Civil Procedure Outline[1]

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Contents

§1 Structure of a Lawsuit

1.1 Preliminaries

1. Find a lawyer.
2. Learn the facts.
3. Determine the dispute and remedy.

1.2 Which Court?

1. *Territorial jurisdiction*: there must be a minimal level of contact between the defendant and the court's territorial sovereign (e.g., the state).
2. *Subject matter jurisdiction*: federal courts have higher thresholds (e.g., interstate disputes in amounts above $75,000). In cases of overlap, plaintiff can choose.
3. *Venue*: usually must have some connection to the place where the dispute occurred.

1.3 Complaint, Filing, and Service of Process

1. *Complaint*: plaintiff's statement of claims. Sometimes called petition or declaration.
2. *Filing*: file complaint at the courthouse. This is when the suit commences.
3. *Summons*: served to each defendant.

1.4 Responding to the Complaint

1. Preliminary objections
   (a) E.g., disputes over territory or venue.
   (b) Motions (to dismiss or quash).
   (c) *Memorandum of law*: the legal arguments supporting a request.
2. *Default judgment*: occurs if the defendant does nothing. Can be set aside if justified.
3. Pleading in response to the complaint.
   (a) In complaints, defendant don't try to prove their case–only to assert what he hopes can be proved.
   (b) *Cause of action*: the violation of law in question.
   (c) *General demurrer*: "even if you're right, you're not entitled to recover anything." I.e., so what?

(d) By default, defendants are deemed to admit allegations they don't deny.

4. Defendant's Answer:
   (a) *Negative defenses*: contesting the facts.
   (b) *Affirmative defenses*: contending other factual circumstances.
   (c) *Motion to strike*: e.g., if plaintiff thinks defendant's answer is insufficient in point of substantive law.
5. Some jurisidictions allow the plaintiff to make a reply to the defendant's answer; otherwise, the answer is deemed denied by default.

1.5 Discovery, Summary Judgment, Settlement

1. *Discovery*: each side investigates its opponent's claims.
2. *Interrogatories*: written questions.
3. *Request for production*: documents, opportunities to inspect, other relevant items.
4. *Depositions*: Party questions a witness on camera and/or before a court reporter.
5. *Summary judgment*: Can be granted if something crucial can be determined beyond legitimate dispute.
6. *Affidavit*: Sworn statement.
7. *Pretrial conference*: attempt to resolve the dispute before litigating.

1.6 Trial

1. *At law*: dor damages; can be tried by a jury.
2. *In equity*: e.g., for an injunction; normally triable without jury.
3. Jury selection: voire dire, challenged for cause, limited number of peremptory challenges
4. Trial process:
   (a) Opening statements
   (b) Case in chief (plaintiff)
   (c) Direct and cross examination of witnesses
   (d) Plaintiff rests
   (e) Defendants can request judgment as a matter of law if they believe the claim is invalid

(f) Case in chief (defendant)

(g) Adverse witness: plaintiff himself is called

(h) Either side can again call for a judgment as a matter of law

(i) Closing argument (plaintiff)

(j) Closing argument (defendant)

(k) Judge instructs jury; jury deliberates and returns verdict

(l) Jury often (but not always) must be unanimous

1.7 Post-Trial or Post-Judgment Motions

1. *Non obstante veredicto*: judgment notwithstanding the verdict, e.g., in response to earlier motions for judgment as a matter of law.

2. Parties can seek a new trial on the basis of procedural errors

1.8 Appeal

1. Can only happen after final judgment, even if there's a gross error early in the process

2. *Interlocutory appeal*: in some jurisdictions, appeal can be made before final judgment

3. *Mandamus*: requires the judge to do something

4. *Prohibition*: on the judge; usually comes from an appellate court in the form of a writ of prohibition

5. *Reversible error*: something on which an appellate court can reverse a decision and call a new trial

6. *Harmless error*: didn't affect the outcome of the trial

7. Appellate review is almost always on the basis of law, not on fact, unless there is "no substantial evidence" to support a factual determination

8. Appellate court will usually only consider objections that were raised in the trial court

§2 Provisional Remedies

2.1 ***Kubrick*: Statute of Limitations**

1. When does the statute of limitations clock begin? ***United States v. Kubrick*** Plaintiff was rendered partially deaf from neomycin treatment at the VA. He discovered the possibility of malpractice only after the two

year statute of limitations had expired. The issue is whether the claim accrues when the plaintiff is aware of the existence and cause of his injury or when he is also aware of the possibility of malpractice. The Supreme Court (White) holds the former (Stevens dissenting).

2. Rule vs. standard:
   (a) White: there's a clear rule here.
   (b) Stevens: a rule is unnecessary—all we need is a looser standard that can be applied on a case-by-case basis.
3. Why does the statute of limitations exist? (see CB 54-55)
   (a) Protect against the "cloud of litigation"
   (b) Protect against "stale claims"
   (c) Keep the plaintiff from sitting on his rights

Themes throughout the class:

1. Procedure as *policy*: how does procedure express values about justice?
2. Procedure as *strategy*: how do actors use process strategically?
3. Procedure and *power*: whom do rules benefit? Does access to rulemakers matter? Why have rules at all? How do state vs. federal issues come into play?

2.2 Due Process Requirements

1. Fifth Amendment: "No person shall be ... deprived of life, liberty, or property, without due process of law"
2. Fourteenth Amendment: "No **State** shall ... deprive any person of life, liberty, or property, without due process of law"
3. Remedies:
   (a) *Plenary*: Usually awarded at the end of a lawsuit. Usual types: compensatory and punitive damages, injunctions, and declaratory judgments.
   (b) *Provisional*: Can be awarded at any time while a lawsuit is pending. Usual types: attachment (seizure of property), temporary restraining orders, preliminary injunctions. They are "designed to stabilize the situation pending the final disposition of the case or to provide security to the plaintiff so that if she succeeds in obtaining judgment she will be able to enforce it effectively."[1]

[1] Casebook p. 46.

2.3 *Fuentes*: Writs of Replevin

1. What are the due process requirements for ex parte decisions?

2. Do statutes that allow writs of replevin only upon ex parte application and posting of bond violate the Fourteenth Amendment?

3. *Fuentes v. Shevin* In multiple consolidated cases, a creditor was granted, ex parte, a writ of replevin for the property of a debtor in default (which was allowed by statutes in Florida and Pennsylvania). The court found that these statutes violate the Due Process Clause (Fourteenth Amendment). Absent extraordinary circumstances, due process requires notice and hearing before deprivation.

   (a) Justice White: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must must first be notified. The right to be heard is a basic part of procedural fairness.

4. Key due process protections: **notice** and **opportunity to be heard** (in a meaningful way)

Similar cases:

1. *Mitchell v. W.T. Grant*: A similar statute in Louisiana was upheld on the grounds that (1) the applicant for the writ must declare the facts in a certified petition or affidavit, and (2) the showing must be made to a judge, not merely a court official.

2. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*: A similar Georgia statute was struck down because (1) the affidavit can be filed by the petitioner's attorney, who need not have any direct knowledge of the facts of the dispute, and (2) the writ is issuable by a court clerk, not a judge.

The minimum constitutional requirements for valid ex parte prejudgment and seizure appear to be:

1. An application grounded in facts.

2. Issued by a judge, not a court official.

3. A speedy hearing.

4. Only applicable to a limited range of transactions[2].

[2]See California's version of these statues, Casebook p. 82 top.

2.4 *Doehr*: Prejudgment Attachment of Real Estate

1. Does prejudgment attachment of real estate (a) without prior notice or hearing, (b) without extraordinary circumstances, and (c) without a bond satisfy the Due Process Clause in the Fourteenth Amendment? *Doehr*: no.

2. *Connecticut v. Doehr*: Under a CT statute, DiGiovanni won a $75,000 prejudgment attachment on Doehrs home in conjunction with a civil action for assault and battery. The court unanimously held that the CT statute would allow deprivation for cases where the defendant's property claim would fail to convince a jury. Without exigent circumstances, a preattachment hearing is required.

3. Concurrences:

   (a) Marshall, Stevens, O'Connor, White: Bonds are also necessary in all cases.

   (b) Rehnquist, Blackmun: Liens can serve a useful purpose (e.g., for laborers to enforce their interests over delinquent landowners). Also, the terms "bond" and "exigent circumstances" are overly vague.

4. *Matthews* rules provide a test for whether deprivation meets due process requirements:

   (a) Consideration of the private interests that the deprivation will affect.

   (b) Examination of the risk of erroneous deprivation, and the safeguards in place.

   (c) Attention to the interest of the party seeking the judgment remedy (in *Mathews* originally, this was the government; here it's the private plaintiff).[3]

§3 Jurisdiction

1. Territorial jurisdiction: jurisdiction over cases arising in or involving persons residing within a defined territory.

2. Personal jurisdiction: a court's power to bring a person into its adjudicative process.

3.1 *Pennoyer*: Personal Jurisdiction and Territorial Power

1. In an in personam case, does service by publication to a non-resident defendant establish territorial jurisdiction? *Pennoyer v. Neff*: Mitchell sues Neff in Oregon state trial court for nonpayment of legal fees rendered

[3] Casebook p. 85.

in 1862-1863. Neff is nowhere to be found, so Mitchell publishes notice of the suit in a newspaper. Neff does not appear, so the court orders a default judgment. The property is attached and then sold to Mitchell, who sells it to Pennoyer. Eight years later, Neff successfully sues Pennoyer to recover the property. The court (Justice Field) relies on an analytical framework in which the basis for jurisdiction is a state's territorial power. States are all-powerful within their borders, and powerless beyond. It holds that service by publication isn't good enough for in personam suits against a non-resident (though it might be good enough for in rem suits). Thus, the original judgment against Neff was void.

