"The art of advocacy is to convince a court that what they're doing is not a breach of precedent." - ARM

Civil Procedure Outline - Arthur Miller - Fall 2008

- **The Life of a Trial**
  - Jurisdiction
    - 7 questions
  - Choice of Law
  - Pre-trial
    - Structure
      - Pleading
      - Joinder
      - Discovery
      - Motions
      - Motions
      - Misc.
    - NB: Not always linear, but this allows a rough conception
  - Trial
  - Post trial
  - Appeal
  - Former adjudication

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JURISDICTION

I. 7 Questions (*** = Constitutional, ###= rule based)

1. ***What Court Has Subject Matter Jurisdiction?
2. ***Of those courts that may have subject matter jurisdiction, which courts will be able to exercise jurisdiction over the defendant or his/her property? (Tickle)
3. ***How do I effectively discharge my obligation to give notice to the defendant and give the defendant an opportunity to defend?
4. ###Has there been proper service of process?
5. ###Does the court have venue?
6. ###If the action is to be commenced in a state court, can it be removed to a federal court?
7. ###At what point do you waive any of the preceding six issues?

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Subject Matter Jurisdiction

II. Subject Matter Jurisdiction

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A. Basic doctrine

1. The party seeking to invoke the jurisdiction of a federal court must make an affirmative showing in the pleading that the case is within the court's subject matter jurisdiction.
2. Parties cannot waive subject matter jurisdiction

B. Diversity of Citizenship + Amount in Controversy

1. **Basic Policy:** 28 USC § 1332
    a) Action → Fed courts IF [*1332(a)*]
        (1) AoC > $75,000 AND
        (2) Dispute is between
            (a) Citizens of different states
            (b) Citizen of state vs. citizen of foreign state
            (c) A + citizens of foreign states
            (d) Foreign state vs. citizen of US state
        (3) NOTE: alien perm. res is citizen of domiciliary state.
    b) Court costs can be imposed if award falls below $75K (ignoring counterclaims)[*1332(b)*]
    c) Corporation → 2 citizenships (incorporation + principal place of business) [*1332(c)*, *White v. Halstead*]
        (1) Muscle test: lots of factories
        (2) Nerve Center Test: massive headquarters
        (3) Totality of the Circumstances Test: don't know which is better, case-by-case basis
    d) Legal rep of Decedent/infant/incompetent → D/I/I's place of citizenship [*1332(c)*]
    e) **1332d is the crazy-ass class action stuff**.
2. **Joinder/Trickery:**
    a) CAN'T USE JOINDER TO GET INTO FED COURT! [28 USC 1359;
    b) Can't assign corp. interests to American to get international litigation into Federal Court. [*Kramer v. Caribbean Mills*]
    c) Can't sue non-parties to create/destroy diversity [*Rose v. Giamatti*]
3. **Mass disasters** → Fed courts (multi-party, multi-forum litigation) [28 USC § 1369]
    a) 3 ways → federal
        (1) D resides in a state + "substantial part" of accident in another state
            (a) Holds even if D is res. In accident state
        (2) Any 2 Ds diverse
        (3) Substantial part of accident took part in diff states
    b) Exceptions → state
        (1) Substantial majority of Ps are non-diverse w/ "primary" Ds
        (2) Claims asserted governed "primarily" by laws of that state
4. Amount in Controversy Issues

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a) Aggregation of claims: allowed "to enforce a single title or right" [*Troy Bank v. Whitehead*]

(1) Test: if one P didn't collect, another's share would increase [*Durant v. Servicemaster*]

(2) 1P/1D→ aggregate even if claims are otherwise unrelated

(3) Many P/1D → aggregate if "single title or right"

(4)

b) In injunctive relief, one of three options [*McArty v. Amoco Pipeline*]

(1) Value to plaintiff

(2) Value to party seeking federal J

(3) "either viewpoint rule": pecuniary result to either party

5. Judicially created exception:

6. Cases!

a) *Strawbridge v. Curtiss* (SCOTUS, 1806, Marshall): There must be complete diversity.

b) Aliens

(1) *Mas v. Perry* (5th Circ., 1974): Mas was a French citizen whose wife was from MS, which is where the two were married. As LSU grad students, they got into a dispute with their LA landlord. Court ruled for diversity, given that she was a citizen of Mississippi and he of France.

(a) <u>"For diversity purposes, citizenship means domicile."</u>

(b) Judicial Improvements and Access to Justice Act of 1988 noted that a permanent resident alien → citizen of the state where s/he is domiciled.

(2) *Singh v. Daimler-Benz* (3rd Circ, 1993): Diversity exists in a suit between two aliens, one domiciled in Virginia and one elsewhere.

(3) *Saadeh v. Farouki* (DC Circ, 1997): Since Congress intended to limit diversity in the 1988 statute, it does not exist in lawsuits between aliens.

(a) Conflicts w/ Singh v. Daimler-Benz

(4) *Ruhrgas AG v. Marathon Oil Co* (SCOTUS, 1999): aliens on both sides of the lawsuit rendered diversity incomplete.

(5) *Intec v. Engle* (7th Circ., 2006): Permanent resident aliens have dual citizenship, both state and foreign. Sometimes this will defeat and sometimes support diversity jurisdiction.

c) Young Folks

(1) *Palazzo v. Corio* (2nd Circuit, 2000): Despite residing in Pennsylvania at the start of a lawsuit, a plaintiff left most of his stuff in New York (mail, job, school, income tax), but lived with his grandparents in Pennsylvania where he registered a car and had his driver's license. Court ruled that he was a resident of New York.

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(2) *ConnectU LLC v. Zuckerberg* (D.Mass 2007): Court ruled that Mark Zuckerberg was domiciled in New York, where his parents lived and where he had a permanent address, and not California, where his company was incorporated, and where he was living/working with the intent to return to college.

d) Corporations

(1) *White v. Halstead Industries* (E.Dist.Ark, 1990): Three tests for where a corporation has its principal place of business:

(a) "Nerve center": "the locus of corporate decision-making authority and overall control"

(b) "corporate activities": where does it produce value (i.e. goods or services)?

(c) "total activity": combine the above two tests in a "realistic, flexible, nonformalistic" way.

(2) *United Steelworkers of America v. R.H. Bouligny* (SCOTUS, 1965): Unincorporated associations (e.g. partnerships, labor unions, charitable orgs) aren't treated as 'citizens' as corporations are, but rather the individual citizenship of the members is considered.

e) Stateless People

(1) *Blair Holdings v. Rubinstein* (SDNY, 1955): Stateless people don't destroy diversity.

f) AOC

(1) *St. Paul Mercury Indemnity v. Red Cab* (SCOTUS, 1938): "It must appear <u>to a legal certainty</u> that the claim is really for less than the jurisdictional amount to justify a dismissal."

(2) *AFA Tours v. Whitchurch* (2nd Circuit, 1991): The AOC requirement for federal diversity jurisdiction requires that P make a good faith estimate that the value of the claims. Dismissal for failing to meet that amount is warranted only where it appears to a "<u>legal certainty" that the claim is really for less than the jurisdictional amount</u>.

C. Federal Question Jurisdiction ("Arising Under")

1. 3 Key definitions:

a) **<u>original jurisdiction</u>**: jurisdiction to hear before any other court can <u>review</u> the matter.

b) **<u>concurrent jurisdiction</u>**: Jurisdiction that might be exercised simultaneously by more than one court; litigant chooses where to file.

c) **<u>exclusive jurisdiction</u>**. A court's power to adjudicate an action or class of actions to the exclusion of all other courts

2. Article III, Section 2

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a) The judicial power shall extend to <u>all cases, in Law and Equity, arising under this Constitution</u>, the Laws of the United States, and Treaties made, or which shall be made, under their Authority

b) Also:

(1) Cases affecting Ambassadors, other public Ministers and Consuls;

(2) admiralty and maritime Jurisdiction;

(3) where the U.S. is a party;

(4) controversies between states;

(5) cases between State and Citizens of another State;

(6) between Citizens of different States;

(7) between Citizens of the same State claiming Lands under Grants of different States,

(8) between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

c) NOT:

(1) Alien (other state, country) v. State

(a) 11th Amendment

3. 28 USC § 1331

a) "The <u>district courts</u> shall have <u>original jurisdiction</u> of all civil actions arising under the Constitiution, laws, or treaties of the United States."

b) Concurrent vs. Exclusive jurisdiction

(1) State courts have <u>concurrent jurisdiction</u> over cases within the federal judicial power except when Congress specifically prohibits it (<u>exclusive jurisdiction</u>).

