Civil Procedure Outline
Spring 2004
Amar

REMEDIES

I. Remedies – aim to cure legal harm

A. Main Types:

1. Substutionary Remedies: seek to provide the P with a reasonable substitute. Ex. money damages for loss of arm.
2. Specific Remedies: seek to restore directly and specifically that which the D has taken from P

B. Substitutionary Remedies:

1. Compensatory Damages: type of substitutionary relief that aims to put party in "rightful position."
   a. US v. Hatahely
      i. F: Native Americans were illegally letting animals graze. Gov sued. Gov took burros and horses. As a result, other cattle died. Native Americans sue for value of taken horses/burros, loss of use (the burros were protecting the cattle, which are now dead), and mental anguish.

      ii. Rightful Position Principle – fundamental principle of damages is to restore the injured party as nearly as possible to the position he would have been in had it not been for the wrong of the other party.
         - Subjectivity problem: How to measure subjective injury?
         - Unpredictability problem: It would be unfair to penalize people bc the opposing party had a particularly strong subjective perspective. (Unfair to penalize A in the extreme just bc B extremely loved his damaged car. A had no way of predicting B's subjectivity.

      iii. Damages must be measured by market analysis. Must use objectivity.

      iv. In pain and suffering, damages must be awarded on individual basis. (Not all are entitled to same damages.) Even if this means high costs.

      v. Important to determine what is characterized as the wrong. (??)
         - Ex. in contract law, we define the wrong as the failure to follow through on a contract, not entering the contract that was never followed through on.

      vi. Mitigation Principle: The right to damages does not extend forever. It is limited to the time in which a prudent person would replace the loss and prevent further harm.

   b. Amount of Damage should be accurate.
      i. If too low, it causes problems:
         - Moral: Not a good policy to leave people under-compensated when it is not their fault. They should not be any worse off.
         - Economic – If D pays less than the harm he inflicts, he will not have the incentive to prevent it next time. He should have to internalize the cost so he can make an accurate cost/benefit decision.

      ii. If too high, it causes problems:
         - Moral: P should not be the beneficiary of a windfall. He should not be any better off than he was before.
         - Economic: P may have the incentive to become the victim. Also, D may become overdeterred. (Ex. If he got into an extremely costly auto accident, he may stop driving altogether.)

2. Punitive Damages
   a. Unlike compensatory damages, seek to punish a D for wrongful conduct….like criminal law.

   b. Civil v. Criminal Procedures for implementing punitive damages:
      i. Level of proof required

- Regular civil: P must prove at a preponderance of the evidence. 51%
- Punitive civil: P must prove with clear and convincing evidence. 65%-80%
- Criminal: P must prove beyond a reasonable doubt. 99%

ii. Allowance of past conduct

- Punitive Civil: P must introduce evidence of the D's net worth when jury is determining amount of punitive damages so it can be determined how much damages will hurt.
- Criminal: P is not allowed to introduce past conduct of D bc it might bias jury.

iii. Review by Appellates

- Punitive Civil: Appellate courts have power to review proportionality of punitive damages (but not compensatory).
- Criminal: Appellate courts have the power to review the sentence.

c. Why do we allow P to collect punitive damages on top of compensatory damages, rather than having punitive damages go to the state?

i. If we don't, P may not bring the misconduct of the defendant to light. He may only bring forward what is necessary to secure compensatory damages (which is less that what is needed for punitive) The punitive damages act as a booty

ii. Some states have experimented with the idea of splitting the punitive damages. However, they have gone back to the winner take all approach. Otherwise, the plaintiff has the incentive to settle because they can get more $ than what they would receive in a judgment. Also, there is an incentive for the defendant, as they pay less than they would have to if the case did not settle. The system has then failed to deter the defendant from such behavior in the future.

d. Honda Motor Co. v. Oberg

i. no review of damages according to Oregon CON.

ii. Common law courts followed their English predecessors in providing judicial review of the size of damage awards. The establishment of an amendment that disallows this review when there are no procedures to provide protection against arbitrary and inaccurate adjudication; the proceedings violate the Fourteenth Amendment.

iii. BMW of North America v. Gore

- F: Gore awarded $4M in suit for him and 1000 other BMW owners.
- The three guideposts to see if damages are excessive are:
  1. the degree of reprehensibility of the nondisclosure
  2. the disparity between the harm or potential harm suffered by the plaintiff and his punitive damage award
  3. the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

3. Liquidated damages – Parties to a contract may agree to a reasonable means of calculating damages should one of the parties breach the contract.

a. Will only be enforced if:

i. the liquidated damage amount is a good faith estimate of what actual damages would be AND

ii. actual damages are likely to be difficult to calculate. (either time consuming or precise)

b. If liquidated penalties operate as a penalty, they will not be enforced. Why?

i. There may be an uneven bargaining position, which resulted in the value that was too low/high.

ii. We do not want to give the incentive for parties to induce breach on each other.

iii. Ex. house construction example. The contract says for each overdue day, construction has to pay $1000 to house owner. Not enforceable.

c. You can have different options of liquidated remedies. (Ex. Limitation of Remedies clause; if you buy something, you can only return it for credit.)

C. Injunction (Specific Performance): Court order requiring a party to do / not to do something.

1. Goal: to put party in "rightful position."
2. Irreparable Injury Rule: when damages are good enough, you cannot seek an injunction.

a. Only applies if damages are exactly equal to value of injunction. If damages are slightly lower, rule does not apply. In practice, rule usually does not apply bc party can always show some reason why damages are inferior.

D. Provisional Remedies: Relief pending a final adjudication of the dispute. Decision made before a full trial on the merits.

1. Preliminary Injunction: Order from court to do/not to do something pending final judgment.
    a. Difficult bc there may be irreparable harm on both sides if preliminary injunction is wrongly granted/not granted.
    b. 2 pronged test used: balance of equity/irreparable harm
        i. ONE: Which side will probably be successful?
        ii. TWO: Which harm would be irreparable?
        iii. Formula: (P likelihood of success x irreparable harm if no injunction is given when it should have been) </> (D likelihood of success x irreparable harm if injunction is granted when it should not have been).
        iv. Likelihood of success need not be PROBABLE. CHANCE of success may suffice. Depends on the amount of irreparable harm.
    c. Preliminary injunction is immediately appeallable.
    d. CASE: William Inglis &Sons Baking v. ITT Continental Baking.
        i. F: P contends that D is guilty of anti-trust violation (below cost-pricing). P seeks preliminary injunction.
        ii. Loss of business to P if no injunction is granted is hard to calculate. In order to grant injunction, it is not necessary that the moving party be reasonably certain to succeed on the merits. If the harm that may occur to P is sufficiently serious, it is only necessary that there be a fair chance of success on the merits.

2. Due Process Issues: Due process requires a hearing before possession of property is terminated.
    a. When does curtailment of ordinary procedures amount to the denial of due process?

    b. RULE 65: Injunctions: Procedural Rules of Injunctions, NOT substantive. Where, how, when.
        i. (a) Preliminary Injunction:
            - No preliminary injunction shall be issued without notice to the adverse party.
            - Consolidation of hearing with a trial on merits:
                1. Before or after hearing for preliminary injunction, court may order trial of the action on the merits to be advanced and consolidated with it.
                2. Any evidence given upon application for preliminary injunction becomes part of record of trial and need not be repeated.
        ii. (b) Temporary Restraining Order:
            - TRO may be granted without notice to the adverse party if it clearly appears from specific facts that irreparable injury, loss or damages will result before hearing can be held AND
            - The applicant's attorney certifies to the court in writing that efforts have been made to give notice and reasons why notice should not be required.

c. CASE: Fuentes v. Shevin
   i. F: P purchased furniture on payment plan. Did not own title until balance paid. If payment not made, K said D could reclaim all items. Statute allows D to reclaim as long as D obtains a writ of repliven. Writ always given upon application of another party who claims a right to property and posts a security bond. P claims statute is in violation of Due Process Clause.
   ii. 14th Amendment only regulates government. Applicable in this case bc statue is allowing the repossession procedure (D obtained a writ of replevin which authorized him to reclaim the items.) Although P did not yet have ownership of the items, court considers possessory interest as a type of property interest.
   iii. 3 variables for how much process is due:
      - How much is at stake? Ex. Library can revoke library card and send an explanation letter after the fact. v. stove.
      - The state interest minus cost of process.
      - Accuracy: making sure deprivation only happens when it should. No arbitrariness.
   iv. Practical implication of Fuentes:
      - Not clear who really won. Fuentes now must pay for attorney for a hearing.
      - It is likely that Fuentes will not have valid reason for not making payment, so creditor will keep property, but still have to pay for litigation. As a result, he will pass the cost of litigation on to the next innocent customers by raising the price.

3. Damages v. Injunction:
   a. Damages are preferred bc with injunction, you are taking away something that cannot be given back easily if it was taken wrongfully. If damages are ordered wrongfully, they can be given back.
   b. Argument that damages are more efficient.
      i. Counter: damages actually take more time to valuate. Injunction would be just as efficient.

FINANCING LITIGATION

I. Attorney's Fees:

A. American Rule: each party pays for its own litigation, regardless of who wins and who loses. (English Rule: Winning party does not pay.)
   1. Not really rules, but presumptions

   2. Pros:
      a. Gives access of courts who would be unjustly deterred from bringing suits due to the high risk of losing and having to pay fees on both sides. (Even if they have a strong case, results are never certain.)
      b. D has incentive to settle even if P's case is weak if settlement costs are less than costs to continue litigation.

   3. Cons:
      a. Does not satisfactorily compensate winner bc winner still has to pay high cost of litigation.
      b. People may be deterred from bringing suits bc they cannot afford a lawyer.
      c. If P has a weak case, D has no incentive to settle bc winning will be a windfall for D since costs will be covered.

B. Different Fee Arrangements:
   1. Flat Rate: amount is based on assessment of how much time it takes to do a task and what attorney thinks hours are worth in the marketplace.
      a. Pro: Predictable and guaranteed for client. Works best when tasks are easy to predict. Commonly used for writing wills.
      b. Cons: Underestimates are possible. Does not work well for tasks where it will be hard to predict the amount of hours required.

2. Hourly Rate: amount is based on hourly rate and exact amount of hours expended
    a. Con: Incentive Problem: attorney is not incentivized to work efficiently. Not in the best interest of the client.
        i. Counterbalanced with incentive to satisfy client by working efficiently in hopes of retaining client's business.
        ii. Counterbalanced with limited time, so attorney may not be able to spend more time than necessary.

3. Contingency Fee: lawyer agrees to provide legal representation with a fee to be paid from proceeds of any settlement or recovery.
    a. Firms will likely take small amount of cases that are likely to win, or large number and assume the volume of winnings will make up for losses when spread out.
    b. Pro: client risks no out-of-pocket expenses. Easier access to courts for the poor.
    c. Con: Successful clients end up bearing the risk of unsuccessful clients. Attorney takes probability of success and amount of end result into determining how much time to spend on cases, so frivolous claims and claims seeking non-monetary damages don't get attention. Gives incentive to underwork cases bc early settlement for a small amount is more attractive to lawyer than a late settlement for a medium amount bc attorney gets higher hourly rate if early settlement.

C. Best Fee Arrangement depends on circumstances:

	Rich	**Poor**
Plaintiff	Pay own lawyer. (Task or hour)	Can't pay own lawyer by hour nor by task. Contingent fee is good (but only for money damages suits).
Defendant	Get insurance or self insure in case you get sued	Legal Aid Other public and non-profits step in. Charitable/pro bono work.

D. Fee Spreading:
1. Insurance: a way of spreading costs.
    a. Those who get sued are subsidized by those who don't
    b. Insurance companies value the risk and make sure to charge enough to cover risk.
    c. Insurance for law – slow growing bc insurance companies have to be able to predict the risk to know how much to charge.
    d. Only works with large pool. Clients pool chances together..
    e. Contingent fee is like insurance:
        i. We pay Kaiser. Those who get sick are subsidized by those who don't.

E. Fee Shifting: American Rule can be avoided:
1. By Common Fund: If P brings a suit that helps others win/vindicate valuable legal rights, then P may be able to recover from a sum that his efforts have created.
    a. Does not shift fees, but rather spreads them out to all benefiting parties.

2. By Contract: clause can provide for a losing party to pay winner's attorney fees.
    a. Ex. most lease agreements obligate lose to pay prevailing party's fees.

3. By Statute: Supreme Court held in Alyeska v. Wilderness Society that legislature could create fee-shifting:
    a. Applied in civil rights statutes to create an incentive to litigate civil rights issues.
    b. Applied in civil litigation against the US.
    c. States have their own variations.
    d. 42 USC 1988: In any action to enforce civil rights, the court, in its discretion, may allow the prevailing party, other than the US, a reasonable attorney's fee as part of the costs.

        i. CASE: Evans v. Jeff D.
            ▪ F: P represented by Legal Aid, sought injunctive relief to improve the treatment of institutionalized children. Class action suit. Services are free, but Legal Aid keeps all monetary damages. D offers settlement in return for P waiving his right

under §1988 to attorney's fees. Attorney was obligated to take settlement offer to P, even though instructed by Legal Aid not to take any settlement that waived fees. P accepted settlement.

- RULE 23(e): requires that a court approve the terms of any settlement of class action. District Court approved settlement.
- Court ruled that District Court did not abuse its discretion to uphold a fee waiver which secured broad injunctive relief.
- As a response to this case, Legal Aid inserts into Ks with clients: "you agree not to accept settlement that waives seeking attorney's fees."

4. By Common Law: courts have power to make exceptions to American Rule
   a. Ex. when P has groundlessly brought a suit, or brought a suit for malicious prosecution.

5. RULE 68: Offer of Judgment (Settlement)
   a. Pre-trial: must be made at least 10 days before trial
      i. If not accepted, it is considered withdrawn
      ii. Rejection does not preclude acceptance of subsequent offers
      iii. If judgment after trial is equal to or less than the offer, P has to pay the costs incurred after the offer was made.
   b. Post-trial: After D is found liable but at least 10 days before a damages trial, same rules as above apply.

PLEADINGS: THE COMPLAINT

I. Modern Pleadings

A. General goal: to notify other side of the basic theory of the case.
   1. This creates the basis of the federal model in Rule 8a.
   2. Only so much information required as to notify D as to what the lawsuit is about.
   3. More detailed information can be hashed out in discovery.

B. Modern standards are much more relaxed as a reaction to traditional standards that barred many cases at this beginning stage for minor technical flaws.

C. Allows many cases in to face stricter filters at later stages of the process.

D. 2 Functions:
   1. Invokes a body of law. Explains how facts taken together constitute something that the law addresses
   2. Provides key factual assertions that fall under that umbrella of law.

E. Modern courts often provide "check the box" forms.

F. Process:
   1. Complaint, pre-answer motion, answer, reply (only if specifically stated in answer that reply is required), amendment (only if relates back).

II. The Complaint:

A. Rule 8: General Rules of Pleading
   1. (a) Claims for Relief shall contain:
      a. (1) a short and plain statement of the grounds upon which the court's jx depends.
      b. (2) a short and plain statement of the claim showing that the pleader is entitled to relief.
         i. NOTE: relates to 12b6 motion, does not apply to claims of fraud/mistake per Rule 9.
      c. (3) a demand for judgment for relief.

   2. (b) Defenses: Form of Denials:
      a. D must give a short and plain statement of the defenses to each claim asserted, and shall admit or deny averments upon which the adverse party relies. If the D is lacking sufficient information, he shall so state, and it is treated as a denial.

   3. (c) Affirmative Defenses:
      a. D must set forth all affirmative defenses.

4. (d) Effect of Failure to Deny:
    a. When a response is required, it is deemed admitted if not denied (unless it relates to the amount of damages.)
    b. When a response is not required, failure to respond is deemed an admission or an avoidance.

5. (e) Pleading to be Concise and Direct; Consistency
    a. A party may set forth 2 or more statements of claim or defense regardless of duplicity.
    b. Fairness rule bc pleadings are made before the parties have full knowledge of the facts of the case.
    c. Ex. a party can claim he never entered into a K AND that he fulfilled his end of the bargain.

6. (f) Construction of Pleadings: shall be so construed as to do substantial justice.

B. Rule 12(b)(6): Motion for judgment on defense of failure to state a claim upon which relief can be granted.

1. Claim can fail for 2 reasons:.

    a. Factual/technical insufficiency. Fails to provide enough facts, or provides them in an incorrect manner. (usually cured by more investigation, factual refinement, technical corrections.) ?Is this still considered 12b6?
        i. Court allows at least one leave to amend.
        ii. CASE: People ex rel. Dept of Transportation v. Superior Court:
            - F: P filed a claim in state court using a form complaint for auto accident.. P sues D bc they are responsible for the median dividing a highway. Gave specific information on where accident took place, who were involved, the direction they were going, and that the other driver crossed the median. Did not explain how the median contributed to the accident. D filed demurrer, asserting that the complaint did not state a cause of action. (State analog to 12b6 motion.) District court ruled that any complaint using a standard form is "nondemurrerable." Encourages D to take it up as a writ of mandate. D files writ.
            - This court rules that adoption of official form has not changed the requirement that the complaint contain sufficient detailing of facts to state a cause of action.

    b. Legal insufficiency. Law does not allow recovery under those facts.
        - CASE: Haddle v. Garrison (Federal District Court):
            1. F: P participated in a federal criminal trial. P terminated, and sues former employer for retaliation, in violation of 42 USC 1985(2) – which creates a federal right of action for any person damaged in person or property as a result of attending or testifying at a court proceeding. D moves to dismiss under 12(b)(6).
            2. Court grants dismissal bc at-will employment can be dismissed for no reason at all, so discharge does not violate 42 USC 1985(2). Loss of job is not a constitutionally protected right.

