**Structure for State Jurisdiction Arguments**

**1) Statutory Analysis**

**2) Due Process - International Shoe/Asahi**

1. **Personal Jurisdiction**
   * 1. *Remember*
        1. *Mechanics of notice is separate than jurisdiction* 
           1. *(Gray v. American Radiator)*
        2. *Choice of forum is not choice of law. Hanson*
   1. **General Jurisdiction (GJ)**
      1. **Statutory analysis**:
         1. If in fed court, piggyback (if no other fed statute) (4k)
         2. do statutes allow jurisdiction to the extent permitted by the Due Process Clause? **(Gray v. Green)**
            1. **resident**? (Miliken)

Kulko v. zuckerberg

* + - * 1. **served in state**? (Burnham: Scalia traditional territoriality, Brennan, reasonable expectation and benefit/burden)
        2. **consent?** (Bauxite, foot in the door.)

by contract (carnival cruise?)

forum choice provisions are valid (Bremen)

* + 1. **Constitutional analysis** (technically, Int’l Shoe):
       1. Contacts
          1. Considered “at home”? (Perkins was, Helicopteros wasn’t)
          2. “Here in all but body” (Ringo Starr)
          3. Old stale contacts count less (Kulko)
          4. Bank account really doesn’t count (Helicopteros)
  1. **Specific Jurisdiction (SJ)**
     1. **Statutory analysis**: Relevant long-arm statute (to the extent permitted by the Due Process Clause).
     2. **Constitutional analysis** (Int’l Shoe)
* \*\* “**Minimum Contacts**”
  + - 1. with the forum state (or US for nationwide service?)
         1. **Related to Specific Transaction**

Single contact can suffice (***McGee***, kind of)

**Effects**

***Calder*** – aimed at forum and had substantial impact there

Location not dispositive without additional connections to forum (Calder, Keeton)

Not subject wherever P is located (Green)

* + - * 1. **Contacts BY the defendant**

Unilateral actions of 3rd parties don’t count ***(Hanson v. Denckla***)

NOT website advertising ***(Pebble Beach***, no worldwide service)

***Zippo*** test falling out of favor (active/interactive/passive)

* + - * 1. **Fairly expect to be hailed into court**

**Purposeful availment of benefits and burdens,** (***Hanson, Worldwide***)

Availed of laws simply by visiting (Brennan in Burnham)

STREAM OF COMMERCE

Gray (lots can be enough)

O'Connor (requires purposeful direction)

Contracts (esp. choice of law provisions) (Burgerking, reined in by Asahi)

* + - * 1. **“traditional notions of fair play and substantial justice” measured by Asahi factors**
        2. Burden on the defendant

Forum favorable to P does not defeat claim –Keeton

* + - * 1. Interests of forum state

Importance of judgment proof D (McGee)

* + - * 1. Interests of plaintiffs in obtaining relief
        2. Interstate judicial system’s interests in efficient resolution

Nothing to suggest inefficiency, evidence, etc

* + - * 1. Interests of states in furthering substantive social policies

Includes providing forums for their citizens

1. **Power Over Property**
   1. Situs of debt accompanies the debtor (Harris v. Balk)
   2. **Quasi In Rem-2 Jurisdiction**
      1. **Statutory Analysis**
      2. **Constitutional analysis:** Also subject to International Shoe and Asahi factors (Shaffer)

**Federal Jurisdiction Analysis:**

5th Amendment, not 14th

Federal Rule of Civil Procedure 4(k) Establishes Jurisdiction through Service

* + - * 1(A): Piggyback rule (if subject to general state jurisdiction)
        + **When piggybacking, due process is determined by 14th Amendment/Int’l Shoe**
      * 1(B): 100 mile bulge rule
      * 1(C): When authorized by federal statute
        + Nationwide service of process

5th amendment (no reasonableness test)

minimum contacts with entire US

* + - * + e.g. ERISA/Bankruptcy

Int’l Shoe Due Process does not extent to 5th Amendment (no sovereignty issues)

Minimum contacts with entire country

* + - * 2) Fed law claim, service establishes jurisdiction if:
      * a) D is not subject to jurisdiction in any state’s court
      * b) exercising jurisdiction is consistent with Const. and laws f

**MECHANICS OF NOTICE AND OPPORTUNITY TO BE HEARD**

1. **Rule 3:** A civil action is commenced with filing
2. **Statutory**
   1. **State:**
   2. **Fed:** 
      1. **Rule 4(c): Service**
         1. Summons served w/ copy of complaint. P’s responsibility
         2. any non-party >18
         3. By marshall or someone specially appointed (at p’s request)
      2. **4(d)** allows waiver of process
      3. **4(e)** in US: state rule or default:in person/abode/legal agent
      4. **4(f)** foreign jurisdictions: reasonably calculated/country’s law
         1. unless prohibited, personal service/mailed service w/ signed receipt
      5. **4(h)** corporations: officer or agent
      6. **4(m):** served within 120 days of filing
3. **Constitutional**