4. 28 USC § 1338

a) District courts have original (and *exclusive) jurisdiction for

(1) *Patents

(2) *Plant variety protection

(3) *Copyrights

(4) Trademarks

b) District courts have original jurisdiction over unfair competition "when joined with a substantial and related claim" under 1338(a).

c) Both sections apply to exclusive rights in mask works (chapter 9, title 17)and exclusive rights in designs (chapter 13, title 17)

5. Other stuff

a) Bankruptcy (Title 11) → Federal. [28 USC § 1335]

(1) "interests of justice" → can abstain

(2) "related to" Tit. 11 but "not arising under" → shall abstain

(3) Decisions to abstain or not are NOT reviewable

(4) District court has exclusive J over all property

b) Commerce and Anti-Trust → exclusive Federal [28 USC §1337]

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c) Civil Rights and Elections → original jurisdiction [28 USC §1343]
(1) "address deprivation of any right privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."
d) US as plaintiff → original federal jurisdiction [28 USC §1345]
e) US as defendant → Federal jurisdiction [28 USC § 1346]
(1) Original Jurisdiction
(a) Wrongfully collected internal revenue tax
(b) Non-tort founded on constitution, act of congress, regulation of executive department, contract with any of the service branches
(2) Exclusive Jurisdiction
(a) Claim against US for government employee acting within the scope of employment
(3) No Jurisdiction
(a) Pension claim

6. Private Rights of Action
a) Definition: a suit by one private party against another for violation of a statute; statutes can create such rights expressly or by implication.
b) Four Part Test for implied private right of action [*Cort v. Ash*]
(1) P must be "one of the class for whose *especial* benefit the statute was enacted"
(2) Indication of legislative intent to create/deny Private right of action?
(a) Key inquiry!
(3) Consistent with the underlying principles of the legislative scheme?
(4) Is the cause of action traditionally relegated to state law?
c) PRAs exist under the Constitution
(1) *Bivens v. Six Unknown Named Agents* (SCOTUS, 1971): 4th amendment provides cause of action for damages resulting from unreasonable search/seizure.

7. Cases!
a) What does "arising under" mean?
(1) *Osborn v. Bank of the United States* (SCOTUS, 1824, Marshall): Federal Courts have jurisdiction over cases involving the Bank of the United States, because the bank was created by Federal Statute and Conress granted Federal jurisdiction to all cases where the bank was a party. Even if a claim arises under state law, the statute creating the bank was the ***original ingredient*** of the claim, thereby justifying federal jurisdiction.

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(2) *Louisville & Nashville R. Co. v. Mottley* (SCOTUS, 1908, Moody): There was no federal question jurisdiction where a breach of contract claim was brought against a railroad that breached on account of a federal law forbidding free railway passes. Alleging a defense based on a Federal law or the constitution is not enough for federal question jurisdiction.

(3) *American Well-Works Co. v. Layne & Bowler Co. (SCOTUS, 1916 ,O.W. Holmes)*: State courts had jurisdiction over plaintiffs claim that a business competitor had slandered the plaintiff, alleging that it did not own the patent to a particularly profitable pump. Since the wrong was slander – and the patent, a federal question, was not at issue – state courts had jurisdiction. ***Creation Test.***

(4) *Smith v. Kansas City Title and Trust* (SCOTUS, 1921): MO law bans investment in illegally issued securities. D invested in Federal securities; P argued act was unconstitutional. Federal Question, b/c right to relief depends on interpretation of Constitution/Federal Laws, even though state cause of action.

(a) Holmes Dissent: "the scope of [D's] duty depends on the charger of their corporation and other laws of Missouri."

(5) *Moore v. Chesapeake & OH Railway* (SCOTUS, 1934): State law invalidated contributory negligence, if D violated federal statute. No Federal Question, no arising under.

(a) Unclear if this reverses Smith, or if *Mottley* is on point here.

(6) *Skelly Oil Co. v. Phillips Petroleum Co.* (SCOTUS, 1950): Instead of suing for breach of contract Skelly sued in federal court under the Declaratory Judgment Act for a declaration that contracts hadn't been terminated. SCOTUS ruled that there was no jurisdiction merely because "artful pleading" brought it into Federal court.

(7) *T.B. Harms v. Eliscu* (2nd Circ.,1964, Friendly): Member of songwriting team may or may not have assigned copyright rights to P. No Federal Question Jurisdiction, b/c the claim doesn't "arise under" copyright law, but contract law.

(a) Basically: no need to interpret the Copyright Act, so no Federal Question Jurisdiction.

b) What does "laws or treaties of the United States" mean?

(1) *Merrell Dow v. Thompson* (SCOTUS, 1986, Stevens): Ps allege birth defects as a result of ingesting D's drug pregnancy. 5 of 6 counts were based on state law, but one count alleged mislabeling under the Federal

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Food, Drug, and Cosmetic Act (FDCA). No Federal question, b/c not a federal cause of action. No implied right of action… just because.

(2) *Grable v. Darue* (SCOTUS, 2005, Souter): To satisfy federal tax delinquency the IRS seized P's MI property. P did not exercise its rights to redeem the property under 26 USC §6337(b)(1), so USG sold it to D. Five years later P filed an action in state court to recover the property. Federal question, b/c of interest in interpreting tax law, and – though it's a state title claim – those claims bearing on fed law are rare enough that the precedent won't hurt.

(3) *Empire Healthchoice v. McVeigh* (SCOTUS, 2006, Ginsberg): POTUS contracts w/ P to provide healthcare for D, who is negligently killed. Medical costs bankrupt D so P can't recover, but then D wins suit. Statute authorizing healthcare is silent; K btw. POTUS and P says it should take reasonable steps. No Federal Question, b/c Congress conferred jurisdiction over suits involving benefits, but not carrier reimbursement claims.

(a) Breyer dissent: But it's a Federal K → Fed common law.

D. Supplemental Jurisdiction

1. Definitions

a) Supplemental Jurisdiction: P appends a claim lacking an independent basis for federal jurisdiction to complaint where such a basis exists.

b) Ancillary Jurisdiction: In an action w/ Federal jurisdiction a claim that couldn't be brought is injected by counterclaim, cross-claim, or third party complaint.

2. Key Question: How far does § 1367 extend out towards Article III?

3. 28 USC § 1367

a) In action where Federal courts have original jurisdiction, they have supplemental jurisdiction on all claims that are part of the same "**case or controversy under Article III**."

b) diversity [§ 1332] → NO Supplemental IFF [*Kroger* operationalized]

(1) if ORIGINAL PLAINTIFF brings claim under:

(a) Rule 14 (Third Party Practice)

(b) Rule 19 (Compulsory Joinder of Parties)

(c) Rule 20 (Permissive Joinder of Parties)

(d) Rule 24 (Intervention)

(2) AND, other requirements of §1332 aren't satisfied

(a) Textually: both AoC and Diversity

(b) In practice: Really, just diversity [*Allapattah, Sunkist*]

c) District courts may decline to exercise supplemental J IF

(1) Novel/complex issue of state law

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(2) Claim "predominates" over the initial claim that serves as basis for SMJ

(3) District court has dismissed all claims over which it has J

(4) "exceptional circumstances" with "other compelling reasons"

d) Supplemental claim tolls while waiting for federal judge to rule, and for 30 days after dismissal.

4. Cases!

a) *Hurn v. Oursler* (SCOTUS, 1933): P sued for copyright infringement (federal) and unfair competition (state). Federal claim was rejected on the merits, but the court still had jurisdiction to decide the state claim.

b) *United Mine Workers v. Gibbs* (SCOTUS, 1966): D was hired as a mine superintendant/coal hauler by a company that had just fired 100 UMW workers. UMW's local violently prevented the opening of the mine. D lost his job, sued under TN common law and Congress' Labor Relations Act; trial court set aside damages for second claim. Yes pendant jurisdiction.

(1) Brennan: "We cannot confidently say, however, that the federal issues were so remote or played such a minor role at the trial that in effect the state claim only was tried."

(2) **Common nucleus of operative fact.**

c) *Aldinger v. Howard* (SCOTUS, 1976): P sued two county employees under civil rights act, but couldn't get county except on state law claim; P argued CNOF. No pendant J, can't join "entirely different defendant" on a claim "over which there is no independent basis of federal jurisdiction"

d) *Owen Equipment v. Kroger* (SCOTUS, 1978): P sued power company, who brought in D (14a), then won on summary judgment, destroying diversity. No more SMJ; analysis must extend beyond *Gibbs*.

(1) Becomes 1367(b)

e) *Finley v. US* (SCOTUS, 1989, Scalia): Federal claim, combined w/ state-law claim against non-diverse D. Although pendant *claim* J is OK, pendant *party* claim is not, per *Aldinger*.

(1) Jurisdiction created by two things

(a) Const→ courts capacity to take it

(b) Act of congress must supply it.

(2) NOT GOOD LAW! Overturned by §1367

f) *Exxon v. Allapattah* (SCOTUS, 2005, Kennedy): If 1 P meets AoC, 1367 authorizes supplemental jurisdiction over related claims.

g) Executive Software N. Am. v. United States Dist. Court (9th Circuit, 1994): District court erred in remanding pendant state claims without relying on 1367.

