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1. List of Issues

- Personal Jurisdiction
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2. SMJ; Removal

- Subject Matter Jurisdiction
 - NOT waivable
 - Can be raised at any time, even for the first time on appeal
 - Constitution (Article III)
 - Statute (1331, 1332)
- Diversity
 - Citizens of different state: Article III
 - 1332
 - COMPLETE diversity
 - How to define citizenship: (calculated at time of suit)
 - Individual: domiciled (presence in jurisdiction, intent to make that jurisdiction your home indefinitely)
 - Special cases:
 - domiciled where parents are domiciled until both 1 AND 2 satisfied
 - Go with whatever state the decedent was in (NOT administrator of estate)
 - 1332(c)(1) If suing insurance company in direct action, then to include place where insured person is a citizen
 - Corporations:
 - 1332: Where incorporated and Principle Place of Business
 - PPB > Nerve Center (AKA headquarters) *Hertz*
 - Partnerships
 - Ex. Law Firms
 - Look at where each partner is a citizen
 - Alien = domicile
 - Amount in controversy exceed \$75,000
 - Appears to be a "legal certainty" that you can or cannot receive 75K *St. Paul Mercury Test*
 - *Diefenthal v. C.A.B.*: flight attendant treated passengers brusquely, no legal certain that facts supported damage claim, good faith is not enough
 - Aggregate claims:
 - P can aggregate claims against a single D

- P cannot aggregate claims against multiple Ds
 - Co-Plaintiffs cannot aggregate claims
 - Exceptions: supplemental jurisdiction and common undivided interest, joint claim that is "indivisible"
- Federal Question Jurisdiction
 - Article III: *Osborne Test*: if fed law involved in any way, then you have federal question jurisdiction
 - 28 USC 1331
 - General federal question jurisdiction
 - "arising under" federal law
 - Cause of action is created by federal law
 - *Holmes Test*: arising under = what law creates the cause of action
 - Cause of action included embedded federal issue
 - *Grable Test*: is the issue:
 - Necessarily raised (can plaintiff tell the story about why they win without federal law?)
 - Actually disputed
 - Substantial
 - Capable of resolution in federal court without disrupting the federal-state balance approved by congress
 - Federal question must appear on the face of well-pleaded complaint, *Louisville and Nashville v. Mottley* Rule
 - Special cases:
 - declaratory judgment: for purposes of jurisdiction you look to mirror image suit
 - Counter-claim: cannot have federal question jurisdiction on counterclaim
 - Exceptions: 1338 (exclusive federal jurisdiction ex. Patent), 1333 (admiralty, maritime)
 - *Mottley*: RR, plaintiffs anticipate federal defense, but that's not okay
- SCOTUS Subject Matter Jurisdiction
 - 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
- Removal
 - 1441: remove from state to fed court, if you could have gone to fed court originally
 - Aka if fed court had original jurisdiction (SMJ)
 - Fed claims: regular FQ analysis
 - Non-fed claims: need supplemental jurisdiction (same case/controversy w/ common nucleus of operative fact, 1367(b) exceptions)
 - 1441(a): def or the defendants all have to agree
 - 1441(b): removal based on diversity of citizenship
 - (1): citizens under fictitious names disregarded

- (2): if def is a citizen of the state where suit is filed, can't bring it to fed court
- 1446: how you can remove
 - File notice of removal in fed district court w/in 30 days
 - If removal becomes available later: get new 30 days from amendment
 - For diversity: 1 year limit from notice no matter what
 - 1446(2)(a) all def have 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

3. Service

- Process must satisfy:
 - Rules and Statutes
 - DPC
- FRCP 4 Generally
 - (c)(2) anyone who is 18 years old and not a party may serve
 - Note: IFP: US marshal or person specially appointed by court can serve process
- Service on individuals in the US
 - 4(e)(1) whatever state law says
 - Either where the fed dist court is located OR where service is made
 - 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
- Serving individuals in a foreign country
 - FRCP 4(f): serving an individual in a foreign country
 - Treaties
 - Foreign country law (personal service/mail if they are okay with that)
 - Whatever the court decides to do, but can't violate a treaty
- Serving Corporation in the 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
 - D doesn't send form w/in 30 days: P has to go through service
 - D will have to pay for service
 - If D mails form back to P, gets extra time before has to respond to complaint
- Proving Service FRCP 4(l)
 - Affidavit
- Time-limit for service FRCP 4(m)
 - 120 days
 - If lapses: court can dismiss with prejudice, order service, for good cause give more time
 - FRCP 3: Case is commenced when you file complaint
 - Important for SoL
- DPC
 - *Mullane Test*:
 - Notice reasonably calculated
 - Notice desirous of actually informing
 - *Jones v. Flowers*: state violated DPC, Mullane test because did not follow up on certified mail BUT state is not required to look up def in phone book

