

Civ Pro, Willis, Fall 2016 - Spring 2017

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I. Due Process

- A. When **government deprives you of life, liberty, or property**, you have a right to **notice** & an **opportunity to be heard**
 - a. 5th Amendment: No person shall be deprived of life, liberty, or property, without due process of law.
 - b. 14th Amendment: Nor shall any state deprive any person of life, liberty, or property without due process of law.
- B. Rule 1 - Scope and Purpose
 - a. The rules are meant to balance the court's ability to make trials "just, speedy, and inexpensive".
 1. slowness can also inhibit justice
- C. **Opportunity to Be Heard**
 - a. Mathews Test - *Mathews v. Eldridge* (social security disability benefits case)
 - Weigh—
 1. Private interest that will be affected by the government action
 2. Risk (probability) of erroneous deprivation through procedures used and probable value, if any, of additional procedures
 3. Government interest that would be impaired if additional procedures were given (usually fiscal and administrative burden)
 - b. Mathews test in action -
 1. *Hamdi v. Rumsfeld* (US citizen enemy combatant detention without trial)
 - a. Majority balances
 - i. loss of physical liberty
 - ii. probable truth-seeking value of additional procedures sought
 - iii. government interests in incapacitating enemies, national security secrets, not diverting resources from fighting war to these proceedings, but also preserving commitment at home to principles for which we fight abroad
 - b. Rights of Enemy Combatants under due process
 - i. Due process requires that detainees classified as "enemy combatants" be given, post-deprivation:
 - *notice of factual basis* for enemy combatant classification, *at meaningful time and in meaningful manner*
 - *fair opportunity to rebut* the government's asserted factual basis, including *right to counsel*, "unquestionably"
 - in front of *neutral impartial decision maker*
 - But does not require Federal Rules of Civil Procedure (FCRP) or evidence, or traditional burdens of proof:
 - hearsay is admissible
 - burden-shifting scheme (whereby once government makes an initial factual showing that detainee is enemy combatant, then burden shifts to detainee to disprove those facts) is acceptable
 2. *Goldberg* - Welfare benefits being taken away. Court ruled that hearing was necessary because the private interest was super high -> welfare is their livelihood, and if it is taken the person is screwed, so they should get a chance to speak their side before it is taken away.
 3. *Lassiter v. Dept. of Social Services* (Right to attorney in child custody case)
 - a. Court uses the Mathews test, but adds presumption that the right to counsel only exists when the person, if unsuccessful, may lose personal freedom.
 - i. Lassiter has an interest in maintaining a parental relationship with her child
 - ii. Risk that parental rights maybe terminated if she cannot advocate for herself without counsel.
 - iii. State has an interest in protecting the child.
 - b. Court held that the due process clause provides for a counsel on a case by case basis. The court should decide upon seeing the case whether or not counsel is necessary.
 - c. The Constitution creates a floor, a minimum standard, but the legislature can offer more.
- D. **Notice**
 - a. When giving notice, you must follow the Constitutional Standard (Mullane Test) and Rule 4
 - b. Constitutional Standard
 1. Mullane Test - To provide notice under the US Constitution, method of giving notice must either give:
 - a. Actual Notice
 - b. Notice reasonable calculated to achieve actual notice under the circumstances
 - Reasonably calculated - *Greene v. Lindsey* (Posting eviction notice on doors was not reasonably calculated because the sheriff knew that they were being removed by kids. Also, other customary alternatives existed i.e. mail)
 - c. or, not substantially less likely to achieve actual notice other than other feasible and customary methods (if and only if conditions prevent use of method so calculated)
 2. *Mullane v. Central Hanover Bank & Trust* (NY trust fund pooling from both residents and non-residents of NY. Only notice given beneficiaries of this specific application was by publication in a local newspaper)
 - a. **Rule:** 3 different constitutional requirements for 3 different groups:
 - i. known beneficiaries with known addresses—must notify by mail
 - ii. known beneficiaries with difficult to determine addresses—notification through publication ok
 - iii. unknown beneficiaries (unborn or contingent beneficiaries)—notification through publication ok
 3. *Jones v. Flowers* (Two returned certified mailings inadequate notice because government knew *actual notice failed*)

- a. court held the certified mailing of notice of tax sale
 - met requirement of state statute
 - was reasonable as first attempt
 - but once mail was returned unclaimed, it was not reasonable to rely on it for notice prior to deprivation of property because:
 - one actually desiring to inform someone would do more, and
 - doing more (regular mail, posting) is feasible and customary
4. Providing Notice Through Service
 1. Not allowed to impersonate a police officer
 2. Cannot be served by being lured to far-away jurisdiction (*Wyman v. Newhouse*)
 3. No service while appearing in court as a witness or criminal defendant
- c. Rule 4
 1. Sections
 - a. contents and amendments
 - b. issuance
 - c. service: what (summons and complaint) and by whom (at least 18 and not a party)
 - d. waiving service (Form 5)
 - e. Serving a competent adult in US
 - i. using state method or
 - ii. personally or
 - iii. at dwelling with suitable person residing there or
 - iv. on agent authorized to accept service
 - f. serving a corporation (state method or on officer or other authorized agent)
 2. *Khashoggi* Rule
 - a. Place is a "dwelling or usual place of abode" if there is an "indicia of permanence" - meaning that the property has been developed by the person and they use it.
 - I.e. service at a hotel wouldn't meet indicia of permanence because you're only there temporarily.
 - The court didn't decide if you can have more than 1 dwelling at a time and if you have to be currently living there at the time of service.
 3. *Mid-Continent Wood Products, Inc. v. Harris*: P attempted to serve D personally through a US Marshal twice by sending certified mail at D's place of employment. Tried again through a private process server to what he thought was D's home 3 times, on third left complaint and summons attached to the door. Court concludes that Mid-Continent did not comply with Rule 4, therefore, Harris never received notice.
 - **Rule:** Court can't make own rules, must follow strict adherence to rule 4.
 - *Wyman v. Newhouse* Rule
 - a. Newhouse was lured into flying to FL from his home in NY just so he could be served.
 - b. Court found that because he was tricked, and would not have otherwise been in FL, the service was not proper, and thereby voided the judgement.
 4. Rule 60(b)(4): Court can order relief from a judgment that is void. 3 requirements for a valid (not void) judgment:
 - i. Notice
 - ii. Personal Jurisdiction
 - iii. Subject Matter Jurisdiction
 5. Full Faith & Credit
 - Every state's courts give the same credit to the judgement of a sister state's court as they would if it was their own judgement.
 - To qualify it must have:
 - Proper notice
 - Pass Mullane Test
 - Have proper jurisdiction
 - Even if a ruling is improper, it can only be challenged under one of the 3 above factors if there is a default judgement. This is why Newhouse challenged that notice was improper.
 6. Rule 12
 - Allows you to claim improper notice or service of process right away so that the case will be dismissed before it even starts.
- d. Provisional Relief
 1. 2 purposes
 - i. Securing the judgement - to ensure that the judgement will be effected (ex. Getting an item in question secured so that it can't be moved or hidden before a decision can be rendered).
 - ii. Preserving the status quo - stop any further injury pending the next stage of decision making
 2. Injunctions - An order to take or refrain from taking specified actions
 - Temporary Restraining Order (TRO) -> More short term relief and immediate
 - Preliminary Injunction (PI) -> more long term relief, and requires both sides to be heard
 3. Winter Test
 - i. Substantive Requirements for Provisional Relief - From *Winter v. NRDC*
 1. Applicant likely to succeed based on the merits of the case
 2. Applicant likely to suffer irreparable harm without an injunction

- Monetary damages will not compensate for the injury
- 3. Harm to enjoined party from injunction outweighed by harm to applicant without an injunction ("Balancing the equities")
- 4. The public interest favors the injunction being issued
- 4. **Procedural Requirements** for injunctions, from Rule 65 and Due Process Clauses:
 1. for a TRO without notice (*ex parte*), Rule 65(b):
 - (1)(A) specific sworn facts on personal knowledge must clearly show immediate and irreparable injury if wait for adverse party to be heard, and
 - (1)(B) movant's attorney must certify in writing efforts, if any, to give notice or why notice should not be required
 - TRO itself must state why injury irreparable and why no notice, when expires, etc.
 2. For a PI, Rule 65(a):
 - (1) must give notice and
 - (2) can consolidate with trial, or use evidence form PI hearing at trial
 3. For TRO and PI, Rule 65(c):
 - applicant must provide security/bond (court may set at \$10)
 4. Note: interlocutory appeal is available for TROs and PIs
 5. Note: if injury has already taken place, it's too late for a TRO or PI (if NY times already published the Pentagon papers, can't get a TRO to un-publish them)
 6. For TRO, PI, and final Injunction, Rule 65(d):
 - shall set forth the reasons for its issuance
 - shall describe in reasonable detail, and not by reference, acts restrained, and
 - binds only parties, their officers, agents, servants, employees, attorneys, and persons in concert with them who receive actual notice of TRO or PI order
 7. *Stormans v. Selecky*
 - New WA law says that pharmacies have to dispense any valid prescription.
 - Some pharmacies didn't want to out Plan B for religious reasons, so the pharmacies filed an injunction to prevent the law from taking effect.
 - Irreparable harm on pharmacists because of Constitutional right to religious freedom, but also irreparable harm to the public if they cannot get access to the drugs they need. The public interest in getting access to Plan B and not having to get sketchy abortions outweighs the religious freedom concerns.
 - i. Tough balance, but leans slightly in favor of the public
 - If you don't listen to a preliminary injunction, you may be held in contempt of court. Even if you think it is unconstitutional, you can't just not listen.
 - Must appeal to get the injunction overturned.
 8. *Winter v. NRDC* (Navy SONAR hurting Whales): NRDC sued seeking injunctive relief on the grounds that the navy's training exercises violated the endangered species act.
 - Court rejected injunction because outweighed given the harm of loss of training compared to an unknown number of animals hurt, and national security interests in favor of the Navy.
 9. *WT Grant* - Constitutional floor for deprivation without prior notice or opportunity to be heard in collections cases:
 - Judge decides + bond + post deprivation hearing

II. Personal Jurisdiction Analysis

- a. **Modern Conception:** Due process = notice & opportunity to be heard:
 1. D must have ties to state making it reasonable and fair to defend there
 - b. **Pennoyer conception:** Due process = jurisdictional restraints on courts:
 1. limits power of each state to its own sphere, yet each must respect other states' judgments. 14th amendment restricts power of state courts to:
 - a. their own citizens
 - b. persons physically present (served) in state
 - c. property physical present (attached) in state and
 - d. others who voluntarily submit to jurisdiction
 - e. supreme court interprets 14th amendment as giving individuals the right to only be haled to a place where the state sovereign has power
 2. **in rem:** jurisdiction over property (res) to determine ownership and control rights over res as to all the world (title, forfeiture, condemnation)
 3. **in personam:** "personal jurisdiction": Jurisdiction over D's body and all D's current and future property, can only make D pay property over which court has jurisdiction, but can file action to enforce judgment in jurisdiction where D's property is located using full faith and credit.
1. **Waiver Analysis:** was personal jurisdiction waived by failure to include the motion in the 1st substantive filing? (Rule 12h- omnibus)

How to raise the argument that the trial court lacks PJ over D

 - **Direct Attack:**
 1. To raise PJ as a defense to prevent judgment in first action
 2. If D appears in action, R12 says must raise PJ defense in 1st substantive filing with court or waived, cannot raise it later in a collateral attack if you lose in the direct attack
 - **Collateral Attack:**
 1. Happens in *Midcontinent*
 2. To challenge a default judgment as void because 1st court lacked jurisdiction
 - Rule 60b4 motion filed in 1st case after default judgment