E. Removal Jurisdiction

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1. **Basic Policy:** Feds have original jurisdiction + action is brought in state court → D's can remove to [28 USC 1441(a)]
    a) Federal question claim + "separate and independent" non-removable claim → [28 USC 1441(c)]
        (1) Feds can try the whole thing
        (2) Feds can remand state-issues
            (a) *Borough of West Mifflin*: state claim must be separate and independent.
    b) Foreign state sued in state court → may remove to Fed, where there shall not be a jury.
    c) **Mass disaster**: if claim could have been brought in Fed ct. under 1369 → removable
        (1) BUT: remand for damages determination, except "convenience of parties…" or "interests of justice."
    d) Fed court can hear claims ordinarily barred in the state court.
2. Federal Officers [28 USC § 1442]
    a) Federal official sued for "act under color" of her office → removable
3. Civil Rights claim → removable [28 USC 1443]
4. NON-REMOVABLE! [28 USC §1445]
    a) Action against railroad arising under Federal Employer's Liability Act (FELA)
        (1) **BEWARE OF THIS EXCEPTION!!!!**
    b) Workman's comp
    c) Violence Against Women Act §40302
    d) Plaintiff cannot remove b/c of counterclaim [*Shamrock Oil & Gas*]
    e) Third parties cannot remove [*First National Bank of Pulaski*, 6th Circ.]
5. Procedure for removal [1446]
    a) Ds file "short and plain" statement of grounds + all paperwork w/ district court
        (1) Must be filed within 30 days of service of process/amended, newly removable motion
    b) D's file removal notice w/ adverse parties and state court "promptly" after a.
    c) Any defect → 30 days to file motion for remand
6. P tries to destroy SMJ through joinder → [28 USC § 1447]
    a) Deny joinder
    b) Permit joinder + remand
7. Class Action: [28 USC 1453]
    a) May be removed by any defendant w/o consent of others
    b) Remand orders are reviewable IF appeal to Circuit w/in 7 days.
        (1) Appeals court must render review w/in 60 days
        (2) Deadline for review can be extended by:
            (a) Agreement of all parties

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(b) Interests of justice

c) Non-Removable class Actions

(1) Securities

(2) Internal corporate governance

F. Challenging SMJ

1. Direct Attack

a) Rule 12(b)1: motion to dismiss for lack of SMJ

b) Rule 12(h)3: Court MUST dismiss if it finds lack of SMJ

c) PJ v. SMJ

(1) *Ruhrgas v. Marathon* (SCOTUS, 1999): D removes. District court dismisses for lack of PJ before considering whether it has SMJ. B/c both are constitutionally required, no reason why one must be decided first.

2. Collateral Attack (against judgement enforcing diff. outcome)

a) Judgment in contested action is "beyond collateral attack" UNLESS

(1) No justifiable interests of reliance

(2) One of three:

(a) SMJ was so silly that entertaining the action "was a manifest abuse of authority."

(b) Judgment "would substantially infringe" on other tribunal's authority

(c) Tribunal lacked capability to make informed determination of jurisdiction

b) Default judgment → collateral attack allowed on:

(1) SMJ

(2) PJ

(3) Notice.

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Personal Jurisdiction

III. Personal Jurisdiction (Jurisdiction of Persons/Property)

A. Basic Doctrine

1. Traditional Basis

2. Expanding Personal Jurisdiction

3. *Shoe* and Progeny

4. General Jurisdiction and Technology

5. Jurisdiction over Property

6. Jurisdiction by Waiver/Consent

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Cause of action	**Systematic and continuous contacts**	**Isoladed and sporadic contacts**
In state	Easy, yes J (*Shoe*)	➔ Minimum contacts analysis (WWVW)
Out of state	1. Long arm? 2. General J analysis ('pervasive, systematic, continuous')	No J (but you've run minimum contacts analysis)

B. Traditional Basis of Jurisdiction over Persons

1. *Pennoyer v. Neff* (SCOTUS, 1877)

a) Mitchell sues Neff for unpaid lawyers fees, even though Neff isn't anywhere in the state. Notice is by publication. Neff doesn't show, and Mitchell wins by default, to be paid by proceeds from an auction of Neff's land, which Mitchell buys, then sells to Pennoyer. Neff returns to the state to find Mitchell on his land.

(1) SCOTUS rules that the initial suit was invalid for lack of personal jurisdiction b/c there was no in-state service. Proceeding *in rem* and then seizing the property would have allowed for service by publication

b) RULE

(1) In absence of a waiver, physical presence in the state is required for jurisdiction

(2) Property to get jurisdiction must be attached at outset, which would allow

2. 14th Amendment

a) Forbids judgments without due process, which sets limits on where a lawsuit can be brought.

b) Post facts of Pennoyer, but pre-decision.

3. *Blackmer v. U.S.* (SCOTUS, 1932)

a) Blackmer had no right to challenge contempt judgment based on failure to answer a federal-statute-authorized subpoena, even though he was in France.

4. *Adam v. Saenger* (SCOTUS, 1938)

a) If you sue in a state court but have no other contacts with it, you're submitting yourself to its jurisdiction for cross-action or countersuit.

C. Expanding Jurisdiction over Persons

1. *Hess v. Pawloski* (SCOTUS, 1927)

a) Mass statute implicitly appointing motor vehicle registrar as agent for service of process by virtue of driving on a Mass road is consistent with due process rights.

(1) Doesn't overrule *Pennoyer*, b/c there's technically consent to in-state process.

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D. *Shoe* and Progeny (Jurisdiction over Persons)

1. Minimum Contacts = Fair Play+ Substantial Justice

a) *McDonald v. Mabee* (SCOTUS, 1917, O.W. Holmes): **fair play/substantial justice**

(1) Domiciliary of TX left, never to return, but his family was at his old house. Notice by publication was insufficient to uphold a default judgment.

(2) "To dispense with personal service, the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."

(3) "And in states bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."

b) *Milliken v. Meyer* (SCOTUS, 1940): **traditional notions of fair play and substantial justice**

(1) Milliken sued Meyer, a Wyoming resident, in Wyoming state court, but service was effected in Colorado. Meyer tried to collaterally attack judgment in Colorado, but SCOTUS upheld the judgment under the full faith and credit clause.

(2) reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard = "traditional notions of fair play and substantial justice"

c) *International Shoe Co. v. Washington* (SCOTUS, 1945, Harlan Stone, Black concur)

(1) **Minimum contacts = fair play and substantial justice**

(2) Company with no offices in Washington, no contracts there, no merchandise there, and makes no deliveries of goods in intrastate commerce but employed thirteen salesmen whose principle activities were in the state, owed money for workers comp.

(3) Hold: Service of process on a salesman there was consistent with due process.

(4) Test: "**enjoy the benefits and protections of the laws of that state**"; "systematic and continuous contacts."

d) Gray

e) *Mcgee v. International Life Ins. Co* (SCOTUS, 1957)

(1) Only contact with CA was this one life insurance policy, where business was conducted by mail. CA court's assertion of jurisdiction

didn't violate due process b/c "**based on a contract which had substantial connection** with" CA.

f) *Hanson v. Denckla* (SCOTUS, 1958)

(1) No jurisdiction over DE trust based *only* on the trustee moved to FL, b/c trust did not "**purposefully avail itself of the privileges and benefits of conducting business**" in FL.

(2) Distinct from McGee b/c CA was involved at genesis of K; FL wasn't here.

g) *Kulko v. Superior Court* (SCOTUS, 1978)

(1) No personal jurisdiction in CA over NY father who bought plane ticket to send his daughter to CA to live with her mom, b/c he had not "'**purposefully availed himself**' of the '**benefits and protections**' of California's laws."

h) *World-Wide Volkswagen Corp. v. Woodson* (SCOTUS, 1980, White, Brennan Dissent):

(1) Car built by two NY corporations bought in NY, driving to AZ, bursts into flames when hit from behind in OK. Doesn't meet the minimum contacts.

(2) Brennan dissent: decision ignores OK interest in the case. Alt test: minimum contacts among the parties, the contested transaction and the forum state.

i) *Keeton v. Hustler Magazine* (SCOTUS, 1984)

(1) NYer Keeton brought libel suit against OHer Hustler in NH, where it wasn't time-barred. Consistent with due process b/c 10K magazines sold monthly in NH and long-arm went all the way to 14 amdt.

j) *Burger King v. Rudzewicz* (SCOTUS, 1985, Brennan, Stevens/White dissent)

(1) Most of the relevant action of a BK franchise took place in MI, including the sale of the franchise, the purchase of the food, the performance of the contract, including services due from BK, the management consulting and supervision. Breach action taken in Florida, where BK headquarters was.

(2) Brennan

(a) Affirm "minimum contacts"

(b) "because Rudzewicz established a **substantial and continuing relationship** with BK's Miami headquarters, received fair notice from the contract documents and the course of dealing that he might be subject to suit in Florida, and has failed to demonstrate how jurisdiction in that forum would otherwise be **fundamentally unfair**, we conclude that the District Court's exercise of jurisdiction did not offend due process."

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(c) "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed."

(3) Stevens/White

(a) "substantial element of unfairness" and therefore no PJ

k) *Asahi Metal Industry v. Superior Court* (SCOTUS, 1987, O'Connor)

(1) Motorcycle tire made by Cheng Shin blows out. Cheng Shin cross complains (Rule 20a2?) to indemnify against Asahi, which sold valves under a Taiwanese contract.

(2) O'Connor

(a) **NEW TEST**: minimum-contacts-plus

(i) Min. Cont. must come about by an action of the defendant purposefully directed toward the forum State

(b) 'Reasonableness' Test:

(i) Consider several factors, including:

(a) Burden on defendant

(b) Interests of forum state

(c) Plaintiff's interest in obtaining relief

(ii) International Reasonableness Test

(a) Procedural and substantive interests of other nations

(b) Federal interest in foreign relations

(3) Brennan

(a) Mere 'stream of commerce' should be enough; disagrees with stream of commerce plus

(b) Thinks PJ should fail under 'fair play and substantial justice'

(4) Stevens

(a) Thinks that stream of commerce is met → minimum contacts

(b) Agrees that PJ should fail under 'fair play and substantial justice'

E. Long-Arms

1. Question: can a state court hear a claim involving a non-resident defendant?

a) Does the 14th amendment ('due process') permit it?

