Chase, Civil Procedure, Fall 2011

Checklist for where actions can proceed:

* Personal jurisdiction
* Venue
* Forum non conveniens
* [Can also use the multi-district litigation statute to move forums if there are other actions going on elsewhere and the conditions are met]
* Subject matter jurisdiction

Parties not original to an action can become part of the action by:

* Joining
* Being joined
* Being impleaded
* Intervening
* Overarching imperative is to achieve just, quick, and inexpensive proceedings (FRCP 1)

ADVERSARY SYSTEM

* 1-2% to jury verdict; 3% to trial (resolved by judge)
* 70-80% resolved by settlement
  + Benefits of settlement🡪 Cutting losses; avoiding the unknown; judicial efficiency
  + Costs of settlement🡪 Deprives of truth (never know facts OR law)
* +ve:
  + Clash of proofs presented by adversaries in a highly structured forensic setting will lead to reliable information upon which neutral, passive decision maker can base a decision/resolution acceptable to both parties and society
  + Jury balances out each other’s biases and judge ensures legal consistency through rules of ethics, procedure, evidence
  + Focus on adjudication of disputes rather than search for truth
  + Evidence presented by parties: insulates decision maker, focuses on most important issues so decision is tailored to parties’ needs
  + Appearance of fairness through procedure leads to acceptance of the result (parties themselves and society) regardless of outcome (b/c people have sense of control of process, opportunity to be heard, treated w/ respect)
  + Neutrality of decision-maker gives opportunity for correcting errors
* -ve:
  + Costly generally
  + Advantage to the wealthier party
  + Yields legal uncertainty

DUE PROCESS (5th Amendment; 14th Amendment applies it to states)

* State power can only be exercised against citizens after it accords due process of law
* Requires procedural regularity as protection against arbitrariness in federal govt’s power
  + How much due process is due? ***Mathews v. Eldridge*** test balances (1) benefit to **individual** of due process, (2) to **government** of depriving, and (3) risk of **erroneous deprivation**.
    - +ve: Balances plaintiff’s interest, government’s interest, and risk of error
    - –ve: Subjective test; gov’t often wins; where gov’t interest wins it allows hearsay evidence and shifts burden of proof to defendant (per *Hamdi*)

1. Right to notice (everyone must have notice b4 being bound by a lawsuit). FRCP 4 governs.
   * Must give notice **reasonably calculated to apprise** target of the action and **enable opportunity to meaningfully contest** (***Mullane***)
     + Constitutional requirement is that you first try personal service.
     + Position #1: If this fails, use mail or more visits at other times of the day (***Greene v. Lindsey***). Not even enough for D to have notice – must actually follow the process for issuing notice (***Mid-Continent***). If P learns notice has failed, must try another course (***Jones v. Flowers*** – certified mail returned unopened b/c Jones didn’t live there).
       - +ve: Better chance of conveying notice and avoiding lengthened proceedings from later claim of insufficient notice
       - –ve: More expensive and incentivizes cutting corners
     + Position #2: Receipt of notice not required – simply an attempt reasonably calculated to reach target (***Dusenbery v. US***). If whereabouts are known, must mail notice – otherwise publication is fine (***Mullane*** – didn’t know who all the people were who had money invested in a fund b/c many were children of trustors).
2. Right to a hearing:
   * ***Hamdi***: risks 1 & 3 in Matthews test are strong enough to merit a hearing to rebut D’s classification as an enemy combatant, but b/c nat’l security means the govt’s interest (2) is strong, hearsay is permitted and there’s a favorable presumption for gov’t.
3. Right to impartial arbiter
4. Right to counsel:
   * Matthews test rules against right to counsel unless personal liberty at stake because P’s interest not huge (i.e. Matthews only favors plaintiff under optimal circumstances)
   * ***Scarpelli***test is more P-friendly b/c shifts focus away from personal liberty and toward relative loss of liberty w/o appointed counsel. In ***Lassiter*** termination hearing, counsel denied b/c is a simple proceeding not requiring legal experts.
     + +ve: Considers expense of appointing counsel; no presumption that counsel denied if liberty not at stake; gives courts more discretion
     + –ve: If court is to appoint counsel, must do so b4 judge has much information so balancing is difficult
5. Right to timely resolution of claims

PERSONAL JDCTN

* Long-arm statute grants state courts power to assert personal jdctn over out-of-state citizens. Can grant power to the extent accorded by the Constitution or can be more specific.
  + If it says “where tort occurred”, could either mean where machine blew up or where it was made (***Gray v. Amer. Radiator***)
* Requires that adhere to due process (***Pennoyer***).Due process **requires notice** reasonably calculated to notify D (per 4) & **jurisdictional basis** (bring case where makes sense to) (per 4(k))
* Conferred by:
  + **In personam jdctn**: jdctn over the D himself (***Scalia plurality in Burnham***: don’t need to apply *Int’l Shoe* test if tag jdctn is possible)
  + **In rem jdctn**: jdctn over property under dispute. (1) Owner must have notice. (2) Must apply *Int’l Shoe* test (***Shaffer*** overrules *Pennoyer*).
  + **Quasi in rem II (“attachment”) jdctn**: jdctn over property unrelated to dispute. Say that this was historically grounds for asserting personal jdctn (e.g. *Pennoyer*), but ***Shaffer***seems to have barred it in favor of an Int’l Shoe test.
* Fed courts get jdctn from **4(k)(1)(A)** – can serve summons on a D that would be subject to the jdctn of a court of general jdctn in the same state as the federal court. Fed court must apply law of state where it’s located
* Court can assert personal jdctn over “silent D” that doesn’t raise an objection (i.e. through 12(b)(6)) – even if personal jdctn requirements not met
* Parties can use K to consent ahead of time which forum will have personal jdctn (***Nat’l Equipment Rental v. Szukhent***). Must be negotiated, or if not, then must be reasonable, or if not, then P has heavy burden to prove it’s inconvenient (***Carnival Cruise***).
  + +ve: (1) respects individuals’ rights to negotiate; (2) corps. have interest in limiting places where can be sued and makes goods cheaper; (3) saves cost of determining correct forum after-the-fact
  + –ve: (1) enables boiler-plate language that forces Ps to sue in inconvenient forums; (2) Ps don’t know contents of small print and sometimes don’t even get small print until after purchase

General jdctn: If D is present in a state, is suable there for anything, no matter where claim arose

* Individuals: “Presence” satisfied by ANY OF THESE:
  + Place of domicile
  + Current location (i.e. “tag” jdctn) per ***Scalia plurality in Burnham*** (ex-husband in CA)
  + ***Brennan concurrence in Burnham***: Presence only gets you min contacts under Int’l Shoe
* Corporations: “Presence” satisfied where have EITHER:
  + incorporated status
  + **systematic & continuous** contacts that benefit from state law suchthat he would **expect to be hailed into court** there and would **suffer no inconvenience** defending there (not clear if fairness required, but probably)
    - jdctn where corp. is HQed (***Bengay Mining***)
    - jdctn where corp. sells **steady stream** of mags (***Keeton v. Hustler Mag.*** – although P wasn’t from forum state, cause of action arose there b/c publication affects him everywhere mags are sold.)
    - no jdctn when only a few tires reach forum state (***Goodyear Dunlop***)
    - maybe jdctn where subsidiary is (didn’t get raised in *Goodyear*)

Specific jdctn (***Int’l Shoe***): D must have **min contacts** such that suit is foreseeable, claim must **arise from that contact**, AND asserting jdctn must be w/in traditional notions of **fair play and substantial justice**.

* **Min contacts**: Mere foreseeability that good will enter a market is too passive to constitute purposeful availment (***WWVW***). D must **purposefully avail** itself of state’s laws: could EITHER mean (1) D purposefully put its product in the **stream of commerce** of that forum (***Brennan plurality in Asahi***); (2) **stream of commerce plus** - D must **purposefully target** forum state (***O’Connor plurality in Asahi***) – ***Kennedy plurality in McIntyre*** builds on this saying that must expect consumer in forum state will **actually purchase** product; (3) If you target US, can be sued anywhere product causes injury (***Ginsberg dissent in McIntyre***). Conclusion: “Direction is moving toward stream of commerce plus.”
  + Goods don’t need to enter forum state to establish min contacts – long-term relationship w/ party in forum state is sufficient (***BK***). Would a short-term relationship?
  + Selling **one life insurance policy** by mail from another state suffices (***McGee***)
  + **Unilateral activity of P** to enter trust agreement doesn’t mean D purposefully availed (***Hanson v. Denckla***)
  + Dad letting kids live w/ ex in another state not purposeful availment (***Kulko***)
  + Owning stocks not min contacts b/c only statutorily located in a place (***Shaffer***), but bank account might be enough for min contacts
  + **Subsidiary might show min contacts** depending on the actual relationship
  + **Targeting the US as a whole is NOT purposeful availment** (***McIntyre***)
  + Goods substantial in quantity OR quality can be sufficient for min contacts (***Zippo***)
  + For online corps., ***Zippo*** establishes standards for min contacts:
    - Signing Ks w/ and knowing, repeated file transfer to customers via web suffices
    - Passive website that makes info available does not suffice
    - Interactive website w/ which users can exchange info hinges on **amount** of user activity and **how commercial** activity is
* **Fairness** determined by balancing (***WWVW***; ***BK***; ***Asahi***):
  + - D’s interest (though relative wealth of parties not a factor (***BK***))
    - P’s interest
    - Interest of the forum state (e.g. protecting sovereignty)
    - Interstate interest in efficiently resolving controversies
    - Shared interest among states in furthering social policies (e.g. family harmony)

***WWVW***: No purposeful availment of Okla. law because no advertising or agents in or substantial revenue from the state; P’s driving to Okla. is unilateral act. That it’s foreseeable car would get into Okla. is too passive for purposeful availment – key foreseeability is whether D would reasonably anticipate being hailed into court there. Both states have an interest in litigating so issue of state sovereignty is a wash.

***Asahi***: Majority agrees would be unfair for CA to have jdctn over D b/c burden of D outweighs other factors since **the injured party had settled**. That D is foreign is big consideration, which is why it’s fair to have jdctn over Gray but not Asahi.4-4 split court over whether are min contacts. *Brennan*: sending goods into **stream of commerce** such that this results in regular and anticipated flow into the state **constitutes purposeful availment**. *O’Connor*: mere awareness not enough – products **must purposefully target state**. *Stevens*: Volume, value, and hazardous nature can contribute to purposeful availment.

***McIntyre*** (machine sold from Eng to US distributor): *Kennedy plurality*: Agrees with O’Connor in *Asahi*: Under stream of commerce argument, **not enough** for purposeful availment **to know that product is being sold** to forum state – company **must itself target** the state. *Ginsburg dissent*: If you target US as a whole, can be sued in any state where product causes injury.

* + +ve: (1) keeps Ps from shopping for best forum which could scare off corps. or increase prices; (2) keeps small companies whose goods are distributed by others nationwide from being open to suit anywhere; (3) there’s at least a forum for suit *somewhere*
  + –ve: (1) allows foreign company to sell through distributor to avoid state jdctn, except perhaps in those states where its sales are very successful; (2) increases big corp.’s power wrt the little guy; (3) Ps may have to go to inconvenient forum to sue

VENUE (§1391)

* Venue appropriate in district:
  + If all Ds reside in **same state**, any **district where a D resides**
    - Corporations reside in districts where are subject to personal jdctn
  + **Where** substantial part of **events**/omissions **giving rise to the claim occurred**, or substantial part of the **property** that is **subject of claim** is located
  + **Fall-back option**: If there is no venue where the action could otherwise be brought, then in diversity cases 🡪 a district where any D is subject to personal jdctn; in cases not founded solely on diversity 🡪 a district where any D can be found
  + Any district for non-US citizens
* Dismissing/transferring venue:
  + When venue is improper, on motion court shall dismiss or transfer case to a dist. where it could have been brought (§1406(a)). The law of the original district IS NOT applied.
    - Cases that were **removed cannot be dismissed** on grounds of improper venue
  + When venue proper but inconvenient(§1404(a)), D can motion or court can sua sponte transfer to district where could have been brought **in interest of justice or convenience** of parties, witnesses, or obtaining evidence. Discretionary. Balancing test **slanted toward P**. The law of the original district IS applied.
    - ***Republic of Bolivia v. Philip Morris***: Judge transfers b/c (1) has backlog; (2) other court has subject matter expertise; (3) more convenient for P; (4) no connection btwn P and Texas; (5) transferring doesn’t prejudice P; (6) existing proceedings underway there that could consolidate with. §1407 allows cases to be consolidated for pre-trial proceedings if conditions are met.

