue money damages, execution (execute a judgment), injunction - Rule 4.1
    - Other Filings - Rule 5
  - Multiple Types of Law that govern Process
    -

	Fed	State
Const	US Const	
		NC Const
Statutes	US Code	NC Gen State
Rules	FRCP	NCRCP

  - Statutory:
    - First Step > File Complaint - FRCP 3
    - Serve Process on Defendant
      - Serve copy of the complaint and summons
        - Summons: FRCP 4(b)
          - Summons is the order from the court to show up
          - Court does it as long as you have the property form, no review
          - Shows court knows about this and will be unhappy if I don't show up
        - Complaint
          - Will tell you:
            - Sued
            - By whom
            - Where
            - Who else sued
            - About what
            - Signed by pro se, by yourself, or which attorney is representing you
            - How you have to respond

- FRCP 4(c)(2): by whom?
  - Anyone who is 18 years old and not a party
  - Not you
  - Can be your attorney, professional process service, dad,
  - IFP: in forma pauperis: you are too poor, don't have to pay filing fees, court can help you with other expenses
    - Who does this? US Marshalls or person specially appointed by the court
    - May be some review to make sure its not frivolous
- Service on individuals in the US
  - FRCP 4(e)(1) whatever state law says
    - EITHER where the federal district court is located OR where service is made
    - Often, service by mail
      - Okay in federal court in NC? Yes
      - Registered mail, certified mail, signature
    - Sometimes service by publication
      - NC: yes, but there are a lot of conditions
  - FRCP 4(e)(2)
    - (A) Hand delivery (personal service)
    - (B) Dwelling, w/ resident
    - (C) Delivery to an agent whether appointed or by law
      - Ex. Sign POA
- FRCP 4(g): Service on a minor
  - Be served upon parent or guardian
  - Serving minor use state law method
- FRCP 4(f): serving an individual in a foreign country
  - Treaties
    - Hague: you give it to the court sends it to justice department who sent it to foreign country court
  - Foreign country law (personal service/mail if they are okay with that)
  - Whatever the court decides to do, but can't violate a treaty
  - Super complicated and it takes forever
- FRCP 4(h): serving a corporation in US
  - FRCP 4(e)(1): state law
  - Officer, general agent, or an agent for service of process
    - Officer: somebody really high, CEO, CFO, defined by articles of incorporation
    - General agent: somebody who can generally bind the corporation
    - Agent for service of process
- Waiver of Service
  - Send letter with waiver form and copy of complaint
  - Plaintiff mails the form and complaint
  - Defendant mails it back to the plaintiff
  - Plaintiff files the signed waiver
  - If D gets waiver and ignores it, D will have to pay for service, and you get more time to respond

        - Defendant doesn't send the form back w/in 30 days, then plaintiff has to do service, file through normal route, defendant will have to pay
        - Plaintiff doesn't have to ask D to waive service. Maybe they don't want D to get extra time. Plaintiff has to pay for service.
    - FRCP 4(*l*): proving service
        - How do you prove process actually occurred?
            - Affidavit
                - Oath, affirmation
                - Carries penalty of perjury
    - FRCP 4(m): time-limit for service
        - 120 days
        - Clock starts ticking when you file
        - If 120 days lapse court can:
            - Dismiss without prejudice
            - Order service
            - If you can show good cause, the court can give you more time
        - Why does this matter?
            - SoL: says you have only ___ years after claim accrues to file
            - Starts on the day the claim accrues
            - Rule 3: case is commenced when you file complaint
                - State statutes SoL get triggered not by file but by service
                    - Trap for the unwary
                        - Plaintiff files
                        - Plaintiff mails waiver form
                        - Defendant mails it back
                        - Plaintiff files signed waiver
                        - If you have a SoL that is triggered by filing, you are fine, as you file you've stopped the clock
                        - If SoL only concludes with service: you have a problem, if SoL lapses during time has the waiver
                            - Only when you file waiver of service form and complaint: that's what completes services for waiver of service SoL
- US Constitution: Due Process Clause
    - Mullane
        - *Mullane Test:*
            - Notice reasonably calculated
            - Notice desirous of actually informing
        - Facts: bank had to serve process on beneficiaries, 5,000 ppl knew some ppls' names but not others. State law: publication is okay. SCOTUS: This violates due process if you have the address
    - *Jones v. Flowers*
        - Facts: jones wasn't paying taxes on notice. Jones leaves house. Jones paid in escrow, he paid mortgage and they pay taxes etc. Jones leaves thinking he's done with mortgage payment taxes. State of AK: send certified letter to house, comes back unclaimed to the commissioner, do it again, publish notice in local newspaper, seize house and sell it to flowers. Flowers sends notice of eviction, Jones' daughter (who is living in house) sees. Jones sues Flowers to get house

back in AK state court. Jones had constructive, but not actual notice. Appealed to SCOTUS

- Constructive notice: should have known
- Actual notice: did you know
- SCOTUS: Jones wins 5-3, state violated DPC of 14th amendment, Mullane test, state court should have followed up on returned certified mail could have sent it first class mail, but don't have to go look him up in the phonebook.

3. Personal Jurisdiction

- Authority
    a. In personam
        - If you want PJ look at court > rules (FRCP 4) > and statutes > can look at state law > 14A and 5A DPC
        - Rules/Statutes
        - 5th Amendment (for feds), 14th (for states): DPC
        - FRCP 4(k)(1): serving summons or filing waiver of service establishes PJ over a defendant if [basically you have PJ if you have service +]
            - (1)(A): make like state court where you sit
                - Pretend a state court, ask if I were a state court would I have PJ
                    - Const. limits through 14th amendment DPC
            - (1)(B): ignore for now
            - (1)(C): Federal Statute
                - Federal fall back: if there were no state where you could bring this claim and 1(A) and 1(B) doesn't work, still want you to bring a federal claim but two conditions
                    - Involve a federal claim
                        - Can't just be diversity
                    - There is no state court that has PJ
        - "long arm": state jurisdictional statute
            - State is reaching the long arm of the law to grab defendant and subject them to their jurisdiction
        - *D'Arcy v. Ketchum*
            - D'Arcy and Gossip in business together
            - Ketchum sued both in NY. Gossip in NY, D'Arcy in Louisiana
            - D'Arcy doesn't show up in NY, serve process on Gossip in NY
            - Never serve process on D'Arcy
            - NY Statute: if joint debtor, as long as you serve process one debtor, you can collect on any of his business partners
            - Ketchum gets his judgment, NY state says you served process on Gossip you get your judgment
            - Ketchum goes to LA and new suit in district of LA: already have judgment, give me money
                - Issue: does judgment have the same force in NY and LA?
                - Article 4: "full faith and credit"
            - D'Arcy wins, never got served in NY, wasn't there in NY
            - Rests on international law, if you've got a foreign judgment would be considered prima facie evidence. Not conclusive evidence could still say it was protected by other parts of the const.
            - Int law: there are limits on which countries can make show up. Everyone gets their day in court and we have to figure it out
            - Old rule: courts have PJ if you have
                - Voluntary appearance

        - Residence in state/country
        - In-state service of process
    - Old rules stayed where it was despite full faith and credit clause
    - Old rules are how you know if state judgment is valid
    - 1849
- *Pennoyer v. Neff*
    - Old Lawsuit: Mitchell sues Neff in Oregon State Court for unpaid legal fees, serves process via newspaper publication. Neff in Cali, resident in Cali. Oregon Court: you served by publication under Oregon law, good enough. Default judgment for 253. Mitchell goes and gets sheriff's deed to Neff's property. Neff owns land worth 15K, Executes against his land. Sheriff sells land. Gets money by selling of land. Sells to Pennoyer.
    - New Lawsuit: Neff sues Pennoyer to get land back.
    - Neff Wins
        - District Ct: problem with affidavit
    - SCOTUS:
        - Affidavit fine
        - Issue: PJ
        - If state of Oregon had power to make Neff show up then its Neff's fault for not being there, to make any defense then he really does owe money
        - Two Principles of public law
            - Every state has sovereignty over people and property in that state
            - No state can exercise jurisdiction over people/property not in that state
        - PJ
            - In personam: person
            - In rem: condemnation/forfeiture
            - Quasi in rem: thing, to satisfy debt
        - Neff had property in state, allegedly owe money in state couldn't be found, seems like quasi in rem case BUT
            - Not quasi in rem because property wasn't seized BEFORE the judgment
        - Don't have in rem, don't have quasi in rem, so go to in personam
        - Pennoyer loses
            - In personam requires one of old rules
                - Voluntary appearance? No
                - Resident? No
                - In state service of process? No
- *Hess v. Pawloski*
    - Car accident in Mass. Hess driver, not resident in Mass, went back to Mass right after accident (not served), consent?
    - Mass statute: if you drive in Mass you consent to PJ
    - Courts frustrated with Pennoyer so they bend rules
- *International Shoe v. Washington*
    - Intl Shoe: PPB In St. Louis, Delaware Corp
    - Employees who go to Washington, rent their own showrooms, work on commission.
    - Washington wants $ for unemployment insurance, Intl Show trying to avoid

        - Washing State sues in Washing State Court
        - Is there DPC?
        - How do they serve process? By mail and one of the salesman
            - Would this work under old rules? No
        - Holding: DPC requires minimum contacts so that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice"
        - NEW RULE: Intl Shoe
            - You need to satisfy traditional notions of fair play and substantial justice
            - Two types of jurisdiction
                - Specific Jurisdiction
                    - Minimum contacts
                    - Contact have to give rise the suit
                    - Whole thing has to be fair and reasonable
                - General Jurisdiction
                    - Continuous and systematic contacts
                    - Whole thing has to be fair and reasonable
- For today, if looking at *in personam* jurisdiction, can use ANY of these rules:
    - Old rules, international rules
        - Voluntary appearance/consent
        - Residence
        - In-state service (inc. agents)
    - Traditional notions of fair play and justice under DPC (either 14th or 5th)
        - If state: 14th
        - If federal: 14th or 5th
    - Specific Jurisdiction
        - Minimum contacts
        - Contact have to give rise to the suit
        - Whole thing has to be fair and reasonable
    - General jurisdiction
        - Continuous and systematic contacts
        - Whole thing has to be fair and reasonable
- *McGee v. Intl Life Insurance*
    - Franklin, CA, buys insurance from Empire (AZ corporation)
    - Empire gives policy to Intl Life, Texas
    - Franklin was sending money via mail to Intl Life in Texas
    - Franklin dies, his mother is beneficiary Lulu McGee, Cal
    - Intl refuses to give her the money
    - McGee sues Intl Life in Ca
    - McGee wins and gets her judgment, takes to Texas
    - Tries to enforce judgment there, Texas said no violates DPC 14th, no jurisdiction back in beg
    - Appealed to SCOTUS
    - SCOTUS:
        - Delivered contract in CA, Franklin sent money from CA, Franklin resided in CA, Ca has manifest interest in protecting its residents
        - McGee can't afford to litigate elsewhere, unfair to force her to travel all the way over
        - There is specific jurisdiction

- *Hanson v. Denckla*
  - Rule: defendant has to have purposefully availed himself of conducting activity in the forum
  - Have to have purposeful availment by the defendant for it to count as one of these contacts
    - General jurisdiction
      - Continuous and systematic contacts
    - Specific jurisdiction
      - Minimum contacts
- *World-Wide Volkswagon v. Woodson*
  - Robinsons bought Audi in NY. A year later they drive to OK and get in an accident. Have to stay in OK because accident is so bad.
  - Robinsons sue WWV and Seaway in OK State court
  - Supreme Court of OK
    - Product made designed to be mobile, should have anticipated it would go everywhere
    - Should be foreseeability that car would travel to OK and cars get into accident
  - SCOTUS:
    - Foreseeability is not sufficient for jurisdiction
    - Fair and reasonable Rule
      - The burden on the defendant
      - The forum state's interest in adjudicating the dispute
      - Plaintiff's interest in obtaining convenient and effective relief
      - Interstate judicial system's interest in obtaining efficient resolution of controversies
      - Shared interest of several states in substantive policy
    - Here: it is fair and reasonable but don't allow jurisdiction in OK
    - Need purposeful availment to get minimum contacts
  - Take away: No matter how reasonable it might be, still need contacts
    - Those contacts can't just be foreseeable they have to involve some degree of purposefully availing
- *Calder v. Jones*
  - Jones says she was libeled by National Enquirer, sues Southern, writer, Calder, editor, in Cal State court
  - Def in Florida
  - Cal Supreme Court: an ind. In Cali need not go to Fl to seek redress
  - Article was INTENTIONALLY aimed at Cali
    - Intentionally defamed her in National Enquirer, intended to cause her injury
  - Purposefully directing contact at Cali
- *Burger King v. Rudzewicz*
  - R, Michigan citizen, opened BK in Michigan
  - R and business partner worked with BK franchise in FL
  - After opened, dealt mostly with Michigan office
  - R refused to stop using and selling BK, BK sues
  - R: only contact with FL is when they originally set up business
  - Contract: any disputes between them and BK have to be tried under FL law

        - Choice of law clause: Florida law
            - For provisions that are default rules, default contractual provisions then you can use a certain states set of default. Anything we want to change we want to do it the way Florida does
        - NOT forum selection clause
            - "I agree only to sue in specific state"
    - Choice of law clause: tells us that they had reasonable foreseeability of possible litigation, purposefully availed themselves of FL law
    - You have this and you have contacts, might be enough
- *Asahi v. Superior court*
    - Zurcher buys motorcycle in CA, tire blows out
    - Tire made by Cheng Shin of Taiwan, tire valve made by Asahi in Japan
    - Zurcher: sues Cheng Shin in Cali state court because made bad tire
    - Cheng Shin brings in Asahi as a third party defendant. Sue Asahi for indemnification.
        - Cover what they owe
        - Basically the problem was the tire valve not our part of the tire really it's all your fault so you should pay what we owe
    - Zurcher and Cheng Shin settle
    - Cheng Shin says we had to pay out money to Zercher Asahi you should cover it
    - Cheng Shin Argument: you put your tire valve into the stream of commerce which carried it all the way to Cali, you knew that could happen, you knew we sold all over the world. Asahi didn't say stay out of Cali
        - You purposefully availed yourself of Cali's laws because you make money from Cali
        - Stream of commerce gets you specific jurisdiction
    - SCOTUS splits 3 ways
        - O'Connor + 3 = no jurisdiction
            - Minimum contacts: you need stream of commerce plus something Cali related
            - Not fair and reasonable on defendant
        - Brennan + 3 : concurs in judgment
            - Minimum contacts: Stream OK
            - Not fair and reasonable
        - Stevens
            - Don't need to figure out stream of commerce
            - Not fair and reasonable
    - HOLDING:
        - Not fair and reasonable
- *J. McIntyre Machinery, Ltd. v. Nicastro*
    - Nicastro: metal worker in NJ using metal machine, defective severs 4 finger. Argues it was defectively designed. Sues JMM. JMM from England. Sues in NJ state courts. JMM sold machine to MMA (McIntyre Machines of America, not owned by England just exist to sold M machines) who is in Ohio). JMM sometimes goes to trade shows in NV, have US patent on machines, don't advertise in NJ, don't have other contacts in NJ
    - NJ Supreme Court: yes you can sue in NJ, stream of commerce theory.
    - SCOTUS: three opinions

- Kennedy + 3: no jurisdiction
  - Plurality, NOT precedent, most popular decision
  - Notice not a problem, problem is authority
  - Consent is key
    - All of rules are submission to states authority
      - Residence
      - In state service
      - Purposefully avail yourself
  - Purposeful availment test:
    - Is it enough to put things into stream of commerce? No, you aren't consenting to NJ by selling things to Ohio
    - "you have to seek to serve a given state's market"
  - US Jurisdiction does not equal state jurisdiction
- Breyer + 1: concur
  - Single sale in NJ not enough for stream of commerce
  - Single isolated sale v. regular flow of goods
  - Regular flow would be okay for stream of commerce, jurisdiction
  - Regular flow + something more
  - Doesn't want to change jurisdiction rules
- Ginsburg + 2: dissent
  - Should have known JMM machines would be sold there
  - JMM not subject to general jurisdiction, only specific
  - No issue about fair and reasonable
  - Reasonable to sue in NJ
  - NOT about consent
  - JMM met purposefully availment test

▪ Take away:
  - Stream of commerce + targeting that forum = specific jurisdiction

- *Jackson v. California Newspapers Partnership*
  - Cal Newspaper accuses Jackson of being injured through steroid use
  - Jackson sues in Illinois Federal Court
  - Does internet change rules? No
  - No General Jurisdiction
  - Specific Jurisdiction?
    - Like calder v. jones
    - No focus on IL
  - Did defendants purposefully avail themselves? No
  - WWV 5 factor fair and reasonable test
    - Burden on De: Yes, D
    - Forum Interest: ?
    - Plaintiffs interest in convenient relief: Yes, P
    - Efficient resolution of controversies: Favors D
    - Shared interest in substantive policy: ?
    - In the end looks probably more fair and reasonable on defendant's side
- *Young v. New Haven Advocate*
  - Newspaper in Conn published story about poor conditions VA prison in connection with Conn inmates
  - Young, warden of prison mention in stories, sues for Libel

        - PJ not enough to meet minimum contacts
        - Not designed to serve or attract a VA audience, designed to serve local conn office
        - That that the article was on the internet didn't make that much of a different, same test as if it were in print
    - Specific Jurisdiction
        - Which acts gave rise to the minimum contacts for the suit
            - But for, but for the act there would be a suit
            - Evidence: act is evidence for claim
    - *Goodyear v. Brown*
        - Brown, parents of two boys killed on bus in FR sued in Goodyear. Alleged problem of bus was the tire. Goodyear: it was driver error. Sued Goodyear (US-Ohio), Goodyear (turkey, Goodyear (France) Goodyear (lux). Sued in NC state court. Goodyear USA said PJ okay can ignore them, consented to jurisdiction
        - Foreign def contested jurisdiction
            - Contacts with NC
                - No employees
                - No bank accounts
                - One connection (owned by Goodyear USA)
                    - Very small % of tires distributed in NC for cement
            - Not Specific Jurisdiction
                - Contacts didn't give rise to the suit
            - General jurisdiction?
                - NC: stream of commerce > continuous and systematic contacts
                - SCOTUS:
                    - NEW TEST: continuous and systematic = at home
                    - Examples of at home
                        - Individuals
                            - Domiciled
                        - Corporation
                            - Incorporated
                            - PPB
                    - Looks at two cases:
                        - *Perkins v. Berquet Consol. Mining Co.*
                            - All of the activities are in Ohio at time of suit, so even though Philippine company 100% of contacts in Ohio > general jurisdiction
                        - *Helicoperatores Nacionales v. Hall*
                            - Peru crash. Helicopteros in Colombia. Suit in Texas court. Contract, bank and equipment in Texas. NOT continuous and systematic NOT general jurisdiction
                    - These companies are at home abroad: No PJ
                    - Don't "pierce the veil" here

b. In rem
    - Authority over the property, can bind the interests of all the different interest of ppl who claim that property
    - Three types:
        - "true" in rem: binds the whole world

    - Quasi in rem I: who has the better claim to the property
    - Quasi in rem II: about some other claim, to settle a debt
- How do courts get in rem jurisdiction?
    - FRCP 4(n): in rem
        - Federal statute
        - Try in personam first: then the court can seize the property per state law
    - DPC of Const
        - State law: 14 A
        - Also 5 A
- Pre judgment attachment v. post-judgment attachment
    - Pre-judgment attachment: for security to prevent the disappearance of assets
    - Post-judgment attachment: when defendant refuses to pay, use attachment to reach assets and garnishments
- *Harris v. Balk*
    - Harris (NC) owes Balk (NC) owes Epstein (MD)
    - Harris traveled to MD, Epstein serves process for money owed
    - Balk sues Harris for money, Harris says I already paid
    - Quasi in rem II jurisdiction
        - Not about who has better title to the money, but I have some other claim, my claim against balk I'm going to prosecute that claim that you have that really belongs to Balk
    - SCOTUS: jurisdiction upheld
- Tillman: Iran case: *Victims v. Iran*
    - Victims owed money from gov from terrorist bombing in Saudi Arabia
    - Sprint owed money to Iran from communications
    - Statute: if country owes money, then victims can sue company that owes country money to get money
    - Valid judgment
- *Shaffer v. Heitner*
    - Heitner: 1 share of stock in Greyhound. Sues Greyhoud corp, 28 directors and officers.
        - Derivative suit: when shareholder says d/o aren't going to sue themselves and I'm going to come in as name of the corporation and sue them
    - Bad actions take place in Oregon
    - Heitner sues in Delaware
    - Greyhouse incorporated in Del,
    - d/o NO connection to Del
    - Quasi in rem II: fundamentally about taking stock because it is about some other claim
        - You messed up company, my share price went down, you should have to pay back to the corporation to reimburse it for the harm you did and that should go to me
    - SCOTUS:
        - INTERNATIONAL SHOE STANDARDS APPLY
        - Go through suit: minimum contacts? Give rise to the suit? Fair and reasonable?

- If you say you own it for this purpose, true in rem or quasi in rem I, then the fact that you own the property then you have a contact, and it gives rise to the suit
- QIR I and TIR: okay to go with wherever the property is
- This case: QIR II:
  - If arises out of rights and duties of ownership, then SJ so PJ
- "traditional notions of fair play and substantial justice"
  - Emphasis on fair play and substantial justice
  - Unfair to stock owner
    - Stock situs is not enough, maybe owner never went to Delaware
- Big picture: why aren't there Delaware contacts? Don't those contacts give rise to the suit?
  - They mismanaged the company which is incorporated in Del
  - Would be fine under DPC, but you have to look at state law
  - State Law: didn't say you can go after d/o because they are d/o, you can go after anybody sited in stock, state law really broad rule,
    - Too broad under DPC
    - State law is focused on the wrong contacts, focused on the share of stock which doesn't generate jurisdiction because it doesn't give rise to the suit
- Holding: ALL in rem jurisdiction, apply International Shoe Standard
  - Most standard property disputes will be just fine
  - Some but not all of QIR II will be okay under new test, but not all
- For specific jurisdiction you had to purposefully avail yourself
  - Courts will say: you're here you will get benefits and protections which means you are under jurisdiction

- "Transitional" transactional see book
  - *Burnham v. Superior Court*
    - Divorce, living in NJ. Wife goes to Cali. Husband cites desertion in NJ sues her. She sues in Cal saying this isn't what we agreed. Dennis travels to Cali on business trip, 3 days, visits kids, gets served process.
    - Cali court: jurisdiction kay because of physical presence
    - SCOTUS: split opinion
      - 3 1/2: Scalia: state service is old doctrine
        - Traditional!
        - If it's okay under traditional okay under due process
      - 1: white: concurs in part
        - No showing here that this is so arbitrary and lacking in common sense
      - 4: Brennan: cares about fair play and substantial justice
        - Run with new test
        - Ok under new test
        - 3 days purposefully availed himself various benefits of enjoying Cali
      - 1 : Stevens: everybody is a little right, I'm not going to try and decide
  - Traditional Rules
    - *Tickle v. Barton*
      - Tickle: invited to HS banquet, served process
      - Fraud, force, that is not good

        - Under traditional rules, no jurisdiction
    - *Grace v. Macarthur*
        - Airplane over AK, served, OKAY! You are w/in airspace of AK

4. Venue

- Venue- generally
    - Which district?
        - Specific
        - General 1391
    - Convenience
        - No constitutional rules
    - Focus: federal venue rules
- 1390
    - Venue: geographic specification of the proper court of courts for litigation of a civil action
- 1391
    - General venue statute
    - Base for venue
    - (b) venue in general:
        - (b)(1): where any defendant resides if all defendants are in that State
        - (b)(2): substantial part of events
        - (b)(3) : Fall back: anywhere where any D having PJ, if b(1) and b(2) don't work
            - Aka if there is no district in which action may be brought under (1) or (2), then anywhere PJ for defendant is okay
    - (c) Residency
        - (c)(1): where you reside; individual: domicile
            - Presence
            - Intent to remain there indefinitely
        - (c)(2): entities: PJ?
            - If you have PJ then you're good
            - Limitation: 1391(d) corporations deemed to reside in States with multiple districts:
                - PJ defined on state by state level
                - Yes subject to PJ on all three
                - Try and divide it by districts
                    - Ask if each district were a separate state then what would PJ tell us?
                    - If this were the separate middle state of NC, would they be subject to PJ?
                - Start off by saying: entity is resident for wherever state has PJ
                    - Divide by district
                    - If no such district: corporate shall be deemed to reside in the district within which it has the most significant contacts
        - (c)(3) any res not in the US may be sued in any judicial district, and the joinder of such a det shall be disregarded in det where the action may be brought w/ respect to other defendants
- Specific venue statutes
    - 1400:
        - Patents, etc
        - Will have diff. rules

- Whatever statute you find will not be exclusive, but sometimes it will be exclusive can only bring case in this district

- Venue is waivable
- What if defendant doesn't like the venue?

	Cases Filed in the Wrong Venue	**Cases Filed in the Correct Venue**
Motions to Transfer	28 USC 1406	28 USC 1404
Motions to Dismiss	28 USC 1406, FR 12(b)(3)	Forum non conveniens (common law doctrine)

- Transfer or dismiss
- 1404 : venue proper but there is a more appropriate federal district of division where it should be litigated
  - (a): transfer, for convenience or justice
    - Have to show: could have been brought OR parties have consented
    - Must demonstrate that considerations of convenience and interest of justice weigh in favor of transfer to that district
      - See private and public factors
        - Convenience factors:
          - Private:
            - Plaintiff's choice of forum (given GREAT weight)
              - P's choice
            - Defendant's choice of forum
              - d's choice
            - Where claim arose, whether claim arose elsewhere
              - Where arose
            - Convenience to the parties
            - Convenience of the witnesses
            - The ease of access to sources of proof
              - Access to evidence
          - Public:
            - The transferee's familiarity with governing laws
              - Which law applies
            - Relative congestion of the potential courts
              - Court congestion
            - Local interest in deciding local controversies at home
              - Local interest, jury
    - To: could have been brought OR where parties have consented (after suit)
    - Consented means consented AFTER suit
    - Consented before suit: could have been brought there
  - (b) district v. division
    - MDNC has sub-parts, Durham, Greensboro, Etc
      - Divisions basically don't matter that much
    - Upon motion or consent, can move it around among divisions

        - If you decide lets hold court on scene of car accident, in theory that district court could do
        - Idea; division you can move around its really flexible
    - (c) dist.ct. may order civil actions to be tried at any place w/in the division in which it is pending
    - Timing more subtle then strict rules of waiving venue objections, court's discretion
        - Why? Plaintiff's do not want to dismiss, transfer doesn't involve that so great deal of flexibility.
        - 1391 is pretty straightforward, should not on day 1 whether it's good or bad venue, whereas private and public considerations might take longer to figure out
  - 1406: WRONG venue, dismiss or transfer to venue where it should have been brought
    - Can dismiss OR can transfer
    - Against, in the interest of justice
        - Convenience and interest of justice (see Public and Private factors)
    - Transfer to somewhere would it could have been brought
        - No consent thing to this part
    - Why dismiss? Because then Plaintiff has to re-file, if SoL are close, might be end of the case totally
    - Court could say: in interest of justice not going to make you go back and refile don't need to ask about SoL: transfer
        - Discretion of the judge
        - Defendant can ask for either, court gets to decide
    - Transfer to any DISTRICT or DIVISION
        - NOT STATE COURT
    - (a): district ct of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or div in which it could have been brought
  - Forum non conveniens
    - Alternative forum with jurisdiction
    - Forum is inconvenient
        - Same private/public considerations as a transfer of venue, but add third party D's (would be easier to combine with other suit over same interest)
  - You can use 1404 or 1406 to transfer a case, but you have to stay in the same system
    - If you are in federal district courts > district courts
    - State > same state
        - Within a state may have their own rules about how to move around
    - CANT fed > state court
    - CANT state > different state
    - CANT state > Foreign court
    - Have to dismiss and re-file for can't
- Meaning of resident under subsection (1)
  - Definition of resident for individuals
    - Domicile pretty much
  - Definition of "resident" for corporations and other entities
    - Entities reside in every federal jurisdiction where it would be subject to PJ if that district were its own state
    - Corporate v. non-corporate entity
        - Statute now includes noncorporate entities like partnerships

        - Non corp entities are treated as citizens of every state in which one of its members is domiciled
- Meaning of substantial under subsection 2
    - *Uffner v. La Reunion Francaise*
        - Facts: Uffner had ship on the open seas it sunk. Insurance company in France, insurance company refuse claim.
            - Underwriter: UK, GA
            - Uffner sues in district of Puerto Rico saying insurance company didn't comply with policy.
                - Why here? Substantial part of events occurred here
                - FR: reason for suit was claim denial which happened in FR
            - Note: PJ waived because FR comp. didn't raise it.
            - Court:
                - (b)(1): doesn't work, def do not all reside in the same state
                - (b)(2): two ideas:
                    - Chain of events idea: in telling the story of what happened do we have to mention PR? AKA if good well-pleaded complaint will have to mention Puerto Rico then okay
                        - Works here
                    - Wrongful event
                        - Is it an event that gives rise to the claim?
                        - Did the insurance wrong in PR? No, only place it did something wrong was FR
                        - No subst part of the events, only events we care about are where something bad happened that we're suing over
                        - This is the test the 8th circuit likes
                    - Here, court chooses chain of events test
                        - Majority test: most of the circuits like chain of events
                        - SCOTUS has never decided
- Party is considered to waive a motion to dismiss for lack of proper venue unless the motion is made at an appropriate time, usually quite early in the case
    - Why? Not const issue, depends on legislature has determined is inconvenient or inefficient
- Some companies use forum selection clauses in contracts:
    - Permissive forum selection clause:
        - You MAY sue in a particular place
        - Always enforceable
    - Exclusive forum selection clause
        - You MUST sue in particular place even if there are better places
        - Maybe not always enforceable
- *Macmunn v. Eli Lilly Co.* 2008
    - *Facts:* Defendant filed motion to transfer products liability case to Mass. Eli Lilly and Co: argues both private and public interests favor primarily because the case has little if any ties to the district
        - Plaintiffs: oppose transfer citing numerous cases involving the same defendant and subject matter that have been resolved in this District.
        - Plaintiffs filed suit in D.C. Superior Court
        - Defendant removed case to District court of D.C. based on diversity
        - 4 months later: def filed motion to transfer case to District of Mass.