- Opposing enforcement of default judgment (midcontinent)
 - Filing a new lawsuit that challenges default judgment
3. On collateral attack, you can ONLY raise arguments that the judgment is void, not that the decision is wrong on its merits
- So if you want to argue the underlying claim, you have to raise direct attack.
 - You have the right to be heard but only once.
2. **Contractual Analysis:** was there a forum selection clause in the contract that would give the state PJ?
- i. Waiving Personal Jurisdiction
- Waiver of a Constitutional right must ordinarily be knowing, intelligent, and yet can also be waived by a forum selection clause.
 - The only limits on waiver:
 - a. Fundamental unfairness (fraud) or
 - b. Extreme inconvenience (foreign country?) or
 - c. Essentially a local dispute
 - From *Carnival Cruise Lines v. Shute*: D was injured while a cruise was in international waters off the coast of Mexico. Filed an action in Washington, but court granted P's motion for summary judgment, since the contract between respondents and petitioner provided that all suits were to be brought in Florida.
 - Because respondents had notice of the forum clause, because petitioner's principal place of business was in Florida, and since there was no bad faith motive for the choice of a Florida forum, Florida was not an inconvenient forum. Since the choice of forum did not limit petitioner's liability in any way, petitioner did not violate the Limitation of Vessel Owner's Liability Act. Thus, the choice of forum clause in the contract was valid.
3. **Rule 4k Analysis:** (Territorial Limits of Effective Service)
- If meets 1B, C, or 2, then go to Constitutional Analysis
 - If meets 4k1A, go to statutory analysis
 1. Subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located
4. **Statutory Analysis:** Does the state long-arm statute permit PJ to be exercised? If yes, go to constitutional analysis
5. **Constitutional Analysis:**
- Is **General PJ** available?
 1. **Tag Jurisdiction:** was D served in forum (and were they there intentionally?)
 - if yes, then court has general PJ, if not, go to forum analysis
 - i. *Burnham v. Superior Court*: Plaintiff Dennis Burnham, a New Jersey resident, was served with process for divorce by his wife in California, while he was visiting California on business. Everyone said that CA had general jurisdiction, but disagreed on the reasoning
 1. Scalia 3: if personally served in forum, general PJ
 2. White adds: D's presence must be intentional
 3. Brennan 4: reasonableness & (weak) purposeful availment both present where D served while in state 3 days
 2. **Home Forum:** is D a citizen of the forum?
 - If yes, then court has general PJ, if not, go to nature of contacts analysis
 - Where is General PJ over a _____?
 - Corporation:
 - Where "at home": incorporated and where principal place of business
 - Possibly elsewhere in exceptional circumstances (*Perkins*)
 - Person:
 - Where domiciled
 - Unclear whether can have sufficient contacts elsewhere;
 - Where served (so long as D is intentionally in forum)
 - Partnership/LLC:
 - subject to general PJ where partners are subject to general PJ
 - *Daimler AG v. Bauman*: Respondent foreign residents brought an action against petitioner foreign corporation alleging that a foreign subsidiary of the corporation committed human rights violations in the foreign country. Upon the grant of a writ of certiorari, the corporation appealed the judgment of the U.S. Court of Appeals for the Ninth Circuit that personal jurisdiction over the corporation was proper based on the activities of a U.S. subsidiary.
 - The corporation was not amenable to suit in the forum state for injuries allegedly caused by conduct of the foreign subsidiary which took place entirely outside the United States. ****A corporation has general jurisdiction only where they are headquartered, incorporated, or in exceptional circumstances where they are "at home"** – see also *Perkins* WWII case where they were temporarily headquartered in US due to war in Philippines, but since no other forum was better, they said the court had General PJ.
- Is **Specific PJ** available? (must have all elements)
 1. **Relatedness:** Does cause of action have a "**substantial nexus**" to the contacts with the forum?
 - a. *Vons v. Seabest Foods*: The claim must bear a substantial connection to D's forum contacts. Says that proximate cause is too narrow and but for test would be too broad so announces the **substantial nexus test**:
 - Substantial Nexus Test:
 - **Sliding Scale** if defendant has big connections to the forum, the connection (nexus) between those contacts and the cause of action doesn't have to be as strong, and vice versa
 - b. *Snowney v. Harrah's*: Snowney, a California resident, sued Harrah's and other Nevada casino operators in a class action suit for breach of contract and false advertising. He brought suit in California state court. The trial court dismissed the suit for lack of personal jurisdiction. Snowney appealed.

- The court determined that the relationship with CA is such that they would anticipate being hailed to CA for a claim even if this particular one didn't come from that route. They could foresee being hailed for this kind of claim.
 - Not necessarily connection between particular claim but has to be the kind of cause of action defendant would expect based on their conduct in the forum state
 - Some jurisdictions have narrower and stricter rules for this than CA though
 - c. *Greenwell v. Auto-Owners Insurance*: CA resident owned apt building in Arkansas and bought an insurance policy in Arkansas from a Michigan insurance company. The policy included coverage of the Arkansas property and coverage for business operated from CA. After 2 fires, the insurance company said that both incidents were subject to a single policy payment limit.
 - Did the insurer have sufficient minimum contacts within CA to allow the state court to exercise personal jurisdiction over the company. No - insurer purposefully availed itself of the privilege of conducting activities in CA by writing a policy covering losses and damages that could arise in CA. However, no substantial nexus between insurer's activities in CA and present action because not suing for CA risk that came to fruition, but something that happened in AK. ****Not sufficient connection between the cause of action (claims on fires) and defendant's forum-related activity**
 - d. *Cornelison v. Chaney*: Truck driver was a resident of NE, but had a CA license and traveled to CA often. Killed someone in an accident in NV, but was hailed to CA.
 - The court decided that there was PJ because there were sufficient contacts with CA for D to be hailed there even though the relatedness was low.
2. **Purposeful Availment**: Did D avail itself of forum through contacts D controlled?
- a. *McIntyre v. Nicastro*: (Finger chopped off by British machine sold thru US distributor)
 - i. **Is sale of finished product through distributor purposeful availment?**
 1. Kenney 4: No, also must target, or seek to serve of specific (state) forum.
 2. Breyer 2: No, Need larger quantity of contacts than a single sale, or targeting. With a sufficient volume of sales you may get enough contacts for purposeful availment and therefore establish PJ.
 3. Ginsburg 3 (dissent): Yes, targeting the US is targeting each and every state for sales.
 - b. *Boschetto v. Hansing*: (P bought a car from D on eBay. Sued because the car didn't meet the description)
 - i. The court says no PJ because eBay is an open forum and the seller didn't purposefully avail himself to CA. It was only 1 sale, so therefore no substantial connection and therefore no PJ.
 1. A single sale through eBay was not enough to constitute purposeful availment
 - ii. Using eBay doesn't completely isolate you from PJ, but at a certain point if there is regular business, then there may be purposefulness (power sellers).
- **Specific PJ for Intentional Torts**:
 - focus on purposeful availment is not where the defendant reached out to the State, but where the harm will thus occur.
 - *Calder v. Jones*: An article was published about P in the National Enquirer which impugned the professionalism of an entertainer whose television career was centered in CA. The magazine was widely published in CA.
 - The jurisdiction over petitioners in CA is proper because of their intentional conduct in Florida calculated to cause injury to respondent in CA. Judgment of CA court of Appeal is affirmed.
 - Calder-effects test (for purposeful direction). The defendant allegedly must have:
 1. committed an intentional act,
 2. expressly aimed at the forum state,
 3. causing harm that the defendant knows is likely to be suffered in the forum state.
 - *Walden v. Fiore*: D stopped by TSA and questioned about large amount of cash they won at a casino. Their Nevada attorney sent proof of the legitimacy of the source of the money but before the money was returned though, petitioner helped draft an affidavits showing probable cause for the forfeiture of the funds which respondent says was false and misleading for failure to include information regarding the lack of drug evidence and the legitimate source of the funds.
 - The defendant, not the plaintiff or third parties, must create contacts with the forum State. In this case, the application of those principles is clear: Petitioner's relevant conduct occurred entirely in Georgia, and the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction. ****Walden reinterprets Calder to say that it is no longer the reaching out with an intentional tort that's important, but the location of the readers of the defamation because that is where the harm will occur.**
 - *Luxul v. NectarLux*: Luxul was NectarLux's (a CA company) exclusive independent rep for the East Coast, and was therefore given access to confidential product info. Eventually, Luxul started using NectarLux's copyrighted images and started selling their own product that was identical to NectarLux's. NectarLux filed suit in CA for breach of contract.
 - The court determined that because the harm was purposefully directed at CA (under the Calder test), the CA courts had jurisdiction to hear the case. ****This case extends the Calder purposeful direction test to apply to some breach of contract cases.**
 - **Continuous Relationship**
 - i. *McGee v. International Life Ins. Co.* (Single insurance policy in a state gave PJ) - one contact formed by D with state (insurance policy to resident) is enough for specific jurisdiction because the relationship was substantial and longstanding.

- i. Even though it was only a single point of contact, the single policy had existed for such a long time that it was considered enough to subject the insurance company to specific PJ in the state.
3. **Reasonableness:** Is it reasonable for the case to be tried in a certain jurisdiction?
- a. World-Wide VW Reasonableness Test (weigh factors)
 - 1. Burden on defendant v. benefit
 - 2. Forum state's interest
 - 3. P's interest in convenient and effective relief
 - 4. Interstate interest in efficiency
 - 5. Interstate interest in substantive social policies
 - b. *International Shoe v. State of Washington* (Modern Conception): Court says there is personal jurisdiction but moves away from the territorial grounding of *Pennoyer*. It uses the doctrine of minimal contacts. It says that Shoe falls under their jurisdiction because they derived a benefit from the state so it is not unfair to burden them with hailing them to the forum.

• **Doctrine of Minimal Contacts:**

- Minimum contacts test: due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."
 - Says contacts will not be enough if isolated, casual and unrelated to the cause of action
 - Is enough if systematic, continuous and related to cause of action
- c. *World-Wide Volkswagen v. Woodman*: Respondents bought an Audi from petitioner, Seaway Volkswagen, Inc. in New York. The following year they bought a new home in Arizona and while driving there, they were in an accident in Oklahoma. Another car struck the Audi in the rear and Kay Robinson and her two children were severely burned and filed suit while in the hospital in Oklahoma.
- i. Uses rule from *International Shoe*: A state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. Because we find that the petitioners have no "contacts, ties or relations" with the State of Oklahoma, the judgment of the Supreme Court of Oklahoma is reversed.
- d. *Asahi v. Superior Court of CA*: Foreign P sued foreign D about indemnity for liability for an accident that happened in the forum. Burden on D is high, state interest is low, interest of D in having suit heard in the USA is low, and there are foreign relation issues that favor against exercising personal jurisdiction over this case. Therefore no PJ.
- i. This case points to the reasonableness factors of:
 - 1. burden of D (because they were from another country)
 - 2. P's interest (Goes against because P isn't even from the forum in which he is trying to sue)
 - 3. Social Policies (State doesn't want to get mixed up with international trade agreements)
6. If you fail in your PJ defense:
- i. In CA: you have to file a writ of mandate immediately with the court of appeals to appeal the decision. If you don't appeal within 10 days, you lose the right to appeal on PJ.
 - ii. In Federal Court: you can wait until the judgement has been given at the end of the trial to appeal, and then just appeal normally.