* ***Due process: Judgment entered without notice is invalid***
* Reasonably calculated to apprise interested parties of pendent action and afford them an opportunity to present their objections (Mullane)
  1. As if really wanted to give notice (Mullane)
  2. Notice exists in order to give opportunity to be heard (Aguchak)
  3. **Content of notice**
     1. Include opportunity to respond with written plea (Aguchak)
  4. **Delivery of Notice**
     1. Insufficient if
        1. P knows likely to be ineffective (Greene v. Lindsey)
        2. Delivered to someone known insane w/out guardian (Covey)
     2. Heroic efforts are not necessary, courier generally ok (Dusenberry)
        1. Certified mail not returned
     3. No sewer service
        1. Can’t watch mailman dump letters down drain (Jones v. Flowers)
           1. Certified mail returned requires further steps
           2. What other reasonable alternatives available?
           3. Searching public records not required
  5. **Agents/Representatives**
     1. If statutes enable implied consent, must also mandate actual notice (Wuchter)
     2. Parties can contract agency relationship (Szukhent)
     3. Class interests can be represented by a sufficient % (Mullane)

**Due Process: Opportunity to be Heard**

* 1. Background: Due Process Developments
     1. Warren Court (Sniadach wage garnishment, Goldberg welfare)
     2. 🡪Due Process Functionalism balancing test
        1. Matthews v. Elridge:
           1. Private (D) interest
           2. Risk of erroneous deprivation
           3. Government (P) interest
  2. Pre-Judgment attachments
     1. any taking of property raises due process issues (Fuentes)
     2. **Current: Doehr application of Matthews Balancing Test**
        1. Private Interests Affected by Prejudgment Remedy (D)
           1. Household items (Fuentes)
           2. Garnishing/freezing money (Di-Chem, Doehr)
        2. Risk of Erroneous Deprivation
           1. **Significant burden (Di-Chem)**
           2. Judge’s discretion vs. clerk (Mitchell, helps)
           3. Post-deprivation hearing (Mitchell, helps)
           4. Bond (insufficient: Fuentes)
           5. Probable cause showing
           6. Showing likelihood of success
           7. Affidavit (Mitchell, Di-Chem)
           8. Fact intensive (Mitchel straightforward, Doehr Complex)
        3. Interests of party seeking remedy
           1. Plaintiff

Previous property interests

Risk debtor could abscond with property (Mitchell)

* 1. Rule 65

a) preliminary injunction – only on notice

b) TRO – may issue without notice if immediate and irreparable injury

**SUBJECT MATTER JURISDICTION (SMJ)**

1. **Must be affirmatively proved (Capron)**
   1. Issue can be raised sua sponte
   2. Grounds for dismissal, even on appeal: (Fed: 12(b)(1))
      1. Lacks v. Lacks,
      2. Before or after PJ (Ruhrgas)
2. **State SMJ**
   1. Assume state court subject matter jurisdiction unless clearly absent
      1. E.g. congressional limited, anti-trust, patent law
   2. Supremacy clause – state courts bound by fed law
   3. Can read limitations narrowly (Lacks v. Lacks)
3. **Federal SMJ**
   1. **Removal**
      1. original jurisdiction is required **(1441(a), Syngenta)**
      2. can’t remove on basis of counterclaim (***shamrock***)
      3. hometown D can’t remove diversity case (1441(b)))
      4. can be removed with other joined claims of common case, or not, discretionary (1441(c)
      5. 1442: if fed officer sued/prosecuted, can remove to fed court
      6. 1443: for civil rights cases, can remove if P can’t enforce right in state
      7. 1445: can’t remove FELA/workmen’s comp/VAWA
      8. 1446: all defendants must consent to removal w/in time limits (1446)
      9. 1447: remand
      10. 1453: class action exceptions
   2. **Challenging SMJ**
      1. Sua sponte/ Parties can’t consent to improper SMJ
      2. If realize non-diverse party during case
         1. Improper jurisdiction can be remedied by dropping nondiverse party (**caterpillar**)
         2. Change of citizenship after start of case doesn’t destroy or restore jurisdiction (**grupo dataflux**)
      3. Collateral attack
         1. Generally disfavored
            1. Particularly if fact bound or if court considered jurisdiction
            2. Exception: default judgments, pure questions of law

**Constitutional:** III.2: authorizes but does not enable Diversity and Arising Under

* **1. Diversity/Alienage (1332)**
  + - 1. **Complete Diversity Requirement (***Strawbridge***)**
         1. **Individuals**

**Domicile**

“true fixed permanent home, to which he has intention of returning when absent”, only replaced with new domicile **(Mas v. Perry)**

Requires citizenship both of US and a specific state (Dred Scott)

* + - * 1. **Corporations** (**1332(c))**

Any state of incorporation

Principal place of business

Nerve center/decision making

Corporate Activities/Operating Assets

Total Activity (mush/hybrid)

* + - * 1. **Unincorporated** Associations (labor unions, partners)

Citizenship of each member

HQ is irrelevant

Rose v. Giamatti (baseball)

* + - * 1. Nominal parties won’t destroy diversity. (Rose)
        2. Class Actions (1332(d))

Diversity for named parties (Ben-Hur)

* + - 1. **Amount in Controversy**
         1. >$75,000 excluding interests and costs (1332)

1. caan increase after initial filing if good faith (Troccoli)
   * + - 1. assume eligible unless legal certainty that not satisfied
         2. for injunctive relief, consider:

plaintiff viewpoint

value to party invoking fed jurisdiction

either party (most courts)

* + - * 1. Aggregating Claims

Single P v. Single D ☺

Multiple Ps w/ joint interest ☺

Multiple P’s w/ separate claims ☹

Single P v. multiple Ds ☹

Unless joint and several

* + - 1. **Domestic Relations and Probate Exception** (narrowly construed)
         1. Domestic Relations (Ankenbrandt)
         2. Probate (Marshall)
      2. **Policy**
         1. **Fed courts:** neutral, superior (resources, tenured, broader jury), cross-pollination/competition, subsidy to state courts, fed interests.
         2. **Against:** hometowner loses from complete diversity req, fed courts shouldn’t deal with state issues, drains incentives for courts to cooperate

