**Civil Procedure – Troy A. McKenzie**

Organizational Outline:

∆ Read fact pattern twice

∆ Outline answers

∆ Ping Pong responses/Anticipate counter-arguments

∆ Don’t exceed word limit

Topic Checklist:

∆ Personal Jurisdiction

∆ Notice

∆ Subject Matter Jurisdiction

∆ Venue

∆ Choice of Law

∆ Pleading

∆ Case Management

∆ Summary Judgment

∆ Res Judicata

∆ Class Actions

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Complaint 🡪 12(b)(6) 🡪 Answer /Counterclaims🡪 Discovery 🡪 SJ 🡪 Trial 🡪 Preclusion

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| **I. Personal Jurisdiction**  |

**Throat clearing**:

* 1. *As this is a state law claim, and is not filed in a federal court where nationwide service is allowed and the circumstances do not seem to merit 4(k) application, the court will* ***piggyback*** *off of the \_\_ST STATUTE\_\_.*
	2. **SHORTCUT**: *Assuming \_\_X\_\_ is not a resident, has not consented to suit in the jurisdiction, and was not served with process in the forum personally or through an agent, we consider if there is any basis for general jurisdiction. Miliken, Carnival, Burnham, Hess.*
	3. **GENERAL J**: *X will credibly argue that GJ is inappropriate: because \_\_\_\_ they are not “at home” in the forum, and because \_\_\_\_\_, their contacts with the forum are not so systematic and continuous as to merit general jurisdiction. Goodyear, Helicopteros. Y can argue that X’s contacts are systematic and continuous enough to make GJ is appropriate (Perkins), but given that the contacts arguably may not even rise to the level of “minimum” (see below), it seems unlikely to succeed.* Unclear whether Asahi reasonableness analysis is necessary for general jurisdiction, but would be similar to SJ. (see below).
		+ Not sufficiently continuous, systematic and substantial to justify
		+ Not a resident. *Miliken*. Didn’t consent to suit/forum. *Pennoyer/Carnival*.
			1. Place of incorporation + nerve center. Hertz.
			2. Conducting business in state? Possibly granted GJ.
		+ Not present in the forum. *Burnham.* Not at home in the forum. *Perkins & Helicopteros*. No actual contacts with the forum. *Goodyear.*

*Are we in federal court?*

**Rule 4:** Piggyback on state courts jurisdiction

**Nationwide Service of Process**: Is there fed provision that allows broader service than long arm statute? (Bankruptcy, copyright, patent, ERISA)?

* Yes🡪nationwide contacts apply, due process under 5th AM (*Asahi test may not apply but do anyway)*
	+ Appropriate even if state law claim

**Is PJ allowed in any state?**

* Yes🡪 PJ under nationwide contacts
* No🡪 if D satisfies minimum contacts with the *entire* US **and** the claim arises under federal law, PJ granted.

**Specific Jurisdiction:**

Throat clearing: *Assuming \_\_\_ST’\_s long arm extends to the full reach of the DPC of the 14th AM] to authorize the court to exercise jurisdiction under the circumstances of this case if the D has certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The claim must arise out of or be connected with D’s activities in the state.* International Shoe. Milliken.

1. *NOTE*: if the long arm statute does not apply, attachment can be used to fill in gap between long arm and constitutional test; if there is no long-arm statute, assume that it goes to full extent allowed by the 14th Amendment.

**Minimum Contacts?**

1. **Plaintiff:**
	1. Does not need to have MC (*Keeton v. Hustler Magazine)*
	2. **“**Effects test” – did D aim conduct at P within forum state that created effect within that state? (*Keeton, Calder)*
	3. Have they purposefully availed themselves? *BK*
	4. Have they benefitted from the state services? *Burnham*
	5. Is there a website that invited commercial transactions? *Zippo*
2. **Defendant:**
	1. Was there no purposeful direction of the product into the forum. *O’Conner in Asahi*
	2. Did the contacts result from the unilateral acts of a third party? *WWV & Hanson*
	3. Did the Δ not target the particular forum? No intentional submission? *Kennedy in McIntyre*
	4. Is there a website that was for informational purposes. *Pebble beach*. Would this calling this a MC contact lead to universal J?
	5. Are the contacts stale or personal? *Kulko*.
3. **Factors/Tests:**
	1. FOREEABILITY:
		1. YES MC: D has so purposefully availed himself that he could foresee being in court there. Brennan in *Asahi*. Availed of benefits of forum state, eg. courts and laws *BK.*
		2. NO MC: can’t broadly construe when a D has intentionally submitted himself a sovereign; need an intentional act to submit. Kennedy in *McIntyre*.
	2. STREAM OF COMMERCE PLUS (purposeful direction):
		1. *YES MC:* Purposeful direction e.g ads or events. *O’Conner in Asahi*, *McIntyre*. Products moved by Δ and not 3rd party. *WW*; *Asahi*.
		2. *NO MC*: SOC not dispositive; must be SOC plus. Products moved by unilateral 3rd party activity. *WW; Asahi*. No purposeful direction. McIntyre.
	3. CONTRACT:
		1. *YES MC:* Single contract and multiple contacts*.* McGee.
		2. *NO MC*: Unilateral movement of a 3rd party w/ a contract into that forum is insufficient Henson.
	4. CHOICE OF LAW/FORUM*:*
		1. *YES MC:* Choice of law is evidence. *BK*. Forum selection valid unless party can show high burden of unreasonableness or injustice. *Bremen*
		2. *NO MC*: It is not dispositive; it’s a separate inquiry that does not prove consent to forum. *BK*. Forum selection invalid b/c of unreasonableness or injustice. *Bremen*
	5. EFFECTS TEST
		1. *YES MC:* If Δ knew of Π’s connection to forum, may have aimed themselves by creating effects in the forum. *Calder*
		2. *No MC:* it’s the Δs connection that’s relevant. *Keeton*
	6. QUALITY OF CONTACTS
		1. Stale contacts insufficient. *Kulko, Pebble Beach.* Personal contacts not necc. As strong as business contacts as signals of availment. *Kulko*. Tangential contacts, like cashed checks from forum or server locations = insufficient.
	* WEBSITE: Same as real contacts; apply with full force we just need to take a more pragmatic approach about what contacts mean
		1. *YES MC:* active website, intended to invite commercial transactions. *Zippo*. High % of traffic. Interactions w/ people over the internet.
		2. *NO MC:*passive website, only for i*nformationa*l purposes, just having website isn’t enough to have universal jus. *Pebble*. Servers locale immaterial. *Helicopteros*. Awareness of web traffic in forum = insufficient
	1. Convenience won’t trump. *Hanson.*
	* Other considerations:
		+ Does choice of law give indication that D should have known might be haled into court? (*Burger King)*
			- Choice of law ≠ PJ (*Hansen)*
		+ Purposeful availment nationwide enough for SJ in any state? Kennedy’ssuggestion in *McIntyre*
			- Not law – need Congress
		+ Nationwide PJ only allowed when fed law claim and it can be shown that D doesn’t have minimum contacts with a particular state (4(k))
			- OR federal statute (e.g. bankruptcy)
		+ Even if reasonable, need MC for PJ (*Hansen, WWV)*

*Note on McIntyre:*

* Can think of it as a stream of commerce case that hasn’t given us a definitive answer on how to view Ds conduct that is aimed at a general area (entire country/region) but isn’t targeted at a particular jurisdiction
* OR Breyer’s opinion as instructive – it’s really about those cases when there aren’t a sufficient amount of Ds products circulating within the forum.

**Reasonableness—Asahi test; trad. Notions of fair play and sub. Justice** (remember, Asahi is the first and **only** case that seems to suggest that it would be unfair to grant forum even though there ARE minimum contacts)

1. Burden on D *Asahi*. Cost. Travel. Forum state law.
	1. Could always transfer under §1404 if more convenient if in federal court.
2. P’s interest: Obtaining relief. Convenience of the forum. Pockets.
3. State’s interest: in providing a forum for this Π/Δ&claim. Is P a citizen of forum state? Consider subject matter of law, e.g. tort, industry.
4. Interstate interest: is this an efficient resolution? Where is the best forum?
	1. interstate judicial system’s interest in obtaining resolution of the controversy **OR** the foreign policy interest of the U.S. (merged for an int’l context only)
	2. is there a sense that the allocation of judicial business would be better served If we did not exercise PJ?
5. Intrastate interest: state versus state. Stepping on another state’s toes?
	* 1. In the ordinary domestic context: states do have an interest in ensuring that each of them and sister state can apply law in a dispute in order to further the purpose of the law

**Quasi in rem jurisdiction:** If over property itself 🡪 always PJ. Otherwise, All suits *in rem* governed by PJ “minimum contacts” analysis. (*Shaffer*).

 **QIR(1):** Where the suit is with respect to rights and duties growing out of D’s ownership of the property. PJ always appropriate. (*Shaffer*)

**IR(2):** Where the attachment serves as the basis for jurisdiction. Must have minimum contacts under *International Shoe* for PJ. (*Shaffer*; *Pennoyer*).