(1) → *Shoe* and progeny analysis!

b) Does the state long arm reach that far?

(1) New York - Jurisdiction if:

(a) Transacts w/in NY or contracts to supply goods/service to nY

(b) Commits tort w/in state

(i) EXCEPT DEFAMATION!!!

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(c) Commits tort outside state, that causes injury w/in state
(d) Owns, uses or possesses property in state
(e) Engages persistent contact w/ state

(2) North Carolina
(a) Local presence
(b) Statute
(c) Local act or omission → wrongful death
(d) Local injury/foreign act
(e) Local services, goods or Ks
(f) Local property
(g) Local foreclosure
(h) Director/officer of NC corp.
(i) Taxes
(j) Insurance
(k) Personal rep of NCer
(l) Married to NCer

(3) Rhode Island – to the 14th amdmt.
(4) California – to the 14th amdmt.

2. Federal Long Arm [Rule 4K2]
a) Federal question jurisdiction + summons → PJ IF
(1) D isn't subject to PJ in state's courts of general jurisdiction
(2) Consistent with due process

b) *Omni Capital v. Wolff* (SCOTUS, 1987): Ds, a British corp and British citizen were being impleaded in Louisiana suit. They weren't present in the state or within the long-arm. No personal jurisdiction, b/c legislatures know best.
(1) Result: Congress passed the federal long arm.

F. General Jurisdiction
1. Continuous and systematic association with a form state that makes it reasonable that the defendant appear in unrelated suits
a) No traditional basis for personal jurisdiction
b) No long arm
c) Is there general?

2. *Perkins v. Benguet Consolidated Mining* (SCOTUS, 1952): Philippine corporation relocates to OH during WWII. Tort cause of action before moving. OH courts can hear suit, given that the business is operating out of Ohio.

3. *Helicopteros v. Hall* (SCOTUS, 1984, Blackmun): D's helicopter crashed in Peru, killing four U.S. citizens, among others. Their decedents sued for wrongful death in Texas State Court. D's contacts included contract w/ TX corp, purchasing choppers from TX, pilots training in TX, and payments to D's NY bank account from a TX account. No General Jurisdiction, insufficient contacts.

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4. *Pebble Beach v. Caddy* (9th Circuit, 2006): D b&b overlooking the pebbly beaches in the south of England and ran a non-interactive website at www.pebblebeach-uk.com. CA's golf course sued. Insufficient contacts for General J, because the website wasn't directed at the forum state.

5. *Zippo Manufacturing v. Zippo.com* (W.D.PA, 1997): active websites → PJ; passive websites → insufficient alone for PJ.

G. In Rem Jurisdiction

1. Gradations of In Rem Jurisdiciton

a) *Pure in rem:* seeks to declaim title to the world

b) *In rem:* seeking to establish interest in the land against someone

c) *Quasi in rem:* 'jurisdiction by committee'; I've got some kind of claim against you that doesn't involve the land but I'm gonna make believe that your land is you and we're going to treat the land as the personification of you for jurisdictional purposes

2. *Shaffer v. Heitner* (SCOTUS, 1977, Marshall): P, a shareholder, alleged that Ds, executives, had violated their duties to Greyhound by causing it to engage in actions that resulted in substantial damages. Grayhound was incorporated in Delaware, with a primary place of business in Phoenix. Place of wrong was Oregon and P was a nonresident of Delaware.

a) Hold 1: In rem proceedings follow *Shoe* and progeny.

b) Hold 2: D's owning stock in DE corp, but no other contacts, fails the *Shoe* test.

(1) Virtually eliminates *quasi in rem*.

3. *Rush v. Savchuk* (SCOTUS, 1980): Insurance obligation can't be attached for quasi-in-rem jurisdiction. Contacts between insurer and forum don't establish the jurisdiction over the insured.

H. Physical Presence Jurisdiction

1. Still good, after all these years.

2. *Burnham v. Superior Court* (SCOTUS, 1990): P and Francie Burnham decided to get divorced and Mrs. Burnham moved to California, where she sued P for divorce. P came into the state for brief business and to see his children, whereupon she served him with process. He challenged w/ special appearance.

a) Scalia: jurisdiction b/c it's traditional.

b) Brennan: nope, still subject to *Shoe* test, but it easily passes, b/c you availed yourself of forum state's laws.

I. Consent Jurisdiction

1. By failing to challenge personal jurisdiction under the rule 12 motion, it is waived, thereby implicitly consenting to personal jurisdiction where the plaintiff filed. (Rule 12h1).

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2. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* (SCOTUS, 1982, White): D, incorporated in Delaware but doing business only in Guinea sued a number of American insurance companies in PA federal court. but the companies contested jurisdiction. PJ can be waived, but the insurers "did not have the option of blocking the reasonable attempt of CBG to meet its burden of proof. [They] surely diid not have this option once the court had overruled [their] objections."

3. *Carnival Cruise Lines v. Shute* (SCOUTS, 1991): Forum selection clause was enforceable for consent jurisdiction btw. Cruise line and former passangers.

J. Challenging Personal Jurisdiction

1. Directly

a) D makes a special appearance purely to challenge jurisdiction.

(1) Trial courts have discretion in procedures at jurisdiction hearings [*Data Disc*]

2. Collateral Attack

a) Attack jurisdiction at proceeding to enforce judgment.

b) *Baldwin v. Iowa State* (SCOTUS, 1931): Once jurisdiction has been adjudicated in one forum, it cannot be attacked collaterally in another.

****

Notice/Opportunity/Process

IV. Notice and Opportunity to Be Heard? [CONSTITUTION BASED]

A. **Basic Policy:** Reasonable notice must be given.

B. Constitutional – Due process

C. *Mullane v. Central Hanover Bank* (SCOTUS, 1950, Jackson): Notice of the impending judicial action was publication in a local newspaper for four weeks, as specified by the New York Banking Law was insufficient to provide notice.

1. Standard: "under the circumstances … reasonably calculated … means at hand."

D. *Fuentes v. Shevin* (SCOTUS, 1972): P challenged UCC, which allowed for the pre-trial seizure of a person's goods or chattels under a writ of replevin on 14th amendment grounds. The Court held that the statutes acted as deprivations of plaintiff's property without due process.

1. Exceptions:

a) The seizure is necessary for an important public or government interest.

b) There is a need for prompt action.

c) The seizure is conducted by an agent of the government.

E. *Connecticut v. Doehr* (SCOTUS, 1991): violation of due process to attach property without prior notice or a hearing, except in extraordinary circumstances.

V. Service of Process [FEDERAL RULE BASED]

A. Rule 4 and Its Mechanics

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1. Contents of Summons (Rule 4a)
    a) Summons must 1) name the court/parties; 2) be directed to the D; 3)give contact info for P's attorney; 4) say when D must appear to defend; 5)notify that failure to appear → default judgment; 6)be signed by the clerk and sealed by the court.
2. How serve Summons? (Rule 4c)
    a) Include copy of complaint
    b) Served by someone who is at least 18 and not a party to the complaint
    c) P may request a marshall
3. How waive summons? (Rule 4d1, 4d2)
    a) P notifies action and requests waiver in:
        (1) Writing addressed to the D
        (2) Naming the court
        (3) Including the waiver form
        (4) Naming 30/60 day response time (in US/out of US)
        (5) Send it by first-class mail or other reliable means
    b) If D declines → costs of service, litigation to secure those costs are Ds
4. What are the consequences of waiving? (Rule 4d3-5)
    a) D has 60/90 days to respond tolled from waiver request
    b) DOES NOT WAIVE objection to PJ or venue
5. How do you prove service? (Rule 4L)
    a) Inside US → server's affidavit
    b) Outside US → as treaty says OR "other evidence satisfying the court"
    c) Forgot to prove?
        (1) No worries, it can be amended
6. *In Rem* Service (Rule 4n2)
    a) No PJ after "reasonable efforts to serve a summons? → seize assets under circumstances and in manner provided by state law
7. How serve process in the US? (Rule 4e)
    a) Follow state law for service
    b) Deliver to person personally
    c) Leave copy at dwelling w/ "someone of suitable age and discretion who resides there"
    d) Deliver copy to agent authorized by statute
8. How serve Process abroad → "reasonably calculated to give notice" (Rule 4f)
    a) Can't violate other country's law
9. Minor or incompetent → state law (Rule 4g)
10. Corporation/partnership → like a person OR to corporate officer (4h)
11. US Govt/person/agency acting in official capacity (Rule 4i)
    a) Copy → US attorney, attorney general, regulatory agency/officer (if applicable)

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b) Time can be extended "reasonably" to cure failure to serve under these rules

12. Foreign state → 28 USC 1608 (Rule 4j1)
13. State or Local Govt → CEO (governor) + follow state law (Rule 4j2)

B. Principles and Cases

1. No Trickery Allowed
   a) *Tickle v. Barton*
   b) *Wyman v. Newhouse*: Service invalid when lured to FL w/ promise of final tryst.
2. Voluntarily in State
   a) Allowed if you're stuck in jail
   b) *State ex rel Sivnitsky v. Duffield*: Man in jail on criminal charge; served in the clink. Wouldn't have been allowed if he'd posted bail and come back voluntarily, b/c we don't want to incentivize skipping town.
3. Agent can be established contractually; you don't need to know her
   a) *National Equipment v. Szukhent* (SCOTUS, 1962, Stewart): Flo Weinberg! K established P's sister as agent for service of process. She was 'served' then immediately sent notice. <u>Proper</u>.