            3. CASE: Haddle v. Garrison (Supreme Court):
                a. P alleged that he did state a claim bc loss of job can be considered damages to property.
                b. Nothing in statute 42 USC 1985(2) states it only protects against constitutionally protected right. Court considers interpretation of statute language "injury to property" as including job, even if at-will. (Loss of job may not be considered property under Due Process Clause, but is considered property under §1985.)
                c. NOTE: Although it was established that loss of at-will employment was not considered property under Due Process, this is NOT Rule 11(b)(2) violation bc P was suggesting a reasonable extension of the established law.

III. Limitations on Pleadings: Ethics

A. RULE 11: Signing of Pleadings, Motions, and Other Papers; Representations to Court, Sanctions

1. (a) Signature: Every pleading must be signed by attorney or party and must include address and phone #.

2. (b) Representations to Court:
    a. A signature implies that to the best of signer's knowledge, with REASONABLE INQUIRY, pleading is:
        i. (1) not presented for improper purpose (ex. to harass or delay)
        ii. (2) warranted by existing law or by non-frivolous argument for extension, modification, or reversal of existing law.
        iii. (3) allegations and factual contentions have evidentiary support or are likely to have after reasonable opportunity for further investigation.
        iv. (4) denials are based on evidence or reasonably based on lack of information or belief. (applies to answers to complaints, not complaints themselves.)

3. (c) Sanctions: If violated, court may impose sanctions upon violating attorneys, law firms, parties.
    a. (1) How Initiated:
        i. (A) By Motion:
            - must be made separate from other motions and describe specific conduct.
            - After receiving notice, violating party has 21 days to correct before Rule 11 motions can be filed with the court. (AKA: Safe Harbor Provision, added in 1993 amendment.) If violation is cured, party is not liable for Rule 11 violation.
            - Court may award the prevailing party reasonable expenses and attorney's fees.
            - Law firms are held jointly responsible for violations of its lawyers absents exceptional circumstances.
        ii. (B) On Court's Initiative:
            - Court may enter its own order placing burden of proof on pleader to show no violation.

    b. (2) Nature of Sanction:
        i. A sanction shall be limited to what is sufficient to deter repetition. May include:
            - Non-monetary damages
            - Penalties paid to the court
            - Payment of moving party's fees and expenses incurred as result of the violation.
            - Money damages shall NOT be ordered upon a party who is represented. ?even if they sign the pleading? ?Didn't BG sanction represented party?
            - Money damages shall not be awarded on court's initiative after a voluntary dismissal has been made by or against the party to be sanctioned or after settlement of claims has been made by or against the party to be sanctioned.

    c. (3) Order: Court shall describe the conduct and explain the basis for imposing sanction

4. (d) Inapplicable to Discovery: Rule 11 does not apply to disclosures, discovery requests, responses, objections, and motions that are subject to provisions of discovery.

B. About Rule 11:
1. Most important constraint on a lawyer's behavior during litigation.

2. Purpose:
    a. To deter frivolous lawsuits.
    b. To preserve scarce judicial resources
    c. To avoid imposing litigation costs on Ds
    d. T keep people from filing a s placeholder and not dong work for a case until later.

3. Applies only to written, signed papers, not oral, representations that are marked with a signature.
    a. Does not say that if there is an attorney, the client is barred from signing. Lawyer might want client to sign too to give client incentive to do legwork and give correct information.

4. Rule 11 is a response to Rule 8's generous requirements that had generated too much frivolous litigation. However, eventually, there was more Rule 11 litigation than substantive litigation bc parties were using it as a way around the American Rule. Led to 1993 Amendment to Rule 11:
    a. Less about compensation, more about deterrence.
    b. Court looked more to non-monetary sanctions.
    c. Safe Harbor Provision: Gives party 21 days to cure violation before Rule 11 motion is filed by opposing party in court. (does NOT apply to Rule 11 violations initiated by court.)
        i. Wrinkle: Gives violating party 21 days to cure, but non-violating party must answer initial complaint within 20 days. (Shows Rule 11 does not deal well when the violation is in the complaint itself.)
    d. If legal theory is frivolous, 11(b)(2) violation, represented party cannot be held liable.
    e. Court has discretion to hold attorney, law firm, and party jointly liable and order attorney fees to be paid. Seems to include co-counsel law firm, even if co-counsel did not sign the offending pleading.

5. CASE: Business Guides v. Chromatic Communications Enterprises
    a. F: Business Guides seeks TRO to prevent competitor, Chromatic, from publishing directory based on allegations of copyright infringement. Evidenced by 10 false seeds in D's directory. Upon ex party questioning of BG, BG admits that 3 are actually correct. Court investigated and found 9 of 10 were correct. Court denies TRO, and considers Rule 11 sanctions. BG tries to use coincidence defense to Rule 11 sanction (Chromatic DID copy the seeds from BG, but by coincidence, the false seeds were accurate.)
    b. How certain you have to be before filing a claim depends on the circumstances. Client told attorney it was urgent to file quickly bc they were losing money everyday. So, judge focused on the amount of investigation that should have occurred after attorney was put on notice that some seeds were accurate.
    c. Court found that BG violated Rule 11(b)(3). P (also signed pleading) sanctioned for not doing enough initial investigation, P and attorney sanction for not investigating enough once they were put on notice that some were accurate, and P and attorney for relying on coincidence defense.
    d. Court ruled that standard of conduct to assess Rule 11 violation is objective reasonableness.

6. CASE: Religious Technology Center v. Gerbode
    a. F: P alleged that D violated RICO. Claim was clearly not warranted. Investigation of existing law would have made it clear that proximate causation was a required element, but claim asserted it was not.
    b. Court ruled a violation of 11(b)(2). Complaint was counter to clear precedent and not made for purposes of extending, modifying, or reversing existing law. Complaint was frivolous by objective standards.

C. Disfavored Claims:
    1. RULE 9: Pleading Special Matters:
        a. (b): Allegations of fraud or mistake must be stated in more than just a short/plain statement. Pleader must set forth exactly what constitutes the fraud or mistake with more specificity/particularity. (ex. who said or did what, when, and to whom.)

    2. About Rule 9:
        a. Is an exception to Rule 8's generosity. General rule is that a pleading is adequate if it gives D fair notice of the claim (Rule 8a), but this general rule is limited by the nature of the claim. If the claim is disfavored, Rule 9 requires "special pleading," which entails more than the general requirements of Rule 8.

b. Fraud::

  c. CASE: Olsen v. Pratt & Whitney Aircraft

    i. F: Olsen was employed by D. Other employees urged Olsen to withdraw from early retirement plan bc his job was secure. Olsen withdrew and was fired. Olsen sues employer for fraud.
    ii. P did not satisfy requirements of Rule 9 claim of fraud, so claim should be dismissed.. Fraud claim must specify:
        - Details of the fraudulent statement
        - Identity of the speaker
        - Where and when the statements were made
        - Why the statements are fraudulent.

      P did not specify what was said, who said it, what their positions were, where/when they said it.
    iii. Circuit court can affirm a lower court's ruling on any ground that is factually clear from the record, even if lower court's ruling was based on different grounds.

  d. Why the exception for fraud/mistake?

    i. Not clear. Speculation was that at the time, fraud and mistake were the main claims that caused injury by the mere claim itself by damaging reputation. Business reputation for honesty is important.
    ii. If rule was written today, it may also include other claims that cause damage by the filing itself. Ex. suits against the government, suits that damages a private party's reputation (racial/sexual discrimination or harassment).

e. Civil Rights:

  i. Attempts have been made to extend Rule 9b even when a claim is not for fraud or mistake.
  ii. Notion of immunity from suit
      - Absolute immunity: Some governmental parties are immune from going through the hassle of a lawsuit, even if he violates the law. (ex. judges and prosecutors)
      - Qualified immunity: If some governmental party is acting in good faith, and acting with a reasonable interpretation of the law, then he cannot be liable, even if he violates the law. (ex. police officers) Justifications:
          1. Moral/Fairness: cops should not have to pay out of his own pocket if he could not have reasonably known his actions were illegal.
          2. Policy: we don't want cops hesitating in fear of being held liable. Society will gain by aggressively busting criminals. It is wrong for society to reap all the upside of police enforcement, but only cops face the downside.

  iii. CASE: Leatherman v. Tarrant County Narcotics Intelligence.
      - F: P alleges a local law enforcement officer searched his home illegally, violating 4th Amendment's ban on illegal search and seizure, and confiscated property, violating 5th Amendments ban on depriving property without due process. P sued government entity under 42 USC 1983. Lower court dismissed case on ground that the complaint failed to meet a heightened specificity requirement of filing a claim under 42 USC 1983.
      - 42 USC 1983: every person who under the color of state law violates rights under federal law can be sued for damages and other relief.
          1. Under color of state law: it is the power that the state has given you that facilitated your ability to commit the act.
          2. Act must deprive another of a constitutional or federal right.
      - Court ruled this heightened requirement does not apply bc it is contrary to Rule 8(a)(2).
      - Court ruled that Rule 9(b) is read as ONLY requiring heightened specificity in claims of fraud and duress. Invokes cannon of interpretation: inclusion of some implies exclusion of others. Since 42 USC 1983 is not mentioned in Rule 9(b), heightened specificity is not required.
      - Holding only applies to cities/municipalities, since they do not enjoy qualified immunity. Leaves open the question of whether this holding also applies to individuals that enjoy qualified immunity.

IV. Allocating the Elements:

A. General rule of burden of pleading: party who has the burden of proving a particular element at trial has the burden of pleading that element.
   1. NOTE: however, burden of pleading CAN be put on opposite side as burden of proof

B. Burden of pleading, hence (usually) burden of proof, depends on:
   1. Public policy: ex. if P is favored in a particular kind of litigation, the D may be given the burden of proving the more difficult elements.
   2. Fairness: ex. the burden of proof concerning an element may be placed on the party who is in the best position to have access to evidence relating to that element.

C. Burden of pleading is placed on the side we want to lose in a close case. That is the only time burden of pleading matters.

D. CASE: Gomez v. Toledo:
   1. F: Gomez was a police officer who blew whistle on other cops. Gomez subsequently fired. Gomez sued police chief for violation of §1983 bc police chief was acting under color of state law to deprive Gomez of job without due process. D claims under qualified immunity, if he was acting in good faith or under reasonable interpretation of law, he is immune from suit. D moves to dismiss under 12(b)(6) bc Gomez did not state in claim that D was motivated by bad faith or acted unreasonably.
   2. Issue: who has burden of alleging existence/non-existence of qualified immunity? If qualified immunity is an element of the cause of action, P has the burden of pleading. If qualified immunity is an affirmative defense, D has the burden of pleading.
   3. Court rules that D had the burden of pleading, Qualified immunity is treated as an affirmative defense. Why?
      a. Nothing in the language of §1983 says qualified immunity needs to be in the pleading.
         i. Amar's counter: immunity was just created, so this does not tell us anything.
      b. Immunity has always been referred to as a defense.
         i. Amar's counter: the legal question has never been asked before..
      c. D is in best position to have access to whether D was acting in good faith.
         i. Amar's counter: that takes care of the subjective element, but there is also the objective element that there be reasonable grounds for a belief formed in light of all circumstances the D was acting within the law. So, this wipes away justification for giving D the burden.
   4. Burden to plead is usually joined with burden of proof. However, Rehnquist's concurrence tries to leave open the question of burden of proof, stating that this holding only applies to burden of pleading, not proof.

PLEADING: RESPONDING TO THE COMPLAINT

I. Responding to the Complaint

A. After P's complaint, D must either:
   1. File a Pre-Answer motion: D can raise certain types of objections to the action at a very early stat of the litigation. If D makes no such motion, or if it is denied, then
   2. Answer: D must file an additional pleading. D must respond to all allegations of the complaint and assert any additional information or affirmative claims that D may have against P.

II. Pre-answer motion:

A. Not Here: Reasons why the court should not proceed with an action.
   1. Ex. lack of SMJ, PJ, not property served, not proper venue
B. So, What?: Questions as to whether the complaint provides a basis for legal relief.
   1. Ex. 12(b)(6). Complaint is insufficient as a matter of law.
C. I don't understand you: Requests for clarification and more information.
   1. Ex. 12(e). Motion for a more definite statement. Rarely granted.
D. No, you are wrong: Substantive denials to allegations in the complaint.
E. Yes, but…: allegations are true, but you forgot something.
   1. Stuff that affects what has been alleged in the complaint, including affirmative defenses. Ex. easement, immunity, SOL is run, comparative negligence, an essential party should be joined.

III. RULE 12:

A. (a) Answer must be made within 20 days after being served personally. If served by certified mail, answer must be filed within 60 days after process was sent, or within 90 days if D is outside US.

B. (b) Every defense to a claim shall be asserted in the responsive pleading if one is required. Except, the following defenses may be made by pre-answer motion:
   1. (1) lack of SMJ
   2. (2) lack of PJ
   3. (3) improper venue
   4. (4) insufficiency of process
   5. (5) insufficiency of service of process
   6. (6) failure to state a claim upon which relief can be granted
   7. (7) failure to joint an essential party under Rule 19.

C. (e) Motion for a More Definite Statement: Request can be made for more clarification. (rarely granted)

D. (g) Consolidation of Defenses in Motion:
   1. A party can make only one pre-answer motion. Defenses must be consolidated into one motion. If a defense or objection is omitted from that motion, the defense or objection is waived except if it is relating to:
      a. failure to state a claim upon which relief can be granted
      b. failure to join a party indispensable under Rule 19
      c. an objection of failure to state a legal defense permitted ?don't get this?

E. (h) Waiver and Preservation
   1. (1) Defense of lack of PJ, improper venue, insufficiency of process, insufficiency of service is waived if omitted from a pre-answer motion (if made) or an answer.
   2. (2) Defense of failure to state a claim upon which relief can be granted, failure to join a party indispensable under Rule 19, and objection of failure to state a legal defense to a claim may be made at trial.
   3. (3) Parties may suggest at any time that the court lacks SMJ.

F. Translation of (g) and (h):
   1. First Appearance Rule: If D makes a pre-answer motion on one or more of the 12(b) defenses, most such defenses must be consolidated in the pre-answer motion, or else they are waived. If no pre-answer motion is made, most 12(b) defense are waived if not made in the answer.
      a. Exceptions: NOT WAIVABLE. CAN ALWAYS WAIVE.
         i. 12(b)(1) Lack of SMJ can be raised at any time, even on appeal for the first time.
         ii. 12(b)(6) Failure to state a claim and 12(b)(7) failure to join an indispensable party under Rule 19 motions may be included in a subsequent answer or a post-answer motion, or even presented at trial.

   2. Why do we allow failure to state a claim at any time?
      a. Cut losses as soon as possible to save resources of court. Does not allow suit to continue if three is no possibility that P will recover. Does not depend on uncovering more information bc based on lack of legal basis, not lack of factual basis.

   3. Affirmative Defenses do not have to be raised in a pre-answer. If it is not raised in answer, it is waived. See answer section.

IV. General Efficient Sequence:

A. Challenge court's ability to hear case. Ex. lack of SMJ.
B. Challenges if there is a real claim. Ex. failure to state a cause of action.
C. Challenges to factual divergences of the other party.
   a. NOTE: however, sometimes resolving factual disparities is easier than answering the legal question, so may want to consider the facts before the legal question. So, most efficient sequence turns on the specific case.

V. Answer:

A. If D cannot dispose of the complaint, he must respond to all factual allegations in the form of denials and affirmative defenses.

1. Denials:
   a. Rule 8(b) requires D to deny only those allegations he actually disputes. Must be explicit about what you are denying.
   b. Rule 8(d) provides that any allegation that is not denied is deemed admitted.
   c. 3 choices:
      i. admit or fail to deny
      ii. deny
      iii. if you are without knowledge of information to form a belief, you can deny on that basis.
      iv. NOTE: if a party intends to deny only part of an allegation, the person shall specify the part that is true and deny only the remainder.

   d. CASE: Zielinsky v. Philadelphia
      i. F: Z in injured when 2 forklifts collide. Z files complaint against PPI, alleging that PPI owned and operated forklift and that forklift was negligently operated. PPI denied allegation. D interpreted the denial to relate to the negligent aspect, but PPI was denying that they were responsible for operating the forklift. 1 year prior, PPI leased the forklift to Carload to operate. So, Carload should be liable instead of PPI, but SOL has run so it is too late to sue Carload instead. P moves for the court to deem the factual allegation that PPI operated the forklift as admitted bc D, by not alerting P to the mistake, failed to exercise good faith in pleading his general denial.
      ii. D's general denial was pleaded in bad faith. It misled P, so is deemed a constructive admission that PPI is the owner and operator of the forklift, even though they are not.
      iii. What is really going on?
         - SOL had run out, so Z could not sue true operator. If that option had still been available, court may have ruled another way.
         - Same insurance company is used by PPI and Carload, so money will be coming out of the same pocket.
      iv. Lesson: avoid compound allegations. Separate each and every one.