FORUM NON CONVENIENS

* Federal courts use FNC so cases can be brought in another country. State courts use it so can be brought in another state, since they can’t transfer between districts as federal courts can.
  + Because invoking FNC is discretionary, judges can impose conditions (i.e. no SoL)
* Can invoke FNC if **other forum has jdctn**, would be **proper venue**,AND **balance** of **factors** favors other forum (***Piper Aircraft*** – UK people killed in UK by crash of PA plane w/ OH engines), e.g.:
  + Convenience to the parties
  + Access to evidence and witnesses
  + Legal or administrative capacity of the chosen court
  + Local interest of having localized controversies decided at home
  + Unfairness of burdening citizens in an unrelated forum with jury duty

***Piper Aircraft***: Dismissal under FNC granted b/c: (1) more convenient for Ps, (2) relevant evidence is in Scotland, (3) **that Scotland’s laws are less P-friendly doesn’t get much weight**, (4) tendency to respect trial judge’s decision.

* + +ve: (1) allowing US courts to determine right and wrong in other countries is judicial imperialism; (2) would flood US dockets b/c courts are so P-friendly
  + –ve: Immoral not to let others harmed by US citizens sue in US
* § 1407is another way to move forums. Consolidation for pre-trial **multi-district litigation** requires that:
  + 1. Actions all involve one or more common questions of law/fact
    2. Transfer will promote the just and efficient conduct of the individual suits
    3. Transfer will be for the convenience of parties or witnesses
  + Usually, after consolidation, actions are disposed of before being remanded back b/c of: settlement; SJ; agreement to try in the transferee forum; issue preclusion.

SUBJECT MATTER JDCTN

* Can’t be waived like personal jdctn and venue can – judge must say jdctn is lacking even if D doesn’t (12(h)(3))
* Federal & state courts both have (“concurrent”) jdctn where SMJ exists (i.e. P can sue in either)
  + Article VI Supremacy Clause: fed law trumps state law when there’s a conflict
* Fed cts are cts of limited SMJ (P must prove jdctn), whereas state cts have presumption of SMJ

Diversity jdctn:

* Must be **over $75,000 at stake** (§1332(a)). Can aggregate multiple claims of one P against one D, but not multiple Ps against one D or one P’s claims against multiple Ds.
* **Complete diversity** required (***Strawbridge***) – no D may have same citizenship as any P (§1332(a)), except in class-action suit (§1332(d)). Const. Art. III only requires minimum diversity.
  + **Individuals** are citizens where **domiciled** – where live and intend to return to when absent therefrom (***Mas v. Perry***). Where they register to vote, buy a house, take a job….
  + **Corps.** are citizens BOTH where **incorporated** ANDthe one place where have principal place of business (§1332(c)(1)), i.e. “**nerve center**” or HQ (***Hertz v. Friend***)
* +ve: (1) prevents bias against out-of-state parties; (2) keeps federal judges up-to-date on state law; (3) relieves caseload on state courts
* –ve: (1) no bias anymore in globalized world; (2) state courts lose opportunity to upgrade state law; (3) creates burden for federal courts

Federal question jdctn: Fed courts have original jdctn over **actions arising under** fed law (§1331).

***Franchise Tax Board*** clarifies that this means:

* Complaint must be **well pleaded**
  + This means **P’s claim must include the fed Q** – can’t be an anticipation of a defense. Complaint must only allege elements on which P relies. ***Louisville v. Mottley*** thrown out b/c federal question concerning free train tickets was expected to be D’s affirmative defense, but did not appear in P’s complaint.
* AND, EITHER **federal law** must **create cause of action** (this is the “Holms test”)
* OR, when state law creates the cause of action, P’s right to relief must depend on **resolution of** a **substantial question of federal law**
  + ***Merrell Dow*** (Ps suffered harm from Benedictin):If state law creates the cause of action based on a fed law, the **fed law** **must include** **private right of action** to sue. In the case, Congress didn’t specify w/ the FDCA so we don’t assume the right is implied.
    - Can be implied PRoA if: (1) Ps are part of class that the statute is meant to benefit; (2) legislative intent suggests implied PRoA; (3) implied PRoA would further the statute’s purpose; (4) P’s cause of action isn’t typically dealt w/ by state law.
  + ***Grable v. Darue*** (lack of notice in fed tax law): **Absence of specified PRoA is** evidence **relevant** to finding no PRoA, **but doesn’t necessarily mean Congress didn’t intend it**. When claim arises under state law, can find fed Q jdctn if:
    - Case necessarily raisesfederal issue
    - Fed issue is actually disputed
    - Fed issue is substantial such that there’s a strong fed interest in resolving it
    - Allowing fed jdctn wouldn’t disturb balance of fed and state judicial responsibilities (i.e. in *Merrell*, issue was tort claim, so would lead to lots of fed litigation, while issue in *Grable* was obscure tax clause).

REMOVAL (§§ 1441, 1446)

* Permitted if action could have been originally brought in fed court
* All Ds must join petition for removal
* Can’t remove based on diversity jdctn if a D is citizen of the state where action is filed
* Removal must be timely
* Judge can’t remand simply b/c of a busy docket
* Can remand if, after removal, fed claims are dismissed
  + When case is removed, apply the state law where case started, even if case is later transferred to a different fed court

SUPPLEMENTAL JURISDICTION

* A fed court that has original jdctn b/c of fed question or diversity also has jdctn over claims that share a **common nucleus of operative facts** w/ the claims in the action such that they form part of the same case or controversy.
  + § 1367(c): Court may choose to decline supp. jdctn over claims when –
    - claim raises novel or complex issue of State law
    - claim predominates over the claim for which the fed court has original jdctn
    - fed court has dismissed all claims over which it has original jdctn
    - there are other compelling reasons for declining jurisdiction
  + § 1367(b): Court must decline supp. jdctn over a claim when case is in fed court **b/c of diversity**, when asserting jdctn **would destroy diversity**, and claim is against D joined under Rules 14 (impleader), 19 (required joinder), 20 (permissive joinder), or 24 (intervention), or claim is by P joined under Rules 19 & 24.
  + Can get supp. jdctn over cross-claims or compulsory CCs b/c stem from common nucleus of facts and not excluded by § 1367(b), but not permissive CCs b/c not common nucleus of facts.

THE COMPLAINT

* 8(a): **Short and plain** argument that ct. has **jdctn** & that P is **entitled to relief**. Requires only that pleader say enough to **give notice** to court & opponent of the claim’s nature (“notice pleading”)
  + 12(e): D may motion for clarification of a vague complaint
* 12(b)(6): Dismisses if the complaint states no legal claim – i.e. its facts, even though **assumed to be true**, would not make P win (“so what”). Laws asserted as fact are not assumed to be true.
  + - [Judge nonetheless **can allow complaint if P is reaching to make new law**, saying law is moving in this direction]
  + ***Conely*** (union failed to represent black employees equally): At pleading stage, allegations sufficient - supporting facts come out in discovery. Only grant 12(b)(6)if beyond doubt that P can prove **no set of facts to support claim**.
    - Even *Conely* would say need to allege the violative act to give notice – can’t just say “you discriminated”; rather “you fired 45 black employees”
  + ***Twombly*** (parallel behavior, refraining from competing): *Souter majority*: Not enough for claims to be conceivable – must be plausible. Don’t need detailed factual allegations, but can’t simply be conclusory or bare assertions – these aren’t the statements *Conely* says must be assumed to be true. Standard should be **once a claim has been stated adequately** (i.e. enough facts), it may *then* be supported by showing any set of facts consistent with the allegations. *Stevens*: Majority conflates SJ w/ the pleading stage – shouldn’t have to show facts yet. This precludes individual Ps from suing corporations when can’t access the facts.
  + ***Iqbal*** (Muslim detainee suing AG for discrimination): *Kennedy majority*: Merely pleading facts consistent with the allegation doesn’t move the complaint from conceivable to plausible. P must give sufficient facts to allow court to draw the reasonable inference that D is liable for alleged misconduct. Test for whether complaint can survive 12(b)(6):
    - Begin by disregarding mere legal conclusions – not presumed to be true.
    - Presume to be true the well-pleaded, factual allegations.
    - These presumed true facts must pass the plausibility standard, moving the claim away from being simply conceivable.
  + Questions left open:
    - What is the line btwn factual & conclusory?
    - How do we know what’s conceivable and what’s plausible? *Iqbal* answers that judge should use judicial experience and common sense. But this means judge has to think P has a chance to win, which contradicts the court’s statement that a judge shouldn’t have to think this to deny a 12(b)(6)!
    - Is factual burden higher only when public policy demands it (e.g. expense in *Twombly* and nat’l security in *Iqbal*)? *Twombly* suggests yes; *Iqbal* says FRCP is trans-substantive and the higher factual burden always applies.
  + Strict pleading requirements:
    - +ve: (1) frees court from wasting time on unwinnable suits; (2) Avoids Ds being pressured to settle even unwinnable claims if would mean exp. discovery or harmed rep.; (3) discourages overly adversarial behavior; (4) forces Ps to think through their claims ahead of time
    - –ve: (1) means that Ps can’t sue if don’t have means to obtain evidence w/o discovery where D holds all the facts; (2) perhaps cost to D of defending outweighs benefit to society of going through w/ the case

THE ANSWER (have 21 days after receiving the pleading to submit)

* 8(b): Rules for defenses**:**
  + For each allegation, response must use a short, plain statement to admit, deny, say that lack sufficient knowledge to admit or deny (works as denial), or say “yes, but” (i.e. D has a legal out).
    - Denial can be general (i.e. all allegations including jurisdiction grounds) or specific to parts of the complaint
      * ***Zielinksi v. Philadelphia Piers***: B/c D made general denial rather than only the part it knew to be untrue and thus made P miss out on SoL to sue the right party, it assumed ownership of the forklift for purpose of the litigation. ­Chase: P also at fault for not better researching who the owner was and for lumping together that D owned the forklift and that the forklift injured P. 10(b) requires separate paras for different claims.
    - If responsive pleading is required and allegation is not denied, then it is admitted (presumed to be denied if responsive pleading not required)
  + 8(c)(1): Must raise affirmative defenses or they are waived b/c raising later would surprise other party or would raise issues of fact not appearing in the pleadings.
    - If a defense not listed in 8(c)(1), this is the test whether it must be raised:

1. May the matter at issue fairly be said to constitute a necessary or extrinsic element in P’s cause of action?
2. Which party, if either, has better access to relevant evidence?
3. Policy concern: Only require the defense to be raised if not doing so would be injustice to other party
   * + ***Ingraham v. US***: Statutory limitation on damages from med malpractice deemed to be affirmative defense that was waived b/c brought too late. Deemed a surprise to the P, per #3, even though #1 & #2 seemed to favor the D.