**Situs of the Debt**: attachment is permissible wherever the debtor may be sued (*Harris v. Balk)*

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| **Subject Matter Jurisdiction: Diversity Jurisdiction, Arising Under Jurisdiction, Supplemental Jurisdiction, Removal Jurisdiction** |

Throat Clearing—**Federal Subject Matter Jurisdiction**: TO BE USED FOR BOTH (REFER TO “ABOVE” in SMJ: FQ)

1. This being a federal court of limited jurisdiction, we will assume the case is appropriate to remand if it does not meet the requirements of 1441. *Syngenta*.
2. Removal is proper only if it could have been filed in fed court in the first instance. Sygenta.
3. If state claim, fed court can get jurisdiction only through 1332 (DJ/AIC) OR 1331 (FQ) OR 1367 (Supplemental – only if CNOOP of claim already properly before the court).
* State courts are assumed to have general, unlimited and origination jurisdiction unless specific exception (bankruptcy, patent, ERISA) (*Lacks)*
* Right to adjudicate is not the same as SMJ. If an “element of the claim” requirement (such as length of in state residency or numerosity) is not met, it must be challenged in a timely fashion. Otherwise, barred under *res judicata* principles. (*Arbaugh*).
* SMJ cannot be waived (*Capron)*
* States can limit the SJ of their courts by carving out long-arm (*Perkins)*

**ASK:** Do we need more information to decide if remand for lack of DJ is warranted?/Look at TAM’s model answer

**Diversity Jurisdiction** § 1332:

1. Requirements of diversity:
	* 1. Statutory: **AIC + complete diversity**
2. **Amount in Controversy** (§ 1332(a)).
	* 1. Must **exceed** $75k
		2. From Δ’s point of view
		3. From Π’s point of view
			1. If filed a lower amount previously. P must show a good faith reason for increase. (*Arnold*).
		4. From either perspective
		5. Once alleged, rebuttal requires legal certainty of less than AIC; high threshold
		6. Three acceptable ways to aggregate claims to meet AIC:
			1. 1 P with multiple claims against the same D. (*Everett*)
			2. Many Ps with a “common and undivided interest” against a D. (*Troy Bank*)
				1. Something like a single piece of property
			3. P against multiple Ds such that D’s liability is common and undivided.
		7. Class-actions. Just one plaintiff needs to meet AIC – supplemental jurisdiction over other Ps. (*Allapattah*).
3. **Complete diversity**—consider @ time of removal – every P must be diff to every D
	* + 1. Determining Citizenship**:**
* Is each party of the United States (*Dred Scott)?* ***AND***
* Is each party a citizen of a different state?
	+ Determined by domicile: (*Mas v. Perry)*
		- Residency
		- Intention to remain/return if absent
1. Important Notes:
	* 1. Alienage Jurisdiction
			1. Alien v. Alien may not obtain diversity
			2. § 1332(a) authorizes jurisdiction over controversies between state citizens and “ citizens of subjects of a foreign state”
		2. Corporate Citizenship:
			1. § 1332 – corporations have dual citizenship
				1. State of incorporation
				2. Principal place of business (Nerve Center Test (*Hertz*))
		3. Unincorporated Entities
			1. Every member of the unincorporated association will have a citizenship and the unincorporated association takes the citizenship of every single one of its members (*Rose v. Giamotti)*
		4. Nominal Parties: no interest in the result of the suit and need not have been made a party thereto
			1. Were any parties fraudulently joined?
			2. Jurisdiction based solely on *real parties (*Note: not a good doctrine; really a neutral forum issue)
		5. Changing Citizenship
			1. SMJ contaminated if:
				1. A party is discovered to be a citizen of a state such that complete diversity no longer exists. (*Kroger*).
				2. A non-diverse party is added prior to time of final judgment.
				3. A non-diverse party changes citizenship to become diverse prior to final judgment. (*Grupo Dataflux).*
			2. SMJ **not** contaminated if:
				1. A non-diverse party is dropped prior to time of final judgment. (*Caterpillar*).
				2. A diverse party changes citizenship to become non-diverse prior to final judgment if SMJ originally appropriate.
		6. Exceptions to DJ
			1. Probate matters: probating the will, invalidating the will, or establishing rights under a will. (*Marshall v. Marshall)*
			2. Domestic Relations cases: divorce, alimony, and child custody. (*Ankenbrandt*).
				1. BUT does not apply to tort claims arising out of these exceptions (*Marshall)*

**Arising Under Jurisdiction** § 1331:

The motion to dismiss for lack of SMJ should be

* *denied because \_X\_’s right to relief necessarily depends on a disputed and substantial federal question, and exercising jurisdiction over the claim has little potential to threaten the federal-state balance.*
* *granted because the “federal ingredient” is not a disputed or substantial federal question, is not necessary to \_X\_’s right to relief, and exercising jurisdiction over the fact-bound matter would open the federal floodgates to all kinds of litigation.*
* Throat clear:
	+ *Since it does not appear that the requirement of 1332 are met, we must consider if jurisdiction is appropriate under 1331.*
* **Ingredient Test**:
	+ *X will argue that because his complaint refers to the [FED LAW], the claim arises under federal law and jurisdiction is appropriate under Article III. He will claim that this “federal ingredient” is sufficient.* Osborn.
	+ *Y will counter that Article III provides a broad inclusive standard that is limited by the statutory delegation, Y will more persuasively point to* 1331.
* **Statutory Test**
	+ **The Motley-Wellworks** WPC
		- *Y will argue that because the cause of action in the well-pleaded complaint is a state law, arising under SMJ is inappropriate* Mottley&Wellworks.
	+ **Smith Grable Exceptions**
		- *X will counter that the federal law is so essential to his claim as to trigger a Smith/Grable exception and permit jurisdiction.*
		- DEFINE THE QUESTION
			* The federal issue is “actually in dispute”
			* Substantial question of federal law. Clearfield.
				+ No PRA an indicator of substantiality *Merrel*
				+ but its absence is not necessarily a sign that it’s not substantial *Grable.* IS THERE $$$/UNIFORMITY @ STAKE?
			* Necessary to the claim (right to relief necessarily depends on interpretation on of the federal statute.
				+ X: *yes, right to relief hinges.* Grable
				+ *Y: no, the federal element is just a part of your claim*. Merrel
		- Floodgates (“disruptive portent”-fact bound issue or pure question of law).
			* X: question of pure law. *Grable*
			* Y: fact intensive. *Empire*

**Federal Common Law:** In discrete category of cases (, federal courts have authority to apply a decision that has been developed as a matter **of federal common law** (*Clearfield)*

* Cases where U.S. is involved or when very strong federal interest at stake
* Even without clear statutory authority, federal courts can develop **judge-made rules** when a crucial federal interest is at stake
	+ Law being developed is FCL and dispute is now governed by it

**Supplemental Jurisdiction**§ 1367**:**

1. Is there a substantial claim over court has “original jurisdiction’ (i.e.under either 1331 or DJ 1332?)
	1. § 1367(a) presumption that fed’l courts can exercise SuppJ under otherwise proscribed by fed’l staute
2. Same case or controversy/CNoOF?
	1. Is there a state-law claim that shares a “common nucleus of operative fact,” such that they arise out of the “same case or controversy?” *Gibbs.*
	2. Almost any Π can be joined if they assert a right to relief and have common question of law or fact. *Exxon*.
3. ***Diversity*** *–* if up on diversity, would supplemental jurisdiction destroy complete diversity?
	* 1. Cannot exercise supplemental jurisdiction if it would destroy diversity (*Kroger*, *Aldinger, §*1367(b))
		2. Supplemental parties *do not* need to meet AIC (only the named parties) (*Exxon v. Allapattah*). (If one claim meets the AIC, it’s fine if the others don’t)
4. Can a pendent party be joined regardless of the AIC?
	* 1. Joinder of additional Ps under Rule 20 is allowed even if their claims are below the AIC (as long as named P satisfies AIC)
		2. But §1367(b) says no Supp. J. for *Defendants* added as Rule 20
5. Act of Congress must have supplied right to hear case (*Finley)*
	1. Congress overruled *Finley* in § 1367(a) – silence is green light
6. ***Discretion –*** Federal court may choose to decline jurisdiction based on novel/complex state law issues, if the state claim predominates over the claim the originally qualified for SMJ, if the original SMJ claim has been dismissed, or for other exceptional circumstances. §1367(c).
	1. **Exceptions –**
		1. If bringing in party would destroy complete diversity (***Kroger***); if the named P or the main claim doesn’t meet AIC
		2. If you bring in defendants under **R14**, **R19**, **R20**, or **R24** of FRCP
		3. If you bring in Ps under **R19** or Ps seeking to intervene under **R24** if exercising supp. J over those claims would be inconsistent with jurisdictional requirements of §1332