4. PJ

- Authority!
- WAIVABLE
 - If you don't raise in 12(b)(6) or Answer, it is waived
- In personam
 - Domicile
 - Presence, service of process while physically and voluntarily present in forum state (*Burnham v. Superior Court*)
 - Consent: express (contract, or implied) (*Hess*)
 - Waiver
 - *Intl Shoe*: PJ over D must not offend traditional notions of fair play and justice (14th A, 5th A)
 - General Jurisdiction
 - Continuous and systematic contacts
 - Contacts occur when D purposefully avail itself of laws (*Hanson*)
 - Whole thing has to be fair and reasonable
 - Factors: *World-Wide Volkswagen*
 - 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
 - *Goodyear*: have general jurisdiction where you are "at home"

- Individuals: domiciled
- Corporation: PPB, Incorporated
- Specific Jurisdiction: only for claim arising out of D's in state contacts
 - Minimum contacts
 - Contacts occur when D purposefully avail itself of laws (*Hanson*)
 - Ex. *Calder*, article intentionally aimed at CA
 - Factors: (1) where is server based (2) who is it marketed towards? (3) where does it draw its sources (4) ties to forum state
 - Contacts can't just be foreseeable, have to involve some degree of purposefully availing *World-Wide Volkswagen*
 - *Burger King v. Rudzewicz* choice of law clause = purposeful availment, this plus contacts would be enough
 - *Asahi*: minimum contacts you need stream of commerce + something forum related
 - *McIntyre*: minimum contacts = steam of commerce + targeting that forum
 - Contacts have to give rise to the suit
 - Tests:
 - But for: but for the act there would be a suit
 - Evidence: act is evidence for claim
 - Whole thing has to be fair and reasonable
 - Factors: *World-Wide Volkswagen*
 - 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

In rem - authority over the property, can bind the interests of all the different interests 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
- Authority:
 - FRCP 4(n): in rem
 - Fed statute
 - Try in personam first, then the court can seize the property per state law
 - DPC of Const
 - State law: 14th A
 - 5th 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*: quasi in rem II jurisdiction upheld.

- *Victims v. Iran*: Sprint owed money to Iran, statute if country owes money victims can sue company that owes country to get money. Valid judgment
- *Shaffer v. Heitner*: apply Intl Shoe for ALL in rem
 - For specific jurisdiction you had to purposefully avail yourself

5. Venue

- Background:
 - WAIVABLE
 - Which district? Focus on federal venue statutes, no constitutional rules
- 1390: venue: geographic specification of the proper court of courts for litigation of a civil action
- 1391: general venue statute
 - (b) venue in general:
 - (b)(1): any district where a defendant resides or multiple defendants and all defendants are in that State, any district where any of the defendants reside
 - (b)(2): substantial part of events
 - Chain of events: in telling the story of what happened do we have to mention this venue OK if well-pleaded complaint will have to mention venue
 - Wrongful event test: is it an event that gives rise to the claim? Only care about where something bad happened that we're suing over
 - *Uffner*: chain of events, SCOTUS has never chosen
 - (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?
 - Entities reside in every federal jurisdiction where it would be subject to PJ if that district were its own state
 - Noncorporate entities: treated like partnerships. Citizens of every state in which one of its members is domiciled
 - 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?
 - 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 def shall be disregarded in det where the action may be brought w/ respect to other defendants

- Specific Venue Statutes:
 - 1400:
 - Patents etc

- If defendant doesn't like venue:

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	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)