III. Venue

a. **proper venue in federal court:**

- 1446(a):
 - if the case is filed in the state court, and removed, it can only go to the federal court "down the street"
- 1391(b):
 - 1. If all D's reside in the same state, District where any D resides (ignoring any D's who do not reside in the US) **or**
 - 2. Where a substantial part of events/omissions in claims occurred, or substantial part of property that is subject of suit is located **or**
 - 3. **ONLY if neither 1 nor 2 exists, in US (rarely), then**
 - Any district in which any D is subject to PJ
- 1391(c):
 - **People** (including permanent resident aliens) in US reside in **District where domiciled**
 - **Non-human D's** reside in all **Districts where PJ** exists over D
 - **Ds not in the US** can be sued in **any district** and residency is ignored
- 1391(d):
 - **Corporate Ds** reside in **Districts which, if were states**, would have PJ over D, or, if no District has PJ but state does, then the district in that state that has the most significant contacts
 - Venue can also be proper if both parties agree to it, or if there is a forum selection clause that directs the case to be tried in a specific form, and therefore venue.

b. **Motion to dismiss for improper venue:**

- Rule 12b3 & 1406
 - Must raise improper venue in 1st substantive filing
 - Court may dismiss **or transfer** to any proper venue

c. **Motion to change venue**

- A proper venue could be inconvenient, possibly leading to a transfer of venue
- 1404(a):
 - For convenience of parties or witnesses or in the interests of justice, by motion or sua sponte can transfer to any proper venue or to another venue to which all parties consent
- Can transfer cases only in one system:

- Federal to federal within the US
 - Or county to county within a state
- d. *Surface Supplied v. Kirby Morgan* - (Dive picture copyright case)
- P filed for declaratory judgement for non-infringement in the Northern District, and in response D filed a countersuit in the Central District. D then filed to dismiss the case in the Northern District. The court would only dismiss if venue is proper in the first case filed by P.
 - First, do general PJ test
 - Found that there was no principle of business in the Central District, and the fact that D is incorporated in CA doesn't give general PJ in the Central District.
 - Next, do specific PJ test
 - The passive website isn't purposeful availment by D, but if they had advertised actively in the district that would've qualified. Because this prong failed, they didn't look at nexus or reasonableness.
 - And because everything happened in the Northern District, this test would not be satisfied for venue.
 - When looking if it is proper to transfer to the Central District, first has to determine if venue would be proper in the Central District, and it is. But the center of gravity of the case and the convenience factors don't weigh in favor of a transfer, so therefore no transfer.

IV. Pleadings

- a. Service of Pleadings
- i. Complaints against new parties are served with a summons or via waiver (R. 4)
 - ii. Other papers (answers, motions, etc.) for parties already in the suit are served on attorney/pro se (R. 5)
 - iii. Difference between insufficient process and insufficient service of process:
 1. *process*—document itself had something wrong with it
 2. *service of process*—the other side didn't serve you properly
- b. Rule 7 - Correct Titles of Pleadings
- i. Pleadings Allowed, Motions and other papers, and disclosure statements
 1. Complaint (original or 3rd party)
 2. Answer (to a complaint, counterclaim, cross claim, or 3rd party complaint)
 3. Reply (to an answer, rare)
 - ii. Pleadings: Contain allegations and denials identifying the court's jurisdiction, the parties, their claims and defenses, and the subject of the suit.
- c. Rule 9(b) - Heightened pleading for Fraud and Mistake Defense
- Must state circumstances constituting fraud or mistake with particularity
- d. **Notice pleading: NO LONGER GOOD LAW** - All that is required for a claim is a short and plain statement of the claim that will give the D fair notice of what P's claim is and the ground upon which it rests.
- i. *Conley v. Gibson* (Railroad fired 45 petitioners and filled their positions with white men, union did nothing to protect them against discriminatory discharges)
- e. Rule 8 - What to include in complaints/answers
- i. 8(a)(1) Requires a "short and plain statement of the legal claim showing entitled to relief".
 1. **Plausibility Pleading - *Twiqbal* Standard**, no longer notice pleading from *Gibson*.
 - a. *Ashcroft v. Iqbal* (D detained for possible 9/11 connections and claimed mistreatment because he was a Muslim. It is possible that Ashcroft had a discriminatory motive to put D in harsh conditions, but it was not plausible. Therefore, the complaint did not state a claim.)
 - **Take all facts as true** (except little green men)
 - **Ignore any "legal conclusions"**
 - Then court must find claim to be **plausible** (somewhere between possible and probable)
 - **Plausible** = somewhere between possible and probable. Judges use their experience to determine what is plausible.
 - **Fact** = something that the party making the allegation might really know, something that can be observed or tested directly
 - **Inference** = something the alleging party cannot truly know, such as the opposing party's state of mind or whether the opposing party was involved in a secret agreement but which someone could infer based on the known facts
 - **Legal conclusion** = the legal significance of a fact or inference
 - conclusory allegations state an element of a claim without asserting the predicate facts and inferences.
 - b. *Swanson v. Citibank* (D claimed she was discriminated against for a loan based on race)
 - i. Because this was a fraud claim, Rule 9(b) requires that the alleging party state the circumstances that show the fraud or mistake (heightened pleading standard) -> malice, intent, or knowledge of the fraudulent behavior. Needs to be a specific complaint.
 - ii. Court held P met the plausibility standard because she identified elements of discrimination and included facts in support.
 - c. *Johnson v. City of Shelby*
 - P need not identify the correct legal claim in their complaint.
 2. Admit, deny, or state insufficient info for each claim
 - a. *Kule-Rubin v. Bahari Group* (P claims that D unlawfully withheld their wages)
 - If you neither admit nor deny, then the court assumes that you admit it.
 - If something is admitted, it is treated as a fact for purposes of the case even if it isn't actually true.
 - b. *Fuentes v. Tucker* (Drunk driver didn't want evidence about his intoxication brought into trial. D admitted that he was drunk so the evidence couldn't be brought in because it would no longer be a material issue)

- Once something is admitted, it cannot be brought up at trial because it is no longer a fact in question.

f. Rule 12 - Defenses

- 12(a)(1) - answer due 21 days after service of process or 60 days after waiver.
 - 12(a)(4) - if R12 motion is denied, you have 14 days after denial or 14 days after new complaint served (grant for more definite statement).
- 12(b)(2-5) - the "use 'em or lose 'em" defenses that must be filed in first substantive pleading (pre-answer motion or first answer)
 - Venue, improper service of process, improper service, and PJ
 - Affirmative defenses, compulsory counterclaims, and other similar claims can be added in through amending your pleading later on.
- 12(c) - motion for judgement on the pleadings
- 12(e) - motion for a more definite statement
- 12(g)(2) - you can make one pre-answer motion with the 14 day extension. You can't keep filing them to keep getting extensions.

g. Rule 8(c) - Affirmative Defenses

- i. You need to get in all of your 8(c) affirmative defenses in at some point before judgement.
 1. You can also include cross-claims, but you can later amend under Rule 15 to assert them later on.
 2. Affirmative defenses must be included, but they can be added later on through an amendment.
 3. *Ingraham v. US* (TX law put a cap on medical malpractice award amounts. P sued gov't for malpractice by an Air Force doctor)
 - a. DoJ should've brought affirmative claim for the cap on award in answer. At trial it was too late and already prejudicial.

h. Rule 11 - Signing pleadings and Sanctions

- i. When you sign a document or later advocate something in court, you are certifying that to the best of your knowledge, you have no improper purpose, are filing to increase the cost of litigation, for dilatory motives, or aren't filing in bad faith.
- ii. Claims, defenses, and other legal contentions are warranted by existing law and are not frivolous.
- iii. Factual contentions have evidentiary support or likely will after discovery
 1. You certify that you did due diligence into the applicable law and say that any factual assertions are backed up by evidence, but don't need to include that info.
 - a. You can say "on reasonable belief" if you don't have the info, but think that you can get it during discovery.
 2. *Business Guides v. Chromatic* - Client did not engage in reasonable investigation and the lawyer did not check into the claims, even after the court said that they should. Rule 11 sanctions were brought against the attorney.
 3. *Frantz v. US Powerlifting Assn.* - original sanctions filed by court were abnormally high, but still gave some lesser sanctions.
 4. *Kraemer v. Grant County* - Only need to do investigation that a reasonable attorney would do. No need to prove contentions beyond a reasonable doubt.
- iv. Denials of factual contentions are warranted by evidence or factual contentions
- v. Nature of Sanctions
 1. If opposing counsel wants to file for a Rule 11 sanction, must wait 21 days to file it. But the court can do it *sua sponte*.
 2. Rule 11 includes a provision that says that the losing party must pay both sides' attorney's fees in connection with the motion.
 3. Sanctions - If a Rule 11 violation is found:
 - a. Can issue monetary or non-monetary sanctions

i. Rule 15 - Amending the pleadings

- i. Timing for an Amendment
 1. You get one fee amendment within 21 days of serving pleading, or within the (earlier of) 21 days after responsive pleading or Rule 12 motion is served.
 2. Can amend after 21 days:
 - a. By consent of opposing party
 - b. By consent of court "**freely given when justice so requires**". Burden is on party opposite the amendment to show why it should not be granted.
 - i. **Foman Standard** - presumes leave to amend unless an amendment of the pleading:
 1. Undue Prejudice to Opposing Party
 2. Undue Delay, Bad Faith, or Dilatory Motive
 3. Repeated failure to cure a pleading's deficiencies (If they had a chance to fix the issue earlier, but didn't)
 4. Futility of Amendment
 3. After Rule 16 Scheduling Order - "**Good Cause**" Standard. Look for Foman points, but the burden shifts to the party amending to prove why there is good cause.
 4. After a Pre-Trial Order - no amendment allowed unless it would prevent "**manifest injustice**"
 - ii. A response to an amended pleading is due 14 days after amended complaint is served.
 - iii. Relating back
 1. Can only relate back if statute of limitations has passed for your claim and doing so would bring you back into limitations.
 2. Can be done when the new claim / defense arose from the same conduct, transaction, or occurrence set forth in the original pleading
 - a. *Barcume v. City of Flint* (D claimed discrimination in promotion by Flint PD, then wanted to add a sexual harassment claim)
 - i. Relating back can be based on a different legal claim if it has the same facts.
 - ii. New claim based on same event would relate back but a new claim based on a new event does not relate back.
 - iv. 15(c)(1)(A) - if you need to change the party,
 1. Must have the same transaction or occurrence requirement met.
 2. *Krupski v. Costa Crociere* (Filed a claim against Costa Cruises, which was the US marketing subsidiary of Costa Crociere, the proper defendant)
 - a. The new party must have known, or should've known within 90 days of filing the original complaint, but for P's mistake

V. Joinder

- a. Only the first crossclaim needs to be transactionally related - R13(g). The first counterclaim doesn't need to be transactionally related - R13(b).

- Rule 18 - After the first claim, you can add any claim whether or not they are transactionally related.
 - b. Rule 13(a) - **Compulsory Counterclaims**
 - i. Must be asserted before judgement (i.e. in the same lawsuit)
 - ii. Must be related to the same transaction or occurrence
 - Logical Relationship Test
 - a. The evidence is overlapping enough that it makes sense to be brought in the same suit for efficiency
 - b. *Appletree v. Casati* - P alleges he was falsely arrested by D, and D filed a counterclaim alleging P libeled and slandered him. Since D is alleging in his counterclaim that statements P has made in relation to the arrest are defamatory, the truth of D's version of the events of the arrest is an essential issue of fact in both the claim and counterclaim, so meets the logical relationship test.
 - c. *Jerris Leonard v. Mideast Systems* - D did not pay legal fees, and default judgement was entered against them. A year later D filed a malpractice claim against the fees matter, but the court held that it was compulsory at the time of the original case.
 - d. *Hart v. Clayton-Parker* - Hart was being sued by a collections agency, but she claimed that they were harassing her. The harassment requires separate evidence from the collections, and therefore is was not compulsory.
 - e. Claim is only compulsory if you have it at the time of the original filing
 - *Lansford v. Harris* (P and her husband filed a joint bankruptcy case in 1983. Harris (D) represented P in litigation, and lost the case. P then retained other counsel to represent them, and D then sued P to collect attorney's fees. P alleged that D wasn't entitled to the fees because he performed in an incompetent manner, but court ruled in favor of D. Meanwhile, bankruptcy appeal ruled against P but for her husband. P then filed malpractice against D, alleging that D failed to ask the court to treat her separately from her husband initially. D argued that 2 yr SOL for malpractice had already passed.)
 - Claim can't be compulsory if it does not exist at the time of the original filing.
 - iii. Exceptions
 - 1. Claim doesn't exist at the time of pleading
 - 2. Claim is pending elsewhere
 - 3. Claim requires unobtainable parties
 - c. Rule 13(b) - **Permissive Counterclaims**
 - i. Does not have to be transactionally related.
 - ii. Can be about anything as long as there's SMJ.
 - d. Crossclaims
 - i. Suing a co-defendant or co-plaintiff
 - ii. Rule 13(g) - the first crossclaim must relate to the same transaction or occurrence or property
 - Once you have your first crossclaim under Rule 13(g), Rule 18 allows you to bring other cross claims even if they aren't related
 - iii. Crossclaims are never compulsory
- e. Joinder of Parties
 - i. **Permissive Joinder** - 1 plaintiff sues multiple defendants or multiple plaintiffs sue 1 defendant
 - 1. Usually a group suing one person or one person suing a group.
 - 2. Reasonably Related (Rule 20) - Must arise out of the same series of transactions or occurrences and have a question of law/fact common to all. This is a very loose standard.
 - *Mosley v. General Motors* (P sued GM for discrimination, and 9 others wanted to join the lawsuit)
 - Even though there was no logical relationship between the discrimination against each person because the type and severity varied from person to person, there was a reasonable relationship because all of the discrimination arose out of the same company policy.
 - ii. **Compulsory Joinder** - Joint Tortfeasors are never compulsory (Rule 19)
 - 1. *Temple v. Synthes Corp.* (P had surgery where device manufactured by D was implanted in his back. Doctor performed surgery and after the surgery, device's screws broke off. P did not join the doctor in the suit)
 - Rule: It is not necessary for all joint tortfeasors to be named as Ds in a single lawsuit—merely a permissive party to an action against another with like liability.
 - iii. **Impleader** - Bringing 3rd party who has derivative liability into the suit (Rule 14)
 - 1. Use 4(k)(1)(a) or 4(k)(1)(b)
 - a. *Toberman v. Copas* (P sued D for damages from a car accident. D claimed that it was a 3rd party trucking company that caused the damages, not him)
 - i. Court held that D could not implead the 3rd party under Rule 14 because D was not claiming derivative liability, he was claiming that the 3rd party was solely liable.
 - b. *US v. Joe Grasso, Inc.* (Owners of boats sued the IRS to return extra taxes that they paid for their fishermen. The IRS then tried to implead the fishermen and captains, claiming that they should be derivatively liable for the taxes should they have to return it to the owners)
 - i. Can't share tax liability, so there is no derivative liability, so you cannot implead the fishermen and the captains in the lawsuit against the company.
 - 2. Bulge Rule - Rule 4(k)(1)(B)
 - a. PJ over a 3rd Party D impleaded under Rule 14 if they are served within 100 miles of the courthouse, even if PJ would not exist under the usual Specific or General PJ methods.

