Civ Pro Outline

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Introduction

- Hobbesian paradigm - this is what life is like without procedure
- **Substantive Law**: Defines legal rights and duties in everyday conduct – if you injure someone through negligence of these duties, you are responsible for damages.
- **Procedural Law**: sets out the rules for enforcing substantive rights in the courts.
- Goes beyond "truth" or determining facts to "justice": "determination of how rights, assets, or losses will be apportioned".
- Despite the outcome, Procedure makes it palatable – parties believe they have been treated fairly even if they lost. "Procedure serves to validate the integrity of the legal system as a whole by providing a remedial process that replaces much more destructive motivation like self-help and personal retribution." (from book)
- The degree of control given to parties is one of the most significant factors in procedure. Attorneys help to ensure that the parties get the most out of the control they are given.
- Justice System less about truth and more about conflict resolution
- Why do people sue and litigate?
    - Parties have diverging estimates on the value of the case.
    - At least 95% settle before trial
    - The process works like a funnel bringing the divergent ideas about the disagreement closer and closer until there is settlement or a narrow area for the trial to determine
    - Civil Procedure and pre-trial procedure is like the funnel below:

Funnel from top to bottom

Complaint / Motion to Dismiss	Widely divergent - plaintiff has more info on value of damage and defendant about liability
Law of the case established	Up till now competing theories of law to be used. This often seals the case of one side or other
Discover/Fact Gathering	Deposition and document request
Summary Judgement	Are there facts to support the legal question
Trial	Focused around a narrow legal question

Due Process Foundations

- **No person shall be deprived of life, liberty, or property without due process
- How do we devise a test to determine the best system of justice? Rather than judge consensus about the outcomes, we should judge the justness of the process
- Litigation is society's preferred substitute for self-help and primitive means of restitution. The remedies it offers must be sufficiently attractive.
- Due Process is:
    - Notice - you have the right to be notified of proceedings against you
    - Hearing - You have the right to speak and be heard concerning action to be taken against you
    - Right to a judge or neutral arbitrator; someone without vested interest
    - Right to a timely hearing
    - Right to counsel
- Putting power into the hands of the state can actually make things worse, so we have to have a fair due process
- Rights based view and the view of imposing/limiting state power
- Our Bill of Rights shows that Americans wanted to go further than British in avoiding abuse of power and being guaranteed due process which could never be taken away
- However there are many exceptions to balance the interest of the state and rights of the person. These are usually contradictory priorities.
- Plaintiff is asking court to exercise state power to get remedy from the defendant. Due process is what is required to fairly determine the action is correct before taking something from the defendant
- 14th amendment in 1868 extended due process to the state and local government
- Substantive Due Process Era
    - End of 19th centurty
    - Substantive meaning to the 14th amendment's prohibition from states' restricting life, liberty or property without due process - expansive definition of liberty
    - Lochner case of making the New York law regulating bakier's hours unconstitutional as limiting their right to contract
        - Strong prsumptions against state regulation as depriving liberty
- Procedural Due Process Era
    - Came in with Warren Court of 1960s - "right to be heard"
    - Process based requirements a state had to meet before restircting the "interests" of citizens
    - Characterized by Goldberg v. Kelly welfare benefits hearing case
    - But sometimes a swift response is needed
- Due Process Functionalism
    - More instrumental approach
    - Check against improper/incorrect gov. decisions affecting life, liberty or property
    - Matthews v. Eldridge - about how much process as due
        - Three factor balancing for considerations of cost and liklihood of error
            - Private interest to be affected
            - Risk of erroneous deprivation
            - Probably value of additional or substitute procedural safeguards
        - Balancing allows for more efficiency and less process when little is at stake (Van Harken - parking tickets) and more process where essential services an issue (Goldberg) 1970

        - Notice and hearing before Welfare benefits could be taken
        - Written appeals not good enough - hearing must be oral, though the procedure may be informal
        - Due process requires opportunity to confront and cross-examine
    - (1974) Calero-Toledo v. Pearson Yacht Leasong Co.: upholding siezure o yacht used in drug transport - seemed to settle the issue (Puerto Rico)
        - "Where only prperty rights are involved, mere postponement of the judicial inquiry is not a denial of due process" - from Phillips v. Commissioner
        - Real property is a significant forfeiture, but real proberty cannot be so spirited away
        - Balancing:
            - Significant government interest of asserting in rem juris which allows for Furthered public interest in preventing continued illicit use of the property
            - Pre-siezure notice and hearing might allow for yacht to be sailed away
            - Unlike Fuentes, not initiated by private parties. - The state is keeping the monopoly of power to itself.
        - "extraordianary" situation
- Pre-judgment attachedment cases - place a lien (befroe a full trial) in anticipation fo winning a favorable judgment
    - The private citizen in effect temporarily wields the power of the state

<u>Fuentes v. Shevin, US, 1972</u>

- Facts
    - Firestone claims breach of contract by Fuentes – writ of **replevin**, seizes stove by simply filling proper form and securing a bond
    - Notice and siezure at same time; def had to get bond and file counter suit to reverse
- Issue
    - Fuentes wants pre-deprivation hearing
    - Due Process right to **notice – 14th Amend.**
- **Principle** – any time state acts contrary to life, liberty, or
        - property, **state must provide at the minimum notice and type**
        - **of hearing**, otherwise violates Due Process clause of 14th Am.
        - (do not have to show will prevail at hearing)
        - Have to have:
            - -notice
            - -hearing
            - -timely remedy
            - -representation
            - -impartial arbiter
- notice and hearing proven best mechanism for guarding
        - against misapplication of state force
- court wants to minimize error
- **Dissent** – hearing doesn't actually provide additional
        - protection, people would not contract for hearing (extra
        - cost) businesses will find way around
- Exception to principle: if overriding state interest
    - public safety – i.e. contaminated food, drugs (yacht case)

- North American cold storage - idea of post-siezure hearing to allow for compensation if necessary
- direct state interest
- national security
- police power
- economic stability

- Analysis: Brightline rule set forth here of right to notice and hearing prior to taking of property - process more important than expedience - introduction of tension between clear rules and exceptions
    - Exceptions to introduce our test

Mitchell v. Grant, US, 1974

- can sequester property of another if show in hearing to judge that
    - have right to property - at least have to have some showing of why you have the right, unlike Fuentes
    - The court official is the judge
- post-deprivation remedies better protection against error than pre-
- deprivation hearing – paying of attorneys fees, losing bond, etc.
- both buyer and seller have interests in property being seized
- Louisiana sequestration statute okay because
    - Notice before taking stuff
    - Opporunity for hearing (ideally before but court settles for right after)
    - Protect any property interest with the bonds
- Analysis:
    - Already retreating from Fuentes bright line with exceptions
        - State controlled monopoly of force
        - State acting in public interest
        - Exigency - yacht case
    - Why the Louisiana statute bettert han Fuentes PA statute
        - Provided more proof of interest of party seeking state action
        - Judge made the decision
        - Immediate hearing for def if requested
        - Provision for damages
        - Attorney fee covered if def wins
        - But NO NOTICE before seizure
- Fundamental approach - what does the constitution say?
- Instrumental approach - trying to reduce error when infringing on rights of citizens as necessary

North Georgia Finishing, Inc. . Di-Chem, Inc., *US, 1975* (talk to group)

- Court feels that this GA statute did not have any of the saving character of the Louisiana (mitchell) statute - no way to dissolve the garnishment without posting bond for twice the values
- i. need to have affidavit ok'd by a judge, not clerk
- ii. figure out which protections avoid erroneous conduct
- iii. Facts – attachment on bank account
- iv. Rule that emerges as noted in Powell concurrance
- must have:

- creditor must post bond to safeguard interest of debtor
- creditor or someone w/personal knowledge of facts must
- file affidavit which sets out prima facie claim
- neutral magistrate must determine affidavit sufficient
- before issuing attachment or replevin
- provision for reasonably prompt post-attachment hearing

○ Analysis:
  - Court searching for best formulas of process for seizure. Realized in this case that notice and hearing prior to was same effect as trial and pre-empted the purpose of pre-trial attachment or siezure

Mathews v. Eldridge, *US, 1976* (instrumental approach)

- **test for determining how much due process is due (Matthews Test)**
  - ○ private interest that will be affected
  - ○ risk of erroneous deprivation through procedures in place
  - ○ gov'ts interest including econ. and admin. burdens
    - Gov. not likely to get money back if found right but could back pay if wrong
  - ○ ii. applied in this case
- social security disability benefits not based on financial need – not risk of serious loss, unlike in welfare situation
  - ○ iii. changed requirement (cut back) of ***__Goldberg v. Kelly__, 397 US 254 (1970) –
    - -affirmative right to notice and hearing (welfare benefits)
    - -holding from goldberg had ben that evidentiary hearing always required before termination of welfare benefits
  - ○ Mathews and Goldberg come out same on first two points of Mathews test but personal interest is much higher (third prong) for Goldberg because the welfare benefits were only income as opposed to supplemental income in Mathews.

Connecticut v. Doehr, US, 1991

- uses *Mathews* test – changes gov't interest to include interest of party
  - seeking prejudgment remedy
  - ○ state and private interest do not balance risk of error and minimal interest of plaintiff
  - ○ Ct. cannot make a determination w/one sided info from P
    - ii. Facts – Giovanni places lien on Doehr's house w/o knowledge
    - prevents Doehr from financing, equity line, etc.; extortion
  - ○ no per se requirements – hearing, bond – incorporate into balancing test
  - ○ Tested CT procedure for pre-jud attachmen of real estate on the home of Brian Doehr to secure potential civil claim of assault and battery; no other reason for attachment than the interest of securing recovery
  - ○ Plaintiff on losing side of bar fight and states attachment justified by the liklihood of judgment in his favor based on claims
  - ○ CN statute did not offer any sugstantial protection to the D.; pure win for P: no bond, no showing of extraordinary circumstances, only required P to sign the affidavit (five one-sent paragraphs)
  - ○ Notice after attachment

- US employed Mathews-type standard to declare Conn statute unconstitutional; with test here "inquiry similar but focus dif. First two parts of test same, focus of third part shifted from govenrment interest to P interest
- Matthews test:
    - Interest affected: severe consequenses even if temporary or partial impairments to property rights - still enough for due process
    - Risk of error and value of additional safeguards: substantial risk because facts are one sided - need hearing and bond to satisfy due process
    - P had no compelling interest; unlike mechanic's lien (spielman-Fond)
        - Gov. interets dismissed as being no greater than P: de minimis
        - Not a compelling enough reason for state to act; judge could make no reasonalble assessment concerning liklihood of actions's success based on one sided, self-serving, conclusory statements.
- Renquist didn't want Matthews test for lis pendis
- Court rejected any per se approaches to the constitutionality of privately initiatiated pre-judgment seizures
- The inicia of reliability fromt eh pre-Mathews case law were incorporated into the constitutional balancing standard.
- Since Mathews, this functional form of due process commands: all critical elements of due process - hearing, counsel, are subject to balancing of the
    - Magnitude of loss
    - Likelihood of error
    - Government interest in swift action

Van Harken v. City of Chicago, 103 F.3d 1346 (7th Cir. 1997).

- Parking ticket changed to civil offense, lose protections – right to face accuser (ticket = affidavit), real judge; no violation
- Use *Mathews* test – **less at stake, less due process required**
    - No real value in hearing
        - Only value of parking ticket at stake (low interest)
        - Low chance of error; very high cost for further safeguards
        - Parking system would be broke if there was more due process; what is offered probably more than needed. City has big interest in keeping streets safe so would not be rational to hand out arbitrary parking tickets; real judge much more expensive
- Problem, b/c society feels like needs some measure of due process
- Text lists this type of case as inevitable application of Mathews test

Hamdi v. Rumsfeld

- Case of direct government action against a private citizen (enemy combatant)
- Very situation Magna Carta written to control almost 800 years ago
- Like Doehr it involves deprivation - liberty rather than propertyf
- Only evidence a signed affidavit by US official who had never met him but "familiar with facts
- Government insisted that its interest in "preventing combatants from rejoining the enemy while relieving the military of the burden of ltigating wartime captures halfway around the world trumped the other interests such as Hamdi's interest in freedom and liklihood of risks or burden of additional process.