2. Doctrine of **collateral attack: a judgment void when rendered is void forever.**

3. Collateral estoppel: binding effect of a judgment on later controversies involving a different claim from that on which the original judgment was based.

4. The Due Process Clause (Fourteenth Amendment) governs personal jurisdiction.

5. In *Pennoyer*, personal jurisdiction is based on territorial power. States are all-powerful within their borders and powerless without.

6. Who benefits from updates to *Pennoyer*?

7. *Milliken v. Meyer*: domicile alone within a state is sufficient to establish jurisdiction.

3.2 *Hess*: Jurisdiction Over Out-of-State Drivers

1. Can a state implement a statute that requires out-of-state drivers to give implied consent to jurisdiction within that state? ***Hess v. Pawloski*** Plaintiff, a Pennsylvania resident, "negligently and wantonly drove a motor vehicle on a public highway in Massachusetts," causing injury to the defendant. In a MA Superior Court, plaintiff contested MA's jurisdiction, which was denied. The Supreme Judicial Court upheld the order. Plaintiff appealed to the Supreme Court on Fourteenth Amendment grounds. The court reasoned that earlier cases (e.g., *Kane v. New Jersey*) have upheld the constitutionality of statutes that require out-of-state drivers to appoint an agent to receive process before using the highway. States can legitimately require to appoint similar agent implicitly, and these kinds of statutes do not not constitute discrimination against non-residents. Therefore, it is consistent with the Due Process Clause for states to require out-of-state drivers to implicitly appoint an agent to receive process, thereby establishing jurisdiction over those drivers if civil actions arise.

3.3 *International Shoe*: "Minimum Contacts"

"But now that the capias ad respondendum has given way to personal service of summons or other form of notice, 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 contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

1. Can a state have jurisdiction over an entity if the entity does not have a permanent presence within the state? What constitutes the necessary contact to establish jurisdiction? ***International Shoe Co. v. Washington***: The State of Washington sued International Shoe to recover unpaid contributions to the state unemployment compensation fund. Justice Stone wrote the opinion.

   International Shoe argued first that the Washington statute imposes an unconstitutional burden on interstate commerce. The court rejected this on the basis that "it is no longer debatable" that the commerce clause gives Congress broad power to regulate interstate commerce.

   Second, it argued that merely soliciting orders within a state "does not render the seller amenable to suit within the state." The court notes that historically, physical presence within a state is a prerequisite for jurisdiction in in personam cases (*Pennoyer*). But now, **minimum contacts** are sufficient. "Presence" is a symbolic term that can refer to business activities within a territory; in other words, it can refer to activities that give rise to the liabilities at issue in the suit. Moreover, since an entity enjoys certain benefits and protections from a state's laws, it also has an obligation to that state.

   The court held that Washington is entitled to recover the unpaid contributions.

   ...due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within theterritory of the forum, he have certain ***minimum contacts*** *with it such that the maintenance of the suit does not offend* ***"traditional notions of fair play and substantial justice."***[4]

2. Justice Black, concurring: States have a constitutional power to tax and sue corporations that due business in the state's territory. The test of "fair play and substantial justice" is "confusing" and gives the court the unwarranted power to strike down any legislation it might see as violating "natural justice."

3. Unlike in *Pennoyer*, *in personam* jurisdiction is based on "minimum contacts," not territorial principles.

[4] Casebook p. 179.

3.3.1 General and Specific Jurisdiction

1. **General jurisdiction**: The defendant has substantial enough contacts with a state that any dispute can be litigated in that state, regardless of whether the dispute arises from those contacts.

2. **Specific jurisdiction**: Contacts to the forum are related to the specific dispute.

3.4 *McGee* TODO

TODO: insurance policies and specific jurisdiction

3.5 *World-Wide*: Jurisdiction Over Out-of-State Car Dealers

1. Does selling a car in one state constitute the necessary minimum contact (under the *Shoe* test) to establish *in personam* jurisdiction over the seller in another state? ***World-Wide Volkswagen Corp. v. Woodson***: The Robinsons purchased an Audi in New York. It caught fire in an accident in Oklahoma.

2. Justice White: To establish jurisdiction, defendants must have minimum contacts, and the contacts must not violate "traditional notions of fair play and substantial justice" (forum State's interest in adjudicating the dispute; convenient venue for plaintiff; interstate judicial system's interest in efficient resolution; and shared interest in fundamental policy goals). Jurisdictional rules have been relaxed, but the Constitution nonetheless privileges state sovereignty. "Petitioners (World-Wide and Seaway) carry on no activity whatsoever in Oklahoma." Petitioners could not reasonably predict being haled into court in OK. Corporations can "purposely avail" themselves of the benefits of conducting activity in the forum state—but there is no such availment here. No contacts, so no jurisdiction.

3. Justice Brennan, dissenting: The Court reads *Shoe* too narrowly. The seller and dealer purposefully injected their product "into the stream of interstate commerce," thus establishing minimum contact.

4. Justices Marshall and Blackmun, dissenting: The dealer and seller chose to become part of a global marketing and servicing network. Cars derive their value from being mobile. The dealer and seller received economic advantage from the ability to draw revenue from Oklahoma.

5. Justice Blackmun, dissenting: Confusing why the distributor and seller are getting sued here. Also, cars are mobile by nature.

6. Questions from Bradt:

(a) Who are the defendants in the case, and which defendants are challenging personal jurisdiction? What is the basis of jurisdiction for the defendants who are not so challenging?

(b) In what states do you think the Robinsons could sue defendants over whom the Oklahoma courts do not have jurisdiction?

(c) Note on page 192 Justice White's statement that even if the forum the plaintiff has chosen will not be abusive to the defendant, the Due Process Clause may bar the plaintiff's choice "acting as an instrument of interstate federalism." Is this consistent with International Shoe? And what do you think of this statement after reading Burger King? Should federalism play any role here?

(d) Pay close attention to Justice White's discussion of "purposeful availment" on page 194, and Justice Marshall's dissent on that point on pages 197–198. Who has the better of the argument? Do you think Worldwide and Seaway should have been subject to jurisdiction in Oklahoma in this case?

3.6 *Burger King Corp. v. Rudzewicz*

1. TODO: Brief
2. Rudzewicz fails to show that jurisdiction would be fundamentally unfair.
3. Justice Stevens, dissenting: it's fundamentally unfair to require a franchisee to submit to the jurisdiction of the franchiser.
4. Questions from Bradt:
   (a) Is this a case of specific jurisdiction or general jurisdiction?
   (b) How did Rudzewicz "purposefully direct" his activities toward Florida? Are you persuaded that his actions justify Florida's exercise of jurisdiction over him?
   (c) Who has the better of the argument as to whether it's fundamentally fair to subject Rudzewicz to jurisdiction in Florida, Justice Brennan or Justice Stevens?
   (d) Why did Seaway and Worldwide VW benefit from the protections of the Due Process Clause while Mr. Rudzewicz didn't? The Court seems to make a lot of Mr. Rudzewicz's business sophistication and the benefits he received from participation in the national market—why weren't those factors persuasive in Volkswagen? Is the work that purposeful availment's doing here justified? (Note that two justices (Burger and Rehnquist) thought that there was no jurisdiction in VW but that there was in BK, and Justice O'Connor (who was on the Court for BK, but not VW), thought there was jurisdiction in BK despite that VW was a controlling opinion.)

3.7 Defenses to Personal Jurisdiction

1. Default and collaterally attack.
2. Appear in court, move to dismiss, and appeal if you lose.

3.8 *Goodyear Dunlop Tires Operations, S.A. v. Brown*

1. TODO
2. Bradt questions:
   (a) Note the Court's definitions of "general" and "specific" jurisdiction (4). The Court, per Justice Ginsburg, defines general jurisdiction as where the defendant is "essentially at home." According to Justice Ginsburg, what are the "paradigm places" where the defendant is "at home"?
   (b) What provision of the North Carolina long-arm statute did the plaintiffs rely on in order to obtain personal jurisdiction over the foreign subsidiaries?
   (c) Goodyear USA (the parent corporation) consented to the North Carolina court's jurisdiction over it. Could Goodyear USA, which is based and incorporated in Ohio, have successfully challenged personal jurisdiction in North Carolina? Was there "general jurisdiction" over Goodyear in North Carolina? Specific jurisdiction?
   (d) The Court notes that some of the foreign subsidiaries' tires made their way to North Carolina (to be used on horse trailers, etc.)? Let's say one of those tires allegedly caused an accident in North Carolina? Do you think there would be specific jurisdiction over the foreign subsidiaries in that case? (Think about that in light of *J. McIntyre.*)

3.9 *Asahi*

TODO

3.10 *J. McIntyre Machinery, Ltd. v. Nicastro*

1. TODO
2. Bradt questions:
   (a) In J.McIntyre, is there a rule that a majority of the Court agrees on regarding the exercise of specific jurisdiction when a defendant places goods in the stream of commerce? What open questions remain?
   (b) Do you agree with Justice Kennedy's minimum-contacts analysis? Is he right that J. McIntyre did not purposefully avail itself of New Jersey's market? Or does Justice Ginsburg have the better of this argument?

(c) Where do Justice Kennedy and Justice Breyer agree? Disagree?