**Removal Jurisdiction** § 1441:

1. Throat clear: Removal J gives a D in state court the right to veto P’s choice of forum by removing to fed’l court, if the fed’l court would have had jurisdiction to entertain if the Π had chosen to go there originally
2. Would the fed court have original J? (can move from state to fed’l, but not fed’l to state)
3. Exceptions that might still bar removal?
	1. Is hometown D removing to hometown fed’l?
	2. Did all D’s consent to removal? 1446
	* Did removal occur w/in a) 30 days of filing or b) 30 days of from when removal became possible? 1446 (§1446(b)(2)(b) and (b)(3)) (Potential for gamesmanship? (1446(c)(3) seems to have some protections for bad faith)

Notes:

* D can’t appeal order remanding to state court
* A federal court is not precluded from hearing case simply because state court lacked jurisdiction (*Feherens)*
* We look at the state of the world at the time of removal:
	+ If not initially diverse, but ends up being diverse, removal is possible.
	+ *Caterpillar* is the case that would be applied, but remember it is a diversity case **not** a removal case (unclear if we can extend by analogy)

**Lacking or Challenged SMJ**:

1. What happens if becomes evident before judgment is entered that there was a flaw in the court’s SMJ?
	1. *Caterpillar:* if flaw concerns presence of non-diverse party, if that party is dismissed before judgment, dismissal of that party can cure mistake and judgment can be made and will be final
	2. *Grupo:* a change in citizenship of a formally non-diverse citizenship to a diversity citizenship once a trial has begun does not restore or cure lack of SMJ
2. After a judgment is made final and no longer subject to ordinary appellate review
	1. Collateral attack

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| **II. Notice** |

The notice or action taken must be **reasonably calculated to give notice and apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.**

1. **Throat clearing: Compliance with statute and constitutional standard (Mullane)**
2. Constitutional Test
	1. Is notice “**reasonably calculated”** under all the circumstances to give notice of the suit and afford an opportunity to be heard, from senders’ (one actually desirous of giving notice) *ex ante* perspective? (*Mullane)*
	2. Does it reasonably convey required information including parties’ rights in litigation and methods available for response? (*Mullane, Aguchak)*
	3. Does it afford a reasonable time for party to appear (*Mullane)*
	4. Is sender aware that notice did not reach recipient?
		1. If so, were additional, *reasonable* steps taken? **Duty** to follow-up (*Jones v. Flowers)*
		2. If no affirmative notice that notice failed, may not need to take additional steps (*Dusenberry)*
		3. Does sender know that notice is likely not to reach party?
			1. Inadequate (*Greene)*
3. Statutory Test – comply with constitutional and relevant statutory standard?
	1. Actual notice is not sufficient, one must follow an applicable statute. (*Wutcher v. Pizzutti*)
	2. If in fed court:
		1. ***Rule 4:*** parties can serve summons/complaint by either 1) The rules of the state where the district court sits or where the service was effectuated, or 2) They can use the FRCP
		2. 4(k) Federal courts of GJ piggy back on state statutes
			1. Exception: federal statutes that authorize service more widely (ERISA, Bankruptcy, etc) – service anywhere in US
		3. 4(f): Only applies to service actually made abroad. (*Schlunk*). Follow international agreements if any exist; otherwise, by means reasonably calculated to give notice.
		4. 4(d): Service can be waived by mail. (But not private delivery (Audio Enterprises)).
		5. 4(e)(2): Can deliver a copy of the summons and complaint to person; can leave a copy of each at the person’s dwelling or usual place of abode with “someone of suitable age and discretion who resides there”; or can deliver a copy to an authorized agent
			1. 4(h): Can deliver service to any employee who knows what to do with the papers. (SS Hellenic Challenger).
		6. Parties can’t serve process themselves

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| **II. Opportunity to Be Heard – pre-judgment attachment** |

 No opportunity to be heard; Constitutionality determined by applying the modified Matthews test that comes out of *Doehr* (Posner – less at stake, less due process is due)

1. **Private interest of the affected**
	1. *X will argue that because….their interest is high*
		1. High interest: Wage garnishment. *Sniadech*. Stove & toaster. *Fuentes*. Even a title may impact ability to secure loans, etc. *Doehr*. Bank account.
	2. *Y will counter that because….the interest is not high. It is not comparable to something like an oven that nourishes daily.*
		1. Distinguish as much as possible from other examples. Also, X’s interest not dispositive; TROs are granted even though interest of affected party is v. high
2. **Risk of erroneous deprivation**—TMK: this factor is the one that ends up deciding—consider who decides, type of ev., barrier req’d by bond, etc.)
	1. *X will argue that because…the risk of erroneous deprivation is high*. Factors that point to insufficiency:
		1. No or delayed post-deprivation hearing. *Mitchell*
		2. Lack of threshold showing on merits that must be made by party seeking deprivation.
		3. Kind of evidence that will be weight is fact intensive w/ live testimony. *Doehr*
		4. A clerk makes the decision. *Dicam*.
		5. There is no/low bond posting.
	2. *Y will argue that because…the risk is actually very low*. Factors that point to sufficiency:
		1. Relatively immediate post-deprivation hearing mitigates. *Di*-*Chem*.
		2. Threshold showing is substantial.
		3. Matter is/equivalent to debt action, specific facts are alleged; documentary proof is available. *Mitchell*
		4. Judge makes the decision. *Mitchell*
		5. The bond posting is substantial. *Mitchell*
3. **Interest of party seeking attachment**
	1. *X will argue because…Y’s interest is low and does not determine the balance*
		1. No prior interest in the property attached. Only attaching for damages.
		2. No exigency/extraordinary circumstances.
	2. *Y will counter that their interest is incredibly high, pointing to…*
		1. Prior interest in the property. *Mitchell*
		2. Exigency/extraordinary circumstances. Risk of flight? Insolvent?
		3. Efficiency. ?
	3. ANY Public interest?
	4. Cost effectiveness of alternative requirements?

2. Will attachment successfully get jurisdiction?

* Would minimum contacts establish jurisdiction?
	+ Must have minimum contacts under *International Shoe* for PJ. (*Shaffer*; *Pennoyer*).

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| **III-V: Venue, Transfer and Forum Non Conveniens** |

Proper Venue (§ 1391):

* Generally, if PJ 🡪 proper venue
	+ Can transfer even when it does not have PJ (*Goldlawr, Inc. v. Heiman)*
* §1391:
	+ Case may be brought in a judicial district in which:
		1. Any D resides
		2. Substantial part of events/omissions giving rise to claim occurred
		3. Substantial part of property that is subject to action is situated
		4. Transaction occurred
		5. Court otherwise has personal jurisdiction
			- Solely on diversity: where any D is subject to PJ at time action is commenced
			- Not on diversity: where any D may be found
			- D is alien: any district
		6. If improper –transfer/dismiss case (§ 1406)
	+ Corporate residence. (c)
		1. In a state with one judicial district: resident of the district so long as the state has PJ
		2. In a state with more than one judicial district and state has PJ over D: for purposes of venue corporation resides in:
			- Any district in that state in which that district would have PJ were the district a state
			- If no such district exists, then the district within which Δ has the most significant contacts
	+ Unincorporated association residence. Place of HQ

Motion to Transfer (§ 1404)

1. Change of venue. § 1404(a): “For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”
2. Cure or waiver of defects. § 1406:
	1. “(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.”
3. Choice of law: (discourage venue shopping)
	1. When transferred under § 1404/diversity, law of transferor court applies. (*Van Dusen*).
	2. When transferred under § 1406, law of transferee court applies.

Forum Non Conveniens

1. May be addressed as a threshold question prior to investigating PJ or SMJ. (*Sinochem*)
2. Does venue appear to be “justice mixed with some harassment?” (*Gulf Oil v. Gilbert)*
3. Standard for overturning a *forum non* decision where the court has considered relevant factors is abuse of discretion. (*Piper*).
4. If there is no adequate alternative forum (very low bar to be considered adequate) then nearly impossible to assert *forum non*. (*Piper*)

TMK OOP:

1. P will urge not to dismiss because the other forum is not an adequate alternative forum
	1. Reasons: These types of claims are disfavored there, relief will be less, no discovery, loser pays system may make it so P can’t bring his suit
	2. D counters that it is an adequate alternative forum because: (Piper)
		1. Nothing suggests they cannot adjudicate the dispute, and
		2. Nothing suggests that recovery would be completely barred
		3. (remember low bar)
2. D argues that P’s choice of forum should not be entitled to deference (Iragorri). Why:
	1. P is a foreign plaintiff that is forum shopping (**show why forum shopping**)
	2. Ds can forum shop too (*Piper)*
		1. Note: Ps citizenship/residence serve as proxy for convenience, not alone enough. No rigid rule protecting U.S. Ps from dismissal for *forum non conveniens*
3. P counters that he has valid reasons for choosing this forum. Why:
	1. Jurisdiction over both Ds which might not exist in the other forum
	2. Evidence is in this forum
	3. On the sliding scale, P’s choice gets substantial deference (Iragorri)
4. Public and Private Interests:
	1. Private: (convenience of litigants)
		1. Forum is convenient for the parties (particularly the Ds) and witnesses
		2. Some evidence is in the other forum, but some is here too
		3. Possibility of view the premises (if relevant)
		4. Hardship on D to retain jurisdiction
		5. Hardship on P if move to another country
	2. Public:
		1. Dispute implicates a public interest shared by the community
		2. Administrative expenses? Burden on jury? Floodgates?
		3. Enforceability problems? *Gilbert.*
		4. Will it lead to a gaming system? Will it hurt locale employees? (*Iragorri)*