- *Issue:* Should case be transferred to another venue?
- *Rule:* 1404(a) requires court to consider whether the case "might have been brought" in the alternative venue and if so, whether transferring the case to that venue would promote the convenience of the parties and witnesses as well as the interests of justice
- *Analysis:* Because contacts relevant to this dispute are overwhelmingly focused in Mass and because this case is still in its nascent stages,
  - Def needs to make two showings to justify transfer
    Defendant must establish that the plaintiff originally could have brought the action in the proposed transferee district
    Defendant must demonstrate that considerations of convenience and the interest of justice weigh in favor of transfer to that district
    Statute call on court to weigh a number of case-specific private and public-interest factors
    Private interest considerations:
    The plaintiff's choice of forum, unless the balance of convenience is strongly in favor of the defendants
    The defendant's choice of forum
    Whether the claim arose elsewhere
    The convenience of the parties
    The convenience of the witnesses
    The ease of access to sources of proof
    Public-interest considerations:
    The transferee's familiarity with the governing laws
    The relative congestion of the calendars of the potential transferee and transferor courts
    The local interest in deciding local controversies at home
  - Private interest factors favor transfer
    - Witness in Mass
    - Medical records in Mass
    - Convenience of witnesses and ease of access to sources of proof: weigh in favor of transfer
    - District has no meaningful ties to the controversy, plaintiffs reside in Mass
    - Lobbyist and sales people regarding DES doesn't tip in favor
    - Operative facts giving rise to the plaintiff's claim arose in Mass
  - Public interests favor transfer
    - Mass has strong interest "in seeing the product liability claims of Mass citizens are tried fairly and effectively"
    - Under DC choice of law provisions, Mass law is likely to apply, no reason Dist of Mass cannot adequately resolve this case
    - Familiarity with DES litigation does not counterbalance this interest; factor points to Mass
    - District contacts with case are not as great as Mass
    - Dist of Mass has similarly experienced magistrate judge whom both parties have requested to mediate other DES cases
  - Both private and public interest factors support transferring the case to the District of Mass
- *Holding:* Court grants the defendant's motion to transfer

- "forum non conveniens"

- The forum is not convenient
- Separate common law doctrine that involves a dismissal and subsequent refiling
- Federal courts use the common law doctrine of forum non conveniens to dismiss a case that was filed in a proper venue in favor of a foreign forum that can provide an adequate remedy to a plaintiff (ie a remedy that is consistent with basic notions of fairness)
    - When deciding whether to grant a forum non conveniens dismissal, federal courts will apply the same private and public interest factors that they use to analyze a 1404 transfer motion.
    - In general, courts are more reluctant to grant a form non conveniens dismissal that to grant a motion to transfer under 1404

- *Piper Aircraft v. Reyno*
    - Facts: Air crash in Scotland. Estates of several Scottish citizens killed in accident sued for wrongful death against Piper Aircraft Company. Case transferred to US Dist Ct. for middle district of Penn. Aircraft manufactured in Pennsylvania by Piper. Propellers manufactured in Ohio by Hartzell. At time of the crash aircraft registered in GB and owned by Air Navigation and Trading Co. operated by mcdonald aviation, scottish air taxi service. Wreckage of plane in Farnborough, England.
        - Why bring in US? Scotland doesn't have strict liability. Easier to win in Cali
        - Def sued in Cali State Court
        - Removed to Fed Court: central district of California
            - Hartzell subject to PJ in cali? No dropped him out of lawsuit
        - Piper transferred to Penn Midd District Court (1404)
            - Hartzell added back in
        - Def: move to dismiss under forum non conveniens
    - Court: motion approved
        - Balancing test from Gulf Oil Corp
        - Is there an alternative forum?
            - Why imp.? Whole point of forum non conveiens is not that you don't have a claim but that there is a better forum
            - UNLIKE venue. For venue you can say you are out of luck this forum doesn't work too bad
            - Forum non conveniens starts on assumption that you are good on everything but we will still kick you out of court if there is somewhere else better for you
        - Private Factors (pretty much the same as 1404 factors but a little difference)
            - Plaintiff's choice
                Shouldn't matter as much if you're foreign
                Worried your just coming here to get more money
            - Defendant's choice
            - Evidence
            - 3rd party defendants
                Off in UK
            - Convenience for parties
            - Witnesses
            - Evidences
        - Public Factors
            - Which law applies
                Every forum has to have choice of law rules
                Van Dusen cited p. 388 footnote 8

When you do a transfer you don't change the law
Even after 1404 transfer DON't change your choice of law rules
Idea: case filed in Cal, as of day it was filed there were certain choice of law rules that were going to apply
If transfer don't need to change choice of law rules, doesn't make sense, don't want that to have

Ferens

Even if the plaintiff requests the transfer, don't change your choice of law rules
Plaintiff chooses forum: gets to keep CoL rules that I have strategically secured

- What choice of law rules did court apply to Piper?
  - California, originally filed there
  - Keep CoL rules of original place even if you transfer
- What choice of law rules did court apply to Hartzell?
  - Pennsylvania, picked up there
  - Weren't part of the transfer
- Piper would use Cal CoL
- Hartzell would use Pen CoL
- What state laws would California pick?
  - What is the CoL for product liability
  - If you look at Cal's list of CoL rules
  - Turns out substantive law I will apply is law of Pennsylvania
  - Use state where it was manufactured
- What state laws would Penn Pick?
  - Its CoL rules say substantive law would be Scottish law
- States might disagree about who should decide the question
- Piper > Cal > Penn
- Hartzell > PA > Scottish
- District Court: which law applies factor
  - It's too confusing!
  - Kick this case as far away from me as I can get it
  - Two defendants and different law applying to each one

○ Plaintiff's appeal to 3rd circuit:
- Appellate court: rejected what the dist.ct. decided
  - Concern: abused their discretion
  - Less favorable to the plaintiff
  - Wouldn't have benefit of US litigation
  - Scottish law is unfavorable to Reyno

○ SCOTUS:
- That's lame
- Court of appeals erred in holding that plaintiffs may defeat a motion to dismiss son the ground of forum non conveniens merely by showing that the sustentative law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum.
- One factor that wouldn't count: WHO WOULD BENEFIT
- Public factor!
  - How hard it is for the judge to figure out which law applies

        - From interest of the system is it going to be hard for judge to apply Scottish law
        - Whether there exists an alternative forum, does court have authority to consider this case?
        - Other factor: other 3rd party defendants
            - It would be more convenient to send to Scotland because they can deal with everything
        - Why would def want other def in the case
            - Easier to say that guy did it, stick him with the bill if the defendant is actually there
            - Can shift the blame as much as possible
        - Court can grant conditional dismissal, we will dismiss your case
            - Defendant you want this case kicked out of Penn courts so it can be done in Scotland
            - Only IF you waive any objection to PJ, SoL
            - Can't get to Scotland and say hey SoL lapses and no PJ
            - Can't say both things can't say there is an alternative forum and then go to Scotland and raises defense
    - Take Aways:
        - *Van Dusen v. Barrack* cited p. 388 footnote 8
            - When you do a transfer you don't change the law
            - Even after 1404 transfer DON't change your choice of law rules
            - Idea: case filed in Cal, as of day it was filed there were certain choice of law rules that were going to apply
            - If transfer don't need to change choice of law rules, doesn't make sense, don't want that to have
        - *Ferens*
            - Even if the plaintiff requests the transfer, don't change your choice of law rules
            - Plaintiff chooses forum: gets to keep CoL rules that I have strategically secured
- *Smith v. Colonial Penn Insurance Company*
    - Insurance company moved to transfer venue
    - Nearest commercial airport was 40 miles away was insufficient to warrant transfer
- State courts typically have the power to dismiss a case that was filed in an improper venue or to transfer it to a proper venue in the same state, such as to a state court in another county. State courts also typically have the power to transfer a case that was filed in a proper venue to a more app. Venue in the same state or to grant forum non conveniens dismissals when the most convenient venue is in another state or country. State courts, however, cannot transfer a case to a federal court, a court in another country, or a state court in another state

5. Pleading

1. Complaint
    - Complaint
        - FRCP 8(a)
            - Jurisdictional statement
                - SMJ: determined sua sponte
            - Short and plain statement of a claim on which relief can be granted
                - Cllaim = facts + (cause of action)
                    - Implied cause of action
            - Demand for relief
        - FRCP 8(b)
            - Can state alternate/inconsistent/contradictory claims
        - FRCP 9(b): heightened pleading standard for fraud & mistake
            - (b) for fraud and mistake need specificity
                - Fraud knowing misrepresentation of immaterial fact to induce another to reasonably rely thereon to this detriment
                - Mistake: if two parties weren't clear to each other
            - BUT knowledge, intent, etc can be plead generally
        - FRCP 11: reasonable inquiry under the circumstances; all papers signed by attorney; sanctions for frivolous arguments, harassment, or lack of factual investigation

    Pleading Standard

    - Pleadings:
        - FRCP: 7(a): how case gets started
        - Pleadings allowed:
            - complaint, answer to complaint, answer to counterclaim/crossclaim, third party complaint, reply
    - For a long time FRCP was "notice" pleading
        - Just idea that other side has to have notice about what they were sued on
    - Armstrong case
        - Way too long
        - 75 pages of 80 are accusations
        - Judge: you need to start over again, not a short and plain statement on which you can state a claim
    - Modern pleading > swinging back to ease of processing claims
    - *Conley v. Gibson*
        - RR employees v. RR and Union
            - Union didn't rep black employees
        - District Court: dismissed, should have sued elsewhere gone to administrative agency
        - SCOTUS:
            - Jurisdiction was wrong
            - 2 arguments ade, wrong jurisdiction and something wrong with complaint
                - Wrong with complaint: doesn’t state a violation of law, refused to set forth specific facts to support general allegations of discrimination
            - Rule 8(a): short and plain statement, claim on which relief can be granted
            - Court thinks there is a claim on which relief can be granted:
                - "no set of facts" idea

- Unless there is no set of facts consistent with complaint that show violation of law they will get over that hump
- Yes there is a set of facts that are violation of law
- "if these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit …discrimination in rep. because of race is prohibited by the Railway Labor Act"

- No specific facts?
- Wrong, you have fair notice of the plaintiff's claim
- "fair notice" idea

- Plain = fair notice, have to generally allege facts

- Allegations can be inconsistent 8(d)(2) and 8(d)(3)
  - Can have alternative statements of a claim or defense 8(d)(2)
  - Can have inconsistent claims or defenses 8(d)(3)
- FRCP 11:
  - (b)(3): allegations have to meet a standard:
    - Have evidentiary support OR
    - If specifically so identified, will have evidentiary support after a reasonable opportunity for further investigation or discovery
- Can plead yourself out of court
  - Ex. SoL problem, have plead yourself out of court
- *Doe v. Smith*
  - Facts: Doe accusing Smith of illegally videotaping the two of them w/o her consent and publishing the videos at school
    - Jurisdiction? State claims hooked on to federal question jurisdiction, federal wiretapping statute
    - Def: MtD 12(b)(6) complaint defective doesn't allege recording was an interception (all claims hinge on fed statute to get into fed court)
    - Fed Dist Ct: dismissed
    - SCOTUS: ok to infer from the fact that legal elements are satisfied
      - infer this from the whole story that is being told here
        - Is it reasonable inference to make from whole story that communication on tape?
          - Yes probably
- Pre-Twombly Rules: *Doe v. Smith*

  Assume well-pleaded facts are true

  Draw all the reasonable inferences for the plaintiff

  Ask if all the elements are pleaded or if can be reasonably inferred
- *Leatherman v. Tarrant County* 1993

  SWAT raid: custom or practice involved of failing to train, of just barging into people's houses and abusing them in various way

  Would it be useful to have a heightened pleading standard? Yes

  Court said that there is not a heightened pleading standard
  - Only fraud and mistake, end of list

  If rules 8 and 9 were written today, claims against municipalities might be raised to heightened pleading, but that has to be done by amending federal rules not judicial decisions

- *Twombly v. (Bells) aka ILEC*

In the beginning:

- AT & T (Ma Bell)
- Broken in baby bells
- Baby bells had monopoly on local service
- Long distance: A T & T
- ILECS
- Incumbent local exchange carriers: Baby bells: local service
- 1996 telecom act: deregulate, let all sorts of ppl compete in this market
  - Baby bells you can provide long distance
  - Att can provide local service
  - New entrant: competitive local exchange company: you can do that: new company: CLEC
  - Get rid of all these regulatory barriers, everybody can compete > better phone service

Problem that developed: each baby bell each has their own service area, they have all agreed to not invade each other's service area so they have a monopoly on each place to keep services high. Agree to all fight off the new company's

- Each guard their territory not letting old guys in, not let new guys in

Sherman Act, Section 1: conspiracy in restraint of trade

- It's not about monopolies like Microsoft, not one big 800 lb. gorilla
- A whole bunch of little companies that have all agreed to pool their resources and monopolize

Twombly: there was parallel conduct to stop the CLECs and not compete with each other, On information and belief, the ILECs have agreed

- 11(b)(3): need factual support for allegation OR if it's so identified you think it's likely to have factual support after you do all the discovery
- This information and belief is a traditional way of "if identified" saying you believe it's true but will have factual support after discovery

Sherman act requires a CONSPIRACY in restraint of trade

- That means an agreement
- Tacit collusion is NOT against the law, you have to agree for it to violate the law

District court: need allegations of additional facts

Appellate court: plus factors aren't needed, could survive dismissal, "no set of facts"

- I could imagine set of facts + parallel course of conduct to get you what you need

SCOTUS:

- Not "no set of facts"
- Don’t second-guess facts
  - Still assuming that what plaintiff says is true
  - "Rule 12(b)(6) does not countenance…dismissals based on a judge's disbelief of a complaint's factual allegations
- Plausibility of the inference
- "Asking for plausible grounds to inter an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement" p. 471
- Always have to draw inferences from what complaint says

        - Have to ask whether they are plausible?
        - Don't ask who do we believe?
        - How do we infer from is plead from what isn't plead
    - Did plaintiffs in Twombly actually allege a real agreement?
        - Plaintiffs allege that they have agreed!
        - No facts to support that
        - Too conclusory
    - Conclusory is BAD
        - "a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than label and conclusions, and a formulaic recitation of the elements of a cause of action will not do"
    - Can we go from what is plead to what isn't plead?
        - That's how you look if its plausible
        - If absence of competition and parallel course of conduct > info and belief, can't make that kind of judge
    - Can draw plausible inference from everybody setting same price at same time
    - How do you know if its conclusory?
        - Something to do with fair notice
        - Something to do with discovery
        - Something to do with legal conclusion
        - But not any of these things
    - Worry about discovery

      Dissent: cant point to a good line about what's conclusory
- Post Twombly:

  Strike out all conclusory allegations

  Assume well pleaded facts are true

  Draw al PLAUSIBLE inferences for plaintiff

  Are all elements pleaded or inferred
- *Ashcroft v. Iqbal*
    - Ashcroft (AG), Mueller (Director of FBI) = defendants
        - Other def: low level agents accused of brutal stuff
    - Iqbal: detained,
    - Complaint alleges about Ashcroft and Mueller:

      FBI arrested large numbers of Arab and Muslim men

      Ashcroft and Mueller approved restrictive confinement

      A and M acted because of the plaintiff's religion and national origin
        - If you can't claim that can't recover under statute suing under
    - Have to plead and prove that defendant acted with discriminatory purpose
    - Majority and dissent share understanding of Twombly
        - Strike out conclusory allegation
        - Assume well-pleaded facts are true
        - Draw all plausible inferences for plt.
        - Are all elements pleaded or inferred?
    - Court:
        - Strike out 3
            - A and M acted because of the plaintiff's religion and national origin, Conclusory
        - Malice/intent/etc can be alleged generally

        - If you struck out number 3
        - There's a leap from 1 and 2 to number 3 isn't plausible
    - This is just like Twombly, conclusory allegation toss it
    - Go to next stuff can they get to it?
    - How do they know its conclusory?
        - Sure there's no heightened standard under Rule 9 b
        - Just go to Rule 8, same as Twombly
    - Danger:
        - Hey that's a conclusory, just repeating the elements of the cause of action
        - Statute: discriminatory purpose
        - You just say they acted with discriminatory purpose
        - My boss always treated people with different races differently
        - Could put in other kinds of detail
        - Now have to do that worried about getting thrown out
        - Do you have to plead your evidence?
            - No
            - Not required
        - If you say this kind of allegation is conclusion start have to
        - Have to interview the AG and the director of the FBI to say hey when you made decision X were you doing it for discr. Reasons?
        - Majority is motivated by discovery
        - We don't want just anybody to come in and allege that hey there were doing for discriminatory reason and get to depose the AG
- Dissent: Souter
    - Who wrote Twombly: Souter
    - Agrees that you can't get from 1 and 2 to get to 3
    - Disagrees: there's nothing wrong with 3
    - Does this complaint give fair notice?
        - Yes they would have a pretty good idea they were being sued for
        - Would know what they were being sued for?
        - Hard to do discovery?
- Problem: never have that kind of evidence especially before you start the claim
    - Not going to know what the boss says to the other boss, basically requiring to have information before pleading that you would normally get form discovery
- Explanation of Iqbal:
    - Iqbal doesn't know what Ashcroft and Mueller were thinking
    - Doesn't know why they did what they did
    - All he knows are these two facts
        - FBI arrested a lot of ppl
        - A and M made role in approving confinement
    - We expect greater degree of persuasion from the complaint that yes this person knows what their talking about and yes it's worth the unpleasant discovery

- Twombly/Iqbal Test:
    - Are the allegations well pleaded?
        - Well pleaded when it is more than mere conclusory statement
        - If so, then assume veracity
    - Are the well-pleaded allegations plausible?

- After well pleaded has been decided > determine whether they plausibly give rise to an entitlement to relief

- Takeaways:
  - Subtract out conclusory
  - Assume well pleaded facts as true
  - Draw all plausible inferences for P, ct will use own experience/common sense to determine plausibility, allows great discretion
  - Once draw reasonable inferences, are all elemented either (a) pleaded or (inferred)
- Twombly/Iqbal:
  - Key issue: whether the allegation was conclusory
  - We don't really have a good sense of what makes an allegation conclusory
  - Want to avoid having conclusory?
    - Add some evidentiary facts
      - Facts that explain why you think you have a case

Responding to the Complaint

- Ways to respond to a complaint:

Answer

Motions

- Rule 12(b) motion to dismiss
- Motion for more plain statement

Default

- Rule 55

Answer FRCP 7 & 8

FRCP 12(a): you have 21 days to file an answer

- FRCP 6: can get plaintiff's consent for more time or make a motion for extension of time
- FRCP 6 motion for extension of time does not stop the clock

Can do 4 main things in an answer:

Admit/deny allegations

- Allegations: assertions about facts

- Assert (unwaived) defenses listed in 12(b) or elsewhere
- Raise affirmative defenses
  - 8(c): state in answer OR Waived
- Assert counter-claims/cross-claims

- *Reis Robotics USA Inc. v. Concept Industries Inc*
  - D: affirmative defenses, P: 12(f) motion to strike to remove unnecessary clutter
    - Can use 12(f) strike any insufficient defense, which means something that would lose on 12(b)(6) if it was a claim
    - Rule 8(b): pleading standard for defenses: should have a short and plain statement
  - Three part test for affirmative defense pleading:
    - Matter appropriately pled as affirmative defense
    - Defense is adequately pled un FRCP 8 & 9
    - Evaluate sufficiency of the defense pursuant to a standard identical to FRCP 12(b)(6)
- Can you just say deny to complaint?
  - No
  - FRCP 8(b)(2): have to fairly respond to the substance

- FRCP 8(b)(4); you have to admit the part that's true
- FRCP 8(b)(6): if a response is required that silence is an admission
  - Counterpart: if no response is required that silence is not an admission
- FRCP 8(b)(5): lack knowledge to form a belief
  - Lack sufficient info
- Restraint: Rule 11: can't just say I don't know
  - Requires reasonable inquiry
  - If don't follow Rule 11 could get sanctioned
- Can say that you lack sufficient info to form a belief 12(f)

- *Ingraham v. US*
  - Facts: medical malpractice. Statutory damage cap: gov's main defense, policy reasons.
  - Is statutory damage cap in list of affirmative defenses in rule 8(c)
    - No
  - Why care?
    - 8(c) says you have to state them in your answer, explicitly in your defense
    - Ordinary defense, like I wasn't in TJ that day, don't need to draw attention to it
    - Affirmative defense: clear I am making this defense
      - Why?

Policy:

Surprise:

Access to evidence

- Which party has better access to evidence.
- Aff. Def. would particularly be w.in the knowledge of person asserting affirmative defense

How important is this defense?

- Is it really really important that it be honored even if doesn't get

FRCP 8 (c) isn't exclusive

How do you know what else falls in the list?

Black's law dictionary

Statement of new matter which admitting the facts alleged in former pleading, shows cause why they should have their ordinary legal effects

- This is what REALLY matter

Even if complaint is all true, STILL find for me because…

This explains all the things on the list

If you don't mention your affirmative defense, you waive it

8 (c): state in answer or waived

It's gone you can't get it back

Even though statute says damages are capped on 500K, aren't going to apply it here because gov forgot to mention it

Motions:

FRCP 7(b)

Asking for a court order

Possible Pre-Answer Motions FRCP 12

FRCP 12(a)(4): if you file a motion under rule 12 it stops the clock

Will re-set to 14 days after court decides

- Motion to Dismiss 12(b)

SMJ
PJ
Venue
Process
Service
Failure to State Claim
Necessary party

- Motion for a more definite statement 12(e)
- Motion to Strike 12(f)

- Possible Post-Answer Motions
  - Motion for judgment on the pleadings 12(c)
    - Post-Answer Motion 12(c)
    - Same standard as 12(b)(6)
    - Can't decide contested matters of fact
    - Deciding law that's clear on the pleadings based on the whole
    - If there's stuff that's in dispute, assume that it favors the non-moving party
      - If P asks for judgment under 12(c), court will say I can't do that you are still fighting over who hit who, assume D is right
      - D files 12(c), can't do that either, again facts are in dispute I have to assume P is right
    - If defendant admitted allegations, court could grant 12(c) motion no facts in dispute here
    - In sum: take all the facts that are jointly agreed to and see if legal conclusion comes to them
- Motion to Dismiss
  - always about some legal issue
  - Court will Assume the well-pleaded facts are true
  - If lawyer files Motion to Dismiss and attaches exhibits, court will treat as Motion for Summary Judgment
    - Because you are contesting the facts and put in lot of evidence
    - All parties must get reasonable opportunity to present
    - Both sides get discovery
    - If you want to contest the facts and now just the law, both sides get good reasonable opportunity to look into the facts
- Defenses that allow you to dismiss 12(b):
  - SMJ
  - PJ
  - Improper Venue
  - Insufficient Process
    - About papers they handed you
    - Gave me the wrong papers
  - Insufficient service of process
    - Method was wrong
  - Failure to state a claim upon which relief can be granted
  - Failure to join a party under Rule 19
    - Necessary party who ought to be in this case but isn't
  - Can bring more than one at the same time

- Motion to Dismiss, FRCP 12(b)(6) failure to state a claim:
  - MUST be made before a responsive pleading, before an answer
  - Tests legal validity of P's allegations,
  - Rely on complaint, answer, and reply
  - Take well-pleaded facts as true
  - Three ways:
    Failure to plead enough facts to meet *Twombly/Iqbal*
    Even if all facts are true, no law permitting recovery
    P pleads herself out of court (fatal fact, establishes affirmative defense)
- Motion to dismiss for a more definite statement FRCP 12(e)
  - Test: so vague or ambiguous that you can't reasonably prepare a response
- Motion to Strike FRCP 12(f)
  - Test: is this prejudicial?
    Unfair prejudice
- Motion to Dismiss for Improper Venue FRCP 12(b)(3)
- FRCP 12(b): every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required
  - Exceptions are the list in 12(b), can include them in the answer or a motion to dismiss
- FRCP 12 (b)(6) motions assume as true the well-pleaded allegations of the complaint. If a defendant introduces supporting factual matter not alleged in the complaint, and the court accepts that matter, then the motion is converted under Rule 12 (d) into a FRCP 56 MSJ
- Can raise defenses in Answer or in Separate Motion
- Omnibus Motion Rule 12(h)
  - If party files pre-answer motion, cannot make another 12 motion based on defenses or objections that were available when filed pre-answer motion
  - Bring em if you've got em
  - Cant file subsequent motions not raised earlier
  - Exceptions:
    Cross references FRCP 12(h)(2) or (3)
    Has to be available
    - Look at 12 (g): has to be available to the party but omitted from its earlier motion

    FRCP 12(h)(2): numbers 6 and 7 can be raised in any pleading or motion or at trial/MSJ
    - Anything you can do at trial you can do at Motion for Summary Judgment

    FRCP 12(h)(3): number 1: lack of SMJ
    - Can raise that at any time
- FRCP 12 Waiver Trap
  - (b)(2)-(b)(5) are waivable!
  - Everything that isn't SMJ is waivable in general
    Court has to reach sua sponte on SMJ
  - 2-5: special rules under 12 that makes you waive theme earlier than you thought you should
  - Waivable: very flexible
  - Rule 12 has some hard and fast rules for rules 2 -5

- FRCP 12 (h) (1): waive a 2-5 if
  - (A) omit from your first rule 12 motion, per 12 (g)(2)
  - (B) failing to either
    - Omit from first rule 12 motion
    - Leave out of motion or answer
- 12(g)(2): except as provided in rule 12(h)(2) or (3) a party that makes a motion under this rule must not make another motion under this rule raising defense or objection that was available to the party but omitted from its earlier motion
  - Omnibus motion rule
- Could you include PJ in answer?
  - Cant
  - Omnibus: if you had it at day 20, should have done it at day 20
  - Failing to include it in omnibus means you waived it, it's out

- FRCP Rule 12 Waiver Trap
  - 12(h): if do not object to 12(b)(2)-(5) defenses, then waive
  - Must consolidate all 12(b)(2)(-(5) defense into one motion or if not motion, answer (lack of PJ, improper venue, insufficient process, insufficient service of process)
  - Can assert other 3 defenses later in litigation (until trial for 6, 7)
  - If any 4 defenses omitted, they are waived
- Beware the waiver trap!
  - If a def omits the Rule 12 (b)(2)-(5) defenses from her pre-answer motion or from her answer, whichever she files first, she waives the omitted defense.
  - If she omits the Rule 12(b)(6)-(7) defenses, she may still make them in any pleading or post-pleading motion until the close of trial
- What are the things that can go in each response?
  - 12 (b) motion to dismiss
    - Can raise 1-7
  - Answer
    - substance
    - Can raise 1, 6, 7
    - Can raise 2-5 (unless waived via motion)
  - 12(c) motion for judgment on pleadings
    - Substance based on agreed facts
    - Can raise 1, 6,7 and 2-5 (unless waived based on agreed facts)
      - 2-5 unless waived, based on agreed facts, doesn't happen very often
  - Trial
    - substance
    - Can raise 1, 6, 7
    - 2-5, unless waived
      - If you put 2-5 in answer, then okay
- Every time you amend the complaint it re-starts the clock for ALL of 12 stuff
  - Only if it new becomes available to you, then it is not waived
- *Hunter v. Serv-Tech*
  - Facts: Hunter sued Offshore. Offshore filed motion to dismiss for insufficiency of service of process. Contained language that it reserved PJ defense
  - FRCP 12(b)(5)- "reserve" 1 & 2
  - (service) Hunter files amended complaint

- Offshore says problems with service
- Hunter amends complaint, "perfect" service
  - They fixed it
- Offshore Answers raising lack of PJ as another defense, lacked minimum contacts
- What happens to original motion to dismiss: Denied as moot
- Again move to dismiss, lack of PJ 12(b)(2)
- Is that ok?
- No
- They said they reserved 2 up in the beginning
  - That's not okay!
  - Look at plain language of statute, need to make a motion, can't just reserve it
  - Reserve doesn't count, not in the federal rules
  - Omnibus: bring em if you've got em
    - Obvi you had it, should have brought it
- Why?
  - Don't want someone to delay proceedings, all at once to deal with it then
- Can you assert PJ in the answer?
  - Didn't assert it in original 12(b) motion
  - Under 12(h); they've waived it
- If they had raised PJ in that first motion probs would have won
- Follow the omnibus motion rule
  - If you don't file it now you've waived it, can't get it back
- How do we know that PJ was available before they amended the complaint?
  - Nothing that was in the amended complaint was relevant to whether there was PJ
  - All the arguments they made in second MtD could have been made in the first MtD
- Additional reason to dismiss 12(b)(2)
  - Answered amended complaint
  - And then made 12(b) motion
  - 12(b) have to be brought before your answer!

Default Judgment

- After 21 days Plaintiff goes to court for Entry of Default FRCP 55(a)
  - Entry of Default, entry on the docket
    - Def can get 55(c) entry of default set aside
  - Then move for 55(b) Default Judgment
    - Can get overturned, 60(b), but very difficult
- Court MUST enter the entry of default on the docket, no discretion, clerk mails copy
- 30 days pass
- PL files motion for default judgment
  - Default Judgment will be automatic if you have: FRCP 55(b)(1)
    - Sum certain or be made certain through computation
    - Affidavit
    - Competent defendant
    - Note: need ALL of these things
      - NO valuing

- Default Judgment not automatic FRCP 55(b)(2)
  - Uncertain damages or other relief
  - Requires some degree of psychological judgment
  - Court counts as an admission of ALL of the well-pleaded facts
    Except damages, don't have to accept numbers are true just because the other side didn't say anything
  - Court will needs to figure out:
    If complaint states a claim
    - Whether relief can be granted

    SMJ
    PJ
    Service
    Are damages warranted?
    Is injunction warranted?
  - Court will not need to figure out:
    Venue
    Did def have ACTUAL notice
    - See Mullane and Jones
  - Court may hold evidentiary hearing on issues, such as damages
    Def could then show up at the evidentiary hearing
    Rule 55: you can show up for different parts of the case
    How does the Def show up? Lawyer puts in a notice of appearance

- *Virgin Records American v. Lacey*
  - Facts: Copyright infringement. P sued for illegally retained songs. D did not respond. P moved for DJ.
  - Court granted DJ and relief. Grants statutory damages, injunctive relief and costs in accordance with the statute
- *Reynolds Innovation v. E Cigarette Direct*
  - Facts: Lacked Pj, so could can't give DJ
  - Added evidence to 12(b) motion to dismiss, so converted to Rule 56 summary judgment

Amending Pleadings

- FRCP 15
- Three kinds of amendments:
  Amendments as a matter of course
  - 1 freebie
  - Don't need other party or court's permission
  - Can amend once as a matter of course w/in 21 days

  Amendment by consent
  Amendment by leave of court
  - "if justice so requires"
  - Lenient!
- Amending pleadings: FRCP 15
  amendments allowed as a matter of right, without needing the court's permission and Amendments by leave of court
  - As a matter of right: Three circumstances
    w/in 21 days of serving that pleading

If the original pleading is one to which a responsive pleading is required, a party may amend the original pleading w/in 21 days after service of the responsive pleading

If a party files a motion under FRCP12(b) to dismiss a complaint, counterclaim, cross-claim, or third-party complaint; or files a motion under 12(e) (for a more def. statement) or makes a motion under FRCP 12 (f) (to strike), then the pleader may amend w/in 21 days after the motion is served

- amendments by leave of court: discretionary: freely give leave when justice so requires

  Factors:
  - Bad faith
  - Reasons for amending
  - Undue delay
  - Number of prior amendments
  - Futility of amendment
  - Preparation prejudice to the other party

  Types of prejudice: preparation, merits, futility

  Rationale: narrow issues for discovery, discovery hasn't happened yet, so this doesn't waste time and money
- Follow *Foman v. Davis*

  Courts weigh the reason for the amendment, the amending party's diligence, any prejudice that the amendment may cause the opposing party, whether the amendment would be futile as a matter of law, and the amending party's prior amendments, if any.

  Preparation prejudice: undue prejudice: prejudice to preparing to defend, in collecting and presenting evidence, that flows from the lateness of the amendment

  Foman: court need not grant leave to amend when an amendment would be futile
  - The court must analyze a proposed amendment as if it were before the court on a motion to dismiss pursuant to 12(b)(6) Acker v. Burling. An amendment can be futile because it fails to state a claim or defense under the applicable law
- Once a pleading has been amended, it is a new pleading, and the opposing party has the same right to respond to the amended pleading that it had to the original pleading

  Nelson v. Adams: when a court grants leave to amend to add an adverse party after the time for responding to the original pleadings has lapsed, the party so added is given [14] days after service of the amended pleading to plead in response. This opportunity to respond, fundamental to due process, is the echo of the opportunity to respond to original pleadings
- *Beek v. Aquaslide and Dive Co.*

  Facts: Beeck injured while using water slide. Sued Aquaslide, Texas corp, alleging it manufactured the slide involved in the accident, south to recover substantial damages on theories of negligence, strict liability, breach of implied warranty. Aqua slide admits that they designed, manufactured, slide. When did SoL lapse?