(d) Note Justice Kennedy's reasons for rejecting Justice Brennan's framework from Asahi (p. 19–20). Do you find these persuasive?

3.11 Purposeful Availment and Purposeful Direction

1. TODO (pp. 237-241)

2. TODO see Hanson v. Denckla

3. Bradt on ***Calder v. Jones***: California actress Shirley Jones (of "Partridge Family" fame) sued the National Enquirer for libel based on a story it published essentially calling her a drunk. Jones sued in California state court. The Enquirer, which is based in Florida, contested jurisdiction on the ground that it did not have minimum contacts with California. The reporter had only gone to CA once, and everything else was essentially done in Florida. The Supreme Court held that there *was* personal jurisdiction over the Enquirer in California on the ground that it "expressly aimed" its conduct toward California. This is an interesting spin on purposeful availment commonly referred to as the "effects test"—if a defendant commits an intentional tort aimed at the forum state and causes harm in the forum state, there is specific jurisdiction over the defendant in cases arising out of that harm in the forum state. In *Calder*, the Court found that the Enquirer had aimed its conduct at California because (a) it knew that's where Jones lived and worked and would therefore suffer the brunt of the injury, and (b) because California was the largest state for circulation of the Enquirer, so it knew the harm in that state would be significant.

3.12 Long-arm Statutes

1. "A court will not find in personam jurisdiction unless there is statutory authorization for the exercise of that jurisdiction."[5]

2. Long-arm statutes enable states to assert jurisdiction beyond their borders.

3. Some extend jurisdiction to the full extent that the Constitution allows. Others specify the circumstances in which states can extend jurisidiction.

4. Detailed long-arm statutes can make the law more predictable.

5. Federal courts usually follow the long-arm statutes of the states in which they sit.

6. If the state long-arm statute does not extend to the full constitutional limits of in personam jurisdiction, the only question before the court is statutory (e.g., in *Bensusan*, below).

[5] Casebook p. 241.

3.13 *Bensusan*: Online Activity

1. Does New York have jurisdiction over an out-of-state defendant because of his online activities? ***Bensusan Restaurant Corp. v. King***: Bensusan and King both own cabarets in New York City and Columbia, MO, respectively. King build a website, and Bensusan sues for compensatory damages, punitive damages, costs, attorney's fees, and to enjoin King from using the name "Blue Note." The New York long-arm statute (N.Y.C.P.L.R. 320(a)) requires that the defendant must have been physically present in the state when he committed the act. The court finds that King was not physically present, and does not meet any of the other statutory requirements for jurisdiction.

2. Federal court cannot be an authoritative source of state law—it can only infer what New York courts would do in a comparable case.

3. In *Inset Systems, Inc. v. Instruction Set, Inc.*, a Connecticut district court held that advertising online could potentially reach "as many as 10,000 Internet users within Connecticut" and is "continuously available." Therefore, the advertiser has "purposefully availed itself of the privileges of doing business in Connecticut."

4. In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, Zippo (the lighter company) sued Zippo (the publishing company). The Pennsylvania district court established the Zippo test for determining jurisdiction in Internet cases. The test relies on a scale of commercial activity. On one side of the scale are sites that exists exclusively to do business online. If a defendant knowingly enters into a contract with residents of a foreign jurisdiction, then personal jurisdiction is proper. On the other side of the scale are sites that passively post information. Personal jurisdiction cannot be asserted for those sites. In the middle are sites in which the user can exchange information with a host computer. In those cases, the "level of interaction" and the "commercial nature of the exchange" are the basis for determining the exercise of jurisdiction.

TODO: pp. 259-261 notes 2-5; Rulebook pp. 24-25: FRCP 4(k)

3.14 *Shaffer v. Heitner*

Should *quasi in rem* proceedings be based on the *Pennoyer* framework of territorial power (which would allow jurisdiction) or the *International Shoe* framework of minimum contacts consistent with traditional notions of fair play and substantial justice (which might not)?

Heitner, the respondent, owned one share of stock in Greyhound Corp., a Delaware corporation with its primary place of business in Phoenix. Heitner originally sued 28 of its officers and directors for damages in a case involving antitrust and criminal contempt violations in Oregon. Under a Delaware statute, he filed for an order of sequestration against the property of the officers. The

property consisted of Greyhound options and 82,000 shares of common stock. The defendants (here, appellants) argue that the sequestration statute did not accord due process of law and that the property seized could not be attached in Delaware. Deleware courts rejected this jurisdictional challenge.

Justice Marshall:

1. *Quasi in rem* jurisdiction has traditionally been based on physical presence, not minimum contacts (*Pennoyer*).

2. The *Pennoyer* framework included a few exceptions (marriage, foreign corporations doing business in a state, etc.).

3. Modern realities expanded the *Pennoyer* framework (e.g., *Hess*) without fundamentally changing it.

4. The *International Shoe* framework supplanted *Pennoyer* for *in personam* cases. No similar conceptual revision has occurred for *in rem* cases, though lower courts have moved strongly in that direction.

5. Key break from *Pennoyer*: asserting jurisdiction over a thing is a "customarily elliptical way" of asserting jurisdiction over the interests of a person in a thing.

6. *Pennoyer* led to odd situations where property serves as the basis for jurisdiction in causes of action that are completely unrelated to the property (like the present case). It is illogical, though *Pennoyer* permits it, to assert jurisdiction indirectly, via property, if direct assertion of personal jurisdiction would not be allowed.

7. There are no good historical reasons to cling to *Pennoyer*.

8. We should therefore use the *International Shoe* test for all assertions of state court jurisdiction.

9. Appellants' holdings do not constitute minimum contacts with Delaware–thus, Delaware does not have jurisdiction.

Justice Powell, concurring:

1. Property that is "indisputably and permanently" within a state (e.g., real estate) might pass the *International Shoe* test. The court should reserve judgment on that issue.

Justice Stevens, concurring in the judgment:

1. Fair notice requires warning that a particular activity will open the actor to the jurisdiction of a foreign sovereign. Buying stock includes no such warning.

2. Agree with Powell.

3. There are other longstanding methods of asserting jurisdiction based on territory that should not be discounted.

Justice Brennan, concurring in part and dissenting in part:

1. Delaware explicitly did not enact a law basing *quasi in rem* jurisdiction over shareholders on a minimum contacts test. For the court to invalidate this imaginary statute is a pure "advisory opinion."

The court unanimously (sans Rehnquist) held that Delaware did not have jurisdiction over the defendants. The Delaware Supreme Court ruling was reversed.

Rule: Jurisdiction in *quasi in rem* actions must be based on the minimum contacts test (*International Shoe*), not the territorial power framework (*Pennoyer*).

3.15 *Burnham v. Superior Court of Calif.*

Is a person's mere presence within a state sufficient to establish that state's jurisdiction over that person?

The petitioner, Burnham, and his wife decided to separate. Before his wife moved to California, the couple agreed to divorce on grounds of "irreconcilable differences." After she left, however, the petitioner filed for divorce on grounds of "desertion." His wife brought suit in California. Some months later, the petitioner was on a business trip in California, where he was served with court summons and a divorce petition.

Petitioner filed a motion to quash on the argument that his brief contacts with California did not meet the requirements to establish jurisdiction. The Superior Court denied the motion and the Court of Appeal denied mandamus relief.

Justice Scalia:

1. The question is whether physical presence is enough to establish jurisdiction, or whether the person must also have minimum contacts.

2. There has never been a case that suggests in-state service is insufficient to establish personal jurisdiction.

3. *Pennoyer* broadened over the 20th century; *International Shoe* established a different standard.

4. The petitioner seeks to establish that presence in the forum state is no longer sufficient to establish jurisdiction. This is entirely wrong. The *International Shoe* test was developed by analogy to the "physical presence" test, and it would be "perverse" to use the *Shoe* test to undermine it.

5. *Shaffer* involved an absent defendant, and it held that the defendant's contacts must include property related to the litigation to establish jurisdiction (or, in a different light, that *quasi in rem* and *in personam* are

really one and the same). There is no absent defendant in the present case.

6. In response to Brennan's concurrence: (1) Brennan proposes a standard based on "contemporary notions of due process"—but this is hopelessly subjective. (2) Brennan argues that the concept of transient jurisdiction—of presence within a state creating a "reasonable expectation" of being subject to suit–is based on fairness. Really, though, it's based on the same traditions that Brennan tries to dismiss. "Justice Brennan's long journey is a circular one."

Justice White, concurring in part:

1. It would be unworkable to decide in each case whether service was delivered fairly. The rule should stand as-is.

Justice Brennan, concurring in the judgment:

1. A rule does not comport with due process simply because of its pedigree.
2. *Shaffer* established that all rules, regardless of pedigree, must comport with modern understandings of due process.
3. More than a century of the rule's existence gives defendants ample notice that their presence within a state can subject them to that state's jurisdiction.
4. By visiting a state, a defendant avails himself of that state's benefits. Without the transient jurisdiction rule, the actor would have the full benefit of access to the state's courts as a plaintiff while remaining immune from the same courts' jurisdiction. This asymmetry would be unfair.

Justice Stevens, concurring in the judgment:

1. The other justices' opinions are overly broad [though he doesn't say how].

The Superior Court's ruling is affirmed.
Rule: presence within a state is sufficient to establish jurisdiction.

3.16 Notice

3.16.1 *Mullance v. Central Hanover Bank & Trust*

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

1. A New York law required a judicial settlement of a common trust fund. In strict compliance with the statute, the Central Hanover Bank and Trust gave notice to beneficiaries by publication in a local newspaper. Does the NY statute requiring, at a minimum, notice by publication for trust beneficiaries violate the Fourteenth Amendment?