* Admitting to claims can be strategic – bars evidence whose function is only to prove that claim.
  + ***Fuentes v. Tucker***: D’s admission of liability for death bars jury from learning that was drunk, reckless, and deaths were horrific. *Concurring opinion*: should let jury hear the details b/c would affect damage determination.
* 13(b) allows counterclaims even unrelated to P’s claim against D. 13(a) requires CCs arising from the same transaction/occurrence as what P sued over. Failure to raise permissive CC doesn’t constitute a waiver of it – could bring a separate lawsuit. Failure to raise compulsory CC does constitute waiver (UNLESS this would result in a “logical inconsistency” – e.g. if A sues B and court finds both equally negligent, would be inconsistent to bar B from suing for his damages even if he didn’t raise the compulsory CC in the 1st action).
* Rather than simply answering, could file a motion. Can use 12(c) for judgment on the pleadings. 12(g)(2), 12(h): All 12(b) motions except (1), (6) & (7) must be made at same time or are waived, and must be made before or in an answer. (6) & (7) can be done in motion, answer, or at trial. (1) is cause for dismissal any time
  + Benefit of filing motion:
    - Avoids expense of discovery
    - Even if motion denied, still get to make defenses in the answer. But can’t later raise the same defense from the failed motion.
    - Causes delay and time is money. 12(a) gives D 21 days to respond to complaint. But if files a motion, gets 14 days from the time the motion is denied.
  + Cost of filing motion
    - If the motion is frivolous, could result in Rule 11
    - If D is poor, extra motion is more expensive

AMENDING THE PLEADINGS

* 15: Amendment permitted b/c neither party has perfect info off the bat.
  + (a) (pre-trial): Only one allowed. Must be done w/in 21 days of serving complaint, receipt of answer, or service of motion (i.e. can fix pleading after a 12(b)(6) motion) (whichever is earliest). Otherwise need opposing party or court’s consent, which should be given freely when “justice so requires”. If you amend, other party gets what is left of the 21 days or 14 days to respond, whichever is longer.
  + (b) (during trial): If new issue is raised and not objected to, treated as if it were raised in the pleadings. If objected to, permit party to amend its pleading if it will aid in presenting the merits, unless it is prejudicial.
  + (c)(1)(A): If SoL for filing new things has expired, can only add new claim if it relates back to original pleading – i.e. it must arise out of the same transaction.
    - ***Barcume*** (tried but failed to amend original pleading about anti-female employment practices to include sexual harassment):If the amendment essentially adds a new claim such that D didn’t have adequate notice and couldn’t litigate against it, then the amendment does not relate back. You know a claim is different if need different facts to prove it.
      * +ve: Prevents prejudicing D w/ the amendment
      * –ve: Denies P the ability to bring all of its claims
  + (c)(1)(C): Amendment can only name new D if: (1) arises out of the same transaction; (2) the party had notice of the action; and (3) knew or should have known it would have been named as D if not for a mistake.
    - ***Krupski***: **Relation back depends on knowledge of party to be added** – not P’s knowledge or P’s timeliness in seeking to amend. Important to get to the merits.

SANCTIONS

* Background: American rule = each side bears own litigation cost 🡪 less expensive to lose
  + 1983 Rule 11 reform 🡪 sanctions mandatory to disincentivize meritless lawsuits
    - Yielded tons of collateral litigation not related to merits of the claims
    - Sanctions awarded even to the extent of reversing the American rule
    - Deterred merited but difficult cases b/c sanctions could be awarded retrospectively if party lost and was deemed to have been pursuing a failing case all along
  + 1993 reform🡪sanctions discretionary, and only in an amount to deter conduct rather than punitive, but *must* be assessed if violation found (***Saltany***)
    - Safe harbor rule gives opponent 21 days from submission of motion for sanction to retract pleading. Court doesn’t see motion in the meantime.
    - 11(a): Attorneys are required to sign every document to convey gravitas. Must research the claims before signing.
      * Continued tension btwn Rule 11 (reducing overcrowded courts) vs. adversarial legalism (open access to courts; disincentivizing bad conduct) and modern FRCP (simplifying proceedings)
* 11(b):
  + (1): Documents may not have improper purpose (harassment, delay, increasing costs)
  + (2): Claim must be warranted by law or by a *nonfrivolous* argument for changing the law
    - ***Saltany***: If P *knows* will lose, his suit is frivolous and sanctionable. Also, court not the forum for protesting government.
    - ***Frantz v. US Powerlifting Federation***: Just b/c the legal theory is colorable doesn’t mean the claim isn’t sanctionable – claim still needs to be investigated
  + (3): Factual claims must either have evidentiary support or will likely have evidentiary support after a reasonable opportunity for further investigation or discovery
    - ***Mattel***:Would sanction the attorney if he didn’t research the dates of the patents. But Rule 11 doesn’t apply to discovery – only to conduct regarding written docs that lawyer certifies as true and to oral statements advocating baseless allegations contained in the docs.
  + (4): Denial must either be based on the evidence or, on belief or lack of information (in which case that reason must be given explicitly).
* Court reviewing sanctions must give deference to lower court b/c of fact-intensive nature of the court’s inquiry and only reverses if sees abuse of discretion.

DISCLOSURE/DISCOVERY

* +ve: Mutual knowledge of the facts will allow (1) proper litigation, (2) promote reasonable settlements, (3) facilitate SJ, and (4) prevent trials from becoming sporting events involving surprise.
* –ve: (1) takes place out of purview of the court; (2) requesting party can ask for marginal materials just to raise the cost to the other side; (3) parties would disclose voluntarily to shatter false optimism and create advantage when settling
* Good that we don’t allow disclosure of *everything* b/c parties would take info for granted and not adequately prepare, undermining adversarial system.
* 26(f): Parties must conduct pre-discovery conf. at least 21 days before the (16) scheduling conf.
* 37(a)-(c): Failure to make disclosures or cooperate in discovery 🡪 sanctions, even for attorney
* **Court has HUGE discretionary power wrt discovery**: Can (1) limit it for cost reasons, (2) allow discovery of info that wouldn’t be admissible evidence, (3) modify timing rules at conference of the parties, (4) issue sanctions for imperfect or failed compliance, and (5)…
  + ***Mohawk Industries v. Carpenter***: D was forced to hand over materials it felt were protected by A/C privilege and couldn’t appeal judge’s discovery decision until after a final judgment on the case. Only alternative (drastic) would be to refuse, get sanctioned, and later appeal the sanction.

Disclosure (mandatory) - 26(a)

* (a)(1): Initial disclosures must be made within 14 days after pre-trial conference unless judge orders otherwise. Nothing wrong w/ disclosing a huge amount of info, even if makes it hard for opponent to find the important stuff – complex cases require lots of preliminary info.
* Must disclose **everything you’ll use to support your case**:

1. (a)(1)(A)(i): Names and contact for all people likely to have discoverable info, + the subject of the info unless its only use is for other party to impeach you
   1. ***Chalick***: Shows that disclosure rules went too far prior to the 2000 reform (parties were forced to disclose even info that opponent might use). D disclosed Dr.’s name but not subject of his knowledge. Sanction was to estop D from claiming Dr. didn’t get timely notice of the action.
2. (a)(1)(A)(ii): Copy or description of all docs, e-info, and tangible things, unless its only use is for other party to impeach you
3. (a)(1)(A)(iii): Computation of each category of damages claimed and underlying docs
4. (a)(1)(A)(iv): Relevant insurance agreements

* (a)(3): Party must disclose names and contact of all witnesses and all evidence it plans to use at least 30 days before trial. For non-expert testifying witnesses this includes the subject matter they will testify abt and a summary of the facts and opinions they’ll give ((a)(2)(C)).

Discovery (mandatory at opponent’s request) - 26(b)

* 26(b)(1): Discoverable info is:

1. Any **non-privileged** matter **relevant** to the claim or defense of **any** **party**
2. For good cause, court can order discovery of **anything related** to the subject matter (even if not admissible at trial) if is **reasonably calculated** to lead to admissible evidence
   1. ***Blank v. Sullivan & Cromwell***: Info about how associates make partner doesn’t bear directly on how associates are hired, but is related to the subject matter and could lead to admissible evidence.

* 26(b)(2): Court must limit discovery when (1) **unreasonably expensive** – use C/B analysis, esp. wrt e-info; (2) **duplicative**; (3) when requesting party had **ample time to discover earlier**.
* 26(c)(1): Court may limit discovery when would cause undue **annoyance, embarrassment, oppression, or other burden** (e.g. intimate facts, proprietary business info, discovery for purpose of intimidation)
* 37(a): A party may motion to compel discovery or disclosure. The party that is unjustified in moving or objecting must compensate other party unless there’s a reason it would be unjust.

Privilege (limit on discovery)

* **Attorney/client privilege**: (1) Communication (2) **btwn client and lawyer** (3) intended to be and actually kept confidential (i.e. no 3rd parties) (4) for purpose of seeking legal advice.
  + Can only be overcome if part of crime, or if waived purposely or by sharing w/ 3rd party
  + ***Upjohn*** (internal inquiry into bribes): Corporation’s A/C privilege applies to all employees at any level – not just those w/ decision-making power. But the facts themselves are not protected - only communication of those facts.
* 26(b)(3): **Work-product privilege**– protects discovery of materials prepared **in anticipation of litigation** (even not for a particular suit) **or self-critical** docs **by or for** a party or its representative, UNLESS opponent shows **substantial need** and that **can’t obtain equivalent** w/o undue hardship (attorney’s **mental impressions, opinions, legal theories still protected** if they are the pivotal issue in the litigation).
  + Request for **info about existence of docs** is just facts and can’t be protected. But argue that if attorney gave the info, would show he thought the docs were important (i.e. mental impression). Also, could get this info from other sources w/o showing attorney’s mental impressions.
  + Court might decide to protect even conversations had by an attorney (even though not docs) on the same logic used in *Hickman* – that this would reveal mental impressions
  + **Dual-purpose** documents are NOT considered prepared in anticipation of litigation.
  + ***Hickman v. Taylor***: Interviews conducted of tugboat survivors were protected (even though weren’t written down).
* 26(b)(5): Must **properly claim** (both kinds of) privilege by saying what you’re protecting & why to enable other party to assess the claim of privilege. If other party thinks privilege is still not merited, can file a motion to compel disclosure.
  + If not clear from description that privilege is justified, judge gets to look at it *in camera* and decide if should be disclosed. Problematic b/c (1) if case is huge, judge can’t look at every doc; (2) could result in judge having too much power; (3) might influence judge even if he doesn’t require disclosure.

Expert witnesses

* Testifying – 26(a)(2)(B):Must disclose identities, opinions they’ll give, facts they considered, quals, trials testified at in past 4 years, payment. Opponent may depose/use interrogatory.
  + Must disclose 90 days before trial, or if witness is to rebut other party, within 30 days of other party’s disclosure
  + Opponent can bring Daubert motion to exclude expert testimony if:
    - Evidence/theory hasn’t been subject of articles in peer-reviewed journals
    - Doesn’t represent consensus w/in scientific community
* Retained but not testifying – 26(b)(4)(D): Don’t need to disclose their names. Opponent **can’t depose**/interrogatory, EXCEPT they CAN get the facts known and opinions held if **special circumstances make it impracticable** to obtain these on same subject by other means
  + Can’t protect a witness from deposition, though, just by paying them and turning them into a retained expert – only protects facts known through preparation for litigation.
  + ***Coates*** (cancer tissue sample): Also exception when it would prevent “expert shopping” b/c it’s important for jury to hear from the experts who disagree w/ a party’s claim. [This may be limited to case of medical disclosures b/c Rule 35(b) specifically requires disclosure of medical exam results.]
    - Problem: “Those experienced in litigation know that for the moist part experts…tend to testify favorably for those who employ them.”
* Not retained for trial: No obligation to disclose anything
  + ***Cordy*** (bike expert): Can disqualify expert that other side retained previously, if:

1. Was reasonable for first party to believe a confidential relationship existed
2. First party did disclose confidential info to the expert
3. If these 2 conditions met, then balance policy objective of:
   * + 1. (1) preventing conflicts of interest & (2) maintaining integrity of judicial process vs. (1) ensuring access to expert witnesses & (2) allowing experts to pursue their professional calling

* Goal in *Cordy* is to protect first party while not permitting it to retain expert just to keep him from testifying against
* *Coates/Cordy* disagree abt whether most important is search for truth or protecting other values like privilege