VI. Subject Matter Jurisdiction Overview

- a. **Power of the court over the type of cases brought before it**
 - i. By statute, Congress has given federal courts narrower SMJ than Constitutional limits (statutes narrower than Constitution)
 - ii. State courts given SMJ by state law
 - 1. State courts of "general SMJ" can hear any type of case unless this type is heard exclusively elsewhere (Tax, bankruptcy, ect...)

- iii. SMJ is NOT waivable
 - iv. Lack of SMJ can be raised at any time, even after judgement has been entered.
 - For a valid judgment:
 - Notice (Mullane, and in federal court, Rule 4)
 - PJ – jdx over the person
 - SMJ – jdx over the type of case court can hear
 - By statute, Congress has given federal courts narrower SMJ than Constitutional limits (statues narrower than Constitution).
 - v. Party asking federal court to exercise SMJ bears burden of pleasing & proving it, but no proof needs to be offered unless SMJ is challenged, or court raises issue sua sponte.
- b. **How to choose state court v. federal court**
- i. No Choice for:
 - **State Court Only:**
 - Family law
 - Probate (Cases involving property of deceased)
 - **Federal Court Only:**
 - Admiralty
 - US (or its agencies) are a party
 - Patent
 - Copyright
 - Bankruptcy
 - ii. If you have a choice (if there is a Federal Question or Diversity SMJ) then consider:
 - Expertise of bench
 - Jury pool
 - Docket backlog or speed
 - Responsiveness to local concerns v. independence from local politics
 - Political leaning of bench
 - Procedural rules
 - Attorney familiarity with forum and its impression of attorney
- c. Article III of the Constitution
- Constitution only creates Supreme Court, so it is up to Congress to create the lower courts
 - Federal question cases = re: Constitution, Treaties, federal law
 - Diversity = controversies between states/citizens of different states
- d. **In order for a case to have Federal SMJ there must be either:**
- i. Federal Q:
 - Constitution – federal law must be an “ingredient” in the case.
 - §1331 – P’s case must depend on federal law.
 - ii. Diversity:
 - Constitution – one P must be diverse from one D
 - §1332 – “Complete” diversity & >\$75,000 (i.e., \$75,000.01)
 - iii. Supplemental:
 - Constitution – Claim arising from same “common nucleus operative facts” as “trunk” Federal Q or Diversity claim
 - §1367(b) – excludes claims by P’s that destroy complete diversity if trunk claim is based on diversity
 - iv. Others:
 - Admiralty, cases against U.S. or against foreign countries, bankruptcy, patent, copyright
- e. If a federal court realizes it doesn’t have SMJ, even if none of the parties complained about it, it must *sua sponte* get rid of the case
- if filed in federal court, dismisses case
 - if filed in state court and then removed to federal court, then remanded back to state court

VII. Diversity SMJ:

- A. Rationale for Diversity SMJ --> Congress feared court could be biased against citizens of another state
 - a. Constitution says one P must be diverse from one D
 - b. §1332 - Diversity Statute
 - 1. **Complete diversity** AND
 - No plaintiff may be from the same state as any defendant
 - Citizenship is where parties lived at the time of filing - i.e. you can't move after filing to create or destroy diversity.
 - 2. **Amount in Controversy must be >\$75,000**
 - c. Mass action statute -> Congress says with mass torts you only need minimal diversity
 - d. Class action statute -> Congress says w/ class actions, in cases over \$5 million, you only need minimal diversity
 - e. Burden on whoever wants to move to federal court to show federal court has jurisdiction
- B. **Complete Diversity Under §1332**
 - **4 Types of Complete Diversity**
 1. Citizen (State A) v. Citizen (State B)
 2. Aliens on one side only – alien v. citizen or citizen v. alien
 - No complete diversity if alien is an legal permanent resident residing in the same state as an opponent
 3. Citizen (State A) v. Citizen (State B) + aliens on one or both sides

- No diversity SMJ over alien v. alien plus citizen only on one side (e.g. can't have aliens on both sides without citizens on both sides)
- 4. Foreign state as P v. citizen
- Determining Citizenship for Diversity
 - Individuals
 - Rule: For purposes of diversity jurisdiction, a party is domiciled in the state where their true, permanent, and fixed home is located.
 - The intention to remain there is important to determine this
 - *Mas v. Perry*: Wife and French national husband sued landlord for having 2-way mirror in their apartment. The couple wanted to have the case tried in federal court, but needed to show diversity. Even though both parties were in LA, P argued that they were MS residents because they no intention to permanently reside in LA because she was just a student there. Court says she is a citizen of MS because it was the last place that she lived where she had the intention to remain indefinitely (where she grew up with her parents). It doesn't matter that she didn't intend to return to MS.
 - Corporations
 - Rule: Citizen where it is incorporated, and its principle place of business ("nerve center").
 - Nerve center = where the officers of the corporation direct the corporation (usually headquarters).
 - A corporation can only have a single principle place of business. If the officers are not at a single location, the court decides,
 - *Hertz Corp. v. Friend*: D's CA employees filed class action wage lawsuit. D wanted to remove to federal court, citing diversity, but P's argued that they were both citizens of CA, and therefore couldn't invoke diversity.
 - Corporations usually prefer federal court (Its more expensive, procedural, and conservative than state court).
 - Small businesses and individuals prefer state court (It's cheaper and more "shoot from the hip").
 - Partnership & LLC
 - Rule: Every place where partners are citizens (can be over 50 places)
 - *Belleville Catering*: Case went all the way to trial, ending in a \$200,000 verdict. It turned out that several litigants were non-diverse because LLCs are citizens where all partners are citizens, so there was no SMJ. The parties incorrectly believed that LLC citizenship was treated the same way as corporations.
 - Trust
 - Rule: If trustee controls, then citizenship of trustee; if members or beneficiaries control, then their citizenships
 - *LMP Ninth Street v. US Bank*: Is the citizenship of all of the certificate holders of the trust used to determine the trust's citizenship, or is it the citizenship of the trustee (the person running the trust)?
 - There are 2 types of trusts
 - i. Where all of the members of the trust have power to manage and vote on the trust's actions = the trust is a citizen wherever each member is a citizen.
 - ii. Where the trust is managed by a trustee = the trust is a citizen where the trustee is a citizen
 - Estate
 - Rule: Where deceased was a citizen (§1332(c)(2))
 - Insurer
 - Rule: In action against insurer even where insured not a D, where incorporated & principal place of business & where insured citizen (§1332(c)(1))
 - U.S. Citizen Domiciled Abroad
 - Rule: Not alien & not a citizen of a state; no diversity SMJ

C. **Amount in Controversy Under §1332**

- a. For diversity SMJ, the claim has to exceed \$75,000, exclusive of interest and costs (service of process fees, filing fees, translator fees, etc.).
 - Interest and costs are not included because you won't know these amount at the time of filing.
- b. If the jury awards P less than \$75,000, court can order that P pay D's costs, and may impose additional costs on P.
 - This does not include the other side's attorney's fees.
- c. A case can be thrown out for lack for amount in controversy, only if D can prove that the amount claimed is impossible for P to recover.
- d. Injunctive relief can also be included to calculate amount in controversy - i.e. the cost to P or D for granting, or not granting the injunction.
- e. Aggregation rules to get to > \$75,000
 1. One P can aggregate all claims against one D
 2. One P cannot aggregate claims against separate Ds
 3. Two Ps cannot aggregate their claims UNLESS it is an undivided claim for which they're suing:
 - Like if 2 people own a house and someone graffiti's it, both owners can't claim the damages.
 - Or a shareholder suit for injury to entire corporation
 - Ps can join their claims in one suit under Rules 18 and 20 even if they cannot aggregate the amounts in controversy, but the federal court must have SMJ over each claim (for example, if one claim is under \$75,000, might be able to join through supplemental SMJ instead).

VIII. Federal Question SMJ

- A. A federal question case is where a claim is brought pursuant to federal statute or Constitution
 - a. Constitution - Federal law must be a "ingredient" in the case
 - b. §1331 - P's case depends on federal law --> the federal question has to be:

1. **A pivotal element**

2. **In P's "well-pleaded" complaint**

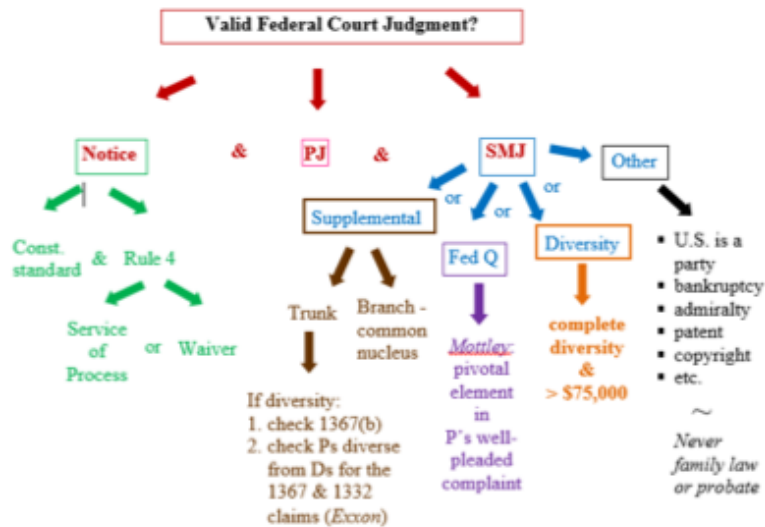
- If the court were to imagine a hypothetical complaint that P could've filed that contained the minimum allegations of law and fact to state a claim, that minimum would raise a federal question.
- Defenses and counterclaims cannot come into consideration of whether a federal question is present.
- If parties incorporate federal law into their contract, no federal question is created.
- *Louisville & Nashville Railroad Co. v. Mottley*: Ps were injured on railroad and settled for free passes for life. 36 years later, Congress passed a statute saying railroads can't issue free passes. Railroad discontinued passes and Mottleys sued for breach of contract. P filed in federal court, conceding that while breach of contract is not inherently a federal question, the claim should be handled in federal court since D would raise the federal statute outlawing free passes as their defense, and P would counter that the act was unconstitutional. SCOTUS held that there was no federal question since P's initial claim for breach of contract did not arise out of a federal question.