**2. Arising Under (1331)**

* + - 1. **Constitutional:** **Original Ingredient (*Osborn*)**
      2. **Statutory: Mottley, American Well Works + Smith Exception**
         1. **Wellpleaded complaint (Mottley, American WellWorks)**

**4 corners of complaint** (**Mottley**)

Not declaratory judgment (also Skelly Oil)

Not counterclaims (**Vornado**)

**Fed law creating cause of action** (American Wellworks)

* + - 1. (or explicitly creating forum – Osborn, ATCA):
      2. if statutory grant, can read limitations narrowly (**Arbaugh**-# of employees)
      3. IMPLICIT right of action (**cor**t)
         1. Class whose benfit
         2. Legislative intent
         3. Underlying purpose of legislation
         4. Settled expectation/fed

**b. Embedded substantial federal question** (**Smith Exception)**

1. Narrow: lack of private right of action indicates unsubstantial, concern about state torts in fed court (Merrell Dow: FDCA)

2. Broadened (Grable): Private right of action is welcome matt, not key

1. Necessary fed question?

Doesn’t include fed K under state law (Skelly Oil)

2. Contested/meaning in dispute?

3. Substantial?

4. Disruptive portents/floods (fed-state balance)

* + - * 1. Garden variety?
        2. Pure law vs. fact intensive

Empire Health Choice

* 3. No artful pleading (**Miller, Bechtel**)

**C.** question of federal common law can be arising under and removeable, but not necessary

3. Supplemental

* + - 1. **If can’t aggregate under 1332:**
      2. **1367(a): Same Case or Controversy**
         1. ***Gibbs*: common nucleus of operative fact**

“one constitutional case” (transactional relation)

fed claim substantial enough for adjudication (don’t have to win on fed claims)

state issues do not predominate

* + - 1. **In context of statutes (Aldinger)**
         1. Supplemental jurisdiction over parties do not require express statutory authorization (1367(b) supersedes Finley, as seen in Allapattah)
         2. But can’t sue parties congress has excluded (Aldinger)
         3. complete diversity requirement (1367(b) maintains 1332) -Kroger
      2. **Court’s Discretion** (1367(c))
         1. Novel or complex issue of state law
         2. Claim substantial predominates claims of original jurisdiction
         3. Dist. Ct has dismissed all claims of orig. jurisdiction
         4. Exceptional circumstances
      3. **Amount in Controversy**
         1. >1 claim meets amount in controversy

Allapattah overrules Zahn

Not “indivisible” or “contaminating”

**VENUE (statutory)**

1. Not choice of law: law of first forum governs after transfer
2. Not Constitutional unless due process implicated
3. Statutory:
   1. 1391(a): federal venue for diversity
      1. D’s residence (if all Ds in same state) or
      2. Where substantial part of claimed events occurred or
      3. Where d is subject to personal jurisdiction
      4. (b)
   2. Is another venue appropriate? 1404
   3. Is current venue inappropriate? 1406

**FORUM NON CONVENIENS (dismissal or transfer):**

**Judge-made doctrine**, can forum non to any other district where might have brought suit

1. Is there an adequate alternative forum?
   1. That would provide SOME remedy (Piper; forum non to Scotland affirmed)
   2. Extremely minimal relief might not count at all.
2. Balancing factors (Gilbert, cited in piper – Scottish plane crash)
   1. Deference to P’s choice of forum
      1. Sliding scale of deference (Irragori)
         1. Weaker presumption when P is foreign, but not depositive
         2. More deference to P if give good good reasons
            1. Better damages isn’t one (Irragori)
   2. Private/Public Interests
      1. State interests (court and local citizens)
         1. Choice of law concern?
      2. Federal interests
      3. Private interests of the parties
         1. (Trial convenience, evidence, etc)
            1. Site of accident not dispositive (Irragori)
3. Sound discretion of district court (limited appellate review)

**APPLICABLE LAW**

1. 10th Amendment: powers not expressly given to fed are reserved for states
2. RDA: law of several states are rules in civil actions where they apply
3. REA (1934): Scotus can prescribe rules of practice and procedure that do abridge, enlarge or modify state substantive rights.

**Erie II (REA)**

1. **Conflict between fed statute/rule and state law**
   1. Conflict
      1. Pro-State: No conflict, narrow reading (Walker, affirming Ragan)
      2. Pro-Fed: “direct collision” is not necessary, as long as fed rule is sufficiently broad. How does it operate in practice? (Stewart).
   2. If find conflict with statute/Rule
      1. Statute: Constitution: arguably procedural?
      2. Rule:
         1. REA
            1. REALLY procedural, not pretext - directed at conduct inside the courtroom, not abridging, enlarging, or modifying substantive rights (Hanna/sibbach)
            2. \*primary conduct outside the courtroom (harlan, hanna c)

includes dissuading suit: bond req in **Cohen,**

* + - * 1. No FRCP has been struck down under the REA.
      1. Constitution
         1. Rationally classifiable/ Arguably procedural (Hanna)
* ERIE II (RDA)