- Supreme Court rueld risk of erroneous deprivation of liberty unacceptably high
- O'Conner for court: fundamental elements of due process - notice, hearing, counsel, arbiter, timliness - must be applied appropriate to circumstances
- Court declared Mathews assessment to be the proper approach even in national security cases: although a hearing is required it would not necessarily include every procedural protection of a peacetime criminal trial
- Due process remains a vital protection or US citizens - may not be discarded altogether when inconvenient
- Analysis - shows core fudamental issues of civil procedure: equity and efficiency

Pleading a Claim

Introduction

- Current pleading system reaction against common law
  - had to come in w/complete pleading, only 1 claim
  - high burden on parties – needed to have full info
  - current system assumes parties do not have information
- **Federal Rules of Civil Procedure (FRCP)**
  - **Rules should be used to pursue a just, speedy, and inexpensive conclusion (inherent conflicts there)**
  - **Rules 1–** purpose of rules – secure "just, speedy, and inexpensive determination"
  - Rule 3: civil aciton commenced by filing a complaint with the court
  - **Rule 7 -** formally announced end of common law pleadings: allowed pleadings only as follows– complaint and answer
  - **Rule 8 -** rules of pleading – "short and plain statement of the claim"
    - **Rule 8a** – ***Conley v. Gibson*** – require minimum of due process – "fairly notified" of nature of claim so he can formulate a response
    - Comlaint should not be dismissed for failure to state a claim unless appears beyond doubt that the planintiff can prove NOT SET OF FACTS in support of claim which would entlitle to relief.
      1. Short and plain statement of the grounds of jurisdiction
      2. Short and plain statement of claim showing entitlement to relief
      3. Demand for relief sought - may include relief in alternative or different types

United States v. Bd. of Harbor Commissioners, D. Del., 1977

- Charged w/dumping oil into water, SICO and NASCO D. says too vague (which D?, amount discharged? How caused? - claim they can't begin to form a response) –motion for more definite statement; denied
- Gov't knows not all companies, doesn't have info
  - **equity v. efficiency –** fairness v. trying all at once
- **incentives –** cheap entry into system (**liberal pleading**), get parties to stay in litigation system, obtain evidence through discovery
  - cheap entry good for plaintiffs, bad for defendants
- **just have to be able to answer complaint at this stage – say yes or no – notice is satisfied**
  - **Rule 12(e) motion for more definite statement only applies to claims "so vague or ambiguous that the party cannot reasonably prepare a response" - more about whether claim is intelligible. Have you been put on notice.**
  - **Need to wait for discovery to "flesh out" government case - can't use 12(e) for this purpose**
- **transubstantiveness of rules** – apply to any situation
- Allow for simple comlaint because the defendant is the lowest cost provider of information. The facts will come out in discovery

McCormick v. Kopmann, App. Ct. Ill., 1959

- Mrs. McCormick sues the owner of the tavern where her husband was drinking and Kopmann, the truck driver who hit her husband in alternative
  - Wrongful Death Act - Kopman negligently drove across center line and caused fatal crash
  - Dram Shop Act - Huls served to many alcoholic beverages to him which rendered him intoxicated and as a result a collision was caused

- Kopmann moved to dismiss that contradictory claims were fatal
- If A+B+C necessary to prove claim, **P** has to prove that rights denied under all three – claim based on "information and belief"
- Can't recover against both
    - but **Rule 8(e) (2)** - **allowed to introduce alternative claims "regardless of consistency" –** similar to *Harbor Comm. "alternatively or hypothetically"…the pleading is sufficient if any one of them is sufficient*
    - Sound policy to achieve justice in one case especially in the case of deceased key witness so P does not know the facts…"truth cannot be stated until it is known"
    - incentives – encourages lack of information (no autopsy)
- Why alternative claims – 2 defendants will mount cases against each other – **Game Theory**
- **Rule 42(b)** – separate trials –court order to further convenience or avoid prejudice, or when conducive to expediency and efficiency
    - **18a** – P can join as many claims as have against D
- Our system based on idea that D has more idea of liability while P has more idea about damages

Mitchell v. Archibald & Kendall (A&K), Inc., 7th Cir., 1978

- Truck driver shot while making delivery, had been told to wait nearby; A&K motion to dismiss, not their premises; motion granted
- **Rule 12(b)(6)** – motion to dismiss for failure to state a claim upon which relief can be granted (as a **matter of law)**, not matter of fact **(**for judge not jury)
    - **not preferred method of disposing cases** – prefer based on facts (if would have plead constructive premises)
    - Facts of claim assumed to be true - dismissed
- Burden on defendant during this stage to raise defense under **Rule 12(h) (1) – otherwise lose these defenses** – lack of personal jurisdiction, improper venue, insufficiency of process or service - d has to make these motions now or waive them forever
    - assume D has more info – higher burden of pleading
    - P has benefit of doubt – **take facts as stated as true**
        - Here plaintiff fails to state claim in light of facts
            1. Could have amended claim – **Rule 15a**
            2. **On appeal the premisis question is now a matter of fact that cannot be reconsidered. Can only review law decisions on appeal - court says the P relinquished the legal rule they now assert because you didn't amend your claim.**
- **Upon 12(b)(6), P could have amended according to 15(a) to plead a claim that was sufficient with the theory of premises they propose at appeal. Instead they appeal the 12(b)(6) and stand on that original faulty complaint.**
- **Rationale:**
    - **Said in claim he was not on premisis**
    - **Instead of amending claim, argued legal theory of what premisis is, but didn't include that theory in claim**
    - **Even so, your theory of construing premisis is bs**
- **Principle:**

  When deciding whether a Motion to Dismiss was properly granted, the court is only required to accept well-pleaded facts as true without considering any new legal theory presented by Plaintiffs.

Ross v. A.H. Robins Co., 2nd Cir. 1979

- Dalkon Shield, Robins deceiving investors as to financial condition of company;
- **Rule 9b** – fraud cases have to **plead circumstances with particularity – factual basis - specific factual allegations**
    - **Must state with particularity the circumstances constitutin fraud or mistake**
    - **What specific representations were made and why they were false**
        - **P would have knowledge of the fraud or else wouldn't know of it because was on losing end of fraudulent transaction**
- but state of mind can be averred generally (malice, intent, knowledge) - how could P know these
- worried about **in terrorem** affects (unfair settlement incentives), reputational harm, facts available to public – have to particularize
    - here reputational harm much greater than market affect– killed 1000's of women, throwing out fraud claim not help – rule misconceived

- Expected Value
    - EVplaintiff = P x A – costs = x
    - Evdefendant = P x A + costs (expecting loss) = y
        1. Difference btwn. x and y is settlement zone

Tellabs, Inc v. Makor Issue & Rights, LTD, U.S. 2007

Four claims of fraud by Tellabs
Governed by Private Securities Litigation Reform Act based on 2d cir
Court dismissed for not pleading fraud with enough particularity which would give strong inference

- Dismissed for not meeting hightened requirement; amended claim
- Courts divided on "strong inference"
- 7th circuit reverses - says reasonable person could infer scienter (reasonable person standard) - Split with 6th circuit "only most plausible inference" standard
- U.S. says 7th cir. does not capture the stricter demand of Congress in PSLR and must be at least as compelling as any opposing inference (a tie)
  an inference of scienter must be more than merely plausible or reasonable - it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent...the inference of scienter must be more than merely "reasonable" or "permissible"-it must be cogent and compelling, thus strong in light of other explanations. A complaint will survive, we hold, only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[2]
  Tellabs increased the hurdle civil litigants must traverse in order to recover damages for securities fraud because it made it more difficult to demonstrate scienter (a necessary element of the claim). Instead of being able to reasonably deduce scienter from the alleged facts of the case, a claimant must also demonstrate that fraud is at least as likely as other, more-innocent explanations.

Cash Energy, Inc. v. Weiner, D. Mass., 1991 [inlcude this case?]

- Environmental contamination b/c of storage by D of chemicals, 12b6 motion
- Court says 9b underinclusive – concern w/abuse of legal system
- Liberal pleading too liberal – expand specificity of pleading to CERCLA (Comprehensive Enviromental Response, Compensation and Liability Act) cases – need factual basis
    - concerns w/litigation costs, burden on judicial system
    - require claim does "substantial justice" – Rule 8e
- **lower courts do not like liberal pleading – they have to hear cases**

Swierkiewicz v. Sorema, N.A (US 2002)

- Employment discrimination case
- Judge tried to interpret McDonnel Douglas evidentiary standard as requiring prima facie pleading to be sufficient
- Court reaffirmed that Employment Discrimination does not fall within 9b exceptions to 8a pleading standard. "short plain statement of the facts
    - Incongruous to require plaintiff to a higher standard to survive motion to dismiss that would be required to succeed on merits at trial if evidence is discovered.
    - Discovery might uncover the evidence needed.
- Greater specificity requirements can only be obtained by amending the federal rules, not by judicial interpretation
- Recovery may appear very remote on face of claims but that is not the test

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, US, 1993 Include this case?

- Execution of search warrants into private homes – killed dogs, assaulted occupants
- **Courts cannot apply more stringent pleading standard in civil rights cases even if the underlying substantive law is more complex**
    - slippery slope argument
    - ***expresio unis*** – if you listed exceptions, the ones that are not listed are presumed to be intentionally omitted by drafter – only 9b exceptions for fraud, etc.
        - exclusive v. illustrative rules
    - decision is ridiculous b/c court can change rules since it is Supreme Court advisory comm. that drafts FRCP
        - Rule 3 – commencement of action, Rule 4 – summons,
- Once again emphasized that rules 8 and 9 can only be re-written by ammending the FRCP not by judicial interpretation

Bell Atlantic Corp. v. Twombly, 2007 (summary judgment below)

- Rule 12(b)(6) tends to punish a plaintiff who has been too detailed with facts which could expose the weakness of the theory of the case before factual discovery has allowed for better facts supporting the theory to come to light.
    - Posner in American Nurses' Ass'n v. Illinois: "a plaintiff who files a long and detailed complaint may actually plead himself out of court by including factual allegations which if true show that his legal rights were not invaded."
    - But can't be too sparse either: 12(e) for more definite statement only applies to small range of pleadings
- In Bell Atlantic court established heightened pleading requirements, not be extending 9(b) but by rereading Rule 8 to mean the comlaint must include facts that is assumed true, add up to a plausible claim.

- Baby bells conspiracy case under Sherman Anti Trust Act
- To prove conspiracy during trial requires proof of "meeting of the minds" of actual agreement
- Obviously this is difficult information for a P to get before discovery so plaintiff only able to produce evidence of parallel conduct to show Ds might have conspired
- Court put Conley's "no set of facts" standard away and introduced the plausibility standard with emphasis on part of rule 8 that says "allege facts SHOWING that P entitled to relief"
    - P had not shown facts to nudge claim from concievable to plausible

- Twombly and Tellabs both indicate a significant retreat from the liberal pleading regime of Conley - court seems to be licensing a preliminary assessment of the viability of the claim before D has even answered (motion to dismiss)
    - Does the new pleading movement apply trans-substantively? Or only to certain areas of law or types of claims?
    - Limited reading reinforced by erickson v. Pardus (alleging mistreatment by prison officials) where court cited a passage from Twombly quoting Conley that pleading need only give D fair notice of the claim and the grounds on which it rests. - did not discuss plausibiliity
    - Also distinguished Swierkiewicz 127 S.Ct. 1955 at 1973

Ashcroft v. Iqbal (S.Ct. 2009)

- Pakistani Muslim arrested after 9/11 and detained by federal government under restrictive conditions. Sued AG and Director of FBI seeking damage that they had treated him unfavorably on account of his race religion, and/or national origin
- D moved to dismiss that they were entitled to qualified immunity; dismissed
- S.Ct. held dismissal proper
- Complaint must contain sufficient factual matter accepted as true to "state a claim that is plausible on its face" (Twombly)
- Allows the court to draw a reasonable inference
- Plausibility standard is not a "probability requirement" but asks for more than sheer possibility
- Threadbare recitals supported by merely conclusory statement, do not suffice
- Rule 8 does not unlock the door of discovery for P with only conclusions
- Determination of whether claim is plausible is a context-specific task requires judicial experience and common sense.
- Begin by identifying pleading which are no more than conclusions thereby not entitled to assumption of truth. Must be supported by factual allegations

- Once a claim is filed that is clear enough for 12(e) motions, procedure serves to weed out and encourage settlement by narrowing the contested claims through admission and denial, converging a common understanding of the facts through discovery, and clarifying the law that will address those facts. Also the cost of moving through litigation is a huge incentive to settle or drop frivilous claims.

The Defendant's Answer

Defensive rules: the rules are less efficient than common law but hope to be more meritorious in nature.