SUMMARY JUDGMENT

* 56: SJ granted if no **genuine dispute** over any **material** fact (rather than insufficient legal theory as w/ 12(b)(6) motion). Originally, issue was not who will win, but whether the case needs to go to trial b/c of a dispute of fact. Now that’s changed.
  + If motion succeeds, case is over (unlike w/ successful 12(b)(6), after which P can amend). However, 56f: Court can grant continuance to allow party to further develop its evidence rather than rule on the SJ motion.
* Burdens during SJ motion:
  + Production:
    - Initially, movant has burden. Must produce SOME evidence that there’s NO genuine issue of material fact. Evidence must be beyond that in the pleadings b/c these alleged facts not assumed to be true like w/ 12(b)(6) motion.
    - If movant produces some evidence, burden shifts to non-movant, who must now produce evidence to show that there IS a genuine issue of fact.
    - If both parties have brought evidence fulfilling their burdens of production, turn to burden of persuasion
  + Persuasion: Burden is always on movant. Must convince that really is no issue of material fact. **Evidence is viewed in light most favorable to non-movant**.
    - ***Adickes***: **Movant must meet burden of production** to show the absence of any genuine issue of material fact **before non-movant must do anything**. Adickes survived SJ b/c D didn’t show that there was no way store manager might have communicated w/ the officers.
    - ***Celotex***: Overturns *Adickes* – SJ granted when **movant merely** **points out that non-movant has brought no evidence** in support of a material fact (e.g. docs don’t show connection btwn D and asbestos). Does NOT quite require that non-movant provide substantial evidence, but it does reduce the burden of production on the movant. This is now the rule, as reflected in 56(c)(1)(B).
    - ***Matsushita*** (conspiracy to drive out US TV maker):Defines “genuine” = issue of fact **not genuine if the evidence could not lead jury to rationally find for the non-movant**. If the non-movant’s argument is not (economically) plausible, or if doesn’t necessarily show illegitimate activity, it doesn’t overcome an SJ motion. Effect is to require that non-movant make its whole case at SJ b/c its burden of proof is called up at that point. Also means that non-movant must reveal its trial strategies early in the proceeding to avoid SJ, so sophisticated litigants will file for SJ to force opponents’ hands.
    - ***Anderson v. Liberty Lobby***: Confirms *Matsushita’s* implication that the standard for granting SJ is the same as for JMOL. To survive SJ, a reasonable jury has to be able to find for the other side. Where the burden of persuasion at trial is higher than normal (i.e. public figure suing for libel), SJ is even easier to grant.
    - ***Scott v. Harris***: At SJ stage, facts must *only* be construed in light most favorable to non-movant if there is genuine dispute as to the facts. Video shows objective facts so no reasonable jury could find in favor of speeding driver – turns the question of whether there was recklessness into an issue of law rather than fact.
  + Where we stand now: In *Adickes*, movant had to counter even inadmissible evidence. Now, movant can just show that non-movant’s evidence is insufficient to meet its burden of production (*Celotex*) or that non-movant’s evidence at SJ couldn’t meet its burden to persuade the jury after the trial (*Matsushita*), especially when the burden of persuasion is higher than a preponderance of the evidence (*Anderson*). Sup. Ct.’s language: “not a disfavored motion” encourages courts to use SJ 🡪 together w/ the recent pleading cases and *Scott v. Harris*,we have diminution in jury’s role
    - –ve: (1) SJ should not be judged by JMOL standard b/c not all evidence has been heard at SJ phase; (2) SJ is supposed to expedite proceedings, but bringing in the burden of persuasion at this stage forces a full paper trial on the merits; (3) denies a jury trial.
    - +ve: avoids cost of trial, inconvenience to jurors, postponing the inevitable

MANAGERIAL JUDGING

* 16**:** Pretrial conferences are required for attorneys and judge can require parties to attend too. Judge can impose sanctions for not adhering to schedule or being underprepared. Judge can mandate mediation or arbitration. Vast judicial power to promote non-trial solution.
  + +ve: (1) Reduces burden on court; (2) parties own the result; (3) reduces need to call jurors (incursion into personal liberty); (4) cuts losses; (5) avoids the unknown
  + –ve: (1) Need court decisions to know what the law is; (2) not for judge to manage people; (3) forcing ADR increases time and exp. of pre-trial proceedings; (4) judge’s managerial activity not subject to review; (5) little evidence that this yields more settlement; (6) law schools don’t train on settlement techniques or negotiation skills

THE TRIAL

Judges

* Article II: President appoints fed judges with advice and consent of the Senate
  + Court of Appeals: exec/leg joint effort
  + Fed district judges: nomination by senior Senator of Pres.’s political party from the state
  + Dist. cts. appoint magistrates. If parties consent to be heard by mag., judgment is final
* 85% of state judges elected (only US and Switzerland elect judges). Problems w/ election:
  + ***Caperton v. Massey Coal***: CEO instrumental in electing the judge presiding over his own case. Recusal required where reasonable person would think presiding would compromise integrity or impartiality – certainly where is pecuniary interest in the case. But judge makes own determination and decided no recusal needed in this case.
  + Public can remove judges when don’t like their interpretation of the law.
  + Judges’ decisions might be impacted by prospect of reelection.

Jury trial

* 7th Ammendment “preserves” the right to jury trial at common law when the value in controversy exceeds $20. Courts have since narrowed the right to a jury:
* Case is entitled to jury trial if: (***Curtis v. Loether*** – discriminatory refusal to rent an apartment gets jury trial even though not in English law b/c the relief sought is $$ – legal remedy)

1. The **statute** under which the cause of action arises **specifies right** to a jury trial
2. If not, see if case would have been heard by a law court in **18th Cent. England**, or at least could be analogized to such a case.
3. If not (i.e. it’s a new law), see if remedy is legal or equitable. **If legal 🡪 right to a jury**.

* 38, 39: If neither party demands a jury, right is waived unless court sua sponte orders a jury trial. 52: In a trial w/o a jury, judge must make specific ruling on the facts.
  + ***Markman v. Westview Instruments***: Further shrinks jury’s role. Although patent infringement cases have right to jury trial, the specific issue of construction of a patent is a close question as to whether it’s an issue of law or fact. **If unsure whether issue is one of law or fact**, use (1) **pragmatic judging** – judges better trained to interpret docs; complex technical claims suggests role for judge; and (2) **policy considerations** – want uniformity in decisions.
    - Some argue due process requires jury involvement. Others say DP requires a capable decision-maker.
    - Possible that future complex cases will be tried by judge.
* +ve of judge trial:
  + Easier for one decision-maker to ask questions, esp. when knows what is admissible
  + No possibility of hung jury
  + Saves some time having to explain the law and submit jury instructions
  + Experience sifting through evidence can help resolve issues of fact
  + Likelier to be consistent in deciding cases
* +ve of jury trial:
  + No baggage from having heard similar cases so more open mind
  + Multiple analyses of the facts can lead to fairer result
  + No risk that will be influenced by inadmissible evidence, which the judge hears
  + Hostility btwn lawyers and judge won’t influence jury the same as it would the judge
  + Multiple biases can cancel each other out
  + Likelier to be viewed as the litigant’s peers so outcome will seem fairer
  + Likelier to be in touch w/ community standards

Jury selection

* 48: Jury verdict must be unanimous unless parties stipulate otherwise
* Lawyers have unlimited # of challenges for cause (e.g., predisposition, relationship to a party). USC allows 3 peremptory challenges (i.e. don’t need to say why), but court can allow more
* Sup. Ct. has constitutionalized jury selection, extending equal protection for both race and gender to jurors in civil cases. **Can’t discriminatorily dismiss, even w/ a peremptory**.
  + ***Edmonson v. Leesville Concrete*** (2 of 3 peremptories used to excuse black jurors): Was already illegal for state to racially discriminate in voir dire (i.e. crim cases). Extends this bar to private litigants in civ cases b/c: (1) juries are gov’t entities; (2) juror has right not to be discrim. against; (3) don’t want discrim. in the court of all places.
  + ***J.E.B. v. Alabama*** (9 of 10 peremptories used to excuse male jurors): Extends bar to discrim. based on gender. *O’Connor concurrence*: Problems w/ the decision: (1) point of peremptories is to exclude extreme views based on gut feelings that you shouldn’t have to verbalize; (2) increases likelihood of collateral litigation over jury selection
* To challenge a peremptory, you have make out a prima facie case of discrimination, opponent gets to give alternative explanation, then you have to show how that’s just a pretext

Jury management tools

1. Peremptory challenges
2. Limits on permissible evidence
3. Jury Instructions (51): Parties give written requests for jury instructions; judge explains jury’s role, what burden of proof means, etc.; parties have opportunity to object; appellate court may grant new trial b/c judge gave improper instructions.
4. Choice of verdict:
   1. General verdict
   2. Special verdicts (49(a)): Breaks down each issue of fact to be decided
   3. General verdicts with questions (49(b)): If answers inconsistent w/ general verdict, judge may set aside general verdict, order new trial, or ask jury to continue deliberations
5. JMOL (50(a)): Brought after evidence presented, prior to jury. Granted if, when viewed in light most favorable to non-movant, **the evidence could not cause a reasonable jury to find for non-movant**. A mere scintilla of evidence in favor of non-movant is not sufficient to avoid JMOL.
   1. ***Galloway v. United States***: Even where there are facts that have been presented that could support a litigant’s case, a judge can use JMOL if determines that as a matter of law, the facts couldn’t persuade a jury. “**Inference is capable of bridging many gaps. But not…one so wide and deep as this**.”
6. Motion for new trial (59): Court can grant new trial either sua sponte or on motion w/in 28 days after the verdict, on grounds that were historically sufficient:
   1. Errors by judge, lawyer, or jury that prejudiced the outcome (e.g. jurors using iPhones)
      1. ***Sanders-El v. Wencewicz***: Lawyer whipped out 10-foot printout of P’s prior criminal record. Judge’s failure to call a mistrial was abuse of discretion. Appeals court normally only corrects issues of law but can reverse issue of fact if trial judge made serious error.
   2. Verdict was against weight of the evidence – judge should rely on the “synthesis of his experience” (***Mann v. Hunt***) (but a rational jury could still have decided that way. If no rational jury could have so decided, judge can use 50(b))
   3. Damages awarded were against the weight of the evidence, even though liability was not. Can use remittitur.
7. Renewed JMOL (50(b)): Losing party makes renewed motion after jury verdict, w/in 28 days. Same standard as JMOL. Court can either order new trial or reverse the jury. If you didn’t motion for JMOL, you waive the right to motion for RJMOL

* There’s been a trend toward increased protections for jurors (race/gender), but at the same time a tendency to increasingly control the jury.

ENDING DISPUTES

Direct attacks

* Motions for new trial or renewed JMOL
* Appeal: Notice of appeal must be filed w/in 30 days of judgment. Review is limited to the trial record (no new facts) and issues preserved for review by trial court (no new issues). Questions of law are reviewed de novo and questions of fact for clear error.
* 60(b): Relief from Judgment: On motion, same court can relieve from final judgment, even if no appeal was made, on the following grounds**:**
  + 1. Mistake, inadvertence, surprise, or excusable neglect – but **not enough if court simply got it wrong the first time**
    2. Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under 59(b)
    3. Fraud, misrepresentation, or misconduct by an opposing party
    4. Judgment is void (e.g. b/c of lack of SMJ)
    5. Judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable
    6. **Any other reason that justifies relief**
    - 60(c): SoL for (1),(2),(3) motions is **one year** after judgment; the rest – w/in a **reasonable time**
  + ***Pierce v. Cook*** (multiple actions arises from tractor accident): Generally a **change in law doesn’t justify reversing** prior judgments. **But** a **VERY narrow exception** is that a fed court can use 60(b)(6) to vacate its own decision when the case it heard had been removed for diversity and the underlying state law changes due to a case arising from the same incident. This is b/c cases in fed court for diversity reasons should rule the same way as the state court would.
  + Courts typically reluctant to vacate using 60(b) (e.g. tough luck if you and your co-P lose and you don’t appeal but co-P does and wins). But will vacate if public policy is compelling enough (e.g. permanent injunction that becomes obsolete b/c of new law).
  + § 18: If P challenges the judgment, D can’t bring defenses he already did or might have brought
* 60(d)(3): Court can set aside its own judgment for fraud on the court (no time limit) – conduct that “attempts to defile the court itself, or is a fraud perpetrated by an officer of the court”
  + ***Kupferman***: D won b/c P didn’t discover doc D held that would have changed the case’s outcome. But b/c D could reasonably have believed P had the doc and chose not to bring it up, no finding of fraud on the court. Not lawyer’s job to make opposing counsel aware of every possible defense.
* Policy concerns: Finality, efficiency, & allowing people to rely on decisions vs. accuracy/fairness

Stare decisis: Like cases should be decided alike by courts in the same jdctn

* Can be used even if claim/issue preclusion don’t apply and even if in different states (Full Faith and Credit clause)
* Can overrule when:
  + Rule is not workable
  + Evolving law has made the rule a vestige of abandoned doctrine
  + Facts have changed such that the old rule is no longer applicable or justified
* DON’T OVERRULE if (1) there’s reliance on the rule & changing would cause special hardship, or (2) when issues are politically contested on both sides – risks delegitimizing the court