1. **If no statute/Rule: Relatively unguided Erie**
   1. Is state policy substantive (R
      1. RDA
      2. York –outcome determinative
      3. Hanna modifies: not talismanic. Outcome affective? Twin aims:
         1. Forum shopping
         2. Equitable administration of the laws
            1. Hanna ex ante, almost any difference can fail ex post
      4. Harlan
         1. Harlan’s Primary Content
      5. Byrd Balancing
         1. State law: integral part/ bound up with rights and obligations of the parties? + states ‘ interests and probability of non-uniform outcome v. Countervailing interests: fed courts run a separate system, with a norm of transsubstantive interest.
      6. Accommodation (***Gasperini*)**
2. **Fed law in state courts: (Dice: substantive law maker not indifferent)**
3. **In Federal Court, what law to use?**
   1. **Usually, Fed court applies state substantive law**
      1. **Fed district courts apply conflicts-of-law rules of state in which it sits** (Klaxon)
   2. **State Law determined as it is, not what it ought to be (Klaxon)**
      * 1. Announced by highest court of state
        2. Prediction of that court’s decisions
        3. Certified questions
   3. **Federal Common Law (counts as law)** 
      1. **When should it be invoked? (Clearfield trust)**
         1. No fed statute on point
         2. Strong federal interest, eg uniformity, conflicts with state law (Clearfield Trust, Boyle)
            1. but not every time commercial paper of US is involved, partic. Private parties (Parnell)
         3. **3 theories**
            1. enclave(Meltzer),
            2. coextensive(fields),

crit (Boyle: Brenan, D)

* + - * 1. statutory interpretation (Kramer)
    1. **What is the content of federal common law**?
       1. Often piggyback on state law
          1. Uniformity (Semtek: vertical uniformity)
          2. Does state law frustrate fed objectives? (Boyle)
          3. Avoid interrupting commercial transactions predicated on state law (Parnell)

**PLEADING**

1. Pre-litigation investigation
2. Pleading
   1. Complaint
   2. Pre-answer motion
   3. Answer
3. **Discovery**
4. **Summary judgment**
5. Trial
6. Post-Trial Motions
7. Appeal
8. **Are the functions of Pleading served?**
   1. **Notice** (modern, replacing old and code fact intensive)
   2. Frame issues for trial
   3. Disclose evidence that will be conested at trial
   4. Get rid of meritless cases
9. **Rule 8: pleading**
   1. 8(a): Claim for relief
      1. Short and plain statement of court’s jurisdiction if necessary
      2. Short and plain statement SHOWING entitled to relief
      3. Demand for relief
   2. 8(e): Construed so as to do justice
   3. Changing standards
      1. old standard: facts unnecessary, dismiss only if “beyond doubt that no set of facts would entitle to relief” (Conley establishing Dioguardi)
         1. NO heightened pleading standard: leatherman (civil rights), ***swierkiewicz*** (employment discrimination)
         2. must liberally construe complaint in light most favorable to Ps (American nurses)
         3. Ok as long as didn’t plead self out of court! (American Nurses)
         4. **Form 11: Clark: Forms are most important part of rules**
      2. new dominant standard (Twombly):
         1. Conley buried
         2. “showing” shifts burden of improbable claims into pleader requires plausibility.
         3. Plausibility is not just for antitrust suits (iqbal)
         4. Substantive law bleeding through (Twombly and Iqbal)
         5. After T and I, **accept facts as alleged, but not implausible inferences.**
      3. Softened by Erickson:
         1. no concerns about discovery, notice
         2. maybe more lenient pro se
         3. not expensive discovery
10. **Rule 9(b) restricted to cases of fraud or mistake** (Iqbal)
    1. 9: Pleading Special Matters
       1. (b): Fraud or Mistake: conditions of mind
          1. fraud or mistake with particularity.
          2. Malice, intent, knowledge, and other conditions of mind may be alleged generally
       2. No rigorous pleading standard, only slightly higher standard than Rule 8 (Denny v. Carey)

**Defenses**

1. 12(b) defenses include:
   1. Lack of : 1) SMJ, 2) personal jurisdiction, 3) venue, 4) process, 5) service, 7) parties
   2. 12(b)(6): failure to state a claim upon which relief can be granted
      1. Fexpensive, hard to win (even post-twombly), usually granted without prejudice)
      2. Alternatives
         1. Dismiss without prejudice and/or
         2. 12(e): Motion for a more definite statement (American Nurses)
2. Rule 8(b): (Answer) defenses; admissions and denials
   1. 1. State defenses, admit or deny allegations in the answer
   2. 2. Must fairly respond to substance (no “showing” language)
   3. 3. General and specific denials: paragraph by parapgraph
   4. 5. DKI: deny knowledge or information sufficient to form belief
      1. can’t be cagey
3. Rule 8(c): lists affirmative defenses
   1. Fraud, illegality, con neg, ass risk, etc etc boiler plate

**Sanctions:** Rule 11: Signing pleadings, etc; Representations to the Court; Sanctions

1. Requires **inquiry reasonable under the circumstances**
2. Since 1990s: Safe harbor period of 21 days before motion in court, adequate notice and opportunity to respond or amend
   1. **Hadges v. Yonkers Racing** (Kunstler)
3. Courts also have statutory and inherent powers to sanction

**Counterclaims and Crossclaims (Rule 13)**

1. Compulsory: 13(a)1(a)
   1. Arises out of same transaction or occurrence
2. Permissive: 13(b)
   1. ANY claim (not related)
   2. No necessary transactional relationship