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| **Erie Doctrine: State Law in Federal Courts** |

Order of Ops

1. Klaxon Rule: What state law would apply?
	1. Apply forum state’s conflicts-of-law rules
2. *Erie* requires we apply state substantive law in diversity action – thus, presumptively state law applies.
	1. A law labelled procedural may have been informed by substantive concerns
3. Is there a conflict?
	1. You can avoid conflict by defining laws narrowly (Ginsburg in *Walker*)
	2. Create conflict by asking if they occupy the same field and fed provision would be cramped by state provision? (Scalia in *Stewart*)
	3. Is the conflict unavoidable? (*Hanna)*
4. If there is a conflict
	* Federal Statute: If fed statute is broad enough to control issue 🡪 **constitutional test** (*Hanna)*
		+ Is statute arguably procedural?
			- Yes 🡪 statute is constitutional 🡪 controls
				* Any statute that is capable of classification as procedural falls within Article III, and is therefore constitutional. (Stewart).
	1. FRCP: **Rules Enabling Act:** Is the federal statute/rule *procedural?*
	* Does FRCP “abridge, enlarge or modify any substantive right” (*Sibbach*)?
		+ If yes, twin aims analysis; if no, Constitutional *arguably* procedural?
	* Scalia in *Shady Grove:*
		+ Is it *really* procedural?
			- Look to the federal provision
	* Stevens in *Shady Grove*
		+ Give full effect to language of REA: can’t know if AEM if you don’t know what the state substantive right is.
		+ *In this case* (fact-dependent approach), would it enlarge, modify or alter a substantive right?
			- X would argue state law can’t be both invalid and valid with respect to a fed rule (Scalia).
			- SC has never actually applied state law over FRCP, but this is closest test to get you to choosing state law.
	* Harlan in *Hanna* – the rule A/E/M bases on primary conduct test (see below)
	* Yes 🡪 Twin Aims (forum shopping, uniformity) – (see below for analysis)
		+ (**UNLESS** federal procedure statute) 🡪 constitutional test
	* No🡪 Constitutional *arguably procedural* test:
		+ Does FRCP encroach on any substantive right behind a procedural mask?
		+ Is it closely tied to the substantive policies of a judicial system in a way that would affect recovery, presentation of facts, and how litigation would proceed?
			- No🡪 FRCP governs
			- Really no test at all.
			- *Note:* Court in essence/practice avoids this part of the analysis. *Good faith standard*: b/c federal rule was passed under REA though all the appropriate channels 🡪 really regulates procedure
5. If no conflict:
* **RDA**: Is the competing state rule *substantive* within the twin aims of *Erie* as interpreted by *Hanna?*
	+ - Forum shopping
		- Inequitable administration of justice
	+ *York:*
		- Doesn’t matter whether you label the rule procedural
		- Is it bound up with the rights and obligation of the parties?
		- Is it outcome-determinative (pure *ex post*)
			* If pure *York* test, everything is outcome determinative
			* If outcome determinative 🡪 substantive for *Erie* purposes
	+ ***Hanna***
		- Would failure to apply state “thing” threaten Twin Aims *ex ante*?
			* Yes🡪 apply state “thing”
	+ Harlan’s **primary conduct test** (*Hanna)*
		- Differentiates when there is an *Erie* problem and when there is a Twin Aims problem
			* Will parties outside of litigation change their behaviour ex ante based on this rule?
			* If so, important to uniformity 🡪 state
				+ Note: Could break tie “this isn’t primary conduct within the meaning of Harlan’s concurrence”

He believes *Hanna’s* test is too simplistic:

Is the state law rightfully regulating the primary conduct of parties?

That is, the rights and obligations of parties in transaction in the real world *and* the behaviour of the party leading up to litigation

* + *Byrd* Balancing – is there a countervailing federal interest at stake?
		- State interest: Does the state law bear on the rights and obligations of the parties?
			* Most important prong
		- Federal interest: Would adhering to state law in any way disrupt the operations of the federal court?
		- Outcome determinative?
	+ *Gasperini* (Ginsburg)approach to *Byrd:* accommodate right and obligations
		- Not just binary choice
			* Scoop substantive heart of state provision and apply it in court without de-uniformizing federal procedure?
			* Can we massage the state law in such a way to respect legislative intent but avoid conflict?
	+ Important notes:
		- State statutes of limitations apply even if they appear to conflict with Federal Rules. (*Walker*)
		- Defining “procedure”:
			* *York*: manner or means
			* Byrd: form or mode
			* *Sibaach*: judicial profess for enforcing rights/duties
				+ Does rule *really* regulate procedure.
			* *Gasperini*: legislative intent
* Conclusion:
	+ In the end, I believe that the court would find the competing state rule substantive and apply it in federal court
	+ In the end, I believe that the court would find a direct conflict, and apply the FRCP in the interest of federal uniformity.

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| **VII. Ascertaining State Law**  |

* Federal courts must apply the conflict-of-law rules of the state in which they sit (**Klaxon Rule**)
	+ Exception: in diversity, transferor court laws apply (*Van Dusen)*
	+ Leads to non-uniformity, O.K. b/c not vertical ≠ forum shopping
* Has highest court in forum state opined?
	+ If not, *Erie Guess*
		- Predict highest court opinion based on lower court opinions
		- Look to dicta in higher courts
			* Discomfort, but necessary if believe fed court is standing in for state court

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| **VIII. Federal Common Law** |

* Should we invoke fed common law? (Important b/c allows for “arising under” jurisdiction - 4(k) exception)
	+ Enclave Theory (*Melzer*): Federal common law should gap-fill federal constitutional or statutory provisions.
	+ Statutory Authorization Theory (*Kramer*): Statute must give initial authorization to embark on the endeavour. Limits fed power unless absolutely necessary.
		- *American Elec. Power Co.* – Congress allocated power to decide issue to different body. Fed common law not appropriate.
		- *Clearfield* - federal interest is so strong, fed courts can make common law.
			* Uniformity
			* Federal objective
	+ Coextensive Theory (*Field*): Courts have coextensive power to make common law under Constitution, so long as not trampling on Congress’ contrary indication.

**DEK**

* **Federal Common Law (FCL): (important because allows for FQ J)**
	+ Federal courts retain power to create federal common law (do it in rare instances)
	+ 3 theories to justify when federal courts can justify this federal common law making power:
		- (1) ***Meltzer’s “enclave theory”***
			* Situations where there are gaps – you need to come and *“fill in the interstices”* with FCLin order to satisfy the federal interests that are laid out by statutory or constitutional provisions (even when Congress hasn’t spoken within the enclaves).
		- (2) ***Fields’ coextensive theory***
			* Any time Congress could act under the Constitution, the authority of the federal courts is *coextensive* with what Congress can do; and federal courts can engage in common law making until Congress says otherwise.
		- (3) ***Kramer’s “statutory authorization theory***”
			* Democratic legitimacy in federal court common law making (you need a statute to authorize them to embark on the FCL making).
			* This comes from a statute that may not apply by direct terms, but gives some guidance to the federal courts when engaging in common law making.
			* Every single time a federal court interprets a statute, the federal court is potentially engaged in federal common law making.
			* He thinks that you need some legislative authorization in the first place.
	+ FCL Test:the Court embarked on a 2-step analysis:
		- **(1)** Determine what law governs (federal v. state) (*Clearfield* broadly read as permitting federal courts to develop federal law for “questions involving the rights of the United States arising under nationwide federal programs.)
			* (1) ***Uniquely federal interests*** that require the preemption of state law
				+ The 3 theories of FCL go into this analysis
				+ Is there a “uniquely federal interest” and “significant conflict” between federal policy and the “operation of state law? (Enclave theory)
				+ Is there a gap in existing authority? U.S. power in queston? (Enclave, Clearfield)
				+ Would the application of state law frustrate some federal policy?
			* (2) ***Significant conflict*** exists between federal and state law
		- **(2)** If federal law governs: What is the content of the federal law?
			* ***Kimbell* Test***:* some cases will use state law, but the court retains the right to fashion a new FCL; when do we need a new federal law?
				+ (1) Need for uniformity! (example: Semtek)
				+ (2) Would application of state law frustrate some federal objective?
				+ (3) Would the application of federal law would disrupt commercial relationships predicated on state law?