Claim preclusion (= res judicata)

* Was it raised as an affirmative defense? If not, it’s waived per 8(c)
* § 17: The **same claim** is precluded when:
  1. Was previously decided by a **final judgment** (i.e. fully litigated)
     + ***Durfee***: Nebraska court fully and fairly litigated the Q of whether it had jdctn over the land so Missouri court can’t re-litigate. Full Faith and Credit clause requires every state to give another state court’s judgment the res judicata effect that the judgment would have if issued by its own court.
  2. Judgment was **on the merits**
     + On the merits includes: decrees (***Martin v. Wilks***), settlements entered into w/ prejudice (***Martino v. McDonalds*** – 1st action over non-competitive clause was settled) (if the court signs off on them), 12(b)(6) dismissal. NOT on the merits if dismissed on grounds of SoL, jdctn, venue, or indispensable parties.
  3. **Same parties, in the same configuration**
     + Nonparties to 1st suit aren’t bound, both for CP and IP (***Martin v. Wilks*** – white firefighters sued after earlier group of white firefighters sued) b/c: (1) due process gives everyone the **right to their day in court**; (2) accuracy requires that everyone be able to bring own evidence.
       - Burden is on the P to join other parties rather than on the other parties to join the action.
     + BUT, preclusion allowed when 2nd party’s interests were adequately represented by 1st party (e.g. inheritor of land, class action, legal relationship, 2nd party controlled 1st action).
       - ***Taylor v. Sturgell***: “Virtual representation” of 2nd P is insufficient even though was friends w/ 1st P, used same lawyer, sued on same FOIA issue. Chase thinks he WAS adequately represented.
* § 24: “Claim” = **arising from same transaction** or series of connected transactions (= related in time, space, origin, motivation, forms a convenient trial unit).
  + Claims arising out of same incident are waived if not brought in 1 action. E.g. Damaged head case – P precluded b/c skull coming out was part of same series of transactions.
  + § 25: Claim still barred if P plans to bring different evidence or theories to, or to seek different relief in the second action (lesson: don’t be too hasty to sue)
* § 20: Exceptions to claim preclusion:
  + Judgment wasn’t fully litigated b/c was dismissed for lack of jdctn, venue, non-joinder, or misjoinder
  + Judgment was invalid b/c of improper notice or jdctn
  + P elects for or court directs dismissal w/o prejudice
  + Statute or court rules that the judgment doesn’t bar other actions on same claim
  + Verdict for D when P’s claim was premature or didn’t meet precondition for suit
* § 26: More exceptions:
  + P couldn’t seek a particular relief in 1st action b/c of limits on that court’s SMJ
  + Parties agreed that P can split his claim
  + 1st judgment is inconsistent w/ the fair implementation of a statutory or constitutional scheme
  + Case involves a continuing wrong 🡪 P can either sue once for total harm or sue periodically
  + Policy favors not barring if there’s extraordinary reason (e.g. 1st judgment yielded an invalid continuing restraint on personal liberty; failed to resolve dispute)
    - ***Federated Dept. Stores v. Moitie***:**Intervening change in law is not grounds for avoiding claim preclusion** UNLESS the case at hand is still w/in the same process (e.g. appealed). Here, Ps precluded b/c brought a new case instead of appealing.

Issue preclusion (= collateral estoppel)

* § 27: The **same issue** can’t be re-litigated if the issue was:

1. **Actually litigated**
   * Not actually litigated if: party defaulted in the 1st action; party admitted the issue rather than litigate it
2. Determined by a **valid and final judgment**
   * If two legal theories are asserted in 1st action and court doesn’t reach one of them, that issue wasn’t subject to final judgment
3. The **determination was essential to the judgment**
   * If an issue was decided in 1st action but the judgment didn’t hinge on it, not considered essential.
   * If 1st action resulted in judgment on several issues (i.e. multiple avenues for liability), no issue considered essential.
   * If jury gives a +ve general verdict on several issues, no issue is determined to be essential UNLESS it’s possible to determine that only one was in fact litigated.
   * If jury gives –ve general verdict on several issues, it’s evident that the jury determined all the issues so there WOULD be IP

* Unlike CP, a party CAN bring different claims that didn’t but could have brought in the 1st action
* New P can invoke non-mutual offensive issue preclusion against a losing D from an earlier action (but a winning D can’t preclude new Ps b/c everyone has a right to their day in court).
  + ***Parklane Hosiery v. Shore***: Private P successfully precludes D since D lost in initial case against the gov’t. Allowed even though if D had won initial case, couldn’t preclude private P b/c wasn’t a party to the initial action. Court **unlikely to invoke NMOIP** (concerned abt “wait and see” Ps), but is allowed to invoke when:
    1. P could have easily joined the first suit (Obvious which law firm involved? Geographically far?)
    2. Precluded party had incentive to litigate 1st action vigorously (e.g. could foresee multiple litigation)
    3. Judgment that is the basis for preclusion is not inconsistent w/ prior judgments
    4. 2nd action affords same procedural protections. (Majority says jury isn’t such a protection b/c is neutral, but dissent strongly argues that it is.)
* § 86 and USC §1738 (“Full Faith & Credit” clause): If a decision in a state court would be held as preclusive in the state’s courts, federal courts must also treat as preclusive, unless the federal claim arises under a scheme of federal remedies that intends to allow a fed claim to be asserted notwithstanding state court decisions.
  + ***Kremer***: State decision in reviewing an admin agency’s judgment in a discrimination case is preclusive in fed court b/c of FF&C clause. Blackmun dissent said this is bad b/c the state court standard of review of admin agency is lax – only to looks at the reasonableness of the judgment rather than the merits. This will cause Ps to not go to state court after an adverse decision in an admin agency b/c state court is likely to affirm and P would then be precluded from fed court.
    - What if state body had been an admin agency? Argue not preclusive – FF&C clause speaks of “courts”; less formal; no jury; not a full hearing of the issues. Argue preclusive – so long as it resembles a court hearing.
* § 28: Exceptions to issue preclusion wrt the same parties from the 1st action:
  + Party being precluded couldn’t have had the initial judgment reviewed
  + **NO IP if there was an intervening change in the law** or if barring it would otherwise avoid inequitable administration of the laws
    - ***IRS Commissioner v. Sunnen***: The law changed so no preclusion. Had K terms been judged against the new law, result would have been different.
  + 2nd forum has **procedural opportunities** that could **likely result in a dif. decision**
  + Burden of persuasion is significantly different in the 2nd action
  + Preclusion would adversely impact the public or the person not party to the 1st action
  + Unforeseeable that issue would arise in context of a subsequent action
  + Precluded party didn’t have incentive to litigate an issue in the 1st action, perhaps b/c he won despite an adverse decision on the issue.
  + Precluded party didn’t have adequate opportunity or incentive to obtain a full and fair adjudication in the 1st action
* § 29: Exceptions in non-mutual situations:
  + Same exceptions as in § 28, plus…
  + Precluded party didn’t have **full & fair** opportunity to litigate issue in 1st action and precluding him here would be unjust
    - E.g. if prior case wasn’t tried by jury, or was settlement
  + Preclusion undermines scheme for awarding remedies in the involved action
  + Person invoking preclusion could have effected joinder of opponent in 1st action
  + Another prior judgment contradicts the judgment that is the basis for preclusion
  + Prior judgment affected by relationships among parties not present in 2nd action
  + Prior judgment was arrived at by compromise
  + Preclusion complicates determination of issues in the 2nd action
  + Preclusion inappropriately bars reconsideration of a legal rule
  + **Other compelling circumstances**
* Policy arguments wrt preclusion:
  + +ve:
    - There’s an interest in bringing disputes to an end
    - Protects litigants form having to re-litigate identical claims/issues
    - Saves judicial resources
    - Wrt CP, separate trials could yield dif. results from the same cause of action
    - Wrt CP, saves resources to force party to bring all claims from the same cause of action in the same suit
    - Wrt CP, allows the parties to rely on the judgment in ordering their affairs
  + –ve:
    - Maybe court didn’t get it right the first time
    - Maybe future parties would better argue the case
    - Could cause race to the courthouse to control the determinative initial litigation

🡪 unfair to P that didn’t get there as quickly; could compromise due diligence

* + - Wrt NMOIP, not fair that the D is precluded but not future Ps
    - Wrt NMOIP, turns the jury into mini-legislature – have power to decide that any future Ps will win against D if can show causation in their case
    - NMOIP is unfair b/c D didn’t get to choose the forum in 1st action; allows new Ps to “wait and see”; ignores that D might not have litigated aggressively the 1st time
    - Non-mutual preclusion can force initial parties to over-litigate for fear of later being precluded.
    - Not necessary b/c people will by common sense realize that if Ps keep losing, they’ll probably lose too. Perhaps even apply Rule 11 to add discouragement.

JOINDER

* 18: A party may join all claims it has against opponent in the same action – doesn’t matter how related they are. If they ARE related enough, may be claim precluded if not raised (though standard is different).
  + 13: CAN raise unrelated counterclaims. MUST raise related counterclaims.
    - 42(b): Court can sever permissive CCs for purpose of efficiency or fairness
  + Cross-claims (1 co-party vs. another) must arise from same transaction as existing claim. Never compulsory.

Permissive Joinder:

* Person may join as P (20(a)(1)) or be joined as D (20(a)(2)) if BOTH:
  1. He asserts or there is asserted against him any right to relief arising out of the **same transaction, occurrence, or series** of transactions or occurrences; AND
  2. The action will raise a **questions of law or fact common to** all Ps if it’s a P joining, or all Ds if it’s a D being joined
     + ***Temple***: It’s ok that P sued manufacturer and not the surgeon b/c joint tortfeasors are not required parties – P is allowed to sue them separately. Manufacturer could have used an impleader on the surgeon.
* 21: Misjoinder isn’t ground for dismissing an action. On motion or sue sponte, the court may at any time add or drop a party or sever any claim against a party.
  + 42: Court can also order a separate trial (after having joint discovery) if it thinks one party would be prejudiced otherwise, or if it would be convenient.

Required Joinder:

* 19(a)(1)**:** Person who can be joined must be joined if:
  + Court **can’t grant full relief** to existing parties in that person’s absence; OR
  + That **person claims an interest** relating to the subject of the action **such that** if the action continued w/o them:
    - the person **wouldn’t be able to protect the interest**; OR
    - the interest **would leave an** **existing party subject to risk of increased obligations**
* **Can’t join** a party if:
  + **Venue** is improper for him and they object to venue (19(a)(3))
  + Court doesn’t have **personal jdctn** over him
  + Would **destroy diversity**
* When required party can’t be joined, court must **decide whether it would be equitable to proceed** or if should dismiss the action. May decide to dismiss if (19(b)):

1. Judgment in the party’s absence might prejudice them or the existing parties
2. The prejudice could not be lessened or avoided by measures such as protective provisions in the judgment or purposefully shaping the relief
3. Judgment rendered in the party’s absence would be adequate
4. P would be able to sue elsewhere

* ***Republic of the Philippines***: The Republic was found to be required but couldn’t be joined b/c of sovereign immunity. Suit was staid b/c proceeding w/o the Republic would prejudice against them (affront to sovereignty); they have no other adequate remedy; judgment would not be adequate b/c they wouldn’t be bound by the judgment; P is Merrill Lynch so they don’t care about the outcome.