B. Preemption

- a. Congress can pass a federal law that preempts state law on a certain issue, which would make it so it falls under federal question SMJ.
 - Ex: ERISA preempts state law regarding employee benefits, so a suit by an employee against her employer about those benefits has federal question SMJ.
- b. Doesn't have to be heard in federal court, since state court can also hear federal question cases
 - State courts just can't hear those types of cases reserved exclusively to federal courts

IX. Supplemental SMJ

- A. Allows claims that would not normally be able to get to federal court on their own to be tried in federal court because they are a part of the same claim or controversy as another claim that is allowed in Federal Court.
- B. §1367 requires:
 - a. A "**trunk claim**" that the court independently has SMJ over.
 - b. A "**branch claim**" that is a part of the same case or controversy as the trunk claim
 - c. Gibbs Test: "**Common Nucleus of Operative facts**"
 - To determine if claims are from the same case or controversy, you need to see if they arise from a common nucleus of operative facts.
 - A logical relationship between the original claim and the claim being added, and the test is that there's an overlap in the operative facts, that for reasons of efficiency and fairness, they ought to be heard in the same suit.
 - The claim must have key facts in common
 - The "same transaction or occurrence" test is sufficient, but is more specific than is required by Gibbs.
 - Ex: Rule 13(g) crossclaims for property would not be same transaction or occurrence, but would arise from a common nucleus of operative fact.
 - Claims that could not be litigated in a 2nd case due to preclusion
 - A compulsory counter claim always arises out of a common nucleus of common facts from the original claim.
- C. §1367(b): **Diversity trunk exception**
 - a. Original Ps cannot bring supplemental claims against persons made parties under R14, 19, 20, or 24.
 - b. Supplemental claims are always ok when:
 - "trunk" is not diversity OR
 - brought by a D
 - c. Note: Ps joined under Rule 20 or class members joined under Rule 23 can bring a supplemental claim for less than the amount in controversy of §1332 (Exxon)
 - This is NOT "aggregation" because they are not summing the amounts
 - d. *Owen Equipment v. Kroger*: Plaintiff, a citizen of Iowa, filed suit against Omaha Public Power district, a Nebraska citizen, in federal district court, where the basis of federal court jurisdiction was diversity. Respondent amended the complaint naming Defendant, an Iowa corporation, as an additional defendant. The initial claim between OPPD and Owen was granted summary judgment so the only remaining parties are both from Iowa.
 - There is no diversity. Even if the OPPD claim hadn't been dismissed, there still would have been no diversity. Diversity is destroyed regardless of the fact that Kroger hid their Iowa citizenship.
- D. 1367(c): District Court **MAY** decline supplemental SMJ if:
 - a. Novel or complex state law
 - b. Supplemental claim predominates
 - The main claim is minor compared to the supplemental claim
 - c. Original trunk claims are dismissed
 - d. Other compelling reasons in exceptional circumstances
- E. 1367(d): Statute of Limitations tolling provision
 - If a claim is dismissed and SoL still hasn't expired, then SoL is tolled for 30 days to give P time to refile in state court.
- F. How to Assess Whether There's SMJ Over a Counterclaim
 - First, look to see if there is SMJ:
 - Diversity?
 - Fed. Qu.?
 - Supplemental?
 - Common nucleus of operative facts?
 - If yes -> then look to see if it's a compulsory counterclaim or a permissive counterclaim (Rule 13)
 - To see if compulsory, use same transaction or occurrence test (analogize and distinguish to cases that we've read)



X. Removal and Remand

- **Removal (If the case starts in state court and is sent to federal):** §§ 1441, 1446, 1447
 - **Who:** All Ds must join petition to remove (except on claims lacking SMJ because they will be sent back anyway)
 - Can't remove if any of the Ds that have been served is a citizen of the state where the action is pending in state court (§1441(b)(2))
 - Idea that a single in-state D mitigates the out of state bias
 - P can't remove her own case since she filed in state court in the first place. (§1441(a))
 - If D improperly removes a case, they must pay P's costs for dealing with the improper removal.
 - **Where:** to Federal District and Division in which the state court is located (§1441(a))
 - **What:** notice of removal automatically removes entire case to federal court without state court review. Then it will be accepted in federal court if:
 - If diversity SMJ exists over the case OR
 - If federal Q SMJ exists over the claim
 - Federal court must remand claims within the case lacking SMJ
 - **When:** If a case is removable when filed, then you have 30 days to remove. If a case becomes removable later on, you have 30 days from whenever the thing filed that allowed removal was filed.
 - Cannot be removed on the basis of diversity jurisdiction if more than 1 year after the complaint was filed, even if it did not become removable until after 1 year.
 - Unless P acted in bad faith to prevent removal (e.g. lowballing damages)
 - If P wants to add non-diverse D -> federal court has discretion to say yes and remand back to State or say no and not permit the amendment (D cannot add a new party to destroy diversity).
 - How is federal Q SMJ determined?
 - Well-pleaded complaint when removal filed
 - How is diversity SMJ determined?
 - Amount pleaded in good faith and citizenship when case was filed of those parties in case when removal notice filed
- **Remand (If the case starts in state court, goes to federal court, and is sent back to state):**
 - You can only remand if the case was removed first
 - **Who:** Any party can move for remand or the court can remand sua sponte
 - **Where:** back to the state court from which the case came
 - **When and Why:** anytime for lack of SMJ
 - After removal of federal Q case claims lacking SMJ
 - Upon granting motion if it destroys diversity
 - §1447c: Within 30 days of removal for technical reasons (not substantive)
 - **Notice of removal is NOT a substantive filing** so does not affect rule 12 use 'em or lose 'ems
 - But usually a party must file a motion to remand
 - If joinder after removal will destroy SMJ, the court can deny joinder, or permit joinder and remand the action to state court (only if originated in state court)
 - For supplemental SMJ the court has discretion to remand, but for federal question or diversity, if the claim qualifies, the court cannot remand.
- *Caterpillar Inc. v. Lewis:* Lewis (KY) wanted to stay in state court, so he brought suit against Caterpillar (DE) and Wayne (KY) to destroy diversity. After the suit was filed, Liberty Mutual (MA) added a subrogation claim because they had to pay workers comp to Lewis and wanted to collect if Lewis won. Lewis settled with Wayne almost a year after filing suit, so Caterpillar then immediately removed to federal court since the 1 year was about to run out and they thought Wayne was now no longer involved after the settlement. However, Wayne didn't settle with Liberty, so there wasn't complete diversity. Lewis filed for remand (because there wasn't actually complete diversity), but the court incorrectly denied the request (and you can't appeal an interlocutory order). By the time it goes to trial, Liberty had settled with Wayne and diversity was restored. Lewis loses at trial, and appeals. On appeal 6th circuit says that because there was not complete diversity at the time of removal, the judgement is vacated. SCOTUS reversed, saying that no one was harmed by the incorrect

diversity and it promotes efficiency to uphold the judgement since it would be a waste of time to redo it. Additionally, diversity jurisdiction rests on the idea that federal courts are fair and neutral, so Lewis would not be prejudiced by having the case tried in federal court.

- **Rule:** So long as diversity exists at the time of trial the judgement is valid and the court won't reverse for an earlier error.
- R61 - Harmless Error
 - Courts will disregard any mistakes as long as they don't prejudice either party.
- *Grupo Dataflux v. Atlas*: GD is a citizen of Mexico and TX. Atlas, a partnership, is a citizen of TX, DE, and Mexico (where all partners are citizens). The matter went to trial, and a jury awarded Atlas \$750,000 in damages. After trial, but before entry of the judgment, Dataflux moved to dismiss the lawsuit on the ground that the court lacked subject matter jurisdiction. The citizenship of a limited partnership is based on the citizenships of its partners. It was revealed that, at the time of filing, Atlas's partners were citizens of DE, TX, and Mexico. Thus, aliens on each side of the case precluded diversity jurisdiction under § 1332, despite the fact that the partner from Mexico had dropped out prior to trial there was no constitutional diversity at the time of filing. Therefore, the judgement was not upheld.
 - **Rule:** Citizenship had at the time of filing stands even if it later changes. A case can become removable by a party dropping out (Like Caterpillar), but a case cannot become removable by virtue of a party moving and changing its citizenship.

XI. Erie

- A. Erie analysis only comes into play when there is a discrepancy between federal and state law in a diversity claim.
- B. State law claims in federal court apply federal procedural law and state substantive law.
 - **Substantive Law:** governs conduct that may or may not lead to a dispute (law that governs how people act in the real world)
 - **Procedural Law:** governs that the resolution of disputes after they have arisen (law that governs all aspects of litigation)
- C. Twin aims of Erie were to stop forum shopping and avoid inequitable administration of laws; didn't want nonresidents to be able to pick their law and not follow state law if they didn't want to.
- D. *Erie RR v. Tompkins*: As P walked along D's railroad tracks in PA, a train passed and an open door struck P and knocked him partially under the train. P's right arm was severed. P filed in NY Federal Court since P wanted Federal law applied to the case because it stated that the railroad was liable even if it was guilty only of "ordinary negligence," and railroads have a duty of care to people traveling along the tracks. D, however, wanted PA state law to apply because P would be considered a trespasser and D would not be liable unless their conduct was "wantonly" negligent (normal negligence is ok). The trial court applied federal general common law. This was affirmed by the appellate court and appealed to SCOTUS. Here, the court should look to NY state law which says to look at the state law of the state in which the tort occurred. Therefore, PA law should be applied.
 - **Rule:** There is no federal general common law. Federal courts when adjudicating diversity claims, must use substantive state law of the state in which the federal court sits and apply it to state law claims in federal court. However, the federal courts apply federal procedural law.
 - Some states have common law that says to use another state's law in some situations (use the state law of the state in which the tort occurred, use the law of the state in which a contract was signed, ect...)
- E. After Erie, the question then becomes how to determine whether a rule is substantive or procedural.
 - a. York and its Progeny -> "Outcome Determinative"
 1. *Guaranty Trust Co. v. York**: P sued D in equity for breach of fiduciary duty in federal court based on diversity of citizenship. Defendant argued that the state statute of limitations had run and that the court was required to apply the state statute of limitations under the Erie doctrine. Here, the SoL is substantive, so state law applies.
 - **Rule:** If a rule is "outcome determinative" is substantive and state law must govern.
 - SoL is substantive because it is based off of legislature or court's idea of how long people should maintain evidence of liability to a claim.
 - Bound up with the right to bring a claim at all; defines the lifespan of the claim.
 - *the reasoning is no longer good law, but the holding is.
 2. *Cohen v. Beneficial Industrial Loan Corp.*: In order to bring a shareholder suit, state law required P to post a bond. Court found the requirement to post bond was substantive -> Court decided that, viewed from mid-litigation, the rule to post bond would be "outcome determinative" since P had not posted bond, therefore making the requirement substantive.
 - **Rule:** When viewed from mid-litigation, if rule would be "outcome determinative," then it is substantive law.
 - There would be a different outcome if the court held that the law was procedural because then federal procedural law would apply and this did not require P to post bond. That means that if this case were to be heard in state court it would've been dismissed and would've been allowed in federal court. By classifying the rule as substantive, it makes it so the state law applies and the outcome is the same in state and federal court.
 - Different outcomes would be unfair and encourage forum shopping.
 3. *Ragan v. Merchants Transfer*: Apply state law that the SoL doesn't toll (stop) until you serve somebody; even though for federal claim, it stops when you file. At this point and time, would be outcome determinative, because didn't achieve service by then, so the case was beyond limitations and thus thrown out, so would be a substantive rule.
 - b. *Byrd v. Blue Ridge Rural Electrical*: P was employed by D and was injured on the job. P sued for negligence. D argued that P was a statutory employee, which are not allowed to sue their employers (instead must accept statutory benefits as compensation for injury). The issue of whether Byrd qualifies as a "statutory employee" must be decided by the trier of fact. The state practice would have the factual question decided by the judge. However, the federal practice is to leave such a question up to the jury. The 7th Amendment governs in federal court and cannot be displaced by a state rule since the federal policy of having the jury answer questions of fact is essential to the federal system.
 - **Rule:** When federal and state procedure cover the same issue, weigh the state v. federal interests to decide which law applies.
- C. *Hanna v. Plumer*: P, an OH resident, got into a car accident with D, a MA resident. D died and P sued his estate for personal injuries in federal court. P served D's executor in compliance with Rule 4, however, MA state law required an executor be served by hand. The issue is whether the appropriate standard for service of process in a federal diversity action is Rule 4 or whether state rule for service should apply.