**Amendments to Pleadings (Rule 15)**

Liberally Construed

* 1. Amendments Before Trial
  2. During/after trial
  3. Relating Back
  4. 15.c.1.A If SOL allows relating back
  5. 15.c.1.B if same transaction, diff’t theories, SOL doesn’t apply
  6. 15.c.1.C changes parties: if served within 120 days (4m) and:
     1. receivednotice so will not prejudice defening on the merits
     2. 15(c)(1)(C): diiff’t parties

i. If received notice and wont’ be prejudiced

ii. If knew or should have known action would have been brought against it but for a MISTAKE concerning ID

* + - * 1. Response to Schiavone (fortune mag)
        2. Ignorance is not a mistake. (Worthington v. Wilson, 7th cir

**DISCOVERY: no surprises at trial!**

1. **Case Management**
   1. Judges preserve efficiency despite adversarial system
      1. No hoarding/harassing
      2. Concern of EXPENSES, ballooning discovery – possibility of limited discovery
   2. Pretrial conference, Judges formulate or simplify issues, eliminate frivolous claims, etc (16(C)(2)
2. **Discovery**
3. Usually: documents 🡪 interrogatories (Rule 33) 🡪 depositions (Rule 30)
   1. (but can go in any order – 26(d)(2))
4. **Documents and Tangible Things** 
   1. 26(b)(1): any nonprivileged matter relevant to claim or defense
      1. need not be admissible (just calculated to lead to discovery of admissible evidence)
   2. Privileged Exceptions
      1. Attorney Client (Upjohn, United Shoe Machinery Corp)
         1. Confidential
         2. Communications
         3. Between attorney
         4. acting as a lawyer
         5. And his client
            1. No control group limitation (Upjohn)
            2. to or from client (Upjohn)
         6. *In connection with* providing legal advice (and not for committing a crime)

\*Incentives to seek legal advice and control internally investigate illegality

* + 1. Work-Product
       1. protection if prepared in anticipation of litigation 26(b)(3)
       2. Unless substantial need and undue hardship – undefined but high standard (26(b)(3)(A), Hickman
       3. Core-work products 26(b)(3)(B)
          1. Can’t invade lawyers’ mind (mental impressions, legal theories, “atmospherics”) (No court standard, but Upjohn)
          2. Verbatim transcripts not core work product. (26(b)(3)(B), Upjohn, Hickman)
    2. Privileges must be expressly claimed by party (26)(B)(5)
    3. Disclosure to third party violates privilege to that info and related info unless:
       1. Federal Rule of Evidence 502
       2. (a): waived only if intentionally disclosed, only for things on same subject
       3. (e) Party agreement on effect of disclosure in Federal proceeding is binding only on parties, unless court ordered

1. **Interrogatories** propounded only to parties (Rule 33)
2. **Depositions**
   1. Anyone can be deposed (Rule 30)
   2. Companies have onus of producing person with knowledge (30(b)(6))

**SETTLEMENT**

**EVπ = Probability \* Award MINUS Cπ**

**EVD = Probability \* Award PLUS CD**

**Cπ plus CD = Settlement Zone (when parties agree on values of P and A)**

Obviously other factors as well

**SUMMARY JUDGMENT**

1. Viewing the record **in the light most favorable to the opposing party,** are there **genuine issues of material fact** such that there **can be a judgment as a matter of law**? (R.56)
2. Burden of Production
   1. Foreclosing possibility of p’s recovery (Addickes)
   2. If moving party does not bear burden of proof at trial, simply pointing to absence of record evidence supporting essential element of P’s claim (Celotex)
   3. Affidavits
      1. Made on personal knowledge, facts admissible in evidence (R.56e)
      2. Can use what will be reduceable to evidence admisssable at trial
      3. **When essential facts unavailable, court may deny, order a continuance, or anything else (R.56f)**
      4. If made in bad faith, reasonable expenses and contempt (R.56g)
3. (Burden of Persuasion):
   1. Anderson (through prism of evidentiary standard at trial)
   2. Matsushita (Twombly//substantive law and judges’ discretion)
   3. Scott v. Harris (view in light most favorable to P, but record can clearly establish facts one way or the other)
4. Sua sponte judgment ok with notice (R.12d)

**PRECLUSION**

1. Policy: Interests of Efficiency and Repose
2. **True Res Judicata/Claim Preclusion**
   1. Valid, final, and on the merits judgment
      1. Valid until overturned (federal, some states differ)
      2. Interlocutory decision does not have claim preclusion effect, maybe issue preclusion
      3. Doesn’t matter if other people appealed their judgments (Moitie)
      4. On the merits
         1. Includes judgment by default, stipulation, or SJ
         2. NOT dismissed on jurisdiction, venue, indispensible parties, interlocutory decisions
   2. Same claim
      1. Not necessarily same legal theory (Matthews v. NY racing)
      2. Was or could have been litigated out of same transaction or occurrence
      3. Bonds are different claims (Cromwell v. County of Sac)
   3. Same parties (or those in privity) (Matthews)
3. **Collateral Estoppel/Issue Preclusion**
   1. **Same Issue?**
      1. NOT necessarily same transaction or occurrence
      2. Cromwell’s bonds might be the same issue
   2. **Actually litigated** (Cromwell)
      1. Different standards
         1. **Vestal**: bright line “look at pleadings”
         2. **Hazard:** contextual view of what was litigated
      2. Decision on the merits
         1. Includes default judgment
   3. **Actually Decided**
   4. **Necessary to resulting judgments** (Rios)
      1. alternative grounds
         1. 2nd Cir and Restatement say none are preclusive
   5. Fairness:
      1. **2nd restatement of judgments more expansive:**
         1. reasonable for parties to produce all available evidence at first trial
         2. passage of time
         3. foreseeable at first litigation
   6. **Mutuality**
      1. Traditionally cannot be burdened or benefited unless both party and adversary bound by prior judgment. Exceptions:
      2. **Nonparty BENEFIT from Previous Judgment**
         1. **Defensive Non-Mutual Collateral Estoppel**
            1. D2 can invoke D1’s judgment against P as a shield (*Blonder-Tongue*)
            2. Efficiency and fairness

Avoid “aura of the gaming table” (bentham)

* + - 1. **Offensive Non-Mutual Collateral Estoppel**
         1. P2 uses P1’s judgment against D as a sword
         2. Contextual/Discretion (*Parklane)*

Could P have easily joined initial case

Curry Hypo

Unfair?