IMPLEADER

* 14**:** D can, as a 3rd party P, serve complaint on a 3rd party D who may be liable to it for all or part of the claim. Can be used by both original D’s and P’s against whom counterclaim has been filed.
  + Unlike joinder, don’t need court’s permission to implead (unless 14 days have passed since original answer)
* ***Toberman*** (car accident, D trying to implead third party truck driver): Can’t use impleader to deny your liability. In the case, impleader was denied b/c D was trying to say he wasn’t liable to the P – impleader can only be used to say “I may be liable to P, but the 3rd party D is liable to me.” What D should have done was say “I deny liability, but assuming arguendo I’m found liable, I’m impleading the 3rd party”

INTERPLEADER

* When party has $$/property interest claimed by multiple others and **doesn’t want to incur multiple liability** for it, can interplead claimants and deposit the interest w/ court to sort it out.
  + Party must legitimately fear multiple liability against the interest
  + Claimants must be adverse to each other
  + Can bring interpleader even before prospective claims have been filed (***State Farm*** bus accident case)
* Rule Interpleader (22) – follows normal rules of SMJ
  + Can only use if there’s complete diversity and $75,000 in controversy
* Statutory interpleader created to deal with jurisdictional limits of rule interpleader:
  + § 1335 – SMJ exists if there’s only minimal diversity and $500 in controversy
  + § 1397 – venue for interpleading proper where at least one claimant resides
  + § 2361 – for purposes of interpleader only, court has nationwide personal jdctn
* Policy:
  + Interpleader good b/c prevents multiple liability for asset-holders and b/c reduces the burden on courts by consolidating litigation for that pot of $$
  + But interpleading party may still have to litigate all over the country to determine if they are liable in addition to that pot of $$ (e.g. State Farm had to litigate elsewhere)
  + Another downside of interpleader (pointed out by the Douglas dissent in *State Farm*)is that interpleading party can use the interpleader to force potential claimants to decide their claims to the pot of $$, dragging them into litigation b4 they’ve even filed claims.
  + At least, though, interpleading party isn’t allowed to force claimants to litigate claims not pertinent to the sum of $$ under interpleader along w/ the interpleader action (***State Farm***). Allowing this would mean the interpleading party, w/ only limited interests, could exert wide control.
  + Although the Federal Interpleader Act expanded the potential for its use, still not useful when parties are international.

INTERVENTION

* Intervention by Right (24(a)): Nonparty must be allowed to intervene when:
  1. Statute provides unconditional right to intervene
  2. ALL of the following are satisfied:
     1. Nonparty has **interest in the property/transaction** that is subject of the action
     2. Disposition of the action could **impede his ability to protect that interest**
     3. That **interest is not adequately represented** by an existing party
        + ***American Lung Assoc.***: Ct. denied utilities’ attempt to intervene, arguing that their interest is too remote, EPA adequately represents their interests, and could always participate in EPA’s rulemaking if P wins
* Permissive Intervention (24(b)): Can be allowed in if (2) statute gives conditional right to do so or (2) **has a claim or defense that shares a common question of law or fact** w/ the main action.
  + Court will disallow if intervention would delay or prejudice dealing w/ the original parties’ rights
* Can get interlocutory appeal for decision to deny intervention

CLASS ACTION

* 23(a): Prerequisites (all must be met for every type of class)

1. **Numerosity:** Class is so numerous that joinder of all members is impracticable
2. **Commonality:** There is a question of law or fact common to the class
   * ***Walmart***: No commonality – how do you know every woman was fired/not promoted b/c of discrimination? Scalia majority says you need *strong* proof to find commonality – perhaps even the same predominance standard required for 23(b)(3) classes. Ginsburg says it’s a lower standard.
3. **Typicality:** Claims or defenses of the representative parties are typical of the claims or defenses of the class
4. **Adequacy of Representation:** Representative parties will fairly and adequately protect the interests of the class
   * ***Hansberry*** (black land-buyers): A party can’t be bound by the judgment in a class action lawsuit unless his interests were well-represented. The fact that his interests weren’t represented by the white Ps in the 1st action means Hansberry wasn’t really part of the class in that action.
     + If class has people w/ dif. goals, court can split and assign dif. representation
   * ***Dow Chemical*** (Agent Orange): Sup. Ct. split 4-4 to allow war vets to sue even though previous class action was settled – not precluded b/c settlement hadn’t adequately represented them given that they weren’t injured yet. Open question.

* 23(b): Types of Class Action:

1. Prosecuting separate actions by or against individual class members would risk (e.g. book banning; limited fund – like a reverse interpleader):

(A) inconsistent or varying adjudications affecting the D; OR

(B) adjudications wrt some class members that would be dispositive of the interests of other members or would impair their ability to protect their interests

1. D has acted or refused to act on grounds that apply generally to the class, so that final injunctive or declaratory relief is appropriate for the whole class (e.g. suing gov’t agencies – can’t give relief to one w/o giving relief to all)
   * + These two are situations where it’s really important that the action be brought as a class b/c the action, if brought as an individual, will likely affect many others
     + Relief is injunctive or declaratory (monetary only allowed if incidental and can’t be individualized)
       - Relief must be the same for the entire class
     + No requirement of individual notice (though court may order it)
     + No option for members to opt out – mandatory classes
2. Qs of law or fact common to class members **predominate** over Qs affecting only individual members, & a class action is **superior** to other available methods of adjudication. Considerations pertinent to these findings include:

(A) Class members' interests in individually controlling the prosecution or defense of separate actions

(B) Extent and nature of any litigation concerning the controversy already begun by or against class members

(C) Desirability or undesirability of concentrating the litigation of the claims in the particular forum

(D) The likely difficulties in managing a class action

* For this type, relief could be pursued 1-on-1 except for the transaction cost
* Relief is monetary damages (can also include injunctive or declaratory relief)
  + Can get individualized damage awards
* The best notice practicable under the circumstances must be given, paid for by P or P’s lawyer (***Eisen***: Thisincludes giving individual notice to all class members who can be identified w/ reasonable effort). Notice must be clear, concise, and in plain language (see 23(c)(2) for specifics on what has to be in the notice).
* Class members must be given the choice to opt out
* ***Phillips Petroleum*** (gas royalties):Court **can assert personal jdctn over class members** that don’t have min contacts w/ the forum state b/c due process jdctnal protections only apply to Ds. [Venue is proper for class members where it’s proper for the representative. For diversity jdctn, class actions require only **minimal diversity**, **$5M total at stake**, and **remover can be from same state** as the court. See § 1332(d) for instances where judge can or must decline diversity jdctn.
  + 23(b)(3) class members at least have the rights to: (1) notice, (2) opportunity to be heard, (3) opportunity to opt out, (4) adequate representation.
* *Eisen* and *Ginsburg’s Walmart dissent* say you can’t look at the merits b4 certifying a class. *Scalia’s Walmart majority* (more recent) says you can.
* 23(e): Proposed settlement, voluntary dismissal, or compromise requires court’s approval
  + Court must direct **notice** to class members who would be bound
  + If binding on class members, court must only approve after hearing and finding it is **fair, reasonable, and adequate**
  + If 23(b)(3), court may offer class members **another opportunity to opt out**
  + **Any class member may object** to the proposal
    - ***Amchem*** (asbestos): Standard for class certification is higher when the goal is to settle b/c court loses its ability to adjust the class during proceedings. Mutual interest in receiving compensation doesn’t count for commonality. Future claimants aren’t adequately represented by named Ps. Issues involving the settlement bear on whether class can be certified. Also, it’s not for courts to decide how $$ should be allocated to so many claimants – legislature’s job.
      * B/c *Amchem* is a tort claim (i.e. unlikely to get class certification for trial purposes) and the decision bars class settlement, it’s unlikely mass torts will ever get class status
* Strong judicial control compared to one-on-one lawsuits:
  + Court must appoint the class attorney and can regulate attorney’s fee
  + Notice is required in a 23(b)(3) class action and court may require notice along the way
  + Settlement is subject to judicial approval
  + See 23(d)(1) and other subsections for more
* +ve:
  + Allows market regulation where actor has violated law but only affects people a little
  + Allows people w/ small claims that wouldn’t alone justify litigation exp. to get to court
  + Class certification often forces opponent to settle to avoid huge risk – “legalized blackmail”
  + Attorney’s fees come out of settlement recovery rather than from P’s own pocket
  + Prospect of huge fees incentivize attorneys to work hard, and Ps don’t have to pay
  + Greater possible recovery of punitive damages
* –ve:
  + Difficult to litigate
  + Attorney has less control over the case - attorney has duties to the entire class and the court takes greater control over the process
  + Expensive to notify all class members, especially given *Eisen’s* req that all class members who can be identified be sent individualized mail (but attorney might bear the cost)
  + Punitive damages will get dispersed among the whole class
  + Conflict of interest btwn class members (awards can be trivial) and class lawyers (usually huge compensation). Hard to separate lawyer’s and clients’ interests during negotiation
  + Might bankrupt D meaning P would get less than if sued independently

GOVERNING LAW IN A DIVERSITY CASE

* In a federal question case, apply federal law
* If a case is before fed court b/c of fed Q, but the court also has supp. jdctn over a state law claim, apply the *Erie* analysis to the state law claim
* § 1652 (Rules of Decision Act, 1789): Where the question is not federal, apply the state’s rules
* § 2072 (Rules Enabling Act, 1934): Sup. Ct. has authority to promulgate procedural rules of the fed courts, but these rules CANNOT abridge, enlarge, or modify any SUBSTANTIVE rights.
* ***Erie v. Tompkins***: *Swift v. Tyson* had said fed courts could apply fed common law 🡪 led to forum shopping (parties could sue w/o diversity to access state law or gain diversity to access fed law). *Erie* said: (1) § 2072 doesn’t authorize creation of fed common law; (2) new scholarship shows we were interpreting § 1652 wrong – in fact, fed courts can only apply fed procedural rules.
* Test for whether rule is procedural:
  + ***Guarantee Trust v. York***: Rule is substantive if it’s **outcome determinative**. B/c applying the state or fed SoL would determine outcome of the case, SoL is deemed substantive so state version is applied. Critique: Procedural rules are also outcome determinative!
  + ***Ragan***: State rule says action is commenced when summons served on D; fed rule says when case is filed w/ court clerk. B/c would determine outcome of case, the rule is substantive and the state version is applied.
  + ***Byrd v. Blue Ridge***: Rejects rigid application of outcome determinative test. Should **balance competing state and fed interests**, esp. where difference in outcome is speculative
* ***Hanna v. Plumer***: If were to apply the outcome determinative test, would apply state service of process rule. A fed rule is procedural (thus apply it instead of the state rule) if:
  + It collides w/ a state rule
  + If it doesn’t collide w/ a state rule, it’s still procedural if it meets the Erie’s twin aims:
    - Preventing forum shopping
    - Avoiding inequitable protection under the law
      * Different service of process rules in *Hanna* are unlikely to lead to forum shopping b/c they’re pretty similar, but different SoL rules in *York* would lead to forum shopping, so in that case the rule was indeed substantive.
    - Harlan’s concurrence: B/c every rule could affect forum shopping, the test should be, does the rule affect primary conduct? If so, it’s substantive.
* ***Gasperini***(lost photographs):

|  |  |  |
| --- | --- | --- |
| Issue dealt w/ in *Gasperini* | NY | Fed |
| Trial court’s standard of review of the jury verdict (after a motion for new trial or JMOL) | Material deviation from what would be reasonable compensation (easy to show) | Shocked the conscience (more demanding) |
| Role of Appellate Court | De novo review – app. court isn’t bound by the trial court’s determination and does its own review | Not de novo – this would run into 7th Amendment problems (which says that no fact tried by a jury can be reexamined except by trial judges – appellate judges cannot). Ginsberg says app. court’s role is to review for mistakes of discretion. Scalia says can review only for mistakes of law. |

* + Ginsberg majority:
    - On the first issue, **construes the fed rule narrowly** so that it’s not quite on point wrt the state rule and can thus apply state rule. The narrow construal approach allows her to sidestep the *Hanna* analysis and not apply fed rule.
    - On the second issue, departs from the *Hanna* analysis to say that fed court can’t adopt the state standard for appellate review b/c would be unconstitutional for appellate court to do de novo review of a jury award. **Fed court must not stray from one of its essential characteristics**. This decision is criticized for saying *Hanna* analysis doesn’t always apply.
  + Scalia dissent: Should construe fed rules broadly so that can override state rule.
* ***Shady Grove v. Allstate*** (class action for unpaid statutory interest on late disbursements):
  + Scalia plurality: Must determine whether fed rule is procedural in its own light. It’s the Rules Enabling Act that limits the application of fed rules – if rule is deemed procedural, it doesn’t matter whether it conflicts w/ state law that is intended to be substantive.
    - If the fed rule is invalid under the Rules Enabling Act (i.e. abridges, enlarges, or modifies a substantive right), go back to the state law. Given the process of producing the FRCP, it is unlikely that a fed rule will ever be determined in violation of § 2072.)
  + Ginsberg dissent: Need to interpret fed rule in light of the state rule – if state rule affects substantive rights, then applying the fed rule would too, meaning that state rule must be applied.