- **Rules Enabling Act (REA) [An Act of Congress]:** "The Supreme Court shall have the power to prescribe, by general rules...the practice and procedure of the district courts of the U.S. in civil actions. Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury..."
 - Congress used its Article III powers to enact the REA.
 - The REA gives the Supreme Court the power to make the Federal Rules of Civil Procedure.
 - The REA imposed a limitation on the Supreme Court's rule making authority -> can't abridge, enlarge or modify any substantive right (either state or federal)
- **Rules of Decision Act (RDA):** "The laws of the several states, except where the Constitution...of the U.S. or Acts of Congress [e.g. the REA] otherwise require or provide, shall be regarded as rule of decision in civil actions in the courts of the U.S. in cases where they apply."
 - State law trumps federal, except where the Constitution or Congress says so. Then use federal rules.
 - Under RDA, Rule 4 is an act of Congress, so it should be accepted, and state law should not overrule Rule 4.
- To assess if a federal rule of civil procedure is legally valid (REA Test):
 1. Rule must be arguably procedural (Constitutional Standard)
 2. Rule shall not abridge, enlarge, or modify any substantive right
 - If the federal rule passes this 2 part test, then you use the federal rule instead of the state rule.
 - If the Federal rule does not pass the test, the federal rule is treated as a custom and instead use the *Hanna* Factors Test to determine whether to use state or federal law:

Test: For a federal judge-made rule/practice, where law is arguably procedural, & different federal & state rules/practices cover the same issue, apply **balancing test:**

Factors weighing in favor of using **federal arguably procedural law** are:

Relates only to the litigation process.

Ex ante, unlikely to substantially affect outcome.

Will not induce forum shopping or discriminate against forum state Ds.

Federal court system's interest in uniform procedure.

Important federal interests served (Const. rights).

Analogous to rules to which Supremes have held federal procedure applies: jury right, burden of pleading, discovery tools

Factors weighing in favor of using **state arguably procedural law** are:

Regulates human behavior outside litigation.

Ex ante, likely to substantially affect outcome.

Encourages forum-shopping & discriminates against forum state Ds.

Presumption that state law bound up with state substantive rights applies.

Analogous to rules to which Supremes have held state rule applies: standard of care, burden of proof, conflict of laws, statute of limitations

d. *Shady Grove v. Allstate*

- Shady Grove treated a patient who was insured by Allstate. Allstate paid the claim, but paid late, and refused to pay statutory interest. Shady Grove filed a class action against Allstate because Allstate routinely paid late and were not following the law that required the payment to be paid or denied within 30 days. NY law doesn't allow class action suits to recover penalties or statutory damages, but Rule 23 has no such limitation. A majority of the Court held that Rule 23 governed regarding class action status and refused to apply the New York statute. Under the REA, a Federal Rule is valid if it deals with "practice or procedure" and does not "abridge, enlarge, or modify" a substantive right. A majority in Shady Grove concluded that Rule 23 is valid.
- When do we use the 3 Shady Grove opinions?
 - When you are faced with a state law claim in federal court and you are trying to decide whether a Federal Rule of Civil Procedure should apply or a state law rule should apply to an issue in the case.
- How do you use the 3 Shady Grove opinions?
 - Does the Constitution apply?
 - Is there a federal statute that applies?
 - **Scalia Test**
 1. Does a Federal Rule of Civil Procedure cover the issue (meaning does it answer the question posed in the case)?
 2. Is that Federal Rule arguably procedural (i.e., within Congress's constitutional power)?
 - Is FRCP procedural on its face? -> which Scalia takes to mean whether it governs the "the manner and the means" of resolving disputes (i.e., meets the REA test)?
 - If the answer to both questions is yes, then apply the Federal Rule and not the state law rule.
 - if the answer to (2) is no then you treat the Federal Rule like a federal judge-made rule, and apply the *Hanna* factors test.
 - **Stevens Test**
 1. Does a Federal Rule of Civil Procedure cover the issue?
 2. Is the state right that the FRCP alters procedural or substantive?
 - Just as with Scalia's analysis, if the answers to both are yes, then apply the Federal Rule and not the state law rule.
 - If the answer to (2) is no then you treat the Federal Rule like a federal judge-made rule, and apply the *Hanna* factors test.
 - **Ginsburg Test**
 1. First see if there is a conflict between the FRCP and the state rule
 - If the conflict is avoidable (Ginsburg will usually think it's avoidable) -> use *Hanna* factors to decide which to apply

- If the conflict is unavoidable (Very rare) -> apply FRCP unless it abridges, enlarges, or modifies and substantive state right
- What we do not know about Ginsburg's analysis is what to do if the conflict is avoidable and the Hanna factors test favors the Federal Rule of Civil Procedure; Prof. Willis's guess is that you do both. We also don't know what to do if the conflict is unavoidable and the Hanna factors favor the state rule; my guess is that if the Federal Rule complies with the REA, you use just the Federal Rule. But, note that if the conflict is unavoidable, she might then use Stevens's REA test (whether the state law being displaced in substantive or procedural) and find that the Federal Rule violates the REA and therefore is treated like a judge-made rule and is subject only to the Hanna factors test, meaning that you use the state rule.

XII. Discovery

A. Discovery Devices

- **Informal:** Basic things like googling people, talking to witnesses, non-parties, getting background information, look on Facebook, Instagram, Twitter, ETC.
 - The other side DOES NOT need to know!
- **Initial Disclosures:** Persons with knowledge and documents or things in support, damage calculations, insurance agreement.
- **Testifying Expert Disclosures:** Identify ALL, disclose report for specially employed
- **Pretrial Disclosures:** Just before trial, disclose ALL witnesses, depositions, transcripts (even if only for impeachment)
- **Depositions:** Sworn testimony, normally oral, video taped, very expensive to do; no more than 10 depositions per side without court permission.
 - In order to depose non party, must use a subpoena.
- **Interrogatories:** Sworn written testimony, parties only.
- **Requests for Production of Documents or Things:** Parties and non parties
- **Physical or Mental Examination:** Need court order! Parties only.
- **Requests for Admissions:** Only parties
- Note: parties must supplement as per R. 26(e)

B. Scope of Discovery - R26(b)

- **Scope:** very broad; can seek info or docs relevant to any claim or defense in the case; or by court order, ask to do any discovery relevant to the subject matter
 - need not be admissible as evidence
- **Limit:** no privileged matter or work product unless exception applies
- **Quantity & quality limits:** Court required to limit discovery if:
 - i. the discovery requested is unreasonably cumulative, duplicative, or obtainable from more convenient, less burdensome, or less expensive source
 - ii. party had already had ample opportunity to get the discovery
 - iii. burden or expense outweighs likely benefit, considering stakes
- Need court order or consent from parties for:
 - a. > 10 depositions per side or > one 7-hour day per deponent
 - b. > 25 interrogatories by each party on each party
 - c. any formal discovery prior to Rule 26(f) discovery planning conference

C. Attorney-Client Privilege: nearly absolute but waivable. Survives death of the client.

1. Communications (only applies to the actual communication/transcript, not the facts)
2. Between client (or potential client) and lawyer (or lawyer's representative)
3. Without presence of others
4. For the purpose of obtaining legal advice (NOT for crime or tort)

• Examples

- What were the circumstances like at the worksite on the day of the incident? --> NO privilege
- What did you tell your attorney about the worksite? --> privilege
 - Your Paralegal, your investigator, your translator etc. are extensions of the attorney and also covered by privilege
 - Anything said in front of another person that is not the attorney blows attorney-client privilege

D. Work Product Protection: Only covers product, not facts

- When do not provide certain documents, citing privilege, you must say that you are withholding them by making a privilege log. This is so the other side can challenge the withholding if they think it is improper.
- **Opinion work product:** impressions, opinions, or theories of the attorney
 - Physical manifestation of their work (notes, recordings, pictures, documents, anything the attorney created)
 - Probably never discoverable in cases for which work product was created
 - Case-by-case determination of whether protection is overcome in subsequent litigation where opinions in work product are at issue
- **Ordinary work product:** other material prepared in anticipation of litigation
 - Only discoverable if demonstrates:
 1. Substantial need AND
 2. Undue hardship to obtain by other means
 - Just because something is expensive to do doesn't mean that it's an undue hardship.
- R26(b)(3)(C) exception for witness statements:
 - Any person may obtain their own written, adopted, recorded, or transcribed statement.
- *Hickman v. Taylor*
 - A tugboat sank and 5 of 9 crewmembers died. D hired an attorney to interview the surviving victims and 3rd party witnesses, and there was a public hearing about what happened. P's attorney requested D's notes and memos about what happened and

his interviews. Court found no substantial need nor undue hardship because P could interview the witnesses and could get the transcripts from the public hearing. Just because the witnesses memories had faded is not enough to overcome the work product protection.

- R26(b)(3)(A-B)
 - Outlines work product protection and exceptions
- R26(e)
 - Parties have a duty to supplement or amend what they have provided if they learn that what was previously provided was materially incorrect or incomplete.
 - Also must certify that their responses to discovery requests are complete and correct.
 - One can request a motion to compel, for protective order, or for sanctions.
 - But attorneys should try to work it out themselves first.
 - If you lose, you usually have to pay the other side's fees and expenses.
- R37
 - Attorneys certify that discovery requests are consistent with the rules/law, and for no improper purpose.
 - R37 is similar to R11 in that it can impose sanctions if attorneys fail to make proper disclosures or cooperate in discovery.
- *Upjohn v. United States*
 - Auditors found P's officers were bribing foreign officials and deducting the bribes as business expenses. P's general counsel conducted an internal investigation and sent surveys to those employees involved to get more info about the bribes. P then turned itself in to the IRS. The IRS requested the surveys, but P asserted work product protection and attorney/client privilege. Court said that communications between the company attorney and all employees should be protected, not just management.
 - Rule: In the corporate context, the attorney-client privilege applies to not only those high-level employees who have the authority to act on the legal advice of the attorney, but also to any of those employees who provide information to the attorney so that he may give such legal advice.
 - A communication between an employee of a company and counsel is privileged when:
 - a. The information is needed for legal advice for the company
 - b. The information has to be within the scope of the employee's job duties
 - c. Employees need to understand the communication is confidential
 - Employee must be told/understand that counsel does not represent them, but the company
- Privileges and Protections are Waived if:
 - 3rd party given access to communication or product
 - Relationship between attorney & client put at issue (malpractice)
 - Necessary to protect 3rd parties from imminent danger (child and elder abuse)
 - Prevent client from committing perjury on the court