(Ex: Parnell: Even though federal interests were involved, cases was about private commercial interests)

* + - * NOTE: if federal common law rule applies 🡪 federal law applies 🡪 FQ SMJ
		- ***Note*** – In the second step is where we consider the states’ interest

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| **IX. Federal Law in State Court – Reverse *Erie*** |

1. Presume sate courts can hear a federal claim unless otherwise barred (patent, antitrust)
2. Does state rule conflict with federal law? Apply state unless:
	1. *Dice* Test (Reverse *Byrd* Balancing)
		1. What is the **state interest?**
			1. How high is state’s interest in maintaining their own procedure?
		2. What is **federal interest?**
			1. Is federal procedure bound up with the rights and obligations of the parties under the claim?
				1. (e.g. juries for FELA)

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| **X. Pleading: Motion to Dismiss, Standard for Pleading, Amendments, Answer, Counterclaim, Sanctions** |

**Motion to Dismiss** - Rule 12(b)

* Dismiss for lack of (1) SMJ (2) PJ, defects in (3) mechanics of (4) quality of service of process (5) improper venue **(6)** failure to state a legally cognizable claim (7) indispensable party
	+ *Note*: Three ways a claim may be dismissed at pleading stage **(Rule 12(b)(6**)):
		- No legally cognizable form of relief
		- Plaintiff has put in an incomplete pleading
		- Futility: P fails to allege a required allegation, and that P cannot meet that obligation
	+ Dismissal is proper depending on standard

**Standard for Pleading:** *Ping-Pong*

* P will argue that under Rule 8 she only had to give a short and plain statement showing she is entitled to relief; no evidence required (no “fact”).
	+ Satisfied b/c gave notice, legally cognizable claim for relief & unless “”no set of facts” (*Conley)*
		- Notice may even be sufficient if judge should understand legal implications not articulated (*Dioguardi)*
		- May not apply more stringent pleading standards to civil rights claims (*Swierkiewicz)*
* Twombly/Iqbal Part I: Sift
	+ D will respond we’re no longer in *Conley*; need to apply *Twombly/Iqbal*
		- Sift through conclusory allegationsnot entitled to presumption of truth (*Iqbal) –* stay in pleading just don’t regard them as true necessarily
			* Bald faced statement of liability
			* Language tracking or includes requirements of law
			* Anything that looks like they’re assuming liability without absolute, solid fact behind it (upon information and belief)
	+ D will point to X and say it is a conclusory statement – **FACT INTENSIVE**
	+ P will respond that it is a factual allegation that builds logically on other factual allegations in the complain
	+ D will argue it a bald statement of liability and simply tracks language of the requirements under the issue at-issue state law
* Twombly/Iqbal Part II:Plausibility Standard
	+ Does what is left in complaint, on its face, presents a plausible claim for relief?
	+ D will argue allegations establish merely the *possibility*, but not the *plausibility*
		- **Reasonable alternative explanation**
	+ P will argue none of the issues that gave rise to *plausibility standard* are at play here; not an antitrust case
		- Trial judges are not ill-equipped to handle discovery
		- Discovery costs won’t be massive
	+ D will argue pleasing requirements are trans-substantive and it applies to all cases. Iqbal.
	+ P will argue D is trying to get in heightened pleading (Rule 9) and that is not applicable (not fraud or mistake)
	+ D will argue P simply hasn’t met the standard pleading requirements (Rule 8)
	+ P will invoke the problem of informational asymmetry to save complaint. Erickson; Twombly – only access to facts is discovery
		- No publicly available information; discovery is crucial to build case
		- There are facts, inaccessible
	+ D will say you need more than a hunch to proceed to discovery; P is not in Erickson’s exceptional P category – pro se
	+ D will argue that was for a pro se P and it was a limited exception, P is not in that category
		- D can move for more definitive statement under Rule 12(e) b/c other issues still not cured
			* Substantive law:
			* She may have pleaded herself out of court because her factual allegations are asserting a different claim rather than the one she pleaded (*American Nurses)*
	+ P will say there can be valid and invalid claims in a complaint (*American Nurses)*
	+ Conclusion: Judge may dismiss without prejudice and give leave to **replead**
* Note: Heightened pleading for pleading **fraud** or **mistake**. (two ways K can be recast as tort)
	+ Rule 9(b): “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”
	+ Rule 9(b) is met when there is “sufficient identification of the circumstances constituting” the grievance such that Δ can form an adequate response.

**Amending Pleadings – Rule 15**

* Permits amendment within 21 days of service (a)(1).
* After 21 days, Court can allow liberally, so long as no prejudice to other side. (Adversary’s consent or whenever “justice so requires” (a)(2)).
* Relation back when (c)
	+ (a) The amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
	+ (b) The amendment changes the party or the naming of the party against whom a claim is asserted, and that D
		- (i) Received notice of the action that it will not be prejudiced in defending on the merits
		- (ii) Knew or should’ve known that complaint targeted him (*Krupski)*
			* May not be allowed if P had opportunity to discover information but simply failed to do so (*Worthington)*

**Answer**

* Has D denied or admitted (a) each claim or (b) generally denial all claims?
	+ (b) Includes denying jurisdiction
* Has D “fairly responded to the substance of the allegation”? (R8(b)(2))
	+ Has D done more than restate the complaint in the negative
		- Conjunction denial not allowed, (denying using identical words is evasive) *Long Beach Paper*
		- Has D denied but not answered? (no pregnant denial)
			* I do not owe P 89,000 (so could owe 88, 899)
				+ Not common; dismissal not proper. DKI
* Has D denied possession of knowledge sufficient to form a belief (DKI)?
	+ Courts don’t like DKIs when D actually has info (*Oliver v. Swiss)*
* Has D responded with all affirmative defenses he intends to raise? (R8(c), i.e. preclusion)
	+ *Note:* may need to pass plausibility test post-*Twombly*
* *Note:* Answer’s easy to draft so D’s don’t usually dismiss at this stage

**Counterclaim – Rule 13**

* Does D’s complaint against P arise out of the “same transaction or occurrence”? (R13)
	+ If so, it is a *compulsory* counterclaim.
		- Does not require adding another party over whom the court cannot acquire jurisdiction. (Rule 13(a)).
			* **Exception.** Does not apply if the counterclaim was already the subject of another pending action or the opposing party sued without establishing personal jurisdiction (*e.g.*, *quasi in rem*).
	+ If not, *permissive* counterclaim.
* P must enter an answer/reply to counterclaim; *Twombly* plausibility standard
* Count can treat counterclaims and affirmative defenses as what they really are, regardless of what Ds call them.

**Sanctions- Rule 11**

* Provisions to deter frivolous pleadings.
	+ An attorney (or pro se party) must sign most court documents 🡪 there is some nonfrivolous reason for the action, not being made for any improper purpose, “such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation” (Rule 11(b)).
	+ Did lawyers have objectively reasonable basis for believing client? (R11)
		- In filings, an attorney is entitled to rely in good faith on client’s testimony when it is “objectively reasonable.” (Hadges).
	+ Were they allowed 21 days to amend, withdraw or justify their mistake? (*Hadges,* R11)
	+ Did party falsify evidence that is critical to their complaint? (*Business Guides)*
		- Courts very strict before 1993
		- Now only applied in situations “akin to contempt of court” (*Hadges)*.
	+ Did party act to “unreasonably or vexatiously” increase costs of litigation? (U.S.C. § 1927)
		- Punishes multiple proceedings resulting from bad faith
	+ Courts have “inherent power” to sanction abuses of the judicial process (*Chambers)*
	+ *Policy:* Don’t want parties issuing sanctions, chill creative advocacy (*Golden Eagle)*
		- Though a party may file a Rule 5 motion if she believes that the other party has violated Rule 11(b),

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| **XI. Case Management: Discovery, Depositions and XII. Settlement** |

**Case Management- Rule 16**

* A pretrial conference is held to create a schedule and determine scope of discovery.
* Often used for the following reasons:
	+ Cost control – limiting discovery and encouraging settlement
	+ Ensuring that judges make parties fulfill their obligations.

**Discovery**

* Intended to operate with minimal judicial oversight
* Facilitates resolving cases on the merits; no surprises
* Frames issue
* Judge facilitates discovery as a restraint and a prod
	+ Prevents abuse/withholding info
* Electronic information. Generally, if information is not reasonably accessible because of undue burden or cost, a party need not provide that information. However, a court may compel that party to do so anyway with good cause. (Rule 26(b)(2)(B)).
* Managing discovery. On motion or on its own, court should limit the cost, burden, and duplicative efforts of parties. (Rule 26(b)(2)(C)).
* Protective orders. A court may limit or prevent discovery to prevent a party or person from annoyance, embarrassment, oppression, or undue burden or expense (from, *e.g.*, revealing trade secrets). (Rule 26(c)).
* Timing. Parties may perform discovery in any order they want. (Rule 26(2)).
* Planning for discovery. Parties must meet before discovery to discuss plans and what they need. (Rule 26(f)).
* Production of documents.
	+ - “Documents” includes “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations” (Rule 34(a)(1)(A)).
		- If a party requests with reasonable particularity what they want and what form or forms electronic data should be produced, the recipient must:
			1. Respond or object within 30 days (Rule 30(b)(2)(A))
			2. Produce them as they are kept in the usual course of business or organized and labeled to correspond to categories in the request (Rule 30(b)(2)(E)).
			3. Request must be consistent with limits in Rule 26(b).
		- Failure to produce documents could lead to monetary sanctions (*Qualcomm*), adverse inference (*Teague*), or even dismissal on the merits (*Plasse* - deliberate destruction or concealment of electronic information).