- Claim was filed with Rule 1 according to rules 7 and 8
- Rule 4: Summons
    - 4(c)(1) summons must be served with a copy of the complaint
    - 4(d) Waiving Service
        - 4(d)(1) one subject to a summons has duty to avoid unnecessary expense of serving the summons; plaintiff may notify def of action and request waiver of service
        - 4(d)(2) - failure to waive may result in expenses incurred by def. for cost incurred making service
        - 4(d)(3) If service waived, def has 60 days to respond after service sent or 90 days outside jurisdictional district of US
        - 4(e) - method of service within US
            - 4(e)(2) by any of following
                - 4(e)(2)(A) personally serve a copy of complaint
                - 4((e)(2)(B) leave at individual's dwelling with someone of suitable age and discretion
                - 4(e)(2)(C) delivery to lawful agent
    - 4(h) Sevice to a Corporation, Partnership, or Association
        - 4(h)(1) in the United States
            - 4(h)(1)(A) by manner in rule 4(e); or
            - 4(h)(1)(B) by delivering a copy to a lawful officer or agent - by also mailing to each defendant
    - 4(k) Territorial Limits of Effective Service
        - 4(k)(1) In General, service establishes personal jurisdiction over a D
            - 4(k)(1)(A) who is subject to the jurisdiction of the court (See jurisdiction section)
            - 4(k)(1)(B) who is a party joined under Rule 14 or 19 not more than 100 miles from where the summons was issues; or
            - 4(k)(1)(C) when authorized by Fed. Stat.
    - 4(m)Time Limit - If defendant is not served within 120 days after complaint filed, cout must dismiss or order service be made within a particular time; or if good cause shown, must extend the time
- Rule 6 is how to compute the time allowed for motions - probably not important but should ask
    - 6(a)(1) period of days
        - 6(a)(1)(A) exclude the day of the event that triggers
        - 6(a)(1)(B) - coutn every day including intermediate Satrudays, Sundays, and legal holidays
        - 6(a)(1)(C) - include the last day of the period but if last day is Sat, Sun, or legal holiday, the period continues until the end of the next regular day or accessible day
- Rule 12: Defenses and Objections:
    - 12(a) Time to serve responsive Pleading (D response)
        - 12(a)(1) In General:
            - 12(a)(1)(A) Defendant must serve answer
                - 12(a)(1)(A)(i)to complaint within 21 days after service; Or
                - 12(a)(1)(A)(II) 60 days is service was timely waived

        - 12(a)(1)(B)A party must serve answer to counterclaim or crossclaim within 21 days
        - 12(a)(1)(c) a Party must serv a reply to an answer withing 21 days (all parties replying to all subsequent motions after complaint and response)
    - 12(a)(2) United State must serve an answer to complaint, counterclaim, or crossclaim within 60 days of service to US Attorney
    - 12(a)(4) come back to this - textbook talks about pre-answer motions extending the deadline for answer? Then says if court denies or postpones disposition on the motion, def had 10 days after notice of courts decision to answer
- 12(b) How to present defenses. Every defense must be asserted in the responsive pleading if required BUT may assert the following defenses by motion (not in answer)
    - 12(b)(1) lack of subject-matter jurisdiciton;
    - 12(b)(2) lack of personal jurisdiction;
    - 12(b)(3) improper venue
    - 12(b)(4) insufficient process;
    - 12(b)(5) insufficient service of process;
    - 12(b)(6) failure to state a claim upon which relief can be granted; and [modern equivalent of demurrer][even if all facts assumed are true, no relief could be granted under the governing substantive law] should be very rare - Conley court says should not be dismissed unless appears that no set of facts can support the claim for relief. - Now openly in quesiton in Twombly (supra) Courts are still reluctant to be liberal about this and in many circuits allow for the claim to be amended. This claimis first opp to clear frivilous claims from the system - can stlill be brought at trial because courts don't want to waste any more resources if it is evident they should not.
    - 12(b)(7) failure to join a party under Rule 19
    - A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. No defense is waived by joining it with one or more defenses
- 12(c) Motion for judgment on the pleading after pleadings areclosed
- 12(d) If on a 12(b)(6) or 12(c), matters outside the pleading are presented and allowed by court, the motion must be treated as a motion for summary judgment (Rule 56)
- 12(e) Motion for more Definite Statement allowed for a pleading which is so vague or ambiguous that the responding party cannot reasonably prepare a response. (more about intelligibility[Harbor Commissioners]) The motion must be made BEFORE filing a responsive pleading and must point out the defects of complaint as well the details desired.
    - If the court orders a more definite statement, the order must be obeyed within 14 days or the court may strike the pleading or issue other appropriate order
- 12(f) Motion to Strike. - the court may strike from a pleading any insufficient, redundant, immaterial or othewise inappropraite material
    - 12(f)(1) on its own
    - 12(f)(2) or on motion made by a party before responding to pleading or within 21 days after being served
- 12(g) Joining motions
    - 12(g)(1) a motion under this rule(12) may be joined with any other motion(s) allowed by this rule
    - 12(g)(2) Limitation on further motions. Except as provided in rule 12(h)(2) or 12(h)(3), a party that makes a motion under rule 12 must not make a later rule 12 motion which raises a defense or objection that was available to the party but omitted from

the earlier motion [In other words - you have to make all rule 12 motions at the same time unless excepted below]

- 12(h) Waived and preserved defenses
  - 12(h)(1) A Party waives 12(b)(2) - 12(b)(5) defenses [lack of personal juris, improper venue, insufficient process or insufficient service] by
    - 12(h)(1)(A) omitting it from a motion in the circumstances described in rule 12(g)(2); [waive any motion 12b2-5 that is not included with initial 12b2-5 motion] OR
    - 12(h)(1)(B) failing to either:
      - 12(h)(1)(B)(i) - make one of those motions by motion under this rule???; or
      - 12(h)(1)(B)(ii) - include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1)[amending pleadings as a matter of course]
  - 12(h)(2) Motions for failure to state a claim, faliure to join a person required by 19(b), or failure to state a legal defense may be raised
    - 12(h)(2)(A) in any pleading allowed or ordered under Rule 7(a)
    - 12(h)(2)(B) by a motion under Rule 12(c)(motion for judgment on the pleading) ; or
    - 12(h)(2)(C) at trial on the merits
  - 12(h)(3) - If the court determines at any time that it lacks subject matter jurisdiction 12(b)(1), the court must dismiss the action
- 12(i) - motions for defenses 12(b)(1)-12(b)(7) (in pleading or motion) , and/or 12(b)(6) motion for judgment on the pleadings, must be heard and decided before trial unless the court orders a deferral until trial

12B defenses:

- Technical defenses of personal jurisdiction (12b2) and venue (12b3) are waived if not raised in response (arent 4 and 5 included here?)
- Merits of claim motions of failure to state claim (12b6) and failure ot join a party (12b7) are not waived until trial?
- 12b1 lack of subject matter jurisdiction NEVER waived and can even be raised on appeal
- The seven defenses of rule 12b are all procedural in nature except 12b6 which challenges the sufficienty of the allegations in complain (I guess this is technically before the process begins

12h1: Disfavored motions will be waived forever if not included in the pre-answer motion or if no motion is made from the answer.
12h2: three favored defenses - faliure to state a claim, faliure to join, and faillure to state a legal defense - can be made in any pleading, or by motion for judgment on the pleadings or at trial on the merits.
12h3: most favored defense - lack of subject matter juris. May be raised at ANY time, even by the court itself and even on appeal.

Shepard Claims Service, Inc. v. William Darrah & Associates, 6th Cir. 1986

- Secretaries talked and agreed to extension for Darrah filing an answer, but there was a mis-statement about whether 45 days from letter or from end of response period (counsel did not review letter); when date from letter passed, Shepard (P) took a default; D filed many motions starting with notice of retention (I'm here) and finally moved to set aside, but trial court would not because D was culpable
- **Rule 6 (supra)** – how to count time and extension
- On interlocutory appeal, Court of Appeals held that where P will not be prejudiced and meritorious defense is shown, a default as the result of mere negligence should be set aside.
    - Passes good cause test
    - Don't want to substitute procedure for justice
    - Here counsel simply careless - to maintaint he judgement needed to have shown "intent to thwart judicial proceedings or reckless disregard"
- **Rule 55 2 kinds default judgment** – by court or by clerk – by clerk if no-show
    - Rule 55(a) – if party fails to plead and fact is made to appear by affidavit or otherwise, clerk *shall* enter party's default
- files notice of retention but not answer b/c wants to know if have filed default
    - notice of retention forces default to be entered by court – under **Rule 55c** – gets a hearing in court – can set aside default for "good cause shown" or under **Rule 60(b)**
        - **good cause test** –
            - no prejudice to plaintiff,
            - defendant has a meritorious defense,
            - Whether culpable conduct led to the default
- Terms for setting aside default judgments are more stringent than for mere entry of default - judicial favor of finality
- court prefers to rule on the merits
    - default robs defendant of day in court
    - should not be used to discipline attorneys

Zielinkshi v. Philadephia Piers, E.D. Penn., 1956

- P motion in limine – limit ability of D to claim that did not own tractor that caused injury, D not know changed companies
- Complaint in same paragraph that D owned the forklift and caused it to injure P. ; D did not technically own forklift and as same paragraph able to deny both at once in a "clever way" by saying it no longer operated the dock - should have spoken up about partner org. owning; statute of limitations then ran out before P found out about spinnoff company owning forklift with same insurer. - too late to join third party
- Spinoff purpose likely to shield D from these very kinds of complaints
- **Rule 8(b)** Answers held to generally higher standard of precision than complaint - lesson here that the answer is part of the production of information which aids the funnell - court doesn't like behavior contrary to production of information - even though P could have avoided much of problem by clearly framing initial claims and probably could have learned truth by following up on some evidence
    - PPI had obligation to be more specific in denial - Obligation of forthrightness beyond formalistic evasion - meet spirit of rules
- Rules only require to admit or deny, did this – but **Rule 10b** requires that break down complaints into separate paragraphs - clearly shows that burden really higher on the answer than the complaint - as we move through funnel...

    - P's mistake in formation of question – D not going to admit responsibility flat out
    - no good faith requirement for answer – just honesty
    - Insurance company likely running the litigation for the D and was also insurer for third party. - really this was the plaintiff's fault but court puts the burden on the D
    - D under no duty to advise complaintants' attorney but neither right to foster the mistake by acts of omission.
- need adversarial system – help get at truth
- test for denial to plaintiff of cause of action
    - prejudice –yes
    - meritorious claim – yes
    - bad faith by D – some level – create co. to cover liability of parent company
        - suspect bad faith to gain advantage in suit
- draconian penalties – for not completely forthcoming answer - forced to fess up to liability where technically is none
    - Court order that jury decide based on finding that original D was the employer of P
- Courts tend to react negatively to evasive behavior
- **penalties if plaintiff is prejudiced by actions** – not allowed to let P go on believing mistake in his complaint

David v. Crompton & Knowles Corp., E.D. Penn., 1973

- Product liability case: D at first said it had no knowledge to admit or deny whether it had designed, mfr'd, and sold product. Later wants to amend answer to a denial. Claims that recently (1972) learned that it did not assume liabilities for Hunter corp., whom it bought in 1961. Hunter produced the machine.
- P says denial of knowledge was patently false and should be treated as an admission
- Issue: whether to tread ammended answer as admission or denial (could affect recovery)
- Even though you didn't buy it, you now own the liability because you messed up your answer. It's not too much of a burden to expect D to be knowledgeable of its liabilities from a decade old contract
    - Pleading lack of knowledge when you have the info could be taken as omission
- *Shepard* test – prejudice (statute of limitations), but have meritorious defense, no obvious bad faith
    - *however* – ***want to create incentive to get information***
        - ***responsibility w/person w/easiest access to info***
- **Rule 15a** – leave to amend answer when justice requires – want decision on merits of case
    - **can deny amendment if undue prejudice to P - if waited then failure to bring originally might have lulled into letting statute of limitations expire and so prejudiced.**

Wigglesworth v. Teamsters Local Union No. 592, E.D. Virg. 1975

- P sued for violation of civil rights (federal claim), now D counterclaim for defamation (state claim) because of comments made in media during intervening time
    - P motions to dismiss as not subject matter jurisdiction (can bring any time during trial); D says compulsory counterclaim **[Rule 13]** within courts ancillary juris. in liberal def. of term "transaction" – have to bring or lose right to bring in later suit
        - Court in countersuit decides – have to figure out now what later court will do
            - Incentives for parties to bring all claims even if not planning on bringing
            - Similar w/cross-claims – **Rule 13a, g**
        - **only if have change of fact or law – not precluded in future**

- **Compulsory counterclaim** – **arises out of same transaction or occurrence** (vs. permissive counterclaim – not same transaction)
    - Must be only a logical relationship between the claims rather than absolute same body of facts
    - Court says here transaction as in occurances are not the same - months apart and no eveidence to show relation
    - Bose standard of common facts also does not fly because facts for libel/slander irrelevant to current case
    - Hence the claim is permissive - dismissed because of subject matter jurisdiction
        - res judicata – will be bound by outcome, same evidence, **logical relationship**
    - decision technically wrong – is same evidence, but court knows defamation claim just harassment – not go forward
- **Rule 8c** – Res judicata – affirmative defense - may have been the guiding principle for plaintiff lawyer knowing if they brought this claim in state court, Wigglesworth would argue res judicata

Parties and Preclusion

Rush v. City of Maple Heights

- Injuries to person and property from potholes in city limits threw her from back of motorscycle
- Filed separate cases for property and personal injurty. Received judgment on property case first. When city appealed injury suit claimed she should not have been permitted to separate action from same incident
- Holding that where a person suffers both personal injury and property damage from same act, only a single cause of action arises; damages from second action precluded by damages from first
- Strike out from English common law distinction of person from property with sep. courts
- Argument for efficiency and justice in courts - claim preclusion issue - res judicata?