2. Affirmative Defenses:
   a. Rule 8(c) D has an affirmative duty to raise certain defenses in an answer to a complaint, otherwise they are waived. Specific defenses the must be plead in answer:
      i. Assumption of risk, contributory negligence, duress, laches, license, res judicata, waiver, fraud, payment, contributory negligence, estoppel, lack of consideration, illegality, injury, release, SOF, any other matter constituting an avoidance or affirmative defense.
      ii. NOTE: this list is ILLUSRATIVE, NOT EXHASUTIVE.

   b. CASE: Layman v. Southwestern Bell Telephone
      i. F: P sued D for trespassing on land. D gave general denial as an answer. At trial, judge admitted evidence that D had an easement, which was not mentioned in D's answer.
      ii. P had burden of pleading elements of trespass: ownership of land, invasion of land, without permission.
      iii. Although Rule 8(c) does not mention easement as a defense that must be plead, court deems the list illustrative, and considers easement to be an affirmative defense that must be plead.
      iv. The catch all phrase in 8(c) is to allow parties to avoid unfair surprise. So, the test for whether or not easement falls into the catch all is whether P would likely have known of the easement without it being mentioned in the pleading.
      v. Why didn't D plead it in the first place?
         - To keep P off guard.
         - Once you plead something, you generally have the burden of proof. If it is a tie, the party with the burden of proof loses.
      vi. D could have used the easement to deny the elements of trespass asserted (ex. no ownership and no lack of consent bc easement) rather than treating it as an affirmative defense. Therefore, no connected burden to prove easement, but yet gave P notice.
      vii. NOTE: Does not apply to Rule 8(c) directly, but a state version of it.

VI. Reply

A. In most cases, the pleading stops with the answer.
B. Rule 7(a) requires a reply if the answer contains a counterclaim denominated as such. Also permits the court to order a reply at its own initiative.

VII. Amendments

A. Tension between 2 goals:
   1. allowing pleadings to reflect the parties' changed view of the case as it develops AND
   2. the notion of prejudice. At some point a party ought to be able to pin down the other side.

B. RULE 15: Amended and Supplemental Pleadings
   1. (a) Amendments
      a. A party may amend its pleading once any time before the responsive pleading is served OR
      b. (if no response is permitted and action is not on the trial calendar) the party may amend once within 20 days after the complaint is served.
      c. Otherwise, a party may amend the pleading only by leave of the court or by written consent and leave shall be freely given when justice so requires.

   2. (c) Relation Back of Amendments: Amendments relate back to the date of the original pleading when:
      a. (1) relation back is permitted by the law that provides the SOL applicable to the action OR
      b. (2) the new claim or defense arose out of the conduct, transaction, or occurrence set forth in the original pleading OR
         i. AKA: when the amendment and the original claim arise out of the same common nucleus of operative fact. Similar to §1367 for supplemental jx. Gibbs case.
      c. (3) the amendment changes the parties in the original claim AND
         i. the new party has received such notice of the action and the party will not be prejudiced in defending the claim on the merits AND
         ii. the new party knew or should have known the action would be brought against him but for mistake concerning proper identity.

C. About Rule 15:
   1. Rule 15(a) Since consent to amend "shall be given freely," it is generally incumbent upon the opposing party to show good cause for why amendment should not be allowed.
   2. Relation Back Doctrine: SOL bars the claim asserted in amendment unless the amended element relates back to the date of the original complaint.

   3. CASE: Beeck v. Aquaslide – Rule 15(a)
      a. F: P sued Aquaslide, who he believed manufactured a slide on which P was injured. In D's answer, he admitted he was the owner of the slide. Admission was based on investigations by insurance companies. More than 20 days after filing the answer, D discovers Aquaslide is not the manufacturer. SOL has run, so impossible for P to now sue the correct manufacturer.
      b. Rule 15(a) Court rules that this falls into category of "when justice so requires," so D is allowed to amend answer. Why?
         i. D was not acting in bad faith, nor was he negligent. He did nothing wrong in relying on insurance co information.
            - Amar's counter: P didn't do anything wrong either. Comparatively, D did more wrong than P.
         ii. If no leave to amend, D would have to pay for something he did not do, and this is unjust.
            - Amar's counter: Also unjust that if you allow amendment, P will have to pay for his own injury.
         iii. D is not completely out of luck. He can still sue real manufacturer. SOL does not run when fraud is the cause of delay in identifying truly culpable party. (Real manufacturer made slide look like Aquaslide slide.)
         iv. If no amendment granted, and trial went forward, D would not have the answer to questions asked at trial. Ex. how the slide was manufactured, the operation and design of the slide. Would be based on speculations of how the real manufacturer conducted business.

4. CASE: Moore v. Baker – Rule 15(c)
    a. F: P filed complaint against D doctor for violating informed consent law while performing surgery. P wants to amend complaint to add a claim of negligence for treatment during and after surgery. Not only has the 20 days expired, the SOL has expired also. P relies on Relation Back Doctrine.
    b. Court ruled the amendment does not relate back. Informed consent occurred before the surgery. Negligence claim is rooted in conduct during and after surgery. D did not have notice that he would have to keep relevant documents, did not interview correct witnesses, so ability to defend a negligence claim is compromised.
    c. Test: how reasonable it is for the other side to know / not know that the amended issue will arise. These claims are sufficiently distinct that one being filed does not give notice that the other will be involved at all.
        i. Azarbal distinguished: Different Sequence. Original complaint claimed malpractice. Amendment was claim of violation of informed consent. When you start with a generic claim of negligence, then move to a more specific claim, it is less misleading. When you start with a specific claim, it sends a message that p has thought through the issue, which leads D to believe that the garden variety claim will not arise.

5. CASE: Bonerb v. Richard J. Caron Foundation – Rule 15(c)
    a. F: P in rehab slips on gym floor and files claim for negligent maintenance of court. Original complaint stated: "participation in exercise program was mandatory," and "D's failure to property supervise or instruct P…" P wants to amend complaint to add counseling malpractice.
    b. Added claim for malpractice DOES relate back bc D had sufficient notice that negligent counseling might be plead. "Improper supervision and instruction" is a synonym for "counseling malpractice," even if not directly plead.

DISCOVERY

I. Modern Discovery:

A. Process by which parties obtain info and possible evidence relevant to litigation to prove allegations in the complaint.
B. Historically, there were no formal discovery rights.
C. Expansive discovery rights are granted through the Federal Rules. Why?
    1. Based on notion that more information you have, the more likely it is to result in the truth/right answer.
    2. Court's don't have the time to enforce rigid discovery rules. Leaves the administration to parties themselves.
D. Modern rules require automatic disclosure of certain information. Otherwise, whether or not you got the info you needed depended on how well your attorney played the game of discovery.
E. Info you get during discovery is not limited to that which is admissible at trial.
F. Info you get during discovery can be used for any reason unless there is a protective order.
    1. ex. can use in a different suit or give to a different party.

II. Basic Structure:

A. Motion to compel RULE 37(a) is sword. RULE 26(c) protective order is the shield.

B. RULE 26: General Provisions Governing Discovery; Duty of Disclosure
    1. (a)(1): Initial Disclosure. Without a discovery request, a party must automatically provide to the other party:
        a. (A) the name, address, phone number of each individual likely to have discoverable information
        b. (B) a copy of all documents and tangible things that the disclosing party may use to support its claims or defenses
        c. (C) a computation of damages claimed
        d. (D) any insurance agreement that may satisfy part or all of a judgment which may be entered in the action
        e. (E) lists multiple exemptions.
        f. Party must provide within 14 days after conference unless a different time is set, or 30 days if the party was joined after the conference was held.

2. (a)(2): Disclosure of Expert Testimony:
    a. (A) party shall disclose to other parties the identity of any person who may be used at trial to present evidence.
    b. (B) must be accompanied by a written report containing a complete statement of all opinions to be expressed and the basis of the opinions, the date considered by the witness, compensation for the witness, and other cases for which witness has testified.

3. (b)(1): In General. Parties may obtain discovery regarding any matter that is not privileged that is relevant to the claim or defense of any party. Relevant information need not be admissible so long as the attempt to discover the info is reasonably calculated to lead to something that might be admissible at trial.
    a. About (b)(1):
        i. AKA: you can pursue leads that might result in something.

        ii. CASE: Blank v. Sullivan & Cromwell
            - F: P sued D alleging sexual discrimination against females in hiring. P served interrogatories on D, asking how female associates were treated once they were in the firm and moved up the ladder. D refused to answer. P takes issue to the court by filing Rule 37 motion. D says not relevant bc Ps are not women in the partnership track The info relates to D's partners and employees who became partners, while the complaint focuses on hiring practices.
            - Court rules the info is relevant bc D's labor hierarchy may be reflective of restrictive hiring practices. It establishes a pattern or practice of discriminating against women. There is a logical inference that people who discriminate against women in partnership are likely to discriminate against women in hiring.
            - Information only has to be reasonably calculated to lead to something useful to be considered relevant. Does not need to be admissible at trial.

        iii. CASE: Steffan v. Cheney
            - F: P (in Navy) was accused of being a homosexual in violation of a regulation. The administrative body recommends a discharge bc he admitted to homosexual orientation. P resigned. Brings suit of constructive discharge. Challenged constitutionality of policy that allows discharge based on someone being homosexual. D deposed P and asked whether he engaged in homosexual conduct. P refuses to answer based on:
                1. 5th amendment. Info is privileged. Cannot force one to be a witness against oneself.
                2. Info sough to be obtained is irrelevant.
            - Court rules irrelevant. The basis for the discharge was homosexual orientation, NOT homosexual conduct. P already admitted to orientation. Does not have to answer about conduct.

4. (b)(2): Limitations: Court may alter the limits on number of depositions and interrogatories or length of depositions. Court can limit discovery if:
    a. (i) discovery sought is unreasonably cumulative, duplicative, or is obtainable from a more convenient or less expensive source.
    b. (ii) the party seeking discovery has had ample opportunity through discovery to obtain the info sought.
    c. (iii) the burden or expense of the discovery outweighs its likely benefit.
    d. the court may act on own initiative or by initiative of 12(c) motion
    e. NOTE: limitation is on mechanics of discovery, not subject matter.

5. (c) Protective Orders. Upon motion by party accompanied by proof that the movant has in good faith attempted to resolve dispute with other party, the court may protect a party from disclosure if info causes annoyance, embarrassment, oppression, or undue burden or expense.
    a. About 12(c):
        i. Relevance of info is outweighed by costs of producing it.
        ii. Protects based on kinds of info that can be sought.
        iii. Paula Jones case. Clinton could have sought 26(c) motion for cause of embarrassment, but did not.
        iv. Addresses the problem of relaxed standard of relevancy under 26(b)(1).

v. CASE: Stalnaker v. Kmart Corp
- F: P sued employer for sexual harassment. P wants to depose 3rd non-party witnesses into discovery concerning voluntary romantic conduct with employer. D files protective order under Rule 26(c) to bar discovery, claiming information is irrelevant and will invade privacy rights of 3rd non-party witnesses.
- Court grants protective order in part.
  1. Discovery on info in these relationship is allowed if employer encouraged or solicited the relationships, even if the relationships were ultimately voluntary. Does not have to constitute harassment. Just has to show that employer took the lead in the relationship.
  2. "Did you ever have a sexual relationship with employer" is not allowed.
  3. "Did you ever have a sexual relationship with employer that he in any way initiated" is allowed.
- What is really going on here?
  1. The witnesses themselves are not complaining, so less incentive to give full protective order.
  2. Hard to establish workplace harassment by only looking at employer and employee.

b. (g) Signing of Disclosures, Discovery Requests, Responses, and Objections
   i. (1) Every disclosure shall be signed by attorney or party if non-represented. Signature certifies that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the disclosure is complete and correct.
   ii. (2) Every discovery request shall be signed same as above, certifying that to the best of signer's knowledge, information, and belief, formed after reasonable inquiry, the request is consistent with established law or in good faith argument to extend law, is not imposed for improper purpose such as to harass, delay, or needlessly increase cost of litigation, and is not unreasonably or unduly burdensome or expensive, given the benefit of the information.
   iii. (3) Court, upon motion or its own initiative, impose on the certifier, the party represented by the certifier, or both the amount of reasonable expenses incurred bc of the violation, including attorney's fees.
   iv. NOTE: Does for discovery what RULE 11 does for pleading. Basically says abuse of discovery is illegal.

III. Discovery Devices:

A. Deposition: Live Q & A under oath with attorney present.

1. RULE 28: Persons Before Whom Depositions May Be Taken
   a. (a) If within the US or a place under US jx, depositions shall be taken by an officer (person appointed by the court or designated by the parties.)
   b. (b) Depositions may also be taken in foreign country, but different rules apply
   c. (c) No deposition shall be taken before a person who is a relative or employee or attorney of any of the parties, or is a relative or employee of such attorney, or is financially interested in the action.

2. RULE 30: Depositions Upon Oral Examination – Qs are asked in person.
   a. (a)(1) A party may normally be deposed without permission by the court.
   b. (a)(2) Exceptions:
      i. The person is in prison
      ii. Anyone if deposed will result in more than 10 depositions (unless other parties agree by writing)
      iii. The person has already been deposed (unless other parties agree by writing)
      iv. Deposition is to take place before time specified in Rule 26(d) unless that person is leaving the US.

c. (d) Schedule and Duration; Motion t Terminate or Limit Examination.
    i. (d)(1) A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under RULE 30(d)(4).
    ii. (d)(2) Deposition is limited to one day of 7 hours. Court must allow additional time consistent with RULE 26(b)(2).
    iii. (d)(3) If court finds a delay frustrated a fair examination, the court may impose an appropriate sanction.
    iv. (d)(4) At any time during a deposition, the party may make a motion to terminate. Must show that it is being conducted in bad faith or unreasonably to annoy, embarrass, or oppress the deponent. The deposition is postponed until the court hears the motion.

d. (e)Review: the deponent has 30 days to review and can make changes if explained.

e. (g) If serving party doesn't show, it must pay fees of other party and deponent. If witness doesn't show bc no subpoena, the serving party must pay fees for the other party's attorney, if the court orders.

3. RULE 31: Depositions Upon Written Questions – Qs are written and read to deponent who answers onto the record.
    a. (a)(1) A party may take testimony of any person by deposition upon written questions without approval of the court with same exceptions as in RULE 30(a)(2)

4. RULE 32: Use of Depositions in Court Proceedings: Depositions may be used in accordance with:
    a. (1) to contradict or impeach testimony of deponent as a witness
    b. (2) of a party by an adverse party for any purpose.
    c. (3) of a witness whether party or non-party may be used for any purpose if they are:
        i. dead
        ii. more than 100 miles from trial or outside US unless the party offering the deposition procured absence.
        iii. Unable to testify bc age, illness, infirmity, or imprisonment
        iv. The party offering the deposition has been unable to procure the attendance of the witness by subpoena
        v. Unless in the interest of justice.
    d. (4) if only part of a deposition is used, the opposing party can request that the entire deposition be shown.

B. Interrogatories: written questions. Can only be imposed on parties.
  1. RULE 33: Interrogatories to Parties
    a. (a) A party may serve interrogatories on other party without approval from court, but must not exceed 25 questions One time only.
        i. Can argue questions are compound in nature, equaling more than 25 Qs.
    b. (b)(1) Each interrogatory shall be answered in writing under oath unless objected to in which even the party must provide reason for objection.
    c. (b)(2) Answers must be signed by party making them.
    d. (b)(3) The party served shall answer within 30 days unless otherwise directed by court or agreed upon by parties.
    e. (b)(4) All grounds for an objection must be stated with specificity. Any ground not stated in a timely objection is waived unless excused by court for good cause shown.
    f. (b)(5) Party submitting interrogatory may move for an order under RULE 37(a) wrt any objection or failure to answer interrogatory.

C. Documents, Tangible Things, and Land
  1. RULE 34:
    a. (a) a party may request the other party to:
        i. (a)(1) produce documents or any tangible things which are relevant and in the possession of the other party AND
        ii. (a)(2) to permit entry upon the relevant property in possession or the other party.
        iii. Analog for non-parties – subpoenas RULE 45a1c.

D. Requests for Admission:
  1. RULE 36
    a. Supplies some incentive for parties to admit to statements or opinions of fact.
    b. If you ask for admission and a party refuses, and you spend time and money proving it at trial, the judge can order reimbursement.
    c. Not used very often bc we don't want parties admitting to things just so they don't have to pay for it later if proven true.

E. Also see Rule 35.

F. Discovery Devices Compared:
  1. Oral Depositions:
    a. Pros:
      i. Can ask follow up questions, or questions based on the answers to previous questions to dig deeper into relevant information.
    b. Cons:
      i. Expensive.
      ii. If objections are raised or privilege claimed, attorneys have to work around it or stop and involve a judge.

  2. Written Depositions:
    a. Pros:
      i. Cheaper and faster than oral depositions.
    b. Cons:
      i. Cannot ask follow up questions, nor base questions on answers to previous questions.

  3. Interrogatories:
    a. Pros:
      i. Cheapest and fastest.
      ii. Can be used to find out who is worth taking a deposition on or to find out an opponent's theory of the case.
    b. Cons:
      i. Cannot ask follow up questions, nor base questions on answers to previous questions.

IV. Privacy and Privileges:

A. Privacy is not protected in discovery unless a motion is made. Even when motion is made, sometimes it is still not protected. Even if information is very relevant, it can be barred through privacy or privilege.

B. RULE 35: Physical and Mental Examinations
  1. (a) Order for Examination: When the mental or physical condition of a party is in controversy, the court may order the party to submit to a physical or mental exam by a certified examiner or to produce for examination in the party's custody or legal control. The order may by made only on motion for good cause.

  2. About Rule 35:
      i. Unlike depositions, interrogatories, physical inspection of property or documents, physical examinations of parties are only allowed by express approval from court.