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **State Rule** | **Federal Rule** | **Substantive/Procedural** |
| **York (1945)** | Statute of limitations | Rule 3 | Substantive |
| **Ragan (1949)** | Action is commenced when summons served on D | When case is filed w/ court clerk | Substantive |
| **Byrd (1958)** | Compensation Act coverage defense decided by court | Decided by jury | Procedural |
| **Hanna (1965)** | In-hand service of process | Rule 4(d)(1) | Procedural |
| **Walker v. Armco Steel (1980)** | State law requiring filing and service in same time frame | Rule 3 | Substantive |
| **Ricoh (1988)** | Forum selection clause not enforceable | Forum selection clause enforceable | Procedural |
| **Gasperini (1996)** | Trial court’s standard of review of the jury verdict is material deviation | “shocks the conscience” | Substantive |
| Appellate court does de novo review | Appellate court reviews for abuse of discretion | Procedural |
| **Shady Grove (2010)** | Class action statute that bars statutory penalties | Rule 23 | Procedural |

ADR

Arbitration:

* FAA makes arbitration agreements enforceable in court (except for grounds that would regularly invalidate a K) and overrides state laws that might be more restrictive
  + Power of arbitrator: (1) award has preclusive effect; (2) awards subject to only minimal court review. Can only reverse award on grounds of corruption, arbitrator’s undisclosed biases, etc. – error of fact or law not grounds for reversal
    - However, arbitrator’s decision doesn’t have stare decisis effect and can’t usually issue injunctions
* ***AT&T***: The ground on which arbitration is challenged can’t be solely against the arbitration clause (i.e. b/c it bars class arbitration) – it has to be on grounds that would void ANY contract. Other side argues that barring class arbitration will prevent Ps from seeking relief.
* +ve:
  + In small cases, quicker (no motions) and cheaper (usually no discovery) – this allows people w/ small claims to get relief even when there’s no basis for class action
    - But big claims are not quick or cheap, plus arbitrators fees can be huge
  + Expert decision-makers
  + Saves the taxpayers money
* Goes both ways:
  + Private – good where companies want to protect their reputations, but bad b/c doesn’t lead to precedent and precludes a social effect where others might bring claims
* –ve:
  + Loss of a jury – arbitrators less likely to give Ps huge awards
  + Often times non-neutrality of the arbitrator b/c the parties pick them
  + Big corps likely to have an advantage b/c they know the arbitrators and also the arbitrators want to get rehired so likely to rule in big corp’s favor
  + Judges come to work every day ready to hear cases; arbitrators have busy schedules so it can take time to get all arbitrators together
  + Can produce arbitrariness b/c can’t correct errors through judicial review
  + Limited pre-trial discovery so not useful for e.g. in med malpractice cases where P relies on info the other party has
  + Takes away from prestige of the courts
  + Where arbitration is contracted in by the company, reproduces power imbalances btwn the parties

Comparative Civ Pro:

|  |  |
| --- | --- |
| Common law | Civil Law |
| Adversarial – lawyer moves the case by filing motions, cross-examines witnesses | Inquisitorial (still are lawyers repping adversarial parties, but judge is more actively involved) |
| Jury | Some have juries but only for crim cases |
| **Concentrated trial** – b/c there’s a jury and can’t drag it out – requires **pre-trial discovery** | **Series of hearings** – enables **periodic discovery** |
| Judges have no special training and are elected/appointed | Judges get specialized training and are promoted meritocratically |
| Transcript from testimony available at trial and on appeal | Judge makes dossier |
| Witnesses can be prepared & cross-examined | Lawyer doesn’t talk to witnesses outside of court |

* +ve of American system:
  + citizen access
  + level playing field (at least wrt opportunity)
  + adversarialism focuses on getting it right
    - BUT adversarialism undermined by required disclosure
  + concentration of trial means quicker resolution
  + checks on the judges means less chance for corruption
  + having a jury means there’s a group of peers so it’s not one person w/ a particular background and bias choosing what evidence to focus on
    - BUT, jury trials are disappearing b/c of stricter pleading, more liberal SJ, *Galloway* allowing easier JMOL
* -ve:
  + Less access to courts b/c of expense

**Key Cases**

The jurisprudence of the last Century has grappled with the tension between protecting judicial economy and limiting the cases that ultimately get decided on their merits. I would argue that a number of cases show that an emphasis on the latter concern has resulted in a trend toward keeping cases and relevant information out of the courtroom and restricting the instances in which information that does get introduced may be heard by a jury.

McIntyre v. Nicastro

The requirements of personal jurisdiction can sometimes serve to keep meritorious cases out of court. Given the high costs of litigation, the bar at which a plaintiff will decide to pursue her action in court is already set fairly high. Forcing her to litigate in an inconvenient forum because the convenient forum cannot assert personal jurisdiction over the defendant further raises this bar. This may tilt the plaintiff’s cost-benefit calculus against pursuing what might otherwise be a winning cause of action.

Liberal personal jurisdiction rules under *International Shoe* meant that it was fairly easy to assert personal jurisdiction. But the progression of cases up through *McIntyre* has further and further constricted the constitutional ability of courts to do so where corporations are concerned. *Asahi* left us with some uncertainty given the 4-4 split on the question of whether placing goods into the stream of commerce is sufficient grounds for finding the minimum contacts needed for personal jurisdiction. *McIntyre*, if not finally deciding this question (given the multivarious opinions given) at least acts as a hand holding a nail over the box containing the stream of commerce argument, waiting for the next case to hammer the nail home. The Kennedy plurality opinion echoed the O’Connor plurality opinion from *Asahi* that the stream of commerce theory is insufficient – what is needed in addition is a more active purposeful availment of the forum state’s protective laws. O’Connor suggested that this might be done through targeted advertising. Kennedy suggested that an expectation that a customer in the forum state would purchase the good would suffice.

The effect of this decision (or more accurately, the building trend toward the stream of commerce plus theory of minimum contacts) is to limit the ability of courts to assert personal jurisdiction over large corporate defendants whose products are widely distributed, but who do not take direct action to market their goods to end users. The increasingly globalized nature of the world has meant that many companies now fit this description as regional and local distributors who localized market characteristics are increasingly being called on to serve as middlemen between producers and consumers. In her dissent in *McIntyre*,Ginsberg voiced her concern about this implication worrying that corporations might evade liability for harm they cause in any state simply by selling their goods to a distributor.

Bell Atlantic v. Twombly

*Twombly* also represents a move away from hearing the merits of a case, but on the pleading front. The drafters of the FRCP wrote Rule 8 to simply require pleadings that are calculated to notify the defendant and the court of the nature of the claim. It specified that the complaint be “short and plain”. On the face, it seems that the Rule envisions a pleading process that does not pose a significant hurdle to bringing an action and allowing the parties to get to its merits. *Conely* seemed to reflect that sentiment when it held that allegations are all that is required to satisfy the Rule’s requirements at the pleading stage. In the *Conely* system, 12(b)(6) motions would only be granted if it was beyond doubt that the plaintiff could prove no set of facts to support its claim.

*Twombly* marked the beginning of a shift away from this model which has made it much harder to clear the pleading stage and move on to discovery. *Twombly* held that more concrete facts are needed. Conclusory allegations are not permitted the presumption of truth that *Conely* would seem to have accorded them. Moreover, even those allegations that are not deemed conclusory cannot simply be conceivable to satisfy the pleading requirements – they must be plausible.

This shift was dramatic in and of itself, but it was unclear after the decision whether the new standard would apply only in highly complicated and expensive anti-trust cases, such as that before the *Twombly* court. The more recent *Iqbal* case not only confirmed the standard set out in *Twombly*, but applied it in a different domain – national security. It further suggested that the higher burden at the pleading stage is not limited to the complex and highly charged fields of anti-trust and national security, but is trans-substantive like the rest of the FRCP.

The move to a stricter pleading standard is in some senses wise. It avoids the expense of discovery when a complaint is unlikely to prevail and precludes bare-bones in terrorum complaints that might pressure defendants in potentially large cases to settle rather than proceed with an expensive discovery process. However, as Stevens pointed out in his dissent in *Twombly*,the stricter standard will severely limit anti-trust actions because plaintiffs generally cannot access the facts at this early stage that they would need to substantiate claims of illegal agreements. And even if they could, that would amount to fact-finding that the FRCP intended to postpone until discovery. Anti-trust cases (and other types of complex cases) may be limited going forward to instances involving a whistleblower or where the government chooses to step in and bring its considerable resources to bear on preliminary fact gathering.

Parklane Hosiery v. Shore

*Parklane* added another weapon to the arsenal of parties trying to prevent an action from getting to the merits. Traditional claim and issue preclusion were already two means of keeping matters out of court – for the valid reason (considering judicial economy) that they were already dealt with in some way through prior litigation. Non-mutual defensive issue preclusion was then determined permissible in another case, but it was not until *Parklane* that non-mutual offensive issue preclusion (NMOIP) was permitted. NMOIP is a powerful tool for keeping actions out of court in that it allows a plaintiff to preclude a defendant that lost in an earlier case even when had the defendant won previously, it could not preclude the new plaintiff.

NMOIP would seem to expose defendants to unfair risk and give plaintiffs an advantage. Concerned with the possibility of “wait and see” plaintiffs, the decision does provide protections for defendants by allowing NMOIP only at the judge’s discretion and barring it under certain conditions. These include when the plaintiff could have easily joined the first suit and when the second action affords different procedural protections. But it strikes me that it is relatively easy for these exceptions not to apply, as they did not in *Parklane*. For example, it is not always easy to join a lawsuit if one does not know about it or if it is being conducted far away.

The effect of the *Parklane* decision is to put companies with many customers at risk of enormous liability, perhaps most obviously for committing torts. If a customer hears that another customer won a lawsuit against the company, the former can invoke NMOIP to essentially win its case as a matter of course. The exclusions perhaps limit the number of companies that will be exposed to such risk. But in the (perhaps only rare) event that an incident involves a company with many potential claimants and these exclusions are not applicable, the effects could be devastating. Argument could be made that this is fair because the defendant had a full and fair chance to litigate the first action and precluding further litigation on the same issue saves the enormous expense often associated with cases of these types (e.g. discovery, expert witnesses, etc.). On the other hand, our system is not flawless and it is possible that the first court erred in the initial action, unjustly exposing the defendant to huge liability. Moreover, it does not seem fair to bind the defendant by preclusion when no future plaintiffs would be. Offensive issue preclusion essentially gives the courts the power of a mini-legislature to decide that all future plaintiffs can sue if they can prove causation in their circumstances. This greying of the separation of powers between government branches bears an unconstitutional flavor.

Hickman v. Taylor

*Hickman v. Taylor* was a path-breaking case in that it created the concept of work-product privilege, which joined the attorney-client privilege and other statutory privileges as a tool for keeping information relevant to case away from the ears of the fact-finder. The new privilege extended court protection to all forms of written or otherwise tangible information prepared in anticipation of litigation (subject to exception for substantial need on the part of the opposing party). This has served to limit the information before the court from which a judgment may be fashioned, necessarily reducing the accuracy of judgments (at least in a portion of cases).

This is not to say that the privilege is a bad idea. It was created in full knowledge of the tradeoff between reduced accuracy in the instant case versus increased long-run accuracy of the system. Without such a privilege, for example, the numerous mechanisms for forcing parties to cooperate with one another, including pre-trial conferences, discovery, and disclosure, might strip our adversarial justice system of its ability to elicit reliable information on which to base decisions. The debate about whether the adversarial system is good to begin with is for another exam question, but if the system is to be protected, there must be counterbalancing mechanisms for protecting the ability of an attorney to advocate for her client. Work product privilege represents one such weapon in the arsenal of attorneys seeking to protect their clients’ interests.

In addition, if work product privilege had not been developed attorneys might be incentivized not to conduct rigorous information-gathering since they would be doing a service to their opponents who could simply request that information. It might also lead to attorneys attempting to disguise their mental impressions to avoid sharing them with their opponents. The opposing side might then call the attorneys to the witness stand to testify about their impressions, turning advocates into the interrogated and clouding the line between client and attorney. Additionally, attorneys would be discouraged from writing down their thoughts in preparing for trial or discussing them with their colleagues to develop them more fully. This would take away from the objective of conducting efficient proceedings. Moreover, even if a case were not to go to trial, as most do not, preparation helps put a party in a better bargaining position for settlement. Finally, if there was no work product privilege, the morale of the bar might be harmed, leading to a general decline in quality of legal services and affecting all future litigants.