- Older preclusion rule allowed for preclusion to run no further than a single pleading, which invited stategic litigation. -would allow like in Rush, to bring minor suit, win the issue and then bring a major suit to leverage that you already have liability established by jury.
- Res Judicata (claim preclusion) - prohibition on relitigating a claim that has already been litigated and gone to judgment - merger and bar only apply when the second action is based on the same claim or cause of action
- Collateral estoppel (issue preclusion) - second claim of separate action - prior judgement may preclude specific issues or facts
- Our system seeks finality
- For preclusion courts began with tautology of what would trigger res judicata, have used "same set of facts test" - problem of not sure at beginning if the facts will be same, and settled on "logical relationship"
- Preclusion protects against expense and vexation of multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing possibility for inconsistent decisions
- Rule 18 allows joinder of claims while res judicata requires it (see Rush)

- **Rule 18 Joinder of claims**
  - 18(a) - In General, a part may join as independent or alternative claims, as many claims as it has against an opposing party
  - 18(b) - Joinder of Contingent Claims - may join two claims even though one is contingent on the other, but the court may grant relief only in accordance with the parties' relative substantive rights.

Manego v. Orleans Bd. of Trade, 1st Cir, 1985 (**res judicata =claim prcl)**

- Wants to open bar on Cape Cod, sues bank and Bd. of selectman for civil rights violation - summary judgment dismissed the action
  - 2nd suit for conspiracy (shermant anti-trust act) against Bd. of Trade, bank
- is second suit barred b/c of res judicata b/c 1st suit based on different theories for same claim - yes, even though parties not identical
  - **no change in law, no change in fact – should have raised claim before –** same transaction, just different motive - can make multiple pleading in alternative
  - **Same transaction: no bright line definition but should be weighed by factors of time, space, origin and motivation (metaphysical approach)**
  - **efficiency concerns**, could have just amended 1st claim

- **can bring against non-party to 1st suit** – Bd. trade
- Claim preclusion – lasting consequence and prospective effect of judgment between parties

Issue Preclusion:
- More complicated than claim preclusion
- Idea that once invoked a determination of fact is deemed conclusive - maximize efficiency of allocation of society's resources.

Persons Bound by Judgment
NonParty Preclusion: Parties and Persons in Privity: doctrine of virtual representation

Taylor v. Sturgell (US 2008)
- Antique aircraft enthusiast who filed a Freedom of information Act claim with the FAA to get records of WWII era plane; his friend Herrick had recently lost in same suit with the same lawyer. Identity of claimant only difference
- Supreme Court rejected preclusion claim: binding Taylor to Herrick's case would transform the first suit into a class action but without Rule 23 structural protections
- Virtual representation (nonparty preclusion) only justified when clear procedural protections or where there was a specific relationship between the party to the judgment and the party to be bound (subrogation)
- Case drew a line with these pre-existing legal relationships and refused broad reading of "adequate representation": Herrick not necessarily adequate rep. just because Herrick had strong incentive to litigate and they shared the same lawyer. - Rather the interests must be aligned and either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty
- Acknowledge danger of vexatious litigation especially with FOIA as there could be limitless persons wanting to try same case (like a patent case) but court felt that stare decisis and human tendency not to waste money will render the risk more theoretical than real.
- Pressure to expand preclusion doctrine held in check by "day in court" principle for all nonparties.

Mutuality of estoppel - person should not benefit from estoppel unless he would also have been bound by the prior judgment with the exception of indemnity

Martin v. Wilks. 1185, and in supplement also a preclusion case (better intervention case)
- Challenge to effects of a civil rights suit allowing for promotions to black firefighters - would affect careers of white firefighters.
- City said they should have intervened and so are precluded
- U.S. said they could not be required to intervene so they could proceed; preclusion without participation soundly disfavored
- Placed burden on the litigants to bind third parties who may be affected by scope of relief sought.

Blonder-Tongue (issue preclusion against losing P)
Plaintiff who had raised a claim and lost on the merits can be bound to eht result in subsequent cases, even against parties who did not participate int eh initial procdeeding, so long as the plaintiff had full and fair opporunity to assert it and so long as the factual determination was necessary for the outcome of the case.

Already had day in court on this issue

Would not preclude if losing party could show that first action failed to allow fair opportunity procedurally, substantively, and evidentially.

so new defendant can use **collateral estoppel as shield**,

Quickly adopted into federal and state law - death knewll of mutuality of obligation doctrine

Parklane Hosiery Co. v. Shore, US, 1979 (**issue preclusion against losing D)**

- Gov't antitrust action, allowed issue preclusion to attach - despite fact def had no choice about the forum or desireability to litigate (previous justifications for estoppel)
- First case to allow use of collateral estoppel offensively against a losing defendant
- Issue preclusion if have had day in court, if not, no – dissent
  - **but** in this case, not unfair b/c could have joined 1st suit **have to consider full range of possible issues upfront**
- **equity v. efficiency – defendant can have to try a thousand times v. able to rely on decision on one issue as final – mutuality of obligation**
- **efficiency wins out – defendant precluded from using same defense if proven wrong in first case** - even though not choose forum
  - concern for wait and see plaintiffs - equity
  - For D in mass harm case, risks are overwhelming: D could win 1 case and lose a thousand – strategic risk in each case of winning one or losing a thousand. Motivation to settle so as to not lose and have it used against you. - throws off economics of valuating the case and settlment range.
  - **determined by judge in 2nd case** – not automatic, equity
  - Strong qualifier - US expressed strong skepticism about the appropriateness of preclusion in the case of a party who had opporunity to participate but chose strategically to sit on sideline. - this qualifier too little too late - now been accepted int eh overwhelming majority of American jurisdictions

Terminology:

- Defensive collateral estoppel: defendant using preclusion as a defensive shield against a plaintiff who had previously lost on that issue. (OK by Blonder-Tongue)
- Offensive Collateral estoppel: improper - preclusion used to forclose a defendant who never had a day in court from mounting a defense, an impermissable outcome
- Becomes confusing with Parklane Hosiery as terms take on distinct and incompatible definitions. However the important thing to remember is that both "offensive" uses of issue preclusion remain impermissable
  - Supra used of issue preclusion by a plaintiff who won an issue against a defendant who never had day in court
  - Similarly a victorious defendant cannot shield from future litigation from parties that might be able to a better job than plaintiff.
- Modern issue on preclusion rather than on collateral estoppel, either offensive or defensive.
  - Under this contemporary rule in most places, a party may be held to an adverse finding in a proceeding in which he participated, but may not seek to bind a previously unrepresented party to the outcome of the earlier case. Still committed to day in court ideal.
  - Taylor good examples of how you can't use winning an issue as a sword against someone who has not had their day in court yet. Parklane and Blunder already had day in court

PARTIES

- Establishing the Structure and Size of Dispute
    - Used to be common for single P v. single D. back when rules adopted; today multi party suit is the usual form of litigation.
    - Proper Parties to a Suit (standing)
        - Real parties in Interest
            - Rule 17(a)Action must be prosecuted in the name fo the real party in interest, except legal representative (guardian, executor, etc)
            - To protect defendant and prevent him from being subject to later suit from real party in interest who never gave up claim just because someone else prosecuted their case supposedly in their name (subrogation allowed like insurers)

Fictitious Names

SMU Assoc. of Women Law Students v. Wynne and Jaffe, 5th Cir., 1979 (**proper parties)**

Title VII suits, women lawyers suing employers for discrimination; do not want to reveal names (in TX)

Rule 10a – **have to include all names in pleading** (anonymity allowed only in some circumstances – abortion, birth control, welfare, etc.) (diff. than rape-shield, victim not a party)

reasons – equity – balanced for both sides, notice, ability to answer, needs to be some cost for P or encourage free vexatious suits (believe this?)

Even though there is no coherence to the exceptions

in suit for damages – names essential b/c need info about them

Except when only injunction – not important

look at rules 1st – then policy arguments (sometimes backend)

Rules, cases, then policy

Lots of policy arguments for this one. This might prevent Title 7 from being effective.

- ***Rule 17: action must be prosecuted in the name of the real party in interest. However certain persons may sue in their own name without joining the party for whose action the benefit is brought: executor, administrator, etc
    - Barnacle of federal ship - no longer really needed or used
- **Joinder of claims (rule 18a)**
    - Rule 18(a) - party asserting a claim, counterclaim, crossclaim, or third-party claim may joing, as independent or alternative claims, as many claims as it has against an opposing party
        - Means that unrelated claims could be tried to gether.
        - Note by rules committee - need not be preceeded together if fairness or convenience justifies separate treatment
            - For such reasons court can order separate trials under rule 42(b)
- **Permissive Joinder of Parties (rule 20)**
    - Rule 20(a) Persons who may be joined
        - 20(a)(1) - Plaintiffs; persons may be joined in one action as plaintiffs if:
            - 20(a)(1)(A) - they assert any right to relief arising out the the same action, or series of transactions or occurrances
            - 20(a)(1)(B) - any questions of law or fact common to all plaintiffs will arise in the action at hand

        - 20(a)(2) - Defendants: Persons may be joined in one action as defendants if:
            - 20(a)(2)(A) - any right to relief is asserted against them joinly severally, orin alternative arising out of the same transaction, occurrence, or series of transactions; and
            - 20(a)(3) any question of law or fact common to all defendants will arise in the action
    - Rule 20 allows for plaintiff, as master of complaint to initially join as many others as necessary and also allowed to name as many defendants as needed.

Kedra v. City of Philadelphia, E.D. Penn., 1978 (parties proper)

- Attacks by policemen over 1 ½ years against Kedra family: joined parties and claims spanning a lengthy period of time
- D says improper joinder under **20a** – **not same transaction**
    - **Rule 21 –** motion to sever certain parties based on misjoinder (when rule 20 used improperly)
    - **Rule 42b – separate trials to avoid prejudice** – rules aspires to fairness and efficiency
        - **Inefficiency and inequity** for P – have to try over and over, inequity for D – prejudice (all policemen together)
            - Lots of societal gains to having them joined. So go with liberalness of rule and allow the joinder. If it becomes a problem, can separate
            - If court were to not join, that could prejudice P by making it look like court does not think it a conspiracy; actaully prejudice either way.
- **decision at threshold (pleading stage) could impact outcome**
    - need more info – decide after discovery
    - Lengthy period will not prevent joinder- joinder provision very liberal as long as reasonably related
    - These events over a period of time are part of an alleged pattern which is sufficient for joinder; can reassess appropriateness of each D after discovery

Insolia v. Philip Morris, Inc., E.D. Wis., 1999 (improper joinder)

- For damages by 3 former smokers for fraud by tobacco companies and trade groups engaging in nation-wide, industry-wide conspiracy to deceive consumers of the addictive and deadly characteristics of cigarettes. Motion to certify class of all Wisc. Residents who were long term smokers diagnosed with lung cancer - denied that common questions of law or fact did not predominate
- D moved to sever claims of three D based on improper joinder as not arising from same transaction or series thereof and do not share a common question of law or fact
- D **Rule 21** motion to sever – not same transaction, series of transaction and do not share a common question of law or fact
- **Holding: Parties may be joined under Rule 20 only if they involve te same transaction or series of or a common question of law or facts predominates.**
    - **claims not sufficiently similar for 1 proceeding - were all affected by "conspiracy in different ways at totally different times. Diff. ages, dif. Brands, quit at different times for dif. Reasons.**
    - **Timing dif. Over several decades, not just years.**
    - **Difficult jury sorting of evidence would prejudice D rights**
    - **no efficiency gains – damages, need to look at indiv.**

Compulsory Joinder of Parties (Rule 19)

- 19(a): Required Parties
  - 19(a)(1): Requied party - a person who is subject to service of process and whose joinder will not deprive the court of SMJ must be joined if:
    19(a)(1)(A): in that persons absence, court cannot accord complete relief among existing parties; or
    19(a)(1)(B): that person claims an interest relating to action and disposing of the action with that person absent may:
    - 19(a)(1)(B)(i): impair or impede that persons ability to protect the interest; or
    - 19(a)(1)(B)(ii): leave an existing party subject to a substantial risk of incurring double, multiple, or inconsistent obligations because of the interest
  - 19(a)(2): Joinder by court order - If not joined but required to, court must order that joinder - if they refuse to join as P, might be made D or involunstary P
  - 19(a)(3): Venue: If a joined party objects to venue and joinder would make venue improper, the court must dismiss that party
- 19(b): When Joinder not feasible - if a person required to join if feasible, cannot be joined, court must decide whether the action should proceed with existing parties or be dismissed. Factors:
  - 19(b)(1): extent absence might prejudice
  - 19(b)(2): extent prejudice could be lessened or avoided by
    19(b)(2)(A): protective provisions in judgment
    19(b)(2)(B): shaping of relief
    19(b)(2)(C): other measures
  - 19(b)(3): whether judgement in parties absence would be adequate;
  - 19(b)(4): whether the P would have an adequate remedy if action dismissed for non-joinder
- 19(c): Pleading the reasons for non-joinder when stating claim; party must state:
  - 19(c)(1): name of any person required to join if feasible but not joined
  - 19(c)(2): reasons for not joining that person
- 19(d): Exceptions for class acitons - see rule 23.