**What is discoverable? - Order of Ops**:

Parties may obtain non-privileged information that is **relevant** to any party’s claim or defense. Information is relevant if it is “reasonably calculated” to lead to the discovery of admissible evidence. (Rule 26(b)(1)).

* *Note*: break down each different piece person is trying to compel and evaluate it separately (even if some are move obvious – throat clearing).
1. Is it **relevant?** (26(a)) – broad scope – P will likely get past this threshold
	1. X will argue relevant b/c they relate to claims and defenses
	2. Y will argue relevance is not met because it is not clear this will lead to information about a claim or a rebuttal of the claim
	3. X will argue that it bears on XYZ and so it’s relevant in that way, at least
	4. The evidence itself need not be admissible, so long as it reasonably calculated to lead to the discovery of admissible evidence.
2. Could a court limit discovery under 26(d)(2)
	1. Does the burden or expense of the proposed disc. outweigh it’s likely benefits (consider AIC, importance of discovery in resolving issue, parties’ resources)
3. Is it protected by **ACP**? – bars inquiry into communications between a client and her counsel in the course of legal representation (*Upjohn*, 26(b)(3)). Absolute privilege; can’t be overcome even when P will be prejudiced. 4 necessary elements:
	1. Attorney
		1. Are they acting as an attorney in providing that legal advice?
	2. Client – under narrow or broad def? Is or sought to be?
	3. Communication
		1. An opinion on law or
		2. Legal services or
		3. Assistance in some legal proceeding, and
			1. Use *Upjohn* for broad
		4. Not for the purpose of committing a crime or tort
	4. To lawyer from client (vice versa)
	5. Claimed and not waived
		1. *“Kept within the seal of privilege”.* If a 3rd party that does not share a common interest is let in on the info, the ACP is waived
			1. Exception: Federal rules of Evidence 502:
				1. Inadvertent disclosure – *if* took reasonable steps to prevent disclosure and rectify error
				2. Court Order – disclosed to gov.
	6. *Ping-Pong* (Y wants ACP)
		1. Y will argue the transcript reflects a communication
		2. X will argue low-level employees were not part of the control group and therefore are not ‘clients’
			1. Y will argue *Upjohn* rejected this test – any employee acting for the organization as an agent is a client
		3. X will argue Z was acting in his capacity as CEO, not as a lawyer (not providing legal advice, but business advice)
		4. Y will argue the communication was with a client, even if aspects of communication were business-like
		5. X will argue even if there was ACP, it was waived when Z revealed content to third party
			1. Y will argue that a denial of wrongdoing is not disclosing a communication
		6. X will argue privilege was waived when he told the FBI (*Upjohn/502)*
			1. Y will persuasively argue it is an exception, in accordance with court order and ACP was therefore not waived
		7. *Notes:*
			1. Privileged information is never discoverable (*UpJohn)*
			2. Info giver must be employee, agent, independent contractor with significant relationship to corp. and transaction that is subject of legal services (*Upjohn)*
			3. Privilege may be asserted by corporation or information giver (*Upjohn)*
			4. Even if ACP, still want to address WPP possibility
		8. (Note: did you do analysis for all evidence?)
4. Is it protected by **WPP**? (*Reqs*: confidential, attorney present, anticipation)
	1. Was material being compelled created in **anticipation of litigation?**
		1. Y will argue it was – *any litigation* (not just this one)
		2. X will argue she has substantial need and can’t get them without undue hardship (WPP *exception—non-absolute privilege)*
		3. Y will persuasively argue she get the substantial equivalent be deposing facts
			1. No unique testimony (person dead, etc)
		4. *Note:* Attorney could argue notes fall in this category
5. Is it protected by **CWP**? (mental impressions, conclusions, legal theories, opinions)
	1. Attorney’s notes – no ACP b/c not communication per se
	2. Y: Disclosing info would amount to “relying on wits of other party”
		1. Contrary to the adversarial process courts rely on to adjudicate cases on the merits
		2. Mental impressions (*Hickman)*
	3. X: substantial need and undue hardship
	4. Usually a high standard – X would struggle to meet it – adversarial system
		1. If met, court could **redact** documents to remove strategic considerations, legal theories and metal impressions.
	5. Likely conclusion: protected under CWP
6. Don’t repeat analysis – refer back by saying “see above.”

**Mechanics of Discovery—***can be done in whatever order, but generally:*

1. Document requests: (R34) reasonably particularity; good place to start
2. Depositions: (R30) must answer question even if requires fact-finding, max of 10 (but can req. more)
	1. Testimony is given under oath; can object to forms of question or assert privilege
	2. 30(b)(6) depo to corp—describe the topic with particularity; corp must put forward most knowledgable person on the topic
3. Interrogatories: (R33) may be more limited in usefulness since the lawyers answer, max 25 (can stipulate more)
	1. Dispositive docs. Explanations of motions, specific questions
4. E-discovery: consider how dumping e-docs may shift costs of discovery

**Depositions**

1. A party may depose any person, including another party, without leave of court except as provided by R30(a)(2). (R30(a)(1)).
2. R30(a)(2): A party must obtain leave of court, and the court must grant leave to the extent consistent with R26(b)(2):
	* 1. (A) If the parties have not stipulated to the deposition, **and**:
			1. The deposition would result in more than 10 depositions being taken under this rule or R31 by Ps, or by Ds, or by 3rd party Ds;
			2. The deponent has already been deposed in the case; *or*
			3. The party seeks to take the deposition before the time specified in Rule 26(d) [(*i.e.*, before planned or before conferencing)], unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; *or*
		2. (B) If the deponent is confined in prison.
	1. A party may depose an organization by describing what information they want, and the organization is compelled to designate someone who actually knows the relevant information to speak on behalf of the organization. (R30(b)(6)).
	2. Deposition happens under oath. Objections may be made, but deponent must answer except to preserve privilege, to enforce a limitation ordered by the court, or to move to terminate the deposition on the grounds that it is being conducted in bad faith or in a manner that “unreasonably annoys, embarrasses, or oppresses the deponent.” (R30(c); R30(d)(3)).
* Interrogatories to Parties
	+ Unless otherwise stipulated or with leave of court, a party may serve no more than 25 written interrogatories. Answering party must provide a complete written answer, but may specify records that may be reviewed to find the information if the burden would be the same on both parties. (R33).
	+ Types of interrogatories that are helpful to ask: identify; describe; or explain (as in a denial in an answer).

**Settlement**: Litigation should be rare b/c parties are collectively worse after costs

1. $EVΠ=P\_{Π}D\_{Π}-C\_{Π}$
2. $EV\_{Δ}=-P\_{Δ}D\_{Δ}-C\_{Δ}$
3. $\left|EV\_{Δ}\right|-EV\_{Π}>T\_{Π}+T\_{Δ}⇒$Parties will settle for $S:EV\_{Π}+T\_{Π}<S<\left|EV\_{Δ}\right|-T\_{Δ}$
4. Definitions:
5. EV is expected value
6. P is the probability that the plaintiff will prevail (as estimated by the party in the subscript)
7. D is the likely damage award (as estimated by the party in the subscript)
8. C is the cost of litigation
9. T is the transaction cost of negotiation
10. S is the settlement amount
11. Discovery is expensive –increases settlement zone
12. When parties will not settle:
* One or both parties are mistaken about the values of the variables.
* The claim is sufficiently novel that the variables may not be estimated with a high degree of certainty.
* When the parties are highly averse to negotiation (such that their subjective T-value is high)
	+ Issue: assumes parties are rational (frequently emotional motivation)
		- Injunctive relief?

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| **XIII. Summary Judgment** |

**Rule 56**: “A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is **no genuine dispute** as to any **material fact** and the movant is entitled to judgment as a matter of law.”

* Take all inferences in favor of the non-moving party
	+ Inferences must be viewed as *plausible* (*Matsushita)*
* Both parties need to produce the facts that alleged not to be in dispute - will rely on non-movant’s version
* Judgement = even if we take your version of all the facts as true, you still lose (or win).
* *Sua sponte* summary judgment. No limitation on judge to grant summary judgment *sua sponte* other than reasonable notice. (Rule 56(f)).