- 1404: venue proper, but more appropriate fed district of division where it should be litigated
 - (a): transfer, for convenience or justice
 - 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 consented (after suit)
 - Def must show: plaintiff originally could have brought action in proposed district and considerations of convenience/justice in favor of transfer.
 - (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
- (c) dist.ct. may order civil actions to be tried at any place w/in the division in which it is pending
- Timing: court's discretion
- Even after 1404 transfer DON'T change your CoL rules *Van Dusen v. Barrack*
 - Plaintiff chooses forum, gets to keep CoL rules
- 1406: WRONG venue: dismiss or transfer to venue where it should have been brought
 - (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
 - Against, in the interest of justice
 - Convenience and interest of justice (see Public and Private factors)
 - Transfer to any district or division of fed court or dismissal
- "forum non conveniens"
 - Forum is not convenient
 - Separate common law doctrine that involves dismissal and subsequent filing
 - Dismiss in favor of foreign forum that can provide an adequate remedy to a plaintiff (consistent with basic notions of fairness)
 - Look at same private/public interest factors for 1404 transfer motion
 - Ex. *Piper Aircraft v. Reyno*, SCOTUS upheld dismissal for forum non conveniens, should be in Scotland

6. Pleading

1. FRCP 11: pleadings, motions, discovery: reasonable inquiry under the circumstances; all papers signed by attorney; sanctions for frivolous arguments, harassment, or lack of factual investigation
2. Complaint
 - FRCP 8(a)
 - Jurisdictional statement
 - Demand for relief
 - Short and plain statement on which relief can be granted
 - "no set of facts" : unless no set of facts consistent with complaint that show violation, will get over that hump *Conley v. Gibson*
 - Plain = fair notice, have to generally allege facts
 - 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)
 - FRCP 8(d) can state alternative/inconsistence/contradictory claims
 - Allegations can be inconsistent
 - Can have alternative statements of a claim or defense FRCP 8(d)(2)
 - Can have inconsistent claims or defenses FRCP 8(d)(3)
 - FRCP 9(b): heightened pleading standard for fraud & mistake
 - Need specificity
 - FRCP 11(b)(3): allegations have to have evidentiary supports OR if specifically so identified will have evidentiary support after a reasonable opportunity for further investigation or discovery
3. Pleadings Standard:
- FRCP 7(a) how case gets started
 - Pleadings allowed: complaint, answer to complaint, answer to counterclaim/crossclaim, third party complaint, reply
4. Responding to the Complaint:
- Answer
 - FRCP 7, FRCP 8
 - FRCP 12(a): have 21 days to file an answer [FRCP 6: can get plaintiff's consent for more time or motion for extension of time note, FRCP 6 motion for extension does not stop the clock]
 - 4 main things in answer:
 - Admit/deny allegations
 - Assert (unwaived) defenses listed in 12(b) or elsewhere
 - Raise affirmative defenses, FRCP 8(c) state in answer OR waived
 - Assert counterclaims/crossclaims
 - *Reis Robotics*: Three part test for affirmative defense pleading
 - Matter appropriately pled as affirmative defense
 - Defense is adequately pled under FRCP 8, FRCP 9
 - Evaluate sufficiency of defense pursuant to standard identical to FRCP 12(b)(6)
 - FRCP 8
 - 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 FRCP 11, requires reasonable inquiry
 - FRCP 8(c) must state any affirmative defense or WAIVED
 - *Ingraham v. US* includes statutory damage cap, 8(c) isn't exclusive
 - What else?

- Statement of new matter which admitting the facts alleged in former pleading, shows cause why they should have their ordinary legal effects
 - Plus all listed p. 22, 23
 - Basically: if defense > even if complaint is true STILL find for me
- 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)
 - Always about some legal issue, court will assume the well-pleaded facts are true
 - If lawyer files MtD and attaches exhibits, court will treat as MSJ
 - Defenses that allow you to dismiss, can bring more than one at the same time:
 - SMJ
 - PJ
 - Improper Venue
 - Insufficient Process (you gave me wrong papers)
 - Insufficient Service of Process (method was wrong)
 - Failure to State Claim upon which relief can be granted
 - MUST be made before a responsive pleading (answer)
 - Tests legal validity of P's allegations
 - Rely on Complaint, Answer, and Reply
 - Take well-pleaded facts are 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)
 - Failure to join a party under Rule 10
 - Necessary party who ought to be in this case but isn't
 - Motion for a more definite statement 12(e)
 - Test: so vague or ambiguous that you can't reasonably prepare a response
 - Motion to Strike 12(f)
 - If Insufficient defense: would lose on 12(b)(6) if it was a claim
 - Test: is this prejudicial?
 - 12(h): Omnibus Motion Rule
 - If file pre-answer motion waive any omitted 12(b)(2)-(5)
 - (1): SMJ, (6): failure to state a claim, (7): required party > not waived, these can be raised in any pleading or motion or at trial/MSJ
 - FRCP 12 Waiver Trap
 - (b)(2)-(b)(5): waivable!. Waive if:
 - (A) omit from 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
- 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
 - Hunter-Serv Tech*: can't "preserve" motions, have to actually raise them or waived
- 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
- 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