***Rule 19 notes**:*

- Defendant's rule - P won't care about future litigation by real party but D doesn't want multiple liabilities
- 19a - identify whether or not the party is necessary
- 19b - balancing to determine if court can proceed without them: prejudice to all parties if case does or does not go forward, system interests in insuring there is a forum available to provide remedy, and tools the court might use to protect the interests of all parties
- Puts courts in a difficult spot by putting the order of questions the wrong way around. Cannot know if the party is indispensible until they have done the balancing test to find out if the case can proceed without. Causes courts to fudge 19a.

Pulitzer-Polster v. Pulitzer, 5th Cir., 1986 (necessary joinder)

- **Facts:** Carol, her mother and sister brought suit in LA court that Samual, director of family owned co. breached fidiciary duty. Taking too long. Now Carol alone seeks damages in federal court (only dif. About termination). D makes a **12(b)(7)** motion to dismiss for failure to join others as indispensable party under **Rule 19. (joinder would destroy diversity)**
- **Holding:** Lillian and Susan should be joined under **Rule 19(a)** if feasible, b/c absent parties do claim an interest relating to subject of action (19(a)(2)(i)) and Samuel may be exposed to risk of

inconsistent/multiple litigations under 19(a)(2)(ii). Under **19(b)** plaintiff's interest is weak b/c relief is available in state court, defendants interest is moderate, absentees have high interest against negative precedent, and interest of courts is high b/c want to avoid needless litigation. So case dismissed.

- court won't let her do this b/c she was the plaintiff and got to choose where to proceed and chose state court, can't just switch now that she's unhappy. If there wasn't the state court option, 19(b) would come out very differently and it would not have been dismissed (no more prejudice to defendant, no more absent plaintiffs interest, no more courts interest)
    - Samuel argues the rule is about negative precedent of multiple litigations
    - Carol says that the conflict has to be about tangible property
- If there was no 19(a) this would be an easy case – the problem is the analytical difficulty of trying to force the case into 19(a)
  Rule: 2-step analysis to decide whether to dismiss an action for failure to join an absent party – 1) **Rule 19(a) –** provides a 3-part framework for deciding whether a given person should be joined. 2) If joinder is called for, **Rule 19(b)** guides court in determining whether suit should be dismissed if that person cannot be joined.
- 19b) what court can do if required party cannot be joined (i.e. if you would lose jurisdiction), determine whether in **equity and good conscience** should proceed without them, factors:
    - to what extent a judgment in their absence might be prejudicial to them and those already parties
    - the extent to which prejudice can be lessened or avoided
    - whether a judgment rendered in their absence will be adequate
    - whether plaintiff will have an adequate remedy if action dismissed for non-joinder

  =interests of plaintiff, defendant, absentees and the public
  Plaintiff's interest in a federal forum
  Defendant's interest in avoiding multiple litigation, inconsistent relief
  Absentee's interest in avoiding prejudice from the proceeding
  Interest of the courts and the public in "complete, consistent and efficient settlement of controversies"
- **Note:** 19b is balancing test. 19a is overly formulaic checklist - Courts don't like this and cheat in exactly the way they did here in Pulitzer to get to right result. **This is just like what we saw in Due Process – Courts are moving from a checklist to a balancing approach which incorporates the checklist but not as necessary elements***

Rule 17: Action must be in the name of the real party in interest, **barnacle**, supposed to help, now being used wrongly; doesn't do much more than what the rule of standing allows. Made this rule so that Insurance co. could sue for claimant rather than claimant just settling for small amount

VEPCO v. Westinghouse Electric Corp., 4th Cir., 1973

- (power failure results to financial damages to VEPCO, an electric company, and more so to its insurer INA. VEPCO sues Westinghouse for INA thinking jury will be more sympathetic, and D. tries to bring INA in - would destroy jurisdiction)
- -attempted dismissal under 17 fails cuz VEPCO still has a [small] pecuniary interest, and can have more than one "real party in interest" (trying to smoke out real party)
- -rule 19, skips 19a analysis straight to 19b.
- Run through balancing test

which leads court to determine that INA is not an "indispensable" party. – 1) not prejudicial to plaintiff, 2) no prejudice shown to defendant, and if some, it can be avoided through how relief is shaped, 3) judgment rendered in INA's absence will still protect INA, 4) courts – not clear that plaintiff would have adequate remedy in state courts – so INA is not an indispensable party

- though found potential for prejudice with INA bringing issue preclusion to go after Westinghouse again, court lessens prejudice by making INA promise to be bound (practical solution but some disregard for rules)

Impleader (Rule 14)

- 14(a) When a defending party may bring in a third party
  - 14(a)(1): Timing of Summons and Complaint - D party may, as third-party P, serve summons and complaint on a nonparty who is or may be liable to it for all or part of claim against it
  - 14(a)(2): TPD claims
    - 14(a)(2)(A): must assert any defense against TPP (impleder, D) under rule 12
    - 14(a)(2)(B): must assert any counterclaims against TPP (complusory or permissive) and any cross claims against other TPD under rule 13
    - 14(a)(2)(C): may assert against the P any defense the TPP/D had to P lcaim; and
    - 14(a)(2)(D): may also assert against P any claim arising out of the transactionor occurrence that is the subject matter of P claim against TPP/D
  - 14(a)(3): P may assert against the TPD any claim arising out fo the transactionor occurrence that is the subject matter of the P claim against TPP/D; TPD must then assert any defense under rule 12 and any counteclaim under rule 13(a) and may assert any counterclaim under rule 13(b) or any crossclaim under rule 13(g)
  - 14(a)(4): any party may move to strike the third party claim, sever it or try separately
  - 14(a)(5): TPD may proceed against a nonparty who may be laible to TPD for all or part of claim against it (further impleader)
- 14(b): Reciprocal impleader - If claim asserted against P, P may bring in a thrid party if this rule would allow D to do so

Clark v. Associates Commerical Corp., D. Kan., 1993 (impleader)

- Suing for damage to his property during D repossession of tractor; D wants to indemnify employee and two others hired by Clark
  - TPD seek to dismiss third party claim; P seeks to strike third party claim under rule 42(b) - impleader causes prejudice
- **Rule 14a –** impleader of TPPs proper since D had valid claim against TPD (based on agency, not indemnity); all about D not P. Derivitive of P claim but not same
  - Practical and equitable concerns overwhelmingly favor trial of all claims at once before single jury
  - **not compulsory but possible – efficiency gains – 1 trial**
  - **3rd party claim does not need to be based on same theory as main claim and does not required automatic liability of TPD once TPP/D liability to P is established**
- Rule within sole discretion of the court to be mindful of efficiency, complexity and prejudice. Interpreted liberally. Allow unless prejudice concerns

Klotz v. Superior Electric Products Corp. v. Butz, E.D.Pa. 1980 (p.273)

- Sues after eating bad burger, D tries to implead college cafeteria where she ate a different burger
- Not proper **14a** – no contractual privity between Superior and College (legal privity is anything that gives relationship) - would need to be separate case. - let P sue the college.
- Should just use **Rule 8a** – denial defense

Counterclaims and Cross-claims (Rule 13) (See Diagram) (also Wigglesworth)

- ***Rule 13***
    - 13(a) Compulsory Counterclaim
        - 13(a)(1) - In General, pleading must state as a counterclaim any claim that - at the time of service - the pleader has against an opposing party if the claim
            - 13(a)(1)(A) - arises out of the transaction ofoccurrence that is the subject matter of the opposing party's claim; and
            - 13(a)(1)(B) - does not require adding another party over whom the court cannot acquire juris.
        - 13(a)(2) Exceptions - need not state the claim if
            - 13(a)(2)(A) - wehnt he action was commenced the claims was subject of another pending action; or
            - 13(a)(2)(B) - the opposing party sued in a way that did not establish personal jurisdiction
    - 13(b) - Permissive counterclaim - a pleading may state as a counterclaim against any opposing party any claim that is not compulsory
    - 13(c) Relief sought - may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party
    - 13(e) - Counter claim Maturing - court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading
    - 13(g) - Crossclaim - a pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the trasaction or occurance that is the subject matter of the original action or of a counterclaim or if the claim relates to any property that is the subject of the original action
    - 13(h) Joinging additional parties - Rules 19 and 20 govern joinder as party to counter and cross claims

Interpleader (Rule 22 and 28 USCA § 1335)

- 22(a)(1) Interpleader by P - persons with claims that may expose a P to double or multiple liability may be joined as D and required to interplead; proper even though:
    - 22(a)(1)(A) - claims lack common origin or are adverse and independent
    - 22(a)(1)(B) - the P denies liability int eh whole in in part to any or all claimants
    - 22(a)(2): D exposed to similar liability may seek interpleader through a cross-claim or counterclaim
- 22(b): suplements and does not supersed rule 20 joinder

Interpleader was device for permitting a person faced with conflicting claims to a limited fund or property to bring all claimants into single proceeding

- It now allows the stakeholder, fearing separate suits by individual claimants, to institute his own action in which all the claimants would be required to litigate their claims simultaneously (not to replace bankruptcy)
- Common Law Doctrine of Interpleader – you wish to renounce your interest in a piece of property – you hand it over to the court and you allow suit to be brought by all parties who may lay claim to it and so resolve the dispute
- Now we don't require people to actually relinquish property to court
- And you can actually be one of claimants yourself.
- Rule 22 – if fed court anyway
- Statutory interpleader (liberalized standard)
    - >$500
    - diverse parties

State Farm Fire & Casualty Co. v. Tashire, US, 1967

- Greyhond bus collides with truck, whose driver's insurer, State Farm, is contractually limited to $20,000 in liability; State Farm does not want to incur costs of multiple litigation, brings interpleader in OR and deposits fund with court saying everyone should litigate all cases there over the money; greyhound wants to do this too.
- interpleader not intended so "that the tail be allowed to wag the dog in this fashion" by dictating venue and entire proceedings from such a small pot
- Even if State Farm's potential liability for all claims removed, there still remained dozens of suits from same action: ruling that State Farm's interpleader is appropriate only to the extent of claims against their insured driver. Claims against other defendants can proceed in their respectively appropriate forums.
- **technically is appropriate for interpleader – limited stake**, but efficiency argument undercut by circumstances
- Not for def who simply don't have enough money - that is for bankruptcy court
- Nor is it a mechanism for disparate lawsuits that are related transactionally to each other and whose common resolution might well serve aims of efficiencty - have to wait for Class Action – just for one cause of action with multiple parties. – an action taken by the defendants.
- Interpleader rarely used because not effective as bill of peace in many situations;

Intervention (Rule 24)

- 24(a): Intervention of right - on timely motion, court must permit anyone to intervene who:
    - 24(a)(1): has right to intervene by a federal statute
    - 24(a)(2): cliams an interest relating to the property or transaction that is the subject of the action, and would be impaired or impeded by action settled without - unless existing parties can adequately represent that interest
- 24(b) Permissive Intervention
    - 24(b)(1) In General: may permit anyone to intervene who:
        - 24(b)(1)(A): is given a conditional right to intervene by fed. Stat.; or
        - 24(b)(1)(B): has a claim or defense that shares with the main action a common question of law or fact
    - 24(b)(3): court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights
- Right of outside party to enter into a lawsuit if they can demonstrate:
    - Sufficient interest at stake
    - Risk of impairment without intervention

- Inability of the original parties to adequately represent that interest
- Can interven permissively if they can rais common question of law or fact and there is gain from their participation without prejudice to the current parties
- "interest" not at all self-evident; concern not enough - to day focus on flexible standard of impairment.