- Right before the ceo goes over and visits the slide, realizes the slide is a fake. Aquaslide wants to amend their answer, Want to deny we made the slide but it realizes that it's way more than 21 days after filing, can't amend as a matter of course.
- Motion for leave to amend complaint. District Court grants motion, Bifurcated trial, part on slide issue part on injury issue. Jury says not Aquaslide's slide.

Issue: should there have been leave to amend?

Court:

- Should there have been leave to amend granted or not?
  - Reasons to deny leave:
    - Undue delay
    - Bad faith
      - Tried to trick etc
    - Repeated failure to cure
      - Had opportunity and didn't
    - Undue prejudice
      - Doesn't just mean if you are worse off, are you unfairly worse off?
    - Futility
      - There's no point
- Does the court find any of these things here?
  - No

amendments during or after trial, a little less generous

- Discretionary, factors:

  Stage of litigation

  Reason for amending

  Visibility of amended claim/defense

  Reason for not included in original pleading
- (b)(2): express or implied consent

  Happens if you do not object to adding new allegation at trial

  Implied consent: when the evidence being brought out doesn't support the old theory,

Can allow amendments that relate back to the date of a timely original pleading

- 3 circumstances in which an amendment relates back:

  (1)(A): law says okay

  (1)(B): same transaction

  (1)(C): changes party/name:
  - Same transaction and w/in 120 4(m) period for service
  - Knew or should have known BUT FOR mistake concerning identity
    - Not deliberate choice
    - Test is what D knows
  - What about fictional defendants? John Doe
    - Not fully settled on how relation back will deal with this

  If relates back: don't care that SoL lapse in the middle because you treat I like the original complaint because it relates back

- Amending pleadings after Limitations Period 15(c)

  Claim has to relate back to date of original pleading

- *Moore v. Baker*

  Facts: Operation injury. Plaintiff sues on original theory: informed consent, brought on last day of SoL. SoL lapses. Moore wants to amend complaint to include negligence/medical malpractice. She could have brought these claims together originally. Original complaint did not say Baker did surgery wrong, said that he did a great job on surgery but should have gotten consent. Moore files motion for leave to amend complaint. If amendment does not relate back, would be lost on SoL grounds. Look at 15(c)(1)(B): is this same transaction? (normal same transaction test, whole ball of wax same treatment okay.)

  District Ct: not same transaction. Denied motion to amend. Moore lost on claim 1 in SJ

  - Why not same transaction? Would need different evidence to prove these claims. Negl/med mal need LOTs of evidence on surgery

  App Ct: P cannot amendment negll claim after SoL. Acts claimed in an amended complaint must arise out of the same conduct, transaction or occurrence as the claims in the original complaint.

  - P would have to prove completely diff facts. Original complaint didn't give notice of newly asserted claim because so different.

- Theory of this relation-back rule: the original pleading gave the party notice of the conduct, transaction, or occurrence for which she was being sued, so she will not be unfairly surprised by the addition of a new claim or defense based on the same events

Amending parties after the Limitations Period

- Amendments changing a party or the naming of a party but seeking recovery for the same events as the original complaint relate back when the party to be brought in by the amendment

  Receives such notice that it would not be prejudiced in defending on the merits

  Is or should be aware that the action would have been brought against it but for the mistake concerning the proper party's ID

  Received notice w/in SoL or 120 days (or such addtl time for service as court allows) after the filing of the original complaints (extra time allows for service as provided by Rule 4(m)

- *Krupski v. Costa Crociere*

  Facts: P injured by slip in fall on D's cruise. P originally sued Costa Cruise, which was the wrong entity.. After SoL then dismissed against Costa Cruise and moved to amend complaint to add Costa Crociere.

  Analysis:

  - Did this arise out of same transaction? Yes
  - Did costa crociree and costa cruise get notice? Yes, court finds constructive notice, same attorney
  - What part determines if this relates back?
    - Key issue: mistaken identity
    - Did she know they were diff companies? On ticket,
    - Who doesn't this sink her claim?
      - Not a deliberate choice.

        - Fully informed choice knowing everything they know at the time of their next decision
        - If don’t learn anything between 1 and 2, then that’s a deliberate choice
    - Test is not what the plaintiff knows, but what the defendant knows
    - Court says this is the other side's mistake

6. Parties, Joinder, Class Actions

1. Parties
    - FRPC 17: Capacity joining parties
        - (a)(1) Real party in interest
        - (a)(3) ratify
            - Court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted the action. After ratification, joinder, or substation, the action proceeds as if it had been originally commenced by the real party in interest
        - (b)(1): look to law of her domicile to see if she has the capacity to sue or be sued
        - (c)(1) ppl who can sue for incompetent person:
            - (A) general guardian
            - (B) Committee
            - (C) Conservator
            - (D) a like fiduciary
        - (c)(2) w/o rep: may sue by next friend or GAL
            - Ask court to appoint to be GAL in order to sue
    - Capacity
        - Capacity to sue is one of the biggest issues of justice (slaves couldn't sue, women "covertures" covered by husbands couldn't sue or be sued)
    - Capacity of Corporation and Entity to be sued
        - 17(b)(2): for corporation > by law where state is located
        - 17(b)(3): if partnership or other unincorporated association: go by state law where the court sits except for federal right
            - If there is federal right that lets you sue in common name, then you can do it whether or not you can sue in single capacity by state law
        - 17(d): you can sue official capacity,
            - Suing the office, so if changeover lawsuit stays, might be imp if you want money from gov instead of individual or seek an injunction
            - Can also sue individual in both official and individual capacities
    - FRCP 25: substitution of parties
        - Death
        - Incompetent
        - Transfer of interest
        - Public officers
            - If public officer dies or next person takes over, suit stays with the public office
    - FRCP 20: what are the outer limits of who can be named in the complaint
    - FRCP 19: who HAS to be included in the complaint
2. Joinder
    - FRCP 18 Joinder of Claims
        - Join em if you got em
        - Consolidate everything into one lawsuit, even if unrelated
        - Why? Efficiency, settlement (ppl might not want to settle one claim if they know you have another claim coming later. Don't need to worry about later things.
        - Court may bifurcate trial (Rule 42) If needed, discretionary
    - 18(b) Contingent Claims

        - Bring all your contingent claims in same complaint, don't need separate lawsuits
    - FRCP 19: who HAS to be included in the complaint
    - FRCP 20: outer limits of who can be named in the complaint
        - Who can join as plaintiffs?
            - 20(a)(1)(A): same transaction or series of transactions
            - 20(a)(1)(B): common question of law or fact for all plaintiffs
        - Joinder of defendants
            - 20(a)(2)(A): same transaction or series of transactions
            - 20(a)(2)(B): common question of law or fact for all defendants
    - FRCP 21 Misjoinder
        - Don't dismiss; sever!
        - Add drop
            - Imp: diversity jurisdiction
    - *Holbein v. Heritage Mutual Insurance* 1985
        - Facts: Plaintiffs, residents of Wisconsin, filed complaint against Heritage Mutual, maintain principal office in Sheboygan WI. Diversity jurisdiction (old 10K rules). 4 plaintiffs, each articulates three independent causes of action under parallel theories of false or reckless misrepresentation, fraud, and breach of promise
            - Factual basis common:
                - Each contacted and interviewed by def's reps in connection with exec employment positions
                - Def made material misrep of fact and failed to disclose other material information with respect to those executive positions during the course of respective interviews
                - Plaintiffs not advised that their employment with corporate def would be subject to a probationary period
            - Particular circumstances for each def are different
            - Heritage: these four plaintiffs cannot join their suit because they are stemming from different interviews over 2 1/2 years, different positions
                - Relief: want 4 separate suits
                - Rule 21
                    - Misjoinder and nonjoinder
                        - Remedy: don't dismiss; Sever!
            - Plaintiffs:
                - Same series of transactions
                - Same behavior
                - "pattern or practice"
                - What's the common question of law or fact?
                    - Do they have this pattern or practice?
            - Court: Agree with plaintiffs. This really is the same series. They find it persuasive that there is this practice.
                - Common question of law: plaintiff: is it illegal to misrepresent stuff before they hire somebody?
    - Very liberal rules for joinder
3. Counterclaims/Crossclaims - FRCP 13
    - Counterclaim: defendant's claim against a plaintiff who has a claim against them
        - Ex. A sues B, B sues A
        - Two types of counter-claims:

        - Mandatory
            - 13(a)(1): exists at the time of service
                - (A): same transaction (big ball of wax standard)
                    - Four tests for determining whether claims arise from the same transaction or occurrence:
                        - Are the issue of fact and law raised in the claim and the counterclaim largely the same?
                        - Would res judicata bar a subsequent suit on the party's counterclaim, absent the compulsory counterclaim rule?
                        - Will substantially the same evidence support or refute the claim as well as the counterclaim?
                        - Is there a logical relationship between the claim and the counterclaim?
                    - Test focuses on the underlying events giving rise to the litigation
                - (B): doesn't need a party w/o jurisdiction
                    - Rule 19 is the necessary parties
                    - Only mandatory if you don't need to bring in a party who would mess up jurisdiction (ex. Diversity)
                        - What would happen? Sue in later transaction, not mandatory
                -
        - Permissive
            - 13(b): anything else is permissive
    - Crossclaim FRCP 13(g)
        - Co-party
        - Same transaction, property
        - (may) All cross-claims are permissive
    - How does a party file a cross-claim or counterclaim?
        - Answer
        - Rule 7: answer to cross-claim, answer to counter-claim, complaint, answer, reply if required
    - One type of cross claim: indemnify
        - Reimburse
        - You actually owe us the damages we had to pay for somebody else
    - 13(h):
        - FRCP 19 and 20 govern addition of a person as a party to a counterclaim or crossclaim
        - Can add party if you qualify under Rule 19 or Rule 20
4. Required Joinder
    - Rule 19 Required Joiner of Parties
        - 19(a): "necessary/required"
            - (1)(A): accord complete relief to existing parties
                - Can P get what it wants?

            OR
            - (1)(B): claims an interest
                - Either:
                    - (i): impede interest
                    - (ii): double/inconsistent obligations
            - If 19(a) applies but you can't join:

- If can't join, "equity and good conscience"
  Prejudice to any parties
  - P, D, absent parties
    Are there are protective provisions?
  - Anything court could do to shape its relief?
    Adequate judgment w/o them
    Does plaintiff have an alternative?
- The above is an equity consideration, don't have to have all of them.
  Different factors to consider

- *Torrington Company v. Yost*
  - Facts: Yost employee goes to work for INA. Torrington sues for violating trade secrets. Yost sues to bring INA in, Rule 19.
    - Court could accord complete relief on just Yost (could make him quit job, give Torrington complete relief, money, etc)
    - BUT INA claims an interest: INA interest in Yost working for him
    - Yost: I have obligation to work for INA, but injunction not to work for them
    - INA and Torrington both incorporated in Del, if INA brought in, no more diversity, SMJ
      - Ie. Yost wants to go to state court
  - Court:
    - Rule: 19(b) 4 parts:
      - Prejudice to INA
      - Protective provisions
        - No problem on money
      - Adequate judgment w/o them
        - Torrington doesn't want money wants injunctive relief
      - Alternative?
        - State court
- Three Steps to analyze if party HAS to be joined:
  Deciding whether the absentee is a required party
  In absence, court cannot accord complete relief, OR person claims an interest that may impair person's ability to protect interest or leave existing party subject to risk of double or inconsistent obligations
  Determining whether joinder is feasible
  Why not feasible?
  - Party may not be subject to PJ
  - Diversity case: party may ruin diversity, SMJ
  - May make venue improper

  Deciding whether to dismiss or continue
  Four factors:
  The risk of prejudice to the absentee or the existing parties if the case goes forward
  Ways to lessen such prejudice by fashioning the judgment
  Whether a judgment rendered in the person's absence will be adequate
  Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder
- Modern:

First, court must determine, under Rule 19(a), whether proceeding w/I the absentee could have adverse consequences on the absentee or the parties If it would, the person will be made a party. If she cannot be brought in, the court has to make a discretionary judgment, under Rule 19(b) whether it can fairly adjudicate the case w/o the absentee

5. Impleader FRCP 14
    - 3rd party who "is or may be liable to it for all or part of the claim against it"
    - 3rd party complaint or 3rd-party defendant
    - Implead the defendant
    - Summons + complaint
    - "third party complaint"
    - Treated like new lawsuit
        - Everything starts over with bringing them in
    - *Erkins v. Case Power & Equipment Co.*
        - Facts:
            - Fitzpatrick: General Contractor, ECRACOM: Subcontractor
            - Erkins sues Case Power for strict liability
            - Case power wants to bring in Fitzpatrick and Ecracom
            - Can they just add them to the complaint via Rule 20?
                - Rule 20: about initial complaint
                - Up to the plaintiff
                - Plaintiff is the master of the complaint
            - Try to bring everybody else under Rule 14
            - Something goes wrong
            - Is this for contribution or indemnity?
                - Contribution
            - What arg does Fitz and ECRACOM make to try and get rid of this?
                - This is totally different, not same transaction, doesn't make any sense. Erkins sued for strict liability
                - Case power wants to bring in for negligence, only liable in case of negligence
        - Court: they are joint tortfeasors, each would be liable to the plaintiff
            - Even if theories are different can still do it
            - Under Rule 14: you are liable to me for all or part of claim against it
            - Allows motion to add Fitz and Eracom
            - Courts consider following when deciding to grant leave under FRCP 14:
                - Timeliness of motion
                - Potential for complication of issues at trial
                - Probability of trial delay
                - Whether P may be prejudiced by additional parties
6. Intervention FRCP 24
    - You get to be a party in the lawsuit
    - Want to shape what's going to happen, stop court from doing something you don't want it to do
    - Two flavors:
        - 24(a): intervention as of right
            - Timely
            - Court has to let you in if you qualif

        - (1) unconditional statute
        - OR (2) claims an interest
            - Impede interest AND existing parties won't protect
    - 24(b): permissive intervention
        - May permit you to intervene
        - Timely
        - (1) conditional statute
            - Have to ask court for permission
        - OR (2) common question of law or fact
            - VERY broad standard
            - Different from Rule 20 where you need common question of law or fact AND same transaction or series of transactions
            - How is that okay?
                - Court has discretion
        - Delay/Prejudice
            - Ask same question twice: is this fair, will it mess up the lawsuit for everybody else?
- Requires timely motion 24(a)
    - Standard: 4 factors:
        - What stage of suit?
        - Purpose of intervene?
        - When did you know?
        - Prejudice to existing parties?
    - Basically: do you have a really good reason to come in? is it fair to the other guy? Fai generally?
- Intervention makes you a party
    - NOT an amicus curiae (can't appeal, ask for relief, block settlement)
    - Party (can appeal, ask for relief, block settlement)
- Take away: intervention is somebody who you can't force to come in even if you wanted to, but can still ASK to come in
- Ex. Bisanz Bros sues pacific RR
    - You have railroad storage yard, it's annoying we want you to tear it up where you are storing
    - Ford motor company: tracks essential to assembly plant
    - Ford wants to intervene, if they shut down storage yard we will be affected
    - RR likes having a rail yard, why would they think they won't fight hard enough to protect Ford's interest?
    - Maybe RR just settles with ppl for money to stop rail yard, Ford wants to be in on negotiation and not cut us out
    - Suppose I own stock in the railroad
        - I want to prevent you from doing that
        - That’s a great rail yard
        - Can I come in as a stock holder and say hey RR I think you are making a bad decision?
            - NO
            - Not intervention of right
            - Existing parts won't protect: under the law did they have the right incentives

- Unless you have some claim of fraud
- In general the RR has every reason as you would to protect its facility
- No reason to let you in because there is already a party there who can protect the rail year

- Two requirements:
  - Intervener must have an interest relating to the property or transaction at issue in the case
  - There must be a risk that her ability to protect that interest will be impaired if the case is decided without her participation
- One exception:
  - Even if the first two requirements are met, the applicant will not be allowed to intervene if her interest is adequately protected by those who are already parties to the case

7. Interpleader FRCP 22 or 28 USC 1335
   - Have a lot of claims, know you will be sued 18 times, just get it done right now
   - Defending party as 3rd party.
   - Allows someone in possession of property or money to force all adverse claimants to that property to litigate the ownership of that property in a single proceeding
   - 22: persons with claims may expose P to multiple liability may be joined as D and required to interplead
   - Statutory Interpleader: 28 USC 1335
     - Changes amount in controversy to only $500
     - Minimal diversity for claimants
     - PJ: 2361: nationwide
     - Venue: 1397: any claimant resides
     - Who fights: claimants
       - Pay money, go home, claimants fight it out
   - Rule Interpleader
     - Amount in controversy: 75K
     - 1332 complete diversity
     - PJ: states
     - 1391 Venue
     - Easier for joinder: if necessary party
     - Who fights: Claimants fight it out
   - Why would you ever want rule interpleader v. statutory interpleader?
     - Statutory interpleader has several advantages, including the right to file based on minimal diversity, a low amount-in-controversy requirement, and the authority to exercise jurisdiction over claimants found anywhere in the US
   - Steps of Interpleader:
     - P determined to be stakeholder who is subject to conflicting claims to that property
     - P pays policy to court and is dismissed
     - Claimants litigate their claims to the stake
     - Resulting judgment determines ownership, bound by judgment

	AiC	Diversity	PJ	Venue	Necessary	Who fights
Stat. interpleader	$500	1335 minimal diversity for claimants	2361: nationwide	1397: any claimant resides	Don't have to worry about this	claimants
No interpleader	$75K	1332 complete diversity	States	1391	R 19(b)	you
Rule 22	$75K	1332 complete diversity	States	1391	Easier	claimants

- *Republic of the Philippines v. Pimentel, temporary administrator of the estate of Mariano Pimentel, deceased*
  - Facts: Victims sue and get a judgment against Marcos
    - Merrill Lynch has account with 35 million dollars, belonged to Marcos. Lots of ppl want this money (Republic, Commission, Pimentel, standing in for all of the human rights plaintiffs, Roxas, judgment against Mrs. Marcos
    - Arelma: name of the account, Shell corporation set up by Marcos to hide some of his money
    - PNB Bank, Owns shares of the bank
    - Sandiganbayan: name of the court in the Philippines
  - If your merrill lynch and you have all these people who want your money, what do you want to do?
    - Use interpleader to say we will bring in all those ppl, We know 35 mill isn't our money, Just holding it for somebody we don't care who
  - Interpleader action
  - Under rule 19(a)
    - Republic and commission are necessary parties
      If we split up money and give it to HR plaintiffs, no way that Philippines gov can get it back. Can't get $10 from each client
    - (1)(B) - interest, if they weren't there it would impede it that's bad
  - Was it feasible to join them as defendants?
    - No, sovereign immunity
      - Old doctrine: sovereign immunity: private person cannot invoke jurisdiction over sovereign without sovereign's consent
      - Foreign government: codified by statute: Foreign sovereign immunity act
        - FSIA protects Philippines in this case, can't be dragged into court if they don't want to be there
  - Know under Rule 19(a) they are required/necessary party
    - Cant join them
    - Now what?
      - 19 (b) if it's not feasible: "indispensable"?
        - Can claim proceed w/o them
        - 4 factors:
          - Prejudice
          - Can you fashion a judgment?

- Adequate judgment w/o them?
- Plaintiff have alternatives?

- Lower courts: allowed claim to proceed.
  - Court of Appeals: You Philippines are going to lose on SoL so we won't worry about sovereign immunity
- SCOTUS: the whole point of sov immunity is you are immune to that kind of question
  - Can only figure out things after we know if Philippines are in this case or not
  - Are Philippines indispensable?
    - Prejudice
      - Yes would be prejudice, forces Phil. Forces them to step out of sovereign character, appear as
      - Ability to fashion to judgment? Way for lower court to fix this that wouldn't prejudice them? No way of giving up the money in a way that protects the absent party that would work
      - Adequacy of J w/o t hem? No way. If you can't do it in a way that will protect Def w/o sac plaintiff
      - Alternatives? Wait and see
        - Who is the plaintiff: Merrill Lynch
        - Just wait
        - Don't worry you've got the alternative to wait
        - If somebody else tries to sue you say: I can't give you the money, republic would be necessary party, etc. you are protected
  - What will solve everything?
    - Once Philippine litigation gets settled, Philippines will figure out if they want their money or not, they will sue and make everyone show up or will give up claim and then everyone can figure it out
  - Stevens: concurring in part, dissent in part: it's not so much to expect them to participate, ought to have them do that
    - Maybe they would be induced to participate if there were a different district judge
      - Judge trying to control litigation

- Joiner rules separate from jurisdiction rules, can these things be litigated at all? Then you add back in SMJ, venue, etc

Supplemental Jurisdiction

- Why have supplemental jurisdiction?
  - Really want to deal with the whole case as a unit
  - Don't want to split pieces of case
- Fed courts: has to have some jurisdiction over every claim that comes before them
  - If you have liberal rules of joinder, then you will run into problem: will have some claims that you don't have jurisdiction over
- In order to have supplemental jurisdiction have to satisfy two tests:
  - Article III
    - See *Gibbs* constitutional standard
  - Statutes
    - 1367 statutory authority
- *United Mine Workers v. Gibbs*

- Facts: Gibbs: superintendent coal, UMW: Union. UMW picketed min, he lost his job. Claiming that they are picketing when they are allowed to. Labor law issue. Gibbs sues in fed court in eastern district of Tenn.
  - Claims: LMRA (fed statute), various torts (state)
  - Both Gibbs and union members from Tenn. for purposes of diversity jurisdiction, both fed and state claim. No SMJ over state claim.
- Why make sense to deal with once?
  - More efficient, Save money, Need one jury, Same story, Easier to do this in one proceeding rather than two
- What could Gibbs do?
  - Go to state court
  - Would have the effect of driving federal claims in state court
  - Federal court will not hear this, because a lot of LMRA violations are also state tort claims, means fed courts not hearing cases Congress wanted them to hear. Policy problem!
- Gibbs: Two part analysis for jurisdiction:
  - When does federal court have constitutional power to hear pendent state law claim?
    - Non-frivolous federal claim
    - Same "case" or controversy" = Common nucleus of operative fact
      - Connected to: "cases" arising under federal law, or controversies
      - One case or controversy
      - Same case
      - Not where law comes from, underlying transaction, when does it make sense to try them together
- How does standard court creates apply to the facts of Gibbs?
  - Yes it's the same nucleus of operative facts
    - Same actions that are said to violate both laws
    - Not test: if you had a situation like that probably okay under common nucleus test
  - Even if the court has power to hear it under article III that doesn't mean it should
- What are cases when courts should authorize its discretion not to hear federal and state claims together under Gibbs?
  - Sensitive/important state issue
    - If action is REALLY about the state claims and federal claims are not imp, don't want the tail wagging the dog
    - If state claims really important, federal claims not main show
  - Jury confusion
    - If one requires beyond a reas. Doubt and the other requires clear and convincing evidence, might as well have two juries might as well have two separate cases
  - Federal claims get dismissed early
    - If early enough that hasn't been a lot of energy put in it
    - Might as well send to state court
  - Summary by Sachs:
    - Discretion
      - Fed claim dismissed early
      - Sensitive/important state issue

                - Jury confusion
        - How does discretion work out here?
            - District court did okay in exercising its discretion
        - It's true that Gibbs lost on fed claim, but it wasn't a minor tail wagging the dog situation, jury found against him. This is not a situation where court should have kicked it out. Okay here.
        - Take away: supplemental jurisdiction:
            - Discretionary
            - Consider judicial economy, convenience and fairness
            - Common nucleus of operative fact
            - Federal claim not minor
            - Exceptions:
                - Federal claim drops early
                - State issues predominate
                - Surer footed reading of state law
                - Likelihood of jury confusion
- *Owen Equipment v. Kroger*
    - Facts: Kroger sues company for husband's death. OPPD (Power company): something wrong with electric line that caused all this to happen. OPPD files 3rd party complaint against Owen. Owen operated crane, OPPD says was negligent.
    - If OPPD held liable, under this state law, have a right to contribution, we were both joint tortfeasors, so were you so you should have to pay your share
    - Kroger amends complaint to include Owen
    - Is adding claim against Owen okay? By OPPD
        - Yes Rule 14
    - Is adding claim against Owen by Kroger?
        - Yes
        - Rule 20(a)(2)
            - Is it the same transaction? Yes
            - Common question of law or fact?
                - Yes, did electric line kill him
                - Was there something wrong with power line
                - If crane hadn't it you were negligent with crane
                - Both care about this question
                - How badly was he injured?
    - Jurisdiction:
        - Where is kroger from: IA
        - Where is OPPD from: NE
            - Inc and PPB NE
        - Owen: thought from NE, but really IA
            - PPB, IA
                - Property law:
                    - State boundaries change
    - OPPD file MSJ, get dismissed
        - Wasn't our fault, nothing wrong with power line, no good evidence pointing the other way
        - What happens to their Rule 14 contribution claim? Goes away
            - If I lose, you have to pay you money

- I won, so you don't have to pay me money
- Only thing left: Kroger and Owens
- Now we have non-diverse parties
- Is there Article III jurisdiction to hear this claim under Gibbs?
  - Under Gibbs, one good federal claim
  - Common nucleus of operative fact, not jury confusions, etc
  - At the time this case was decided 1978, was there statutory authority under 1332?
  - Supplemental jurisdiction wasn't passed until after this happened
  - Under normal 1332 diversity: case dismissed, no diverse parties
- Court of Appeals: don't worry about it
  - Your claim is just ancillary so we can sneak it in anyway
- SCOTUS: not okay
  - Create incentive for evasion
    - If the rule were that you could have this suit w/o special statute how could two parties who wanted to be in federal court make that happen?
    - Just implead 3rd party
    - Just bring in straw man from another state who will then implead the person you really want there, dismiss them, then you have your lawsuit
  - Won't allow evasion of 1332
  - 1332 requires complete diversity
  - No way

○ Congress responds: 1367

○ US 28 1367 - Supplemental Jurisdiction
- (a) Gibbs!
  - If you have same case or controversy, then fed jurisdiction over the original thing then supplemental jurisdiction over state claim
    - Additional parties okay
  - Think of federal claim as BIG HOOK
- (b) but not for adding D's in diversity! (big key is if original claim is 1332 diversity claim)
  - But not *Owen*, basically
  - bars jurisdiction over certain claims by plaintiffs in cases based on diversity jurisdiction
  - Over claims by plaintiffs against parties under Rule 14, 19, 20, 24 OR over claims by persons proposed to be joined as plaintiffs under Rule 19 OR seeking to intervene as plaintiffs under Rule 24
  - When exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332
- (c) discretionary Gibbs, may decline based on these reasons:
  - Is state law novel or complex?
  - Does state law claim substantially predominate?
  - Has the federal claim been dismissed?
  - Catch all-other compelling reasons
- (d): toll, stop the clock on SoL
  - You get 30 days after its dismissed, don't want to have no ability to go to state court
- Basically: authorizes fed court, if it has jurisdiction over one claim, to hear other claims that are part of the same "case or controversy" (see article III of Const)

- Same case or controversy = common nucleus of operative facts (*Gibbs*)

- Can evade AiC rule, because Congress messed up:
  - P1 sues D for 85K, P2 sues D for $5
  - 1367:
    - (a): okay
    - (b): 1332
      - Is it made by plaintiff against person made party by 14, 19, 20, 24?
      - No,
  - Just avoid Aic
  - *Exxon Mobil Corp v. Allapattah Services*

Class Actions FRCP 23

- Policy issues:
  - Efficiency
  - Lots of small dollar claims (which means people aren't likely to bring claim) if bring all at once better chance of being litigated and holding companies accountable
  - Makes companies be better because need to conform to society standards
  - Have to make sure individuals are adequately represented in class, given notice, etc
    - Due process issue for those not participating voluntarily
      - For ex. If 100 plaintiffs v. 1 def, maybe plaintiffs win 55 times, defendant wins 45 times,
      - But with class action ONE roll of the dice. Only one shot for all of the plaintiffs
      - Company has to take the risk that it will lose 100% right now (makes it more likely to settle)
      - Plaintiffs have to take on shot, if unlucky could lose all chance at justice
- 23 (a) and 23(b) are how you decide if class should be certified
- 23 (c)
  - Governs process of certification
  - Allows you to create sub-classes
  - Revise certification decision
  - 23(c)(4) class limited to particular issues
    - Can limit by issues ex. Only going to certify on liability not damages, then each plaintiff takes their damages issue to court
- Pre-reqs for class certification
  - *Hansberry v. Lee*
    - First case: *Burke v. Kleiman:*
      - Restrictive covenant that restricts who could own the law
        - State law: if you have 95% of the landowners then it will run with the land
          - Idea behind run with the land, how things work regularly: in ordinary contract If I sell you land and attach some condition like I'll sell you this land I want you to use it as a wilderness preserve, I will turn it into strip mind. Sue original buyer for damages. Hey I sold you this land instead you strip-mined it. What if you obey it but then you sell it to someone who sells it to someone who strip-mines it. This doesn't matter. The promise is only good for person who bought the land
          - If covenant runs with the land: it binds all future owners

- What did court find about the 95% issue?
  - In initial case Burke trying to enforce covenant
  - In original case: parties stipulated that it was 95%
  - Both of them agreed, both plaintiff and defendant agreed
  - Claimant not trying very hard at all to get out of covenant
    - Collusive law suit!