XIII. Dispositions

- Types of Dispositions = All the ways to defeat a case
 - Default judgment
 - Failure to defend a case, or as a sanction
 - Voluntary Dismissal
 - Usually by consent (settlement)
 - Involuntary Dismissal file a complaint but then don't pursue the case
 - For failure to pursue a case, or as a sanction, or for failure to state a claim, lack SMJ or PJ, improper venue, process or service.
 - Judgment on the Pleadings
 - For failure to state claim or defense
 - Summary Judgment
 - Considering matter outside of pleadings, no genuine dispute of material fact.
 - Judgment as a Matter of Law (JMOL)
 - Based on evidence admitted at trial, no reasonable jury could find for non-movant (Directed verdict/JNOV).
 - Jury verdict or Judicial Findings of Fact and Conclusions of Law
- Motion to Dismiss - R12(b)(6)
 - Court looks at the pleadings to test claims for legal sufficiency and factual plausibility (Twiqbal Standard)
 - Assuming facts in complaint are true, do they plausibly add up to a legal claim? -> if not, then the case is dismissed.
- Summary Judgement - R56
 - Court looks beyond the pleadings and instead looks at the evidence that the parties are going to be able to produce at trial -> have they found enough at discovery using judicial resources so that it's worth sending to trial?
 - Court will not assume any facts are true --> instead, viewing the evidence in the light most favorable to the nonmoving party (the party opposing the motion for SJ), court must assess whether that evidence is enough to go to a jury.
 - Court will only grant summary judgment if there is no genuine dispute of material fact.
 - **Material Fact**: essential to an element of a claim or defense
 - **Genuine Dispute**: actual (objective) and good faith (subjective) controversy; a dispute a *reasonable jury* could resolve in favor of non-movant.
 - SJ motions are usually filed by D because D only has to knockout 1 element of the claim, while P has to prove all of the elements.
 - P can motion for summary judgement on:
 - On an affirmative defense
 - Counterclaim

- If D admits an element of their claim
- Affidavits
 - Enough to use as evidence for the non-movant
 - Must be on personal knowledge and competent to testify
 - Set out facts that would be admissible as evidence at trial
 - Can explain if you need more time or discovery to get more evidence
- Burden of Pleading
 - What is the burden?
 - Plausibility standard under R8
 - Heightened pleading standard under R9 (Ex: fraud).
 - Who bears the burden?
 - P bears burden for their claims and affirmative defenses to counterclaims
 - D bears burden for counterclaims and affirmative defenses
- Burden of Production at SJ or JMOL Stage
 - What evidence must be produced at this stage of litigation?
 - The movant without the burden of proof (typically D) must show non-movant (typically P) cannot prove an element of their claim/defense, either:
 - Through evidence negating an element, OR
 - By pointing to absence of evidence on the record
 - Non-movant with burden of proof must show evidence from which a reasonable jury must find for it.
 - Who must come forward at any given stage with evidence?
 - At SJ stage, the moving party must first come forward to make its showing.
 - The burden shifts to non-moving party to produce its evidence.
- Burden of Proof
 - What is the burden?
 - Proof required to persuade factfinder of claim, damages, or defense (most civil cases = preponderance of the evidence standard)
 - Who bears the burden?
 - P bears burden for their claims and affirmative defenses to counterclaims
 - D bears burden for counterclaims and affirmative defenses
- Rule: To move for summary judgment, you don't need evidence negating the other party's claim; its enough if you can show that the non-moving party doesn't have sufficient evidence on an element of their claim.
 - *Celotex Corp. v. Catrett*
 - P is suing for wrongful death due to asbestos exposure by D. D moved for SJ. D tried to point to a lack of evidence (as opposed to offering affirmative evidence) to support the motion for SJ. SCOTUS held that you don't need to affirmatively negate an element, just need to point to an absence of evidence for the P's claim. Then burden shifts to the non-movant to come forward with evidence supporting the claim.
- Rule: You don't just look at whether a reasonable jury could find for the non-movant in the abstract, but rather, in terms of a particular claim and with reference to the burden of proof they would bare at trial.
 - *Anderson v. Liberty Lobby*
 - P sued D for libel. D moved for SJ. The court should use the evidentiary burden of proof required at trial to decide whether a reasonable jury could find for the non-moving party. Here, the burden of proof is "clear and convincing evidence," so you would need to show more than a "scintilla" of evidence to defeat SJ.
 - **Brennan's dissent** - it is a jury function to evaluate the weight of the evidence
 - Deprives party of their 7th amendment right to have a jury
 - Rule: In deciding a summary judgment motion, all facts are viewed in the light most favorable to the non-moving party unless no reasonable jury would be able to accept that version of the facts.
 - *Scott v. Harris*
 - P was a fleeing criminal in a car chase with D. D's cruiser camera video taped the entire pursuit. During the chase, D rear-ended P's car to get him to stop, causing P to fly off the road and hit a tree. P was paralyzed, and sued D for violating his 4th Amendment right against unreasonable search and seizure. P said that he was not driving in a way that endangered the public and that rear ending him was unnecessary, but the video from D's cruiser showed otherwise. SCOTUS held that the video was sufficiently compelling that no jury could accept P's version of the events in light of the video, and that therefore there was no dispute of material fact to survive SJ.
 - *Tolan v. Cotton*
 - Police officer shot P. there was a genuine dispute of material fact, so it survived SJ and went to trial to sort it out.
 - JMOL (R50)
 - JMOL Motion: At trial after party fully heard on issue, before case sent to jury (generally when party moves for JMOL); cannot rely on evidence anticipate will put on.
 - So P must introduce sufficient evidence from which a reasonable juror could find that every element of their claim exists.
 - Renewed JMOL Motion: After jury verdict, must have filed earlier (i.e. before jury went out) JMOL motion ("deferred" decision on motion to avoid violation of 7th amendment) – have requirement must file earlier motion is because 7th amendment says judge cannot reexamine jury's decision, so basically way around and justify by saying not reexamining jury's decision, reexamining earlier JMOL motion.

- JMOL motion at close P's case-in-chief: Tests whether P met burden of producing sufficient evidence for reasonable jury to find for P on each element of P's claim.
- JMOL motion at close of D's case-in-chief: Same tests as to D's affirmative defenses.
- JMOL motion at close of evidence and renewed JMOL motion: Taking all reasonable inferences from evidence at trial in favor of non-movant and uncontradicted, unimpeached evidence from disinterested witnesses in favor movant, no reasonable juror could find for non-movant.
- Purpose of JMOL -> jury decision may not be based on evidence if there is insufficient evidence -> to constrain the possibility that a jury may act capriciously (a check on jury under the Due process clause)
- *Reid v. San Pedro*: Court overturned jury verdict when there was evidence equally favoring both parties; the evidence showed that P's cow could have entered the property through D's fence that was in disrepair, and there was also evidence that the cow entered through P's open gate. P did not prove P's case by a preponderance of the evidence. Nobody saw the cow, so no way for jury to bridge the gap of evidence.
 - Rule: if the evidence is equally balanced, the court must grant SJ for the D.
- *Galloway v. United States*: Crazy man files suit for insurance benefits. 8 year gap of time where didn't introduce any evidence about his condition.
 - Held: JMOL was proper, the 8-year gap in evidence is too large of a gap to allow the jury to fill. If allowed jury to fill this gap, then that decision must have been based purely on speculation and that would violate the Due Process clause.
 - Dissent: This is jury's role – to fill these gaps in evidence. Looking at 7th amendment.
- *Reeves v. Sanders*: Age Discrimination claim against employers. Holds enough evidence to deny JMOL and enough evidence for jury to decide there was discrimination.
 - Held: The gap lies in the heart and minds of the decision maker, and that's a gap the jury is allowed to fill (in some sense giving jury larger gap to fill than Galloway). In discrimination case going to always have to make inferences because can't get into person's head.

XIV. Trial

- Sequence at Trial
 - Can bifurcate or trifurcate based on rule 42
 - Jury Selection
 - Impanel the jury panel (jurors plus alternates in state court)
 - Opening Statements:
 - P then D
 - Tell client's story, previewing evidence, not law
 - P's Case-in-Chief
 - Witnesses: direct, cross, redirect, re-cross, etc.
 - Exhibits: lay foundation, move to admit, then publish to jury
 - JMOL
 - Motion usually by D
 - D's case:
 - JMOL motion possible but rare
 - Rebuttal
 - P's rebuttal, then D's rebuttal, then close of evidence
 - JMOL motion by either or both sides, as to any claim or affirmative defense
 - Closing Arguments:
 - P, then D, then P (closing close)
 - Recap evidence as argue
 - Tell jury exactly what want them to do, with reference to instructions and verdict sheet
 - Jury Instructions:
 - Deliberations
 - Verdict
 - In federal court, must be unanimous
 - Then entry of judgment
 - Renewal JMOL motion
 - Only if prior JMOL motion was made
- Civil Jury Right
 - U.S. Constitution and CA Constitution reserves jury trial right in some civil cases
 - Ideal is jury will bring the wisdom of a cross section of the community to bear in each case
 - Flipside is jury can also bring community prejudices
 - 7th Amendment
 - "In suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."
 - **When does the 7th amendment civil jury right apply in federal court?**
 - Even if no Constitutional right, Congress can give statutory right to jury trial
 - Decide by issue, not by case
 - some issues and relief go to jury, some to judge

- Historically, juries make decision about liability and damages and judges make decisions about injunctions or other types of equitable relief
 - If P sues for damages and injunctive relief, damages go to the jury and injunction is decided by the judge.
- Historical Test for whether Constitutional right to a jury:
 - If cause of action existed prior to 1791 and was in law courts, have jury right
 - As to causes of action not existing prior to 1791, decide using factors:
 - By analogy** to matters tried prior to 1791 in law courts and
 - By reference:** to type of relief:
 - Typically damages cases are legal, thus jury right applies, BUT:
 - Restitution is equitable, awarded by judge
 - Some causes of action existing in 1791 without \$ relief were at law
 - Jury decides whether to impose civil penalty but judge decides the amount
 - Curtis v. Loether*
 - P accused D of housing discrimination for not renting to her. D was white, P was black. D requested a jury trial while P was seeking an injunction and damages. Court held that P had a right to a jury for her damages claim because the Fair Housing Act damages was considered a suit a common law. Since the main form of relief under FHA is damages, this points towards a jury right.
 - How to determine if a statutory claim falls under the 7th Amendment:
 - Analogize to similar cases at common law
 - Look at the types of relief available under the statute
- Mechanics of Civil Jury**
 - Demand Rule 38:**
 - Must be in pleading or within 14 days of last pleading directed to issue
 - Cannot withdraw demand without consent of the other parties
 - Selection:**
 - Questionnaire followed by voir dire performed by Court and/or counsel
 - Unlimited challenges for cause
 - 3 peremptories per party by statute
 - In assembling pool and exercising challenges, race or sex discrimination is unconstitutional
 - Discrimination claim – “Batson” challenge
 - Rule 48 provides that a jury can be anywhere from 6-12 people
 - We want a critical mass of jurors to get a reasonably broad cross section of society/experiences.
 - Instructions:**
 - Must be given to counsel prior to closing argument
 - Must object so Court has the opportunity to cure before case goes to jury
 - Verdict:**
 - Minimum of 6 jurors is waivable Constitutional Due Process requirement
 - Federal Rules require unanimity unless the parties consent to non-unanimous
 - Rule 49
 - General Verdict:** black box decision in favor of one party, with damages figure but no explanation
 - General Verdict with Interrogatories:** Black box decision and answers to questions
 - If the answers are consistent but irreconcilably conflict with the verdict, court must:
 - Send case back to the jury
 - Grant new trial OR
 - Enter judgment based on the answers
 - If the answers are inconsistent and some irreconcilably conflict with verdict, court must:
 - Send case back to the jury OR
 - Grant a new trial
 - Special Verdict:** answers to questions from which the Court determines the verdict
 - If answers are inconsistent, the court must:
 - Send the case back to the jury
 - Grant a new trial OR
 - Eliminate inconsistent answers and enter judgment based on the remaining answers
 - **court must attempt to reconcile jury answers “by exegesis if necessary”
 - Gallick v. Baltimore & Ohio R.R. Co.*
 - P was bitten by a bug that was attracted to a poorly maintained stagnant pool. The bite got infected and P lost both legs. The Court of Appeals said there was insufficient evidence from which a jury could reasonably conclude that the bite was a result of D's negligence in maintaining the property. SCOTUS held that the evidence that the pool attracted the bug was sufficient for the jury to make their own determination and bridge the gaps in evidence. Jury gave a special verdict, but there were inconsistencies in their answers to certain questions.
 - Rule:** When courts are faced with seemingly inconsistent answers to jury questions, the court should try to reconcile the answers “by exegesis if necessary” (Look for what the jury must have thought behind what ended up getting on the page).
 - Motion for a New Trial** - Rule 59 (or mistrial if raised during trial)
 - Standard:** substantial justice requires a new trial, meaning error is likely to prejudice moving party **PLUS**