- ii. CASE: Schlagenhauf v. Holder
  - F: Bus Collided with tractor trailer. Passengers of bus sue bus company, bus driver, owner of tractor (Contract Carriers), driver of tractor, and owner of trailer (National Lead). Passenger sued bus company. Bus company cross claimed against CC and National Lead on negligence. National Lead cross claimed against bus company and driver, claiming that driver's eyes and vision were impaired and deficient. National requests 9 physical examination of driver by different specialists.
  - Court rules that Rule 35 does NOT violate Rules Enabling Act. Under REA, the FRCP may not abridge, or deny any substantive right. However, Rule 35 is procedural, not substantive, so it is not a violation of REA.
    1. According to Hanna, rules are procedural so long as they are rationally capable of being considered procedural.
  - Rule 35 applies to all parties to the cause of action, not limited to parties named in the lawsuit. Otherwise, would give party's incentive to add unnecessary names to suits.
  - Court ruled pleadings did not show good cause, were conclusory, and did not put his condition in controversy.
  - What is really going on here?
    1. There seems to be enough evidence that something is wrong with the driver's eyesight, but National Lead was asking for too many exhaustive examinations. Court is sending a message that if they only asked for eye exam, it would have been approved.
  - Dissent: Black: would uphold all exams. Good cause was shown that D was not mentally or physically capable of driving. Driver must have been blind or crazy.
  - Dissent: Douglass: Not enough evidence to show even eye exam is OK. Threshold depends on if party is P or D. If P, the nature of the exam is confined by the injuries alleged by P. If D, the nature of the exam is to look for anything, so more intrusive.

C. Privileges can exclude information that is relevant bc there are certain relationships that we want to promote as social good. So, we insulate certain conversations.
   1. Each state decides which relationships to promote.
   2. BUT, privileges can be waived.
   3. Ex. self-incrimination, doctor-patient, attorney-client, husband-wife.
   4. Only bars source and communications of information. Cannot ask wife to disclose how many beers he had if the only way she knows is bc husband told her.

D. Also see Rule 26(c) section.

V. Discovery Abuse:

A. Tactics of abuse:
   1. It costs time and money to engage in discovery, so can be used as a means to wear the other party down.
   2. Send over much more information than was requested by other party, so party has to sift through to find anything useful.

B. Often abused bc:
   1. It is a powerful tool. Can wear the party down or be used to improve settlement amount.
      - a. Each side attaches a value to litigation, used to determine settlement amount.
        - i. Value for P: Probability of success x amount of anticipated recovery - costs
        - ii. Value for D: Probability of loss x anticipated exposure + costs
        - iii. The probability of loss/success often do not equal 100% bc the parties have different views of the evidence, of what juries believe…
      - b. If you increase costs, you change settlement dynamics. Jack up the costs for the other party, and they may be willing to settle when they otherwise would not.
   2. It is hard to police abuse bc rules are mostly party administered.

C. Enforcing Discovery Rules and Controlling Abuse:
  1. RULE 37: Failure to Make of Cooperate in Discovery: Sanctions
     i. Sets forth devices to either elicit the information or to respond to the parties' refusal to supply it.
     ii. Court may impose punishments ranging from awards of expenses OR dismissals of entire case OR entry of default judgment.
     iii. Some sanctions are available on the occurrence of misbehavior. (d) and (g).
     iv. Other sanctions cannot be sought until after court orders party to comply. (b).
     v. Normally a party must seek a motion to compel before court imposes a sanction.
        - Exception: RULE 37(d): if there is not answer nor objection to an interrogatory, or you don't show up for deposition, or you don't respond to a request for inspection, you can get immediately sanctioned.
  2. See RULE 26(g)
  3. Establish rules for lawyers.
  4. Give judges tools to punish abuses.
  5. Availability of 26(c) protective order. If party knows you can get protective order for unreasonable discovery requests, they may limit requests to those that are reasonable.

D. Appellate Review of Discovery Orders:
  1. Abuse of discretion is standard of review.

  2. CASE: Chudasama v. Mazda Motor Corp.
     a. F: P was injured in accident while driving minivan. P sued D for product liability and fraud. P asked Mazda to produce all docs relating to everyone who has ever worked on a car or component of the car in question, and everyone who has worked on advertising. D responds with objection to every request, on every possible ground. D tries to dismiss fraud claim bc claim was not plead with specificity as required under RULE 9. District court did not respond to motion to dismiss fraud claim, nor objections to motions to compel. Grants P's laundry list of discovery requests and institutes strict deadlines. Mazda could not comply and district court imposed sanctions including default judgment. (estops Mazda from contesting facts, so effect is admission.)
     b. Court of Appeals rules Disctrict Court erred:
        i. Agreed with district court that Mazda opened itself up to sanctions. Car manufacturing info is probably relevant in that it might produce leads. Advertising info is relevant only to fraud claim. But, blames district judge.
        ii. Discovery requests were too broad.
        iii. District court failed to give Mazda direction. Did not rule on objections to motions to compel nor motion to dismiss.
     c. Sanction under RULE 26(g) is an abuse of discretion bc, although D withheld legitimate disclosure, such self-help was prompted by the trial court's mismanagement.
     d. Sanctions under RULE 37 is an abuse of discretion bc, in light of the trial court's mismanagement of the case, it constitutes an extreme prejudice to D's right to a day in court.
     e. Ruling is dangerous bc court does not want to incentivize a self-help regime. Normally, even if you think a request is unreasonable, but court finds it reasonable, you must answer.
     f. Seems like failure is due more to the system than the judge.
     g. This case is an exception to the Final Judgment Rule. It is appeallable on interlocutory basis bc court thought that the default order was such a crucial party of the case that it allowed appeal even before the case was finally ruled by the court below.

RESOLUTION WITHOUT ADJUDICATION

I. Default Judgment:

A. When D fails to file a timely answer to a properly served complaint and summons, a pretrial termination f the lawsuit is made on procedural grounds.

B. RULE 55: Party fails to plead or otherwise defend; judgment entered in default.
   1. Unless otherwise stated, operates as an adjudication on the merits, so P cannot refile. However, court can dismiss without prejudice.
   2. Bright line test: Party entitled to a default judgment must have initiated the suit and file for a default judgment when time for responding has expired.
      a. Poor form if done on the very first day possible. May irritate judge.
   3. If the party against whom the judgment is sought has appeared, filing party must serve him with notice of the application for default judgment at least 3 days prior to hearing on application.
   4. A party cannot have default judgment entered against him if he has not been properly served. (Peralta v. Heights Medical Center)
   5. If damages are in doubt, a trial may still be required, even in D's absence.
   6. RULE 55(c) permits a party to set aside a default judgment if they can show some plausible reason for failing to respond. (bc courts prefer to rule on merits.) (D would use RULE 60(b) motion to reopen.) (often used when it was lawyer's fault, if D was improperly served, or when D is claiming lack of PJ.)

C. About RULE 55:
   1. Courts don't like to use default judgment bc cases should be heard on merits when possible. Its main purpose is to threaten D into answering complaint.

   2. CASE: Peralta v. Heights Medical Center
      a. F: Employer Peralta had guaranteed debt to hospital incurred by employee. P sues Peralta to recover. Peralta is served personally, but late. Peralta did not answer. Court enters default judgment and possesses and sells home. D files bill of review to set aside default judgment. TX court ruled it could only be set aside if D had a defense on the merits, otherwise there was no harm in suffering default judgment.
      b. Default judgment and taking possession of property without proper notice is a violation of due process deprivation of property.
      c. Notice is a fundamental requirement. There should be no requirement that a party show meritorious defense to set aside default judgment made under faulty service of process.
      d. Even if D was liable, suffering default judgment prevented him from being able to bring in another party (the employee) or to get a better deal on his home and paid off the debt.
      e. Only D can initiate, not court. (Bc court is not wasting resources when D does not answer.)

II. Involuntary Dismissal:

A. Forces P to prosecute a case or comply with procedural rules once P has initiated the lawsuit. (RULE 41b does to P what RULE 55 does for D.)

B. RULE 41(b):
   1. If P fails to prosecute or comply with procedural rules after filing a suit, D may move for dismissal of any claim.
   2. Dismissal operates as adjudication on the merits, unless specified otherwise by court. (sanction for procrastination!)

C. About RULE 41(b)
   1. D is injured when claim is filed, even if it is not brought to trial. So, P should be held accountable.
      a. Commercial and psychological injuries.
   2. Purpose: at some point, we want D to know he does not have to worry anymore. Same as SOL. If no RULE 41b, purpose of SOL would be nullified.
   3. D or court can initiate. No bright line test for when it can be sought. Must determine when P is dragging feet too much.

III. Voluntary Dismissal:

A. Allows P to dismiss a case.

B. RULE 41(a)(1)

1. (a)(1)(i) allows P to dismiss a suit any time before service by the adverse party of an answer or motion for summary judgment, whichever first occurs.
2. (a)(1)(ii) permits the P to dismiss any suit at any time if all parties agree.
3. (a)(2): authorizes a voluntary dismissal by permission of the court.
4. Unless otherwise stated, the dismissal is without prejudice, so P is allowed to refile the suit. However, a court can dismiss under this rule WITH prejudice.

IV. Settlement:

A. Agreement between parties that in return for something, P will agree not to pursue claims or D will agree not to pursue counterclaims.

B. 50-60% of criminal cases end in settlement.

C. Parties generally have freedom to settle without approval of the court.

1. Exception: class action suits (RULE 23(e)), minors, or some multi-D cases.

D. Policy:

1. Pro settlement:
    a. Cheaper and faster than formal forms of adjudication
    b. Qualitatively better bc consent is a basic part of justice
    c. Can take account of nuances in fact and parties' interests that may be lost at trial.
2. Con settlement:
    a. Deprives public of definitive adjudication of issues that may reach beyond the individual case.
    b. Leaves parties less satisfied than a chance to have their day in court.
    c. Allows might to overpower right.

E. Contracts: Settlements are usually Ks that can be attacked on any K grounds.

1. P agrees not to file a lawsuit.
2. P agrees to seek voluntary dismissal
    a. But, P is not prevented to refile.
3. P consents to a dismissal with prejudice (so can't refile)
    a. But, then can't enforce settlement through the courts.
4. Contracting for Confidentiality:
    a. Settlements often include agreement not to reveal settlement terms to the public.
    b. CASE: Kalinauskas v. Wong
        i. F: P sues Ceasars for sexual harassment and wants to depose Ms. Thomas who settled a sexual harassment claim last year, but how signed a confidentiality agreement. Relevant bc it shows pattern and practice of discrimination.
        ii. Privacy provision can't prevent the second P from getting access to what would otherwise be unprivileged and relevant information. Therefore, Thomas can testify about facts of discrimination, just cannot testify about terms of settlement. (seems to split the baby)
        iii. Settlements that suppress evidence violate the greater public interest.
        iv. Thomas could have filed protective order herself. Court would have had to balance relevance v. her intrusion.
        v. Practical Effects:
            - If confidentiality provision had no effect in Thomas settlement, D has less incentive to settle next time.
            - Also, D probably paid high amount bc confidentiality provision was included. Won't pay as much for the next P.
5. Contracting for a Judgment:
    a. Who owns the judgment after settlement?

F. Consent Decrees: Sometimes courts get involved in settlements, so they are more than just Ks.

1. Why is decree sometimes favorable for P?
   a. If the issue is a federal law, putting the settlement merely in a K would subject it to the law of the state for enforcement.
   b. Once it is a decree, future disputes revolving around it have to be reviewed by judge. Claim preclusion is enforced through the court, not just through the K.
   c. Damages. If settlement is in the form of a decree, a violation results in damages plus sanctions for violating court order. If settlement is just in K, a violation only results in damages.
2. Why is decree sometimes not favorable for D?
   a. Decree publicizes the issue. Decree becomes part of the public record whereas a settlement K does not.
   b. It is easier to defend breach of K than violation of court order. If it is a decree, the judge hearing the case may be irritated that HIS order was violated.

3. In sum, P's biggest goal is enforceability. D's biggest goal is confidentiality.

4. CASE: Matsushita Elec. Industrial Co v. Epstein
   a. F: Shareholders are upset about a merger and file 2 class action suits. Filed in federal court in CA for breach of securities laws and filed in Delaware state court for violation of fiduciary duties. Federal court granted D summary judgment. P appeals. Parties settle Delaware state case, but want a Global Agreement that disposes of both claims. Delaware state court blesses the agreement. D is not living up to settlement agreement. Takes the issue to court for enforcement. Federal Appeals court rules that the blessing by the Delaware state court can only related to the state law claim, not the federal claim, bc federal court had exclusive jx over the federal issue claim.
   b. Under Delaware preclusion law, the Delaware state court could resolve federal claims by settlement even though they could not adjudicate on the merits. Under Full Faith and Credit Clause, federal court in CA must use the Delaware law of preclusion.
   c. How to resolve the idea that fed court has exclusive smj, but state court can resolve claims through decree:
      i. Consent decree is not an opinion or precedent on federal law. Whole reason to grant exclusive jx is to limit interpretation of federal law to federal courts, which is not violated here.
         - Counter: a decree is like a court saying the settlement is fair and reasonable, which requires some interpretation of federal law.
      ii. If it was a mere K settlement, state court would have jx to enforce.

G. Vacature:

1. Removes the case from the public record. No longer a decision that is citable for use by anyone.
2. Vacated judgments have attractive qualities for both sides:
   a. Blurs the line between total victory and total defeat. Lets each party walk away thinking it has won something.
   b. Eliminates what would otherwise be a strong precedent that one side would view as undesireable, so would pay the other side a higher settlement bc that side generally would not care.

3. CASE: Neary v. University of CA
   a. F: UC David veterinarians do a study as to why animals are dying in the central valley and they attribute the loss of livestock to poor ranch management practices. Ranchers content it was government pesticides. Ranchers sue for liable and get $7 million. UC wants to appeal, but offers to settle at $3 million in exchange for not appealing, if P agrees to request from court a dismissal with prejudice. Ct of Appeals denied request.
   b. As a general rule, settlements should be effectuated pursuant to parties' terms, so court must grant request to dismiss case with prejudice
   c. Rests on theory that courts are here primarily to resolve disputes between parties. Courts are a publicly funded forum for private people to resolve matters. If parties agree, the courts should facilitate the agreement and act accordingly.
   d. Dissent: Purpose of judgment is to administer the laws of the state for the benefit of society. Should NOT alter rulings to mere request of parties.

4. CASE: US Bancorp Mortgage v. Bonner Mall
    a. F: Bonner Mall declared bankruptcy and Bancorp held mortgage on the mall and is therefore one of the creditors. Bonner filed a re-org plan that invoked New Value Exception to the priority rule – permits owners of a bankrupt firm to retain interest in investment, even when creditor has not been paid. BankCorp appeals NVE bc this will put him lower on the ladder to be paid. 9th Cir rules against BankCorp. Appeals to Supreme Court and Cert granted. Before case is heard, parties settle. BankCorp Supreme Court to order 9th Cir. to vacate ruling on NVE.
    b. BankCorp wants to vacate judgment bc he is repeat player and does not want unfavorable verdict.
    c. Court rules that the decision should not be vacated except under unusual or exception circumstances.
    d. Court gives same reasoning as Dissent in Neary. The function of the courts extends beyond mere dispute resolution. Courts are for the benefit of society. Individual parties do not have the right to deprive the public of these rulings.
    e. The availability of vacature may deter settlement at an earlier state if parties believe an unfavorable verdict can simply be wiped away.

5. BonnerMall does NOT overrule Neary bc:
    a. BonnerMall is limited to the federal courts. Sate courts can make their own decisions.
    b. In BonnerMall, only one party was asking for judgment to be vacated. In Neary, both parties requested.
    c. Neary did not deal with interpretation of federal substantive law, while BonnerMall did, so even if both parties wanted vacateur, Supreme Court probably would not have granted for BonnerMall.

V. Summary Judgment:

A. Curtailed adjudication. Alternative to trial for cases so one-sided that a trial would be pointless and wasted expenditure.
B. Extremely important tool: even if you are not sure you will be granted a summary judgment, should make motion anyway bc it may bring collateral benefit of having the other side respond.
    1. Can get a snapshot of what evidence the other side has bc they have to present it or lose.
    2. Parties may choose to only show minimum amount of evidence to get past summary judgment so as not to reveal their whole hand, but this is risky.
C. Is considered a final judgment, so has preclusive effect.
D. Focus is on facts and evidence and what you can prove, not your allegations.
    1. Contrast RULE 12(b)(6) which focuses on allegations.
E. Serves as a screening device to prevent ALL cases that were allowed through liberal RULE 8, and RULE 11, and discovery from coming to trial.
F. In theory, summary judgment is granted only when the jury would be completely irrational to find the other way. In practice, summary judgment is granted even if there is a slim chance the other party will win, but so unlikely as to justify saving the court's resources.
G. Summary judgment motions are subject to RULE 11.
H. The burden of producing evidence at summary judgment tracks the burden of proving that fact at trial.
I. Sometimes, even if there is no genuine issue of material fact, P/D is not entitled to summary judgment bc:
    1. Evidence is so one sided the other way, in favor of the non-moving party.
    2. There may be issues that are Qs for juries, not for the judge. Ex. negligence. Every aspect of an aspect is agreed upon. The Q of whether the facts taken together amount to negligence is something jury should decide. (unless negligence per se).

J. RULE 56
    1. (a) and (b): either side, with or without affidavits, can move for summary judgment in whole or in part.
        a. D moves more often and is more often successful, bc only has to prove one element is missing while P has to show all required elements.