○ Default FRCP 55

- After 21 days, Plaintiff goes to court for Entry of Default FRCP 55(a)
 - Entry of Default, entry on the docket
 - Court MUST enter the entry of default on the docket, no discretion, clerk mails copy
 - Def can get 55(c) entry of default set aside
 - Then move for 55(b) Default Judgment, after 30 days
 - Can get overturned, 60(b), but very difficult
 - 55(b)(1): default judgment automatic if sum certain or made certain through computation
 - 55(b)(2): default judgment not automatic, certain damages or other relief

Court counts as an admission of ALL well-pleaded fact, except damages

Court will need to figure out:

- If complaint states a claim upon which relief can be granted
- SMJ
- PJ
- Service
- Damages warranted? Injunction warranted?

Court will not need to figure out:

- Venue
- Actual notice (Mullane, Jones)

Court may hold evidentiary hearing on issues, such as damages

Amending Pleadings

○ Three kinds of amendments:

Amendments as a matter of course

- Don't need other party or court's permission
- Can amend once as a matter of course once w/in 21 days

Amendment by consent

Amendment by leave of court

- "if justice so requires"

○ Amending pleadings: FRCP 15

(a) 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

Forman v. Davis court need not grant leave to amend when an amendment would be futile

- 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.
- Once amended, it is a new pleading, opposing party has same time to respond to the amended pleading as original pleading. (14 days after service) *Nelson v. Adams*

(b) amendments during or after trial

- 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,

(c) 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

- Why? 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

Moore v. Baker claim has to relate back to original pleading: not same transaction because would need different evidence to prove these claims.

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
- *Krupski v. Costa Crociere*
- Test: what the DEFENDANT knows, should the defendant have been on notice due to plaintiff's mistaken identity?

7. Parties, Joinder, Class Action

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 substitution, 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 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
 - Consolidate everything into one lawsuit
 - (b) bring all your contingent claims in same complaint
- FRCP 19 who HAS to be included in complaint, Required Joinder of Parties
 - 19(a): "necessary/required" =
 - (1)(A): in that person's absence, court can't accord complete relief to existing parties
OR
 - (1)(B): person claims an interest
 - And disposing that person's interest Either:
 - (i): impede person's ability to protect that person's interest
 - (ii): gives that person double/inconsistent obligations
 - If 19(a) applies but you can't join:
 - If can't join, "equity and good conscience" on whether to proceed:
 - 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
 - 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 exist 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

- FRCP 20 outer limits of who can be named in 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
 - *Holbein*: liberal rules for joinder
- FRCP 21 Misjoinder
 - If misjoined: sever!
 - Add/drop: diversity jurisdiction important

Counterclaims/Crossclaims FRCP 13

- Counterclaim: defendant's claim against a plaintiff who has a claim against them AGAINST AN ADVERSE PARTY
 - May include in Answer, Rule 7
 - Two Types:
 - Mandatory: 13(a)(1) (exists at 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?
 - (B): AND doesn't need a party w/o jurisdiction
 - Rule 19 necessary parties
 - Take away: claim is only mandatory if you don't need to bring in a party who would mess up jurisdiction (diversity)
 - Permissive: 13(b) anything else is permissive
- Crossclaim FRCP 13(g) against a CO-PARTY
 - Co-party, same transaction, property
 - (may) all cross-claims are permissive
 - Ex. 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 counterclaim or crossclaim = can add party if you qualify under FRCP 19 FRCP 20

Impleader FRCP 14 AGAINST A 3RD PARTY

- 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
- *Erkins*: 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