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<u>Venue/Transfer/Forum Non</u>

VI. Venue [RESIDENCY BASED]

A. Does the court have venue under 1391?
   1. Yes → transfer or dismiss for *forum non* reasons? (1404)
   2. No → move to where it does have venue

B. Venue in cases "founded only on Diversity of Citizenship" (1391a)
   1. All Ds in same state → where any D resides
   2. District in which substantial part of events giving rise to claim occurred
   3. No district in which action can be brought? → District where any D is subject to PJ

C. NOT "founded solely on diversity of citizenship" (1391b)
   1. Same as 1+2 above
   2. No D in which action can be brought → where any D <u>may be found</u>
      a) Probably not different from 3, above.

D. Odd actors
   1. Corporations → reside where subject to PJ
   2. Aliens → sued anywhere
   3. USG agent/agency:
      a) Where D resides
      b) Substantial part of events giving rise to claim
      c) No real property in action → where P resides
   4. Foreign State:

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a) Substantial part of the events or omissions

b) 1605b claim → district where vessel or cargo is situated

c) 1603b against agency or instrumentality → any district where it is doing/is licensed to do business

d) DC district court, if against state or political subdivision

5. **Mass Disaster:** where D resides OR where "substantial part" of accident took place

VII. Transfer [28 USC 1404]

A. THIS IS A PERSONAL JURISDICTION QUESTION TOO!!!!!!

B. Action → where it might have been brought:

1. For the convenience of parties and witnesses
2. In the interests of justice

C. Case:

1. *Hoffman v. Blaski* (SCOTUS, 1960): D, Illinois residents, brought a patent infringement action in the NDTX against a P, a Texas corporation. P tried to transfer to NDIL b/c more favorable interpretation in that circuit. No initial venue → no transfer.
2. *ADD JOHN DEERE!*

VIII. *Forum Non Conveniens*

A. Denies jurisdiction because it's being used to "vex", "harass" or "oppress" an opponent. [*Gulf Oil v. Gilbert*]

B. Heavy presumption for Plaintiff's choice

C. Private interests [*Gulf Oil*]

1. Access to sources of proof
2. Availability to compel unwilling attendance
3. Cost of obtaining attendance of willing witnesses
4. "all other practical problems that make trial of a case easy, expeditious and inexpensive"

D. Public Concerns [*Gulf Oil*]

1. Litigation "piled up in congested centers"?
2. Jury duty for ppl. w/o relation to the litigation
3. Forum applying home-state law?

E. Cases!

1. *Piper Aircraft v. Reyno* (SCOTUS, 1981, Marshall): A Pennsylvania-manufactured aircraft (with propeller from Ohio) crashed in Scotland. Decedents were Scottish, as was the charter service, air traffic controller, and the maintenance crew. The wreckage was in England. Forum non, accident, the evidence, the Ps are all abroad.
2. *Wiwa v. Royal Dutch Petrolium* (2nd Circ. 2000): Nigerian emigrés allowed to proceed w/ human rights claims arising from suit in Nigeria, b/c plaintiff given wide discretion.

IX. Waiver

A. Federal Rule 12

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1. Note: Subject Matter jurisdiction is never waived
    a) *Capron*
2. 12(h)(1)
    a) Following can be waived
        (1) Personal jurisdiction
        (2) Improper venue
        (3) Insufficient process
        (4) Insufficient service
    b) ALL FOUR ARE AUTOMATICALLY WAIVED IF NOT ASSERTED IN PRE-ANSWER MOTION OR IN ANSWER
3. 12(h)(3)
    a) Parties can't waive subject matter jurisdiction
        (1) *Mottley*
4. 12(g)(2)
    a) All rule 12 motions must be combined into a single document; if you assert one, but not the other, you're sunk.
        (1) "If you're going to speak under 12, speak once"
    b) Safety valve; just clarified: if you don't consolidate, you can still make rule 12 motions in your answer

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Choice of Law

X. Ascertaining the Applicable Law

A. **Key Question:** Where state and federal law conflict in federal court, which law is to be applied?

1. Note: only occurs in diversity cases; Federal question J means you're dealing with federal law
2. Which issues are governed by Erie?

B. Black Letter law:

1. 10th Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
2. 28 USC 2072 (Rules of Decision Act)
    a) (a): SCOTUS sets "general rules of practice and procedure and rules of evidence" in Fed. Courts
    b) (b): "Such rules shall not abridge, enlarge or modify any substantive right."

C. Cases!

1. *Erie v. Tompkins* (SCOTUS, 1938, Brandeis): **state law should be applied except in constitutional matters or acts of Congress.**

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a) For 96 years, SCOTUS had been misinterpreting the Rules of Decision Act to allow federal courts to create rules of decision which congress was 'confessedly without power' to enact statutorily.

b) *Swift v. Tyson* allowed forum shopping.

(1) *Black and White Taxicab*: KY corp sues KY rr, but KY state courts won't enforce, so company reincorporates in TN, sues under diversity J and gets Feds to enforce.

c) Courts have been misinterpreting the RDA, and using it to claim powers where Cong. Can't enact a statute.

(1) Brandeis *doesn't cite where in the constitution he's using to justify* – Amdt. 10?

(2) Puts Erie beyond the reach of Congress

d) Historic concept of choice of law in tort says, apply the law at the place of the tort, so PA law applies.

2. *Guaranty Trust v. York* (SCOTUS, 1945, Frankfurter): Doesn't matter whether state law is 'procedural' or substantive' state law must apply. **IF 'outcome determinative' → state**

a) "a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the state"

b) The "outcome of litigation in the federal court should be substantially the same" as in state court.

c) Based on policy NOT constitution: prefer uniformity of courts, even though Art. III and RDA give courts power to prefer fed rules.

3. GUARANTY-PLUS TRILOGY

a) *Ragan v Merchants Transfer* (SCOTUS, 1949): State law, not F.R. CivPro 3, determines tolling of statute of limitations. State law applies.

(1) No way to tell what tiny piece of procedure will be *Erie*-fied!!!

b) *Cohen v. Beneficial Industrial Loan* (SCOTUS, 1949): State law, not F.R. CivPro 23.1, governs need for security-for-expenses bond in shareholder derivative suit.

c) *Wood v. Interstate Realty* (SCOTUS, 1949): Diversity action unavailable if you can't get into state court on the claim. State law applies.

4. *Byrd v. Blue Ridge Electric* (SCOTUS, 1958, Brennan): If there is a federal interest, a three part balancing test applies. **IF 'outcome det.' AND Fed. Interest → balance 3 factors**

a) State policy

b) Distribution of function

c) Probability of outcome differential/forum shopping/inequitable admin of laws

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5. *Hanna v. Plumer* (SCOTUS, 1965, Warren): Once you've got an applicable and valid federal rule of civil procedure, it automatically applies.

a) *Hannah I:* **IF 'outcome det' and Fed practices. v. State issue. → consistent with underlying policies of Erie?**

(1) Underlying policies: prevent forum shopping and inequitable administration of the laws.

(2) Also: service of process differences doesn't abridge/modify/enlarge a substantive right [28 USC 2072 (b)]

(3) Example:

(a) A state with no class actions, but a class action brought in diversity under Rule 23 is OK.

b) Hannah II: **IF Fed rules v. state practice → 3 pt. test → all yes = FED control**

(1) Is federal rule applicable?

(2) Is federal rule constitutional?

(3) Is Federal rule valid exercise of congressional authirty

6. Additional Modifications of Hanna!!!

a) *Walker v. Armco Steel* (SCOTUS, 1980): For Byrd/Hanna to apply, there must be a direct contradiction between the state law and the Federal Rules.

b) *Stewart v. Ricoh* (SCOTUS, 1988, Marshall): Federal statute dealing with procedural matters (i.e. transfer) controls, if in direct conflict with state law. [CHECK THIS!!!]

(1) Basically *Hanna* with a Fed statute, not a federal rule.

(2) Scalia Dissent: issue didn't come within scope of transfer law.

c) *Gasperini v. Center for Humanities* (SCOTUS, 1996, Ginsberg): 7th amendment doesn't limit appellate review of excessive jury decisions. No conflict btw. Constitution and state law. [CHECK THIS!!!]

(1) Outcome affective test?

(2) Balance federal and state concerns?