Small stakes in 1st case

Procedural opportunity to D different? (forum)

Not if inconsistent past judgments

* + 1. **Nonparty BURDENED by prior judgment**
       1. Problems:
          1. Pennoyer concerns: can’t be bound without jurisdiction, notice, opportunity to be heard

“Day in court” ideal (Wilks)

participation, adversarialism

* + - * 1. Repose and efficiency
      1. Generally, not burdened unless party to prior suit (Wilks)
         1. Burden is on parties of a suit to join relevant others
      2. **Narrow exceptions for virtual representation (Taylor v. Sturgell)**
         1. Adequate representation (class action, etc)
         2. Pre-existing legal relationships (privity)
         3. Agreement (maybe incl. detrimental reliance)
         4. Assumed control of lawsuit (P2 ran suit 1)
         5. Relitigation by proxy (P1 runs suit 2)

Montana v. US

* + - * 1. Special statutory schemes (bankruptcy, etc)
      1. Inefficient vexatious litigation contolled (Sturgell)
         1. Stare decisis
         2. (EV) human tendency not to waste $

1. **State/Fed Preclusion**
   1. Inter-court Preclusive effects:
      1. State cases in state courts: Full faith and credit clause
      2. State cases in fed courts: Full Faith and Credit Act
      3. For diversity cases in state courts, there is a federal common law for preclusion, but it piggybacks (Semtek)
         1. Vertical uniformity
         2. Potential exception for strong fed interest, probably never used
      4. For diversity cases in diversity courts, divided:
         1. Federal preclusion law (Prof Degnan)
         2. State preclusion law (Erie Principle)

**JOINDER**

1. **Permissive Joinder (rule 20)**
   1. May join if assert rights arising out of same transaction, etc., common question of law or fact
   2. Broad test, rarely contested
2. **Required Joinder (rule 19)**

**Rule 19(a): Persons required to be joined if feasible**

1. Required party:

A person subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction MUST be joined if

A) in absence, court can’t accord complete relief among existing parties

B) person claims an interest such than in absence:

I) practically impair or impede protection of interest

II) leave existing party subject to substantial risk of double/multiple/inconsistent obligations

2. Joinder by court order

court must order such persons to be made party, either Ds or involuntary Ps

…

**Rule 19(b): When Joinder is Not feasible**

whether in equity or conscience should proceed (is party “indispensible”?)

(used in ***Pimentel*)**

* + 1. Prejudice to existing parties and prejudice to stranger
    2. Extent prejudice could be lessened or avoided by protective provisions, shaping relief, or other measures
    3. Adequacy of judgment rendered with party absent
    4. **Would *P* have adequate remedy if suit dismissed?**
  1. More abstract version articulated in ***Provident Tradesmen***
     1. Plaintiff’s interests
     2. Defendant’s Interests
     3. Outsider’s Interests
     4. Public Interests (complete, consistent, and efficient resolution)

**CLASS ACTIONS:**

**Plaintiff’s burden to prove class (Castano)**

1. **Constitutional** limitations on taking away day in court
   1. Pennoyer (14th amendment):
      1. due process concerns of proper representation for parties not joined by service of process
   2. Adequate representation! Requires common class interest (***Hansbery v. Lee)***
      1. Virtual representation is a limited exception – basically only if some kind of privity (Taylor v. Sturgel)
   3. Rule 23 incorporates 5th Amendment/Due Process concerns
2. RULE 23

* **a) PREREQUISITES**
  + 1) CLASS **NUMEROSITY** (usually satisfied)
    - *So numerous that joinder will be impracticable*
    - *Efficiency concern*
    - *25-40 threshhold, 100 no question*
  + 2) CLASS **COMMONALITY** (usually met)
    - *common questions of law or fact*
    - SUMSUMED BY PREDOMINANCE in (b)(3): (Amchem)
  + 3)REP **TYPICALITY**: whether class rep is sufficiently LIKE class
    - \* *disrcirm: promotion/hiring.* ***Falcon***:
    - *\** asbest: *NO set of reps could be typical of this class.* ***Amchem***:
  + 4) REP **ADEQUACY OF REPRESENTATION**

fairly and adequately protect the interests of the class

* + - * *already afflicted/not yet manifested,* ***Amchem***
      * *insurance cut-off year-* ***Unfair distribution. Ortiz****:*
    - *mechanics of actually prosecuting*
      * *competent counsel vs. selling out?*
        + *: suspicious bargaining regime, inventory claims who settled separately* ***Ortiz, Amchem***
* b) **TYPES OF CLASS ACTIONS**

*Mandatory classes*

* + **23(B)(1)** **Limited Pot**, etc: if risk of
    - A**) inconsistent judgments**/incompatible standards for opposing party
    - B) **dispositive of the interests** class members
      * *Eg. Provident Tradesman limited insurance pool*
      * *Can’t arbitrarily declare a fund limited without proving:*
        + *limited funds (no “constructive bankruptcy”)*
        + *and likely size of claims*