Intervention FRCP 24: want to be a party to shape what's going to happen

- 24(a): intervention as of right
 - Timely
 - Court has to let you in if you qualify
 - (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 (diff from Rule 20 where you need common q AND same transaction)
 - Delay/prejudice
- 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?
- Two requirements:
 - Intervenor 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

Interpleader FRCP 22 or 28 USC 1335

- 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
- 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 FRCP 22
 - Amount in controversy: 75K
 - 1332 complete diversity
 - PJ: states
 - 1391 Venue
 - Easier for joinder: if necessary party
 - Who fights: Claimants fight it out
- *Republic of the Philippines v. Pimentel, temporary administrator of the estate of Mariano Pimentel, deceased*
- Supplemental Jurisdiction
- Article III
 - *United Mine Workers v. Gibbs* supplemental jurisdiction:
 - Discretionary
 - Consider judicial economy, convenience and fairness
 - Common nucleus of operative fact (aka same case or controversy, Article III Const)
 - Federal claim not minor
 - Exceptions:
 - Federal claim drops early
 - State issues predominate
 - Surer footed reading of state law
 - Likelihood of jury confusion
- Statutes: 1367 statutory authority
 - (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!
 - Key: if original claim is 1332 diversity claim, court does not have supplemental jurisdiction over claims by plaintiff against parties added under 14 (impleader), 19 (required joinder), 20 (permissive joinder), 24 (intervention) (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:
 - 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

Class Actions FRCP 23

- 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*: CoL plaintiff by plaintiff
 - Divide class into sub-classes by state
- 23(b) Can have a class action if you have the prereqs AND
 - (1) 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
 - (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.
 - (2) injunctive or declaratory relief for class as a whole
 - One injunction apply to everyone
 - NOT for money damages, except for exception: incidental/automatic
 - (3) 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
 - Judgment: have to indicate in judgment who got notice
 - Court has to approve settlements
 - Have to make sure it's fair for those not there
- 23(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
 - Notice and opportunity to opt-out twice, once after filed and 2nd time after settlement
 - Usually plaintiff pays
 - Very rarely D will pay, like really evident D was guilty so he will pay
- 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)*: Coupons don't work.
- *Walmart v. Dukes*: if pay can't be (b)(2), This was improperly certified under 23(a): commonality: each individual case, different town, different manager
- Class Action Fairness Act 1995
 - 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

8. Discovery

- a. 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*: in a company who is under privilege? Line broader than control group but probably doesn't reach ordinary worker
 - Marital
 - Psychotherapist-patient
 - Some state: doctor-patient
 - If put content of that communication in controversy, then you are waiving that privilege
 - Matter: any info
 - Relevance: anything that can LEAD to admissible evidence
 - 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
 - 26(b)(3) work product doctrine
 - Codified from *Hickman*
 - 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 have to disclose
 - Compensation
 - Attorney-provided data or assumptions
 - Trial preparation experts: almost entirely excluded from discovery except exceptional circumstances 26
- b. Timing of Discovery
 - 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
 - 14 days later, send discovery plan to the court AND 26(a)(1) disclosures
 - 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*: Ct can alter discovery rules: very broad discretion under FRCP to move things around
 - 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 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
 - 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
 - Pretrial disclosures include:
 - Evidence, witnesses, outline
 - Why would they require you to do that?
 - Enable Motions in limine (pre-trial objections)
 - 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
- c. Discovery Mechanisms:
 - Interrogatories FRCP 33
 - Info available to party
 - Don't have to provide conclusion or opinion on the law
 - Have to provide application of law to fact
 - Documents Requests
 - FRCP 34: Parties
 - Any tangible thing: any medium even if they require translation
 - Must be how usually kept
 - Any document under your control
 - FRCP 45: Document request for non-parties through subpoena