2. (c) Judgment shall be granted if pleadings, depositions, interrogatories, and affidavits show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law..
    a. Genuine Issue:
        i. Disagreement is supported on both sides such that a finder of fact could rationally come out either way.
        ii. Is NOT a weighing of evidence, but determining if there is enough evidence for a jury to weigh.
        iii. Judge is anticipating what trial will look like based on the evidence that the parties expect to introduce at trial.
        iv. Assume that the nonmoving party will get all benefits of a reasonable doubt by the jury.

    b. Material fact:
        i. A fact is material if it bears on the claim as defined by the substantive law and the theory of the parties.
        ii. Depends upon:
            - How the lawsuit is plead
            - The substantive law that governs the litigation
            - The theories of the parties.

    c. Entitled to judgment as a matter of law:
        i. When moving party would win bc case is so one-sided.

3. (f) if one party seems not to have had time to gather sufficient evidence to defeat summary judgment, summary judgment will not be granted. (however, if there has already been an extended time for recovery, court may grant)

4. CASE: Celotex Corp v. Catrett
    a. F: P brings wrongful death action for product liability. D moves for summary judgment. P has burden of proving each element of cause of action. Disputed fact is causation: whether he died from Celotex asbestos. D claims if not, then he is not liable.
    b. To defeat a summary judgment claim, non-moving party must either:
        i. Reject moving party's claim. Affirmatively disprove what P needs to prove. OR
        ii. Denial: Show that P lacked required evidence.
    c. The burden of persuasion at trial necessarily affects the burden of production under summary judgment.
        i. When the burden of proof rests on the non-moving party, summary judgment claim does not require that a party produce any evidence at all. It can be granted by showing a lack of evidence produced on the other side. Since there was not evidence that decedent was exposed to Celotex's asbestos, and the burden of proof at trial was on the non-moving party, summary judgment is appropriate.
        ii. If there was no evidence either way on a required element, the party who does not bear the burden of that element wins.
    d. Different opinions on what party needs to shoe to prove lack of evidence:
        i. Rhenquist: D just has to say that P has nothing. D can't be expected to prove a negative. Celotex is not expected to parse through non-moving party's evidence.
        ii. Brennan: D must go through record and evidence that P might rely on . Parsing through is necessary.
        iii. White: Must do more than just show absence of evidence on the other side, but not as much as Brennan suggests.

5. Spectrum of Proof:

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D                      A                                          B                    P
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a. Farther move to right, stronger P's case is.
b. A: point of evidence at which a reasonable juror could find causation
c. B: evidence is so strong, a rational jury would have to find causation.
d. Between A and B: a rational jury could find either way.
e. To avoid summary judgment against P, P must get to the right of A.
f. To be granted summary judgment for D, D had to get to the left of A.
g. To be granted summary judgment for P, P had to get to the right of B.
h. To avoid summary judgment against D, D must get to the left of B.

6. CASE: Visser v. Packer Engineering Associates:
    a. F: P must prove age motivation for his termination. Key question is whether age was a but for cause of termination. Trial court grants summary judgment to D. This court affirms.
    b. P tries to use pretext argument: says pretext was that he was fired for disloyalty to company, when it was really disloyalty to the supervisor. Misunderstands notion of pretext. Pretext is something the employer says is the reason for termination as a cover up for termination based on discrimination. P is trying to say that D was trying to cover up the real reason of disloyalty to him. Doesn't make sense.
    c. Orthodox v. Realist view of summary judgment.
        i. Orthodox: sum judgment should only apply when moving party would win directed verdict after the trail
        ii. Realist: issue is whether non-movant has a prayer of winning at trial (this one wins.)
    d. Not enough evidence of age motivation in hiring. The only facts are the P was in a protected age range and D knew he was coming up for pension. If that was enough, every age case would be to a jury. P did have affidavits from coworkers stating supervisor fired Visser bc of age, but they were not testifying to any facts, only their conclusions and sense of what happened.
    e. This case shows how the appropriateness of summary judgment turns not just on legal abstractions, but how one thinks the real world works and what kinds of evidence show certain facts.
    f. Dissent: Flaum: Evidence is enough to cross the line and avoid summary judgment.

VI. Pretrial Orders and Judicial Management of Litigation

A. Pretrial Conferences
1. All judges have authority to call pre-trial conference.
2. Function:
    a. To streamline cases, hurry them along. It reduces the amount of cost that goes into trial. Makes trials more manageable by explaining timelines and what to expect. (although data shows it does not actually lower costs)
    b. To avoid a trial altogether. In hurrying trial along, judges encourage and facilitate some non-trial resolution and settlement. Most of the time cases don't settle bc each side sees their side optimistically. Judges can make informal assessments of their legal arguments to get both sides to see the case from a similar vantage point.
3. So, goals of management are to make trial more manageable and to make trial less likely.

B. CASE: Sanders v. Union Pacific Railroad

1. F: P sued employer for injury on the job. Counsel failed to comply with almost every requirement of rigid, strict pre-trial order. Warned at pre-trial conference that if things were not ready by timeline, there would be sanctions. (Law clerk presided over this conference.) Nothing was ready, so court dismissed with prejudice.
2. This court affirms. Counsel has not good excuse for missing deadlines, he had been given adequate warning, and judges need to back up their orders, otherwise the orders will not be taken seriously.
   a. System was harmed. Orders were not followed, which breaks the authority of the system. Also, by P failing to notify court that he was going to miss deadlines, the court was deprived of the opportunity to impose lesser sanctions. Also, counsel was explicitly warned of the possibility of this sanction.
   b. D was also harmed. We want each side to have fair notice and warning of what the other side is brining to trial. P had an advantage of seeing D's papers before D could see P's papers.
3. Dissent: sanction is too harsh. (en banc review later reversed.)
4. Amar agrees with dissent, but the district court ruling was not unreasonable. Also, strange bc clerk was responsible for the key task of finding how legitimate P's excuse was, and judge does not even give P the opportunity to explain to judge himself.
5. Even if district court decision stood, P would not have been out of luck.
   a. Could have sued lawyer for malpractice, but would also have to prove you were harmed by his negligence. That it was more likely than not that you would have won your suit. Harmless Error Doctrine: harmless error is not enough. We care about the bottom line.

C. CASE: McKey v. Fairbairn

1. F: Landlord allegedly responsible for moisture build up that turns into ice that P slips on when leaving for work. Judge asks about theory of negligence at pre-trial conference, and lawyer agreed that it was failure to fix roof. Tried to amend with housing ordinance that makes landlord specifically responsible, and should have been on a negligence per se theory. Judge excludes housing ordinance negligent per se theory bc limited by pre-trial conference. P appeals. Ct of Appeals affirms exclusion.
2. Parties have to be able to rely on representation of the other side, otherwise there will be unfair surprise.
3. If allowed, D is injured bc he:
   a. did not have adequate time to research the statute and prepare.
      i. Amar's counter: court could have granted a continuance to give time for research, BUT, this costs the court more.
   b. May have already revealed things about the lease that may now hurt him when the statute is an issue.
4. Appeals states that P would have lost anyway bc contributorily negligent.
   a. Court cares about bottom line. BUT, this is a Q of fact, so is not appropriate in a summary judgment analysis. It should not have been brought up.

IDENTIFYING THE TRIER

I. Judge or Jury?

A. Background of Constitution:

1. Articles of Confederation did not give central government much power. Evident that this was not a recipe for success.
2. Those who opposed Constitution did so bc it gave too much power to central government. Bill of Rights were used as part of a bargain by which constitution was ratified

B. RULES:

1. 5th Amendment: federal government cannot indict without a grand jury.
   a. does not apply to states by definition.

2. 6th Amendment: government can't punish in criminal trial by more than 6 months in jail without a petit jury.
   a. Also applies to states

3. 7th Amendment: In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved.
    a. applies to federal court only, although most states have analog.
    b. Corresponds to RULE 38.
    c. Floor, not a ceiling. Congress can provide jury even when not mandated by this Amendment.
    d. In deciding whether you have a right to jury trial today depends on if you would have had a right to a jury trial in 1791.
        i. Legal Claims: could have been brought in court of Common Law. Allowed jury.
            - Ex. Substitutionary relief, money damages, REPLEVIN, EJECTMENT, suing for emotional distress.
        ii. Equitable Claims: could have been brought in court of Equity. Did not allow jury.
            - Ex. when monetary damages were inadequate remedy. Judicial order, injunctions, specific performance, rescission.
        iii. How to determine if remedy sought is legal or equitable? Look to the benefit/loss of the parties.
            - If focus is on making the P whole, then legal.
            - If focus is on what D unlawfully gained, then equitable.
        iv. Difficulty arises when claims today did not arise in 1791. Must determine how it would have been decided by playing the analogy game.
    e. Why the fixation on history?.
        i. Originalism: In interpreting the Constitution, we should look at the state of affairs a the time of ratification. Explains fixation on historical factor.
            - Ex. Scalia said tag jx is OK bc it was OK back then.
        ii. Word "preserved" instead of created, protected. Preserve means to keep the same.

f. CASE: Chauffer, Teamsters & Helpers v. Terry
   i. F: Union member suing union bc the union for failure of duty of fair representation. Unions were outlawed in 1791, so not clear whether this would be considered in court of equity or law.
   ii. STEP ONE: Ashwander Principle:
      - If question can be answered by the statute, go no further. Want to avoid constitutional adjudication when possible. 7th Amendment provides floor, not ceiling, so see if statute requires jury. Does not in this case.
   iii. STEP TWO: Apply a 1791 analogy. 2 PRONGS:
      - Look to the nature of the CLAIM, or CAUSE OF ACTION:
         1. Here, it is breach of duty of fair representation.
            a. Attorney/client relationship. Legal. Like malpractice. Lawyer owes a fiduciary duty to client, just like a union owes a duty to a member.:
            b. Trustee/beneficiary relationship. Equity. Like breach. Some assets are set aside for the benefit of another and managed by trustee. Trustee owes a fiduciary duty to beneficiary similar to above.
            c. Trustee is closer. Beneficiary does not control the trustee, just as the member does not control the union. But, the client does control the attorney. So, equitable. (not clear why control factor in the relationship matters to the court.)
            d. However, since there is also a breach of K claim, court says it is legal. 7th Amendment question depends on the nature of the ISSUE to be tried, not the character of the overall action. In order to prevail on breach of fiduciary duty, P needs to show there was a duty through a K. (K claim is subsumed within breach of duty claim.)
            e. Left with a tie.
      - Look to the nature of the REMEDY:
         1. Here it is compensatory damages.
         2. Court says this prong is more important.
         3. Legal in nature
   iv. So, P has right to jury trial
   v. Majority: if there is a tie, the remedy prong is most important.
   vi. Brennan concurrence: second prong should be the only test. Easier to determine how a remedy would have been treated in the past. Nature of claims is too free-form.
   vii. Kennedy dissent: accuses Brennan of abandoning historical test.

g. CASE: Amoco Oil Co. v. Torcomian:
   i. F: Torcomian operated a service station, trying to get a franchise K with Amoco. Never enter a formal K. Torcomian claims an agent of Amoco promised they would be accepted as franchisees. Amoco files suit to seeking to have Torcomian ejected, a permanent injunction restraining Torcomian from using the station, enjoining him from using the logo, and recovering lost profits for not being able to rent station to someone else. Torcomian filed compulsory counterclaim (RULE 13b) for specific performance of K and damages for breach of K. Eve of trial, Amoco tried to drop legal claims to prevent Torcomian's right to jury trial.
   ii. Court ruled a jury trial for 2 reasons:
      - Amoco did not drop the ejectment claim, which is legal.
      - Torcomian's counterclaim had legal elements with damages in excess of 100K.
   iii. Q of the meaning of the 7th Amendment (equitable v. legal) is a Q of federal law.
      - So does not matter that the state treats ejectment a equitable.
   iv. When you have multiple claims, some which are legal and some which are equitable:
      - CASE: Beacon
         1. In a case with overlapping equitable and legal claims, a party can get a jury trial on any legal claim.
         2. Sequence matters. Bc substantive right to jury is in the constitution, the jury trial should precede any hearing on the equitable claim and the jury's findings would control as to any common factual issues. So, jury's findings are binding on judge when issues overlap.
         3. Rationale:

a. There is no constitutional right to be free from jury trial.
b. We don't want to encourage preemptive lawsuits. Ex. a party filing equitable claim first to preclude jury in second, legal claim.

4. Exceptions to jury trial:
    a. CASE: Atlas Roofing v. OSHA
        i. In cases in which "public rights" are being litigated – e.g. cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact – the 7th Amendment does not prohibit Congress from allowing a trial without a jury.
            - AKA: Congress can essentially destroy the right to a jury trial, but limited to public rights setting when government is involved in its sovereign capacity.
            - Rationale: efficient to cut out jury.
            - Ex. OSHA enforcement proceedings are allowed to be brought in administrative forum without jury.
            - Does not apply to private individuals.
            - Problem: what is the definition of public rights? Opinion uses e.g. (for example) so it is not clear that this ruling is truly limited to the public rights setting. Might be a slippery slope.
            - This holding allows much of the New Deal legislation to be enforced. It would be too expensive to enforce with jury trial.

II. Judge's Recusal:

A. 28 USC §455:
1. (a) Justice must recuse self "in any proceeding in which his impartiality might reasonably be questioned."
    a. Catch all. Objective standard. Focuses on the appearance of impropriety, not actual impropriety.
    b. Can be waived if both parties agree.

2. (b) a justice shall recuse himself under certain particular circumstances:
    a. (b)(1): justice has personal knowledge of disputed evidentiary facts or has bias
    b. (b)(2) justice has served as lawyer in the matter
    c. (b)(4) knows that he, his spouse, or his minor child has a financial interest in the subject matter, or in a party to the proceeding
    d. (b)(5) justice, his spouse, his child, or relative to 3rd degree is party, witness, lawyer in the proceeding or has an interest.
    e. Cannot be waived!

3. (e) No justice shall accept from the parties a waiver of any ground for disqualification enumerated in (b). Where the grounds for disqualification arise under (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.
    a. Rationale:
        i. (a) is objective. Deals with appearances of impropriety. Outsider will believe that if the parties think it is OK, then it is OK.
        ii. (b) is more specific. Lists certain circumstances when there is a higher chance of actual bias. 4(b) is not for the sake of the parties, it is to prevent damage to the system. When appearances of impropriety are so great as in 4(b), even if parties feel it is fair, the rest of the public will not think it is fair.

B. About § 455:
1. We don't want judges to grant request for recusal very frequently bc then parties will seek recusal every time they think the judge won't rule favorably for them. Creates cost and injustice.
2. Recusal in lower court results in reassignment to another judge in the district. BUT, recusal of Supreme Court results in only 8 members hearing case. Means higher possibility of a tie.
3. OK for judges to speak their mind on issues of a case. We want/expect an open mind, not an empty mind.

4. CASE: In re Jeffrey C. Hatcher:
    a. F: Father is a federal district judge. Judge watched son participate in a related case when in law school. Same conspiracy, same people, same weapons used. D sought to have judge recused. Failed. D convicted. Appeals. This court says judge should have recused self.
    b. 455(b)(1) fails. The trial was on public record, so judge did not hear any privileged information. Plus, much of the record of first trial was submitted for this case.
    c. 455(b)(ii) fails. Son is within a close enough relationship, and was acting as a lawyer (even though just a clerk) but it was a different proceeding.
    d. 455(a) – court accepts. Use objective standard.
        i. Partiality would be questioned by a reasonable, well-informed observer. Lay people are often skeptical of the judiciary.
        ii. Amar says much of it depends on how well-informed the standard is. If observer knows there are ethics involved in the judiciary, or that justices commonly discuss prior cases with attorneys, then may not find a violation.

III. Juries

A. General:

1. Juries are at the heart of the Constitution: of the people, for the people, by the people. Traditionally viewed as a check on government oppression.
2. This has not worked out as planned. Problems:
    a. Jury verdicts are not respected.
        i. BUT, must remember that public is only seeing a partial review of the case. Jury may have seen more evidence, but there is no vehicle for a jury to write up a justification of a decision.
    b. Juries are not seen as representative sample of society. Anyone who has a better way to spend time ends up not having to serve.
    c. No one wants to serve on juries.
        i. Not paid, not told how long they will have to serve, not able to take notes or ask questions.
3. How did this happen? Power has been taken away from juries by judges and lawyers.
    a. Judges and lawyers are repeat players, so benefit from investing in things that over the long haul will increase their power.
    b. Public does not have incentive to complain about it bc not repeat players, so the upside of success is shared by all, but cost is incurred only by the person bringing the complaint.
4. Function of jury:
    a. Citizens play a role in shaping the law.
    b. Serve as buffer between state and individual
    c. Voting and serving on jury are fundamental rights
    d. Bonner Mall – courts are about serving public, not just the parties.
    e. Educates the public about the law.