- Second case: *Hansberry v. Lee*
  - Hansberry buys land from Burke's husband. Lee is trying to evict H based on covenant. Hansberry says no it was actually 57%
  - What did IL court say: trial court:
    - Covenant bound everybody
    - Ya it was a fraud but its res judicata
      - Res judicata: the thing has been adjudicated
  - IL Supreme Court: all buyers are bound
    - Because original case was brought as a class suit
    - Unclear if that's true, affected by IL supreme court to prevent integration
  - SCOTUS: not class action
    - Constitutional problem: hey this is a Due Process problem
    - Pennoyer: one is not bound by judgment in personam in a litigation in which he has not been made a party by service of process
    - Only ppl who showed up in court were Burke and Kleiman
    - Don't say you can never have class actions with absent parties
      - 677: in such cases, by generally recognized rules of law,
        - In general, Due Process says you have to be there BUT there are some traditional recognized exceptions for class suits
    - Why does SCOTUS think class action is a recognized exception?
      - 676
      - Class suit was an invention of equity
      - In particular, there were some limits:
        - Have to have common interests
        - Adequate representation
        - Formal class treatment
    - Look at Burke v. Kleiman
      - Common interests?
        - No, inconsistent interests, only 57%!
        - No common interest
      - Adequate representation
        - Those opposed not adequately represented
      - Formal class treatment
        - Trial court never followed any procedures for treating the lawsuit as a class action

- These requirements re-capitulated in 23(a)
- 23(a):
  - Numerosity
    - Class is so numerous that joinder is impracticable
  - Commonality

        - Common question
        - Common question of law or fact
    - Typicality
        - Common interest
        - Claims or defenses of rep parties are typical of claims or defenses of the class
    - Adequacy
        - You are an adequate representative of the other people
        - Rep will fairly and adequately protect the interest of the class
    - Clear class definition
    - Reps are in class
    - ALL of these are findings (requires thinking about the evidence)
- *Phillips Petroleum Co. v Shutts* 1985
    - Protected by court, adequate representation here
    - Unlike absent def, absent plaintiff isn't on the hook for money
    - Plaintiff is not subject to the remedies, you won't get an injunction against you, so it's okay
    - You have to have notice, and an opportunity to participate or opt out (sometimes)
    - Three reasons why it's okay for this court which totally lack PJ over you to wipe out your claims over fears roebuck:
        - Protected by court, adequate rep here
        - P not subject to remedies
        - Notice and opt out (sometimes)
    - Also dealt with choice of law
    - If IL court brought IL law to everybody, can you imagine a problem with that?
        - Cal person, where maybe Cal law is better for plaintiffs
        - If IL more friendly to defendants
        - And Haynes are not exactly adverse, collusive
        - IL: let's find somebody to bring class action with the most hostile law, sue in that state and wipe out everybody's claims
    - Big problem if you can manipulate choice of law for claims
    - Phillips decided: you have to do choice of law Plaintiff by Plaintiff
    - How would you normally deal with that
    - Nationwide class of ppl buying washing machines
        - Split class into state wide sub classes
        - So some of the sub classes might win, some of them might lose
    - Can't just certify one big class
        - 23(a) factor that would get you: typicality
            - Typicality is about the typicality of your claims or defenses
            - Some ppl have claims under GA law, defenses under MD law
            - No longer typical
            - Each sub class has to be separated out couldn’t have just one representative do anything
    - Need to actually find 50 people to represent each sub class
    - 50 classes
    - Some things together, some things in the small class
- Types of Class Actions:
    - 23(b) Can have a class action if you have the prereqs AND

prejudice class action

- If you tried to do it as an individual action instead of class would have issues of prejudice
- (A): incompatible standards for the defendant
  - Ex. Diff injunctive reliefs
  - Ex. Lots of patients sue drug maker, half of label to side effect x, and other court 2/3 label to side effect y
- (b) disposing of other plaintiffs interest
  - Ex. Limited fund case
    - Defendants gone bankrupt but had insurance policy. Insurance policy is only thing you could possibly get. First plaintiff to get to defendant would get all the money. Next plaintiff is screwed.
    - If I let you win as an individual plaintiff is that going to be a problem
    - Normally bankruptcy takes care of this, mini-bankruptcy proceeding a bunch of plaintiffs on this one issue and only so much money to satisfy them all

injunctive or declaratory relief for class as a whole

- One injunction apply to everyone
- NOT for money damages, except for exception: incidental/automatic

catchall

- Predominance
  - Class questions predominant over individual questions
- Superiority
  - Class mechanism is superior to getting everybody relief
- Damages class action, if you want damages this is the box you will be in
- Individualized class action, involves relief that goes to each class member
  - Damages
  - Injunctive relief, different injunction tailored to each plaintiff
- Must notify!
- Best notice practicable
- Give option to opt out of class and sue as an individual
- Judgment: have to indicate in judgment who got notice
- Settlement: 2nd notice and opt out
- Court has to approve settlements
  - Have to make sure it's fair for those not there
- (c)

For (b)(1) and (b)(2):

- Notice is up to the court

For (b)(3)

- Must notify
  - best notice practicable
    - Individual notice to all members who can be identified through reasonable effort
    - Plain language
  - Opportunity to opt-out
- Usually plaintiff pays
  - Very rarely D will pay, like really evident D was guilty so he will pay

- What does notice have to include?
  - Clearly and concisely state in plain, easily understood language
  - Not a system that works particularly well in affording notice
- Why?

  (b)(1): no way to handle through individual suit

  (b)(2): wouldn't want to handle as an individual suit, better to do it as a class

  No real incentive to do one of these suits

  (b)(3); individual might want to do on their own
  - Ex. In re Teflon: person who has cancer might want to sue on their own.
  - Want to let people opt out
- How could notice requirement affect litigation incentives?

  Really expensive really quickly

  Less likely that you will bring suit

  Have to know you are going to win

  That you can get it certified as class

  Have to have money up front, notice goes out at the beginning of the lawsuit

○ *In Re Teflon*

- Facts:
  - EPA bringing suit against Dupont
    - Paid big fine
  - Plaintiff's attorneys: we want to sue DuPont for same reason, 23 state sub-classes. Claim: Teflon and non-branded products, causes bad things to happen with bad chemicals. 3 classes here: Have branded cookware or documentation, Have generic cookware or documentation, Bought it, but don't have it now
  - Type of class: (b)(3)
- Two implicit requirements of Rule 23:
  - Clear class definition
    - Also part of 23(c): judge defining class, need a way to figure this out
  - Class representatives are part of the class
    - Could always allege you are part of the class:
    - Actually have to figure out that this is true
- Court:
  - Problem with class definitions:
    - 1. : evidentiary problem. Hard to figure out who has all of their receipts
    - 2.: all these generic was sold under bunch of brands, nobody knows whether the cookware they bought is or is not in that category. Do you have something to have the same chemical as
    - 3. : broader: even worse, no documentation, can't prove it now
  - 23(a) requirements
    - Numerosity
      - Ok
    - Commonality
      - Common question: does this chemical cause cancer?
    - Typicality
      - No
      - If every claim requires big inquiry not typical claims and defense
    - Adequacy
      - Claim splitting a problem here

- Only bring some of your claims
- Here, chose not to bring personal injury claims
- Cant include medical bills doesn't apply to whole class
- Only way to get this to be handled in class situation:
  - Value of frying pan
  - Medical bills
- They just gave up your medical bills!
- You aren't adequate rep because they are giving up really valuable claims that some people want but some people don't

- 23(b)(3) requirements:
  - Comparison of common questions v. individual questions
    - Common questions here: products, chemicals, bad?
    - Individual questions: who bought, when, what kind, how much did they pay, what kind of heat did they put it on, what kind of damages are you owed?
    - Here: individual questions predominant common questions
  - superiority?
    - Individual questions determine outcome of each case
  - Is this the kind of thing that is best done as a class action
  - Concern: claim splitting
    - Leaving out personal injury
    - Ignore whether you got cancer from this
    - Not asking for damages for ppl who got cancer
    - We want damages from cookware that was overpriced because it had cancer causing things in it
  - Individual questions for personal injury would be huge
    - Know they will lose certification
    - The right way to deal with this problem is individual suits: superiority problem
  - What could they have done?
    - Sub class in class action
    - Limit class action to certain issues: liability
      - Did DuPont know it had bad chemicals
      - Anyone who cares about that can then bring it up in individual problems
      - Won't recover money in the same way if you are leaving it to individuals for big dollar suits/big dollar damages
    - Claim splitting: waiving our claim as to that issue
    - Limit class action: specifying claim issue
    - Problem: DuPont won't want to settle
    - Plaintiffs' lawyer: don't want to bring it narrow range of liability because they won't settle. They will only settle once they actually know what the damages are, which won't happen until after liability suit because then there will be lots of individual suits

- *General Telephone Company of the Southwest v. Falcon*
  - Facts: Class plaintiff: Falcon files claim on behalf of all Mexican Americans not promoted and not hired
  - Court:

- Problems:
    - Typicality: he's not typical from all the members of the class, discrimination in promotion v. discrimination in hiring
    - Adequacy: maybe he's not the right person, need two class plaintiffs, need two sub classes maybe we need different issues
    - Commonality: insufficient basis for concluding that the adjudication of his claim for promotion will require any common question concerning the failure of pet to hire more mexican-americans
        - Does Title VII ban discrimination on the basis of race?
            - Common question of fact
            - Rule 20 this would be okay
                - Same transaction requirement
        - Actually kind of a difficult question
        - Don't know if these questions are useful enough
- Trial hasn't happened yet, but still the court is making findings
    - Findings: after looking at the evidence
- Issue: rule 23: court needs to know not as a matter of pleading if we read your complaint is all this stuff true, is it actually true?
    - Sometimes knowing if it's true or false will require all the evidence that we haven't gotten yet
    - Court has to decide this stuff early
    - But it also doesn't have the full benefit of all the evidence that might later be presented
    - Courts: certify to start with and change your mind or vice versa
    - Problem with changing your mind on certification:
        - Settlement:
        - If you certify, then settle
        - Then court never changes its mind
        - Or no we won't certify, then settlement is small,
        - No good way of dealing with this problem when evidence you need takes

- *Walmart v. Dukes*
    - Facts: Dukes + 1.5 million women class of Wal-Mart employees. Claim: management discretion in hiring, promotion > systematically disfavors female employees.
    - Majority:
        - This was improperly certified under 23(a): commonality: each individual case, different town, different manager
        - unless we can presume that managers discriminate there is no glue that ties the managers together
        - Trying to certify as (b)(2)
            - Problem: back pay is not incidental, have to figure out back pay for each individual, damages questions are individualized which is why you in (b)(3) you care about predominance and superiority
    - Dissent:
        - This policy, the second policy, is what we are interested in
        - So this is common question, useful common question
        - We will get worthwhile something beneficial out of asking that that will be the same for everybody

        - Still have to get to pred
        - dominance inquiry, but that's 23(b)(3), haven't gotten there yet
- Settlements and Rule 23(e)
    - Fundamental problem: settlements with class actions principle agent problem, lawyers and class plaints are agents for all absent plaintiffs but don't always act in accordance with those absent plaintiffs' best interest
    - 23(e) Settlement
        - Has to be fair, reasonable, and adequate
        - Can object
            - Not opting out, not saying I don't want to be covered by settlement
            - I just think it's not enough money
            - Lawyers are selling us out, increase amt of settlement or deny it all together
    - *Synfuel Technologies v. Airborne (DHL)*
        - Facts: Claim: If you don't write in how many lbs, we will just write in 5, then charge you: DHL
        - Airborne willing to settle
            - In settlement,
                - Each person has to come in and say how many packages you got
                - You get free coupon for DHL services, up to $30 if you have the documents,
                - Injunction for more training
                - Plaintiff attorneys: $5 million dollars (dist ct. cut down to 600K)
                - Synfuel get $10K
        - Issues: Coupon: You want to deal with DHL anymore, all you get is the right to deal with them more
            - How many ppl actually file proof of claim with documentation? 7K 3% of class, 97% of class gets nothing
        - Hutslers object to settlement
        - Synfuel and DHL:
            - This is fair because we have a lousy claim
            - Sure the total dollar amount is 75 million, but chance of acquiring that is very very low
            - SoL had already passed
            - Voluntary payment doctrine!
            - Our claim was so lousy getting anything is a benefit
            - That training will lead to changes in operations that will help ppl out
    - Court: these are dumb
        - We think that the lousy claim is not what you said at the beginning
        - Operational changes will help future ppl, but won't do anything for ppl who have already done it
- Class Actions Fairness Act of 1995
    - CAFA:
        - Aggregation
            - Allows aggregation of each person's claim to meet the 75K diversity requirement to get into fed court
        - No forum defendant rule
        - Minimum diversity
        - One defendant removal rule

        - Any one defendant can take it into the federal courts
    - Mass actions included, (100+)
        - Apply CAFA rules to these actions too
    - BUT:
        - 2/3 of plaintiffs from forum and other local connections, then you can't remove
        - 1/3 plaintiffs from forum > discretionary
- Even without CAFA, under Supreme Tribe of Ben-Hur v. Cauble, use class represtanative of plaintiffs for diversity
    - Strawbridge: complete diversity
- This caused plaintiffs to pick class rep who was from same state as def and to pick class rep who was in good state, such as IL
    - IL: good for plaintiffs
    - These places sometimes did weird stuff like reverse bifurcation
        - They would do damages first then liability
        - Basically this would force ppl into settlement
- Thought for CAFA: let's get it out of state courts into federal courts
- Now nationwide class actions brought in federal court or state specific in state courts

7. Discovery

a. Model Rule 4.2: if you know someone has an attorney have to contact them through attorney
   - Your client could contact the other person

b. Forms of Investigation:

Form		**Who?**	**Rule**
Informal Investigation	Before complaint		Rule 11
Required Disclosures		Parties	Rule 26
Interrogatories	Under oath	Parties	Rule 33
Depositions	Under oath	Anybody who might have relevant information	Rule 30, 31
Request for Production of Documents		Parties	Rule 34
Subpoena for documents (duces tecum)		Anybody	Rule 45
Physical or mental examinations		Parties	Rule 35
Request for Admissions		Parties	Rule 36

   - Documents and depositions requested through subpoena
     - Subpoena, under penalty
     - Subpoena ad testificandem: deposition
     - Subpoena duces tecum : documents

Scope of discovery: FRCP 26

   - 26(b)(1): non-privileged matter relevant to a claim or defense
     - Privileges:
       - Atty-client:
         - elements:
           - Communication
           - Made between privileged persons
           - In confidence
           - For the purpose of obtaining or providing legal assistance for the client
         - Upjohn Co. v. US, in a company who is under this privilege?
           - Rejects control group idea
           - CEO, control group (ppl who control A and P), Smith ordinary worker
           - Different in every state
           - Line: broader than control group but probably doesn't reach smith
       - Marital
       - Psychotherapist-patient
       - Some states, doctor-patient

        - If you put the content of that communication in controversy, then you are waiving that privilege
    - Matter:
        - Any information is matter
    - Relevance:
        - Can LEAD to admissible evidence
        - Ex. FRE 407: evidence of subsequent remedial measures is inadmissible at trial
            - Why? Exclude it at trial to avoid disincentivizing ppl to fixing the problem
        - BUT if it violates 407, still discoverable
- 26(b)(1): for good cause you can get anything relevant to subject matter
    - Broad scope of discovery
    - Limits of discovery:
        - (b)(2)(B): specific limitations on electronically stored information
            - e-discovery subject to undue burden or cost test
            - If undue burden, then you have to show good cause
        - (b)(2)(C): on motion or on its own, court must limit frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines:
            - three part test for burden:

                If discovery duplicative or alternate source

                Party seeking discovery had ample opportunity to obtain the information by discovery in the action

                Burden > benefit
        - Particular limits on discovery:
            - *Hickman v. Taylor*

                Facts: Accident killed ppl on tugboat. Hickman: administrator of decedent's estates, sues Taylor who owns the tugboat. Hickam: sends interrogs asking for crew member statements that had been assembled by lawyer, Fortenbaugh.
                - Alt. way Hickman could have gotten info: public hearing before US dept., could have transcripts, or depositions
                - Fortenbaugh: refused to hand them over, held in contempt

                SCOTUS: you can't have the doc
                - If you make lawyer turn over all the notes; then F wouldn't take any notes in the next case
                - Exception: work product doctrine
                    - Codified in 26(b)(3)
            - 26(b)(3) work product

                Documents and tangible things, prepared in anticipate of litigation, by or for party representative
                - UNLESS substantial need or hardship

                Covers: lawyer's mental impressions

                Doesn't cover: person's own statement, if you are P, D gives statement to lawyer
            - 26(b)(4)(C) expert drafts are work product

                BUT
                - Compensation
                - Attorney-provided data or assumptions

- Trial preparation experts: almost entirely excluded from discovery except exceptional circumstances 26

Why? Are you going to use a lot of trial prep experts if the other side will get their stuff? No if they aren't testifying, there's not a lot you need to know about them,

- There is NO silent objection in discovery. Cannot just sit on the document and not tell anyone it exists

Timing of Discovery:

- Service: Day 0
- First thing attn will do: issue retention policy
  - Tell everybody stop deleting your e-mails
- Informal Investigation Rule 11
- 26(f) meet and confer
  - Parties get together to talk about:
    - 26(a) disclosures
    - Discovery Plan
    - 26(f)(3): lots of stuff they can talk about. Figure out how they want discovery to run
    - 26(f)(3)(e): can override the federal rules
      - Why would the rules let you do something like that?
      - Normal things that happen: relax the time limit. Lawyers push deadlines out
- 14 days later, send discovery plan to the court AND 26(a)(1) disclosures
  - Typically unless they monkey around with the rules
  - 26(a)(1) disclosures: have to reveal: show your cards rule, hit me with your best shot rule
    - People who know stuff that helps you, the disclosing party
    - Documents and things that helps you, the disclosing party
    - Computation of damages
    - Any insurance agreements (insurers are the ones with the money)
    - Exceptions, ex. An action by US to collect on student loan
  - *Flores v. Southern Peru Copper Corp*
    - Facts: MtD. Motion to not disclose insurance policy, in order to avoid trade secrets being revealed, business plans being revealed
      - PL; wants to know settlement range
      - Any exception for when motion to dismiss is filed?
      - MtD does NOT stop the clock
        - Discovery keeps going whether you file motion to dismiss or not
        - MtD is entirely parallel, once its decided if granted case disappeared
        - UNLESS file motion to delay disclosures OR put an objection in the discovery plan
      - PL willing to delay all the disclosures except the insurance
      - Ct: Pl is willing to delay everything, Ct has power to override discovery rules
        - Ct can alter discovery rules: very broad discretion under FRCP to move things around
        - Ct: cite Moore's (Lexis) federal practice, Wright and Miller (WL): the bible for civil procedure,

- 16(b) scheduling conference
- 16 (b) Court issues scheduling Order
  - Has to be before 120 days after defendant has been served
  - Has to be 21 days from meet and confer
    - Can change judge says I want to confer
  - Scheduling Order must include:
    - Must include deadlines for:
      - Joinder
      - Amend. Pleadings
      - Discovery
      - Motions (MSJ)
    - May include:
      - Various discovery things
      - Date for another conference, trial
  - Once scheduling order set
    - After ORDER goes out can't just stipulate to change, have to get Judge to change
- Other things you have to disclose:
  - 26(a)(2) Experts who might testify
    - Who, written report w/ opinions, basis
    - Exhibits
    - Qualifications and money
    - Why? Really easy to sandbag someone with an expert, but who is this expert? No idea how to rebut if have no idea. Need to be able to get your expert to think about it. Make expert look bad with expert money.
  - Don't need to disclose at beginning of case, don't do this at very beginning, HAVE to do this before trial, 90 days before trial
  - 26(a)(3): "pretrial" 30 days
    - What else do you have to do in pretrial disclosures, other than expert
    - Evidence, witnesses, outline
    - Why would they require you to do that?
      - No surprises, Jury system requires you to have theatrical performance at which everything happens, both sides need to be fully prepared, can't have anything new coming in, Enable objections, Cant unring the bell
        - Motions in limine
          - Basically pre-trial objections
          - Motion to prevent the other side from using this evidence because it would subject to certain rule at trial
- 16 : general rule for general pre-trial orders
  - 16(b): specific scheduling order
  - All of the conferences that might occur before trial not just initial one

e. Discovery mechanisms, forms
- Interrogatories FRCP 33
  - Limited to 25 (parties can change)
  - Info available to party
  - Produce business records: IF same burden
  - Written questions sent to other party to be answered under oath
  - 33(b)(1)(B): info available to party

        - Has to find info if it's not available to that person, because it's about what's available to the party
    - Objections rely on rules:
        - 26(b)(1): has to be relevant
        - 26(b)(2): benefit greater than burden?
    - Relevant: things that might lead to admissible evidence
    - 33(d): have option to just produce business records IF same burden
        - Can allow then to come to warehouse and collect
    - Purse question of law: not going to get a response
        - Objection: calls for a conclusion or opinion on the law
    - Application of law to fact: Okay
- Document Requests
    - Rule 34: Parties
    - Rule 45: document request for nonparties through subpoena
        - What info: what court, where to show up, whether you are supposed to bring documents
        - Where does a subpoena issue from?
            - Court where action is pending
                - Normally court may not have jurisdiction, but under new rule court gets mini service of process exception for everywhere
                - Can send subpoena nationwide
        - Can they force him to travel all the way to NJ to attend the deposition?
            - Issue it from where action is pending
            - But you can actually hold the deposition somewhere else
        - Do you have to issue permission from the court to issue subpoena?
            - New Rule 45
            - a(1): attorney may also sign and serve subpoena if you are allowed
            - You can send out subpoenas under your own name
            - Power to compel anybody in the world to show up at a hearing
        - Either an attorney can issue a subpoena, clerk of the court (doesn't review anything)
            - Clerk issues them a blank check, like a summons
            - Raises issues:
                - What if Gattick has nothing to do with this dispute?
                - What can he do?
                    - Move to quash subpoena
                        - What district do you move to quash a subpoena? District where compliance is required
                            - This means: if they were going to have the depo in CA and CA is where you need to show up, relevant district court is where you move to quash
                            - That court can refer to the issuing court
        - 5(c)(1)(A): have to have a limit of 100 miles for a deposition if not a party or an officer of a party
            - Party/officer or no big expense: exception applies to trial
        - If you fall in these categories you can be commanded to attend a trial in the same state:
            - Party officer

        - No big expense
        - Important because if beyond 100 miles (ex-California)
    - Different rule for trials and depositions?
        - Part of discovery
        - Trial: can't move the trial multiple places
    - What are the circumstances in which a court will quash a subpoena?
        - Quash or modify: in district where you would have to show up
        - Two categories for quashal:
            - Must quash:
                - not enough time
                - Distance
                - Privilege or other production
                - Undue burden
                    - What if part is undue burden but part is not? Can't quash but could modify
                    - Modify subpoena: ask court in district of compliance
            - May quash:
                - Trade secrets
                - Unretained expert opinions UNLESS party serving subpoena shows a substantial need AND party will compensate appropriately
                    - Dragging in expert
                    - One thing parties can do is hire person and pay for time
                    - Courts don't want to do that, would be unfair to random people
                    - Can't just drag in an expert you aren't paying
                    - Exception: the only way to get this expert, only way to get it and will pay appropriate amount of money, court will rule,
    - What if we don't just want him to testify but also produce documents?
        - Rule 45
        - Subpoena duces tecum
        - Can say include are there any documents
- RPD
- Rule 34: any tangible thing = document for this purpose
    - Any medium even if they require translation
    - Usually kept
    - Any document under your control

○ Depositions FRCP 30, 31
- Question witness, under oath
- Oral/written
    - Oral: 30
    - Written: 31
- Exam, cross-exam
- Before trial
- Who? Anyone
- If want to depose:
    - Send a notice to all the parties involved

        - Have to include
            - time and place of the deposition
            - have to have person you are talking to name and address
            - recording method
    - Not before a judge, but officer of the court there, typically a notary or stenographer
        - Main job is to ensure recording method is working
        - Administer the oath
    - How do you depose a corporation?
        - Can't force to show up, cant administer oath
        - Corporation appoints a representative
    - Rule 30: entity
        - Have to testify known or reasonably available info
        - Either send one person who knows a lot or send multiple ppl
    - Rule 30(c)(1): can have cross-x, redirect, etc
        - Like trial
    - Objections:
        - If privilege: don't answer AND state for the record objection privilege
            - Object, have to NOT answer the question
        - Any other objection: answer the question and state the objection
            - Note it on the record, can say objected when question asked
    - What can you do with a deposition/
        - Use to prepare for trial
        - Use to impeach witnesses
        - Can only use as actual evidence at trial when the person cannot be at trial
            - Rule 32: variant of hearsay
    - If not a party, will have to subpoena for deposition
        - See above Rule 45
    - How long can a deposition last? 7 hours
    - Rule 30(e) after deposition is over you get an opportunity to review the recording/transcript and say hey I misspoke
        - It's still evidence, but you are allowed and obliged and correct anything that you think is wrong.
        - If you made mistake you are
- Examinations FRCP 35
    - Why? Damages, pain, suffering, medical malpractice, paternity
    - ORDER needed
    - Only for parties
    - Mental or physical condition has to be in controversy
        - Has to relevant to an issue and at the core of what we are talking about
    - *Sacramento v. Bridgestone*
        - Facts:
            - Plaintiff admitted to drug use, sharing needles, bi-sexual, believed to be more subject to HIV exposure
            - Def: either take HIV test or give up request of damages based on future life expectancy
                - If he alleges personal injury and general state of health might be relevant to injuries
            - If Patient had already taken HIV test: def could get it

        - Court:
            - Def just trying to scare Patient into settlement
            - No good cause, no order for physical examination
            - Def. could have obtained actuarial statistics saying if someone uses drugs what's their life expectancy, then PL could have used their own evidence
            - If any other method other than physical or mental examination: then do it that way
    - Requests for Admission, Rule 36
        - Written questions which are conclusive
        - (a)(4) Must answer in good faith
        - Binds you in the case
            - You have waived your ability to claim the opposite
        - If answer not admitted, must specifically deny it or explain why the party cannot admit or deny
        - If you make a mistake and make admission you shouldn't have:
            - 36(b): withdraw or amend with motion and court order
f. Conflicts over Discovery
    - If trade secret what can you do?
        - Resist discovery via motion
        - Put in Privilege Log:
            - Description then the reason for non-production
            - Things they requested but not giving them and why
            - They can then contest it to the court
            - Make this a known unknown
            - Fight about reason, court will want to look at it and decide are they right about this or not
        - Can't just fail to produce it!
    - Motion to compel: please compel them to give me that document. Get court order violation of which would be contempt
        - Cost: judge is sleeping dragon
        - Don't want to wake up the judge unless you absolutely have to
    - Motion for Protective Order
        - Court says this is privileged information
        - Kinda like motion to not compel
        - Declaratory judgment version
        - Party opposing discovery bears the burden
        - Basic framework: turn over lots of stuff
            - If you don't want to turn it over, you should have to explain why you don't want to turn it over
        - What does 26(c)(1) say you have to do before you get protective order?
            - Parties have to work it out together
    - What other kind of motion can you get to protect you?
        - Limit, methods, seal, trade secrets: limit access
            - Not look beyond 1987
            - Ex. Divorce filings often under seal, nobody's business how much property ppl have etc
            - Trade secrets: pose another problem: in order to litigate case have to know whether they are telling the truth but can't tell info in court. Limit access to info

to your lawyer, nobody who knows anything about engineering can be in the room when we look at secret document

- Privilege Log:
  - Includes work product
  - Includes burden outweighs benefit
  - Everything you don't want to turn over from request
  - If they say you didn't ask for that, don't have to include in privilege log
- 26(b)(5): accident disclosure Information produced
  - (a): privileged log
  - Accidental production: 26(b)(5): everything that might be produced
    - You have to claim the privilege
    - Other side MUST return/ sequester/ or destroy
      - Sequester: put it in locked box and not look at it
      - So that then you contest
      - Preserve it in that locked box until you resolve the dispute over whether its privileged or not
      - Happens a lot with metadata
      - Don't want to send track changes with info
      - State ethics rules also cover this
    - Options:
      - Stay quiet
        - Hope they never notice, possibly get sanctioned
      - Claim
        - Return, sequester, destroy obligation on the other side
- Rule 26(b)(2)(B)
  - Can object because of undue burden or cost
  - Motion, either protective order or compel
    - Producing party has burden of showing burden unless the other side shows good cause
  - Sets up special process because e-discovery has a lot of disputes
- Failure to Respond to discovery:
  - No secret objections, party opposing discovery bears burden
  - Motion to compel
  - Motion for protective order
  - Motion for sanctions
    - Can move directly to MoS
  - Rule 33/34 require objections to be specific
  - Rule 26(c) protection of trade secrets, confidential information, must consider hardship, nature/magnitude and weigh interests

g. Discovery Sanctions
- *Chudasama v. Mazda*
  - Facts: Plaintiff: man and his wife suing for accident. Very broad discovery requests, ex. Every employee who every worked on every Mazda ever
    - 4 strategies Mazda uses:
      - Object
        - Court doesn't rule on the objections
      - File motion to dismiss the fraud claim
        - Will reduce a lot of the discovery because entirely new issue

                - Court doesn’t rule
            - Ask for Protective Order under 26(c)
                - Court doesn’t rule
            - Don’t turn over everything over, withhold info
                - Are you allowed to do this? NO
                - Not supposed to do this
        - District Ct: grants Pl's motion to compel and issues sanctions HUGE sanctions including a default judgment, lift protective order over trade secret
        - Appellate Ct: ya you aren't supposed to do this but they had a really good reason, district court abused its discretion
            - MtD: district court has discretion doesn’t have to rule on MtD immediately could wait until after trial, here, they abused their discretion, fraud claim was terrible which would have shrank the discovery
            - Compel order: sanctions were excessive, dist. Ct. should have ruled on objections before they start granting motion to compel
            - Re-assigned case to another judge
    - Main rule governing attorney conduct in discovery is not Rule 11
    - Instead main rule governing attorney conduct in discovery Rule 26(g)
        - Requires attorneys have to certify
        - Atty certify every response
    - 26(g):
        - What does this rule require that is special and unique compared to Rule 11?
        - Have to certify you aren't imposing burden
        - If responding, has to be complete and direct to the best of your knowledge
    - Rule 11:
        - When you file complaint: not saying this is complete and correct at the time it's made
        - Whereas with discovery lawyer has to say this is complete and correct as far as I know
        - Have to say as far as I know my attorney isn't lying to you
    - Rule 37: imposes sanctions
        - Motion
        - If you stonewall, don’t show up to deposition, then they don’t have to first move to compel,
        - Otherwise have to go through motion to compel then motion for sanctions
    - Take away:
        - 26(g):
            - Atty certify
            - Undue burden
            - Complete and correct
        - 37: sanctions
            - Motion

h. E-Discovery
    - *McPeek v. Ashcroft*
        - Facts: McPeek sues supervisor at BOP for sexual harassment. They settle. McPeek sues Ashcroft for retaliation for first suit. McPeek wants emails, some deleted, a lot of e tapes to support his claim. Party producing pays for discovery, so DOJ would pay.
        - Issue: expensive e-discovery, DOJ objects, are they compelled to release data?