2. The NY Court of Appeals overruled objections that notice by publication here violates the Fourteenth Amendment.

3. Justice Jackson:

   (a) The only notice to beneficiaries appeared in a local newspaper, in strict compliance with the NY statute.

   (b) At the time of the first investment, the trust had contacted each person by mail.

   (c) It doesn't matter whether this proceeding is *in rem*, *quasi in rem*, or *in personam*. In all cases, courts have the right to protect claimants' rights to notice and hearing and determine claimants' interests.

   (d) There's not much precedent here.

   (e) Notice by publication is chancy at best compared to notice in person—"we are unable to regard this as more than a feint."

   (f) It's not necessary to put huge effort into finding unknown claimants. Notice by publication is fine if it's not reasonably easy to make contact.

   (g) For parties with known contact information, notice by mail is the minimum requirement. The NY statute requiring a minimum of notice by publication in all cases is unconstitutional.

4. The notice requirements in the New York statute are unconstitutional. Judgment for the appellant (Mullane).

5. Rules:

   (a) The constitutionality of the method of service is independent from the classification of the cause of action as *in rem*, *quasi in rem*, or *in personam*.

   (b) If it's easy to serve notice by mail or in person, notice by publication does not satisfy due process requirements.

3.16.2 *Jones v. Flowers*

1. When notice of a tax sale is returned undelivered, is the government required to take additional reasonable steps to satisfy the Due Process Clause?

2. The plaintiff, Jones, was delinquent on his property taxes. The state sent two certified letters to his address over the course of two years, both of which were returned as "unclaimed." Just before the property was to be auctioned, the state also published a notice of public sale in a newspaper. The house was sold to Flowers.

3. The trial court granted summary judgment in favor of the defendants (the Commissioner and Flowers). The Arkansas Supreme Court affirmed.

4. Justice Roberts:

   (a) Due process does not require that the property owner receive actual notice, but it does require a reasonable attempt (*Mullane*).

   (b) A person who actually wanted to inform someone about an impending tax sale would surely take extra steps if a certified letter of notice was returned unclaimed.

   (c) The state could have resent the letter by regular mail or posted it physically at the address. (It should not be required, though, to hunt for Jones's contact information.)

5. Justice Thomas, dissenting:

   (a) Process requirements must be determined ex ante. They should not be dependent on the outcome of the first attempt. state should take additional steps to give notice.

6. Reversed and remanded.

7. If notice by mail of an impending tax sale is returned unclaimed, the

3.17 Consent by Contract

1. Objections to jurisdiction have to be made at the beginning of a suit.

2. Before *Carnival*, forum selection clauses in form contracts were disfavored. Now they're found in virtually every consumer contract.

3.17.1 Contractual Consent to Jurisdiction: *Carnival Cruise Lines, Inc. v. Shrute*

1. The plaintiffs, the Shutes, purchased tickets for a seven-day cruise through a travel agent. The cruise line, Carnival, sent the defendants the tickets by mail. The tickets included a contract that named Florida as the forum state for any litigation regarding the contract. By purchasing the tickets, the Shutes agreed to the terms of the contract.

2. Mrs. Shute injured herself during the cruise by slipping on a mat. The Shutes sued in Washington for negligence. Carnival argued that (1) the forum selection clause in the contract requires the Shutes to bring suit in

Florida, and (2) Carnival did not have sufficient contacts with Washington to allow its courts to exercise personal jurisdiction.

3. The U.S. District Court for the Western District of Washington granted Carnival's motion to dismiss on the grounds that Carnival had insufficient contacts with Washington to exercise personal jurisdiction. The Court of Appeals reversed on the grounds that Mrs. Shute would not have been injured but for Carnival's solicitation of business in Washington. The Court of Appeals further held that the forum selection clause could not be enforced because (1) it was not freely bargained for, (2) the Shutes are physically and financially incapable of pursuing litigation in Florida, and (3) the clause violates the Limitation of Vessel Owner's Liability Act.

4. Issues:

   (a) Is the forum selection clause enforceable?

   (b) Is it too inconvenient for the Shutes to pursue litigation in Florida?

   (c) Does the forum selection clause violate the Limitation of Vessel Owner's Liability Act?

5. Justice Blackmun:

   (a) In their briefs, the respondents (the Shutes) conceded that they received adequate notice of the forum selection clause.

   (b) Some forum selection clauses might not be enforceable, e.g., if they were established through "fraud or overreaching."

   (c) In *The Bremen*, the court upheld the validity of a forum selection clause in international admiralty between two commercial actors. The Court of Appeals applied *The Bremen* in this case to hold that the forum selection clause was unenforceable because the parties had not negotiated it. The Supreme Court (Blackmun here) argued that the Shutes (individuals) did not negotiate with Carnival (large corporation).

   (d) The lack of bargaining does not automatically invalidate the contract, however. There are plenty of reasons why a non-negotiated forum selection clause would be reasonable: (1) avoid litigation in every single passenger's different forum, (2) dispelling confusion about the proper forum, and (3) reduced fares resulting from the limited fora. Thus, the clause is enforceable.

   (e) Re Florida as an inconvenient forum: Shutes have not satisfied the burden of proof to show heavy inconvenience.

   (f) Re violation of the Limitation of Vessel Owner's Liability Act: no evidence that Congress intended to avoid having a plaintiff travel to a distant forum in order to litigate.

6. Justice Stevens, dissenting:

(a) Only the most meticulous passenger will be aware of the forum selection clause.

(b) Passengers will not be able to evaluate the contract until they agree to it by purchasing a non-refundable ticket. Negotiation is not possible.

(c) Clause *is* null and void under the Limitation of Vessel Owner's Liability Act.

(d) This is a contract of adhesion. The Shutes did not know or consent to all of its terms.

(e) Forum selection clauses are not enforceable if they were not freely bargained for.

(f) The forum selection clause makes it more difficult for the Shutes to recover damages for the slip-and-fall, which is contrary to public policy.

7. Holding: The Court of Appeals is overturned (i.e., the forum selection clause was enforceable; the forum was not inconvenient; and the clause did not violate the Limitation of Vessel Owner's Liability Act).

8. Rules:

   (a) Forum selection clauses can be enforced even if they were not freely bargained for.

   (b) Plaintiffs have a high burden of proof to show that a forum is so inconvenient that it violated due process.

   (c) The Limitation of Vessel Owner's Liability Act does not protect plaintiffs from traveling to distant forums to litigate their disputes.

3.18 Subject-Matter Jurisdiction and Venue

3.18.1 Federal-Question Jurisdiction

1. todo

Louisville & Nashville RR Co. v. Mottley

Grable & Sons Metal Prods. v. Darue Eng. & Manuf.

3.18.2 Diversity Jurisdiction

1. todo

Mas v. Perry

Hertz Corp. v. Friend

3.18.3 Supplemental Jurisdiction

1. todo

United Mine Workers of America v. Gibbs

Owen Equip. & Erection Co. v. Kroger

3.18.4 Removal

1. todo

Caterpillar Inc. v. Williams

3.18.5 *Forum Non Conveniens* and Transfer of Venue

1. todo

Piper Aircraft Co. v. Reyno

1. Six people were killed when a small plane crashed in Scotland. On behalf of the decedents, the plaintiff sued the aircraft manufacturer (Piper) and the propeller manufacturer in a California superior court. Piper successfully moved for transfer to the Middle District Court of Pennsylvania, pursuant to 28 U.S.C. 1404(a) (change of venue for convenience). Then, in district court, it moved to dismiss on the grounds of *forum non conveniens*. The district court granted the motion, and the defendants agreed to submit to the jurisdiction of Scottish courts. The court noted several private interest and public policy reasons for moving the venue to Scotland.[6]

2. The Third Circuit reversed the motion to dismiss, arguing (1) that the district court did not have the authority to review the policy reasons for dismissal, and (2) that dismissal is never appropriate when the law of the alternative forum is less favorable to the plaintiff.

3. The Supreme Court rejected the Third Circuit on both questions. First, it held that differences in substantive law between two forums should never be a substantial factor unless the alternative forum is egregiously bad. Second, the it held that the district court did not abuse its discretion in weighing the public and private interests, on the basis that foreign plaintiffs deserve less deference in determining the convenience of a forum.

[6] Casebook p. 474–75.

§4 The Governing Law in the Federal Courts

4.1 *Swift v. Tyson*

1. Swift owned a bill of exchange that Tyson originally made to two other men, who endorsed it over to Swift. Tyson refused to pay because of a breach of the original contract for which the bill of exchange was originally issued. Swift sued Tyson in federal court for payment. Under "local" law (New York state law), which the state court followed, Tyson's defense was valid. Under "general" law, which federal courts followed, the defense was not valid against Swift.

2. 34 of the Judiciary Act of 1789 required the application of "the laws of the several states." (Roughly equivalent to 28 U.S.C. 1652.)

3. In a unanimous opinion, Justice Story held that the federal court "should follow the general law rather than a state's local law in cases where the state law deviated from the general law."[7]

4. After the Civil War, the economic interests of the states began to diverge (north: finance, manufacturing; south: agriculture, labor). The Supreme Court expanded general law to include torts, so ndustrial accidents were increasingly litigated in federal courts. Federal courts also grew increasingly sympathetic to creditors and employers. Those who favored the results of state courts became enemies of *Swift*.