D. Which State Law Governs?

1. Federal courts sitting in diversity apply:

a) choice of law rules of state where court sits [*Klaxon v. Stentor*]

b) law of transferor court, if a transfer [*Van Dusen v. Barrack*]

2. When applying state law, a federal court should rule as a state court would have ruled [*Mason v. American Emery Wheel Works*]

3. To combine *Erie, Klaxon, and Van Dusen*: "Our principal task, in this diversity of citizenship case, is to determine what the New York Courts would think the California courts would think on an issue about which neither has thought." [*Nolan v. Transocean*, 2nd Circ., 1960, Friendly]

a) NY choice of law rules → apply CA law

b) Removal rules → apply choice of law rules of state court

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c) No CA precedent

E. Federal Common Law

1. Two Categories

a) Areas where Congress has given the courts power to develop substantive law

b) Rule to protect uniquely federal interests.

(1) Three part test [*Clearfield Trust*]

(a) Federal competence to create law in this area?

(i) would Congress be able to adopt a law in such an area?

(b) If A → should state or federal law govern?

(c) If B →, should courts borrow state law or create a new federal rule?

(2) Examples

(a) Admiralty

(b) Foreign Relations

(c) Gap in Federal Statute ('interstices source')

(i) Ex Federal law w/o statute of limitations

F. Reverse-Erie (Federal Law in State Courts)

1. Four ways for State Courts to apply Federal Law (non-exclusive list)

a) Congress creates a right that can be brought in either state or federal court, but is non-removable if the former.

(1) **FELA!!! FELA!!! BEWARE THE FELA EXCEPTION!!!**

b) A federal defense is asserted to a state claim. (*Mottley*)

c) Presence of federal interest or policy

d) Federal law provides precedent

2. State procedural law applies.

a) BUT beware substantive/procedural distinction!

b) *Dice v. Akron* (SCOTUS, 1952, Douglas): FELA action in state court. Though state procedural rules apply, the federal interest in jury trials under the 7th amendment means that the gimmick to keep P from a jury trial is substantive, not procedural → federal law should be applied.

(1) Inverse *Byrd!*

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Pleading and Motions

XI. Pleading and Motion Practice

A. Pleadings and Motions Generally (Rule 7a)

1. 7 Types of Pleadings

a) Complaint

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b) Answer to a complaint
c) Answer to a counterclaim
d) Answer to a crossclaim
e) Third-party complaint
f) Answer to a third party complaint
g) Reply to an answer
(1) Only if court orders

2. Motions
a) How to request a court offer
b) Made in writing unless during a hearing or at trial
c) State:
(1) grounds for seeking the order
(2) relief requested

B. The Complaint
1. Basic Complaint
a) **Basic Rule:** Pleading must contain 3 things: (Rule 8a)
(1) Short and plain statement of the "grounds for the court's jurisdiction"
(2) Short and plain statement of the "claim showing that the pleader is entitled to relief"
(a) 12b6 is move to dismiss for failure to state this claim
(3) Demand for relief sought
b) Cases!
(1) *Dioguardi v. Durning* (2nd Circuit, 1944, Clark): Weird, conclusory statements of fraud are enough to satisfy the claim showing the pleader is entitled to relief.
(2) *Conley v. Gibson* (SCOTUS, 1957): 12b6 dismissal is only appropriate if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."
(3) *Swierkiewicz v. Sorema* (SCOTUS, 2002, Thomas): Pleader need not lay out a prima facie case in the complaint.
(4) *Bell Atlantic v. Twombly* (SCOTUS, 2007): Pleader must show 'plausibility' to survive a 12(b)6.
(5) *Erickson v. Pardust* (SCOTUS, 2007): Pro se plaintiff could put purely conclusory statements into his complaint and survive a 12(b)6.

2. Pleading Special Matters (Rule 9)
a) Absent specific denial, no need to assert
(1) Party's capacity to sue/be sued
(2) Party's authority to sue/be sued in a representative capacity
(3) Legal existence of organized associatins
b) Fraud/Mistake

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(1) Circumstances must be stated "with particularity"

(a) Malice, intent, knowledge may be alleged generally

c) Conditions Precedent

(1) OK to allege generally if stating

(2) Must deny with particularity

d) No need to prove (OK to assert)

(1) legality of official document or act

(2) jurisdiction of foreign court

e) Cases!

(1) 9b [FRAUD] is "not a rigorous standard" (*Denny v. Carey*, EDPA, 1976), but presumably a higher standard than in 8a.

(2) *Tellabs v. Makor* (SCOTUS, 2007, Ginsburg): Congress requires "strong inference of scienter" to plead under the Private Securities Litigation Reform Act (PSLRA).

3. Alternative/Inconsistent Allegations

a) Rule 8d3: No need for pleadings to be consistent.

4. Pleading Damages

a) Special Damages must be pled. (Rule 9g)

b) *Ziervogel v. Royal Packing*: If special damages aren't pled, they can't be raised at trial.

5. Prayer for Relief

a) Rule 54(c):

(1) Default judgment must be exactly what was pleaded

(2) Every other final judgment must grant "relief to which party was entitled"

C. Motions Attacking Complaint and Other Pleadings (Rule 12)

1. Timing

a) Answer (20/60/90 days; summons/waiver request sent/int'l waiver request sent)

b) Counterclaim (20 days)

c) Answer reply (20 days)

d) US, agencies, officers etc. sued in official capacity (60 days after service on US attorney)

e) US officers etc. sued in <u>individual</u> capacity in connection w/ duties (60 days after service on US attorney or D, whichever is later)

f) Rule 12 Motion denied/postponed by court (10 days after ruling)

2. Defenses by motion (The <u>12Bs</u>!!!!!)

1. Lack of SMJ

2. Lack of PJ

3. Improper venue

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4. Insufficient process
5. Insufficient service
6. Failure to state a claim
7. Failure to join a party

3. Motions to Dismiss
   a) 12(c): after close of pleadings, a party can move for judgment on the pleadings
   b) 12(d): Under 12(b)6 or 12(c) + intro of un-plead material → Rule 56.
      (1) Parties can now introduce evidence as if it were a Rule 56 hearing.
4. Answering the Complaint (8b, 8c)
   a) Parties must admit, deny or plead insufficient information in response to each allegation. (Rule 8b)
      (1) If everything is false → general denial
      (2) If some stuff is false → specific denial
      (3) If part of claim is true → partial denial
      (4) Lack of information → effect of denial
      (5) No denial → you've admitted it!
   b) Affirmative defenses (Long list in 8c)
      (1) What if defense isn't listed in 8c?
         (a) Federal Question Jurisdiction → statute
         (b) Diversity Jurisdiction → state practice

D. The Reply (Reminder: reply is a pleading)
   1. See rule 7a.

E. Amending a Pleading (Rule 15)
   1. PLEADINGS, NOT MOTIONS!!!
   2. You can amend ONCE As a matter of course ('free fire zone')
      a) Before responsive pleading
      b) IF responsive pleading not allowed → Within 20 days after serving the pleading to be amended
   3. Otherwise: opposing party's written consent or the court's leave.
      a) "the court should freely give leave when justice so requires"
   4. <u>Relation-Back Doctrine</u>
      a) An amendment is treated as if pleaded in the initial complaint.
         (1) Important if the statute of limitations has passed.
      b) When is it allowed?
         (1) Statute authorizes it
         (2) Claim or defense comes from "conduct transaction or occurrence" in the initial pleading
         (3) 3 part test → changing the party against whom claim is asserted
            (a) Same "conduct, transaction or occurrence"
            (b) w/in 4m time (120 days)

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(i) new party received notice that won't prejudice defense on the merits AND
(ii) knew or should have known that the action would be brought against it.

(4) If US is added as party, time is tolled from process delivery to US attorney

c) Hypo to help think about relation-back

(1) What if we're in a state that doesn't allow relation back after statute of limitations and there's an attempt

(a) Guaranty/Ragan/Walker line: procedure/substance dichotomy
(b) Hanna: there's a federal rule
(c) §2072: a federal rule that "abridges, modifies or enlarges a substantive right" is invalid

F. Deterring Frivolous Pleadings (Rule 11)

1. When presenting a written document to the court, an attorney represents (11b):

a) Not being presented for any <u>improper purpose</u>
b) All legal contentions are <u>warranted by existing law</u>, or non-frivolous argument for changes
c) Factual contentions have (or likely will have) <u>evidentiary support</u>
d) <u>Denials are warranted</u> under the evidence

2. Sanctions for 11b violation

a) "court may impose appropriate sanction"

(1) Can be Mikado-esque
(2) "absent exceptional circumstances" the firm is also held liable
(3) "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."

b) 11b motion MUST

(1) Be made separately
(2) Served under rule 5
(3) NOT be filed if challenged paper is withdrawn/corrected w/in 21 days

c) Court may also impose on its own initiative
d) Does not apply to discovery

3. Cases!

a) *Surowitz v. Hilton Hotels* (SCOTUS, 1966, Black): 'the Irving Brilliant case'. Plaintiff didn't understand the complaint b/c she was Polish and lacked education. Dismissal was inappropriate, b/c it wasn't a sham pleading.

(1) Black: "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion."

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Joinder

XII. Joinder

A. Joinder of Claims (Rule 18)

1. Basically, anything goes.

2. A party asserting a claim may join "as many claims as it has against an opposing party"

3. *MK v. Tenet* (DC Circuit, 2002): Virtually any claims against Tenet by plaintiffs can be joined.