- FRCP 45 subpoena
 - Clerk of court or attorney may sign subpoena
 - Have to have limit of 100 miles for deposition
 - 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
- Depositions, FRCP 30, 31
 - Oral: FRCP 30
 - Entity: has to testify known or reasonably available info
 - Can have cross-x, redirect, etc
 - Objections:
 - If privilege: don't answer and state for the record objection privilege
 - Any other objection: answer the question and state the objection
 - (e): get opportunity review and correct mistake
 - Written: FRCP 31
 - Notice has to include:
 - Time and place of depo
 - Person you are talking to, name and address
 - Recording method
 - How use?
 - To prepare for trial
 - Impeach witness
 - Can only use as evidence if person cannot be at trial
 - If not party, FRCP 45 subpoena for deposition
- Examinations, FRCP 35
 - Parties, order need
 - Mental or physical condition has to be in controversy
 - *Sacramento v. Bridgestone*: don't need HIV test, other ways to show life expectancy
- FRA, FRCP 36
 - Written questions which are conclusive, binds you
 - Must answer in good faith
 - Must specifically deny or admit
 - (b) withdraw or amend with motion and court order

d. Conflicts over Discovery

- Privilege Log
 - Includes work product
 - Includes burden outweighs benefit
 - Everything you don't want to turn over from request
- Objections
 - 26(b)(1): irrelevant
 - 26(b)(2): burden greater than benefit
 - Undue burden or cost
 - Producing party has burden of showing undue burden unless the other side who's good cause
 - Sets up special process e-discovery
- Motion to Compel
- Motion for Protective Order
- 26(b)(5) accidental disclosure:
 - Have to claim privilege
 - Other side MUST return/sequester/or destroy
- Motion for Sanctions
 - Can move directly to MfS
- 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

e. Discovery Sanctions

- *Chudasama v. Mazda*
 - Example of court abusing discretion over discovery
- FRCP 26(g): main rule governing attorney conduct in discovery
 - Atty certify every response
 - Undue burden
 - Has to be complete and direct to the best of your knowledge
- FRCP 11 v. FRCP 26
 - 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
- FRCP 37 imposes sanctions
 - Motion

f. E-Discovery

- Issues of e-discovery:
 - Volume
 - Collection
 - Preservation issues
 - Range of formats
 - Ease of searching
- Cases dealing with e-discovery:
 - *McPeck*: sample, see how much useful
 - *DaSilva*: predictive coding

g. Magistrate Judges 631-636

- 636(b)(1)

- w/o consent: judge just assigns
 - Decide non-dispositive pre-trial matter
 - w/ consent: can do anything
 - 14 days to object to magistrate decision
 - Judge can overturn decision:
 - Clear error of fact
 - Contrary to law
 - If dispositive pretrial matter:
 - Judge reviews recommendation de novo
- h. 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

9. Trial and Judgment

1. Ways to get a Ruling on the Merits:
 - 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
2. Dismissal FRCP 41
 - Ways:

- (a) voluntary dismissal
 - (1) by the plaintiff
 - notice
 - Has to be before Answer or MSJ
 - Stipulation: all parties
 - Don't need court permission for either (except for class actions)
 - (2) by court order
 - Standard: is there any 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
 - (b) involuntary dismissal'
 - Court's discretion
 - On the merits unless courts states otherwise or its jurisdiction, venue, Rule 10
 - w/o prejudice: jurisdiction, venue, Rule 10
 - Two types of dismissal:
 - Without prejudice
 - Can file again in same court, and almost always in other courts
 - On the merits
 - Basically with prejudice
 - Cant file again in same court, usually but not always in 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
 - *In Re Bath and Kitchen Fixtures Anti-Trust Litigation*: bright line rule you can file notice of dismissal until answer to MSJ.
3. Settlement
- Rule 41: 41(a)(1)(b) dismissal by notice or stipulation will be without prejudice, unless the notice or stipulation states otherwise
 - 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: contempt
 - Public
 - 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
 - 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
 - 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
4. Summary Judgment FRCP 56
 - Standard: No genuine dispute of material fact such that party is entitled to judgment as a matter of law
 - 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*: MSJ based on evidence right now, not promise of evidence at trial,
 - FRCP 56 MSJ
 - (a) can be for claim or defense OR part of claim or defense
 - Standard:
 - What is the rule of subst law applicable to the motion?
 - Which facts matter are "material" to applying that rule of law?
 - What are the parties arguing about?
 - What is the proper record for SJ? What evidence may the court consider?
 - 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?
 - 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?
 - What is the proper disposition of the motion?
 - Separate between two types of burdens
 - Burden
 - Who loses if
 - Burden of Production
 - Who loses if nothing on the table