4.2 *Erie R.R. v. Tompkins*

1. A passing train injured the plaintiff, Tompkins, was while he was walking on a footpath along a railroad track in Pennsylvania. He brought suit in federal court in Southern New York. Under Pennsylvania state law, the plaintiff would have been considered a trespasser and therefore not entitled to recover damages. Under general law, the railroad might have been held negligent.

2. The legal circumstances were unusual. At the time, "general law" usually benefited corporations, while "local law" usually favored individuals. In this case, however, the plaintiff argued for the application of general law.

3. The trial court and appellate court, following *Swift*, found that since no state statute governed the issue at hand, general law should control. They found for the plaintiff. The issue before the Supreme Court was whether the district court was free to disregard Pennsylvania common law.

4. The Court overturned the *Swift* rule, After *Erie*, there was only federal law and state law. Wherever the federal law did not explicitly apply, state law controlled.

[7] Casebook p. 491.

5. Justice Brandeis made three arguments:

   (a) First: the *Swift* court had misinterpreted the intentions of the authors of the Judiciary Act of 1789: "...the construction given to it by the court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written." (The notes point out that the historian on whom the opinion relies, Charles Warren, might have mistakenly interpreted the Rules of Decision Act as requiring federal courts to follow state common law even in areas where federal common law applied.)

   (b) Second: *Swift* caused significant "injustice and confusion"[8]—e.g., companies reincorporating in other states in order to establish diversity jurisdiction to have their cases tried in federal court (*Black & White Taxicab*). "*Swift v. Tyson* introduced grave discrimination by noncitizens against citizens."[9]

   (c) Third: The federal government did not have the power to legislate rules of tort or contract law. (This quickly became untrue as the Court expanded the federal government's power to regulate these areas under the Commerce Clause). Federal courts also do not have the power to create rules in these areas.

6. "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.... There is no federal general common law."[10] Judges often rely on "general law" as a way of ignoring state laws that conflict with their views.

7. Judgment was reversed and remanded to be decided on the basis of Pennsylvania state law.

8. Justice Reed, concurring:

   (a) It is enough to broaden the *Swift* framework to hold that "the laws" in the Rules of Decison Act include state common law, rather than declare the entire *Swift framework* to be unconstitutional.

   (b) It's "questionable" to say that Congress has no power to declare which substantive laws contol in federal courts—moreso because "[t]he line between procedural and substantive law is hazy."[11]

[8] Casebook p. 501
[9] Casebook p. 496.
[10] Casebook p. 497.
[11] Casebook p. 499.

4.3 "Outcome Determinative" Test: *Guaranty Trust v. York*

1. Background:
   (a) **Substance vs. procedure**: did *Erie* and the Rules of Decision Act apply to both procedural and substantive law?
   (b) Before the FRCP were enacted in 1938, courts were divided into courts of law (in which cases were triable by jury) and courts of equity (where there was no right to a jury).
   (c) The **Conformity Act of 1872** required that in cases *at law*, federal courts must conform to the procedural rules of the states in which they are located. Thus, there were procedural differences between federal courts in different states, but few differences between federal and state courts in the same state.
   (d) But, in cases *in equity*, federal and state courts followed different rules. Federal courts developed their own system of procedural rules for suits brought in equity.[12]
   (e) The **Rules Enabling Act of 1934** authorized the Supreme Court (with congressional approval) to develop a national system of procedural rules for federal civil cases. So while *Erie* required federal courts to follow state rules in substantive law, federal courts developed independent procedural rules (codified in the FRCP in 1938).
2. 1942: The plaintiff, York, brought suit in equity in NY federal court for fraud that occurred in 1931. The defendant argued that the NY statute of limitations applied both to cases at law and in equity. The plaintiff argued that the federal rule of laches, which typically applied in equity cases, should apply in this case.
3. The trial court applied the NY statute of limitations. The appellate court reversed, holding that the laches doctrine should have applied, and granted summary judgment to the defendants.
4. Justice Frankfurter:
   (a) There is not a clear distinction between "substantive" and "procedural" rights.
   (b) This case dealt with a state-created right. When a federal court adjudicates a state-created right solely on the basis of jurisdiction, it becomes "in effect, only another court of the State."
   (c) Question: does the statute of limitations affect "merely the manner and the means" of the right to recover, or is it "a matter of substance" that affects the result of the litigation?

[12] Casebook p. 504.

(d) *Erie* did not intend to "formulate scientific legal terminology" around the terms "substantive" and "procedural." It intended to ensure that outcomes of diversity cases in federal court would be similar to outcomes in state courts.

(e) The *Erie* doctrine does not distinguish between cases at law and cases in equity.

(f) "The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity."[13]

(g) The Court reversed the appellate. Remanded for hearings under the NY statute of limitations.

(h) The **"outcome determinative" test**: would it significantly affect the outcome of the litigation for a federal court to disregard state law? If so, *Erie* holds that the court should follow state law.

5. Justice Rutledge, dissenting:

   (a) The distinction between "substantive" and "procedural" law is arbitrary but important.

   (b) Forum states are free to apply their own statutes of limitations, which may be different from those of the state that originally created the substantive right.

4.4 Challenging the Rules Enabling Act: *Sibbach v. Wilson & Co.*

1. A federal court required a plaintiff to submit to a medical examination. The examination would not have been mandatory under Illinois state law. She refused the exam on the grounds that the Rules Enabling Act forbade rules that abridge litigants' substantive rights. The court held that the rule requiring medical examinations was procedural, not substantive.

2. Justice Frankfurter (and three others) dissented, arguing that the examination rule constituted "invasion of the person" and was therefore significantly different from other procedural rules.

4.5 *Byrd v. Blue Ridge Rural Elec. Coop.*

1. The plaintiff, Byrd, sued the defendant for negligence for an injury he sustained while connecting power lines.

[13] Casebook p. 507.

2. The defendant argued that the plaintiff was a "statutory employee" under the South Carolina Workmen's Compensation Act when the injury occurred, which would mean that the plaintiff was barred from suing and was obliged to accept statutory compensation benefits.

3. The questions on appeal are (1) whether the appellate court erred in directing judgment for Blue Ridge without giving Byrd an opportunity to introduce further evidence, and (2) whether Byrd is entitled to a jury to determine factual issues.

4. Justice Brennan:

   (a) Blue Ridge argued that a judge, not a jury, should decide the question of immunity. In *Adams v. Davidson-Paxon Co.*, the South Carolina Supreme court held that a judge, not a jury, should determine the question of whether the plaintiff was a statutory employee (and therefore whether the employer is immune from paying damages). The defendant's argument contends that the federal court should follow this state precedent.

   (b) First: *Erie* held that in diversity cases, federal courts must respect state-created rights by state courts. Here, the Supreme Court found that the decision in *Adams* to send the immunity question to a judge was a "practical consideration"—"merely a form and mode"—"and not a rule intended to be bound up with the definition of the rights and obligations of the parties."

   (c) Second: Mere "form and mode" rules can be important if they bear substantially on the outcome of the litigation. It may be in this case that the question of whether immunity should be decided by a judge or jury would bear substantially on the outcome. Here, however, there is a general federal policy of sending factual questions to the jury. Even though it may affect the outcome, the federal rule should outweigh the state rule because a federal procedural rule is "not in any sense a local matter."

   (d) Third, it is not at all clear that sending the immunity question to a jury would result in a different outcome.

   (e) The federal rule applies. Reversed and remanded.

4.6 *Hanna v. Plumer*

1. todo

4.7 *Walker v. Armco Steel Corp.*

1. todo

4.8 *Gasperini v. Center for Humanities*

1. todo

4.9 *Clearfield Trust Co v. United States*

1. todo

§5 Pleading

5.1 FRCP 8: General Rules of Pleading

- (a) Pleading must contain:
  - (1) Short and plain statement of jurisdiction.
  - (2) Short and plain statement of claim.
  - (3) Demand for relief.

  (b) Defenses; Admissions and Denials:
  - (1) General response:
    - (A) Short and plain statement of defense to each claim.
    - (B) Admit or deny allegations.
  - (2) Denial must respond to substance of allegation.
  - (3) General denial will deny everything. Otherwise, specific allegations must be separately admitted or denied.
  - (4) Denial in part requires admission of the part that's true and denial of the rest.
  - (5) Defense must acknowledge lack of knowledge where it exists, which has the effect of a denial.
  - (6) Failure to deny = admission.

5.2 FRCP 10: Form of Pleadings

- (a) Caption/names of parties.
- (b) Paragraphs must be numbered; independent statements must be separated.
- (c) Adoption by reference.

5.3 *McCormick v. Kopmann*

1. McCormick, widow of a man killed in a collision with Kopmann, makes two claims that are in question on appeal:
   (a) Count I: wrongful death against Kopmann.
   (b) Count IV: dram shop claim against the Huls.
2. Defendants moved for directed verdicts. Denied. Jury returned verdict for $15,000 against Kopmann and found the Huls not guilty. Kopmann moved for judgment notwithstanding the verdict or for a new trial; both were denied.
3. Kopmann appealed, arguing:
   (a) Counts I and IV are mutually exclusive. The court agreed, but held that this does not prevent them from being pleaded together. The Illinois Civil Practice Act (modeled on FRCP 8(e)(2), allows alternative pleading where the plaintiff is "genuinely in doubt as to what the facts are and what the evidence will show."[14]
   (b) Allegations of intoxication in Count IV count as binding admissions. Court held that "he is not 'admitting' anything other than his uncertainty."[15]
   (c) Prima facie case in Count IV means plaintiff was contributorily negligent regarding count one. The court found that the plaintiff did exercise due care and was not intoxicated.
4. Affirmed.
5. Plaintiff can plead claims that are fundamentally inconsistent.
6. Pleadings are not binding admissions. They're hypotheses subject to proof and disproof.