- Court: sample number of records see how much is relevant
    - Random sample: how many actually have useful data, get a sense of how good this is going to be really and how hard it's going to be

- Issues of e-discovery:
    - Volume
    - Collection
        - How will you collect all the data?
        - If you got sued:
            - Emails are on cell phone, my laptop, my iPad, my apple TV duke email Gmail Hotmail account
    - Preservation issues
        - Do you have to save all the drafts? Can you not hit the delete key? Electronic data changes all the time
        - 37(e): proposal about preservation:
            - Not an actual rule just a proposal
            - Unify the standard, right now courts are going different ways on what your preservation standards are
                - Some courts: not going to sanction until you are willfully destroying
            - Unified single standard: what your obligations are when you get to preserve data
            - Problem: only unified standard they could agree on is kitchen sink test
                - You have obligation to preserve everything that should be preserved look at all the circumstances
                - Doesn't really tell us what we should preserve or not
        - Another issue: is it when you know suit is pending? When you reasonably know there could be a lawsuit? Only after you were sued?
    - Paper documents generally look the same, but e-discovery could be in all kinds of formats
        - Email, PDF, video, audio recording, access log for work,
        - Sometimes very diff to get out of format
    - Ease of searching
        - Much more easy to search
        - One good thing
- *DaSilva Moore v. Publicist Group*
    - Facts: Case about: employment discrimination suit, Female employees sue publishing house
    - Issue: how you are going to go through and search the documents in this case
    - Technique publisher wants to use:
        - Predictive coding
        - Teach the computer to find what's important
        - Have humans look at documents, sample of 1000 documents this one is coded as relevant this one not, let the computer loose on bazillion docs in warehouse
    - Who is writing this opinion (first one)
        - Magistrate judge
            - Junior varsity judge
            - What can they decide? 636(b)(1)
                - w/o consent: judge just assigns
                    - Decide non-dispositive pre-trial matter

- Dispositive:
  - Something really big
  - MSJ
  - MtD
  - certification
- Non-dispositive: discovery decisions!
  - This is a big deal! Discovery issues are very discretionary. Magistrate judges have a lot of discretion. Might make it really hard to win claim or defense. What they decide will only be overturned on clear error, so their decision is really important
  - If you don't follow discovery decision, you can be held in contempt
- Judge can overturn decision:
  - Clear error of fact
  - Contrary to law

- Recommend for dispositive pretrial matter
  - They hold the hearing , as if going before real judge, instead of writing opinion they write a recommendation
  - Judge reviews it de novo
    - De novo: fresh pair of eyes on a blank slate
    - In practice, judges typically adopt the recommendation whole sale
    - So in practice magistrate has a lot more power than recommend might mean
- Special Master
  - Goes out before judge decides, takes testimony runs a mini trial then reports back
  - Ex. SCOTUS uses for contests between Texas and OK for water rights
    - Assign special master, you figure it out tell us what you think
  - De novo review
- How much time do you get to object to a decision by the magistrate judge?
  - 14 days

- w/ consent:
  - They can do anything
    - Including the trial
  - Why would you ever consent?
    - Freer dockets
    - Don't have enough real judges
      - Congress sets the number, and they don't set numbers that high because they are appointed for life
      - Much rather have limited number and supplement with magistrate judges

- Can hold you in contempt if you don't fulfill their discovery ruling
- Magistrate judge:
  - This is just fine
  - Defendant's showing seed docs,
  - Can figure it out later if it doesn't go well
- Plaintiff's object, up to district court
  - What standard of review?
    - Contrary to law
    - Clear error of fact
  - Not a de novo set up!
    - De novo is for recommendations
    - This is non-dispositive pre-trial motion
  - Why doesn't DistCt think reliability is a problem?
    - Turning over all info on how they were going to do it
    - If they didn't feel it was relevant they could discuss it later
    - They were going to also have random test batch that you could say is the machine actually catching the stuff we want you to catch

○ Beisner: Discovery a better way: need for effective civil litigation reform

- Problems for Biesner, e-discovery:
  - Volume
    - Edited things
      - 14 versions of same document all of which is discoverable
    - Drafts!
  - Cost
    - Documents themselves are more informal
      - Have to spend time decoding that
      - Higher cost
  - New avenue for abuse
    - American Rule: everyone pays your own way
    - Contrast with English rule: Loser pays
  - Spoliation claims
    - Spoliation:
    - Flipside of preservation
    - If you didn't preserve the evidence: spoliation
  - What sort of sanctions might court visit on you if court allow spoliation?
    - Money
    - Adverse Inference
      - You tell the jury you should feel entitled jury to infer something from the fact evidence is gone
      - Tell the jury: you HAVE to infer the evidence was bad since evidence is gone
    - You lose by default
  - person who e-discovery is sought may not be a party in the case
    - Ex. Subpoena google for e-mails
    - What's the problem here?
      - Who's going to pay for it?
    - What are the party's incentives?
      - Will ask for the moon

        - Third parties really get socked in e-discovery suits
- Biesner's proposals for reform:
    - 'Flipped' rule: asking party pays in discovery
        - Why would this be a good idea according to Biesner?
            - Wouldn't abuse the system
            - You won't ask for as much
    - Guidelines for cost-shifting
        - Discovery generally
    - Cost-shifting for discovery disputes
        - Only in a motion fight
        - Whoever loses the motion fight has to pay
    - Defining preservation obligations
        - Really hard to know all the information you've got
        - Make distinctions on different types of data
    - Limiting sanctions for failure to preserve to intentional or reckless conduct

      Reckless conduct: aware of risk but decide to do it anyway

      Intentional: intended to do it
        - Limit sanctions to intentional or reckless spoliation
            - Different from negligent spoliation: didn't know didn't think of it
            - Proposed Rule 37(e) does a version of this
            - Sanctions only for intentional/reckless or where you've just lost any meaningful opportunity to make claim or defense
            - If not this stuff: can still have curative measures, not sanctions but pay any extra costs you incur or give you extra discovery to make up for it

Further Policy issues:

- Major driver of litigation costs
- Easy pleading standard: makes discovery HUGE part of case
- Can't afford to litigate through discovery > settle
- US: party directed, lawyer directed
    - v. world judge directed
- Two problems with lawyer directed:
    - Ask for too much and give too little
- American way: party producing discovery pays
    - One proposal: e-discovery: switch burden to have plaintiff pay for everything
        - Sometimes shifting burden wouldn't help, because additional expense in downloading stuff, reviewing everything

8. Trial and Judgment

1. Dismissal FRCP 41
    a. Ways of Dismissal
        a. Voluntary
            1. By the plaintiff
                - Notice: plaintiff
                    - Has to be before Answer or MSJ
                        - Want to be before facts have gotten too far, facts are in dispute and on the table
                        - MSJ usually comes after an Answer its included because under 12(d) you can have MtD that gets converted into MSJ when it relies on facts outside the complaint
                    - Why not before MtD? MtD is what tells you you made a mistake, want ppl opportunity to file after they know about whatever mistake you made
                - Stipulation: all parties
                    - Don't need any permission for either of these
                        - Except for class actions
                            - The plaintiff who is there will abuse the plaintiffs who aren't there
                            - If you can voluntarily dismiss you don't know what under the table agreement
                            - Court needs to review why are you dismissing, why is this going away?
            2. By court order
        - Why would you want to voluntarily dismiss your own lawsuit
            - Don't like judge, defeat diversity jurisdiction, fix flaws, find a longer SoL, avoid discovery

    Two types of Dismissal

    Without prejudice
    - Can file again in the same court
    - Plus almost always in other courts

    On the merits
    - Basically with prejudice
    - Cant file again in the same court
        - And usually, but not always, other courts too

    Two dismissal rule
    - When a plaintiff dismisses a voluntary dismissal on notice 1st time: dismiss w/o prejudice
    - When a plaintiff dismisses a voluntary dismissal on notice 2nd time: dismissed on the merits
    - Can always notice a dismissal if you w/in the time limit
    - Can't keep getting free throws
    - Take away:
        - Subsequent dismissal by notice will be on the merits
    - If you get stipulation: def is okay with it, so if def is okay with you backing off that doesn't trigger the two dismissal rule. Def was okay with you trying again

- If court order: court is okay with you trying again
- Don't want plaintiff to keep trying over and over again by notice
- Rule 41: if you re-file a previously dismissed action and shouldn't
  - May order costs of previous action
  - May stay proceeding

Involuntary dismissal

- On the merits unless the court states otherwise or its jurisdiction, venue Rule 19
  - Aka w/ prejudice
- Court's discretion
- If jurisdiction, venue, Rule 10: w/o prejudice

○ *In Re Bath and Kitchen Fixtures Anti Trust Litigation*

- Facts: Alleged price fixing conspiracy
  - Putative class action, MtD
  - Def moved to dismiss for failure to state a claim
  - Pl: we might have more info
  - District court: amend your complaint
  - Pl: filed notice of dismissal, Give leave to amend, notice of dismissal
  - Dist court: too late!
- App court: bright line rule you can file notice of dismissal until answer to MSJ
  - Even though you went through hearing, etc, you are still home free can still have backsies
  - Notice is NOT a motion
    - Motion: asking a court to do something
    - Notice: shouting from the rooftops announcing to the world
  - Not past the point of no return
- What's the standard that court uses for court order voluntary dismissal?
  - Is there any plain legal prejudice?
    - "plain legal prejudice"
  - Would it be unfair to the other side to let them try again some later time or is it appropriate given the circumstances
  - Not the same as being w/ prejudice
    - w/ prejudice: as to the plaintiff to stop them from filing again
  - Is it prejudicial is it unfair to the defendant

Settlement

○ Rule 41: 41(a)(1)(b) dismissal by notice or stipulation will be without prejudice, unless the notice or stipulation states otherwise

- Why would you ever state otherwise?
- Settlement
- Settlements are put in, they put in notice or stipulation of dismissal both sides agree this will be with prejudice
- Private contract: works out the settlement, I'll give you $1million
- Way settlement gets case out of court is notice of dismissal by notice or stipulation

○ Easterbrook: Justice and Contract in consent judgments

- Why settle? Reduce risk, figure out what the answer is going to be. Most ppl are risk averse would rather have certain amount rather than uncertain amount, give up a little bit
- Settlements often agreed to "in the shadow of the law": maybe the law really is more than settlement amount, if it's really clear it is a lot more wont

        - Assess what are my chances of winning at trial, what is it going to cost me, how good is my case
    - He says this usually doesn't leave the parties worse off
        - What about less bargaining power? Etc
        - Industry: litigation financing
            - Take a loan on day 1, they collect judgment on day 300, they get to keep a large part of the money in exchange for you getting the money now
        - Constant tradeoff between deal making v. substantive justice
        - Deal making has advantages: presumably reason why party is willing to do it
    - Why does E worry about consent decrees by government?
        - Consent decree later administrations cant back off
        - Danger: are you binding your successors
        - Pres can't issue order that bind next Pres (exception: Pardons)
        - We should limit the extent to which government can enter into consent decrees
        - Settlement: harder to settle with the government in private contractual arrangement
            - Sovereign immunity
            - Can't get money
            - Could get a release defense
- Basic difference between consent decree and settlement
    - Consent decree:
        - Court order, parties write the stuff that will be in there, sealed by the court, court has to review it
        - Enforceable as court order
        - Enforcement: contempt
        - Public? : yes, unless sealed
        - SMJ: Rely on Old SMJ, always go back to that court and say hey court enforce that order,
        - Change: court must modify
        - Attorney's fees: depends on the statute
            - if you sue under Title VII: if you would get attorney's fees if you would win, get attorney's fees for this
            - Do whatever the rule would be if you actually won the case
        - Why would you agree to something court would enforce and that you can't change on your own?
            - If you are settling a claim against someone with no money, prefer contempt
    - Settlement:
        - Private contract
        - Enforcement: sue for breach
            - Rule 8 (c): affirmative defense: release: they promised not to sue me, release defense , they released their claim against me
        - Public?: up to you
        - SMJ: not always SMJ for private contract suit, state contract law, just a contract suit have to go through standard diversity stuff if you can get it back to federal court
        - Change: parties can amend
        - Attorney's fees: usually no, unless agreed

        - Why would go with private settlement?
            - Don't have to make it public
            - Don't want anybody else there ever was a dispute
- Rule 68: Offer of Judgment
    - D can make offer 14+ days before trial
    - Impact of making offer:
        - If take offer: settlement
        - If P says no: and does worse than the offer, they pay the costs
            - Really their fault for keeping it on going
            - Have to pay court's extra costs for on-going
            - Method to encourage parties to reach agreement before trial

Summary Judgment

- FRCP 56
    - Standard:
        - No genuine dispute of material fact such that party is entitled to judgment as a matter of law
    - Is judge deciding which side they believe?
        - Suppose you have two witnesses, one says light was red, other says light is green
        - Genuine dispute!
        - In theory the judge could believe either one
        - What should judge do? Deny
- Summary Judgment is different from Bench Trial
    - Bench Trial:
        - Credibility
        - Persuasive
        - Fact finding
    - SJ: has to be so clear that no jury could think there is a dispute
        - If out of 20 ppl who look at red light if 1 disagrees, then that's a dispute
- Three steps:
    - Moving party: burden of production
        - Have to bring out facts that support them
        - Exhibit to the motion
        - Have to show prima facie case
    - Non-moving party, file opposition to the motion
        - Burden: show Facts are in dispute
        - Here are some facts we think are in dispute, evidence
        - Have to burst that bubble, there is some evidence on the other side
    - Moving Party left with ultimate burden of persuasion
        - If judge can't decide either way, moving party loses
- *Slevin v. City of Salem*
    - Facts: Slevin, Adam (Fitzgibbons brother who committed suicide by hanging himself in his cell) sued City of Salem
        - City of Salem: MSJ, dist ct grants
    - Mass. Supreme Judicial Court:
        - Standard: checklist

What is the rule of subst law applicable to the motion?

- Duty
    - Risk: yes, he was facing an unreasonable risk of harm

- *Know/show know: only issue left! Did they know or should they have known that they wanted to do something*
- Breach (protect?): didn't take special measures to protect this person? No they did not do anything special
- Causation: not in dispute
- Injury: not in dispute

Which facts matter are "material" to applying that rule of law?

- What facts make a diff for whether they know or should have known
- What did the officers know and what should they have known
- Dispute belt: is this a genuine dispute of material fact? Court says no. probably not material whether he was wearing a belt or not will not tell you whether the officer knew or should have known

What is the proper record for SJ? What evidence may the court consider?

- How does court figure out what the officers knew or should have known?
  - Affidavit
    - Written statement under oath
  - If had depos, any other discovery would have worked
  - What does Rule 56 require about affidavits?
    - Personal Knowledge: something you actually saw
      - Saw he was sad
    - Admissible facts
      - Have to follow rules of evidence
        - Judicial notice
          - Includes rules and regulations of salem jail
      - Can't use hearsay
      - Why does it have to be admissible at trial?
        - We know what's going to happen at trial w/o having to run it, only works if stuff you are looking at is all admissible at trial
    - Competent to Testify
  - What about plaintiff's deposition testimony? Yes all in the record
  - Can't always intro dep testimony at trial, so why can you use depo testimony here?
    - Rule 56: what could be admitted into evidence if this person testified at trial
    - Gotta be admissible or in a form that would be admissible if they were actually doing it at trial
  - Admissions are in the records
- What would slaven have to pull out in order to make it evidence?
  - Would have to make complaint statement an affidavit
  - Have to have personal knowledge have to explain how you know this

Has the moving party met its burden of showing there is no genuine dispute of material fact in that record and that it is entitled to judgment under the applicable rule of law?

- yes

If the movant has met its burden, has the non-moving party met its burden of showing specific facts in the record that create a genuine dispute of material fact under the applicable rule of law?

- No, says that they will have evidence at trial

What is the proper disposition of the motion?

- Allow, have to make SJ based on evidence that exists right now

- MSJ Motion for Summary Judgment
  - Rule 56
  - 1. sustentative law:
    - What are the elements? What do we need to prove?
  - 2. what facts are material?
    - What are the parties arguing about?
  - 3. what evidence is in the record?
    - That might bear on these fact
  - 4-6 Burdens + Disposition
- Separate between two types of burdens
  - Burden
    - Who loses if ….
  - Burden of Production
    - Who loses if nothing on the table
    - Suing someone for car accident, get to trial, no one presents evidence

      Who loses? Person who bears burden of production
  - Burden of Persuasion
    - Who loses if scales are balanced
    - Ex. One person says he hit me with the car, other person says he didn't hit me with the car

      Person who loses is person who has person of persuasion for that issue
  - Burdens tend to be borne by the party raising the issue,
    - More generally by the party seeking relief
- When can a party move for summary judgment?
  - 12(d) cant file at MtD stage
  - 56(d): give opportunity to develop facts
  - Is there an end date?
    - 56(b): any days until 30 days after close of discovery
  - 56(b): after close of discovery, have 30 days
- Doubts and reasonable inferences go AGAINST movant
- Basically: we throw all the evidence in a pot, is it clear which side wins?
  - Is there no way a rational jury could believe the other side?
- 56(c)(1): party making motion has to support it by citing evidence
  - Movant has to support the motion by citing evidence
  - How do you support motion with whole motion is that they don't have any evidence?
    - Cite evidence that doesn't favor other side
    - Look at depo transcript they never asked X, therefore no evidence about X, so X not there

- Celotex part of trilogy of cases
  - Basically interpreted rule 56 and laid out structure
  - *Anderson v. Liberty Lobby*: most cited case

○ *Duplantis v. Shell Offshore Inc.*
- Facts: Plaintiff slips on board on boat operated by Grace. Shell moves for SJ, wasn't our greasy board, maybe it's grace's problem.
  - Employees in affidavits: duty of grace employees to keep clean, some IDK, no understanding between parties that they can prove it's shell's problem
  - PL: offers letter from expert, wasn't sworn so wouldn't be admissible at trial
- Ct: Simply filing a MSJ does not immediately compel the party opp the motion to come forward with evidence demonstrating material issues of fact as to every element of its case
  - If moving party will not bear the burden of proof at trial, the moving party need not produce evidence negating the existence of a material fact, but need only point out the absence of evidence supporting the nonmoving party's case
  - Party that moves for SJ, bears the burden to establish that its opponent has failed to raise a genuine issue of material fact. To prove this may either
    Submit evidentiary documents that negate the existence of some material element of the opponent's claim or defense
    If the crucial issue is one on which the opponent will bear the ultimate burden of proof at trial, demonstrate that the evidence in the record insufficiently supports an essential element of the opponents claim or defense
  - Shell: p can't prove duty, essential element of negligence claim

○ 56(a)
- SJ can be for claim or defense
- OR part of claim or defense

Judgment as a Matter of Law (JMOL)

Various ways you can get a ruling on the merits:
- 12(b) MtD
  - law and facts in complaint
- 12(c) MtD
  - law + undisputed facts in the pleadings
- 56 MSJ
  - law + "undisputed" evidence from discovery
  - Parties may still be fighting about but it, but court says their fight isn't a real fight nothing on the other side a jury could buy
- 50 Motions for Judgment as a Matter of Law
  - Is there a legally sufficient evidentiary bases as measured by "reasonable jury"
  - 50(a): Judgment as a Matter of Law AKA directed verdict
  - 50(b) Renewed JMOL, AKA JNOV

Rule 50 Motions for Judgment as a matter of law
- 50(a)(1) JMOL after the P's case- law + P's case: Can P win?
  - Defendant doesn't have chance to present evidence
  - Is there a legally sufficient evidentiary bases as measured by "reasonable jury"
- 50(a)(1) JMOL after P's and D's case - law + facts from both: Who MUST win?
  - MUST make to renew, to make 50(b) later
- Trial and Verdict - law to the facts as the jury found them

- 50(b) Renewed JMOL - law + plaintiff and defendant's case
  - Let's you say after the verdict: There's no way they should have come out with those facts
  - Renewed JMOL: look at P and D case and look at what was before the jury and if they weren't reasonable
  - Can renew from JMOL after P or after D, but probably want to do after P AND D, because (b) is about the specific legal question that was raised before the jury, in order to renew it

50: evidentiary standard

- 50: legally sufficient evidentiary basis "reasonable jury"
  - Don't make credibility determinations
  - How is this different for standard from SJ?

    Essentially it's the same test

    Instead of evidence from discovery, just look at what plaintiff has said in their case
  - Common case: where you defeat the inference

    Don't have to make credibility determination in order to say who's going to win

    Ex. Slaven puts out testimony, immediately after brother booked police called in psychology, they knew should have been on watch, Defendant: o that was for somebody else, that inference just disappeared. Inference gets popped and nothing left

Basic Issues

- Why important to raise 50(a)?
  - Suppose other sides forgets one element of 4 elements
  - If you don't raise 50(a) problem
  - Have to give other side opportunity to fix it
- Why have 50(a) JMOL?
  - *Rutherford v. Illinois Central RR*: "method for protecting neutral principles of law from
  - Basic idea: asking judge to take the case from the jury on the ground that the evidence is too weak to support a verdict
  - LEGAL judgment that the evidence is so lopsided that there really is no meaningful factual dispute for a jury to consider

    Judge is NOT resolving factual issues
- Why might a judge prefer to deny these 50(a) motions and then only deal with them really once they get renewed as 50(b)
  - 50(a): never know what the jury would have said, if after appeal want to know what jury would have said, need new trial
  - 50(b): after verdict, already know what the jury would have said

Pennsylvania v. Chamberlain defeating the inference

- Facts: Rep for decedent sues RR and Chamberlain, saying crash of switching cars over a hum caused death.
  - P: claim is they crashed, evidence: Bainbridge heard a loud crash from 900 ft away
  - Trial Court: grants JMOL, because prima facie case was rebutted by other witnesses

If Bainbridge had been an eyewitness and said I saw a crash, could you get a JMOL for that?

- No, So why isn't this a credibility determination?
- Defeat the inference!
- Ya Bainbridge on his case would create case
- But Bainbridge's statement could be totally true, that he heard a loud noise, and other ppl didn't see a crash and this defeat the inference between Bainbridge's noise > crash inference
- Not saying somebody got it wrong not
- We are just defeating an inference

Majority Rule v. Scintilla Standard

Majority Rule

- Look at ALL the evidence for both sides and then say what could a reasonable jury do without making any credibility determinations

Scintilla Standard

- Only look at non-movant's evidence
- Is there scintilla of evidence that supports non-movant?
- Ex. Bainbridge would be scintilla of evidence, so JMOL would be denied

Have to make 50(a) motion to make 50(b) renew motion, but can make 50(a) motion AT ANY TIME, doesn't have to be at the end of the case

- Could do 50(a) motion three ways: at end of plaintiff, at end of def, both
- Can only appeal if make 50(b) renew
  - Can't just appeal from 50(a)
  - De novo standard of appeal
- 50(b) has to be on the same defect!

Summary:

Analysis same for 50(a) and 50(b):

1. Legally sufficient: whether the evidence is such that w/o weighing the credibility of witnesses or otherwise considering the weight of evidence, there can be but one conclusion as to the verdict that reasonable persons could have reached
2. Courts must draw all reasonable inferences in favor of the nonmoving party and it may not make credibility determinations or weight of evidence

b. Fail to make 50(a) and you waive 50(b)
   1. You can only make 50(b) for what was raised by 50(a)
   2. You can only appeal 50(b)
c. 50(a) can be made after nonmoving party has been heard, both P and D have presented or both. Also after an issue has been fully presented

5. Jury Trial
   a. 7th Amendment:
      a. jury trial cause
         - Suit at common law: suit historically law, remedies: damages, writs! Common law in sense of law, equity, admiralty
         - > $20
         - "right to jury trial" "preserved"

         Re-examination clause

         - Fed ct.
         - Cant re-examine jury-found facts
         - Except per 'common law'

Common law, equity, admiralty at the time of the revolution:

	Law	Equity	Admiralty
Courts	King's Bench/Common Pleas	Chancery	Lord high admiral
Subjects	Contracts, Trespass (Tort), property disputes	Trusts (way a trust works, trustee is person who technically owns property but have various duties which aren't legal duties are equitable duties), corporations, partnerships, divorces and wills, all the old ecclesiastical jurisdiction	High seas
Remedies	Money damages, return specific property	Order injunction, declaratory relief, accounting (we've had partnership you were person who handled all the money want to figure out where money went, court forces person to show where money went may not do anything just shows you)	lots
Procedure	Oral testimony jury	Civil law procedures (resembled European civil law system): written depositions, facts decided by a judge	Civil law procedures

Historical test: look back to 1791, and see what they would have done then

- At that time would have to file separate lawsuits for equity and common law actions
- Res judicata: thing has already been adjudicated
  - If you went to equity court then common court, common court would have to follow findings of equity
  - BUT only get jury in law courts, not court of equity

Fed courts never had sep courts of law and equity, district court sitting as law court or sitting as equity court

1938: FRCP

Made fed courts uniform

Merge law and equity

Issue: gotta follow 7A still, have to preserve right to jury trial at common law

If law and equity merged, have to figure out where law issues are and where equity issues are

Dairy Queen v. Wood 1962

- Facts: McCullough gives TM to DQ, DQ sublicenses to franchisees. M sues DQ for not paying fees, wants damages, injunction, accounting. Woods: judge, denies DQ request for jury trial. M brings writ of mandamus to order judge to perform his duties
  - Law: damages, would get jury
  - Equity: injunctions, accounting, would get judge
- Court: jury finds facts first (7th Amendment). Get a jury trial on the damages issues (any issue relevant to damages, liability etc any fact that you have to determine will be decided by jury) Any facts leftover that aren't necessary for damages but necessary for equity, judge can do
  - Take away: in any particular case have to ask:
    - Which questions really come up for the law side?
    - From any remaining questions that remain for equity side
    - Really have to know what's law and what's equity

Beacon Theatres v. Westover 1959

- Facts: Fox and Beacon have anti-trust dispute. Fox has right to exclusive first run, Beacon: that violates anti-trust law. Fox goes to court sues Beacon for decl judgment. Beacon replies with counter-claim for damages
- Court: tie goes to the jury. Jury decides common issue. More protection of jury right. Jury right always trumps!
  - First you figure out: fact have jury find all fact relevant to their jury issues
  - If any facts left over for equity then judge finds those

New Congressional statutes: how do you determine if jury or not? Look are the remedies analogous to law courts?

Ways Court has cut back on 1791 analysis:

Administrative agency proceedings (don't need a jury)

Size of the jury (6-12)

Directed Verdicts/MSJ (did not exist at common law: judge would just tell jury you should do this but jury didn't have to if he didn't like it he could call a new jury, modern: very high standard don't get to jury)

Who can request a jury trial?

- Either party

How do you request jury trial?

- Pleadings
- Written demand

FRCP 38

- Right to jury trial:
  - Demand > get it
  - Don't demand it > waive (bench trial)
    - If waive: see rule 30
    - Could file motion, court's discretion

FRCP 39

- If you didn't demand, file motion and ask the court
- Court may also order sua sponte
- 39(c)
  - If No 7A or statutory right to jury trial
  - Motion/sua sponte: can get advisory jury or binding jury with both sides' consent

Strategic Considerations for a jury trial:

- Sympathetic

- Damages
- Complexity
- Prejudice (jury's prejudice, judge's prejudice)

FRCP 47 Selecting Jurors

- Get to examine juries before trial
- Challenges:
  - Peremptory challenge:
    - Free strike
    - Can't be used on forbidden grounds, discriminatory grounds
  - For Cause:
    - Juror is actually plaintiff's cousin
    - Jury would make money
- Voir dire
  - Questions for jury selection
- Venire:
  - Pool of ppl who show up

Jury Trial:

Opening arguments
Plaintiffs case
Defendant's case
….iterations, plaintiff re-direct etc
Closing Arguments
Judge gives jury instructions
Gen verdict/ special verdict

- v.
- Bench trial:
  - Sequence:
    - Opening arguments
    - Plaintiffs case
    - d's case
    - ….
    - Closing arguments
    - Bench trial
    - Findings of fact
    - Conclusions of law
  - Why spell stuff out?
    - Appeal
    - Appeal from jury trial v. appeal from bench trial
      - See second half of 7A: re-examination clause
      - Not supposed to re-examine jury verdicts
      - LOTS of limits
      - No such limits on what the judge finds
      - Might use clear error standard to say we have to really know they messed up
      - Jury verdict: REAL real hard to get
  - Who does fact finding?
    - Judge, court
    - Can get advisory jury or special master

- FRCP 53 Special Master
  - Random person, serves as rep of the court as stand in for the judge
  - Hear testimony
  - Make report
  - Judge not bound by report
    - Review report de novo
    - UNLESS parties agree to a different standard
      - Used for complex patent cases, might want special master with PhD in physics

Jury Instructions

- Judge tells jury what they need to inf
- HAS to be unanimous in fed courts
  - Doesn't always need to be in state court

Two Types of Verdicts:

General Verdict

Special verdict

- Bunch of boxes: do you find that they ran the red light? Do you find person crossing against light? Write in medical bills
- Judge takes all of that and figure out who wins

Policy considerations:

- Jury = gold standard for figuring out the truth, but only 2% cases go to jury trial in fed courts
- Langborn article:
  - Why were there so many trials in the old days?
    - Wasn't as costly
    - Pleading different before federal rules
  - Old days:
    - Law side:
      - Really exacting pleading rules
      - Plead to issue
        - Can't argue both: it wasn't me, and even if it was me self defense
      - Made it easy to do jury trials, juries only had to deal with one issue
      - Oral, theatrical performance
    - Equity:
      - Lacks joinder rules
        - More complex cases
      - Judge decide
        - Written evidence
      - Judge could appoint special master if needed
      - Discovery!
  - What happens to change all this? 1938 liberal pleadings FRCP
    - Use lax joinder rules and complex cases
    - Equity conquered common law!
    - Procedures we use are old equity
      - Use discovery

Written evidence

- Why does this process encourage settlement w/o trial?
  - Discovery, settle
  - Person confessed in discovery
  - Or MSJ

    Know all the evidence, if they are being unreasonable, SJ

    MSJ was uncosnt when applied to juries in Old times,
  - Don't really need trial
- Why settle?
  - When you can agree on expected value

Judgment and Remedies

FRCP 54 Judgment, Costs

- Have to have for final judgment before you can appeal
  - If no just reason for delay, court can certify a partial final judgment for appeal
  - At any time before final judgment or certified partial final judgment, court can ALWAYS change its mind (Through rule 60)

Judgments:

- Official order of the court
- Order that goes out and changes the state of the world
- Order: who gets relief and why

FRCP 58, Entering Judgment

(b)(1)

- Clerk enters judgment if:

  General verdict

  Court awards only costs or sum certain

  Court denies all relief

  Is it okay for clerk to order judgment here? Remember clerk monkey

(b)(2)

- Court approval to enter judgment if:

  Special verdict
  - Ex. Party was negligent was guilty for this percentage, but def negligent for this percentage

  General verdict with questions

  Other relief
  - Ex. Injunction
- Why need court approval? Have to think about the law and what the law means

  Notify all parties promptly
- w/o court's direction, clerk must promptly prepare, sign, and enter judgment when court denies all relief
- What if no piece of paper ever gets produced?

  Party may request

  Appeal from a judgment. No judgment issued nothing to appeal

58(d)

- If they haven't entered judgment parties can ask

58(c)

- if you don't need a separate document, putting it on the docket is okay, if you do need a separate document:

  Either get your separate document

Or you wait 150 days from when its noted on the docket
Used to be if you needed sep doc and never got it, could never appeal
New rule: 150 days from when noted on the docket can treat it as if judgment from that day

Remedies

- Which remedies are available for which law: substantive law

Execution of remedies, FRCP 69

- Executing a money judgment
  - Use state procedures
- Going after a person's property
  - Use state procedures
  - Some things exempt from execution see MDNH laws
    - Mini bankruptcy statute: even if you are in judgment way under water not going to take away stuff ppl need to live, tools of trade, etc
- 69(a)(2)
  - Can get discovery in connection with execution
    - Why? To find out what assets a person has to see how they can pay you back

Interest, 28 USC 1961

- Pre-judgment interest: provided for as a matter of substantive law, depends on what you are suing for and depends on state
- Post-judgment interest: between judgment and execution: 28 USC 1961
- 28 USC 1961
  - .12% as of last June
    - 1 year treasury bond, risk free rate
  - Why would it be that low?
    - Plaintiffs would prevent you from mailing the check
    - Interest rate has to be low or plaintiff has no incentive to actually collect the money
    - But its so law that the defendant has every interest in stretching it out (could earn interest on it in the meantime)

Seizing a person or property, FRCP 64

- Seizing a person or property
- Use state procedure
  - Every remedy is available that under law of state where court is located, provides for seizing a person or property to secure satisfaction of judgment, federal statute governs to the extent it applies
- Available: Arrest, attachment, Garnishment, Replevin, Sequesterian, other corr or equivalent remedies
- *Arrest*: seizing a person
  - Old days you could arrest someone when you start private lawsuit
  - Replaced by service of summons
  - A seizure or forcible restraint
  - The taking or keeping of a person in custody by legal authority, esp in response to a criminal charge; the apprehension of someone for the purpose of securing the administration of the law, esp of bringing that person before a court

Limited to cases of child custody, civil cases rarely in fed court unless treaty or intl connections

- *Sequestration*: put property aside
  Fighting over Picasso put Picasso in court's vault so that nothing bad can happen to it in the mean time
  The process by which property is removed from the possessor pending the outcome of a dispute in which two or more parties contend for it
- *Attachment:* taking property to satisfy a judgment which doesn't necessarily have to be about that property
  The seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment
  Taking property to satisfy judgment
  Attach property put a lock down on that property so he can't move it anywhere
  Making sure you will be good for it when the time comes
- *Garnishment*: If 3rd party has money that belongs to defendant: FRCP 64
  Harry v. Balk
  Ex. Garnish someone's wages, go to employer and get part of paycheck
  - Bank account

  Key: 3rd party
  Black's Law Dictionary: someone who is indebted to or bailee to the defendant
  - Bank is indebted to def
  - Boss who owes you wages is indebted to you
  - Bailee: arrangement in which bailor gives property to bailee to hold (ex hat check)
  - Judicial proceeding in which a creditor (or potential creditor) asks the court to order a third party who is indebted to or is a bailee for the debtor to turn over to the creditor any of the debtor's property (such as wages or bank accounts) held by the third party
  - Plaintiff initiates a garnishment action as a means of either prejudgment seizure or postjudgment collection
- *Replevin*: going to get my own stuff back
  An action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it
  A writ obtained from a court authorizing the retaking of personal property wrongfully taken or detained
  Maybe they bought it under re-possession agmt, it's my stuff now
  Sheriff goes out with you, sheriff is authorized to use force to get your stuff back
  Different from re-possession, re-possession is a form of self help
  - Not a remedy the court orders
  - You person go and steal that car but this time it's legal but repossession
  - Barrier: has to be peaceful
- *Fuentes v. Shevin* 1972

Facts: Margarita Fuentes bought a stove, stereo, service policy from Firestone Tire, Total cost $500, $200 left over service. Dispute! Firestone get writ of replevin in small claims court, post bond. Put up money if it turns out our taking gas stove was wrong here's a bunch of money that goes to Fuentes, Sheriff came too! Fuentes have an opportunity to give her side of the story before this happened? No. Florida law: just fill out a form. Ex parte! One sided

Court: Due Process! 14th A: need notice and opportunity for a hearing. Just private party suing you

- Why isn't it enough that they posted bond? Injury that is inflicted in the meantime with not working stove is not the kind of thing that you can just pay back. They can do stuff outside the court, they can manipulate say how about we just give you the stove back and not pay bond
- What kind of prejudgment seizure would the court permit?
  - Have to have the opportunity for a hearing first! Can have prejudgment seizure
  - Can have prejudgment attachment so long as there is a fair prior hearing
- Don't want sheriff gov to be involved here whenever some relatively privileged party decides it's time to go steal a gas stove

Dissent: why not just make the bond really big? This is not that big of a deal and a hearing won't change things much.