- Burden of Persuasion
 - Who loses if scales are balanced
 - 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
 - Either: cite evidence that doesn't favor other side or say look no evidence for X
 - *Duplantis*:
 - 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
5. Judgment as a Matter of Law (JMOL)
- 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
- 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):
 - 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
 - Courts must draw all reasonable inferences in favor of the nonmoving party and it may not make credibility determinations or weight of evidence
 - Fail to make 50(a) and you waive 50(b)
 - You can only make 50(b) for what was raised by 50(a)
 - You can only appeal 50(b)
 - 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

6. Jury Trial

- 7th Amendment:
 - 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'
- 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* 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 Theaters v. Westover* 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)
 - No 7A or statutory right to jury trial
 - Motion/sua sponte: can get advisory jury or binding jury with both sides' consent
 - FRCP 47: selecting jurors
 - Challenges: peremptory or for cause
 - Voir dire
 - Venire: pool of people
 - Jury instructions:
 - Judge tells jury what they need
 - Jury HAS to be unanimous in fed courts
 - 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
7. Bench Trial
- Findings of Facts, Conclusions of Law
8. Special Master FRCP 53
- 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

9. 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
- Entering Judgment FRCP 58
 - 58(b)(1)
 - Clerk enters judgment if:
 - General verdict
 - Court awards only costs or sum certain
 - Court denies all relief
 - 58(b)(2)
 - Court approval to enter judgment if:
 - Special verdict
 - Ex. General verdict with questions
 - Other relief
 - Ex. Injunction
 - 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
 - FRCP 69 execution of remedies
 - Executing money judgment, going after person's property : use state procedures

- 69(a)(2) can get discovery in connection with execution
 - 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
 - Seizing a person or property, FRCP 64
 - 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: seizing a person
 - Attachment: taking property to satisfy a judgment which doesn't necessarily have to be about that property
 - Garnishment: If 3rd party has money that belongs to defendant: FRCP 64
 - Replevin: going to get my own stuff back
 - Sequestration: put property aside
 - other corr or equivalent remedies
 - *Fuentes v. Shevin*: for prejudgment seizure, have to have opportunity for a hearing first
- Injunctions and Restraining Orders, FRCP 65
 - 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
- 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
- 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

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

Harmless Error FRCP 61

AKA errors are harmless unless they affect substantial rights

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*

Ex. 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
- Evidentiary 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
- Relief from Judgment, FRCP 60
- 60: change mind AFTER final judgment
- 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
- 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

Arbitration

Arbitration governed by Federal Arbitration Act FAA 9 USC 1-16

- 9 USC 2-4
 - 2 Validity, Irrevocability, and enforcement of agreements to arbitrate
 - decision is valid, irrevocable and enforceable
 - EXCEPTION: grounds...for the revocation of any contract (fraud, duress, Unconscionability)
 - 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
 - 7 arbitrators can summon before them any person as a witness, issue subpoenas, person refuses: district court may compel
 - 9 award of arbitrators; confirmation, optional; jurisdiction; procedure
 - 10 same; vacation; grounds; rehearing
 - Factors that allow you to vacate award: Fraud, partiality, misconduct, exceed/imperfect, manifest disregard of the law?
 - 11 same; modification or correction; grounds; order
 - Correct award for clerical mistake, wrong matter, typos
 - 16 appeals
 - Can appeal if arbitration has been denied
 - Cannot get interlocutory appeal for granting arbitration
- *AT&T v. Concepcion*
 - California's Unconscionability blocks arbitration, doesn't work. Arbitration is speedy. Class actions can't be informal, so okay to deny class action arbitration.

Attorney's Fees

English Rule: loser pays

American Rule: everybody pays their own way

Fee Shifting: special statutes shift fees from party that would ordinarily pay them to another (Title VII)

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, gov was correct as a matter of law, it was correctly classified