***Ortiz*** (*asbestos) dicta*

* + **23(B)(2)**
    - interests of absent class members could be impaired/ **Injunctive/Declaratory** relief appropriate for class as a whole
* 3) *Opt Out*
  + **23(B)(3)**
  + **Predominance and superiority**
    - **Common questions of law or fact PREDOMINATE** 
      * *\*****Amchem****/asbestos: uncommon questions abound*
    - **Class action is SUPERIOR to alternatives for fairly and efficiently adjudicating**
    - *\*Predominance and Superiority are**P’s burden* 
      * *Can’t assume forum law applies to plaintiffs (Shutts)*
      * *Will individual mini trials be necessary(state law, etc)? (Castano)*
    - *\*Can’t ignore differences in state laws for diverse claims, but not dispositive*
      * ***Castano***
* A) class members’ interest in individually controlling separate actions
  + *\*positive value claims raise autonomy issues*
* ***\*Castano v. American Tobacco****:*
* B) extent and nature of **litigation already begun**
* C) **desirability of concentrating in particular forum**
* D) **difficulties of managing class action**

***\* Blackmail concerns (Castano)***

* ***Judicial Blackmail:*** *resources of the court*
* ***Defendant Blackmail:*** *Esp.* ***IMMATURE TORT*** *huge variance,*
* *BUT not always credible (P’s weaker alone, less likely to litigate)*

***\*Note: Ps do not require minimum contacts***

***Phillips Petroleum v Shutts* (not rule 23, but general concerns)**

* **Ds require more protection** 
  + (liberty interests, haled into court, burden of defense)
* **Absent class members require less protection**
  + Don’t have to do anything, lose only chose in action
  + Especially with negative value claims
  + Protected by representative and by court

**c) CERTIFICATION/NOTICE/JUDGMENT/SUBCLASSES, ETC.**

**1) Certification Order**

* **A) earliest practicable time**
* **B) define class and appoint counsel (23(g))**
* **C) conditional certification -- may be altered or amended before judgment**

**2) Notice**

* **A)** b(1) or b(2): court **may direct notice** to the class
* **B)** b(3): court **MUST direct best notice that is practicable** under the circumstances, including all individuals who can be identified through reasonable effort. Plain, easily understood
  + ***\*Shutts*** *excluded parties not served. Other courts allow public notification to suffice. More strict on notice for opt-in classes!*
  + ***\*Mullane: indiv notice by mail, if impractical constructive by publication***

**3) Judgment…**

**5) Subclasses**

**d) CONDUCTNG THE ACTION**

* **B) ongoing notice**
* **Only AFTER 23(a) and (b):**

**e) SETTLEMENT, VOLUNTARY DISMISSAL, COMPROMISE:**

**Settlement requires court approval**

* 1) notice
* 2) hearing finding it is fair, reasonable and adequate
  + \**equitable impressionistic consideration*
  + *\*inflation (amchem)*
  + *\*legitimacy concerns (amchem)*
  + *Would extra money just have gone to lawyers? (Ortiz)*
* 3) identify agreements made in connection with proposal
* 4) may require new opportunity to opt out for b(3)
* 5) any class member may object
  + **\****Most class actions settle before litigation (after some dispositive motion)*
* *\*Settlement classes: class action filed AFTER settlement (not intended to be litigated)*
  + - *Settlement Class context taken into account, but not dispositive* 
      * ***Diet Drugs*** *settlement class of six million was divided into subclasses and approved, with may opt-out opportunities*
  + *Alternative:* ***deference to district court and efficiency***
    - ***Amchem,* Breyer’s Dissent*:***
      * *Interest in solving the problem if settlement is not unfair, concern that negative claims will never be heard*

**f) APPEALS**

* May permit interlocutory appeal granting or denying certification w/in 10 days (doesn’t stay actions)

**CLASS ACTION PRECLUSION: *Cooper v. Federal Reserve Bank of Richmond***

Class action precludes future cases for

1) **Individual claims** (often of class reps) that were actually and necessarily litigated

2) **Class claims** on general issues (e.g. pattern and practice of discrimination)

NOT on all individual claims of every class member

**SUBJECT MATTER JURISDICTION**

1. Fed question ok
2. Diversity
   * + 1. Named parties for complete diversity (Ben Hur)
       2. Ok if >1 member >$75,000 (Allapattah)
          1. But can’t aggregate (Snyder v. Harris)