Natural Resources Defense Council, Inc., v. US Nuclear Regulatory Commission, 10th Cir., 1978
(intervention – also no bipolarity)

- Whether private parties seeking to mine uranium could participate in a challenge to the way the NRC interpreted environmental impact assessment of proposed mining
- NRDC has standing based on associational standing; suing USNRC for granting licenses w/o environmental impact statements; mining corp. want to intervene;
- United Nuclear allowed b/c their license – not opposed by parties; other two denied but now appeal
- **3-part test for interest**
  - interest – loosely defined, not direct interest
  - adequately represented – show "may be" inadequate (incentive for UN to rollover, already has license)
  - would impair ability to litigate – no res judicata (not a party) but stare decisis

  Intervention hinges on representation
  - American Mining: small company with dif interests from large UNC
  - Kerr McGee – interest in securing license in future - UNC does not have incentive to represent them since UNC already has their license

- Obviously this case more of a public type case - not a good representative of how this rule interacts with more private disputes.
- Interest best gauged by type of suit - the more private the dispute, the less right outsiders have to participate
- private (intervention excluded) v. public (more freely granted)
  - want to be able to bind as many as possible so won't have to relitigate
  - Courts need QUALITY INFO, actual parties might not have it, need expertise/info/perspectives, complex, affects lots of issues and parties
- *Stringfellow* doctrine – if intervene, you don't have full rights of actual parties: limited discovery and ability to question witnesses at trial, etc
- Definition of interest is unclear

  Cascade Natural Gas v. El Paso

  Court found that intervention as a right should have been granted, b/c the intervenors were so situated as to be adversely affected "by a merger that reduces the competitive factor in natural gas available to Californians"

  Decision was taken as representing a broad interpretation of interest required by Rule 24(a)(2) including non-legally protected interests, like economic concerns

  Donaldson v. US

  Court applied much narrower concept of interest – refusing intervention despite a much stronger *practical* interest on part of intervenor b/c no "significantly protectable interest" was asserted. (This is guy trying to intervene on lawsuit against his former employer to give his tax records)

  Trbovich v. United Mine Workers: retreating from "significantly protectable interest" to "zone of interests" to satisfy the former

  Purely economic interest alone is insufficient as a legally protectable interest"

  Allard v. Frizzell –

denied right ot intervene b/c interest was general and abstract, claiming that interest asserted in subject of litigation must be a specific legal or equitable one

- **Note:** whether organizations can intervene really comes down to 1) whether it's a public matter or private matter (like divorce) as part of discretion, if public law, apply more liberally, 2) will participation of intervening party help court resolve whats before them by providing additional info? **Note:** When balance gets close, court often says they won't let them in under **24(a),** but will let them in permissively under **24(b).**
    - **24(a)** defines a legal right to intervene – so appellate review will look at it to see if there was an error as a matter of law.
    - **24(b)** is done to help the court and is purely discretionary and unreviewable – no case of permissive intervention being overturned by court of appeals

Rule 42: (consolidation; separate trials)

- 42(a): Consolidation - court may join all common questions of law or fact, consoidate actions, or issue any other order to avoid unecessary cost or delay.
- 42(b): Separate Trials - for convenience, to avoid prejudice, or expedite and economize, court may order a separate tiral of one or more separate issues, claims, cross-claims, counterclaims or thrid party claims but must preserve any federal right to jury trial
    - Limited gains - only cases in same venue can be consolidated and no parties can be added.
    - Just need to convince judge and make sure jury will not be confused
- 28 U.S.C. sec1404 - fed court may order a change of venue
- 28 U.S.C. sec 1407 - provides for transfer aroudnt eh country; MDL (multi-district litigation)
    - Each can only reach cases in the federal system at the same time - no anticipatory powers
    - No procedure for cros transfer between federal and stat

Class Actions

Problems:
1) prisoner's dilemma – need state regulation
2) insufficient value of any particular claim – no incentive to litigate
3) disparity of resources – big tobacco has an easier time winning
4) broad impact of remedy – e.g. *Brown* affects so many kids
5) certainty of termination

Supreme Tribe of Ben Hur v. Cauble (1921) -
- example of class action in equity - required very close identity of interests which is not a common occurance.
- Supreme court made clear that object of class action to bind absent members an dconsequently achieve finality, equalizing the stakes in the litigation

Hansberry v. Lee, US, 1940
- Question of representation forefront
- racially restrictive covenant for housing development; white owner trying to prevent Hansberry, (black family) from moving in.
- Previous case though evidence doubtful, had found the covenant effective which presumably bound all future potential home sellters
- Court focused on adequacy and fairness of representation in reversing and found the covenant was not binding
  - Burke case only involved white people - they wouldn't have been in that class - the "class" was pro-covenant
  - Burke did not have enough procedural protections in place and could not bind the absent class members to the judgment - certification had been too informal
- Principle: places tremendous due process pressure on procedural mechanisms necessary to provide "structural assurances of fair and adequate representation"

R23(b) – types
(1) limited fund
    //interpleader, must include all poss. claimants, mandatory
(2) injunctive [civil rights]
    relief cannot meaningfully be given to one w/o giving it to all e.g. *Brown*
    no req't for notice or opt out
(3) damages – catch-all
    driven by need for efficiency
    requires "predominance" of common questions, "superiority" of class action over other methods

Rule 23(a) – Prerequisites to a Class action requires four general prerequisites for class certification
- Numerosity - must be some efficiency gain over joinder. Rarely fewer than 20
- Commonality - central question that if true for one is true for all.
- Typicality - is the proposed named plaintiff typical fot he class

- Representativeness - reality today is that class rep is the lawyer; particularly important test prong with modern prepackaged settlement class actions: whose interest is lawyer looking out for. See Amchem products v. windsor.

23(b) – Class Actions Maintainable -- Once Class has fulfilled 4 general prerequisites, it must also be one of the following 3 kinds of class actions defined in functional terms according to purpose and application

- **(b)(1)** -- [limited fund] -equivalent of an interpleader action that might be filed by a stakeholder; focuses on potentially harmful consequences for the parties absent the class action, may fare worse individually but better collectively as everyone gets a slice; no ability to opt outdivided into 2 parts

  (b)(1)(A) "incompatible standards" class concerned with the interests of the party opposing the class
  - Prof says this is already covered by 23(b)(2) – so we have no cases under this – basically deals with 2 contradictory injunctions

  (b)(1)(B) "impairment of interests" class, focusing on the interests of the absent class members
  - this is impleader, limited fund transactions
- **(b)(2)** – [injunctive] applicable when injunctive or declaratory relief is sought against a party who has acted or refused to act on grounds generally applicable to class

  declaratory/injunctive relief so individuals don't matter much, relief can't meaningfully be given to one and not all

  no reason to opt out, b/c when injunctive relief you're automatically covered just definition by being part of class

  doesn't trigger individual autonomy rights, so while right to **notice** may attach, doesn't necessarily

  Not appropriate for predominantly money claims, but can be incidental
- **(b)(3)** – [damages catch-all], where case does not fit within first two but still expedient to have class action; applying when questions of law or fact common to class predominate, and the class action is determined to be the most effective means of resolution.

New development beginning in 1966 – for people who to effectuate legal remedy need to be bound together. Efficiency driven saying there will be gains to bring it all together
Most frequently used in suits for damages
Creates entreprenureal incentives for lawyers
Not intended for mass torts
Greater constitutional due process challenge - Only kind of class action that triggers an automatic right to notice under 23(c)(3) so can opt out.
Individual notice ruled a constitutional requirment
Most effective notice possible given the circumstances

<u>Other requirements of Rule 23</u>

23(c) – Determining by order whether to certify a class action; appointing class counsel; notice and membership in class; judgment; multiple and subclasses

- **(c)(2)(a)** – court may direct appropriate notice to class
- **(c)(2)(b)** – difference b/w **notice** for (b)(1) and (b)(2) on one hand, and (b)(3) on the other as (b)(3) is for damage awards where notice is more important b/c they are individual matters – efficiency driven device where claims of efficiency overwhelm claims of autonomy – so court will let it go forward with someone else representing – but recognizes it may be wrong so will allow you to **opt out**

- **(c)(4) –** most untested area of class action rule. Where appropriate action may be brought with respect to a particular issue

23(e)—Settlement, Voluntary Dismissal or Compromise – class action takes customary power out of hands of individual litigant. So court must approve any voluntary dismissal, settlement or compromise b/c court is now a guardian of the case and must ensure that settlement is fair, adequate and reasonable

In class action, power is out of individual litigants hands and plaintiff is stripped of his normal rights. If settlement is offered, and it is best for overall class, but not for named plaintiff – lawyer is obligated to take it. And named plaintiff can't fire him and get a new lawyer b/c of this – named lawyer is stuck (Lazy Oil v. Witco)

23(f) – Appeals – interlocutory appeal—allows for appeal for denial of class certification before you get to out come. – this is very abnormal – usually you can't appeal until the entire matter is completed b/c courts don't want to hear piecemeal cases. Exception is here b/c court thinks that grant/denial of certification has a drastic effect on a case so it is important to review it b/4 it gets to merits

Holland v. Steele, N.D. Geor., 1981

- wants class **certification** of detainees in this jail – ability to call civil lawyer
- D contends class in appropriate because jail includes pre-trial detainees and sentencees; Same as *Pulitzer* - D acting like concered for representation class - bs
- **Lawyers driving litigation – do not want Holland to control or settle - public interest attorneys want to help the class. Not about Holland once he is a representative he has legal duty to class**
- **Rule 23e** – once class certified, only dismiss or compromise with court supervision
- Appropriate for same class - if at trial it becomes clear that it is not they can be separated or make subclass
- class actions have to be **appropriately certified**
- **23a– prerequisites for class action** – **numerous** (actual people with live claims who are too numerous to be joined), common question of law or fact, typicality of claims (lead P just a placeholder), **adequate representation to protect interests - key in this case is who the lawyers are.**
- response to *Hansberry*
- *With injunctive relief here, individuals not important.*
- ***23(c)(1)** – certify as early as possible in litigation*

Notice Requirement

- **23b(2) and 23b(3) classes**
  - only 23(b)(3) triggers right to notice
    - class only formed for efficiency reasons – not organic ties
  - b(2) – not individual rights

Mullane v. Central Hanover Bank & Trust Co., US, 1950

- Accounting of aggregation of trusts to lower administrative costs for bank, notice requirement of accounting procedure as formality to allow trustees to review the accounting - bank wants court to decree the accounting closed
- Sent personal notice upon creation of the accounts so they have the addresses
- Mullane – appointed representative for income beneficiaries – wants more notice, says have property interest, newspaper ad not enough

- Ruling that notice was not sufficient and due process violated; where possible has to be individual notice; sets standard for rule 23(c) formal requirment of individual mail notice in 23(b)(3); must be **reasonably calculated** to reach; process which is gesture only does not suffice; when have addresses, reason disappears to use method less likely to inform
- Newspaper may be sufficient for unknown persons, those who have abandoned the property (likely to have someone watching over your real property interests for you; or for future trustees/owner (interesting)
    - Persons outside of juris that don't get mail would be adequately represented by those in juris who do.
    - Court making cost/benefit analysis about how many people should get notice for what cost.
- **notice raises administrative costs** – have to send out mail
- **paradox** – lawyer wins notice, clients lose – have to pay for notice which has no actual use

In mass class actions, create a fund and rules to govern it - individual claimants apply and after its gone that's it. D needs finality.

Castano v. American Tobacco Co, 1996
class complaint v. tobacco institute & tobacco co's seeking compensation for injury of noictine addiction
class- "all nicotine dependent"
ultimately, court rejects certification- didn't consider variations btw. state laws, how trial would be carried out
fails superiority requirement of 23b3- most compelling rationale for finding superiority (negative value suit) not present here
common issue of law/fact: varying state law, individual facts, diff standard of negligence
no efficiency gains bc immature tort!!!
limits of 23b3 class action: mass torts pose legit problem, sometimes alternative to class action is NOTHING (b/c negative value)

Consumer Class Actions
- Consumer class actions often critcized for resulting in small recoveries for class members but big fees for attorneys
- Defendants say purpose not just compensation but deterrence and disgrogement of wrongful profits
- These are mostly negative value cases
- Question whether entreprenuerial behaviror of attorneys is beneficial
- In approving class settlements judge must scrutinize carefully the fairness of the settlement as fair, reasonable, and adequate for class members

Notice
Eisen v. Carlisle & Jacquelin, Us, 1974
Class of odd-lot traders, says ripped off by brokers – want more notice
Negative value case
Judge can't make inquiry into validity of case and thereby make def pay 90%
By making lawyers pay for notice, test their bona fides – whether will actually bring case - further encourages entreprenuerial lawyer
Required notice by mail to all identified class members
Need notice AND adequate representation

Mass Torts
- trial is exceptional – settle along grid based on likelihood of trial

- asbestos – big problem
- possible solutions – complete preclusion (struck down *Jenkins v. Raymark*), sample of cases (struck down - *Cimino*), class action?