**Order of Ops**

1. Throat clear: “Assuming this is only material fact open to dispute, Y will argue that the court should grant summary judgment under rule 56 because…”
	1. No genuine dispute over a material fact 🡪 entitled to SJ as a matter of law
	2. Y will argue there is a dispute because \_\_\_\_\_\_\_
2. Who has *burden of production* on these issues at trial?
	1. Movant: Can he present affirmative evidence to negate an essential element of the non-movant’s claim or just a defense?
		1. Must “foreclose the possibility” for SJ to be appropriate. (*Adickes*)
		2. Not easy to do
			1. Is there proof or just allegations? *Scott.* (see below)
	2. Non-Moving party (more likely):
		1. **Burden of production** – Moving party must always produce information to establish SJ is even possible.
			1. Meets burden by:
				1. Present affirmative evidence to negate essential element of non-moving party’s claim (*Adickes*)

See above for OOP

* + - * 1. **OR**, demonstrate that non-moving party’s evidence is insufficient to establish an essential element of the claim. (*Celotex)*

Consider evidence:

Does it rise to the proof level required for the claim (preponderance/beyond a reasonable doubt)? *Liberty Lobby*

Hear say/affadavits from non-deposable parties?

Could the court find that the facts don’t meet the level of plausibility they’d need to for the burden to be carried? *Matsushita*

Are there equally plausible alterative motives for conduct?

Are the reasonable inferences that would need to be drawn implausible?

If doesn’t meet, **no SJ**

If met, *burden shifts* to non-movant.

* + 1. In response, non-moving party may:
			1. Ask for more time under Rule 56(d), **or**
			2. Argue deficiency relates to inadmissible evidence, such that it could be admissible through a continuance. (R56f)
		2. Burden shifts back to movant, who may:
			1. Issue is whether the inadmissible evidence submitted is **reducible** to admissible evidence (*Celotex)*
				1. P could say it is b/c she can make hearsay evidence admissible by:

State that she will call witness that will support the claim

Get an affidavits to support claim

Likely not hers – she isn’t expert/reliable

Depose witnesses (R56(d))

D could argue it is discretionary – court should not allow her to do this here b/c of X.

1. Are there reasonable inferences drawn favouring non-movant not plausible, or clearly contradicted by the record? (*Matsushita; Scott v. Harris)*
2. Conclusion: if non-moving party has been fully heard, and we don’t believe there is anything that should go to the jury b/c no genuine dispute on a material issue 🡪 SJ

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| **XIV-XV. Preclusion: Res Judicata (claim) and Collateral Estoppel (issue), Mutuality, Non-Party Preclusion, Joinder** |

For all preclusion, must be valid, final, and on the merits (*e.g.*, not dismissed for lack of SMJ, but 12(b)(6) w/ prejudice and default judgments are on the merits).

**Claim Preclusion/*Res Judicata:* Finality/Repose** (valid judgment; same facts without any intervening changes in fact or law)

1. A valid, final judgment precludes litigation of another action involving the same claim.
	1. All rights from one transaction 🡪 claim 🡪 adjudicated on merits 🡪 final
		1. This is why counterclaims are compulsory under R13
			1. Was the injury there at the time of complaint?
	2. Order of Opps:
		1. Is there a: (*Mathews v. New York Racing Ass’n*).
			1. Judgment on the merits
			2. Involving the same two parties or those in privity
			3. Over same transaction or occurrence
			4. It is the finality and not the correctness of the judgment that matters (*Moitie)*
				1. If you don’t like a judgment 🡪 appeal
			5. Statute of limitations is not on the merits (*Keaton)*
		2. If not same parties, does **one of the exceptions to mutuality apply?** (Virtual representation is not sufficient). *Taylor*.
			* 1. **Privity** (legal relationship) – law outside procedural world
				2. **Agreement to be bound** (consent)
				3. **Assumed Control** (*Montana)*
				4. **Proxy** (collusion to avoid preclusive effects)
				5. **Special Statutory Schemes**

Does not bar claims that could not have been brought in the court that brought the judgment (*e.g.*, antitrust).

* + - * 1. **Adequate Representation**

NOT from virtual representation (*Taylor)*

Interests of parties must be aligned **and:**

Procedural protections (class actions)

Understanding by P that suit was brought in a representative capacity

May require notice

**Issue Preclusion/*Collateral Estoppel:*** Preservation of limited resources

1. Discrete issues of fact or law that were litigated in a prior suit cannot be relitigated even if the claims are different.
2. Issue must have been:
	1. Actually litigated (*Cromwell)*
		1. Unlike claim preclusion, litigation is not bar to future litigation
		2. Level of generality matters (broad makes IP less likely)
			1. Was the issue the **same**?
		3. Where is it in the evidence?
			1. Pleadings?
				1. Inaccurate but if beyond that judicial economy goal is compromised
	2. Necessary to the judgment? (*Rios)*
		1. Was the decision regarding this issue actually necessary to the judgment?
			1. Reverse test: Had this issue been decided differently, would the judgment have changed in the previous litigation?
			2. Consider how affected by:
				1. Passage of time issue?
				2. Reasonable to produce all info in prior?
				3. Foreseeable issue would arise again?
		2. We do care about the correctness of the judgment (contrary to *Moitie)*
	3. On the merits?
		1. SOL/Default is not on merits
		2. Could party have appealed decision?
		3. Decisions by state agencies usually not precluded, but federal agency decisions usually are
		4. Pending appeals considered final for purposes of preclusion
3. Non-Mutual issue preclusion: generally, one cannot be bound to a judgment to which one was not duly named as a party and served with process. *Pennoyer*.
	1. Not a party 🡪 can’t be bound (*Martin)*
	2. Can we apply a non-party exception? (see above)
	3. **Defensive:**
		1. Generally, OK if the P is trying to benefit by relitigating an issue decided against it in another case. (*Blonder-Tongue*)
	4. **Offensive** (good b/c judicial economy, proper incentives; **careful)**
		1. Never allowed against federal government *(Mendoza)*
		2. If stranger is invoking collateral estoppel for their benefit, courts are hesitant but may be willing to invoke these factors. (*Parklane)*
			1. Could not have easily joined suit
				1. Don’t want side line Ps
			2. Would it be unfair to apply the judgment against the D?
				1. Lack of incentives to vigorously defend issue in prior suit ?

How substantial were possible damages?

Were future suits foreseeable?

* + - * 1. Risk of inconsistent judgments?
				2. New procedural opportunities available in current suit that weren’t available in prior suit (i.e. favourability of forum)?
1. *Notes***:**
	1. If the case was decided incorrectly, as long as it was a judgment on merits, its finality is preclusive. *Moitie.* Prioritize finality in general over fixing specific.
		1. Except where the law that changed was so monumental it is like a new fact/circumstance.
	2. Full preclusive effects if the issue was specific to class (*Cooper)*
		1. Or was issue specific to the individual P?
	3. *Intersystem Preclusion:* Preclusive effect of a federal court judgment sitting on diversity is determined by the preclusion rule that would apply to a judgment of the state court in which the fed court sits (*Semtek)*
		1. We prefer vertical uniformity to horizontal uniformity (*Erie* concern)
		2. **Unless** state law is incompatible with fed interest (e,g. bankruptcy)

**Joinder**

**SITUATION**: X wants the judgment to happen. Y wants to stop the judgment. Y is going to say, “NO! This stranger who isn’t here needs to be here! B/C P can’t get relief, D might have multiple litigations, outsider’s interest is really high, Court and public interest says no trial!”

1. Throat clear – only if D is indispensable will the court dismiss the case. To determine, run through a R20 and R19 analysis.
	1. R20: **Permissive** joiner
		1. So long as there is are common questions of law or fact and they assert their right to relief that is joint or several and arises out of the same transaction or occurrence
2. **Required** (R19)
	1. *Step One*: Are you a **required** party? (19(a))
		1. Y will argue Z has an interest in the matter, and disposing of the matter in their absence would:
			1. Impair/impede ability to protect that interest. *Provident.*
			2. Subject existing party to multiple/inconsistent judgments. *Pimental.*
		2. X will argue that even if that’s true, Z is not necessary party because court can accord complete relief between the parties. Pimental.
	2. *Step Two:* Is it **feasible**? (19(a)(i))
		1. If yes, join
			1. A required party who refuses to join may be ordered by the court to be a defendant or an involuntary plaintiff
		2. If not (e.g. no **PJ/SMJ** or immunity – can’t be served with process), *step three*
	3. *Step Three:* Can court, **in equity and good conscience*,*** proceed to judgment in their absence? (19(b), *Provident, Pimentel):*
		1. Evaluate: (retrace part of *step one)*
			1. **Ps interest** in having a forum
				1. Adequate relief? Alternative forum? SOL?
			2. **Ds interest**
				1. Is Ds liability FULLY decided after trial? Should it be shared with outsider?
				2. Is strangers claim against D time/space barred?
			3. **Outsider’s interest** in avoiding prejudice
				1. Extent to which litigation would impair or impede ability to protect their interest
				2. Is interest represented? (*Provident)*
				3. Why are they claiming sovereign immunity?

If they really cared, wouldn’t they be in it?