B. Selection Process:

1. Assemble pool of jurors
    a. Usually drawn from voter registration. Means young people are underrepresented bc list is not updated very often. Problematic bc legal issues bear differently on them than other groups.
    b. No group of mentally competent adult citizens can be systematically excluded from selection
    c. If there were less challenges allowed, the pool could be smaller, and people would be called less often

2. VOIR DIRE (to speak the truth)
    a. RULE 47(a) Jurors are questioned by court and/or by parties.
    b. Challenging for Cause:
        i. Each party may challenge any juror for cause. May seek to convince the judge that the juror is not qualified.
        ii. In practice, once relatives and employees of parties are eliminated, judges do not dismiss for cause.

    c. Peremptory Challenges:
        i. Allows lawyer to strike juror for any reason, or no reason at all.
        ii. 28 USC §1870: Each party has 3 peremptory challenges
        iii. Big reason why juries are not representative.
        iv. Based on lawyer hunch that the juror will not be as sympathetic to his party as another juror.

v. Unconstitutional if reason is race or gender.
- Party can object to a preemptory challenge by showing a prima facie case that allows a court to infer a pattern based on race or gender, but is hard to do with such a small sample size.

vi. Arguments against Peremptory Challenges:
- Impossible to prove what is on mind of lawyer, especially when lawyer does not have to give a reason, and especially with such a small sample size. The idea is built on allowing hunches, so it is almost impossible to prove that race/gender motivated. Everything turns on credibility of the lawyer. (Purkett case)
- Only way to really get rid of race/gender based peremptory challenges is to get rid of them altogether.
- Supreme Court has never suggested that peremptory challenges are constitutionally required.
- Numbers analysis shows that preemptory challenges work against numerical minorities. Leads to juries that are not representative of public.
    1. Counter: since both sides have the challenge weapon, each side will cancel each other out, leading to a representative sample.
    2. Response: There is no guarantee that the end result will be even. Opposing forces do not always cancel each other out in good ways.
- They are based on scant evidence bc voir dire is usually cursory and therefore reflects no more than stereotypes.
- If one thinks that the right to vote includes also the right to be on a jury, then it is hard to square the inclusiveness with practice that judges cannot police to prevent illicit activity.
- The exception barring basis of race and gender is a slippery slope. Soon, one will not be able to challenge on the basis of age.
- Creates incentive for parties to spend a lot of money investigating background of potential jurors when background info on jurors should not matter.

vii. Arguments in favor of Peremptory Challenges.
- Legitimacy idea: allows parties to choose their juries, thus giving any ensuing verdict legitimacy in their eyes. They played a part in shaping the result.
    1. Counter: that may be true for the parties, but not the public. If the pubic feels a jury is not representative, public may view the result as illegitimate.
    2. Another counter: when did legitimacy turn on your power to pick decision makers? Cannot pick a judge, nor grand jury. Why should you have a hand in picking petit jury?
- Allows a party to excuse a juror whom they may have offended in the course of voir dire. Sometimes lawyers have to ask tough questions in order to uncover "for cause" problems. May have irked a juror who may hold a grudge.
    1. Counter: this problem goes away if voir dire is limited.
    2. Another counter: It is bizarre that a "for cause" standard is lower than recusal standard for judges when the judge has much more power. Juror is only 1 out of 12. The same standard for recusal of judges should be used for jurors. Should be more narrowly defined like in §455.
- Historical argument: We should not get rid of traditions that have such a long history.
    1. Counter: These challenges were initiated to enable parties to get rid of the few outliers and create homogeneity, which is what we don't want anymore. They were created when the pool was more homogeneous, so they did not have as much of an effect then as they do now when we are more diverse.
    2. Response: since we operate under unanimity, without the challenges, we are giving outliers and deviant views veto power, which they should not have.
    3. Counter to Response: Deal with it. Get rid of unanimity. Nothing in constitution requires it. Relax unanimity if it means making the 12 who are there to be representative.

viii. CASES:

- Batson: State actor (D.A.) cannot use race as a reason for preemptory challenge in criminal cases. It is a violation of Due Process.
- Edmonson v. Leesville: extends Batson to civil cases and private attorneys. Jury is a public body bc the government delegates some of its powers to the jury. Therefore, in selecting this jury and exercising preemptory challenges, even private parties are engaging in state action, so subject to Due Process Clause. (Like Bonner Mall, courts are here to serve the public, not just to resolve dispute for parties.)
    1. O'Connor's dissent: jury selection is a matter of private choice, so is NOT state action.
- Purkett: shows how hard it is to show race bias in preemptory challenges. Attorney used 3 of 4 challenges to eliminate black jurors. Claimed it was bc long hair and facial hair. Court accepted.
- JEB v. Alabama: extends Batson to gender, but not in civil cases. In criminal only. Why not civil? It is only considered state action when the state itself was a litigant. Really going on: O'Connor doesn't think that Edmonson is right.

C. Ideas for Reform:

1. Abolish/cut back on preemptory challenges.
    a. See all reasons above for why preemptory challenges are bad.
    b. Main problem: The problem with getting rid of preemptory challenges is that you are left with allowing oddball views onto the jury that can hold veto power. You create the risk that marginal voices can uphold results.

2. Also relax the unanimity requirement.
    a. If unanimity is not required, the oddball voices will not have veto power. Supreme Court has not held that unanimity is required. Idea of a veto is not seen anywhere else in US government.
    b. Main Problem: If you don't need everyone's vote, there is no incentive for jurors to listen to what those in the minority have to say.
    c. Solution: Decrease unanimity in a temporal way. After 1 day, you need unanimity. After 2 days, allow a 11-1 verdict.

3. Increase size of jury.
    a. Supreme Court has not held that 12 is the required number to serve on a jury. Larger juries are less aberrational. More jurors will learn the process.

4. Use the first 12 people selected.

5. Move away from juries bc the law is complex and jurors are incapable of comprehending the issues.
    a. Counter: presupposes judges are better than juries.
    b. Counter: would have to amend the constitution.
    c. Counter: even if evidence is technical, the main issue might not be technical. Ex. who is credible?
    d. Counter: Wrong Q: are the juries we pick today incapable? Right Q: are the juries we SHOULD be picking to day capable? Maybe we should be picking juries with knowledgeable professionals.
    e. It might make sense in some areas of law that are particularly complicated (ex, IP)

6. Improve conditions for juries.
    a. Provide child care, allow juries to take notes, pay more.

7. Emphasize that it is not just a right, but a duty. Enforce the right/duty. Create incentive for showing up for jury duty. Punish for not showing up. Mandate it.
8. Prevent shirking, so juries are a better representation of society.
9. Cut down trial time.
10. Reverse Batson, allowing preemptory challenges even for racial/gender based reasons.
11. Expand voir dire. Then, the lawyer can base preemptory challenge on more actual or implied bias rather than stereotype.
12. Combine expansion of voir dire and abolishment of preemptory challenges
13. Permit preemptory challenges but clarify the basis on which they would be permitted (only under certain conditions, similar to those listed for recusal of judge.)

TRIAL

I. Judgment as a Matter of Law:

A. Method to control irrationality.

B. RULE 50: Judgment as a Matter of Law (close cousin to RULE 56 for summary judgment)

1. (a)(1) a court may grant a motion for JML if after the non-movant party has been fully heard, there is **no legally sufficient evidentiary basis for a reasonable jury to find for a party on that issue**.

2. (a)(2) must be made before the case goes to the jury. Must specify judgment sought, applicable rule, and its relationship to the facts.
   a. Usually brought at the close of presentation of evidence by the party against whom the motion is sought.
   b. Easier for D to win bc D only has to disprove one element.
   c. Now called directed verdict.

3. (b) the motion can be **renewed** after the jury has come back with a verdict against you.
   a. Granted if the jury has done what no reasonable jury could have done.
   b. Now called jnov.
   c. Must first bring motion for directed verdict to preserve right for jnov. Why?
      i. It may avoid wasting jury time if the decision can be made before jury deliberates.
      ii. Whenever the jury comes back with something irrational, and the judge must correct, it hurts the system bc it undermines faith in the system. Irrationality has been exposed to the system.

C. About RULE 50:

1. Almost all motions for directed verdict are turned down by judge.

2. Why would a judge deny directed verdict, but grant a jnov?
   a. Judge changes his mind.
   b. Judge hopes the jury comes back with the right answer. This is the best scenario bc it is how the system is supposed to work.
   c. Efficiency. Saves a jury trial from being wasted. If directed verdict is granted, and losing party appeals, and appeals court found directed verdict was granted improperly, then there must be a whole new trial. Jury trial has been wasted. But, if instead jnov is granted, and losing party appeals, and appeals court found the jnov was granted improperly, no need to hold a new trial bc the court would just reinstate the jury verdict.

3. Why wouldn't all RULE 50 cases be taken care of under RULE 56?
   a. The party may not move for SJ. It is not required in order to preserve right to JML.
   b. The evidence used for RULE 56 is only a preview. It is not always a perfect preview. The evidence brought to trial may be different than that used for SJ decision. (ex. witness may change testimony)

4. CASE: Reid v. San Pedro, LA, and Salt Lake RR
    a. F: RR tracks with fence along side. Gate is open and there is a hole in the fence. P's cow is killed on tracks near open gate. RR is liable if cow went through hole, but P is liable if cow went through gate. Jury returned verdict for farmer. RR appeals. This court reverses. No reasonable jury could have thought the cow came through the hole rather than the gate.
    b. P did not show with sufficient evidence that the cow passed through the hole. Law says it must be more likely than not that the cow came through the hole for P to prevail.
        i. At best, there is a 50% chance that the cow went through the hole. (probably lower bc the cow was found by the gate.) If existence of an essential fact can point equally to 2 things, 1 of which renders D liable and 1 which doesn't, P must fail bc the burden is on the P to show it is more likely than not (more than 50%) that D is liable.
    c. Depends on whether the facts create a rational inference. Tiny changes in the evidence could make an inference by a jury rational and therefore permissible.
        i. Ex. if shown that the gate was a narrow opening, and the hole was large, and there were no scrape marks on the cow.
    d. Also depends on how one views the world and the probabilities of evidence in it.
        i. Ex. Visser case: if employer was heard referring to P as "old man" your determination of whether this constitutes evidence of discrimination depends on your view of how probative that statement is. How it is usually used.

5. White Cab Co and Yellow Cab Co
    a. P was hit by cab. 75% cabs are white; 25% are yellow. P sues white. More likely than not that it was white. Grounds for SJ/DV/JNOV?

        i. Could come out 3 ways:
            - JML for P: Use of statistics show us it is more likely than not that it was white. No rational jury could say it is not more likely than not that the cab was white.
                1. Pure numbers.
                2. We have a shortage of information bc we don't know where all white cabs were at that time. Rules are structured to give incentive to those who have access to the info. In this case, D.
            - JML for D: Most courts would come out this way, even though the numbers point to more likely than not. Why?
                1. Circumstantial evidence is not as strong as direct evidence.
                    a. Ex. witness who said car ran red light – direct evidence.
                    b. Ex. photo of other light showing it is green – circumstantial.
                    c. People think human based evidence is more reliable.
                    d. BUT, this is not strong since it is proven that witnesses are often wrong.
                2. We distrust statistics:
                    a. Nature of statistics: they remind us of something that we know and live with, but what we don't want to be reminded of: we're wrong a certain percentage of the time.
                    b. Statistics get really complicated, really fast. Eyewitness said cab was white, but eyewitness is only right 90% of time. What is probability it was white?
                3. Discomfort with all or nothing approach. When we attach liability, it is all or nothing. If white is responsible, they must pay 100%, even though there was only 75% likelihood that they caused the accident. Disconnect between the likelihood of wrongdoing of D and amount of liability for D.
                    a. Solution: take a market share liability approach.
            - Leave it for jury

6. CASE: Pennsylvania RR v. Chamberlain
    a. F: Decedent killed when fell or was thrown from RR car he was riding. His estate alleges negligence by RR. Theory is that a string of cars that hit victim was negligently let loose by RR employee. Witness for P says he heard a crash and saw 2 cars moving together, and no longer saw decedent. Witnesses for D say there was no collision. Trial court directs verdict for D. Court of appeals reversed. This court reinstates directed verdict for D.
    b. P's witness and evidence alone is not enough to for directed verdict. His testimony, even if not rebutted by D's witnesses, is not enough. He did not see the collision.
    c. Often these decisions turn on how well the lawyer pulls together a convicing story by weaving the facts together. Should fit inferences into a compelling story.
        i. Should have mentioned that speed of second car was faster, gap was going to close at some point, sooner or later they would collide, witness heard crash. Plus, decedent was an experienced worker, so should not have fallen off by himself.
        ii. Rationality depends not just on the evidence in the case, but your view of the work that tells you how strong you think that evidence is. Recall Visser.

7. CASE: RR v. Stout
    a. F: Child was on turntable and was hurt by RR. No factual dispute. Negligence.
    b. Even when facts are not in dispute, sometimes judge will give a question to the jury.
    c. Therefore courts not only make juries fact-finders, but also allow juries to make laws by giving them cases where there is no dispute.
    d. When it comes to applying a standard like negligence to specific facts, we want the life experiences of 12 average people in the community to be applied to reach a unanimous conclusion instead of using just 1 judge's experiences. Community assessment is good for negligence. (may not be helpful for patent infringement.)

D. RULE 50 and RULE 56 Compared:
1. The standards are identical for JML and SJ. No legally sufficient evidentiary basis is the same as no genuine issue of material fact. No a matter of "what," but a matter of "when."
2. RULE 56: is the issue before us one that can't come out reasonably either way?
3. RULE 50(a): is the issue that is about to go to the jury one that can't come out reasonably either way?
4. RULE 50(b): is the issue that just came back from the jury irrational?

II. Burdens:

A. Burden of Persuasion:
1. Defines the extent to which a trier of fact must be convinced of some proposition in order to render a verdict for the party who bears it.
2. Civil cases: preponderance of the evidence.
3. Only comes into play when matters of evidence are completely in balance. Party who holds burden of persuasion loses when tied.

B. Burden of Production:
1. Defines which party must find and present evidence
2. Satisfying a burden of production means that the trier of fact MIGHT rationally conclude X, but not that it MUST conclude X.
3. A party with the burden of production can lose even before trial if she fails to demonstrate by investigation and discovery, sufficient evidence for a jury to find in her favor. So, summary judgment relies on this.
4. Ex. Reid Case. P lost bc she did not satisfy her burden of producing evidence that showed causation.

III. Controlling Juries:

A. Just bc ultimately a jury may decide a case, does not mean they can't be influenced.

B. Controlling the jury before the verdict:

1. Voir dire: to screen out jurors who may reach irrational result.
2. Rules of evidence: effort to insulate juries from info that might be misleading.
3. Instruction:
    a. Generally straightforward explanations of the legal principles that apply to the case. Laying out framework, NOT talking about evidence.
    b. 2 Audiences:
        i. Jury
        ii. Appellate court.
4. Comment:
    a. Practice in federal courts by which the judge will indicate to the jury how he views the evidence. Which evidence was most important and which way it cuts. NOT about laying out the framework.
    b. Ex. If negligence was the cause of death, it had to be due to the collision, so focus on the collision and the testimony of the witness.
    c. Not prohibited, nor frowned upon.
    d. Problem: Jury might give the judge more deference than he should have. Undue influence from the judge.
    e. We draw the line when judge's comment tries to invoke a superior institutional capacity as a judge.
        i. Judge can invoke his experience as a person, NOT as a judge.
        ii. Ex. Judge cannot say "In my experience of trying loads of cases, that when witnesses wring their hands, they are lying."

C. Controlling the jury after the verdict:

1. Usually hard bc: Reexamination Clause: no fact tried by a jury shall be otherwise reesamined in any court of the US than according to the rules of common law.
    a. If fact is tried by jury, court cannot upset it.
    b. Jnov is NOT unconstitutional bc rules of common law had directed verdict in 1791. Jnov is really just a directed verdict anyway. But, for this to work, there MUST have been a motion to direct a verdict before submission to the jury.

2. JNOV (see above)

3. New Trial: RULE 59
   a. RULE 59 motion can be sua sponte. Judge can grant new trial without motion from parties.
   b. New Trial serves 2 functions:
      i. Flawed Procedure: Mistake or Change:
         - It is not the jury's fault.
         - Judges have a lot of discretion to grant a new trial..
         - Ex. the trial court made a mistake, during the time the jury was deliberating the law changed, juror misconduct.
         - Easy to identify and uphold..
      ii. Flawed Verdict: No change or mistake
         - "Verdict is against the weight of the evidence." Jury did not do the sensible thing.
         - Judge has narrow discretion to grant a new trial.
         - Soft form of directed verdict. May not be up to the standard of a JNOV, but can satisfy standard of new trial.
            1. A result CAN be against the great weight of evidence even if there is substantial evidence to support it.
         - Judge cannot act like a 13th juror and decide he would have ruled the other way had he been in shoes of juror.
         - More common ground for granting new trial.
         - JNOV and New Trial Compared:
            1. JNOV is saying that the winner of the verdict had not evidentiary support for at least one essential element of the claim or defense. That party loses.
            2. New trial is saying the great weight of evidence is against the verdict. Starts contest again.
   c. Conditional New Trial:
      i. Granting of RULE 59 motion does not have to be all or nothing. Can be limited to part of the case. (ex. for damages.)
      ii. Remittitur: judge orders a new trial unless P agrees to accept reduced damages.
      iii. Additure: judge orders a new trial unless D agrees to accept additional damages. IF accepted, P's motion for new trial is dismissed. (less common.).

   d. CASE: Lind v. Schenley
      i. F: Jury ruled for P. D was granted JNOV and alternatively new trial. Ct of appeals reverses.
      ii. Crucial that both were granted. Had JNOV not been granted, there would be no final judgment to take to appellate court, so no immediate appeal. Court granted new trial along with JNOV to signal that even if the jnov is reversed, there is still going to be a new trial.
      iii. 2 things to keep straight: 2 layers of deference.
         - Standard the trial court should have applied in deciding whether to grant new trial (could a rational jury have done that?) is DIFFERENT than
         - Standard the Court of Appeals is supposed to apply to decide whether the trial court's ruling is sustainable or not in favor of a new trial (Abuse of discretion.) Gives trial judge a lot of deference.
      iv. Ultimately, 3rd Cir Court gets around all of this by saying that the trial court asked the wrong question in deciding whether to grant new trial/jnov. Trial court judge stood as 13th juror, which it should not have done.
      v. Dissent: Court of appeals did not give adequate deference to trial judge.
         - Amar's counter: Court of appeals is criticizing trial judge for not showing adequate deference to the jury.

e. CASE: Peterson v. Wilson:

i. F: P claims he was fired for being a whistle blower, which violated his constitutional rights. Jury rules for P with awards. Judge granted new trial based on comments jurors made after returning the verdict, during a discussion outside the presence of the parties, indicating the jury completely disregarded Court's instruction. Juror disobedience. New trial. P loses. P appeals the granting of the new trial in the first place.

ii. Granting second trial should not have been done since it violates FRE 606(B)

- Federal Rule of Evidence 606(b); you can't impeach a jury verdict for statements made about their decision unless there was improper outside influence or if a juror introduced new evidence.
    1. Ex. juror did experiments at home. 12 angry men switchblade.

iii. Judgment of first court is reinstated.

iv. It is not unlawful for judge or lawyer to interview jurors to ascertain whether they understood the instructions afterwards.

v. If a judge misinstructed the jury, we undo that. If a judge properly instructed the jury, but the jury misunderstood, we do NOT undo that. Why we don't care what goes on inside jury's head? Black Box:

- We would be calling into question to many verdicts. It would get too cumbersome. You would always be able to find a flaw.
- No easy way to know that a particular juror's explanation of the rationale is an accurate representation. After you make a decision with high stakes, psychological factors change your perception.
- Soft variables should be used for juries to reach conclusion. If case has made it to the jury, it probably means it could rationally go either way.

vi. However, a court CAN ask a jury to explain how it reached its verdict:

- Special verdict: jury does not render a general verdict. It answers Qs about the evidence that reveals an answer.
    1. Problem: when jury returns inconsistent answers. So, most courts don't use.

f. Spectrum of Deference to jury.