Anchem Products, Inc., v. Windsor, US, 1997
Settlement class for asbestos claims seeks to bind all present and future claimants to settlement agreement under 23(b)(3) certification
Ginsberg: worried about the "adequacy of representation" 23(a)(4) because interests of the futures and the current injured are not the same
(sub-classing would ensure adequacy, cuz it would allow someone to stand up for your particular rights, but commonality of interests)
-23(b)(3)predominance of law and fact would never hold cuz broad factual differences btwn class members –extent of injury, length of exposure, smoking history, conflicting state laws re. negligence, etc.
-can't fulfill **Rule 23(e) Court must approve class settlements** cuz you need the settlement to be the result of an adversarial process not a mediation with no prospect of a trial (baseless assessment of fairness of settlement)
-defendants will not settle unless class is all-encompassing, guaranteed res judicata
=>mass torts difficult to resolve using class action rules!
Confirms the central lesson from Hansberry - class actions offer efficient mechanism to resolve comparably situated claims in one aggregate proceeding
For those absent, critical due process issue is adequacy of representation

In the Matter of Rhone-Poulenc Rorer, Inc., 7th Cir., 1995
- Threshold issue: Is D liable for contamination of blood solids supply that has left some (a lot) of hemophiliacs being HIV positive; possible negligence in testing
- Melding the law of the 50 jurisdictions inadequate for dealing with conflict of laws
- Despite great liklihood that plaintiffs would lose at trial the certifying the classw oudl nevertheless create irresistible pressure to settle

Martin v. Wilks, US, 1989
- white firefighters weren't adequately represented by the city of Birmingham in a class action where black firefighters got jobs and promotions(that were promised to whites). Holding that whites not bound. If an absentee party is not adequately represented and is uniquely the true loser in absentia, then preclusion requires joinder. If you want res judicata, you need to bring everyone in.
- Maybe they should have intervened but intervention is not required
- **Scope of preclusion entrusted to parties to original litigation. Strangers to the litigation do not have to figure out whether or not they will be bound.**
- **If what is sought at trial is to bind third party, then logic of rule 19 through other joinder rules – 19, 20, 21, gives mechanism to bring everyone you need into litigation for full soiree of remedies.**

Discovery

- dispute resolution:what legal claims are valid? narrowed through motions to dismiss
- facts exchanged- discovery is to open up free flow of info
- -discovery is unbelievably expensive, US much more liberal/invasive than other countries
- results in HUGE legal fees, can quickly enter into moral hazard- imposes high costs on other party
- *26a - mandates certain disclosures*
- *26b1- provides broad scope of discovery, anything relevant to claim or defense*

Discovery Tools:

Rule 31: deposition (can depose party/non-party, must subpoena non-party)
Rule 33: interrogatories, written questions answered in writing under oath (only sent to parties)
Rule 34: written request for access (documents, electronic info, etc.)
Rule 35 – phys./mental exam – exception, need court order (can get of party or someone in party's custody or legal control)
Rule 36: force another party to admit/deny any discoverable matter

30(b)(6) – designate 1 person from co., corp. to answer questions – whole co. held accountable – very important/efficient rule
37 – range of sanctions for noncompliance

Davis v. Ross, NY, 1985
defamation action, wants discovery of Ross's net worth to determine punitive damages, higher cost to Ross to reveal financial info b/c she is a public figure
extortionate possibilities, possibility of court's assessment of merits affecting rulings on discovery

Coca Cola Bottling Co. v. Coca Cola Co. D. Del, 1985
bottling co. asked for secret formula for coke, one of best protected formulas, ever.
dispute w/ bottlers is legitimate if diet is the same formula as regular
coke settles because they won't give away formula

Hickman v. Taylor:
new rules restrict pleading to general notice giving
discovery serves: to narrow/clarify basic issues, device to ascertain facts/info regarding whereabouts of facts, relative to issues

In Re convergent tech. securities
litigation- 1000+ interrogatories, uses up too much time/money
1983 amendments- good faith & common sense
1980s- courts insisted parties turn over "core materials" before formal discovery
Rule26a1- added initial disclosure (controversial, lawyers have to hand over info. harmful to their clients)

Document inspection-

- Rule 34- can demand opportunity to inspect, copy, test of sample documents, e-store info, or tangible things
- "control requirement"- authorizes entry onto property for testing/measuring

- interrogatories
- Rule 33- permits any party to send written q's to another party that must be answered under oath- has spawned more discovery disputes than any other discovery device
- too susceptible to abuse, simple to write, may be burdensome to answer
- depositions- most expensive in terms of overall litigation expenditure
- q & a, anything transcribed can be used as if it occurred in open court

- physical/mental exam. only discovery tools where advance ok from court is required
- Rule 35a- where mental/physical condition is "in controversy" may order to submit to an exam

discovery sequence & tactics:
pleading stage: carefully drafted complaint, establish essential facts
Rule 26f3- "discovery plan"- design shortly after suit is filed
Rule 1b: scheduling order
Rule 26d: permits formal discovery only after conference

Kozlowski v. Sears, Roebuck & Co, D. Mass 1976
Sears failure to produce documents relating past accidents w/ flammable pj's
failed to appeal/failed to produce- Rule 37- sanctioned for non-compliance
all presumptions against Sears
-Sears says p can look for docs just as easily
-courts can't look at merits early on to assign costs
-court says Sears should keep records so possible to find
Sears= cheapest producer of info!! efficiency gain
Courts will not shift burden and make p's attorney locate desired docs/verify impossibility of task--costliness is a product of d's self serving index scheme, p has no control

McPeek v. Ashcroft- p wants DOJ to search backup systems, might yield deleted info, d says too expensive, DOJ chose not to search backup tapes
cost/benefit analysis-
make party seeking restoration of backup tapes pay?

SUMMARY JUDGMENT

SJ: burden of proof/persuasion: prove your case, usually falls on party looking to change status quo (usually p)
up to you to prove your case! exceptions= res judicata, preclusion
in most cases, someone moves for SJ

SJ- opportunity to win before trial
Rule 56c- demonstrate no genuine issue as to any material fact
2 sections- burden of proof v burden of production
Burden of proof/persuasion: ultimate burden on p, change status quo
only exception - affirmative defense - 8c
Burden of production: duty of producing evidence- sufficient evidence to go to trial in the first place?

generally, SJ is post discovery
2010: **no genuine dispute of material fact**, instead of no general issue of material fact

Adickes v. Kress
lunchroom refused to serve schoolteacher who sued alleging conspiracy btwn. Kress & police, after some discovery Kress moved for SJ
Sup.Crt: SJ was improper bc respondent failed to show absence of any issue of genuine fact
as moving party, respondent had burden of show absence of genuine issue to any material fact
didn't foreclose possibility that policeman was in store while white petitioner was,
burden on movant (Kress) to foreclose possibility of non-movant producing evidence to support her case, **absolute absence of genuine issue of material fact**
Rule 56e

holding in Adickes widely criticized, makes burden for SJ greater than burden at trial, takes away purpose of SJ (no weed out claims w/ no basisS)

3 basic approaches
-approach in Adickes: **movant must establish truth of his position**
Louis's approach: movant only has to meet burden of production or show (through discovery) absence of proof of essential element of nonmovant's case
-puts/could put slightly higher burden at SJ than at trial**, show essential element is missing**, shifts burden back to p to come up w/ evidence showing there is a genuine dispute
Currie: would treat SJ same as motion for judgment as matter of law (rule 50)- no burden of production on movant who would not bear burden of production at trial
-**bright line rule: if no burden at trial, no burden at SJ**

under Louis's standard, SC probably would have affirmed SJ
-at least show something to suggest other party can't prove essential element
under Currie- b/c Kress would have no burden at trial, should have no burden at SJ

Celotex Corp. v. Catrett
-motion by Celotex for SJ for lack of evidence to support wrongful death complaint (exposure to p's asbestos product"

Sup.Crt: 56c mandates SJ is after discovery, party fails to establish existence of essential element to their case, if so can be no genuine issue of material fact bc complete failure of proof of essential element renders all other facts immaterial
-**movant's burden of production on motion is equal to burden of proof on claim, which for d is zero**
Renquist: Currie's standard
-**lowering burden of moving party from Adickes**, don't need to get affidavits particularly when you wouldn't have to do so at trial
-**need only "point" to absence of fact,** then p must produce whole trial package
-wants SJ to become a usable tool before trial
dissent: Louis's 50% standard, point to absence of fact by summarizing the record or an issue on the record

Bell Atlantic v. Twombly
motion to dismiss antitrust claims, Sup. Crt. held complaint should be dismissed
majority: need enough facts to raise interference that there was an illegal agreement
--to survive a motion to dismiss, complaint must contain sufficient fact to create a plausible claim
court must accept legal facts, but not conclusions, as true
facts must give rise to a plausible claim
once we allow judges further power toward end of the case, why wait? increase power of judges to throw out a case more toward beginning

Matsushita Ind. v Zenith Radio-
antitrust suit, Amer. tv manu's alleged conspiracy by 21 firms
d's moved for SJ
p's claim=implausible, economically irrational
p's had to show more persuasive evidence than would otherwise be necessary
judges decided predatory price schemes are rare, why are they in the position to decide this? usually a jury decision

Anderson v. Liberty Lobby
inquiry on SJ motion mirrors standard for a directed verdict, trial judge must direct verdict if only one reasonable conclusion as to verdict

Markman-
dry cleaning patent infringement, what does "inventory" mean in dry cleaning business? Markman says 7th Amend. issue right to a jury trial
look to history, English common law- no historical precedent
look at functional considerations: "jurors unburdened by training" less able to understand patent language, concern that jury won't be uniform
many people today read as judges stepping in/taking over role typical of juries
judges realize need to get cases off the docket, want tools to narrow down the funnel, so they will make certain factual determinations in the interest of efficiency and expertise

Personal Jurisdiction

in personam- court has power over defendant
in rem- who owns property in dispute
quasi in rem- d owns property, gives jurisdiction, claim unrelated to property

General jurisdiction- d can be sued in forum on claim from anywhere
Specific jurisdiction- d can be sued in forum on claim that arises from activity in forum (claim must relate to activity in forum)

Pennoyer v. Neff (1878)
Neff entered into a contract in Oregon, left unpaid bills to Mitchell, then went to Cali
notice posted on Neff's property left in Oregon, published in local paper for 6 wks
-sale of Neff's land to Pennoyer held improper
conditions for personal jurisdiction
1. domiciliary: domiciled in state
2. can consent
3. in-state service of process (caught/"tagged" in state)

challenges to Pennoyer test:
mobility of population (automobile)
mobility of business (corporation)
mobility of info (internet/globalization)

Hess v. Pawloski, 1927
Hess sued Pawlowski (Penn) for personal injuries from an accident in Mass.
jurisdiction based on Mass. statute that said by driving in Mass, nonresident accepted appointment of registrar of Mass to receive notice in action against nonresident
-Court holds Mass has jurisdiction under Pennoyer by two legal fictions
    -by driving on Mass court, d has implicitly **consented** to jurisdiction
    -s**ervice on d's "agent"** - registrar satisfies consent requirement
-p. had to mail formal notice to d, court required receipt of notice

International Shoe v. Washington, 1945
p, Delaware corporation based in St. Louis w/ no offices in Washington
11-13 salesmen in Washington: residence in state, rent display rooms, merchandise shipped into Wash.
Int. Shoe said: its activities do not equal presence in Wash. state
1) **d has minimum contacts in forum to justify jurisdiction**
- systematic and continuous activities in the forum state
- contacts are transitionally related to the cause of action
2) **Whether jurisdiction would offend traditional notions of fair play and substantial justice**
doesn't overrule Pennoyer, adds to traditional bases for jurisdiction

Black's dissent- don't need fair play and substantial justice, w/ minimum contacts it is per se fair play to hale them into court in the state - minimum contacts are necessary and sufficient for jurisdiction

McGee v. International Life

d, insurance co. based in Texas, is sued in Cali by mother of their only policy holder there. d challenges Cali jurisdiction. court held even though d had only **one contact** w/ the forum state, it still **has jurisdiction**

Crt. noted:

1) purposeful availment - solicited contract in Cali

2) p's claim arose from d's contact with forum (relatedness)

3) state's interest- Cali had an interest

only one contact (reinsurance sent to Cali) - extreme minimum

WW Volkswagen v. Woodsen, 1980

Robinsons (NY residents) bought Audi in NY, drive through Oklahoma on their way to Arizona and their car explodes. sue WW Volkswagen in *Oklahoma state court*

does Oklahoma have jurisdiction over WW Volks (reg. distrib.) & Seaway (retailer)

Held: no jurisdiction because **minimum contacts not met**!

Forseeability test: WW Volks. couldn't reasonably have anticipated that stream of commerce would extend this far- **forseeability that d could get sued in Oklahoma**

-**purposeful availment by d**: marketing, channels for customer service, advertising, agents (not found here, WW Volks only distributes NY/CT/NJ, Seaway sells in NY)

-stream of commerce: aware of possibility that product would end up there, deriving economic benefit

balance- WWV did not enjoy benefits of Oklahoma laws/take advantage of market in forum

Brennan dissent: by selling a car- injects it into stream of commerce

Calder v. Jones

Nat'l Enquirer (Florida corp) published a story about Jones, a Cali. entertainer

Jones sued d for libel in Cali state court

--**jurisdiction upheld**, *even though d never set foot in Cali*, bc **d caused effect there** by writing defamatory statement (focus of activities was in Cali- story concerned activities of Cali resident, Cali sources, brunt of harm suffered in cali

"minimum contacts": r'ship among d, forum and litigation

intentional wrongdoing aimed at Cali. resident

Keeton v. Hustler

-libel suit against nat'l distributed publication

NY res. first sued Ohio corp in Ohio, statute of limitations ran out

NH: only state that limits hadn't run out

second libel suit, Sup. Crt. allowed

jurisdiction is okay- sufficient interest by NH (residents misled)

-lack of contacts did not foreclose juris

allowed forum shopping, p is master of the complaint

3 prong test (Calder):

1)d commits intentional tort

2)p must feel brunt of harm in that forum, forum must be focal point of harm suffered bc of tort

3) d must have expressly aimed tortious conduct at the forum- such as forum can be said to be focal point of activity

Asahi Metal Industry v. Superior Court, 1987

stream of commerce
Zurcher (Cali resident) is injured when tire on motorcycle bursts on Cali highway
sued to recover in Cali state court
d. Cheng Shin Rubber (Taiwanese corp. manu'ed tube issue in tire) files cross-complaint against Asahi (Jap. co. supplied tube valve assembles), Zurcher drops out, left with Cheng Shin v. Asahi in Cali state court
Split: 4, 4, 1
Brennan:
- **placing a product in stream of commerce**, reasonably anticipate product will get into forum
O'Connor:
need more- require action of d to be **purposefully directed at forum state**
-ex. ***showing intent/purpose to serve*** *market in forum*
here- no action by Asahi to avail itself of Cali Market, didn't know they could be hailed into Court in Cali