B. Permissive Joinder of Parties (Rule 20, 21)

1. Plaintiffs

a) Same T+O AND common question of law/fact

2. Defendants

a) Relief asserted jointly from same T+O AND common question of law/fact

3. Limitations

a) Courts may issue orders to protect against "embarrassment, delay, expense, or other prejudice"

b) Misjoinder: court may "on just terms" add or drop a party or a claim against a party (Rule 21)

4. This rule allows for mass actions!

C. Compulsory Joinder of Parties (Rule 19)

1. How to Analyze:

a) Question 1: Who should be joined under 19?

b) Question 2: Is there **SMJ, PJ, Venue of party to be joined**?

c) Question 3: IF NOT – whaddya do?

2. SMJ + service of Process + (a or b) below → required joinder

a) Court cannot accord complete relief without the person

b) Party claims an interest +

(1) Disposing may impair/impede ability to protect the interest

(2) Party in the action might incur multiple/inconsistent obligations b/c of the interest

3. Joinder can be accomplished by cour torder

4. Compulsory joinder makes venue improper → must dismiss party

5. Can't join a required party → court decides whether to continue

a) Factors to consider

(1) Will judgment prejudice person or existing parties?

(2) Could prejudice be avoided in the process of trial?

(3) Would a judgment in that person's absence be adequate?

(4) Will P have adequate remedy w/o action?

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6. Pleading must state:
    a) who is unavailable under compulsory joinder
    b) the reasons they aren't joined
7. Case!
    a) *Provident Tradesmen v. Patterson* (SCOTUS, 1968, Harlan): Courts are not required to dismiss if a required party can't be joined. Instead, there is a four part balancing test:
        (1) Interests of:
            (a) Plaintiff
            (b) Defendants
            (c) Absentee
            (d) Public

D. Counterclaims (A sues B, and B says 'back atcha') [Rule 13]
1. Compulsory counterclaim → MUST assert if (13a)
    a) Same transaction and occurrence of opposing party's claim
    b) Does not require adding another party where court lacks jurisdiction
    c) EXCEPTIONS
        (1) Claim was part of other action when pleading was served
        (2) Suit by attachment
2. Permissive counterclaim (13b)
    a) Everything that isn't compulsory
3. Counterclaim generally
    a) May detail any kind of relief
    b) IF matured or acquired after earlier pleading → court MAY permit a supplemental pleading
    c) IF inadvertently omitted → court MAY permit "if justice so requires"

E. Cross Claims (Rule 13g)
1. Against fellow plaintiff or defendant (co-party)
2. MUST arise out of same T+O or involve "property that is the subject matter of the original action"
3. Joinder rules govern the addition of someone as a counter-/cross-claim.

F. Third Party Claims/Impleader [Rule 14]
1. **<u>ALL OF THE RULE 12s APPLY!!!</u>**
2. DEFENDANT can bring in when:
    a) Has claim for liability
    b) w/in 10 days of serving answer
        (1) later requires "court's leave"
3. PLAINTIFF can bring in when:
    a) Shot at by any other party
    b) All the other rules for defendant are satisfied

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4. 3rd party Defendant
    a) May assert <u>all of the Rule 12s</u> against the Impleader
        (1) **<u>MEANS THAT ALL OF THE RULE 12s APPLY!!!!</u>**
    b) Has all the same counter and cross claim requirements
    c) May shoot at all parties (including impleaders of its own)
    d) May be shot AT by plaintiff
5. Cases!
    a) *Too v. Kohls* (SDNY, 2003): Four part test for when court should grant the more-than-ten-day impleader request.
        (1) D did not deliberately delay the filing
        (2) Impleader would not unduly delay the trial
        (3) 3rd party D wouldn't be prejudiced
        (4) Third party complaint states a claim for which relief may be granted

G. Intervention (Rule 24)
1. Intervention of Right → court MUST permit
    a) Right conferred by statute OR
    b) Party's ability to protect interest may be impaired by litigating
2. Permissive Intervention → court MAY permit
    a) In General
        (1) Statute confers conditional right
        (2) Has claim or defense that shares with the main action a common question of law or fact
    b) By Government Officer
        (1) Claim based on statute or executive order administered by officer or agency
        (2) Claim made based on agreement under statute or executive order
    c) Court must consider whether action will be unduly delayed or prejudiced
3. Plead this under RULE 5.

H. Interpleader (Rule 22, 28 USC 1335)
1. Set the thing at issue in front of the court and disclaim legal right to it to avoid being sued.
2. Statutory Interpleader [28 USC 1335]
    a) District courts have original jurisdiction IF
        (1) More than $500
        (2) At least one of the claimants is diverse from another
3. Rule Interpleader [Rule 22]
    a) Plaintiff
        (1) Possible double or multiple liability → join them as defendants and require to interplead EVEN THOUHGH
            (a) Ds claims lack common origin or are adverse/independent

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(b) P thinks it's really hers

b) Defendant

(1) Same as plaintiff but accomplished through cross or counterclaim

4. Case!

a) *Lundeen v. Cordner* (8th Circ., 1966): Wife I and Wife II both claim a life insurance policy. Metropolitan says 'we know we owe somebody, just not who'.

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Class Actions

XIII. Class Actions (Rule 23) → Representative party may sue/be sued as a class

A. SMJ for Class Actions

1. Federal Question

a) You've got it

b) Don't worry

c) You're set.

2. Diversity + AOC → 1332(d) = CAFA FUN!

a) Class action, AoC> $5 mil → federal courts IF

(1) Minimal diversity (any P different from any D, under standard diversity rules)

(2) 2 standard exceptions → state courts

(a) Securities class action

(b) Corporate governance action brought in state of incorporation

b) When may/must Feds decline J?

(1) **Federal court CAN keep it state** "in the interest of justice … looking at the totality of the circumstances" IF

(a) Btw. 33% and 66% of all Ps are non-diverse with D in state where action was filed

(b) Factors to consider

(i) National or interstate interest?

(ii) Whose law governs?

(iii) Pleaded in attempt to avoid federal jurisdiction?

(iv) "distinct nexus" w/ class members, harm, defendants

(v) P class is over-represented comparatively by citizens of forum state

(vi) Have similar class actions been filed in the previous 3 years?

(2) **Federal court MUST keep it state:**

(a) Two ways:

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(b) Principal Defendant Non Diverse → 2 part test

(i) > 66% of P's from forum state

(ii) Principal D is non-diverse

(c) At Least One Defendant Diverse → 4 part test

(i) > 66% of P's from forum state

(ii) At least one D

(a) Is on the hook for siginificant relief AND

(b) Conduct forms "significant basis" for the claims AND

(c) Is non-diverse

(iii) Principal injuries were in the state

(iv) No similar class action has been filed against Ds in 3 years

(3) <u>Exceptions to decline-ability</u>

(a) Primary Ds are States, State officials or other govt. entities

(b) Number of members of all Ps is under 100

c) Citizenship determinations made at time of complaint/amended complaint filing

B. Does the purported action meet the prerequisites? (Rule 23a)

1. Joinder of all parties is impracticable ("Numerosity")
2. Common question of law and fact ("Commonality")
3. Claims/defenses of representative parties are typical of class ("Typicality")
4. Representative parties will "fairly and adequately protect the interests of the class"

C. Three Types of Class Actions (23b)

1. 23(b)1: <u>Anti Prejudice Class Actions</u>
   a) Risk of "inconsistent of varying adjudications"
   b) Individual actions would "substantially impair/impede" Ps ability to "protect their interests"
2. 23(b)2: <u>Injunctive Class Actions</u>
   a) e.g. Brown v. Board of Ed
   b) ARM: "I love b2. You should love b2. If you had a conscience you'd love b2."
3. 23(b)3: <u>Money Class Actions</u>
   a) Standard:
      (1) common questions predominate
      (2) class action is "superior to other available methods"
   b) Factors to consider
      (1) Class member's interests in individual control
      (2) Has litigation already begun elsewhere?
      (3) Desirability/undesirability of concentrating in a particular forum
      (4) Likely difficulties in managing a class action

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D. Certification! (23c)
    1. Certification Order
        a) Rule on certification "as early as possible"
        b) Define the class
        c) Lay out class claims, issues or defenses
        d) Appoints class council
    2. Providing notice
        a) B1/b2: "appropriate notice to the class"
        b) B3: "best notice that is practicable under the circumstances" communicating:
            (1) Nature of the action
            (2) Definition of the class
            (3) Claims, issues, defenses
            (4) That member may enter an appearance through an attorney
            (5) Court will exclude from class if you'd like
            (6) Time and manner for requesting exclusion
            (7) Binding effect
    3. Subclasses (23c5)
        a) "where appropriate" subclasses can be singled out and each treated as a class
    4. Judgment MUST
        a) B1/B2: Describe class members
        b) B3: Describe those who were notified and didn't request exemption
    5. Appeal (23f)
        a) Ordinarily, interlocutory orders can't be appealed
        b) 23f: application to appeal certification order
            (1) Must be filed w/in 10 days of order

E. Conducting the Action (23d)
    1. Court may issue orders that:
        a) Prevent undue repetition in evidence
        b) Require appropriate notice of:
            (1) Step in the action
            (2) Proposed extent of judgment
            (3) Opportunities to come into the action
                (a) Perhaps to signify whether the representation is "fair and adequate" or present claims
        c) Impose conditions on representative parties or intervenors
        d) Require amendment of pleadings
        e) Deal with similar procedural matters

F. Settlement (23e)
    1. Allowed only with the court's approval
        a) Standard: "fair, reasonable and adequate"

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2. Court must notify those who would be bound
3. Parties must file a statement identifying the agreement
4. No opportunity to request exclusion? → court MAY reject settlement
5. Class member may object under settlement provisions; that objection can only be withdrawn with the court's appeal.