Note: Fuentes applies to all 64: seizure property before judgment

Injunctions and Restraining Orders, FRCP 65

1. Preliminary injunction
   - Just while case is on going
   - Final injunction: what happens after case

- Prelim Injunction 4-Factor Test *Winter v. Natural Resources Defense Council*
  - Likelihood of success
    - Why only likelihood? Don't know merits of the case. Haven't gone through discovery show enough to justify intervening
  - Likelihood of irreparable harm
    - Can't repair with money after case is over problem!
  - Balance of equity
    - Is this fair to the other side?
  - In the public interest
    - Granting injunction would harm PI, ex. Gov has to cut down forest for forest fire to create break

Temporary restraining order

- Can issue without notice!
- Ex parte
- How do we limit TRO to make it less dangerous?
  - Extra conditions (b)(1) and (b)(2)
    - Sworn
    - Immediate and irreparable injury
    - 14 day limit, court can expand to 28
    - Expedited hearing

        - Bond (also other)
    - Why is this different from Fuentes and not unconstitutional?
        - Fuentes: injury was irreparable
            - Fuentes could have just paid up
        - Only irreparable if you can't fix later, especially with money
- What's the difference between TRO and Prelim Injunction?
    - Have to have notice for prelim. Injunction
- *U v. Texas v. Camenish* 1981
    - Facts: C, deaf grad student at UT, said they violated act by not providing sign language interpreter. Seeks decl relief, prelim injunction, final injunction.
        - Dist Ct: granted prelim injunction.
        - UT interlocutory appeal: appeal before final judgment (exception to the rule that you can get an appeal except for final judgment)
        - Court of Appeals: didn't get to decl or final/perm inj issues: C graduates
            - No point in getting final perm ink doesn't matter
            - Only issue: who pays?
        - SCOTUS:
            - This is not moot. Still have question of who will resolve this money. Request for decl judgment and perm injunction moot, but prelim inj not moot. Order trial on the merits. Need to know who actually wins to determine who gets to pay for interpreter.
        - Justiciability:
            - Article III Standing: "case or controversy" 3 parts:
                - Injury
                - Causation
                - Redressability
            - Prudential: even if this is a case, but your claim to injury is weak, we aren't going to deal with it
            - Two separate doctrines that go along with standing at different times:
                - Ripeness: timing of lawsuit, if nothing actually happened: not ripe
                - Mootness: opposite of ripe.. Over ripe, doesn't matter anymore.

Final Injunctions, FRCP 65

- Who bound by final judgment under rule 65?
    - Parties, agents/employees, active concert/participation
    - Need actual notice!
        - Not just constructive notice
        - (d)(2): ppl who are bound by it are only those who are those who received actual notice
            - "service or otherwise"
- Punishment for violation: contempt of court
- *Zenith v. Hazeltine Research Inc*

- Facts: Zenith manufactures radios and TV sets. Hazeltine Research Inc (HRI) license some patents. Hazeltine Corp: parent company of HRI. Zenith don't want to renew license with HRI. HRI collude with foreign patent pools to block import of Zenith. HRI sued Zenith for infringement, Zenith counter-claims for misuse of patent with conspiracy. HRI and Zenith stipulate that HRI and Hazeltine considered one entity. Hazeltine was not a formal party
- SCOTUS:
  - You can't stipulate you are the same company if they don't agree
  - Pennoyer: one is not bound in personam unless made party through service of process
  - When would SCOTUS find you are the same company?
    - If Hazeltine actively controlling the litigation
    - Really directed litigation?
    - Active concert
    - Alter-ego
      - What's required to prove that? You're just shell companies, not really a sep company there, don't keep separate papers, don't act as if separate company, one company when it pleases you,
      - Hard test to win

Declaratory Judgments, 28 USC 2201, FRCP 57

- A binding adjudication that establishes the rights and other legal relations of the parties w/o providing for or ordering enforcement. Often sought, for example, by insurance companies in determining whether a policy covers a given insured or peril
- 28 USC 2201
  - Can you get a declaratory judgment whenever you want?
  - Need:
    - Actual case or controversy
- Mirror image
  - If you say this is my land could image I'm going to wait for them to sue me for walking on what they think is my land: instead, you do decl. judgment action to quiet title
- FRCP 57
  - Does it say anything meaningful? No
  - Preserves your jury rights!
  - Your jury rights depends on the mirror image case
    - If case that was going to be brought against you was equity: no jury, law case: jury

Douglas Laycock, Modern American Remedies: Cases & Materials 1-9

- Categories of remedies:
  - Compensatory remedies
    - Compensate plaintiff for harm they have suffered. Compensatory damages
  - Preventive remedies: prevent harm before it happens
    - Coercive remedies
      - Injunction: personal command from court to litigants ordering them to do or to refrain from doing some specific thing.

        - Ex. Specific performance decree: order defendants to perform their contract
        - Violate injunction? Contempt, court may impose escalating punishments
    - Declaratory remedies
        - Authoritatively resolve disputes about parties' rights, but they do not end in a personal command to defendant
        - Implicit rather than explicit
- Restitutionary remedies
    - Designed to restore plaintiff all that defendant gained at plaintiff's expense
    - Often reverse mistaken or voidable transactions, restoring both sides to their original position
    - Focus on defendant's side of the transaction, sometimes restoring possession of specific property where it is practical to do so
    - May award to plaintiff profits defendant earned by conscious wrongdoing, even if those profits exceed plaintiff's damages
- Punitive remedies
    - Designed to punish wrongdoers
    - Punitive damages
- Ancillary remedies
    - Designed in aid of other remedies
    - Ex. Costs and attorneys' fees, punishment for contempt, garnishment, writ of execution,

- Substitutionary and specific remedies
    - Substitutionary: plaintiff suffers harm and receives sum of money
        - Compensatory damages, attorney's fees, restitution of the money value of defendant's gain, punitive damages
    - Specific remedies: seek to avoid this exchange
        - Aspire to prevent harm or undo it. Seek to prevent harm to plaintiff, repair harm in kind, or restore the specific thing the plaintiff lost
        - Injunctions, specific performance of contracts, restitution of specific property, restitution of a specific sum of money
    - Useful for lawyers but usually not much turns on precise categorization of cases near the line
- Legal and Equitable Remedies
    - Legal
        - Compensatory and punitive remedies
        - Mandamus, prohibition, habeas corpus
        - Most substitutionary (exceptions)
    - Equitable
        - Injunctions and specific performance decrees
        - Older, more specialized declaratory remedies
        - Receiverships
        - Most specific (exceptions)
    - Declaratory judgment: created by statute after merger, so not classified either way
    - Restitution: some legal some equitable some both

New Trial; Relief from Judgment

FRCP 59 New Trial

- In general, grounds for a new trial:
  - (a)(1)(A): Jury : for any reason for which a new trial has heretofore been granted
  - (a)(1)(B): non-jury for any reason for which a rehearsing has heretofore been granted in a suit in equity in federal court
  - (a)(2): non-jury: court may open judgment if one has been entered, take additional testimony, amend findings of fact, conclusions of law or make new ones and direct the entry of a new judgment
- Summary:
  - Jury: heretofore…
  - Non-jury: heretofore…
    - Re-open
  - 28 days after entry of judgment
  - Can also do sua sponte OR use ground not in the motion
- 59(d)
  - 28 days, can order a new trial for any reason that would justify granting a motion
    - Can order new trial sue sponte
    - Or use a ground not in the motion

3 grounds on which a judge may grant a new trial

- Weight of evidence
- Process errors
- New evidence
- These are all glosses on heretofore stuff, basically categories before FR would have gotten a new trial
- P 1106

59(e): for altering or amending a judgment

- Remittitur: alters or amends the judgment by knocking down what the judge did
- Remittitur: either you get less money or new trial
  - 7A problem?
  - SCOTUS: $50K is part of original verdict
  - Some evidence for it at common law
  - CANNOT appeal if you take the money instead of new trial
- Additur: not okay in federal courts
  - Jury gives you $1, court says you deserve 50K or new trial
  - SCOTUS: extra 49K is not part of the jury's verdict, didn't exist in common law,
- 50(b): okay to combo judgment as a matter of law, new trial, and remittitur

Trivedi v. Cooper

- Facts: Cooper: employer, Trivedi: employee. Three claims: Failure to promote, Retaliation, Hostile work environment. Trivedi testifies that Cooper used racial slurs: judge thinks this is the strongest evidence favoring T. After plaintiff's case, Cooper 50(a) judgment as a matter of law for retaliation and failure to promote, Judge denies. Defendant's case: Strongest evidence by judge: weird counseling sessions, weird behavior), Expert testimony that he is clinically insane. Jury Verdict; T wins : Retaliation: $1, Backpay: failure to promote, 700 K for hostile work environment. Cooper: 50(b) motion, Moves for new trial 59(a), Moves for remittitur 59(e)
- Judge:
  - 50(b) motion

- Failure to Promote: deny 50(b)
- Retaliation: deny 50(b)
- Hostile work environment: waived, no 50(a) motion
- Standard: no reasonable jury
    - Here: sufficient basis for verdict

- 59 motion
    - Failure to promote
        - Deny new trial
    - Retaliation
        - Deny new trial
    - Hostile work environment
        - Deny as to liability
            - Why? Jury found witness credible
        - BUT remittitur, see below as to damages
    - Standard: weight of the evidence is really strongly against you, I am clearly convinced that this is wrong
        - Judge can't throw out judgment, orders new trial. Still goes to a jury
        - If there is a legally sufficient amount of evidence to support the plaintiff, we can keep going through a bunch of juries plaintiff wins plaintiff wins, judge will give in
        - If jury verdict not supported by weight of the evidence let's ask another jury, only if two or more juries all agree then judge will be persuaded by things
        - How is this fair? Long-standing rule of common law, very important that only a jury could issue a final answer back then.. Jury could refuse to listen to weight of the evidence.
- 59(e) remittitur
    - 50K is the top of the range, maximum damage, anything more would shock the judicial conscience
    - Given the weight of the evidence, this is the maximum
        - This is not how it's supposed to be normally
        - If they say jury verdict can stand on liability, the amt of damages could probably be more than 50K
        - What shocks the judicial cons is getting 50K when you shouldn’t have gotten any
        - Judge letting merits affect assessment of the damages
    - Damages: excessive!
    - Standard: "shocks the judicial conscience"
    - Remittitur: so take 50K or new trial on damages and liability
        - Why? Because all the damages can't be separated from liability here
        - Could you sep. damages ever?
            - Car accident, could separate damages: how badly was this person injured
            - Wheatly v. Beattar: jury found def liable for beating the plaintiff, awarded only $1 in damages, court: damages not supported by evidence, separate damages! We found you beat him up, for damages all we care about is how badly were you hurt

        - Here how would you figure out, because how badly you were discriminated against depends how badly the person discriminated against you
    - T did well given testimony, probably in interest to take money and run
    - Jury found fact: extent to which he was damaged, judge ordering remittitur is re-examining that fact, how is this constitutional?
        - 7A: preserved feature of common law, part of original verdict. That 50K is first 700K of the jury, so it's okay

Harmless Error FRCP 61

Unless justice requires otherwise, no error in admitting or excluding evidence-or any other error by the court or a party-is ground for granting a new trial, for setting aside verdict, or for vacating, modifying or otherwise disturbing a judgment or order.

- At every state of the proceeding, court must disregard errors and defects that do not affect any party's substantial rights

Process errors:

- New trials can also be ordered for an error in the trial process, if the error probably or to a substantial degree affected the right to a fair trial or the jury verdict, and if it was timely and specifically raised by the moving party
- Improper Argument to Jury
- Witness misconduct
- Jury misconduct
    - Process errors based on jury misconduct implicate the rule of evidence that excludes juror testimony to impeach their verdicts. A juror's testimony is inadmissible to show what was said or what occurred during the course of deliberations or what influenced the juror's mental processes, except that it is admissible to show that extraneous prejudicial information was improperly brought to the jury's attention or that any outside influence was brought to bear on any juror
- Evidentiary errors

Let minor errors stand, only care about errors that affect substantial rights

What is not harmless?

- Really prejudicial testimony
- Rule 50: judge goes wrong way on JMOL
- Serious jury instruction errors

Harmless error:

- If you win
- cumulative view of errors
- No value in determining issues
- Curative instruction

New Evidence FRCP 59

- Very very rare
- Don't have much time between entry of judgment and motion, 28 days
- Test: could you reasonably have found it earlier
- Sometimes things do come up that justify re opening the judgment
- 28 days
- What happens if you find a problem after?
    - Rely on Rule 60

Relief from Judgment, Rule 60

- 60: change mind AFTER final judgment
- General method from getting relief from the judgment: Take it up on appeal,
- But rule 60 is about dealing with it where it is, at the district court, without having to go anywhere else
- Flipside 54(b)
  - 54(b): judge can change their mind before final judgment
- Very very rare to get past final judgment rule
- (a): clerical mistakes
  - Category of technical error: strange one,
  - Clerical mistake: uniformly recognized
  - can fix clerical mistake whenever it's not on appeal
    - Why not on appeal? If it's gone up to appeals court stays there, they will fix it
- (b)
  - (1) mistake, inadvertence, surprise, excusable neglect
  - (2) newly discovered evidence
    - After 28 day from rule 59
  - (3) fraud on the court
    - Fraud on the court
    - Not just fraud on what you are suing over,
    - Deliberately presenting perjured testimony, deliberately presenting fake exhibits
  - (4) void judgment
    - Judgment w/o good notice or otherwise w/o personal jurisdiction
    - Ex. I get sued in Alaska, default, no contacts with AK, judgment that gets rendered there, but later I can show in AK nullify that judgment its void no PJ
    - Or if they try and enforce it elsewhere attack as void judgment
  - (5): judgment satisfied or released or no longer equitable
    - If already paid the money, lets knock that judgment off the books I've already done everything that needs to be done
    - Injunction, now C has graduated, no point in having sign language interpreter
  - (6) any other reason
    - REALLY narrow
    - Basically requires some extraordinary cause that is not captured in the rest of this
- Time limits:
  - 1-3: 1 year
  - For ALL 1-6: a reasonable time
  - Why not clerical mistakes over a year: if the judgment was missing a zero, should fix that
  - Why limit fraud on the court? Worry, that's really fact intensive, newly discovered evidence really fact intensive
  - What can you do if there was fraud on the court, safety valve? 60(d)
- 60(d): can have separate suit where you have to go in and prove things,
  - Court always have inherent power to set aside a judgment for fraud on the court but they have to do that sua sponte

        - Write letter to the court, ask judge, w/o motion
    - Why no time limit on void judgment?
        - If void then void today, can't be made better with passage of time
    - Excusable neglect: you screwed but it was reasonable enough in context that we will allow you to keep going
        - Let you go back and start over
    - Take away: court has broad discretion in granting relief from judgment. In exercising it, courts repeatedly emphasize that Rule 60(b) is not a substitute for appeal, that finality should not be lightly disturbed, that they must consider and protect good faith reliance on a judgment, and that the movant who asks the court to set aside the judgment in order to litigate again must show that it has meritorious claim or defense. Deck is stacked against the motion

Arbitration

- Arbitration: alternative dispute resolution (ADR) . What looks like a procedure before someone not a judge, private person chosen by the parties
    - Is a matter of contract
- ADR:
    - Arbitration
        - Private 'judging'
        - Arbitrator: power to impose judgment
    - Mediation
        - Talking things through
        - Mediator: sit down and try and convince two sides to understand each other
        - Mediator: No power to impose judgment
- Arbitration governed by Federal Arbitration Act FAA 9 USC 1-16
    - Passed in 1925 to deal with judicial hostility to arbitration
    - Judges didn't like idea that somebody else would be making decisions not them
    - Congress passed FAA to say no no arbitration is okay and part of law
    - Some dispute over whether FAA apply to fed or fed/state, SCOTUS has said FAA applies to fed and state (if you have contract that deals with interstate)
    - 9 USC 2-4
        - 2 Validity, Irrevocability, and enforcement of agreements to arbitrate
        - 3 Stay of proceedings where issue therein referable to arbitration
        - 4 failure to arbitrate under agreement, petition to US court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination
        - 9 award of arbitrators; confirmation; jurisdiction; procedure
        - 10 same; vacation; grounds; rehearing
        - 11 same; modification or correction; grounds; order
        - 16 appeals
    - Section 2: decision is valid, irrevocable and enforceable
        - EXCEPTION: grounds…for the revocation of any contract
            - Arbitration is a matter of contract, if contract not okay
            - Reasons to void contract:
                - Fraud
                - Duress
                - Unconscionability
    - Section 3: stay proceedings

        - If we have lawsuit going on and we need to stop it and go to arbitration use section 3
        - Is there an agmt?
        - Is this w/in the terms?
        - Is the issue arbitrable?
            - Is there an agmt
            - Is this w/in the terms
- Section 4: lets you make a petition to compel arbitration in fed court
    - Fed court that would have had SMJ if it had gone to the court
    - If not diversity case: FAA isn't a way of getting into diversity
    - Might still have to be in state court
    - If you would otherwise be in fed court you can do this procedure
    - What are the elements you have to prove to get order to compel?
        - Get a trial on the making of the agreement, failure/neglect
            - Can get a jury trial on that
        - Is this issue within the agmt: then order sending you to arbitration can be backed up with contempt
    - If you don't have a lawsuit yet…
- Decision of arbitrator: award
- Section 7: arbitrators can summon before them any person as a witness, issue subpoenas, person refuses: district court may compel
    - Arbitrators have subpoena power
    - Really weird thing! Normally subpoena power is only the courts, what makes it better?
        - Court has to enforce it
    - Arbitrator has subpoena power but court must enforce
- Section 9: what can you do with award:
    - Confirmed by the court
    - Add shiny seal
    - Okay now we are going to give you a court order saying this is a good award it's now a judgment of the court
    - Confirmation is OPTIONAL
    - Only when a problem comes up, arbitrator gives award and person won't pay do you go to the court
    - Allows you to collect now just like any other judgment of court
- Section 10: factors that allow you to vacate an award
    - Fraud
    - Partiality
        - If arbitrator turns out to be other person's cousin, that's not okay
    - Misconduct
    - Exceed/imperfect
        - You go to arbitrators for award and what you get back is Mark Rothco painting signed, court will say find vacate use different arbitrators
        - If they so imperfectly execute that we can't even tell there is an award
            - If relief is vague, can't figure out what they want you to do
    - Dispute in circuit courts: Section 10: "manifest disregard of the law"
        - Theory: if arbitrators go in and manifestly disregard the law, then maybe they are exceeding their powers

- Arbitrators to decide what's good and right for everybody regardless of the law
  - Private: you and your friends might turn to someone else to settle dispute
  - That person is not going to be applying law of NC, just trying to create law
- Sometimes appoint to decide with a accordance with the law
  - Ex. They say murder doesn't count, just a mistake
  - But does it exceed their powers?
- Manifest disregard the law a reason to overturn judgment?
- Questionable
- Dispute in circuit courts
- Can NEVER overturn for manifest errors of fact, different from judicial decision which you can appeal

- Section 11: lets you correct an award
  - Correct
    - Clerical mistake
    - Wrong matter
    - Typos
- Section 16 Appeal
  - Pro-arbitrary
  - What kinds of orders can you get interlocutory appeals (appeal before final judgment) from?
    - If arbitration has been denied
      - Ex. Refusing a stay
      - Denying petition
      - Confirming or denying partial award
    - Against arbitration can get immediate appeal before final judgment
  - What kinds of orders can you not get interlocutory appeals from?
    - Granting arbitration
      - Granting stay
      - Compelling arbitration
  - Why?
    - The whole point of arbitration: get it done quickly then worry later about whether we need some other
    - Whether some other issue came up that requires correction on appeal
  - Pro-arbitration set-up

- Note: to be covered by FAA, arbitration agmt has to be in writing
- Future and Existing Controversies
  - Future controversy
    - Arising out of some kind of agmt that you don't know about yet
    - Anytime in the future we disagree going to arbitrator
  - Existing controversy
    - Already arisen
    - Current controversy lets go to arbitrator
- Arbitration agmt: settle?
  - Settle it whatever way the arbitrator says, but not quite right
  - Doesn't treat this as a waiver of your rights

- Another way of actually resolving the dispute
- Can arbitrate non-waivable statutory rights
  - Ex. Discrimination: we are going to arbitrate any claims of racial or gender discrimination
- Most arbitration agmts specify:
  - arbitrator
    - Arbitrator:
      - Gets to decide issue,
      - Can be one person, panel of ppl
      - Can agree in contract OR agree to pick later
  - Procedural rules
    - Informal
    - More limited discovery
    - Don't use FRE
- Reasons for arbitration
  - Expertise
  - Speed
  - Cost
  - Confidentiality
    - Public court systems are public unless sealed
    - Arbitration agmt can keep things confidential
- *AT&T v. Concepcion*
  - Facts: Parties: AT&T Mobile, Concepcion: couple angry free phone was subject to sales tax for $30.22. Concepcion file claim combine sue as a class action, AT&T moves to compel arbitration, as part of service agmt. Key feature of arbitration agmt: denied class arbitration, Had "class action waiver", Have to bring claims as an individual, Waive right to bring claims as a class
    - District Court: did not enforce waiver, this is unconscionable
      - Cali Law: this is unconscionable to have agmt to waive right that bring class action
      - If that's Unconscionability, that's ground for revocation of any contract, in the exception for section 2
      - It's not arbitration specific, that would run into section 2
      - But no, this applies both arbitration agmts and agmts about standard litigation that say you waive your right to sue as a class in real court
  - SCOTUS:
    - Majority: this conflicts with the FAA
      - This is an obstacle to the FAA's purposes
      - Point of arbitration: easy speedy low cost procedure. In theory you could have a requirement that everybody has to have a jury, whether you are going to arbitration or not. That everybody has to use FRCP. Everybody has to get discovery. BUT all that stuff would mess up arbitration. And they say class actions do that too
      - Class actions: can't be informal. Need procedural formality to ensure fairness to class. Need to protect people who are absent. That private person is arbitrating claims whether they are there or not. Need to follow procedures to make sure DP aren't violated. Risk of class action is so great, nobody would arbitrate

        - Sachs:
            - They couldn’t say what they wanted to say
            - This isn't Unconscionability! This is void for public policy, doesn't look like Cali's other laws
            - Public policies of US; set by FAA as in favor of arbitration
            - Cali can't just say we worry about companies getting away with bad stuff
            - Have to come up with some other label for it
            - Court doesn’t say that because court won't say we don’t believe you California, unwilling to call shenanigans
    - Dissent: Breyer
        - Why does justice breyer think it's important to let this state law stand?
        - Should compare class arbitration to class litigation
        - Class arbitration is fair
        - Claims are small dollar amount, plaintiffs only get 7500 if don’t get claim's face value (here 30.22)
        - Makes small claims almost impossible, need class litigation
        - Public policy worry:
            - Companies will get away with it!
                - Response by Sachs: that's a weird fit to Unconscionability, usually Unconscionability is about unfairness to those two parties
            - Without class action, they will just be nice to Concepcion and screw everybody else
        - It doesn’t frustrate the purposes, it's just like class action

Attorney's Fees

- English rule: loser pays
- American Rule: everybody pays their own way
    - Fee Shifting: special statute shifts fees from party that ordinarily would have paid them to another
    - Ex. Title VII employment discrimination
    - FOIA
- Why would congress make fee shift statutes?
    - Things like freedom of information, person wouldn’t be as likely to bring suit if they didn’t have possibility of attorney's fees being paid
    - Losing side pays
    - Prevailing party
        - Have to get relief from the court
- Court's Catalyst theory: if you prodded gov into releasing the documents then you are the catalyst so get relief, so gov pays attorney's fees
    - Not good law
    - Buckhannon
        - Says no the catalyst theory is wrong
        - Worried that gov won't want to give out documents at all it will wait for court to
- Congress has made exceptions:
    - Open Govt Act: catalyst Okay for FOIA
- *Brayton v. USTR*

- Facts: Brayton filed FOIA for classified intl trade agmt: Denied, intl trade agmt Properly classified. During suit, resolved, disclosed. Waits on EC, Eventually Europe says okay fine We don't need it kept secret. US produces the documents.
  - Under this special exception that says catalyst theory is okay for FOIA, I want my money
  - USTR: it wasn't you it was Europe changing its mind
- Court:
  - If the government was correct as a matter of law than that is dispositive
    - Sure eventually USTR gave you all this stuff and you don't have to get relief from the court to get you money here
    - We are giving you an exception to that
  - But we don't give you money when you claim was no good to begin with. There was a proper order to keep it classified. USTR was on the law w/in its rights to wait for Europe. The fact that you got docs doesn't mean you have any good legal claim
  - Basic idea: only substantially prevail if you're not a loser on summary judgment
- Holding: No.

9. Post-Judgment Procedures

1. Appeals
    - SCOTUS
        - 28 USC 1254 Courts of appeals; certiorari, certified questions
        - 28 USC1257 state courts; certiorari
        - These statutes provide jurisdiction for SCOTUS appeals
    - Statutes:
        - 28 USC
            - 1291 Final decisions of district courts
                - Collateral order doctrines
            - 1292
                - (a) inj
                - (b) certify for discretionary appeal
                - (c) Interlocutory decisions
                - (e) new rules by SCOTUS
            - 2107 Time for appeal to court of appeals
                - 30 days normal
                - 60 days government
                - Can be extended
            - 2111 Harmless Error
                - Errors have to affect substantial rights of the parties to matter
    - Federal Rules:
        - FRAP 3: appeal as of right - how taken
        - FRAP 4(a), (d), Appeal as of right- how taken
        - FRCP 46 Objecting to a Ruling or Order
        - FRCP 51 Instructions to the Jury; Objections; Preserving a Claim of Error
        - FRCP 61 Harmless Error
        - FRCP 62 Stay of Proceedings to Enforce a Judgment
    - Process:
        - File notice of appeal with district court, they made copies and sent it up to court of appeals FRAP 3
            - In notice:
                - Who's appealing
                - What you're appealing
                - Where you're appealing to
            - Must file notice w/in 30 days FRAP 4
                - Timing is jurisdiction, if you file too late then you don’t get it on appeal
                - 4(a)(5): district court can grant limited extensions
                - Post-verdict motion restarts the clock when it's resolved
                    - Ex. Rule 59 new trial motion , whenever that process finishes then you get 30 days. If deny that motion you get 30 days from denial
    - Key: can you appeal from a jury trial because decision was against the weight of the evidence?
        - NO
    - 3 Ps of Appeals:
        - Prejudicial

    - Has to affect substantial rights Rule 61
    - If you complaining to district court they will only deal with if they substantial rights, so makes sense that appellate can only deal with things that can get fixed at trial court
- Preserved below
    - Didn't bring it up, don't want to sandbag the trial court, give them a chance to fix it
    - Rule 46: it's enough for you to ask for something and district court thinks about it and says no. that manes they could have said yes, so you could take it up on appeal because they had the chance to think about it and do the right thing
- Presented Above
    - At Court of Appeals
    - typically comes in the briefs
    - Also sometimes statement of the issues they will have you file this separate thing early on, not binding just summary of things you will be raising
        - Statement of the Issues
- Note, these three Ps all apply to the appellate: the person who wants to disturb the judgment below
    - Court of Appeals reviews JUDGMENTS not opinions
    - Court of appeals can affirm on any ground supported by the record
    - Can't reverse a district court decision on some ground that's supported by the recorded but isn't preserved and objected to
    - But you CAN scour record to affirm a judgment below
    - IF dist court does some things help, some things hurt, decides different issues:
        - Cross-appeal: when appellee also doesn't like stuff going on in the district court, both sides are appealing
            - Loser appeals
            - Winner appeals
            - 3 Ps apply to everyone appealing
            - Same 30 day clock
- Exceptions to the 3 Ps
    - Plain Error Doctrine
        - Three elements:
            - Was there error?
            - Was that error plain?
                - Clear or obvious
            - Does it affect substantial rights?
        - Is this the sort of thing the district court should have noticed sua sponte?
            - If it's not in that category can't win
    - Exceptions to Preservation requirement *Narey v. Dea*n:
        - An appellate court will consider an issue not raised in the district court if in involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice
        - The rule may be relaxed where the appellant raises an objection to an order which he had no opportunity to raise at the district court level
        - Plain Error Doctrine: The rule does not bar consideration by the appellate court in the first instance where the interest of substantial justice is at stake

- Plain error doctrine: codified for claims of error in jury instructions by FRCP 51(d)(2)
- A federal appellate court is justified in resolving an issue not passed on below..where the proper resolution is beyond any doubt
- May be appropriate to consider an issue first raised on appeal if that issue presents significant questions of general impact or of great public concern