4 part test - "Notions of fair play and justice" (Int. Shoe)
burden on d
interests of forum state
p's interest in obtaining relief in forum
overall systemic efficiency

applied here- severe (d has to travel from Taiwan to Cali)
slight (only claim left indemnity from Ching Shin to Asahi
considerably diminished, not a Cali p anymore, inefficient
low- no outstanding factors make Cali a better forum than anywhere else

Palovich v. Superior Crt.
d posts website w/ info on how to decrypt/copy DVDS
p. alleged d. misappropriate its trade secrets by posting DeCSS program, claimed jurisdiction in Cali bc knew his actions would impact Cali businesses (Hollywood and computer industries)
mere forseeability that 3rd parties might use DeCSS to harm motion picture industry cannot satisfy express aiming requirement
-this broad of an interpretation would eliminate purposeful availment requirement
-communication on internet merely posting info cannot be equated w/ express aiming at the entire world
Calder v Jones most relevant

Burnham v. Superior court
personal service w/in jurisdiction: classic "tag jurisdiction"
p, NJ resident, served w/ divorce proceedings while in Cali visiting his kids
Scalia: Pennoyer law is still good, no challenge to jurisdiction w/ in state service
Brennan: uses Int. Shoe. - by visiting forum state, d "avails" himself of benefits provided by state w/out transient jurisdiction- asymmetry would arise, d could sue his wife in Cali if he wanted
all justices agree Cali. had general jurisdiction

Helicopteros Nacionales de Columbia v. Hall (1984)
General Jurisdiction Alternative
4 Americans working in Peru for Consorcio/WSH killed in a helicopter crash

Helicol (Columbian corp) contracted w/ Cons./WSH to move personnel, materials, equipment to job site, meeting in Texas, one meeting in Texas
claims did not "arise out of" and are not related to Helicol's activities w/ Texas
Sufficient contacts- constitute continuous and systemic general business contacts?
No, no place of business in Texas, not licensed to do business there
only contacts- sending CEO there for contract, accepting checks, purchasing services and equipment, sending personnel to Bell for training
Brennan's dissent-- wrongful death claim is significantly related to the contacts btwn Helicol & Texas, does allow for specific jurisdiction

Carnival Cruise Lines

clause is on back of cruise ticket that says any suit brought had to be brought in Fla, by buying ticket- consent to FFla. juris, court upholds- passengers are benefited w/ lower cost of tickets (really?)... much of cruise industry in Florida
industries can become crucial in shopping substantive law, greatly enhances ability to control legal error

Subject Matter Jurisdiction

what court has authority to decide case- state or federal

Article 3 of Constitution gives Sup. Crt. power to hear cases
-btwn citizens of diff states and disputes involving aliens
-arising out of federal law

§1331 – Federal Question Jurisdiction
§1332 – Diversity Jurisdiction

- between citizens of different states complete diversity rule (no diversity if any p is from same state as any d, citizenship = state of domicile)
- $75,000 amount in controversy (if one d, one p- can aggregate claims, if multiple parties on either side- can't aggregate. if *joint* claim- look at total value of claim not number of parties)

Mas v. Perry
Jean Paul Mas (France) married Judy Mas (home state- Miss), suing landlord for watching them through a two way mirror in Louisiana
living in LA for school, undecided as to where they would reside next
General Rule- need complete diversity
-**domicile: true, fixed, permanent home,** change of domicile only w/ intent to stay
Mrs. Mas's domicile = Miss.
Amount in controversy- Mr. Mas only received $5k, but amt in cont**. based on amt claimed by p in good faith**

-based on facts/claims- reasonable amount? to dismiss an amt in controversy- no way based on facts they could've pled in good faith

Louieville/Nashville RR v. Motleys, 1908
"well pleaded complaint rule"
couple injured in railroad accident gets free lifetime passes in return for an agreement not to sue
Act of Congress- forbidding free passes/transport
Motleys sue RR for enforcement of passes, claim federal question bc RR's defense will be federal statute, case will ultimately turn on if statue applies to Mottley's circumstances/ constitutionality of statute
Rule- federal claim has to be apparent on the face of the complaint
if p chooses to file in federal court, **p must have federal claim**, not that d has defense based on federal law that will likely be raised
"four corners rule"

Merrel Dow Pharmaceuticals v. Thompson
Suit by Canadian and Scottish citizens against manufacturer of Bendectin, a morning sickness drug that caused birth defects. P's trying to keep the case in state court, because the federal court will throw the case out for *forum non conveniens (another court way more appropriate)*

On the face of the pleadings, P is suing under state tort claims
Not stating a federal claim, so would fail the Mottley test

Holmes test – federal subject matter jurisdiction exists where federal law specifically creates the cause of action

Merrell Dow facts would not meet this test because the FDCA does not give a private individual right of action

- **Four-Part Test for Implied Federal Right of Action:**
- **P is intended beneficiary of the federal statute**
- **Legislative intent to have private right of action (like Title VI housing discrimination)**
- **Private right of action would further the statutory purpose**
- **Not an area of traditional state interest**

- Example: Title VI for housing discrimination doesn't include a private right of action, but the other civil rights statutes did. Title VI was obviously to protect civil rights plaintiffs, not an area where the state was trusted to create a remedy, so we should read an implied
- As applied to Merrell Dow facts:
    1. P's are not part of the class for whose special benefit the statute was passed
    2. The indicia of legislative intent reveal no congressional purpose to provide a private cause of action
    3. A federal cause of action would not further the underlying purposes of the legislative scheme, and
    4. Respondents' cause of action is a subject traditionally relegated to state law
- Neither side actually argues for this, because P wants to stay in state court and D does not want to open itself up to liability under the FDCA instead of just common-law state tort claims
    -

Federal Ingredient- no implied/expressed right of action, but federal interest is significant --> should be adjudicated in fed court

Three-Part Test for Federal Ingredient:

1) Substantiality – state question will necessarily turn on interpretation of federal question

2) Uniformity – interest in having issue decided for the whole nation

3) Special Circumstances – i.e. novelty of issue such that there is need for federal expertise in interpreting federal law

Essentially collapses federal question inquiry into implied

Court splits 5-4, majority says Federal Ingredient standing is not enough, too expansive, dissent says it depends how substantial the federal law is in the question

Grable & Sons Metal v. Darue Engineering

action for quiet title, **federal question** comes in because of tax code

Grable claims IRS failed to notify him of seizure w/ exact procedure

-Darue removed case to fed. dist. crt. as presenting a federal question, bc claim of title depended on **interpretation of notice statue in fed tax law**

Sup. Crt. upheld removal to fed crt, **clear federal interest in uniform application of tax laws**

--Court rejected any reading of Merrell Dow that would have required either an express or an implied federal cause of action for federal question jurisdiction

--Claims not to have overturned Merrell Dow – confined only to situations in which there is **no concern of federalizing large swaths of state law**

-Look at comparative capacities of federal and state courts

Similar to Markman analysis, who is in best position to answer the question without risking the division of labor between federal and state court

-Does the state cause of action depend on a federal law question?

-Look at potential balkanization of federal law or federal government's particular expertise on the issue
-Federal regulatory interest / fed court expertise relative to state – who is best positioned to answer the question
-**Turns substantially on federal question**
-Supported by congressional intent about the division of judicial responsibilities between federal and state
---**high federal interest in answering the question (**i.e. in determining issues re national tax collection)

Supplemental Jurisdiction

28 USCA § 1367

lets federal court hear non-diverse/non-federal question claim

(a) "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy"
(b) takes away supplemental jurisdiction
only in diversity cases-
- claims by plaintiffs
- -against parties joined under Rules 14, 19, 20 or 24
- -claims by Rule 19 plaintiffs
- -claims by Rule 24 plaintiffs

United Mine Workers v. Gibbs

fed claim: interference w/ business opps. against federal labor law
and state claim: tortious interference w/ contract under state law
-- both claims arose from same behavior by the union

Gibbs test

1) "one const'l case"/same occurrences/transactions
2) sufficiently substantial fed claim merits adjudication
3) **common nucleus of operative fact**
4) state issues did not predominate
5) court has agreed to hear both (fed court discretion)

both claims swept into federal court
reasons: fed claims should stay in fed court, efficiency
but when fed. jur. is based on DIVERSITY, not fed qu., supp. juris. will not be granted! no special reason to go forward in state cout bc all claims arise under s.law

Owen v. Kroger

ancillary jurisdiction

Kroger (citizen of Iowa) sues OPPD (Nebraska corp) for wrongful death of husband, which impleads Owen (Kroger's employee) also from Nebraska
-Kroger figures out claim v. Owen, becomes apparent Owen is actually citizen of Iowa
OPPD v. Owen can go forward in federal court
-destroys diversity (not complete diversity)
-if K. brought suit at first, would not have had diversity jurisdiction
unlike Gibbs- no substantial federal question, only based on diversity
claims arise under state law-- want to concentrate in state court

Choosing between state and federal law
once diversity jurisdiction is established, do we use state or federal law?

first hundred years- federal common law

Swift v. Tyson

issues in federal court in NY, diversity jurisdiction, issue would be decided differently if based on state or federal law
if state law- consideration would be rejected

fed law- consideration would be found
Rules of Decision Act: default= state law, exception- constitution, treaties or US statutes say something else
Story opinion: **state, judge-made common law doesn't count as law**
state law only includes statutes

Black & White Taxicab v. Brown & Yellow Taxicab
to get around KY state law, B & Y reincorporates in Tenn.
allows forum shopping
raises problems with Swift doctrine

Erie v. Tompkins, 1938
Under Pennsylvania common law, Plaintiff is a trespasser, so the RR owes him no duty. Under federal common law, Plaintiff is an invitee, so RR owes Plaintiff a duty. dist. crt: no state statute, fed crt is free to use its own law
HUGE: Sup.CRt. REVERSES- Penn. common law should apply
federal court must apply state substantive law
-Rules of Decision Act § 1652
-10th Amendment: fed gov't can't invade powers of state gov't

Guaranty Trust v. York
class action on behalf of non-accepting noteholders, fed. crt. bc of diversity
suit based on alleged breach of trust by Guaranty (failed to protect interests or disclose self interest)
different statute of limitations depending on whether state or federal law is applied- outcome determinative
Court **says we have to apply state law bc of Erie**, even though normally think of state of limit's as procedural (bc **outcome determintive**)
matters of substance v. matters of procedure: we don't want ppl forum shopping! (substance)

Klaxen: conflict of laws rule- applied in federal court must conform to those prevailing in that of state's courts

Hanna v. Plumer, 1965
service to executor made in compliance w/ **Rule 4d1**
-not "in hand" service required by Mass rules
whether federal court should follow state rules or Rule 4d1 of Fed Rules CivPro regarding service of process.
here, **outcome determinative**
-under York, state rule would apply
majority opinion:
twin aims of Erie rule:
-discourage forum shopping
-avoid inequitable administration of laws
--> procedural aspect of State v. fed law, not relevant to choice of forum
Rule 4d1 is valid, controls case
Harlan's dissent: inquire if choice of rule would substantially affect those primary decisions respecting human conduct our system leaves to states

Erie flowchart:
in federal court, one of the parties wants state law to apply to a particular issue
conflict between state and federal law?

YES
conflict w/ Federal Rule?
if rule is *valid* under REA: **federal rule wins**
-does it regulate procedure?
-or "abridge, enlarge, or modify any substantive right?"
in real world- FRCP always wins
conflict with constitional provision or fed statute?
if constitutional, win over state law

NO
is state rule bound up with implementing of state created rights & obligations? ***does it regulate primary behavior?***
yes- state law
no- balancing test, unguided Erie choice
twin aims of Erie: forum shopping, inequitable admin of law
yes- state law
no- fed law
Fed Countervailing interests (for fed law) Byrd
follow state law unless strong federal interest
Outcome determinative (York)
if outcome determinative, follow state law

Gasperini v. Center for Humanities, Inc., 1996
regarding standard of setting aside an award of damages
different rules in NY law and FRCP 59
NY standard, 5501c: "deviates materially from what would be reasonable compensation"
federal rule: "shocked the conscience of the court"
-Ginsberg: use state law, serve both interests
7th Am: can't review facts tried by jury
remand to district court to let trial judge make review

Lawyers and Clients

Hickman v. Taylor
public hearing by US Steamboat Inspectors- testimony of 4 survivors available to all interested parties
lawyer does his own investigation
p requests content of lawyer's notes, lawyer says no
not attorney/client privileged, but "work product": in preparation for litigation, includes lawyers thoughts
SC affirms- info p is seeking is info they already have access to, didn't show they would be prejudiced without it
consequence? lawyer would stop writing things down
turns lawyers into witnesses
Rule 26b3: once you stamp with work product, can't be discovered
other party has to show NO other way to get info or so outrageously costly that it would be undue hardship

Zuk v. E. Penn.
filmed sessions, wrote a book
brought claims for copyright infringement
Rule 11 sanction- for filing complaint and failing to withdraw, signing all doc's
case is wrong, both facts and law