10. Post-Judgment Procedures

1. Appeals

- SCOTUS
 - 28 USC 1254 Courts of appeals; certiorari, certified questions
 - 28 USC 1257 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
- 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
 - Presented Above
 - Exceptions to the 3 Ps
 - Plain Error Doctrine FRCP 51(d)(2)
 - 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. Dean*:
 - An appellate court will consider an issue not raised in the district court if it 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
 - 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 FINALITY PRINCIPLE
 - Limited to final decisions of district courts
 - Final: resolve, leave nothing to be done
 - Exceptions to finality principle
 - Collateral order doctrine: *Cohen v. Beneficial Industrial Loan Corp* 1949
 - Exception to finality principle
 - Must be:
 - Collateral to the merits
 - Issue unrelated to merits
 - Completely resolved below
 - 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
 - If it's important
 - Serious and unsettled
 - Statutory exceptions to finality principle: interlocutory appeals:
 - 1292: two main categories of jurisdiction outside of the final judgment rule:
 - (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
 - Stay of Proceedings to Enforce Judgment 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
 - 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
2. 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
3. Claim Preclusion, *res judicata*
 - Three main elements of claim preclusion:
 - Same claim
 - Think of as same CASE
 - 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
 - Valid, final judgment on the merits
 - Valid: court has to have PJ, SMJ, def has to have proper notice
 - Exception: when def resp to lawsuit and both parties litigated the case w/o raising jurisdictional problem
 - Final: in the sense of appeal
 - Judgment on the merits: jury verdicts, JMOL, MSJ, default judgment
 - NOT on the merits dismissals w/o prejudice, jurisdiction, venue, necessary parties Rule 19, generally SoL
 - Same parties
 - Same claimants and same respondents
 - 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
- Exceptions to claim preclusion:
 - Consent to second suit
 - Claim preclusion is WAIVABLE
 - The parties have agd int 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
4. Issue Preclusion *collateral estoppel*
- Applies to lose of issue only
 - You lost before on this issue so you should again too
 - 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
 - *Blonder-Tongue* okay to be non-mutual and defensive
 - Offensive: Preclusion as a sword
 - *Parklane* okay to be non-mutual AND offensive
 - Test:
 - Identical issues
 - Actually litigated and decided in lawsuit #1
 - 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
 - *Cambra v. Jeffrey Mass*
 - Same party or in 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
- Prior Inconsistent prior judgments

11. 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
- Rules Enabling Act > 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
- Erie* Twin Aims:
- a. No forum shopping
 - b. No inequitable administration of justice
5. Federal Common law
 - a. *Hinderlider v. La Plata & Cherry Creek*: fed common law for deciding water issues, river, between two states if no statute (later got a statute...)
 - b. *US v. Standard Oil Co*: fed common law for soldier injured, army going to make other ppl pay what army paid, BUT SCOTUS defers to Congress to make statute
 6. *Byrd v. Blue Ridge*
 - a. Judge or jury decide? 7th amendment jury right!
 - b. Ask: is this an essential character of federal law?
 - Like right to a jury
 7. *Hanna v. Plumer*
 - a. Hanna I: Does the federal practice pass twin aims of *Erie*?
 - *Walker v. Armco Steel*: SoL: commence means serve process (state) v. Commence means file (fed). Fed rule not on point, fed rule is for fed clocks. Hanna I: fails, there is inequitable administration of laws, use state practice.

Hanna II:

- Does it really regulate procedure?
 - i. 2072(a), *Sibbach*
 - Does it abridge/enlarge/modify any substantive right?
 - i. 2072(b)
8. *Shady Grove Orthopedic Associates P.S. v. Allstate Insurance Co*
- a. Plurality: class action rules in conflict.
 - 2072(a): does it really regulate procedure? Does FEDERAL law really regulate procedure?
 - 2072(b): passes, if get passed (a) probs get passed (b)
 - b. JPS:
 - 2072(a):
 - 2072(b): does STATE rule substantive OR intertwined with substance?
 - i. Then you can tell if fed rule A/E/M substantive right
9. 2072: does it really regulate procedure?
- a. Ask, is this the kind of thing you would see in Procedure class?
 - b. Oloff: Oloff only gets substantive rules,
 - Anything that's about proving what happens or dealing with the court process: would sound like procedure
10. Hanna Flow Chart
- a. 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?
- Is it "arguably procedural" *Hanna*
- Is it rationally related to procedure: if rationally capable of classification as procedure then procedure: Congress can regulate it
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?
- i. 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

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

Twin aims of Erie

- Preventing forum shopping
 - Prevent inequitable administration of laws
- Coupled with Byrd; extra exception for something that's an essential characteristic of fed system (ex. Jury system)

12. Comparative Law - US and Germany

- 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