/--/---/

13th juror Big Mistake (new trial) Miscarriage of Justice Jnov / Summary Judgment

i. 13th juror:

- no deference to jury. Judge stands in the shoes of a juror and decides he would have voted differently.
- Not what common law and Rule 59 had in mind..

ii. Big Mistake: New Trial

- More deference to jury. Not simply that the judge would have voted differently.
- Against the great weight of the evidence.
- Quite clear that the jury has reached a seriously erroneous result.
- This IS what Rule 59 had in mind.

iii. Miscarriage of Justice: JNOV or Summary Judgment

- Most deference to jury. Harder to satisfy than new trial

APPEAL

I. General:

A. Most cases are affirmed on appeal

B. Appeals balance goals of civil procedure:

   1. Fairness: parties should win or lose depending on their compliance with procedural rules and quality fo their argument.
   2. Justice: the right party should win, regardless of technicalities.

C. Strong presumption that the trial court is correct. Most decisions are not reviewable. When they are, much deference is given to the trial court..

D. Federal and state practice often diverge on this issue.

E. There is no constitutional right to appeal in civil cases.

II. Who Can Appeal?

A. Adversity: Must be a losing party to a lawsuit that has not settled.

   1. Not enough that you feel all of your arguments were not embraced, or some of your issues were rejected, unless rejection hurt the party in some way.
      a. Relief sought under rejected theory was more or different than relief granted under winning theory, then appealable. (not if relief is identical.)
         i. Ideological harm of not creating good law is NOT enough.
      b. Collateral Consequences
         i. CASE: Aetna v. Cunningham:
            - Insurance company is suing a client. Aetna won on K theory, but lost on fraud theory.
            - This IS appealable bc there are collateral consequences. Under bankruptcy law, if you have a claim of breach of K against a bankrupt party, your recovery has lower priority than if you have a claim of fraud.

   2. Supports the Notion of harmless error. The legal system is about correcting mistakes that matter, not those that don't.
      a. Who has the burden to extablish harmlessness?
         i. Civil: Burden is usually on the apellee to establish harmlessness. (rather than burden on appellant to establish harm.)
      b. What is the burden?
         i. Civil: by clear and convincing evidence.
         ii. Criminal: beyond reasonable doubt.

   3. Doctrine of Mootness: one may not appeal from a judgment when circumstances have changed in such a way that relief is no longer possible.
      a. Exception: if the claim is likely to recur, then a party may appeal even if issue is moot.
      b. Settlement renders an issue moot.
         i. Ex. BonnerMall: as part of a settlement, parties cannot ask an appellate court to set aside lower court's action.

B. Contemporaneous Objection: A party must have raised the issue below in order to preserve the issue on appeal. Failure to do so constitutes a waiver of the contention.

   1. Rationale:
      a. Efficiency: want to prevent people from bringing up new information and giving the appellate court too much to look at.
         i. Counter: gives incentive to treat trial court as a kitchen sink, which is not very efficient.
         ii. Response counter: Rule 11 bars party from bringing EVERYTHING to trial.
      b. Efficiency: it keeps claims from going up the appeal level. We want to give the trial court a chance to avoid the mistake in the first place or correct it as early as possible so there are not continuing consequences.
      c. Respect for the judge: it is disrespectful for an appellate court to rule that the trial court got it wrong when it is based on something that the trial court did not get to consider.

2. NOTE: An appellee CAN use a new argument (not new facts) in support of the judgment on appeal. Does not have to be an argument used in the original trial by the parties nor does it have to be used by the lower court to reach the decision. Why?
    a. Once a trial court has reached a ruling, we want to preserve that ruling as long as we can do so without stepping on the toes of the trier of fact.

3. Exceptions:
    a. Plain Error Rule: If a mistake that a trial court judge made was so fundamental and egregious, it is unfair not to let an appellant bring it up on appeal even if not raised below.
        i. Rationale:
            - To ensure justice for people who have bad lawyers.
                1. Hard-nosed advocate counter: P still has recourse of suing lawyer for malpractice.
                    a. Note: this might work in civil setting bc remedy makes P whole. Does not work well in criminal setting bc can't make up for unjust prison time.

    b. Change in Law:
        i. Hard-nosed advocates: Too bad. If you did not bring an issue up below, it is not appealable even if there was a change of law. Party should have anticipated the change in law and raised the issue to preserve the right to appeal.
            - Counter: The law was the established framework at the time. Raising the issue may be barred by Rule 11.
            - Response Counter: NO. It would not have been barred by RULE 11 bc RULE 11(b)(2) allows for reasonable extensions of the law.
            - Response: The change of law was so unexpected that it would have been seen as not reasonable.
        ii. Moderates: If the change in law is fundamental, a court may let it in even if not brought up on appeal.
            - Rationale:
                1. We don't want to give parties incentive to bring the kitchen sink to trial (including all potential extensions of law.) RULE 11 takes care of this problem to some extent, but It is good policy to encourage parties to narrow complaints and not use all the room that RULE 11 allows.

C. Party must also raise the issue on appeal. Among all the issues you raised and lost on in the court below, you must tell the judge what to focus on. Why?
    1. Courts should not do work of lawyers.
    2. Autonomy: Parties should be able to make decisions on what they want to present.
    3. Efficiency: Not efficient for the court to have to decide what issues may be raised.

III. Right to Appeal?

A. There is no constitutional right to appeal a civil case, so a jx could discourage, forbid, or make all appeals a matter of discretion, rather than a right.
    1. However, every state grants at least one appeal in a civil case "as of right."
        a. A court must look at a case, but does not have to write a long opinion on why it is affirming the case.

2. A court may condition an appeal with a burden that may make an appeal less easy, convenient, or economic.
   a. CASE: Bankers Life v. Crenshaw
      i. F: Law that if you list in trial court, and you have damages against you, and you appeal and it is affirmed, you owe 15% more than you did.
      ii. Supreme Court upheld the law bc you have no constitutional right to an appeal in the first place.
   b. CONTRAST CASE: Lindsey v. Normet
      i. F: State statute required tenants appealing an eviction judgment to post a bond twice as great a the rent expected to accrue during the appeal.
      ii. Court invalidated the statute under violation of the Equal Protection Clause.
      iii. Reconciliation with Bankers: Lindsey statute singled out a group of people and treated them differently (poor people can't bring suits.) Bankers statute treated all appellants the same way.

IV. When a Decision May Be Reviewed:

A. 28 USC §1291: Final Judgment Rule: appeals lie only from final decisions of the district courts, with statutory exceptions.
   1. Functions: defines the moment at which an appeal is proper AND grants jx for the appellate courts to hear that appeal.
   2. Final Judgment: one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.
   3. Interlocutory decisions do NOT get appealed.
   4. Not all state systems follow the FJR.

   5. CASE: Liberty Mutual v. Wetzel
      a. F: T7 sex discrimination case. Trial court grants motion for summary judgment for P. Circuit court affirms on the merits. Supreme Court grants cert. Hears arguments and does research.
      b. Supreme Court determines it does not have jx to review the case bc the circuit court never should have heard it bc no final judgment was reached in the trial court. The trial court found liability, but did not issue a remedy. (so did not leave "nothing for the court to do."
      c. Supreme Court tries to find an relevant exception to the final judgment rule, but cannot.
         i. RULE 54(b) allows appeal of certain claims that have been resolved even when other claims of the same case have not been resolved.
            - Does not apply 54(b) only applies to multiple claim actions. Here there is only 1 claim seeking multiple relief, NOT multiple claims.
         ii. RULE 56(c) summary judgments are interlocutory, and this is seen at least as partial summary judgment.
            - Does not apply bc P asked for more than mere declaratory relief.
         iii. §1292(a)(1). If we treat the judgment of the trial court as declaratory judgment and a denial of the injunction. Grants and denials of injunctive relief are immediately appealable.
            - Does not apply bc it is a stretch to say injunction was denied AND
            - The wrong party is appealing. This would only work if P was the appellant. But here, D is the appellant.

6. Policy of the final judgment rule:
    a. Final Judgment Rule should stay::
        i. Efficiency: FJR Saves time for appellate courts.
            - Might reduce the number of appeals bc issues become moot or not worth the appeal if party won overall case.
            - Economies of scale: Want the court of appeals to look at a case in one package to save time.
            - Bouncing back and forth delays justice.
    b. Final Judgment Rule should not stay / we should allow more interlocutory appeals:
        i. Efficiency: FJR Wastes trial court time.
            - If error is made early on, and party is allowed to appeal immediately, mistake will be nipped in bud without having to waste an entire trial, just to re-try again..
    c. Good/Bad is determined by:
        i. Which resources are more valuable:
            - If appellate court, then FJR.
            - If trial court, then no FJR
        ii. How frequent reversal is compared to affirmation:
            - If more reversal, then no FJR.
            - If more affirmations, then FJR.
    d. Even if FJR is generally efficient, why not except it in this case where it is obviously going to lead to inefficiency?
        i. The question is whether FJR in the main is efficient, not if it is in each individual scenario.
        ii. Nature of a rule: the more you make exceptions, the weaker the rule.
        iii. You consume more resources trying to decide when/when not to apply the rule.

7. Exceptions to the Final Judgment Rule: if we clearly define the exceptions, they do not weaken the rule-like quality much.
    a. Practical Finality: Collateral Order Rule: (created through common law)

        i. CASE: Lauro Lines v. Chasser
            - F: Ps on cruise that was hijacked. Passenger killed. Cruise ticket had forum selection clause. P can only sue in Naples, Italy. Estate of passenger sues cruise company in NY. D moved to dismiss based on forum selection clause. District court issued interlocutory order denying dismissal. D immediately appeals to 2nd Cir. Denied bc violated Final Judgment Rule. D tries to use Collateral Order Rule exception. Supreme court affirms – not appealable.
            - Cohen Exception: Collateral Order Doctrine: Immediate appeal of an order is allowed if the order:
                1. conclusively determined the disputed question AND
                    a. whether suit can be filed outside Naples.
                2. resolved an important issue completely separate from the merits of the action AND
                    a. enforceability of the forum selection clause.
                3. will be effectively unreviewable on appeal from the final judgment. Party will not be able to vindicate right after the final judgment.
                    a. Case turns on this issue. Depends on how you define the right.
                    b. Lauro says the right is right not to be sued outside Naples.
                    c. Court says the right is right not to be subject to binding judgment from court outside Naples, SO, it can be vindicated after the final judgment EXCEPTION DOES NOT APPLY BC DIDN'T SATISFY THIS PRONG
            - Scalia concurrence: bottom line is how fundamental the right is.
            - Amar thinks the district court got it wrong. The right to appeal after first trial, then take case for another trial in Italy is hardly a right at all.

ii. Areas where policy is important enough to permit interlocutory appeals:
  - Cohen – bond requirement
  - Immunity by government officials – they should not have to stand trial
  - Order requiring disclosure of documents that are claimed to be protected under client/attorney privilege

iii. Areas where policy is not important enough to allow immediate appeal:
  - Orders refusing to certify class actions.
  - Orders disqualifying or refusing to disqualify trial counsel for conflicts of interest
  - Orders denying motion to dismiss on grounds of immunity from service of process
  - Government immunity IF based on facts "I didn't do it."

iv. Amendment of §2072 – Congress gave Supreme Court power to decide when a ruling is final under §1291 for purposes of appeal

b. §1292(a): allows appeals of interlocutory orders granting or denying injunctions.
  i. Does not apply to TRO (bc short duration of 10 days), but does apply to preliminary injunctions.
  ii. Denial of a summary judgment in favor of one seeking a permanent injunction does not give rise to the right to immediate appeal under §1292(a) bc the ruling is simply a step on the way to trial, not a rejection of a claim on the merits.
  iii. Rationale: Injunctions are special and potentially dangerous:
    - If you ask for it, you need a strong reason.
    - If you get it, there may be big consequences.

c. §1292(b): Permits a court to authorize interlocutory appeals from non-final judgments when:
  i. District court judge certifies that the order involves a controlling question of law as to which there is substantial ground for difference of opinion AND
  ii. Immediate appeal from the order may materially advance the ultimate termination of the litigation AND
  iii. Appellate court agrees to it.
  iv. Not heavily used.

d. Mandamus: you can appeal immediately under mandamus if you show exceptional circumstances that amounted to the usurpation of power. Writ of mandamus orders an official to do something they are required to do by law and have no discretion not to do.
  i. Only used in extraordinary circumstances that justify the invocation of this extraordinary remedy. (ex. when judge denies a jury trial, or to protect against a transfer of a case out of the jx.) It is sometimes interpreted as a censure of a judge, so not often used.

V. Scope/Standard of Review:

A. General:

1. Even when you get an appellate court to look at your case, what the trial court does is often going to be the final word bc of the deferential standard of review.

2. The standard of review depends on the nature or character of the trial court's ruling that you are challenging.
  a. Question of Law: (court misunderstood the law)
    i. Reviewed de novo. Attach no presumptive validity to what has been done before.
    ii. The questions are more important.
      - Court of appeals are better at the rules of law than trial courts.
      - 3 heads in appellate court are better than 1 in trial court.

  b. Question of Fact:
    i. Clear Error Standard. More deferential.
    ii. Although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed
      - Sounds like standard for new trial "against the great weight of evidence".
    iii. When there are 2 permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.
      - Very deferential. Sounds like jnov "when rational fact finder could have concluded."

c. CASE: Anderson v. Bessemer City
   i. F: P was only woman to apply for job out of 8 candidates. Hired man. P claims discrimination. Bench trial. Judge concludes P was denied on account of sex. Makes findings that: she was better qualified than the man and gender was on the mind of all committee members. D appeals. Cir court reverses, saying findings were clearly erroneous. Finds the male was more qualified and sex was not on the mind of all committee members. Supreme Court reverses for P.
   ii. Court of Appeals improperly conducted a de novo review of the evidence. Should have used the "clear error" standard of review. Correct Q is whether on this record it would have been rational to make the findings the district court made.
   iii. Court of appeals tried to give reasons for less deference to the district court:
      - The district court re-printed P's own arguments as findings. Used the lawyer as a law clerk.
         1. Does not justify. No reason the court can not reflexively adopt like that. Plus, they did not adopt, they took as starting point and amended.
      - The evidence was in document form. Deference should clearly be given to trial court when in oral form bc the trial court witnesses it personally, so is a better fact finder. But, when it is in written form, that deference should not be given.
         1. False. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. (Now embodied in RULE 52) Why the deference, even for written evidence?
            a. Clearly better for oral testimony:
               - Personally experiencing witness testimony.
               - Can read witness..
            b. Also including written:
               - Specialization of labor: trial courts will be better at finding the credibility of written documents if we keep given them that job. They will develop the expertise.
               - No reason to think trial court is WORSE than appellate court. Unless we have a reason to think appellate court would be BETTER, we should not redo the fact-finding process.
               - 3 heads are not better than one for fact-finding.

VI. Review by the Supreme Court:

A. Supreme Court is limited to taking cases from federal court or from highest state court that has a federal question.
   1. So, 2 Routes to get to Supreme Court:
      a. Federal district court – federal appeals court – Supreme Court
         i. Possible that a case filed in federal court on diversity based on state law goes up federal court ladder and is reviewed by Supreme Court, but not likely.
      b. State trial court – (may have another state court level here) – highest state court – Supreme Court.
         i. Only taken if federal question. State courts have final word on state law. S Court cannot correct a misapplication of state law when the state court was doing the applying…ONLY when federal court was doing the applying of state law.

B. Not all cases that Supreme Court CAN take ARE taken by Supreme Court. Review by Supreme Court is completely by discretion of Court.
   1. Takes 4 out of 9 justices to grant review of a case.
   2. Takes 5 out of 9 (majority) to reverse lower court opinion.
   3. Criteria used by Supreme Court to decide to review a case.
      a. How confusing is the federal question?
         i. Does NOT focus on whether the lower court got it right/wrong.
         ii. Good evidence is if there is a big split in the lower courts on how the issue is interpreted.
         iii. Do NOT want to say the lower court clearly got it wrong bc you want to argue the S Court should hear a case to make the law more clear. If it is already clear, no need to take the case.
      b. How important is the question of law?
         i. Court may measure it in dollar terms.
         ii. May look to how much the legislature seems to care about it.
         iii. May look to how frequently the question comes up – indicates that it will affect a large number of cases.