- a. verdict or damage award is contrary to clear weight of evidence
 - unlike JMOL, court can weigh credibility
 - **OR**
- b. Errors in trial process:
 - Admission of improper evidence over movant's objection
 - Jury, witness, or opposing counsel misconduct
 - **Juror Misconduct:**
 - Internal deliberations (even intoxication) are inadmissible for any purpose
 - Only outside influence on the jury can impeach verdict such as:
 - Outsider in deliberations or
 - Juror "independent research"
 - **Opposing Counsel Misconduct:**
 - *Sanders-El v. Wencewicz*: Opposing counsel made a show in front of the jury by throwing D's rap-sheet up into the air to show how long it was after the judge said that counsel could not present the rap-sheet as evidence of D's past bad behavior.
 - Prejudicial happenstance, or
 - Something that taints the jury and makes it so they can't judge the case impartially -> Witness dying on the stand, etc...
 - Improper instruction to which movant timely objected
 - **Procedure:** must file within 28 days of judgment (use-it-or-lose-it)
 - **Appeal:** if granted, not a final order, so cannot appeal until after a new trial

XV. Appeals in Federal Court

- Usually must be filed within 30 days:
 - But 10 days in CA state court for denials of motion to quash summons on grounds of lack of PJ.
- Usually can only appeal from a final judgment (dismissal or judgment), except (i.e. when we will allow an interlocutory appeal):
 - Preliminary relief (one element to obtain is likely to succeed on the merits),
 - By permission from the appellate court - §1292
- Usually appeals will only review:
 - a. Errors revealed by the record (because appellate court wasn't there, really can only review things that were in the actual record in the case),
 - b. To which a timely objection was made in the trial court (because want trial court to have a chance to fix things), AND
 - c. Which materially affected the outcome – R61 (must be material because if it's something that really didn't affect the outcome, then waste of resources to allow appeal)
 - Can't appeal harmless errors
- Standards of Review:

| <u>Name</u> | <u>Meaning</u> | <u>When Applies</u> | <u>Examples</u> |
|----------------------|----------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Plenary or "de novo" | No deference to trial court, starts anew | Legal issues at stake: reviewing court is in the same position as the trial court | Whether X is plausible; R 56 and 50 motions; Erie; preclusion; jury instructions; motion for SJ |
| Abuse of Discretion | Defer to decisions within the bounds of the trial court's discretion (not deciding whether they were right or wrong) | Case management issues, applications of law to fact such as evidentiary issues | Rule 11 sanctions; Rule 15 (amending pleadings) prejudice determination; venue transfers; evidentiary rulings; Rule 59 new trial motions; misconduct; joinder/ case management) |
| Clear Error | Very deferential, only if definite and firm conviction that TC erred (only if convinced that the TC was wrong) | Issues of fact: trial court observes witness demeanor, etc., and appellate court does not | Facts |
| Plain Error | Only if manifest miscarriage of justice | When no objection was made in TC | Anytime no objection is made in TC |

I. Preclusion

- Clash between the correctness of decision v. need for response (finality and certainty) and cost to litigants, courts and public of litigation (efficiency, fairness to D, etc.).
- Must be raised as an affirmative defense in original OR any amended pleading.
 - The person claiming something is precluded bears the burden to show that.
 - Federal, NOT state, law decides preclusion because if they didn't, it would wildly affect forum shopping if parties got to pick and choose preclusion law.
- Offensive and Defensive Preclusion

- **Offensive Preclusion:** Using issue preclusion to advance a claim (i.e., affirmative defense when P seeks to foreclose D from litigating an issue the D has previously litigated unsuccessfully in an action with another party).
 - Claim preclusion cannot be used offensively.
- **Defensive Preclusion:** Using claim or issue preclusion to defeat a claim (when a D seeks to prevent a P from asserting a claim the P has previously litigated and lost against another D).
- **Difference between offensive & defensive preclusion**
 - With defensive, encourages a P to bring together all Ds in first suit because if judgment rendered against P (i.e. P couldn't prove an element of their claim), then can't try to use the same claim against a different D – will be precluded. In offensive, a P would benefit from suing separately from a different D because if judgment entered against D in first case, then P2 can use that, and if judgment entered in favor of D in first case, D would still have to litigate second case because don't know why judgment be entered in favor of D (a lot of ways to lose).
- **Rule Preclusion = compulsory counterclaim rule**
 - Party with counterclaim meeting requirements of R13(a) (existed at time of service responsive pleading, same transaction or occurrence, etc.) is precluded by a valid final judgment from asserting the claim in other litigation.
- **Claim Preclusion = res judicata**
 - A valid final judgment on the merits precludes further litigation between the same parties or their privies of claims arising from the same or a connected series of transactions or occurrences, that could have been asserted in a prior suit.
 1. **A final valid judgment**
 - a judgment on a claim, counterclaim, crossclaim or a third party claim is final once issued by the trial court even if appealed (until reversed or successfully challenged collaterally) – to be valid must have had PJ, SMJ, and notice
 2. **On the merits**
 - includes default judgments, dismissals on merits or as sanctions, unless dismissed without prejudice (e.g. for lack of PJ, SMJ, proper venue, or notice, or judge explicitly says case being dismissed without prejudice)
 3. **Precludes subsequent litigation**
 - undecided when prior judgment entered
 4. **Between the same parties (could be P or D) or their privies**
 - Second party is a legal successor in interest to the first party (e.g. new owner of a company),
 - Parties are in a principal-agent relationship (e.g. employer-employee, insurance company-insured),
 - Both suits are controlled by the same party (one is agent for other, but very difficult to prove that's true), OR
 - Second party was represented in prior case (interests aligned, first party knew representing second party and second party had notice it was being represented)
 - ** Common MC question: P cannot sue a D for claim and lose on claim, then sue another D falling within one of the above categories with the first D, on same claim.
 5. **Of a claim arising from the same or connected transactions or occurrences**
 - so logically connected that for reasons of fairness and efficiency ought to be heard in one suit (substantial overlap of witnesses and proof)
 6. **That was or could have been asserted in the earlier-decided suit**
 - if first court lacked SMJ over the claim and litigant seeking to assert preclusion could not have filed that case in or moved it to a court with SMJ, then would not preclude claim.
 - *Fetter v. Beale* – P won judgment for bruise to his head. P sued again later after a part of his skull fell off. P's 2nd claim was precluded. (Defensive preclusion)
 - The law of the court that issued the opinion decides the claim preclusion effect -> Because the parties in the first case cannot plan for every compulsory counterclaim that might come up
 - *McConnell* – husband and wife are injured in a car accident. Husband voluntarily dismisses his claim in the wife's suit in state court with prejudice. Claim is precluded because it involves the same personal injury from the same bank account.
 - Dismissing with prejudice IS "on the merits"
 - *Moitie* – Claim precluded. Moitie 1 and Brown 1 were joined with other claims against Ds in an antitrust case. The case was dismissed and all parties except for M1 and B1 appealed. M1 and B1 filed a different state law claim, M2 and B2. M2B2 was removed to federal court and dismissed based on res judicata because essentially the same claim was litigated in M1B1
 - HYPQ: Husband and wife get into same accident and husband brings tort suit, but wife doesn't, she is NOT precluded from bringing her own tort suit because not in privity (might be different if both have claim based on a contract they both signed).
 - HYPQ: If have a tort claim against now ex-spouse that was presented in family court during the divorce proceedings to show the marriage should be dissolved, NOT precluded from bringing that tort claim against husband after the divorce proceedings because family court does not have jurisdiction over tort claims (but issue preclusion could risked in this situation if the issue was relevant or necessary to first finding and one that arose in the first case).
- **Issue Preclusion = collateral estoppel**
 - Any valid final judgment in which a party has sufficient motive and (full and fair) opportunity to litigate an issue precludes relitigation by that party or its privies of the same issue if the issue was actually litigated and necessary to the prior judgment.
 1. A final judgment
 - need not be on merits, could be on PJ, SMJ, etc. issue
 2. In which a party had full and fair opportunity to litigate an issue
 - cannot bind party who lacked motive or opportunity to pursue or defend in prior case.
 3. Precludes relitigation by that party or its privies
 - but nonparties can assert issue preclusion against a party or privies (criminal case outcome binds D and prosecutor but not victim in subsequent civil suit)
 4. Of the same issue of fact or application of law to fact

- issue, not and entire claim; note that meeting higher standard of proof meets lower standard but not vice versa
5. If the issue was actually litigated
 - not a default judgment or potential issue, but need not involve an evidentiary hearing (could have been decided on papers), AND
 6. The decision on the issue was necessary to the prior judgment:
 - Test: If the issue had been decided differently, would the same judgment have been entered?
 - If yes, the issue was not necessary (i.e. could that issue have formed the basis for an appeal? Or would it have been “harmless error”?)
 - Often when trying to use issue preclusion defensively, cannot show the issue was necessarily decided in a particular way (i.e. making it necessary) to the first litigation because difficult to tell (unless special verdict form) why the D won the first time, but not the same problem when issue preclusion being used offensively because in order for a P to win, must prove each and every element of their claim.
- *IRS v. Sunnen* – Whether the royalties that were paid to the wife were part of the wife’s income. D’s income tax liability during 1929-31 from a 1928 contract that D assigned to his wife was litigated in 1935, and the Tax Board concluded that D’s royalties were not taxable income. In the present case, the court applies res judicata regarding the same contract but the liability during 1937-41.
 - Proceeds from identical contracts signed in other years: **Interpretation of a phrase in one contract in NOT controlling precedent as to the same phrase in another contract -> different contracts raise different issues**
 - Proceeds from the same 1928 contract in other tax years: **Each year is a separate issue as to tax liability**
 - **Neither interpretation nor tax year have a preclusive effect.**
- o Non-mutual collateral estoppel
 - a. **Non-mutual**: means that it’s not the same two parties in the new suit, but a new third party is trying to use litigation the previous party took part in to estop them from raising the same issue with their current case.
 - b. *Parklane Hosiery v. Shore* – Shore (P) filed suit against Parklane (D) for releasing false proxy statements. After case filed the SEC filed suit against D claiming same thing. In SEC suit, P wasn’t allowed to join, no jury, and all SEC had to prove was the proxy statement was false. SEC won suit, and court ruled proxy statement was false. Then P’s suit came to trial and P wanted to estop D from litigating whether the proxy statement was false because it was barred by issue preclusion since already proved. D argued this violated their right to jury trial if can’t litigate that issue again.
 - Held: P still needs to prove causation and damages, but P is allowed to use nonmutual offensive collateral estoppel to preclude D from trying to relitigate the issue of whether the proxy statement was false. Also says the right to a jury trial in this case is not such an important, key, thing in this litigation. And in weighing the factors, they all favor allowing issue preclusion.
 - Note: The presence or absence of the jury does not make a difference to issue preclusion.
 - c. Factors for deciding whether to permit use of nonmutual collateral estoppel:
 1. Extent to which prior suit was fully adversarially litigated:
 - Stakes of prior suit for party against whom estoppel invoked (if stakes were small and D didn’t have much incentive to litigate in first case, estoppel may be inappropriate)
 - Competence and experience of counsel in prior suit
 - Foreseeability of this sort of later litigation when prior suit was litigated
 2. Differences between prior forum and this forum:
 - Limitations on procedures available in prior forum (e.g. second court’s civil procedure rules allow broader discovery, rules of evidence allow crucial evidence that was inadmissible in first trial, long-arm statute broader in second case, etc.)
 - Inconvenience of prior forum
 - Differences in applicable law in prior suit
 3. Fairness and incentives on parties:
 - Whether inconsistent prior judgments exist, so relying on one is unfair
 - Whether party seeking to use estoppel should in fairness have joined prior suit, rather than waiting to pick whether to use prior litigation
 - New evidence of changed circumstances since prior litigation
 - Public interest in relitigation of claims, especially claims against government
 - d. *** For non-mutual collateral estoppel, must first determine if claim meets all the requirements for issue preclusion, and then consider the factors for whether/not to permit non-mutual collateral estoppel.