* + - 1. **Public’s interest**
				1. Is claim frivolous/futile?
				2. No piecemeal litigation

Low if possibility of further litigation is low (*Provident)*

* + 1. *Conclusion*: Even though factors weight in favour of dismissal, courts sceptical of 19(b) arguments b/c they are often strategic ways to get cases out of court

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| **XVI. Class Actions** |

1. Initiation of the class action
	1. Lawyer cannot solicit clients for a class action for the lawyer’s personal gain. (*Ohralik*).
	2. However, they can solicit clients for civil rights class actions. (*In re Primus*).
	3. SC: afraid of judicial black main
2. Due process requirement (upheld through 23(a)(2-4))
	1. “It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present.” (*Hansberry*)
	2. Adequate representation requires that there be no conflicting interests in the class with respect to the issue being litigated such that they are actually on opposite sides of the issue. (*Hansberry*).
3. Certification: 23(a) – “Prerequisites” (can be used strategically by both Ps and Ds)
	1. *Numerosity* (looks to class as a whole)
		1. **Joinder** of all members is **impracticable** –25 minimum, 40 usually threshold
	2. *Commonality* (looks to class as a whole)
		1. Action must raise a question of **law** or fact common to the whole class.
			1. Allows for individual differences so long as common interest is enough to bind class together (*Hansberry)*; **common injury**?
		2. Critical question is whether the common question of law or fact will produce **common answers** applicable to the entire class (*Dukes)*
			1. Necessarily requires an analysis of the merits of the case – cannot be helped (Scalia *Dukes)*
			2. If b(3) class, after *Dukes* – predominance is included in commonality.
		3. Courts are required to engage in choice of law analysis when class sweeps in members of multiple jurisdictions (*Shutts)*
			1. Can fix by **subclasses**
				1. If potentially very different rules apply, sub-classing is too difficult/costly (*Castano/Amchem)*
	3. *Typicality* (looks to named Ps)
		1. Usually found when each class member’s claim arises from the **same course of events**, and each class member makes **similar legal arguments** against D
		2. Goal: named P’s claim and class claims are so *interrelated* that the interests of the class members will be fairly and adequately protected in their absence
		3. Same claims? (*Falcon)*
			1. Is Ps claim weaker/stronger than others?
		4. Type of relief sought is typical of class (*Amchem*)
			1. Consider time relation of Ps
			2. Is P **wealthier** than class?
				1. How will this affect the class?
	4. *Adequate Representation:* (looks to named Ps and attorney)
		1. Will they fairly and adequately protect the interests of the class?
			1. Concern for autonomy in claims from class members that they may want to pursue on their own; might be more beneficial to prosecute own claims rather than dragged into collective. *Castano*
			2. Is P using class strategically?
		2. Can the named representatives monitor the case?
		3. Is the same attorney representing individuals with competing interest? (*Amchem)*
			1. Is one attorney representing various subclasses?
				1. If no typicality 🡪 can’t have same lawyer
			2. Is attorney being loyal to class? (*Amchem)*
				1. Are they selling peace?
		4. If there are conflicting interests, (2) and (3) may be met, but (4) is only met if there are discrete subclasses to protect those interests. (*Amchem; Ortiz*).
		5. Guarantees that class will have had a *figurative* day in court (exception to *Penn*)
			1. Allows for finality of judgment; all members precluded (*Hansberry)*
4. Types of Classes: 23(b)
	1. **Limited Fund Class** (*Ortiz)*
		1. Mandatory (especially careful about autonomy concerns)
		2. Notice required must meet *Mullane* standard (consider $)
		3. **Need to show** (1) amount of claims have (2) outstripped fund that is (3) necessarily limited
			1. Class size must be **naturally definable**
				1. Are obvious members being left out? (*Ortiz)*
			2. Equity? (*Ortiz)*
			3. Is the fund really limited?
				1. Is it an attempt at common law bankruptcy? (*Ortiz)*
	2. **Injunctive Class** *(Dukes* – though it should have been a hybrid class*)*
		1. Mandatory for a reason?
			1. Or just because cheaper notice?
				1. Only appropriate notice as mandated by court
				2. Arguably no notice is possible
		2. Is the relief appropriate for the whole class?
			1. Is it taking valuable claims away from Ps?
		3. Monetary relief is usually not permissible (*Dukes)*
			1. Structural answer problem
			2. REA problem – AEM D’s substantive rights
			3. Even if incidental?
				1. Does it flow naturally to class as a whole in virtue of the other damages?

Can’t be need for individual adjudication – goes to all or none

* + - * 1. Open Question (*Dukes);* likely not. Better solution:

**Hybrid Class:**

*Wal-Mart* should have been b(2) and b(3) class

Tack on 3, restructure cohesion 🡪 money damages

* 1. **Damages Class** *(Castano, Amchem)*
		1. Opt –out class
		2. Usually money damages
		3. Notice is higher than Mullane (best that is practicable under circumstances) – very expensive $
		4. *Predominance*: do common questions predominate over individual questions?
			1. Stricter commonality requirement (arguable not after *Dukes)*
		5. *Superiority:* is a class action superior to other methods of litigating controversy?
			1. Do different state laws apply (*Shutts)*
				1. Risk of error?
			2. Are there fissures within the class members interests and needs for relief?
				1. Can be rectified by subclasses (*Amchem)*
			3. Is individual proof necessary?
				1. E.g. Fraud: do we need to show individual reliance? (*Castano)*
			4. Difficult to manage litigation?
				1. Too many different state laws?
				2. Too many subclasses?
				3. Immature tort – do we need more information on how individual claims would be heard? *Castano*
			5. Are there autonomy issues at stake?
				1. How valuable are individual claims? (*Castano*)
				2. Good for negative value claims
		6. Notice requirement (23(c)) 🡪 all members “who can be identified through reasonable effort” must be notified in plain, easily understood language, the nature of the action, the claims asserted, that the judgment is binding, and how to opt out.)
			1. Expensive!
	2. **PJ**
		1. Ps don’t need minimum contacts (*Shutts)*
			1. Not same burden on P than on D
				1. Absent members aren’t burdened by adverse judgment
				2. In 23(b)(3) claims, personal jurisdiction is not necessary, but must be sent “reasonably calculated” notice with an opt out form. (*Phillips Petroleum*).

Why?

Loss of chose in action

Thus, can opt-out

* + 1. If D is class: heightened reqs b/c may have to pay and adverse judgment would affect
	1. **Settlement Classes**: can judge decide that settlement is “fair, reasonable and adequate?”
		1. Can’t get to (e) unless (a) and (b) are dually satisfied
			1. Want Ps to maintain credible threat against Ds that they actually can litigate the claim
			2. Counter with Breyer’s *dissent* in *Amchem*
				1. It’s a good deal – solves a significant problem, everyone is better off – sliding scale – (e) vs. (a) + (b)
		2. Management issues are not relevant (*Amchem)*
		3. Settlement may indicate whether adequate representation was met
		4. Is settlement fair?
			1. Procedural protections put into place for fairness?
				1. Adjustments for inflation
				2. Is money distributed unfairly? Are named Ps doing better?
			2. Was there reasonable notice to all bounds
				1. May get another opportunity to opt out – Due Process

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| **Appendix** |

* **Federal Rules of Civil Procedure**:
	+ Rule 8: General Rules of Pleading
	+ Rule 9: Heightened Pleading
	+ Rule 11: Frivolous lawsuits; Sanctions
	+ Rule 12(b): How to Present Defenses; Motions for Judgments on the Pleadings
		- Rule 12(b)(6): Motion to Dismiss for failure to state a claim upon which relief could be granted
	+ Rule 12(e): Motion for a More Definite Statement
	+ Rule 13: Counterclaims
	+ Rule 15: Relation-Back
	+ Rule 16: Case Management
	+ Rule 19: Required Joinder
	+ Rule 20: Permissive Joinder
	+ Rule 22: Interpleader
	+ Rule 23: Class Action
		- Rule 23(a): Prerequisites (numerosity, commonality, typicality; adequate representation)
		- Rule 23(b): Types of Class Actions
			* 23(b)(1) **–** limited fund class action (mandatory)
			* 23(b)(2) – injunctive class action (mandatory)
			* 23(b)(3) – damages class action
		- Rule 23(c): Certification; Notice
		- Rule 23(e): Settlement
	+ Rule 26(b): Discovery Scope and Limits
		- Rule 26(b)(1): discoverable matters; relevance
		- Rule 26(b)(3)(A): work-product doctrine
			* Rule 26(b)(3)(A)(ii) – undue hardship and substantial need
		- Rule 26(b)(3)(B): core work product
		- Rule 26(b)(5): attorney-client privilege
	+ Rule 26(c): court protective orders (Fed. R. Evid. 502)
	+ Rule 26(d): sequencing (anytime after Rule 26(f) conference)
	+ Rule 30: Depositions
	+ Rule 33: Interrogatories
	+ Rule 34: Requests for the Production of Documents
	+ Rule 41: Dismissals
	+ Rule 56: Summary Judgment