5.4 *Zuk v. E. Penn. Psychiatric Institute*

1. Zuk sued EPPI for copyright infringement. District court dismissed under FRCP 12(b)(6) (motion to dismiss), and found Zuk and his counsel liable for $15,000 in sanctions and counsel fees. Zuk settled his liability and his counsel, Lipman, appealed.
2. EPPI moved for sanctions "on the grounds essentially that appellant had failed to conduct an inquiry into the facts reasonable under the circumstances and into the law."[16] The court imposed sanctions based on FRCP 11 and 28 U.S.C. 1927.

[14] Caseboko p. 663.
[15] Casebook p. 664.
[16] Casebook p. 671.

3. Lipman had no liability under the Copyright Act.

4. There was no bad faith on Lipman's part. Therefore, the lower court abused its discretion in awarding sanctions based on 28 U.S.C. 1927.

5. The lower court did not identify exactly how the sanctions were based on the FRCP and USC rules. The FRCP sanctions were appropriate, because the original plaintiffs' research was deficient both factually and legally, but it is not possible to review them further. Remanded to consider the type and amount of sanctions specific to the FRCP violation.

6. "...we conclude that it was in error to invoke without comment a very severe penalty."[17]

5.5 FRCP 11: Signing, Representations, Sanctions

- (a) Attorney (or self-represented party) must sign all papers.
- (b) Representations must:
  - (1) Not have any improper purpose.
  - (2) Make claims warranted by law or make nonfrivolous arguments for changing the law.
  - (3) Have evidentiary support (or probably support) for factual contentions.
  - (4) Make denials of factual contentions warranted by evidence, reasonable belief, or lack of information.
- (c) Sanctions:
  - (1) After notice and opportunity to be heard, court may sanction an attorney, firm, or party for 11(b) violations. Law firms must be held jointly responsible.
  - (2) Motions for sanctions must be made separately. The party has 21 days from the date of service to withdraw the challenged paper. The court can award expenses to the prevailing party.
  - (3) On its own initiative, a court can ask a party to show why it hasn't violated 11(b).
  - (4) Sanctions must be limited to what is necessary for deterrence. Sanctions can be nonmonetary or monetary.
  - (5) Limits on monetary sanctions:
    - Courts cannot sanction a represented party for violating 11(b)(2) (i.e., lawyers are responsible for legal contentions).

[17] Casebook p. 678.

        - Courts cannot impose monetary sanctions unless it issues an 11(c)(3) show-cause order before dismissal or settlement.
    - (6) A sanction order must include an explanation.
- (d) Rule 11 does not apply to discovery motions.

5.6 FRCP 12: Defenses and Objections

5.7 *Zielinski v. Philadelphia Piers*

1. Facts:
    (a) February 9, 1953: Sandy Johnson crashed a forklift into Frank Zielinski, causing injuries.
    (b) February 10, 1953: Carload Contractors, Inc. sent an accident report to its insurance company.
    (c) April 28, 1953: Zielinski filed complaint against Philadelphia Piers, Inc., arguing that (1) PPI owned the forklift that Johnson was operating and (2) Johnson was acting as an employee of PPI.
    (d) April 29, 1953: complaint was forwarded to the insurance company.
    (e) June 12, 1953: PPI's general manager responded to interrogatories 1 through 5.
    (f) August 19, 1953: Sandy Johnson testified in a deposition that he was an employee of PPI.
    (g) September 27, 1955: Pre-trial conference held where Zielinski learned that the work of moving freight on the piers had been sold to Carload Contractors, Inc., and that Johnson became an employee of Carload.
    (h) October 21, 1955: From the answers to supplementary interrogatories, plaintiff learned that the accident report had been submitted to the insurance company.
2. In the original complaint, Zielinski claimed that PPI owned the forklift and that Johnson was an employee of PPI. Initially, PPI simply responded, "Defendant...denies the averments of paragraph 5."[18]
3. PPI's response was inadequate. It meant to only deny the claim of employee negligence, but it should have also addressed the question of whether PPI owned and operated the forklift. PPI's response led Zielinski to believe that PPI was the owner and operator of the forklift, but in fact it had been sold to CCI. Zielinski sued the wrong company, but by the time he learned his mistake (September 27, 1955), the statute of limitations had run.

[18] Casebook p. 686.

4. FRCP 8(b) requires responses to claims to explicitly affirm or deny each element of a claim.

5. The court held that the doctrine of equitable estoppel requires that the case go forward against PPI with the record showing that PPI owned and operated the forklift—even though that wasn't actually the case.

5.8 *Worthington v. Wilson*

1. Facts:

   (a) February 25, 1989: Worthington was arrested by two police officers.

   (b) February 25, 1991: Worthington filed a complaint against the Village of Peoria Heights in county court against "three unknown named police officers." The Village removed the action to the District Court for the Central District of Illinois.

   (c) June 17, 1991: Worthington amended his complaint to identify the two police officers by name.

2. The statute of limitations was two years, which had expired when Worthington filed his amended complaint. Defendants argued that the amended complaint cannot related back to the filing date of the original complaint under FRCP 15(c).

3. In response, Worthington made three arguments:

   (a) Relation back is governed by an Illinois statute, not 15(c).

   (b) The 15(c) requirements are satisfied.

   (c) He should not be punished for omitting the officers' names in the original complaint because the Peoria Heights Police Department had withheld that information.

4. In *Schiavone v. Fortune* (1986), the Supreme Court held that parties to be brought in by amendment must receive notice of the action before the expiration of the statue of limitations period.

5. December 1, 1991: FRCP 15 was amended in direct response to *Schiavone*. The new rule allowed complaints to be amended at any time to correct misnamed defendants as long as the defendant was aware of the action within 120 days of the filing of the original complaint. Notice is no longer required.

6. Under the new version of FRCP 15(c), Worthington's amendment was acceptable.

7. Defendants also argued that 15(c) does not apply because the defect in Worthington's original complaint was due to lack of knowledge, not a "mistake." The 7th Circuit had previously held that lack of knowledge of

the proper defendant does not involve a mistake. The district court here disagreed, but out of deference agreed with defendants and granted their motion to dismiss.

§6 Joinder

6.1 Joinder of Claims, Counterclaims, Cross-claims

6.1.1 FRCP 18: Joinder of Claims

- (a) A party can join as many claims, counterclaims, and cross-claims as it has against another party.
- (b) A party may join two claims even though one of them is contingent on the disposition of the other.

6.1.2 FRCP 42: Consolidation; Separate Trials

- (a) If actions involve a "common question of law or fact":
  - (1) Join all matters at issue.
  - (2) Consolidate the actions.
  - (3) Issue other orders to avoid cost or delay.
- (b) Court can order separate trials.

6.1.3 FRCP 13: Counterclaim and Crossclaim

- (a) Compulsory counterclaim
- (b) Permissive counterclaim
- ...

6.1.4 *Jones v. Ford Motor Credit Co.*

1. Plaintiffs sued Ford Credit, individually and as class representatives, for racial discrimination under the Equal Credit Opportunity Act.
2. Ford asserted counterclaims (1) for the plaintiffs' unpaid car loans and (2) conditional counterclaims against any class members in default of their loans.
3. District court held that Ford's counterclaims were not compulsory counterclaims and declined to exercise jurisdiction over the counterclaims.
4. Two types of counterclaims:

(a) **Compulsory**: arising from same transaction or occurrence; forfeited if not raised.

(b) **Permissive**: any claim not arising from the same transaction or occurrence.

5. Appellate court here agreed that Ford's counterclaims were permissive.

6. Compulsory counterclaims *do* establish supplemental jurisdiction.

7. Third Circuit rejected the view that independent jurisdiction is required for all permissive counterclaims.

8. Now, permissive counterclaims need only have a "loose factual connection" to the original facts—a broader requirement than the *Gibbs* CNOF test.[19]

9. The court held that (1) supplemental jurisdiction (under 28 U.S.C. 1367) may be available for permissive counterclaims and (2) the court should not exercise its discretion to not grant supplemental jurisdiction until it has ruled on the plaintiffs' motion for class certification.

6.1.5 *Fairview Park v. Al Monzo*

1. Fairview sued Robinson Township, Al Monzo, and Maryland Casualty. Al Monzo crossclaimed against Robinson Township, and Robinson Township counterclaimed against Al Monzo.

2. Court dismissed Fairview's claim against Robinson Township on a statutory basis.

3. The court then dismissed Al Monzo's crossclaim against Fairview because of a lack of independent jurisdiction (since both were PA residents).

4. The court entered judgment for Fairview against Al Monzo.

5. On appeal, Al Monzo argued that "it could not be divested of jurisdiction by the Township's dismissal as a primary defendant."[20]

6. The appellate court relies on the principle that "jurisdiction which has once been attached is not lost by subsequent events."

7. Since the claim against Robinson was dismissed *not on jusridictional grounds*, Al Monzo's crossclaim can remain.

[19] Casebook p. 718.
[20] Casebook p. 725

6.1.6 Parties and Standing

1. Standing means a party has a claim that can survive a motion to dismiss.
2. Standing requirements stem from the "case or controversy" requirement of Article III.
3. Rules have been criticized as obscure and complex.
4. State courts generally follow different and simpler standing rules.