G. Class Counsel (23g)
1. Basically, court must ensure adequacy

H. Attorney's Fees
1. Claim made under 54(d)2
2. Class member can object

I. State law for class actions
1. Apply different state law for different members of the class

J. Cases!
1. *Castano v. American Tobacco* (5th Circ, 1996): Trial court certified a class of all nicotine-dependant persons in the US. Dismissed for failure to consider that the many variations in state law would have wiped out any pretense of commonality.
2. *Phillips Petroleum v. Shutts* (SCOTUS, 1985, Rehnquist): In a class action, personal jurisdiction does not require that each class member have minimum contacts with the forum state, but the forum state must have sufficient interest in the claims to assert its state law on <u>all claims</u>.
3. *AmChem v. Windsor* (SCOTUS, 1997, Ginsberg): Cannot combine those currently sick with asbestos with those who are not yet sick. Fails on "predominance" grounds.

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<u>Discovery</u>

XIV. Discovery Basics (Rule 26)
A. Required Disclosures (26a)
1. Mandatory discovery (26a)
a) REQUIREMENTS
(1) Contact info and subject for all individuals w/ discoverable info "unless the use would be solely for impeachment"
(2) Copy of all documents supporting claim "unless… impeachment"
(3) Computation of damages for each category
(4) Any insurance agreement
b) EXEMPTIONS
(1) Bottom of p. 72 in supplement
2. Expert Testimony (26a2)

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a) Must be accompanies by a written report containing
(1) Complete statement of all the opinions to be expressed
(2) Data or other information used to form opinions
(3) Exhibits
(4) Qualifications
(a) Including all publications for last 10 years
(5) List of other cases where testified in past 4 years
(6) Statement of compensation

B. Work Product Doctrine (26b)
1. Hickman operationalized
2. Basic standard:
a) parties can get "any nonprivileged matter … relevant to any party's claim or defense"
b) "Relevant information need not be admissible at the trial if the discovery appears **reasonably calculated to lead to the discovery of admissible evidence.**"
3. Court may limit if: (26b2c)
a) Unreasonably cumulative or can be obtained more conveniently OR
b) Party has had ample opportunity to obtain the information OR
c) Burden outweighs benefit
4. Trial Materials
a) Documents and tangible things are NOT discoverable UNLESS
(1) 26b1 (Basic standard) is satisfied AND
(2) Party shows substantial need AND
(3) Party cannot obtain w/o "undue hardship"
b) IF disclosed → court must protect against mental impressions, legal theories, etc.
5. Experts
a) Expert who may testify → depose after report
b) Expert NOT to testify → only depose IF
(1) "exceptional circumstances under which it is impracticable" to get the info other ways
6. Claiming Privilege (26b5)
a) Withhold otherwise discoverable info by:
(1) Expressly making the claim
(2) Describing the withheld material "without revealing info" but that will allow the opposition to assess the claim

C. Protective Orders
1. To protect from "annoyance, embarrassment, oppression…"
a) Forbidding discovery
b) Specifying terms, including time/place

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c) Prescribing method of discovery
d) Forbidding inquiry into certain matters/limiting
e) Designating persons to be present
f) Require sealing of deposition
g) Require that trade secret not be revealed/be revealed in specific way
h) Require simultaneous filing, to be opened as court directs

2. May also order to permit discovery

D. Cases!

1. *Seattle Times v. Rhinehart* (SCOTUS, 1984): Seattle times was prevented from publishing information it obtained through discovery, while defending from a defamation suit.

XV. Discovery Tools! (Rule 27-others)

A. Mandatory Disclosure (26a): see above

B. Oral Deposition (Rule 27, Rule 30): question anyone under oath regarding the subject matter of the case

1. Notice: required if deponent is a party
2. Non parties can be subpeonad
3. Can ask inadmissible questions
4. LIMIT: 10 each of 7 hrs. apiece (Rule 31/33)

C. Deposition on Written Questions: rare

D. Interrogatories: send questions to other party, who will answer w/ counsel before returning

1. Limit to 25 written questions
2. Rule 33: get general information and specific answers

E. Document Discovery (Rule 34):

1. Within the scope of 26b
2. Party must produce: designated documents or electronically stored information or tangible things.

F. Physical/mental Exams (Rule 35):

1. Requires motion AND court order
2. 2 required elements for order
    a) Good cause: info cannot be obtained elsewhere
    b) In controversy: being specifically examined
3. Limited to parties!
4. Might violate REA: does it abridge, enlarge or modify a substantive right?

G. Request for admission (Rule 36):

1. basically, you can't deny this fact in good faith.

H. Tactics: Pushing and Tripping

1. Tripping → fight every effort to disclose
2. Pushing → drown 'em in paper

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Summary Judgment/Trial by Jury

XVI. Summary Judgment (Rule 56)

A. Basic Rule: "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law"

B. When make motion?

1. Claiming party → move after 20 days OR after opponent's rule 56
2. Defending Party → may move at any time

C. Serving the motion

1. 10 days before the hearing

D. IF motion well-pled, opposer must show a genuine issue through affidavits, not just pleading

1. If affadavits are unavailable, court may
   a) Deny the motion
   b) Order a continuence
   c) Issue any other just order

E. Cases!

1. Celotex v. Catrett (SCOTUS, 1986, Rehnquist): Summary judgment may be appropriate, even when the moving party fails to produce evidence demonstrating a lack of factual dispute. Instead, it can show that the other party has failed to show a genuine dispute of material fact.

2. *Anderson v. Liberty Lobby* (SCOTUS, 1986, White): Motions for summary judgment must consider the applicable standard of proof applied to the opposing party's claims.

3. *Matsushita v. Zenith* (SCOTUS, 1986, Per Curiam): Suit alleging predatory pricing is dismissable, because Matsushita had no motive to conspire. Plausible inferences from pre-summary judgment evidence may be drawn unless two of them conflict.

XVII. Trial by Jury

A. HYPO

1. All of the fact issues relating to what the D is doing and whether a nuisance has been established
2. Effect of injunction is purely legal
3. Whether injunction should issue is purely equitable
4. SO: you can't answer the jury triability issue until you've atomized the case and broken out its issues and tossed them into the appropriate basket

B. Who gets what?

1. Purely legal →jury
2. Purely equitable → judge
3. Common →presumption ('thumb on the scale' via 7th amdt) to JURY
   a) Jury's decision is then binding on the judge when the judge turns to equity function

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C. **How to Answer These Questions:**

1. announce your Beacon Theatres proposition,
2. analyze the case and you break it down into its constituent issues.
    a) Law
    b) Equity
    c) Combination
3. EXAMPLE: Breach of contracts case for widgets.
    a) Was there K/was it breached → common
    b) What are the damages → law
    c) Specific performance → equitable

D. Cases!

1. Beacon Theatres v. Westover (SCOTUS, 1959): Fox had an exclusive-rights contract. Beacon notified Fox that they thought it violated anti-trust. Fox sought declaratory relief and an injunction prohibiting Beacon from suing until the action was resolved. Beacon counterclaimed for treble damages and demanded a jury trial. Jury trial can't be denied b/c Fox sued first.

a) **cleanup doctrine**. The jurisdictional principle that once an equity court has acquired jurisdiction over a case, it may decide both equitable and legal issues as long as the legal issues are ancillary to the equitable ones. [Cases: Equity 39. C.J.S. Equity § 73.]

b) **Black letter rule**: A court may not deny a jury determination of factual issues through a prioer determination of equitable claims.

2. *Dairy Queen v. Wood* (SCOTUS, 1962): Artful pleading of just equity can't keep you away from a jury trial.

XVIII. Rule 42 – Joining/Severing Trials

A. Common question of law/fact → court MAY
1. Join for hearing
2. Consolidate thea ctions
3. Take other steps to avoid unnecessary cost or delay

B. When MAY judge split?
1. For convenience
2. To avoid prejudice
3. To expedite/economize

XIX. Res Judicata?

A. Res Judicata
1. Vegas chip: you can play it or not play it, you cannot split it
    a) Chip is cause of action
    b) Once there is an adjudication of part of it, it's as if you adjudicated all of it

B. Collateral Estoppel

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1. Cause of action has changed – so there's no res judicata – BUT one or more of the issues was litigated in first action
    a) so defendant has had day in court on that issue before
    b) IF defendant has had full fair opportunity on that issue in A1, collateral estoppel says s/he cannot relitigate the issue
        (1) Works even if parties shift
    c) Estoppel (preclusion) of the issue, b/c it's already been litigated
        (1) If on the same crashed airplane, and the first plaintiff wins on the merits, the *second* plaintiff just says: this question has already been litigated, only thing to adjudicate are my damages
2. SO: if the 'whales' come in through the mass action and win, the minnows can come in once the victory has been established under collateral estoppel and *only* litigate damages

C. Res judicata is the sword that cuts the head off the claim; it's done. Collateral estoppel is the scalpel, that just cuts the issue out