- 1291 SMJ of Court of Appeals
  - Limited to final decisions of district courts
  - Final: resolve, leave nothing to be done
- *In Re Recticel Foam Corp.* 1988
  - Facts: Hotel Fire. Mass action: 2000 plaintiffs v. 200 defendants
    - Problem: Do-Def moved to compel production of video and photos. Holder of images wants half o 600K cost of gathering. Ct: D's split 300K. RTC didn't want to pay. Case management order, some order that is about how the case is going to run
    - Is that a final decision under 1291?
      - No lots of discovery, the whole case is yes
      - Can the court change its mind about production order? Yes, it can change its mind about ANYTHNG until Rule 54 final judgment or certifies for final judgment
      - Discovery is pre-liminary to trial
  - How would appellate court fix this problem at the end of the case?
    - Could still move the money around at the end
    - Appeal the judgment saying the allocation of costs was wrong and I want something else to pay money I had to shell out (but in the meantime RTC had to shell out)
    - No irreversible legal consequences here
  - What problems would there be if appellate court could review this kind of stuff?
    - Disrupting trial court
    - Piece-meal review
      - If you have review after every decision, app court will see case 18 times, better to have one set of briefs that figure out the problems at the end
    - Expense and delay
  - Do discovery orders qualify under collateral order doctrine
    - No
  - Here, doesn't apply could get relief after final
  - Peon to finality on 1156:
  - Case management!
- Collateral order doctrine: *Cohen v. Beneficial Industrial Loan Corp* 1949
  - Exception to finality principle
  - Must be:
    - Collateral to the merits
      - Issue unrelated to merits
      - Common law defense of qual. Immunity protects an official from personal liability for conduct that does not violate clearly established law or was objectively reasonable. If A sues B, a gov official, for official act, and trial court denies B's motion to dismiss because on A's well pleaded facts, B's act violated clearly established law, the ruling is separate from the merits

because the court need not consider the correctness of A's factual allegations in order to decide the legal question of whether B's act violated clearly established law
    - Completely resolved below
        - District court isn't about to change its mind on
        - Ex. Trail court refused to make plaintiffs post a security for the payment of def's litigation expenses should def prevail,
    - Effectively unreviewable on appeal
        - Whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders
        - Ex. Abney v. US, double jeopardy covers second prosecution not just second conviction
    - If it's important
        - Serious and unsettled
        - Ex. Whether a criminal pros exposes the def to double jeopardy
- Foreign sovereign immunity, I am foreign crown prince cannot be sued. If district court denies that motion, at that point the issue is totally unrelated to whatever else I am suing him about. His sovereign status is not relevant to car accident
    - Completely resolved below: no more fighting about this
    - Unreviewable on appeal: he has to go through indignity of the trial
        - Can't just solve it afterwards doing the damage right now
    - Important!
- Discovery orders? No
    - Lohawk industries
        - Facts: Atty client privilege. Dispute about whether privilege had been waived or not
        - Dist ct: you have to disclose
        - coll order doctrine should apply:
            - Cant undisclosed: unreviewable
            - Nothing app court can do to fix it at the end
            - If the problem is the DISCLOSURE nothing you can do to fix that problem
        - SCOTUS: doesn’t work
            - Discovery order:
                - Not important enough
                - Would create too many other problems to have atty client privilege problems bouncing up and down between district court and appl court
        - Why?
            - Made up in the 40s
            - Ran with for awhile
            - Congress told them to cut back on it for awhile
            - Now, collateral order doctrine is a closed set of cases
                - Can still use it
                - But can only use it if you can find Supreme Court or Circuit case where someone used it before
                - Stopped allowing new entrance

- Final by direction Rule 54(b)
  - Exception to finality principle,
  - To disposition of fewer than all the claims or parties as to which the trial court directs entry of final judgment
  - Rule 54(b) authorizes the trial court to direct entry of a final judgment as to one or more claims or parties, but not as to parts of claims (such as liability only on claim for damages)
-

	Final ?	Collateral?
12(b)(6) Pleading, Denied	No	No Why? Would be reviewable on appeal
12(b)(2) PJ denied	No	No Why? You can fix that when you appeal because they will just reverse the judgment against you

R 24 Intervention- Denies	No	Probably
		Why? Doesn't resolve everything in the case
		But for her she can say I want to intervene
		• Unrelated to merits
		• Resolved
		• Unreviewable on appeal
		  • Not a party! Cant appeal
		• Important
		  • If right to intervene then some important thing at stake

R 56 MSJ against me, Grants (raises everything)	Okay	n/a
Partial MSJ as to liability	No	No Why? Can be protected on appeal
P sues D1,2,3, D3 D3: no contacts in AK, moves to dismiss on PJ, granted	No	Probably not Why? Probably something you might be able to review on appeal

- Statutory exceptions to finality principle: interlocutory appeals:
  - 1292: two main categories of jurisdiction outside of the final judgment rue:
  - (a) injunctions, etc
    - Immediate harm

        - Court is reaching out and effecting the world before the case is over, if they are going to do that, we need to fix it
    - (b) discretionary review of certified questions
        - If district judge thinks:
            - A controlling question of law
                - Appellate courts don't deal with question of fact
            - Substantial ground for disagreement
                - Seems like a big issue
            - Immediate appeal would help the case
        - District court can certify a question for discretionary appeal
            - Appellate court doesn't have to take it
            - Counter part to 54(b)
                - 54(b) lets you certify whole claims
                - 1292(b): certify one question
                - If there's one question you really want help on, then it's in their discretion
        - Unless district court AND appellate court both agree, not going to happen
        - Have the ability to bring up individual questions like atty client, just have to do with permission
            - This is why the collateral order has fallen out of favor, if real big issue then dist court and appl court will agree, don't need collateral order doctrine
        - Dist court can do it on their own, but you can move for it as well
- FRCP 62
    - Automatic stay for 14 days
    - No matter what 14 days go by you don't have to pay
    - Then you can ask the district court for a stay pending appeal
        - Big factor: if you have a reason to think irreparable later
        - For ex. If you think Painter is going to blow it all in three months
        - If Painter multi-millionaire and is good for it, no pay it now
    - Can also ask appellate court if dist court says no
    - Can also ask SCOTUS, but chance they will say yes is very low
    - Can put up supersedeas bond: bond pending appeal
    - Ask for stay of injunctive order, so long as the opposing parties' rights are secured
    - Allowed to stay it but have to make sure it's going to be okay
    - Stay factors:
        - Similar to prelim injunction factors
        - Who will win on merits? Irreparable harm?
        - Ex. If class: pay $3 for 5 million ppl, no way you will get that money back likely to get a stay
- Standard of Review
    - Question of Law: de novo
        - Why? App judge just as good as figuring law a district court
    - Question of fact (bench trial): clear error
        - Why? Harder to review from afar, district judge has better opportunity deal with facts judge credibility
    - Discretion question: abuse of discretion
        - Bifurcation: rule 42: prejudice

Question of Law	De novo
Bench Trial, findings of fact	Clear error
Jury Verdict	CAN'T appeal directly
R 50 question of law, JMOL	De novo
R 59 new trial weight of evidence	Abuse of discretion
Case management: Discovery/Bifurcation	Abuse of discretion

- "an error of law is always an abuse of discretion" when you are in abuse of discretion land AND you find out that dist court was confused about the governing law when it made that order, then that auto establishes abuse of discretion
    - If the reason they abused discretion was misunderstanding of law: automatically an abuse
- An error of law is always an abuse of discretion: if judge confused about law, error of law we can review de novo, now that you understand law try again and next time abuse of discretion
    - If you got the law wrong you necessarily abused your discretion
    - Don't defer to what dist court thought the law as, app court will say what the law actually is
        - De novo that's wrong send it back down
    - If dist court findings of fact: app court will defer unless clearly erroneous
    - If jury verdict comes out wrong way: cant appeal, jury didn't do anything wrong
        - What you have to do is make rule 50 or 50 motion, get overturned in district court
        - Then app court will review what dist court did
        - Rule 50: question of law: de novo
        - New trial weight of the evidence; discretionary decision: abuse of discretion
    - Generally subject to discretion like bifurcate, discovery: discretionary matter, abuse of discretion
        - App court wont overturn unless they can say yes dist court was abusing its discretion

Mandamus

- Writ of mandamus used whenever commanding officer or court to do something
    - Modern: don't need officer part, have injunctions
    - All law courts have power to issue injunctions
    - Still have command court to do something
- The All Writs Act 28 USC 1651: authorizes a party to petition a Court of Appeals for writ of mandamus directed to the trial court to do its duty or abide by its jurisdiction. It is an extraordinary remedy requiring a showing both of a special risk of harm and a clear entitlement to relief, usually based on the trial court's usurpation or abdication of authority
    - All the old common law stuff courts can do you can do to ex. Writ of mandamus
    - What is the standard when issue writ of mandamus:
        - No other adequate means of relief
            - Why would that be necessary?

- If there was another way to get the relief on appeal it wouldn't be necessary for mandamus
- Mandamus: extraordinary!
  - Clear and indisputable right to relief
- Very very rarely are you going to have mandamus

○ *In re Recticel*
- Codef asked for writ of mandamus to get out of cost-sharing order
- App Ct: no
  - Why? Other means of relief, could wait for final judgment and appeal

○ Most of the time: wait for final judgment and appeal is an adequate means of relief

Claim Preclusion, *res judicata*

○ Affirmative defense FRCP 8(c)
- Most courts will refuse to apply doctrine if a party fails to raise the defense in the manner specific

○ About individual case, claim right

○ Applies to both the winner and the lower
- Same ticket problem? Is this the same ticket you cashed in last time
  - Idea; every time your rights are violated you get this ticket, you can cash it in but once you cash it in, it's no longer good. You are precluded even if you are right, from cashing it in again

○ Three main elements of claim preclusion:

Same claim
- Think of as same CASE

Valid, final judgment on the merits

Same parties

Same claim

Four standards: Same Transaction > (broader than) > Same evidence > (broader than) > same primary rights
- Same evidence test: same evidence needed to prove claim?
  - What evidence do you need to prove? If different let it end
  - Focuses on evidence need to prove liability, not damages
- Transactional test: same transaction as before?
  - Compulsory counter-claims, supplemental jurisdiction, joinder
- Same group of operative facts test
  - Not really obvious when something is two groups of operative facts and really just one
- Primary rights test:
  - if different rights? Let it in
  - a plaintiff has a separate claim for each right that the defendant violated (carter v. Hinckle
    - Narrower definition than transaction or same evidence

River Park v. City of Highland Park 1998, 703 NE.2d 883
- Facts: Parties: River Park and Spatz, City. River park has ownership interest in lot, Spatz is developer, want to build a country club. Spatz petitioned city to approve development. Got approval from commission. But City allegedly blocked development plans, then bank foreclosed. City bought land cheap. Basic: City delayed permit process until River and Spatz went bankrupt until City could buy at cheap price.

- Plaintiffs sued in Fed court in Ill: Statute 42 USC 1983: lets you sue for violation of const rights, this violated due process. Dist Ct: dismissed with prejudice
- Plaintiffs sue in state court: Breach of contract, abuse of governmental power, tortious interference with business expectancy. Def: move to dismiss claim preclusion. Dist Ct: grant motion

- Court:
  - Standards:
    - Same evidence test: same evidence needed to prove claim?
      - What evidence do you need to prove? If different let it end
    - Transactional test: same transaction as before?
      - Compulsory counter-claims, supplemental jurisdiction, joinder
      - Majority of states use this test
    - Same group of operative facts test
      - Not really obvious when something is two groups of operative facts and really just one
    - Primary rights test: if different rights? Let it in
      - One other test not mentioned in case but mentioned in book:
  - Which test is easiest to satisfy?
    - Transactional
    - Whenever you have different transactions, necessarily going to have different evidence
    - Can you have two claims that are part of some transaction but different evidence?
      - Yee, Garza, lots of claims. Same transaction but different evidence might be needed to prove that Garza started the fire, not enough training, someone got run over
  - Supervenience: no difference in one w/o a difference in the other
    - Ex. Color there can be no different in color between two marks in the board w/o a different chemicals in the color
    - Same way here, there can be no difference in operative facts than difference in evidence
  - Same argument between evidence and primary rights?
    - You can't have difference in evidence in liability without difference in primary rights
    - Could have primary rights involved that could have different evidence
  - Same Transaction > (broader than) > Same evidence > (broader than) > same primary rights
  - Here,
    - Primary rights test: all totally different,
    - Same evidence test: probably would have not counted for preclusion
    - Same Transaction: all same transaction
      - State court claims barred by claim preclusion
      - All under city delay stuff event, same transaction
      - This is what the court uses

Claim = same transaction test = same case

- Let you bring all your claims together

- If you have to put all your claims in the same case, if you don't do it you will be precluded next time

  Compulsory Counter-Claims FRCP 14
- How does claim preclusion relate? Same rule!
  - When it comes out of the same group of operative facts
- Basically, you can think of same transaction test as a version of the compulsory counter-claim rule, but now for plaintiffs
- Whenever if you were a defendant you would have to bring all of your claims, now if you are plaintiff you have to bring all of your claims arising out of same transaction or occurrence otherwise you are going to now bring them out later due to claim preclusion

  Evaluation of Transaction test:
- Advantages:
  - Efficiency
    - Fewer lawsuits have to bring everything at once
  - Promotes fairness, reduces amount of waste
  - Accuracy on the facts> generally if you throw all claims in all the facts you will make better decision than if you break it up in pieces
- Disadvantages:
  - Might be unfair to plaintiffs who don't realize all their claims
    - Might have even thought of crazy law
  - Kitchen sink problem:
    - Plaintiff brings EVERYTHING in fear of not able to bring claims later
    - Makes more work for courts to go through bad claims
  - Can be unclear
  - Vagueness!
  - 1189-1190:
    - Trying to implement standard is really tough
- poses greatest risk that claim preclusion will bar a later filed action, plaintiffs more likely to combine their causes of action in a single case
  - Supplemental jurisdiction and liberal joinder rules: make it easy for plaintiffs to join all related causes of actions, so no unreasonable burden
  - Reduces likelihood of conflicting results and protects public's image
  - Does best job of prompting interests of fairness to defendants because the test offers the broadest protection against serial lawsuit
  - Problems: so broad plaintiffs may not realize that claim preclusion will prevent subsequent litigation
  - Puts plaintiff at risk of inadvertently losing opportunity to pursue a legitimate cause of action

Valid, Final Judgments

- Valid:
  - For valid judgment court needs PJ and SMJ
    - Judgment w/o jurisdiction is VOID
      - Unless jurisdictional issue was fully and fairly litigated
        - When wont a jurisdictional issue be fully and fairly litigated? Default judgment. So still have a chance to challenge PJ later

- Exception to the exception: unless there's a manifest abuse of authority
- Judgment w/o jurisdiction is void!
  - Unless jurisdiction issue was fully and fairly litigated
    - Unless manifest abuse of authority
- Historically judgment invalid, not entitled to claim preclusive effect, if court issuing the judgment lack PJ or SMJ or def did not receive proper notice
  - Limited exceptions :
    - When def responded to lawsuit and both parties litigated the case w/o raising jurisdictional problem
      - Unless the district court's decision to hear the case was:
        - A manifest abuse of authority OR
        - Would substantially infringe the authority of another tribunal
      - Then claim preclusion would apply to this judgment

- Final
  - Final: in the sense of appeal
  - Note: can have on-going litigation in more than one court, even with very same claim
    - Often it will get stayed in one court
    - Diff rules for when fed court waits for state court
      - Ex. D wins in NY St. Court
      - What happens?
        - If you get final judgment in appeals sense, then D automatically wins in SDNY
      - What can happen after final judgment?
        - Could have state equi of Rule 60 Rule 60, could have appeal
      - What if you appeal and it gets reversed?
        - Trot back over to federal side
        - Rule 60 (b)
          - Specific exception for when judgment based on judgment that has been reversed
          - I want relief taken away against me
- Judgment On the merits:
  - Generally, not only jury verdicts but summary judgments, judgments as a matter of law and default judgments
    - Basically, the idea is that claimant has had an opportunity to litigate her claim and address the merits of the case, at least in some respects
  - Like Rule 41 dismissals on the merits
  - NOT on the merits:
    - Dismissal w/o prejudice
    - Jurisdiction, venue, necessary parties under Rule 19
      - All of these are about the court not about you
    - Generally, SoL
  - On the merits:
    - MSJ
      - Court looked at evidence, court said you lost,
      - Based on subst claim, with prejudice, on their merits under Rule 41

        - Dismissal on the merits under Rule 41
        - Dismissal with prejudice
        - Dismissal based on subst. claim
    - If you get on the merits dismissal can't go back to that same district court AND often, but not always, any other court
        - Often but not always: for things like pre-conditions to suit, if problem if reason why you lost was that time for other sides perf for contract had not arrived, when arrived you are allowed to bring claim again
        - Or if you were supposed to send letter to EEOC before you filed and dismissed, once you send letter you could bring a suit after precondition met
    - Unless safe rule: on the merits dismissal means you can't go back to any other court either
    - SoL: generally not on the merits
        - Contested question
        - Conflict of laws
        - Some states have different limitations periods
        - Some states treat differently
        - SoL: treat as expiration of claim
            - Other state: SoL is time limit on us, but you can shop around for someone else that it isn't past SoL
    - Often it will satisfy on the merits, and if everything else is satisfied: then
    - Can't go back to this court: rule
    - Can't go back to other court: because of claim preclusion
        - Because often on the merits

Same Parties

- Same claimants and same respondents
- Claimant: anybody asserting a claim against somebody else
- Ex. 3 car accident: A, B, C
    - A sues B and C
    - If B has claim against A arising out of car accident, does it have to bring it?
        - Yes
        - Compulsory counter-claim 13(a)
    - If B has a claim against C, does he have to bring it?
        - No, cross-claims are not mandatory
        - Cross-claim 13(g), may bring but don’t have to
    - In some subsequent suit, is B prohibited from bringing claim against C?
        - No
        - That's okay
        - Even though A, B, C all same parties here
        - B wasn't claimant last time because he's not covered
- Exceptions to named party rule:

    Consent

    Substantive legal relationship
        - Property

    Guaranteed adequate representation
        - Class action
        - Fiduciaries

        - Ex. Parent or guardian
        - Ex. Trustee

    New plaintiff had control all along
    - If Herrick is Taylor's sock pocket

    Old plaintiff is in control all along
    - If Taylor is Herrick's sock pocket

    Statutory Scheme
    - Ex. Bankruptcy trustee
    - Probate: executor of estate
        - Then beneficiaries are bound by executor's suit

- *Taylor v. Sturgel* 2008
    - Facts: First suit: Herrick sues FAA under FOIA to get docs, loses. Second suit: Taylor sues FAA under FOIA to get docs
        - Taylor and Herrick good friends
    - *SCOTUS:*
        - What is general rule about when people are precluded? Parties!
            - Pennoyer
            - In general, not bound if you are not a party
        - FAA: Wants another exception to name party rule: "close enough"
        - That's not going to work
        - Why won't that work?
            - Principle: named party rule
            - Need procedural protections
                - This would be rule that ate class actions
                - If you have close enough rule
                - Then anyone who might be in class action with you then that might be close enough
                - Class actions have procedures!
            - Headache! Don't know who's close enough vague balancing test
        - Why isn't there a problem with repetitive lawsuits?
            - Stare decisis will cut down on a lot of this, courts decide same cases same way
            - Ppl don’t like wasting money
        - How do 6 exceptions apply in this case?
            - Consent: Taylor never consented
            - 2: no
            - 3: no
            - 4, 5: control really requires agency relationship, just the fact that you agree isn't enough
                - Is the old plaintiff really in control?
                - What if old plaintiff paid for legal expenses? Wouldn’t matter, wouldn’t constitute control
        - Remanded to determine if Taylor is acting as Herrick's agent
- Typically, a judgment only has preclusive effect for the parties who litigated the case. A judgment, however, can preclude non-parties in certain narrowly defined circumstances, such as members of a class action and purchasers or property that was subject of prior litigation

- 6 exceptions to claim preclusion:
    - Consent to second suit
        - Claim preclusion is WAIVABLE
        - The parties have agd in terms or in effect that the plaintiff may split his claim, or the def has acquiesced therein
    - Expressly reserved by first court
        - The court in the first action has expressly reserved the plaintiff's right to maintain the second action
    - Joinder/jurisdiction/venue/etc bar
        - Something barred you before, it's okay wasn't your fault
        - The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the SMJ for the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief
    - Statute lets you
        - The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim
    - Continuing or recurring harm
        - Boiler explodes: bad burns, 50% chance of cancer
        - Can sue for burns now, can sue for cancer later
        - For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit and chooses the latter course
    - Extraordinary reason
        - Is clearly and convincingly showing that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition have a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy
- How do you raise claim or issue preclusion?
    - Evidence outside the pleadings
    - Rule 12(b)(6) motion: law plus
        - well pleaded facts in the complaint, take facts in the complaint as true
        - Judicial notice
            - Sometimes can take judicial notice of past court decisions. Take judicial notice of decision. Can't always take judicial notice of everything that happened within that court case
    - Rule 56 MSJ: law + evidence produced in discovery
        - 56(b): no beg time limit on when you can file MSJ
        - Can get rid of case really early doing that
    - What happens if you file for SJ too early before discovery over?
        - 56(d) gotta have enough opportunity to develop the record
        - Can go look for more evidence

- One side: we never heard about earlier case I want time to research this you can get it

  Usually if collateral estoppel:
- Answer will be provided by papers from earlier case

Issue Preclusion collateral estoppel

Exception: prior inconsistent judgments

Mutual vs. Non-mutual

- Mutual: same parties
- Non-mutual: party who lost and 3rd party
- Can't have preclusion asserted against you unless you've had your day in court

Defensive v. Offensive

- Defensive: Preclusion as a shield
  - To stop claim against me
- Offensive: Preclusion as a sword
  - To assert claim against you
  - Let's you win a claim, in earlier suit you lost on this issue now I'm going to assert claim against you and win because of that

About issues, arguments the parties make

Applies to loser only

Same reason problem: you lost before for this reason, so you should lose again for this reason too

Issue preclusion only fair if:

- Issue in the two lawsuits is the same
- That issue was actually litigated in lawsuit #1
- It was litigated with full and fair opportunity, so that we have substantial confidence in the outcome (or perhaps more accurately, in the opportunity for a reliable outcome)
- It was actually decided
- It was essential to the judgment in lawsuit #1, and not a gratuitous (and perhaps unappealable) finding

Red flag for issue preclusion: multiple lawsuits

Start by ID the first lawsuit that reaches final judgment

- Not always first lawsuit filed

Decide whether an issue decided in lawsuit #1 arises again in lawsuit #2

Consider the circumstances and quality of the litigation in lawsuit #1 in order to decide whether an issue decided in lawsuit #1 will have preclusive effect in lawsuit #2

Means that this doctrine applies even to lawsuits that are completely collateral, have nothing to do with, the transaction that gave rise to lawsuit #1

So common law added requirement: issue must actually have been litigated and decided

Does not apply to issues that could have been litigated but weren't UNLIKE claim preclusion

Felger v. Nichols 1977

Facts: Zane Nichols, Appellee, lawyer, Milton Felger, appellant, client.

- 1 Nichols sued Felger for unpaid legal fees, Felger defended on ground legal services were inadequate. Nichols won.
- 2 Felger sues Nichols for legal malpractice.

- Claim preclusion? Not same claimants and respondents, they switch sides, never asked court for money for malpractice before. Fed courts: 13(a), state court: don't have mandatory counter-claim rule
- Nichols MSJ: final judgment for him in fee sue precluded Felger from bringing suit Court granted motion

Court:

- Issue preclusion here
- even if you couldn't present claim, we care about the argument
  - If you were able to litigate issue before (which he did with first case, that legal services inadequate)
  - If malpractice was essential element of new claim, and you lost it before, automatically know done
- Felger presented evidence of attorney performance, had opportunity to litigate the issue

Holding: judgment affirmed. MSJ was good

Panniel v. Diaz 2004

Facts: Panniel had accident with Diaz

- Def: Diaz, drove ambulance for RW
- Def: Robert Wood Johnson University Hospital (RWJ)
- Def: New Jersey Manufacturers Insurance Company (NJM)
  - Panniel had personal injury protection insurance from this company
  - RWJ had auto liability insurance from this company
- Judgment #1: Arbitration: Panniel and NJM
  - Arbitrator: held that the accident did cause the foot injury and awarded medical expenses covered by the policy for that injury. Foot accident was "related" to accident
- #2: P sued Diaz and RWJ
  - P: invoked collateral estoppel on whether foot injury caused by the accident, arguing NJM had already litigated the issue in the arbitration
  - Moves for Partial SJ on causation
- Conflict: are the accident and foot injury related? Connected?

Test:

- Restatement (2d) Judgments (by ALI: compilation of lawyers, professors, judges)
  - Identical issues
  - Actually litigated and decided
    - Look at substantive law to figure this out
      - Jury verdicts: just give final answer, find for plaintiff for ____, have to figure out what is actually decided
  - (valid), final and on the merits
  - Essential to judgment
  - Same party or in privity
  - [unfairness?]
  - In general if you meet all 5 requirements you are good for issue preclusion

Court:

- Here,
  - Issue:
    - Issue in one: "related"

Issue in two: causation

No subst difference, basically close enough

This is a mixed question of fact and law, but mostly factual question, whether accident caused the injury is mostly a factual question. Can you have issue preclusion on fact question? Yes.

Factual stuff is where its more useful to preclude re-litigation.

Actually litigated and decided:

Went to arbitration, looked at evidence,

Had evidentiary hearing:

Basically a mini-trial

Witnesses, present evidence, don't have a jury sitting there but use evidentiary hearing to decide issues and find facts

Courts will do this as well as arbitrators

- For ex. Contested issue on motion, might have evidentiary hearing

V, F, OtM

Claim preclusion

Same thing? Yes pretty much

Same standard carry over

Suppose in case #1, judge grants a partial SJ on a particular issue

That will serve to resolve the issue for purposes of the issue

Does that resolve the claim? No

Another suit is pending on the same issue? Do you get issue preclusion?

- Not necessarily
- Not final until it's a final judgment
- Either you resolve all the claims of all the parties in the case OR district court certifies the judgment 54(b)

Why is this important that this issue not preclude you on this other case?

- District court could change its mind
- Don't want to say hey I have partial SJ from this case over here and go to other case and get issue preclusion because you don't know if they will change their mind

Until final judgment can always change their mind, so won't get issue preclusion on the basis of interlocutory ruling

Essential

Related: she couldn't have won w/o getting that issue in the first case

See Cambria v. Jeffery Mass

Here, claim was essential

Same party/privity

Insurance company there, subst legal relationship? Re-litigation by proxy

Subst legal relationship: succeeding somebody else's rights, is that what Diaz and Hospital's situation? No they aren't succeeding to insurer's rights, if anything insurer is succeeding to their rights

Re-litigation by proxy?

If P sues for 1 million, and insurer only cover 500K, who covers the rest? Hosp and Diaz?

So it doesn't make sense to bind Diaz and hospital by what happened to insurer, Diaz and Hospital will still care!

Premiums might go way up, be in the newspaper

Insurer's interests don't line up with Diaz and Hospital

Court: they were bound by what happened in insurer's litigation

Sachs: court gets it wrong!

- BUT even though kinda close, build in exception for parties

Real thing: they mess up at privity have to through stuff into unfairness category when really they ought to be more narrow about privity

Unfairness!

Exceptions to issue preclusion:

No appeal in #1

- No OPPORTUNITY for appeal

Question of law and

- unrelated facts
  - Imagine first case court had first amendment ruling, don't want this party subject to different first amendment for the rest of your lives. If it's on a question of law and different facts might not want to bind you
- Change in law
  - Not going to say you have to go around with old statute

- Different procedures (small claims court)
- Different burden of proof
  - OJ trial: gov go after you for criminal pros have to show beyond a reasonable doubt, then they sue you in civil trial only need preponderance of evidence. Let them try again.

Hurts third parties, couldn't foresee new action, For some reason you didn't have full opportunity in #1

- Binding these parties would hurt third parties that would be problematic, wont bind

Ex. Gov not subject to issue preclusion

Cambria v. Jeffrey Mass

Facts:

- First lawsuit: Jeffrey v. Cambria

J collided with car driven by C's employee.

Court finds for Cambria:

J sued C for negligence

C pleaded contributory negligence

Court: collision caused by negligence of both parties

Judge finds both parties are negligent

So Cambria wins

In old days C would win even if pl a little bit negligent (still rule in NC)

- Second Lawsuit: Cambria v. Jeffrey

Claim preclusion? No
Suing about same accident?
No compulsory counter-claim rule
Same parties have to be same claimants same respondents
Switch sides, gotta let it go
Jeffrey: issue preclusion
First suit found you negligent
I should have to litigate again

- Court:

What was necessary to judgment in the first case?
Negligence of Jeffrey
Once we know J negligent, that tells us if C wins
Doesn't matter if C negligent or non-negligent
So this issue COULDN'T have been necessary to the judgment because if you flip it around it's the same result
C's negligence doesn't matter for the judgment
Why does it matter if it is essential to the prior judgment?
Court won't be as careful for non-essential issues
It knows that whatever finding for C doesn't really matter
On the other hand, courts try to be careful about everything they do, BUT
If C: don't like employee found negligent, what can you do about it?
C won the first case
Not going to appeal finding where you win
Either have system where ppl appeal judgments they won to clear their name from bad things about district court
OR have system where you can go back and re-litigate issues
Have to say no bound anymore by non-essential element of final judgment
Appellate courts review judgments not opinions

- Note: What if trial court had multiple independent rounds?

Say J was negligent and C not negligent
Each of findings independently sufficient so NEITHER of them are essential according to issue preclusion
Courts split on about this

Non-mutual issue preclusion:

Same claimant and same respondent for claim preclusion, why does that matter?

- Don't want to bind ppl who didn't have opportunity the first time

Issue preclusion: requirement has been relaxed
Non-mutual issue preclusion:

- Defensive : shield of issue preclusion
- Offensive: sword

Defensive

- *Blonder-Tongue Laboratories v. University of Il Foundation* 1971

Facts: University of Il Foundation sued Blondger Tonge for Patent infringement. Previous suit UofIF and another laboratory: patent invalid. Blonder: patent already found invalid, issue preclusion

Standard issue preclusion? No longer between same parties

Key of non-mutual: same party who LOST

Don't need the same party who won to be there the same time around

Defensive: Defending against claim by UIF

SCOTUS: approved this use of issue preclusion by someone who was not a party to lawsuit #1 against someone who was

Why is it fair for win worse off and lose they don't get anything?

Old days: had to be same parties on both sides

New RULE: only party that lost has to be same party here

Why does it make sense to bind UIF in this case? If the jury says its invalid and lost

Already litigated that issue, inefficient to do this again

Time and money! You had full and fair opportunity

"Aura of the gaming table": shouldn't be gambling with the court system, if you lost you should feel like that meant something not like to try again next year

Why did we used to do it differently?

Fundamentally about adversarial process

Judge is umpire

Lawyers fight

Don't really care about the truth, except to help one party win and other party lose. If one party wants to concede on issue we don't care whether it's true or not

A sues B on issue

A sues C on same issue

- This is a NEW issue, new case
- New fight
- All we care about is this new fight and who actually ought to win

Approach in Blonder Tongue: more toward inquisitorial system: court is looking for truth, judge as magnifying glass Sherlock Holmes what really happened. In that situation it makes tons of sense because court has already found the truth. If court got the right answer

- Makes sense to have non-mutual issue preclusion
- Therefore, parties have to fight tooth and nail because if you lose the first time you lose forever

Offensive non-mutual collateral estoppel

- Typically involves a defendant fending off liability by asserting issue preclusion based on a finding from a prior action OR plaintiffs have sought to invoke issue preclusion to establish facts to prove its claim
- *Parklane v. Shore*

Facts: First suit: stockholders v. Parklane. Second suit: SEC v. Parklane, SEC wins, proxy was false, gets injunction No jury trial. Shore says I just saw this great doc, court: the other court just said SEC wins proxy statement false. Give me money damages because they've proven that proxy statement was false. Damages: common law: jury. They file motion for partial summary judgment (Damages unresolved) All we know is that proxy was false

Shore use issue preclusion: claimant

Claimant seeking to win, then that's offensive

If resp trying to block: then that's defensive

SCOTUS:

No jury in SEC, now getting bound by no jury even though no jury right?

Offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does.

Defensive use: precludes plaintiff from re-litigating identical issues by merely switching adversaries, gives plaintiff strong incentive to join all potential defendants in the first action

Offense: creates opposite incentive for wait and see attitude, in hopes that first action by another plaintiff will get favorable judgment. Increase total amt of litigation, since potential plaintiffs have everything to gain and nothing to lose

May be unfair to a defendant

Fist case: small damages maybe choose not to fight, future suits not foreseeable

If second case provides more procedural opportunities

If judgment in first case is inconstant with one or more previous judgments in favor of the defendant

Solution? Grant trial courts broad discretion to determine when it should be applied

General rule: in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel

Here, none of the above discussed reasons is present. No unfairness, does not reward plaintiff who could have joined earlier action

Def had incentive to litigate SEC vigorously

Judgment with SEC was not inconsistent with any other decision

No procedural opportunities available now that weren't available before

Def had full and fair opportunity to litigate claim with SEC, precluded from re-litigating question of whether the proxy statement was materially false and misleading

Court notes problems in parklane that might be relevant to non-mutual offensive issue preclusion:

"wait and see" problem

- Plaintiff just waits until another plaintiff will win and then sue D because they know that other plaintiff already won
- Why wouldn't this happen with defensive preclusion?
  - Defendants don't get to choose if they hang back or not
  - Plaintiff's incentive to have one big lawsuit against everyone, sue everyone at once
- Incentive for non-mut offensive preclusion: join 'em all!

Foreseeability problem

- Have to foresee other people's suits
- If I lose on issue X, have to worry about who will sue me on issue X
- Why is this less of a problem for defensive?
  - If you lose, everyone else gets a shield, who will file suit in which other ppl get shields? What will they be shields against? You! If you are worried about giving up something,
  - Only issue: foresee your own suits
  - When am I going to want to bring more lawsuits
  - A lot easier to figure out what suits I might want to sue on

Inconsistent judgments

- Train accident, whole bunch of ppl on the train, 50 ppl on the train. Claim: RR fault. P1 sues, loses. P2 sues, loses. …. P26 wins. Was P26 estopped by other suits? What happens for suit 27 under offensive issue preclusion? P27 wins! RR bound by loss, P27 wasn't bound by P1-P25, not there for those lawsuits. Same thing for the rest of the lawsuits
- How does SCOTUS deal with this problem?
  - Put in exception: in addition to issue preclusion exceptions, another exception:
    - FOR PRIOR INCONSISTENT JUDGMENTS
    - Not going to bind RR in P27
    - Is there any different between jury and P26 or jury in P1? No totally random.
      - What if by chance its P1 that wins
      - P2 will win
      - Will that be solved by inconsistent judgment exception? No
      - Why is this more of a problem for offensive than defensive?
        - Plaintiff has huge incentive to bring best plaintiff first

- Defendant: plaintiff chose field of battle and lost, it's a little more fair that everyone else has a shield against you
- Offensive: if you were taken to court kicking and screaming and lost, its more unfair that next plaintiff has shields they can use against you

Was there jury in first case? No, SEC, injunction

Would there have been a jury in the second case? Yes, damages,

What does the court say about this?

not a big problem

Footnote 1250

Basically neutral

This is much of a problem is offensive rather than defensive

- When you start off being sued rather than suing, why?
- Problem: first case start off being sued, defensive: first case start off suing
- If you want a jury, when you start of suing you can ask for one, ask for damages
- If you don't want a jury, ask only for injunctive or equitable relief
- If you are suing: you get to pick!
- More fair that you suffer from your choice of whether or not to have a jury when you start of suing as opposed to when you start off being sued and other people get to pick when you get a jury

Person who starts off suing has a lot of technical advantages, so lots of reasons why it's more unfair under offensive preclusion to make them suffer

Most states DON'T have offensive non-mutual preclusion

In Parklane: fed courts do have non-mutual offensive issue preclusion

Stacks deck against the def based on choices other ppl made,

Note: Const and statute full faith and credit principles generally require that the enforcing court the court in which issue preclusion is invoked, give the same preclusive effect to a judgment that the rendering court would. However, if the rendering court is a fed court sitting in diversity, then the enforcing court applies the preclusion law of the state in which the rendering court sits

- Take away:
  - Old: Mutual
  - Blonder-Tongue: okay to have non-mutual, but only if it's defensive
  - Parklane: Okay it can be non-mutual AND offensive

- Summary:
  - Preclusion:
    - Claim Preclusion: res judicata
    - Issue Preclusion: collateral estoppel
      - Exception: prior inconsistent judgments
      - Mutual vs. Non-mutual
        - Mutual: same parties
        - Non-mutual: party who lost and 3rd party
        - Can't have preclusion asserted against you unless you've had your day in court
      - Defensive v. Offensive
        - Defensive: Preclusion as a shield
          To stop claim against me
        - Offensive: Preclusion as a sword
          To assert claim against you
          Let's you win a claim, in earlier suit you lost on this issue now I'm going to assert claim against you and win because of that
  - Old: Mutual
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        - If I lose on issue X, have to worry about who will sue me on issue X
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          If you lose, everyone else gets a shield, who will file suit in which other ppl get shields? What will they be shields against? You! If you are worried about giving up something,
          Only issue: foresee your own suits
          When am I going to want to bring more lawsuits
          A lot easier to figure out what suits I might want to sue on
      - Inconsistent judgments
        - Train accident, whole bunch of ppl on the train, 50 ppl on the train. Claim: RR fault. P1 sues, loses. P2 sues, loses. …. P26 wins. Was P26 estopped by other suits? What happens for suit 27 under offensive issue preclusion? P27 wins! RR bound by loss, P27 wasn't bound by

P1-P25, not there for those lawsuits. Same thing for the rest of the lawsuits

- How does SCOTUS deal with this problem?

  Put in exception: in addition to issue preclusion exceptions, another exception:

  FOR PRIOR INCONSISTENT JUDGMENTS

10. State Law in Federal Court

1. *Erie* Doctrine
    a. See Flow Chart
2. Rules Decisions Act > codified into 28 USC 1652
    - "the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."
    - Which states' law do you apply?
        - Klaxon: apply CoL rules where the court sits
        - AKA What Would the State Supreme Court Do

Congressional Laws

a. 1789 Judiciary Act
    - Set up courts
b. 1789 Process Act of 1789
    - Procedures, modes of process for fed courts to follow
    - Common law actions: use the ones that are now used in state courts
        - Static Conformity
        - What state courts NOW do
        - What happens if state court totally revises procedure? Keep procedure from 1789
    - Equity and Admiralty courts: follow the civil law
        - Do equity and admiralty courts do
        - Follow traditional chancery practice
    - Act time limited
c. 1792 Process Act of 1792
    - Section 2:
    - Common law courts: same static conformity
    - Equity and admiralty: same civil law BUT you can also make Rules!
d. 1872 Conformity Act
    - Common law: Dynamic conformity!
        - Update the way state courts are updating
    - Equity and admiralty: doesn't say anything, get to make your own rules
e. 1934 Rules Enabling Act > codified in 28 USC 2072
    - (a) Procedure
        - Rules authorized by 2072(a) are those for practice and procedure
    - (b) can't abridge, enlarge or modify a substantive right
        - Limitation, BUT the rule cant A/E/M substantive right
    - Enables SCOTUS to promulgate rules for fed courts for common law actions
        - Equity court had already been doing their own rules
        - This added in law side
        - Noted: you can fuse law and equity if you want
        - Rules actually written by Committee of the Judicial Conference, then SCOTUS approves
        - Process covered by 28 USC 2073

1938 Federal Rules of Civil Procedure

- Big change: one system for law and equity

OLD VIEW

Ex. NY Constitution Reception Statute, types of law in NY:

- US Const
- US law and treaties
- State constitution
- State legislation
- State customs and usages
- Colonial Acts (up until 4/19/1795) unless repugnant to US Const
- Eng/GB Statutes (up until 4/19/1795) unless repugnant to US Const
- Eng. Common Law (up until 4/19/1795) unless repugnant to US Const
  - Same TOPICS but common law changes over time

Generally:

- US Const
- US statute/treaties
- State const
- State Statutes
- State local usages
- General common law that state might have adopted

View of Law:

- Legis. Makes law
- Judges interpret/apply law
- Law = custom and usages (common law) and written law (legislative law)

Swift v. Tyson 1842

- Facts: Norton and Keith sell land to Tyson in Maine, they don't actually own the land. Tyson gives them bill of exchange which they endorse to Swift because they owe him money. Swift goes to Tyson to pay check, Tyson says there's no land. Swift sues Tyson in fed court (diversity jurisdiction). Swift says he was acting in good faith, holder in due course rule, person how held the check in due course ought to be able to recover. Tyson: NY courts would say Swift loses.
- Court: Justice Story
  - NY State courts won't control here. All of that stuff is just evidence of the law it is not the law itself. Court decisions aren't the law, courts are just applying it. Courts applying local customs and usages. But the issue here is not local custom or usage but commercial law which is thought of as a problem of general common law. NY adopted this general common law when it adopted English Common Law, unless they have a local usage or custom barring it, then it's going to be okay. You should look at what state court says as evidence but it's not binding. Under RDA, Local statutes, custom, local interpretation of legislation that would be okay too. General rule is holder in due course, so Swift should win the case.
- Post-Swift: forum shopping different results in state and fed courts in NY

*Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*1928

- Facts: BY moved to Tenn. to get diversity (most of operations are KY, but Tenn. gets access to fed courts). RR gives BY exclusive contract to provide tax service from their RR station. BW uses area around RR. BY sues BW and RR in fed court in KY. KY state court: contract is monopolistic so void for public policy, statute or special custom for contact.
- Court: Laissez faire. Contract is valid. RR property can do with it whatever they want.

- Dissent: SEE BELOW

NEW VIEW

Types of Laws

- US Const
- US statutes/treaties
- Erie: there is no federal general common law
  - BUT federal common law on specific categories
- State Const
- State Statutes
- State common law (common law of NY, of Penn)

New view of law:

- Courts make law too
  - Fed courts make fed law
  - State courts make state law
  - If fed statute says apply law of the state > look to state courts for state common law

Dissent *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*1928

- Holmes
- It is a fallacy that there is federal common law. Law has to have authority to make it law. Has to be the command of sovereign, has to have single authoritative source. Highest court promulgates common law rules. State Supreme Court says what the law is. Mere existence of the state supreme court shows get to say what the law is and apply law but also make the law. Courts are delegated power to make law on any sort of common law topic. There is no general common law. Constitution means federal government is a government of limited powers, so federal government can only make rules about certain topics, this includes judges since judges make law. If judges are making state common law that is a violation of federalism.
  - Conflict:
    - View of law:
      - Story: incorporation of English common law into our system
      - Holmes: courts are delegated power to make law on any sort of common law
    - RDA:
      - Story: RDA means you look to State courts for Local statutes, custom, local interpretation of legislation
      - Holmes: RDA means you have to apply state common law.

Erie v. Tompkins

- Facts: Tompkins, Penn citizen, sued Erie RR for injury sustained walking on path alongside RR. Sues in NY fed court. Legal issue: whether or not Tompkins was trespassing which changes the duty of the RR. Fed Courts: not a tresp, had a duty not to harm him. State court: is a trespasser, no duty. NY CoL rule: apply Penn law because event happened there. RR has HQ in NY.
- Court: Brandeis
  - Get rid of Swift Rule. Swift was wrong about RDA, law of the states means state statutes AND common law. Swift leads to uncertainty and forum shopping. Swift is unconstitutional, no federal general common law. Fed Gov can't just make up fed laws. US Const, fed statutes and treaties, anything else has to be state law. It

can be written or unwritten state law, but there's no federal general common law. There is some illegitimate federal common law trying to sneak in here through Swift rule.

- If opinion not clear for state law: Erie Guess: What Would State Supreme Court Do: guessing what the highest court would do. Want to have same law applied in state and fed courts. Can look to analogous cases, appellate and trial courts in the state, commentary, trends in other lines of cases/states, Restatement. If there is decision but it is outdates, fed court not bound by it, fed court can get what the state highest supreme court would do. State trial judge bound by that old decision.
    - Fed courts making Erie guess: only conditionally binding until State Supreme Court makes a decisions. NOT making state common law. It's not based on their discretion it's a guess of what someone else would do. Might have divergence between state courts and fed courts for a long time until State Supreme Court finally settles the issue.
    - Fed courts also have the option to certify a question to State Supreme Court, discretionary with the state whether or not to accept.
    - Why Penn law: CoL rules of NY. But problem! RDA just says apply states laws in cases where they apply, where do these state laws apply?

Klaxon v. Stentor

- Facts: Stentor (NY) sells Klaxon (Del) their business, Klaxon promises best efforts and to share some profit. Stentor sues in 1929 in Del. 1939 Stentor gets jury verdict for 100K. NY Statute that gives you 6% interest for pre-judgment. District court: NY statute applies, contract made in NY performance in NY. App Ct: affirms, NY place of Performance
- SCOTUS: don't look to restatement of conflict laws. Look at what Del. Conflict of laws rules are, they will tell you what states' laws apply. Del State court: follow Delaware CoL rules. Discourage forum shopping.
- Take away: in diversity use CoL rules of the state in which you sit
- Post-Klaxon: Nelson article criticism:
    - Under Klaxon have vertical uniformity but horizontal disuniformity
    - If most cases involve diversity, then a single federal rule would get you the most uniformity
    - If most cases involve non diverse parties, who cant to federal court
        - Then the rule for forum shopping is Klaxon rule, because only a few ppl could get into fed court
    - If non diverse do you have to sue in the state where you're from
        - No
        - You can still have forum shopping
    - Defense of old rule: better to have one rule that everyone can run to if you can might reduce forum shopping
    - No one can agree on what rule to put in: Congress can't decide
    - There's always going to be forum shopping for non-diverse parties
        - Always going to have choice of states, if you can get jurisdiction, can be different courts you can do to
    - Point of uniform fed rule: at least for diverse ppl we can force them all into the same box

Federal common law

Hinderlider v. La Plata & Cherry Creek Still topics of federal law on specific statutes

- Background: Example of fed common law. River between two states. One state says you are taking too much water out of the river. Other sate: we just passed a statute we get all the water. Suit between state and another state, no way state common law would apply. There is a giant whole in the law that we have to fill somehow, have to fill it with federal common law.
- SCOTUS: you don't get all the water. Put in position of deciding these case and will decide federal common law to do it.

US v. Standard Oil Co.

- Facts: Etzel, soldier, hit by truck by Standard Oil in Los Angeles CA. Government paid medical bills and disability.. Gov sues standard oil, want indemnification, reimburse for medical bills and services as a soldier and expenses of your tort. If hadn't been a soldier, California CoL rules would apply.
- Court: Court does not apply state tort law because military is special, worry about uniformity. Don't want states to be able to order fed government around (McCulloch v. Maryland, power to tax is the power to destroy). Need federal common law rule,, not federal statute. Can't use state law, have to use federal common law. Court: we get to decide how much standard oil should have to pay, law capacity for work and the creative work of judges. Congress can revise if they want to. In the end, however, court decides to defer to congress on the matter and not create a federal common law rule.
- Post-Standard Oil: court does end up passing a statute
    - Three options for fed court trying to decide whether or not to apply liability:
        - Uniform judge made rule
        - Non-uniform rule adopting state law
        - Wait for congress

Post-Klaxon Cases

Guaranty Trust Co of New York v. York 1945

- Facts: Conflict of interest when you transferred some notes and loans that you held in trust. State law issue. Suing in Fed court in NY. GT defense: NY SoL, state court applied SoL. York: This is an equitable action, doctrine of laches which is more flexible, so that's what should apply.
- SCOTUS: Cite any rule of civ pro about laches? No FRCP, laches came from traditional equity practice. Forms and mode v. substantive right to recover. Either you win or lose tied up to SoL. SoL: thought of as procedural about remedy not sust. Right. Deals with means of recovery. Question to ask: is this outcome determinative?. Why? Vertical uniformity, forum shopping is BAD.
    - Test: Outcome determinative, back-ward looking

Byrd v. Blue Ridge

- Facts: Byrd injured while installing power lines. Sues in fed courts. Byrd working for construction contractor who was contracted by Blue Ridge. If employee of Blue Right: limited to worker's comp. If not, then can sue later.
    - State rule: SC Rule: whether or not employee decided by judge
    - Fed rule: decide by jury
- Court: Judge or jury would have an impact on outcome if outcome only consideration. BUT really worried about jury right guaranteed by 7th A. Federal system is an independent system. Have to look at form and mode, issue is whether it is bound up with rights and obligations.

Hanna v. Plumer 1965 GOVERNING TEST

- Facts: Hanna (OH) and Osgood (Mass) in car crash in SC. Hanna sues Plumer (Osgood's executor) in Fed Dist. Mass. Conflict between state, Mass. Law: if sue executor you have to do it by hand w/in 1 year. Fed Law: FRCP: service okay at their home with a person of suitable age. Hanna did FRCP way, year has lapsed, no way to go back and perfect service.
- Court: Outcome determination analysis was never intended to serve as a talisman. Instead: outcome determination test therefore cannot be read w/o reference to the twin aims of the Erie rule: (1) Discouragement of forum shopping (2) Avoidance of inequitable administration of laws. If no federal rules look to policies: twin aims of Erie (1) avoid forum shopping (2) avoid inequitable admn. Of laws. (1) not the kind of thing ppl switch forums over (2) would not change ability to recover by diff. citizens not inequitable adm of laws. In general, relatively unguided Erie choice was bout if no fed rule on point, then look to these policies and say what would be best.
    - Here, there is a federal rule. Congress has the power to set federal rules because necessary and proper clause goes really far, if rationally capable of classification as procedure, then it counts as procedure. Under the constitution, if "rationally capable of classification" as procedure, Congress can regulate it: AKA arguably procedural test
    - Under REA: has to be rule of and procedure, can't abridge, enlarge or modify a right.
        - One of practice and procedure: Test: does this rule really regulate procedure?
            - Know it when you see it
        - Cant A/E/M subst. right?
            - Does it really abridge, enlarge or modify?
- Harlan: arguably procedural is dumb. Rule should be: Does the choice of rule substantially affect rules of conduct. If the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.

Walker v. Armco Steel 1980

- Facts: Walker, carpenter, injured while pounding nail into wall. Armco: Manufacturer of nail. Walker sues Amco sayin nail had defect which was caused by negligence of manufacturer and design, state law issue. Walker sues in West Dist of OK. OK SoL: you must commence your suit w/in two years, commence means serve process (exception, if file w/in two years gives you extra 60 days to serve process). Walker files on last day in two year period in fed court, under FRCP get 120 days to serve process. Fed court case commences upon case filing, FRCP 3. Walker: I'm in fed court where commence means file. Armco: nope, commence means serves process.
- Court: federal rule is not on point. FRCP 3 and OK statute are not in conflict. When Rule 3 uses commences it really means commence for fed rule clock purposes. FRCP is internal to fed rules. FRCP doesn't mean anything for OK SoL. OK clocks get to run on their own and run out at certain time, don't deal with Hanna II.
    - Hanna I:
        - There IS inequitable distribution of laws
            - You would get different results
        - Sachs: nobody knows what this really means
            - Inequitable: anything that will sound good as inequitable admn of laws

- Only some kinds of parties can get into fed court > would get more time to sue
    - Inequitable to give some ppl more time to sue and some ppl not more time to sue
        - Sounds like Guaranty Trust: what GT was trying to combat
- Fails Hanna I test

- Court: use state practice
- IF went through tests:
    - Guaranty Trust: Outcome Determinative Test:
        - Go with state law, because it is outcome determinative
        - Not good law anymore
    - Does Ragan survive? Old case
    - Hanna I/Byrd Test:
        - Fail twin aims of Erie:
            - Forum shopping
                - When the injury happens, not going to care about where forum
            - Inequitable administration of the laws
                - ?
        - Essential characteristic: Byrd: okay
    - Hanna II Test:
        - If there were FR that specifically addressed this situation:
            - Would it pass Hanna II?
            - Not sure
            - Is this really about procedure? Sounds like it
            - Does it A/E/M? maybe not, but talks about
        - Court doesn't have to deal with that question in this case, because they say the federal rule is not on point

Shady Grove Orthopedic Associates P.S. v. Allstate Insurance Co. 2010

- Facts: Galvez is in car accident, her insurer is Allstate. Gives Allstate benefits to Shady Grove Ortho, doctors who treated her. Allstate makes payments but payments are late and they refuse to pay 2% interest rate (NY statutory penalty for late insurance payments of 2%). Shady Grove sues Allstate on behalf of the class for all those not paid 2% penalty. (Note: need 5 million, under Class Action Fairness Act it's okay to aggregate small claims by class members if the total exceeds $5 million). Sue in NY Fed Court .
    - FRCP 23: class action rule. Probs 23(b)(3) class
    - NY Statute: CPLR 901: (b) may NOT be maintained to recover a statutory penalty.
        - Why? Class actions are made as an incentive to sue. Penalty is already an incentive to sue, by making it high enough for ppl to bring action. Don't necessarily need both.
    - Allstate: no conflict, fed rule on point. Rule 23 is about class actions, certifiability. State law is about whether class eligibility. Ask, is this the sort of cause of action that can be maintained as a class: is it eligible for class treatment? Then look at 23(b) for certification
- Plurality: Scalia: Rules are in conflict, class action may be maintained class action may not be maintained. Hanna II. Note section 2(b) and 2(d) about Hanna II are just the plurality not the majority.

        - (1) does it really regulate procedure? Yes, this is like joinder, everyone walks away with $500, subst everybody is the same, everyone who has claims can bring them in a single proceeding this is just like joinder.
        - (2) A/E/M? plurality really ties this and procedure together. You aren't getting more money, just like joinder. Doesn't matter that Allstate says it has subst right not to be sued in class action, now subst if you just label it substantive.
        - Scalia doesn't care about NY's purpose for enacting law, just look at rule. Don't care if NY had subst purpose, all we care about Is if Fed Rule is procedural
        - Don't care if it influences forum shopping, only care about forum shopping under Hanna I. Don't care about forum shopping under Hanna II. Problem in Erie is forum shopping subst law that is outside court's purview. BUT procedural aspect of fed system, that's okay forum shopping.
- Concurrence: JPS
    - There is a conflict, joins Scalia part 2(a)
    - Votes to allow class action
    - Agrees fed rule on point so we are in Hanna II land:
        - Majority: procedure: A/E/M these questions are answered by saying is fed rule procedural
        - Stevens: have to ask: is STATE rule substantive OR intertwined with substance
            - Not substance but so closely bound up might as well be
    - Examples of things intertwined with substance: SoL, burden of proof, state damages cap, so they are not procedural
    - Intertwine test: could you imagine re-writing subst. law to include this requirement?
        - SoL: 2 years to sue, could imagine this is just like a ticket
        - Burden of Proof:
        - Could imagine: if other side bears the burden of proof you could imagine writing that in to subst law by saying: negl is a tort but only if the other party did not have contributory negli
            - But contr neg is a def
            - Structuring subst law to include burden of proof
            - Hard to imagine: negl is a tort except if a class action
                - Doesnt sound like subst law anymore
    - State rule here: not substantive
        - Just about class action, just procedure
        - Not intertwined with substance, because it can't be bound up with substance of NY law, applies to other states' law too. All claims regardless of where law comes from.
    - A/E/M: only way to know that is to ask, is state rule substantive
- Dissent: Ginsburg: Rules are not in conflict. State statute not about class actions, it is about remedy. Don't read the statute as if its saying no class actions to recover statutory penalty, yes you can bring class action but if you do you can't ask for statutory penalty. No fed rule on point. Hanna I land > ask about forum shopping and inequitable administration of laws.
    - Twin aims of Erie:
        - Forum shopping? Yes, diff rule in fed and state court,
        - Fails so use state practice

- If analyze under Hanna II: look to see were state legislature's purposes substantive, then say yes they are A/E/M subs right

Tests for 2072

- (a) Is this procedure
- (b) does this A/E/M substantive right?
  - JPS: is State rule substantive OR intertwined with substance?
- Ely Test: was it done for procedural reasons?
  - Hard to apply
- Eve-of-suit test would you know on the eve of suit
  - Doesn't generate rules that attract judges intuitions
- Congressional note: are these policies extrinsic to the business of the courts?
  - Over-inclusive
- Primary decisions respecting human conduct
  - Test is under-inclusive
- Sachs best test: is it procedural
  - Best test: is this the kind of thing I would be taught in procedure class?
  - Have to argue by analogy
    - SoL: substantive
    - Damage cap: not procedural
    - Burden of Proof: Grey area

Putting it all together:

Oloff and the Hanna Rule

- What is the line between substance and procedure?
- One way to think about it: Oloff, huge and omniscient
- You decide to give Oloff instructions about what you wanted him to do, he would always know who's guilty who was lying who ran red light
- You would have to give him instructions
- Only rules you would give Olaf are substantive rules
  - I want you to give this person money
  - What is going to happen on the ground
- Anything that's about proving what happens or dealing with the court process, ancillary disputes: would sound like procedure
- This gets a lot of the questions right
  - What kind of instructions would you need to give omniscient entity that would give you anything you want
- On this model are burdens of proof substance or procedure?
  - Olaf doesn't need burdens of proof
  - Real ppl do need burdens of proof
- We need to figure out what's substances, what's about procedure
  - Burdens of proof: sound like court procedure but really imp for who wins and loses
  - Going to call that substance
  - That's too important

Flow Chart, Hanna

- Logical structure of the investigation

Why ask: do fed and state courts usually do the same thing on this issue?

- Fed and state rule are the same, so it doesn't matter, no conflict doesn't matter

- Federal practice: federal courts do something other than what the state courts usually do
  - What they usually do
- Fed practice, State Practice: what they usually do

Can congress decide this question?

- Why ask this?
- What kinds of law can Congress pass in for courts, "arguably procedural"
- Heavy thumb on the scale
  - Congress tries to regulate something that it thinks is procedural, probably procedural unless crazy

Has congress done this? > federal statute > yes

- If congress has said something and they had the power to say it: we do it because it's the law
- If specific statute on point, that's really great, all we need to know: is that statute const? if yes then follow it

No specific statute > is there a federal rule on point?

- General statute: 2072, delegates power to SCOTUS to set out rules of procedure and practice and then we ask,
- If delegated to rule, is there a rule that covers it? If yes

Is it within Rule Enabling Act: Hanna II, re-read 2072, if fed rule> run it through 2072 machine and make sure it really is valid. What you get from Hanna II (thumb on the scale, Court has never struck down the rule it has authorized)

Does it really regulate procedure?

Test: does it "really regulate procedure" Sibbach

Does it abridge/enlarge/modify any substantive right?

Seems like the same inquiry…

Congress thought it was saying the same thing twice, repeating, no, we really mean procedural

Maybe some situations where a truly procedural rule really would A/E/M subst right

- Ex. 5 page limit on all complaints
- Complicated state statute, elements of cause of actions: 300 things
- No way to plead 300 elements in 5 pages
- This would A/E/M subst rights

Ex. Federal rule, on point, but it fails this inquiry

- What do you do?
- If something wrong with federal rule?

If something wrong with federal rule > Does the fed practice pass *Hanna I* "twin aims" test or *Byrd's* essential character" test

Take away: if no fed rule, or fed rule not valid

Then dumps you back to Hanna test

Reserve test, something you use

Sorta thing courts might take a diff view on

Twin aims of Erie

- Preventing forum shopping
- Prevent inequitable administration of laws

11. Comparative Law - Germany and US Civil Courts

Saturday, December 7, 2013
5:36 PM

- Germany v. US civil case system

	German	US
Fact Gathering	Judge, inquisitorial	Parties/lawyers, adversarial
Who Pays	Eng Rule, Loser pays	Am. Rule
Experts	Judge	P/L
Specialization	Yes	Some at state, Not much in Fed
Pick Judges	Bureaucracy	Appointed/Elected
Std. of App. Review	De novo, even for fact	Judge: clear error Jury: JMOL: de novo: reasonable jury? Crazy jury

- Germany:
  - Judge: fact gatherer:
    - Party submits with complaint assertions of facts and possible
    - Parties: suggest sources of proof
      - But judge doesn't have to interview them all
    - Can stage the issues
    - Decides:
      - Which witnesses to interview
    - Developing evidence, would find contrib. negl. On his own
  - Lawyers:
    - Not allowed to talk to witnesses first
  - Loser pays:
    - Want to spend as little as possible, if you lose you will pay for everything
    - Confident you would win: might say run up the bill then really socking the other guy
      - Other side will know that and will run to you to settle now if that's true
  - Witnesses: judge talks to, no coaching
  - Experts: judge chooses
    - Probably say: parties find someone you agree on, if you agree then probably impartial
    - OR if parties can't agree: each party picks expert and they have to pick third expert, I will listen to all three experts
  - Specialization:
    - Judges will have more knowledge on particular subject, specialize, easier to adjudicate and more timely
  - Selection of judges:
    - you rise through the ranks, evaluated by superiors in civil system service (ex decisions upheld on appeal), learn to become a judge on the job
  - Appellate review

        - Appellate court goes through everything again
        - Really easy to overturn facts
        - Have to have this since judge does thing
        - One type of bureaucratic controls
- US:
    - One big trial: deals with ALL genuine issue of material fact and
        - Ex. Duty, breach, causation, injury AND defense: contrib. negligence
        - Judge could bi-furcate trial, but doesn't happen that often
            - Jury!
            - Would have to get whole new crop of juries
    - Judge would only know about contrib. negl. If parties bring it up
    - One big trial approach: greatly increases cost of litigation
        - Trial on ALL the issues takes longer,
        - A lot cheaper: big contributory negligence issue figure that out, talk to one witness and once we've heard that might be all we need to do for the case
        - As opposed to talk to witnesses 18 times on all the issues
        - American system much more expensive: kitchen sink approach
    - More costs you impose on the other side more settlement leverage
        - Doesn't matter who wins or loses still going to have to pay all this money
    - Who decides which witnesses to call? Parties
        - Coaching!
    - Experts
        - P/L choose
        - Plaintiff: expert, Defendant: expert
        - If you are member of jury no idea who to trust, both seem equally credible
        - Two experts they sound like what they know what they're doing
        - Juror: ordinary person, ordinary level of education, less likely to be able to sort out
        - If parties pick: who gets picked? Experts that favor their side
            - Doesn't mean that anyone is actually lying for money or consciously shading their testimony
            - But problem: the ppl they select as experts are not the best known who are really impartial
            - Ppl who are known for having one particular point of view
            - Likely to get experts who are very divided on the middle and not have impartial expert in the middle
    - Selection of judges:
        - worry: appointed and elected no review have to give them an entire career before we know enough about you before we know it's safe to put you on the bench
        - Pick old ppl for judges, lawyers with experience, no rising through the ranks, being a judge is your life job,
    - Appellate review:
        - Really hard to overturn facts
        - Clear error standard: trust facts found by a judge
            - Judge probably won't find many facts
        - Jury: trust jury
        - Real focus of jury: leave them alone most of the time
        - Jury system that changes it

- Core of argument: US system totally different because of our reliance on the jury system
- How do we incorporate German system?
    - Can't do the one thing: which is get rid of the jury
    - Can do: more managerial judges
    - A judge could get their own expert if they wanted to
        - Allowed by fed rules
    - Could institute English rules
        - AK use English Rule
    - More specialized courts
    - Judge could have more control on discovery
        - More control over pretrial
        - Ex. Could say all discovery over contributory negligence first
            - Then when that's done say if you want to submit SJ on this issue do that
        - Heavily controlled pretrial etc
- Above would require a lot more investment into judges, etc