* ***POLICY***
* **Cite:**
  + FRCP 1: “just, speedy, and inexpensive”
  + Due Process: fed (5th) and states (14th)
* **Framing Questions**
  + **What is the power of the court?**
    - Where does it come from?
    - How far does it extend?
  + **What are the rights of the parties and the state?**
    - Matthews due process balancing
* **Major Concerns:**
  + Efficiency
    - Dismiss lawsuits
    - Clear dockets
    - Don’t want to have to hear the case before you can hear the case (8)
    - Sometimes the price of systemic fairness is an unjust judgment against an individual (*Moitie*)
    - Opposed- virtual representation
    - (SJ, 12(b)(6), *Twombly*/*Iqbal,* preclusion, joinder, class actions)
    - *In terrorem* concern
    - *Celotex and Matsushita*
    - Stare decisis and human tendency not to waste money
      * (Taylor v. Sturgell)
  + Accuracy
    - Discovery (FRCP 16)
    - Judge/jury
    - Get to the merits (pleading standards, supportive discovery (16))
    - Inspire trust in the law (also predictability, dignitary, repose)
  + Impartiality
    - Advantages for repeat players?
    - Iqbal – separation of powers
  + Dignitary
    - Goldberg, Mathews-Balancing, Dioguardi,
  + Rationality
    - Balancing standards; multi-part tests
  + Predictability
    - Joinder/preclusion/class action rules don’t want multiple inconsistent judgments
  + Participation
    - Includes ACCESS
      * Effective notice (*Mullane, Aguchak*)
* Conley, Erickson (*pro se)*
  + - Class actions (Hansberry, FRCP 23)
  + Adversarial system
    - As opposed to inquisitorial
    - opportunity to be heard (*Mullane*)
    - Cf. discovery process (FRCP 16)
    - USA believes this is the way the truth will be outed by those who bear the burden to out it
    - Sometimes requires supervision by judges (case management)
  + Repose
    - Increasing finality to each level of adjudication
    - *Moitie, Lacks v. Lacks*
    - Rule 13(a) (compulsory counterclaims)
    - Preclusion
  + Judge vs. Jury
    - FRCP 8 vs. *Twombly/Iqbal*
    - 7th Amendment
  + Federalism
    - Supremacy Clause: Art. VI.2
    - FFC: Art. IV § 1
    - FFC Act: 18 U.S.C. 1738
    - 10th Amend (powers not delegated to US nor prohibited to the states are reserved to the states)
    - Harlan’s Hanna concurrence: address contradictions of dual sovereigns (Montescqieukejrw;aewaerwelw;)
    - State courts (general jurisdiction) vs. fed (limited)
    - Applicable Law:
      * RDA: state law in civil actions where applicable but congress can limit
      * REA: SCOTUS makes rules of procedure
    - Don’t want easier standards for fed courts (*Brown v. Board*) State Law in Fed Court: For:
      * + No (fear of) home-state advantage,
        + “superiority” of fed courts (resources, political insulation, tenured, broader jury), cross-pollination/competition,
        + subsidy to state courts,
        + fed interests in multi-state issues.
      * Against:
        + Hometown loses from complete diversity req,
        + Fed courts shouldn’t deal with state issues,
        + drains incentives for state courts to improve.
  + Law and Economics
    - Efficiency
    - Why litigate/settle
    - Cost of litigation
* **Paradigmatic shifts:**
  + Formalism (*Pennoyer*) 🡪 Realism (*International Shoe*)
    - Formalism: law self contained internally coherent rational entity that could be deduced
    - Realism: law abt social relations and governing people, common law changes with society, policy matters
      * Critique: judge’s breakfast decides cases
    - Specifically: Territorial Jurisdiction (Pennoyer) 🡪 Reasonableness
      * Changes in integrated national economy
      * Balance of states’ rights within their borders and non-residents
  + Due Process
    - Substantive (“liberty” includes right to K, Lochner v. NY) 🡪
    - Procedural (Warren Court, 1960s, right to be heard) 🡪
    - Functionalism/BALANCING:
      * mid-1970s: HOW MUCH due process?, Matthews balancing
      * Relative interests in accuracy and expediency
  + Stringent SJ rules (FRCP drafters) 🡪 more open to SJ
    - Increased judicial management; infringement on right to jury trial?
    - Celotex, Anderson, \*\*Matsushita
  + Elaborate common law pleading 🡪 code pleading 🡪 Liberal FRCP
    - R. 8: Liberal pleading (Conley), Rule 15 (easy amendments)
    - 🡪 *Twombly*/*Iqbal*
      * Pleading doesn’t look like it’s all about notice anymore
      * judge v. jury
  + Originalism vs. evolving
    - “originalism” – apply rules that existed at conception of the constitution/spec amendment – limits judicial alterations
      * Scalia in Burnham
    - Marshall: blind imitation of the past is bad
      * Brennan in Burnham
  + What is law?
    - Derived from first principles, General Federal common law (*Swift*)
    - Law derived from the authority of the state
      * State common law is Law, Erie, Brandies
  + Role of the Federal Courts (see federalism and balance of powers)
    - Limited only to diversity until 1875
    - Intervention preventing progressive legislation (Early 20th)
    - Erie scaling back the federal judiciary (New Deal, York, Frankfurter)
      * Clearfield Trust: Common law only to govern gaps, often piggyback on state law
    - Federal prerogative asserted (Hanna, Warren)
    - Expanding civil rights (Warren Court)
    - Defining scope
      * Raising amount in controversy
      * Defining federal question
      * Defining supplemental jurisdiction
  + Expanding understanding of parties and preclusion
    - Grudging accommodation of mass society
      * Non-mutual estoppel
      * Class Actions
        + Representative party can bind others (Hansberry)

Adequacy

Legitimacy

Judicial scrutiny – “structural assurance of fair and adequate representation” (Amchem)

* + National 🡪 International context
    - Asahi (extends federalism concerns internationally)
    - Helicopteros (no real relationship, no jurisdiction)
    - Bremen: 1972
      * (K forum selection honored): can’t subject the world to our parochial laws
    - Piper (weaker presumption for foreign D)/Irragori (not dispositive)
    - Pimentel
  + Technological Advances
    - Dramatically increased costs of discovery
    - Challenging territorial jurisdiction (Pebble Beach, Zippo)
  + Shifting Balance of Powers
    - Executive (Iqbal, Boyle, vs. Warren Court-Goldberg, etc)
    - Legislative (Boyle, Amchem, 3 theories of fed common law)