6.1.7 FRCP 20: Permissive Joinder of Parties

6.1.8 *Kedra v. City of Philadelphia*

1. Plaintiffs brought action under the Civil Rights Act and the Constitution against city of Philadelphia and multiple police officers and officials for brutality, etc.
2. Defendants first contested the mother's prosecution of the case on behalf of her minor sons. Court rejected this as frivolous.
3. Defendants second argued that there was an improper joinder of defendant parties because the events, which occurred over fourteen or fifteen months, do not arise from the same transaction, occurrence, or series of transactions or occurrences. Court found that the events *did* arise from the same occurrences, so joinder was proper under FRCP 20(a).
4. There was also the question of whether joinder of defendants would prejudice some of them. Court held that it would be better to address this question after discovery.

6.1.9 FRCP 19: Required Joinder of Parties

6.1.10 *Temple v. Synthes Corp.*

1. Temple sued Synthes in district court and the doctor in state court. The district court ordered Temple under FRCP 19 to join the doctor or face dismissal. The appellate court agreed.
2. Here, the Supreme Court reversed because the doctor and Synthes were jointly and severally liable, which historically are *permissive* parties but not *necessary* parties.

6.1.11 *Helzberg's Diamond Shops v. Valley West Des Moines Shopping Center*

1. Helzberg's lease with Valley West stipulated that no more than two other full jewelry shops could open in the mall. When the mall signed a lease with a fourth jewelry shop, Lord's, Helzberg sought injunctive relief against Valley West.

2. Valley West moved to dismiss because Helzberg had failed to join Lord's under FRCP 19. Denied.

3. It was not feasible for Lord's to be joined because Lord's was not subject to the court's personal jurisdiction. Under rule 19, the court was then required to determine whether Lord's was indispensable. It decided that it was not, because Lord's absence would not prejudice it because all of its rights under its lease are maintained.

4. "In sum, it is generally recognized that a person does not become indispensable to an action to determine rights under a contract simply because that person's rights or obligations under an entirely separate contract will be affected by the result of the action."[21]

6.1.12 FRCP 14(a)–(b): Third-Party Practice

- (a) When a Defending Party May Bring in a Third Party.
  - (1) A defending party may bring in a third party, at which point the defending partybecomes a "third-party plaintiff." It must obtain the court's leave to file a complaint against a third party more than 14 days after serving its original answer.
  - (2) The third-party defendant:
    - (A) Must assert rule 12 defenses.
    - (B) Must assert 13(a) counterclaims, may assert 13(b) counterclaims, and may assert 13(g) crossclaims against other third-party defendants.
    - (C) May assert any of the third-party plaintiff's defenses against the primary plaintiff.
    - (D) May assert claims [counterclaims?] against the primary plaintiff arising from the same subject matter as the plaintiff's claim against the third-party plaintiff.
  - (3) Primary plaintiff may assert claims against third-party defendant arising from the same subject matter as the plaintiff's claims against the third-party plaintiff. The third-party defendant must assert rule 12 defenses and rule 13(a) counterclaims, and may assert rule 13(b) counterclaims and rule 13(g) crossclaims.
  - (4) Any party may move to strike, sever, or try separately the third-party claim.
  - (5) Third-party defendants can assert this rule against any nonparty.
  - (6) [Admiralty/maritime jurisdictions]
- (b) When a plaintiff may bring in a third party: same rules as for defending parties.

[21] Casebook p. 749.

6.1.13 *Banks v. City of Emeryville*

1.

6.1.14 FRCP 24: Intervention

1. (a) Intervention of right.
2. (b) Permissive intervention.
3. (c) Notice and pleading required.

6.1.15 *Atlantis Dev. Corp. v. United States*

1.

§7 Discovery

1. Discovery consists of (1) interrogatories, (2) requests for production or inspection, and (3) depositions.[22]
2. Fuller disclosure leads to the most favorable case for each party.[23]
3. Legitimate purposes: promotes settlement, helps determine whether a case can be decided in a summary judgment.
4. Less legitimate purposes: inflict costs, harass, reconstruction [–? see p. 883.]
5. State discovery rules generally track the federal rules.
6. The discovery process:
   (a) *Informal investigation*: happens outside the compulsory structure of formal discovery—interviews, document review, property visits.
   (b) *Discovery plan*: FRCP 26(f) requires parties to agree to a discovery plan.
   (c) *Initial disclosures*: mandatory disclosures include (1) names and contact details of relevant individuals, (2) copies or descriptions of records, (3) computations of damages, and (4) insurance information. FRCP 26(a)(1)(A). Parties are only required to disclose information that is favorable to their cases.[24]
   (d) *Depositions*:

[22] Casebook p. 9.
[23] Casebook p. 882.
[24] Casebook p. 885.

i. Depositions are binding but expensive. Lawyers generally depose all unfriendly witnesses.[25]

ii. FRCP 30 defines the scope of depositions.

iii. Lawyers can instruct defendants not to answer to (1) preserve a privilege, (2) enforce a protect order limiting discovery, or (3) stop abusive behavior.

(e) *Interrogatories*: written questions that must be answered under oath, often with accompanying requests for documents. FRCP 33 governs interrogatories.

(f) *Production*: items can be obtained by subpoena if necessary. FRCP 34 controls.

(g) *Physical and mental examinations*: only when physical or mental states are issues in the case. FRCP 35 controls.

(h) *Requests for admission*: to determine whether facts are accurate and documents genuine. FRCP 36.

(i) *Motions for protective orders and motions to compel*: court must award attorneys' fees to the winning party. FRCP 26(c), 37(a)(1).

(j) *Sanctions*: most commonly an award of costs.

7.1 FRCP 26: Duty to Disclose; General Provisions Governing Discovery

- (a) Required disclosures.
  - (1) Initial disclosure.
    - (A) Generally:
      - (i) Names and contact details.
      - (ii) Copies or descriptions of documents, etc.
      - (iii) Computation of damages.
      - (iv) Insurance details.
    - (E) Parties must supplement disclosures when required under 26(e).
- (b) Discovery scope and limits.
  - (1) Parties can discover all nonprivileged matter relevant to claims or defenses. It need not be admissible at trial if it is *reasonably calculated* lead to the discovery of admissible evidence.
  - (2) Limitations on frequency and extent.
    - (A) Court can alter limits.
    - (B) Electronic information need not be produced if it carries undue burden or cost.

[25] Casebook p. 886.

        * (C) Court must limit discovery under certain circumstances (enumerated within).
    - (3) Trial preparation: materials [i.e., work product—see *Hickman*].
        * (A) Tangible things prepared for litigation are not discoverable, unless:
            · (i) They are discoverable under 26(b)(1).
            · (ii) There is substantial need or they cannot be obtained without undue hardship.
        * (B) Mental impressions, etc. are excluded [i.e., only facts are discoverable].

How would *Hickman* be decided under this rule?

        * (C) People can access their own statements.

- (c) With good cause, the court can protect material from discovery.
- (d) After the initial discovery meeting under 26(f), discovery can proceed in any sequence.
- (e) Supplements and corrections are sometimes required.
- (f) Conference of the parties; planning for discovery.
    - (1) Parties must confer as soon as practicable.
    - (2) Parties must submit a discovery plan within 14 days.
    - (3) Requirements for the discovery plan.

7.2 FRCP 29: Stipulations about Discovery Procedure

7.3 FRCP 30: Depositions by Oral Examination

- (a) When a deposition may be taken.
- (b) Notice of the deposition; other formal requirements.
    - (1) Notice.
    - (2) Producing documents.
    - (6) Notice or subpoena directed to an organization.
- (c) Examination and cross-examination; record of the examination; written questions.
    - (1) Conducted as they would be at trial.
- (d) Duration; sanction; motion to terminate or limit.
    - Limited to one day of seven hours.

7.4 FRCP 33–36

- 33: Interrogatories to Parties.
- 34: Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes.
- 35: Physical and mental examinations.
- 36: Requests for admission.

7.5 Privileges and Sanctions

1. There were several privileged relationships under the common law, including attorney-client, spouse-spouse, doctor-patient, clergy-penitent, and others that vary by state. There is also the Fifth Amendment privilege against self-incrimination.
2. Privileged information is not discoverable even if it is relevant to the litigation.
3. Privilege protects the source, not the information itself.
4. Privilege can be waived, even unintentionally.

7.5.1 Work product: *Hickman v. Taylor*

1. Enabling broad discovery vs. encouraging adversarial hearings.
2. "Work product" is material prepared in anticipation of trial.
3. Facts:
   (a) February 7, 1943: tug J.M. Taylor sank; five of nine crew drowned.
   (b) March 4, 1943: public hearing at United States Steamboat Inspectors where the four survivors testified.
   (c) March 29, 1943: Fortenbaugh privately interviewed survivors and took signed statements. (He conducted other interviews, too, and in some cases made memoranda.)
   (d) November 26, 1943: estate of the fifth dead crew member (here, petitioner) brought suit against the two tug owners and the railroad.
4. Petitioner requested via interrogatories copies of all incident-related records, including signed witness statements, unwritten oral statements, and Fortenbaugh's own memoranda. The court in the Eastern District of Pennsylvania held that the materials were not privileged and ordered disclosure. When the respondents refused, the court held them in contempt. (The contempt order allowed Fortenbaugh to appeal immediately, rather than wait for the trial to end.)

(a) Under 26(b)(1) alone, these materials would have been discoverable, and they were not protected by attorney-client privilege.