I would argue that the privilege has developed in an intelligent manner. It protects communication about facts, which necessarily involves interpreting the facts and would be giving too much away in terms of trial strategy if it needed to be divulged. But it does not protect the facts themselves, which would be unfair to the party that could not get to the facts first. Regardless, the advent of the work-product privilege represents another means of preventing fact-finders from fully addressing the merits of a case.

Galloway v. United States

*Galloway* is significant in that it highlights the extent to which we have departed from the 7th Amendment’s intent to “preserve” the right to a jury trial. The court held that even where there are facts that have been presented that could support a litigant’s case, a judge can invoke judgment as a matter of law and prevent the case from being heard by a jury if it determines that as a matter of law, the facts could not persuade a jury. Again we see a mechanism for preventing the fact-finder from being able to consider the merits of a case and make its own determination.

Speaking for the majority in *Galloway*, Rutledge argued that the decision did not undermine the role of the jury because a century of case law preceded this 1943 case demonstrating the legitimacy of the use of JMOL. The recently adopted FRCP 50 reflected this. Moreover, that courts have historically been able to exclude evidence shows that juries were never the absolute masters of fact in a court proceeding.

Dissenting, Black argued that there were facts in the case that could have led a jury to find the opposite way that the court came down and that JMOL was thus misplaced. He bemoaned the erosion of jury power and cited a number of historical figures who spoke about the jury’s role. Hamilton, he report, said that a jury verdict should not be reexamined, but if it was, the reexamination should only be done by a second jury. Patrick Henry said that a jury verdict could *never* be reexamined. Chief Justice Jay’s opinion in the first civil Supreme Court case affirmed the jury’s role as the trier of facts. Black also related that the directed verdict was an innovation in 1850 that contradicted the rule stated only 15 years earlier that even where there is no evidence to prove a fact, the best a judge can do is instruct the jury so.

My own opinion is that if a court finds itself in the gray area between allowing a trial to go to jury or not, it should err on the side of the 7th Amendment right to a jury trial. Be that as it may, the trend seems to be building off of *Galloway’s* precedent toward further limiting the jury’s role through all sorts of managerial judging mechanisms. We may not have seen the last of these efforts.

Conclusion

These cases suggest a trend toward constraining the number of actions whose merits get heard and the subset of these actions that ultimately go to a jury. *McIntyre* is the most recent in a long line of cases that have waffled on how far to extend personal jurisdiction, ultimately deciding in favor of a relatively restrictive standard that requires purposeful availment of the forum’s laws to the point that a defendant must have expected the forum’s citizens to purchase its products. *Twombly* made it harder for cases to be brought to begin with, reducing the number of cases that could make it to the stage at which they might be tried on their merits. *Parklane* extended the power of preclusion, ensuring that fewer cases that might otherwise have cleared these hurdles would be litigated on their merits. *Hickman* allowed new types of information to be concealed once parties made it to the discovery stage, restricting judges’ discretion that had previously enabled them to force parties to share a wider range of material bearing on the facts of the case. *Galloway* limited the right to a trial by jury, thus placing in the hands of sometimes a single decision maker the power to determine whether facts are relevant, and thus in a sense the power to determine fact.

Although often unstated in particular cases, it may very well be that underlying this trend has been the laudable goal of preserving judicial resources so as to better be able to litigate cases that demand more scrutiny. But the cost is that many actions that might have merit are barred from getting to the stage where they can be tried on their merits, or are tried without all relevant facts being admissible or heard by a jury once they do make it to the merits phase. I am uncertain that we are on the most just side of this tradeoff.

REFORMS TO MAKE OUR SYSTEM BETTER AT RESULTING IN CORRECT JUDGMENTS

Langbein’s main point is that our system is not necessarily designed to result in correct judicial decisions. One reform that could be made is to circumscribe attorney-client and work-product privilege. These privileges result in keeping information from the opposing side that might lead to more just outcomes at trial. Rolling back these privileges would result in a return to the basic premise of discovery, which is that mutual knowledge of the facts will allow proper litigation, promote reasonable settlements, facilitate summary judgment, and prevent trials from becoming sporting events involving surprise. It would also return to the judges the greater discretion they had before *Hickman* that had enabled them to force parties to share a wider range of materials bearing on the facts of the case.

Although limiting attorneys’ ability to withhold information that is currently privileged may enhance the transparency in a given trial, it would also have several negative effects. First, attorneys might lose their incentive to rigorously gather information since their opponents could simply request the information from them. Second, it might lead to attorneys attempting to disguise their mental impressions to avoid sharing them with their opponents, and their opponents might then call them to the stand to testify about their impressions, blurring the line between client and attorney.

Another reform might be to mandate that a judiciary representative be present during all phases of discovery to ensure that discovery is conducted properly. Rule 37 already allows for sanctions if discovery orders are not properly adhered to, but this does not offer the positive support that attorneys evidently need in some cases to pursue discovery in a manner that it in the best interests of their clients. A judiciary representative might have instructions to advise attorneys on the most basic or obvious avenues to pursue as a kind of backstop against missing important elements of a case. The problem with this approach is that adding judicial oversight would tax the judicial system, which is already heavily taxed, particularly in the wake of the financial crisis, which has seen courthouses across the country forced to shut their doors. Moreover, such a representative would not truly be working for a client, so his or her incentives might not be properly aligned. Further, besides the practical difficulties associated with adding to the judicial burden, creating such a position would undermine FRCP 1’s note that the Rules are meant to facilitate quick and inexpensive proceedings.

To combat poor performance in the handling of a case, the American Bar Association might require law schools to provide and even mandate their students to engage in more clinical work to prepare for handling cases. Alternatively, courts might require trial attorneys to pass an exam before being permitted to work on a case in their courtrooms. While this approach would add to the already stressed lives of law students, it would go a ways toward remedying an oft-heard critique of the law school experience, which is that it does not prepare lawyers for practice. Additionally, many professions require certain standards of performance before allowing professionals to practice their trade. The ABA already require that lawyers pass the bar exam, so it would not be such a stretch to require prospective attorneys – at least those destined for litigation – to demonstrate at least minimal abilities.

A controversial idea might be to tie attorneys’ fees to their performance in litigation. This could be done by precluding attorneys from being paid at all if they lose (in other words, requiring contingent fees). Such an approach would incentivize good practice during litigation, but might chill the legal profession as a whole, and might preclude cases requiring exceedingly long timeframes from being taken up by an attorney.

A similar idea could be to create a court position (or add to the judge’s list of responsibilities) that would monitor attorneys’ performance and step in if the performance were deemed to be insufficient, perhaps postponing the proceeding at that point so that new attorney could be obtained. Rule 11 sanctions might be extended to cover not only submitting documents for improper purposes or brining frivolous or indefensible claims, but inadequate performance as a client representative as well. The problem with this approach is that the standard against which to measure adequate performance would necessarily be highly subjective. However, the standard for applying Rule 11 is currently subjective as well so this might not be a huge issue.

The Rule 59 motion for a new trial is already available to parties that claim that their attorneys made an error. Perhaps another solution would be to expand the ability of judges to grant new trials if attorneys are deemed to have done a poor job representing their clients. Of course this would cause the same problem of discretion as described in the previous paragraph.

IN DEFENSE OF THE JURY TRIAL

The strongest defense of the jury system is that it provides a check on the potential arbitrary power of a judge. Having only one or even a few people decide a case allows personal biases to creep in. A panel of jurors has a decent chance of evening out those inevitable biases so that they do not determine the ultimate judgment. Additionally, the old adage “more heads are better than one” is certainly applicable here, where more perspectives on what the facts indicate is likely to lead to a fairer result than if only one analysis were to be applied.

The fact that the jurors have no training or expertise in fact-finding is exactly the point of the system. Facts are not something that can be ascertained through special training. They are in the eyes of the beholder and those eyes are conditioned according to the norms of the society in which they develop. Justice should be doled out according to these societal norms, which can only be decided by a cross-section of society. Limiting fact-finding to a judge would put the power in the hands of one person to decide how society views a particular set of facts. This notion was challenged in *Scott v. Harris* when the majority found that a video record can be used to determine objective fact, but I would side with Stevens’ dissent in arguing that different people would interpret even a video in different ways. The more people that get to weigh in on what a set of facts means, the more likely that truth is to be uncovered. And this is not an objective truth, but rather a truth according to the societal norms that our country aspires to. A jury, drawn from the various corners of society, is likelier than a judge to be in touch with those standards.

The fear that juries will produce irrational decisions should be tempered by a number of structural safeguards built into the FRCP. First, Rule 48 requires that a jury verdict be unanimous unless the parties stipulate otherwise. That every juror must be persuaded of the accuracy of the body’s determination serves to weed out the potential or irrationality.

Peremptory challenges are another way of controlling juries to ensure that especially radical views do not get represented. However, the limit on peremptories such that they cannot be used discriminatorily against particular groups contributes to the goal of arriving at a jury that truly represents a cross-section of society. Potential jurors may not be rejected on the basis of innate characteristics that might predispose them to certain views. If it were possible, for example, to reject female potential jurors on the ground that they are, as females more likely to side with injured plaintiffs, our system would permit categorical exclusion a sentiment that makes up a significant segment of our societal norms. Similarly, restricting fact-finding to judges would restrict the determination of fact to the small subset of society from which the judiciary is typically drawn. Judges are typically white men who come from privileged backgrounds that afforded them the opportunity to gain the education, experiences, and connections necessary to become a judge. We should not allow this or any subset of society determine what is factually correct for the remainder.

Juries are further restricted by the use of jury instructions, codified in Rule 51, and the choice of a general verdict, specific verdict, or general verdict with questions, codified in Rule 49. These rules allow parties to request particular instructions and object to others, and allow the judge to control the ultimate instructions. Thus, the jurors are guided to make only decisions that are pertinent and necessary and are prevented them from irrationally taking matters into their own hands.

Judgments as a matter of law, motions for new trials, and renewed motions for a matter of law are additional checks, preventing cases from going to a jury when only an irrational jury could find in favor for one of the parties, or from curing irrational decisions ex post. These safeguards ensure that even when irrationality does creep into the jury system (as it must since jurors are mere humans), the irrationality is checked and can be overruled.

It should be noted that there are downsides to the alternative to using juries as fact finders – namely, using judges – that I would argue outweigh the faults in the jury system. First, judges are often elected and can thus be swayed by politics. This came out most prominently in *Massey Coal*, in which one of the parties to the lawsuit was able to influence through his campaign contributions the election of the judge who tried his case. Although there are structural safeguards built in, such as recusal, these can fail as they did in this case, where the judge did not recuse himself. Even when corruption is not as evident, judges may be overly sensitive to the demands of the political system and might not decide facts impartially if they think that the decision they would otherwise come to would upset their base of support.

Another problem with judges as fact finders is that they hear cases every day and may bring baggage from previous cases to bear on current ones. For example, a judge might see a case that is particularly reminiscent of a case he heard years ago in which one of the parties was grating to the judge. This might subconsciously (or consciously) lead the judge to find against the party in the current case occupying the same position and bias the judge against it.

Unlike judges, juries do not hear evidence that a judge might rule inadmissible. Thus they make their determinations based solely on the information that is deemed a legal basis for drawing factual conclusions. As hard as judges might try to filter out inadmissible evidence when the time comes to make a factual determination, he cannot force himself not to remember what he has previously heard.

In addition, judges have a relationship with the attorneys for both sides, through pre-trial conferences and through the dialogue that can take place during trial that juries do not have. As seen in A Civil Action, these relationships can turn sour and have the potential to bias a judge against a party merely because he has had grating experiences with the attorney. Juries are free of this burden.

A final reason to hold jury trials that has not yet been mentioned is that it furthers one of the goals of the justice system, which is to resolve controversies to the (relative) satisfaction of both sides. It is likelier that the parties will feel that the conclusion is arrived represents their interests when the fact finders are drawn from their peers than when the decider is an aloof bureaucrat, often from a different stratum of society.

Notion of the black box of the jury is central to preventing tyrannical government intervention in Americans’ rights to decide their own affairs.