5. The Third Circuit reversed, holding that the requested information was privileged because it was part of the **"work product of the lawyer."**[26]

6. Justice Murphy:

   - Discovery has two purposes: (1) narrow and clarify the issues in the case and (2) ascertain the facts.
   - The specific rule in question here is irrelevant; what matters is the question of whether "materials collected by an adverse party's counsel in the court of preparation for possible litigation" are privileged.[27]
   - Hickman (petitioner) argued that the privilege to withhold material must be limited to the attorney-client privilege.
   - The attorney-client privilege is not an appropriate framework to answer the question in this case because that privilege does not cover witness interviews or subsequent memoranda, etc.
   - Here, Hickman has requested information that he could have discovered for himself (e.g., testimony of known witnesses). Hickman has failed to show that disclosure of these materials is necessary or that nondisclosure would lead to injustice.
   - The Supreme Court was generally enthusiastic of the liberal FRCP disclosure regime, which was still new at the time.[28] Requiring disclosure of an attorney's work product would lead to "[i]nefficiency, unfairness, and sharp practices."[29] Other arguments against disclosure (in Bradt's framing):
     (a) It would create a disincentive to create the work product in the first place, which might make for worse lawyering.
     (b) "Sweat of the brow" argument: it would be unfair to let an attorney freeride on an opposing attorney's work.
     (c) Mental impressions are inherently private.
   - Affirmed.

7. Justice Jackson, concurring:

   - Restricting discovery preserves adversarial proceedings.
   - Requiring lawyers to disclose their work product would force them to become witnesses for "other witnesses' stories."[30]

8. Parts of *Hickman* codified in FRCP 26(b)(3):

[26] Casebook p. 919.
[27] Casebook p. 920.
[28] Casebook p. 920.
[29] Casebook p. 923.
[30] Casebook p. 925–926.

(a) The definition of work product and its broad protection.

(b) "But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."[31]

(c) Work product immunity is limited when there is "substantial need" or the threat of "undue hardship."

7.5.2 Work-product doctrine

1. In 1970, the FRCP were amended to include an exception for work-product materials in 26(b)(3): material "prepared in anticipation of litigation or for trial..."

2. The work-product doctrine can be overcome only if the information cannot be obtained or can only be obtained with great difficulty.[32]

3. Courts (including the *Hinckman* court are divided on whether attorneys must disclose unrecorded recollections of witnesses' statements.

4. Work product is only protected if it was prepared specifically for the possibility of litigation (though the specific case may not matter).

5. Witnesses must still be disclosed before trial.

6. Discovery sanctions:

   (a) FRCP 26(g): courts must sanction violations of the 26(g) certification requirement.

   (b) FRCP 30: failure to attend a deposition or to subpoena a witness for a deposition is sanctionable.

   (c) FRCP 37: (1) If a court orders disclosure, it must award costs to the winning party. (2) If a party disobeys a judicial order, the court must order it to pay expenses.

   (d) The severity of sanctions are left to district courts.[33]

7.5.3 FRCP 37: Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

- (a) Motion for an order compelling disclosure or discovery.
  - (1) Must include a showing of a good faith attempt at discovery or obtaining disclosure without court action.
- (b) Failure to comply with a court order.

[31] Casebook p. 925.
[32] Casebook p. 929.
[33] Casebook p. 977.

§8 Summary Judgment

1. **Motion for dismissal for failure to state a claim**: assuming the plaintiff's allegations are assumed to be true, the court determines whether there is a cause of action. Federal claims fall under FRCP 12(b)(6) and state claims fall under demurrer rules. Motions to dismiss are based on the pleadings themselves; any additional factual allegations will cause the motion to be treated as a motion for summary judgment.

2. **Motion for summary judgment**: either side can challenge the legal sufficiency of the other's factual allegations or legal contentions under 12(a) (formerly 12(c)).

   (a) Exists to decide issues that are so one-sided that a trial would be wasteful.[34]

   (b) Pleadings do not support motions for summary judgment[35]—i.e., they must be supported with facts, not allegations.

   (c) "...one of the prime uses of discovery is to gather information that will be useful in supporting and opposing summary judgment."[36]

   (d) **Burden of production**: plaintiff must produce sufficient evidence on each element of the case for a jury to reasonable rule in its favor. Otherwise, under FRCP 50, the judge may grant judgment as a matter of law.[37]

   (e) **Burden of persuasion**: the standard by which a plaintiff will have to convince a jury (which, in civil cases, is "by a preponderance").[38].

   (f) Summary judgment tests the whether a party can meet the burden of production.

[p. 994 n. 5: how do you determine whether a motion for summary judgment is "supported"?]

8.1 FRCP 56

- (a) Court can grant summary judgment if "there is not genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."
- (b) Parties may file motions within 30 days after the close of discovery.
- (c) Procedures.
  - (1) Supporting factual assertions.

[34] Casebook p. 992 n. 1.
[35] Casebook p. 993 n. 2
[36] Casebook p. 993.
[37] Casebook p. 994–95 n. 4.
[38] Casebook p. 994 n. 4

  - (2) Facts must be admissible.
  - (3) Court can consider materials not cited in the motion.
  - (4) Affidavits/declarations.
- (d) When facts are unavailable to the non-movant.
- (e) Failing to properly support or address a fact.
- (f) Judgment independent of the motion. [Courts can grant summary judgments absent motions from any party.]
- (g) Failing to grant the requested relief. [If the summary judgment doesn't end the case, its outcome can still come into play during trial.]
- (h) Court can impose sanctions for bad faith affidavits/declarations.

8.2 *Adickes v. S.H. Kress & Co.*

1. Sandra Adickes, a white teacher, took a group of black students to Kress's restaurant in Hattiesburg, Mississippi. She was refused service and then arrested for vagrancy.
2. She alleged that (1) she was refused service because she was part of a mixed-race group and (2) the refusal of service and subsequent arrest resulted from a conspiracy between Kress and the Hattiesburg police. The District Court for the Southern District of New York directed a verdict for the defendants on the first count [i.e., no cause of action?] and granted summary judgment on the second. The Second Circuit unanimously affirmed.
3. The Supreme Court reversed on both counts (but the edited opinion in the casebook addresses only the summary judgment on the second count).
4. Justice Harlan:
   (a) To show conspiracy as alleged, Adickes must show (1) that an employee of Kress deprived her of her constitutional rights and (2) that the defendant acted "under color of law" (which is satisfied if an employee and the policeman "somehow reached an understanding to deny Miss Adickes service"[39]).
   (b) Summary judgment was inappropriate because the respondent, Kress, "failed to carry its burden of showing the absence of any genuine issue of fact"[40] (and any material it submits "must be viewed in the light most favorable to the opposing party."[41]

[39] Casebook p. 986.
[40] Casebook p. 987.
[41] Casebook p. 988.

(c) In this case, the two big factual gaps were that the police officers failed to "foreclose the possibility" that (1) they were in the store and (2) influenced the Kress employee to not serve Adickes.[42]

(d) Because respondent did not meet the burden of establishing the police officers' presence, petitioner was not required to file opposing affidavits.

8.3 *Celotex Corp. v. Catrett*

1. Catrett died in 1979. In 1980, his wife (respondent) filed suit against 15 asbestos companies, including Celotex (petitioner).

2. Celotex moved for summary judgment for lack of evidence showing that its product was a proximate cause of Catrett's death, including a lack of witnesses who could testify to that effect. Catrett produced three documents she claimed demonstrated "a genuine material factual dispute."[43] Celotex argued that the documents were inadmissible hearsay.

3. The District Court for D.C. granted the motions from Celotex and the other defendants. Catrett appealed only the grant for Celotex. The D.C. Circuit reversed on the grounds that Celotex failed to show any evidence to support its motion.[44]

4. Justice Rehnquist:

   (a) The D.C. Circuit's opinion was inconsistent with FRCP 56. The plaintiff bears the burden of proof for its claim, and in this case the defendant's motion contended that the plaintiff failed to establish the existence of an element essential to its case.

   (b) The moving party need not negate its opponent's claim.

   (c) "One of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."[45]

§9 Jury Trials

9.1 Overview and Background

1. Very few cases go to trial.[46]

[42] Casebook p. 990.
[43] Casebook p. 996–97.
[44] Casebook p. 997.
[45] Casebook p. 998.
[46] Casebook p. 1057.

2. As of 2002, 2/3rds of federal trials were heard before a jury, while 97% of all state trials were heard before a judge.[47]

3. Pre–jury verdict motions: nonsuit, directed verdict (state) or judgment as a matter of law (federal).

4. Post–jury verdict motions: judgment n.o.v. (state), judgment as a matter of law (federal), or new trial (both).[48]

5. A party waives the right to a jury trial if it does not request it. FRCP 38.

6. Seventh Amendmend guarantee to a jury trial does not apply to the states.[49]

7. Six and twelve are the most common jury sizes. Six is the lower limit.

8. The Supreme Court has upheld non-unanimous verdicts. FRCP 48 requires a unanimous verdict unless the parties stipulate otherwise.

9.2 *Simblest v. Maynard*

1.

9.3 *Sioux City & Pac R.R. Co. v. Stout*

1.

9.4 FRCP 50

1.

9.5 FRCP 59

1.

9.6 Overview of Post-Trial Motions

1.

9.7 *Tanner v. United States*

1.

9.8 *Spurlin v. Gen. Motors*

1.

[47] Casebook p. 1058.
[48] Casebook p. 1060.
[49] Casebook p. 1098.

9.9 Entering and Enforcing Judgments

1.