C. A decision not to take a case does not have precedential weight, nor should it.
   1. A decision not to take a case does NOT mean the Supreme Court agrees with the lower court's outcome.
   2. Timing is important.
      a. Time may not be ripe for review. Justice may think if they intervene at this time, they may not think it through as clearly as they could a few years from now with a different backdrop.
      b. Court may want to wait to hear more lower court interpretations of a new issue..
   3. Specific case is important:
      a. There may be a cert worthy issue, but the issue may be only a small issue in a big, complicated case. Might be better to wait for another case where the federal issue is central, and can be the determining factor.

D. Writ of Certiorari: asking the court to review your case.
   1. Supreme Court receives approx. 5000 writs of cert a year.
   2. Takes 80 per year.

FORMER ADJUCICATION / PRECLUSION

I. General:

A. Former Adjudication / Preclusion includes:
   1. Claim Preclusion = res judicata
   2. Issue Preclusion = collateral estoppel
   3. Sometimes res judicata means both claim and issue preclusion together.

B. Every preclusion situation involves 2 lawsuits.

C. Goals of Preclusion: (same for claim and issue preclusion)
   1. Repose:
      a. Both the P and D can know that it is over and understand with certainty what their rights and responsibilities are.
      b. Same rationale for SOL.
   2. Efficiency:
      a. Parties do not have to spend more resources. Prevents oppression of Ds by having to litigate multiple, costly lawsuits.
      b. Judicial system does not have to spend more resources. Limited resources can be dedicated to the new cases.
      c. There is no reason to have more courts revisit the same thing unless we are confident that the case will be better. No reason to think it will be decided any more accurately the 3rd, 4th, 5th time.
   3. Avoiding inconsistency:
      a. There is most likely a range of rational answers for every case. If we redo the case, we may come up with a different answer. Even though we know multiple answers can be rational, we are uncomfortable with this inconsistency.

D. So, why can't judges bring claim preclusion sua sponte?
   1. We still want to protect the autonomy of the parties. That is an important principle too.

E. Why doesn't the desire to get it right prevail over the justifications of preclusion?
   1. Generous ability to appeal. We already have a mechanism for making sure the court got it right.
   2. If the rulings are different, there is no guarantee that the first got it wrong and the second got it right.
      a. This is why we typically reserve exceptions to preclusion for situations when we have reasons to believe the second time around is better fit to get it right.

F. Policy:
   1. System is less generous at the preclusion stage bc it is so generous at the pleading stage.

II. Claim Preclusion:

A. Central issue: what does the lawsuit do to the parties' rights?

B. Process:
   1. Preclusion is an affirmative defense under RULE 8(c). Must be raised or it will be waived.
   2. Party makes motion for summary judgment.
      a. NOT 12b6 bc 12b6 looks only at the complaint. To argue preclusion, you must look at the evidence of the earlier litigation.

C. Does NOT matter which party won the first lawsuit to apply claim preclusion. Only matters that there WAS a first lawsuit that is similar enough to the second for preclusion.

D. Claim preclusion focuses not on what was litigated, but what could have been litigated.

E. When a court renders final judgment on the merits of a cause of action, that cause of action or claim cannot be litigated between the same parties or persons in privity to them.
   1. Elements:
      a. Final judgment on the merits
      b. 2 case that involve the same cause of action
      c. Same parties or privities

   2. Final Judgment on the merits:
      a. Judgment of first action must be a resolving matter.
      b. Not all final judgments on the merits receive preclusive effect. Court may want to assign preclusive effect for 2 reasons:
         i. The court considered and decided the merits of a lawsuit.
         ii. One party misbehaved and the court dismisses the suit as a sanction. Sanction would not have teeth unless it was with prejudice. So, "on the merits" is not intended to be interpreted literally.

c. Considered "final judgment on merits" for claim preclusion purposes:
    i. Full jury trial (but some jx wait until appeal)
    ii. Directed verdict
    iii. Summary judgment
    iv. JNOV
    v. Failure to comply with a discovery order
    vi. Dismissal after RULE 12(b)(6) motion: (P should have at least one leave to amend.)
    vii. Failure to prosecute, unless judge orders it without prejudice.
        - Rationale: otherwise it would carry no punitive effect.
    viii. Full judgment and an appeal.
    ix. Consent decree
    x. Failure to raise an affirmative defense or compulsory counterclaim.

d. Considered NOT "final judgment on merits" for claim preclusion purposes:
    i. Lack of SMJ, PJ, wrong venue, lack of proper service or failure to join a party under RULE 19.

e. CASE: Gargallo v. Merrill Lynch
    i. F: G opened brokerage account with Merrill. Brokerage sued for collection. G counterclaimed:
        - First suit: Gargallo counterclaimed ML in OH state court for violation of federal securities law. State court dismissed Gargallo's claim with prejudice for violation of state analog to RULE 37. (Did not comply with discovery requests and court orders.
        - Second suit: Gargallo filed in federal court charging ML with violations of federal securities laws.
    ii. 28 USC §1738: Look to OH preclusion law to see if they apply final judgment to RULE 37 violation. They do.
    iii. Wrinkle: OH state court did not have SMJ to hear case in first place bc federal courts have exclusive jx over federal security law.
    iv. 28 USC §1738: Look to OH preclusion law to see how they handle the wrinkle. OH subscribes to R2d Judgments that a judgment rendered by a court lacking SMJ ought not to be given preclusive effect.
    v. So, Gargallo is NOT claim precluded.
    vi. Hypo: If G did not bring counterclaim, so violated RULE 13 as well as RULE 37, would he be barred? More likely there would be preclusive effect for RULE 37 violation (bc he wasted court time) than RULE 13 violation (no intentional wasting of court time.)

3. Must have 2 cases that involve the same cause of action.
    a. Before a claim can be precluded by a suit, it must BE a claim at the time of that suit.
    b. Broad agreement that when same legal theory, same episode, but different factual way of establishing the theory, it is the same claim. PRECLUDED.
        i. Ex. P sues D for negligence. First case, I claim you were driving too fast which establishes your negligence. Second case, I claim you were drunk which establishes your negligence. Same claim.

    c. SPLIT: Same theory, same episode, different harms.
        i. Transaction Approach (Modern): 2 claims are the same if they arise out of the same transaction or series of connected transactions. Looks to whether claims are related in space, origin, or motivation/logic. If yes, then same claim.
            - Broader preclusive effect.
            - More incentive to bring all your claims in the first suit, so more efficient.
            - Similar to 28 USC §1367 for Supplemental Jx. "arises out of the same case or controversy," and Gibbs "common nucleus of operative fact" and relation back "arises from same transaction or series of transactions."
        ii. Traditional / Evidentiary Approach: 2 claims are the same if the same evidence is needed to support both claims.

iii. CASE: Frier v. City of Vandalia
  - F: P had 4 cars towed. P was not allowed to retrieve cars until fee paid. P filed action against City.
    1. First suit: filed in state court. Seeking replevin. Wanted court to order city to give back car. P must show the property was wrongfully held. P lost.
    2. Second suit: filed in federal court against the city. Due process issue: City took cars without due process of hearing. District court dismissed on failure to state a claim and merits bc P had notice. Cir court affirms on grounds that the claim was barred by the first action, although agrees that hearing should have been sooner than 1 month after taking the cars. This court affirms.
  - This court must apply the preclusion law of the state under 28 USC §1738. Illinois uses the Evidentiary Focus.
  - Court finds these are the same claim, so precluded. Both dealt with the wrongful seizure of the car. So, claim preclusion applies.
    a. Concurrence: The evidence is different, so preclusion does not apply. The replevin claim: need to show superior possessory right of car, the illegality of taking the car. For Due Process: need to show the process of taking it was wrongful. But, in ruling on the merits, would come to the same result bc post-deprivation hearing was enough – no violation of Due Process.

4. Must be the same parties or privities – Requirement of Mutuality
   a. Privity: a person so identified in interest with another than he represents the same legal right.
   b. Issue: what is a single party?
   c. CASE: Searle Brothers v. Searle
      i. F: 2 suits:
         - First suit: Divorce proceeding between Woodey and Eldean. Court awarded land to Eldean.
         - Second suit: Sons want to sue Edlean claiming 50% interest in the property.
         - Issue: was the father an adequate representative of the sons?
      ii. Court says father was acting in an individual capacity, not representative of boys, so no privity and no claim preclusion.
      iii. Court chooses to take narrow interpretation of privity to stay clear of constitutional problems.
         - If we stretch privity too far we deprive parties of their day in court.
      iv. Court would be more inclined to bar if sons simply chose not to intervene with first suit. Here, they were not able to join bc it was divorce proceeding.
      v. Dissent: Sons were called as witnesses and should not be allowed to re-sue bc that constitutes harassment of mother.

F. NOTE: preclusive effect of judgment is always determined by the jx in which the judgment was rendered.
    1. State law of preclusion of different jx and federal preclusion law can vary wrt:
        a. How is "same claim" defined? (Transactional or Evidentiary Approach)
        b. How is "final judgment on the merits defined? (Does the jx consider a RULE 37 dismissal for failure to comply with discovery a final judgment on merits? If a case is pending appeal, is it final in the interim?)
        c. Does the jx apply preclusive effect when the first court lacked jx to hear the case?
    2. If 2 suits, first brought in state, second brought in federal, the federal court must apply the law of preclusion of the state of the first suit. Why?
        a. 28 USC §1738: judgments of state courts shall have the same full faith and credit in every court within US territories as they have by law or usage in the courts of such State.
            i. So, federal courts within a state must give state court judgments full faith and credit.
            ii. Preclusion laws of states sometimes come from common law, sometimes from statutes.
        b. NOT Full Faith and Credit Clause of Article 4 bc that only mandates that one state court respect the judgment of another state court. This scenarios is federal court respecting state court, so full faith and credit does not apply.
    3. if 2 suits, first brought in federal court, second brought in state, the state court must apply the federal law of preclusion bc Supremacy Clause.
        a. Federal Claim Preclusion Law:
            i. Mainly comes from Common Law.
            ii. Mainly follows R2d of Judgments: Transactional Approach.

G. Claim preclusion only applies when you could have brought the second claim in the first suit.
    1. Ex. if first claim must be heard in special replevin-only court, second Due Process claim is not precluded.

H. Forcing P to combine all claims arising out of the same transaction does not force the court to try all those claims in a single suit.
    1. RULE 42(b) allows courts to sever parts of a complaint for trial.

I. RULE 18(a): a party may join as many independent or alternative claims as she has against the opposing party. If she doesn't, and they satisfy the elements above, they are claim precluded.

J. Consistency: Logical Implications of the Former Judgment.
    1. While res judicata is generally driven by common law, it is supported through federal statue to an extent.

    2. RULE 18(a): a party may join as many independent or alternative claims as she has against the opposing party. If she doesn't, and they satisfy the elements above, they are claim precluded.
        a. Consistent bc it allows parties to bring multiple claims so they won't be barred later by res judicata / claim preclusion..

    3. Permissive Counterclaims: RULE 13(b): claim against opposing party not arising out of the transaction and occurrence that is the subject matter of the opposing party's claim.
        a. AKA: Can be brought, but is not required, and consistently, would not be barred by res judicata / claim preclusion.

4. Compulsory Counterclaims: RULE 13(a): a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the matter of the opposing party's claim and does not require for its adjudication the presence of 3rd parties of whom the court cannot acquire jx.
   a. NOTE: only applies if party files a pleading.
   b. AKA: Failure to bring a claim that you should have brought constitutes a waiver to bring that claim forever.
   c. Consistent bc helps regulate res judicata / claim preclusion.
   d. Policy: harsh rule. Forces D who did not want to be a P to be a P before they are ready. Compromises autonomy we usually give to people about when and where they sue.
   e. Rationale: efficiency: only have to look at a case once.
   f. Pleading marks the point when the interest in judicial economy outweighs the interest of the convenience/automony of the party. So, you don't have to file a counterclaim unless you have pleaded.

      i. EXCEPTION: Inconsistency of Judgment: Principles of Res Judicata establish a narrowly defined class of common law compulsory counterclaims: precedent and policy require that res judicata bar a counterclaim when its prosecution would nullify rights established by the prior action.
         - If your counterclaim is inconsistent with the original claim, you MUST bring the counterclaim in the first suit, even if you have not pleaded, or else you are precluded.

         - CASE: Martino v. McDonald's System
            1. F: P entered a K with McDonald's system. Term that no one in Martino's family could operate competing fast food chain. Martino's son opened Burger King.
               a. First Action: Mc sued M for breach of K. Suit ended with consent judgment of findings of fact and law.
               b. Second Action: M sued Mc for anti-trust violation of the no-compete clause
            2. M is not claim precluded from bringing this suit.
               a. RULE 13(a) does not apply bc action 1 settled before M answered. 13(a) only applies to a party who has pleaded.
            3. M's claim IS precluded under inconsistency of judgment. If M wins on the anti-trust violation claim, that judgment is inconsistent with the decree that the anti-trust provision was enforceable.
            4. Hypo: if the first suit was settled without a decree, M would not have had this problem.

III. Issue Preclusion / Collateral Estoppel:

A. Central issue: Whether some part of a previous action can/cannot be litigated again.

B. Issues or facts litigated in a prior action may not be relitigated in a subsequent action between the same parties or their privities.
   1. Elements: 2 lawsuits. Must be:
      a. The same issue involved in both cases.
      b. Issue must have actually been litigated and determined.
      c. Issue was essential to the judgment

   2. Same Issue: Literally must be the same question.
      a. Wrinkle: burden of proof
         i. A civil case judgment does not have issue preclusive effect on a criminal case judgment bc burdens of proof are different. HOWEVER, a criminal case judgment DOES have issue preclusive effect on a civil case judgment.
            - Criminal standard: beyond a reasonable doubt (higher standard).
            - Civil standard: preponderance of evidence (lower standard – subsumed into criminal standard.)

3. Issue must have been actually litigated and determined.
    a. Contrast with claim preclusion where theories can be barred even if not raised in the court below, but SHOULD have been raised.
    b. Settlement and stipulation of fact or application of legal theory to fact does NOT carry issue preclusive effect. Why?
        i. Efficiency: we do not want to give parties the disincentive to stipulate or settle out of fear of issue preclusion later. Stipulation and settlement save court time.
    c. We CARE about who won (contrast with claim preclusion).

4. Issue was essential to the judgment. Must have been a key issue.
    a. RULE 52(a): In a bench trial, a judge must separately set forth the facts and conclusions of law. Not true for jury trials, so it is more difficult with a jury to know whether or not the issue was essential.

    b. Multiple issues to a claim:
        i. No issue preclusion when verdict is too opaque and lists multiple grounds.
        ii. No issue preclusion when verdict lists too many findings to support a judgment. The findings are considered only "dicta of fact." Why?
            - A determination may not have been carefully or rigorously considered as it would have if it had been the necessary result.
            - Otherwise, the losing party might be dissuaded from appealing bc of the likelihood that at least one of them would be upheld and the other not even reached. If P appealed solely for the purpose of avoiding the rule of issue preclusion, then the rule might be responsible for increasing the burdens of litigation on the parties and the courts rather than lightening those burdens.
        iii. When issues of alternative grounds are appealed, and appellate court affirms findings, we DO attach preclusive effect to however many issues are reviewed and affirmed. Why the difference with appellate courts?
            - There has already been an extra safeguard – the appeal.

        iv. CASE: Illinois Central Gulf RR v. Parks
            - F: Bertha and Jessie in car accident with RR.
                1. First suit: Brought in Indiana state court. Bertha sues RR for injuries. Jessie sues RR for loss of consortium. Bertha won, Jessie lost.
                2. Second suit: Jessie sues RR for injuries. RR asserts defense of contributory negligence RR argues claim preclusion bc same accident as first suit and same parties. RR argues issue preclusion for contributory negligence since jury did not find for Jessie in first suit (arguing Jessie should not be allowed to litigate/counter the argument of his contributory negligence.).
            - No claim preclusion: Indiana does not embrace the transactional approach. Not considered the same claim bc injury to the body is different to injury to a relationship.
            - No issue preclusion for Jessie's contributory negligence. Jury verdict was too opaque and there were multiple grounds on which they could have ruled, so we don't know which issues led the jury to find no recovery for Jessie. We don't preclude speculative issues. Could have been:
                1. Contributory negligence OR
                2. Lack of damages OR
                3. No negligence from RR (but this is not a possible reason bc Bertha won.)
                4. "Where a judgment may have been based upon either of 2 or more distinct facts, a party desiring to plead the judgment as an estoppel by verdict or finding upon the particular fact involved in a subsequent suit must show that it went upon the fact.
            - Yes issue preclusion for RR negligence: it was a required element in Bertha's case.

C. Between Which Parties?

1. Mutuality: to benefit from preclusion, one had to be a party or privity of the earlier action.
    a. Traditionally: mutuality was a requirement for issue preclusion, like it is for claim preclusion.
    b. Why is mutuality good?
        i. Fairness: it is unfair for one party to use prior judgment when he himself would not be so bound. (Allowing non-mutuality creates asymmetry).
            - P1 v D1 and D1 loses. D1 is issue precluded in second suit with P2.
            - P1 v D1 and D1 wins. D1 is NOT issue precluded in second suit with P2.
            - If D loses in first case, he will be liable for same issue in second suit.
            - If D wins, he must defend the issue again in second suit.
            - Counter: There is no inherent unfairness in this asymmetry as long as the party hurt from the issue preclusion had their fair day in court.
    c. Now: Mutuality requirement has been relaxed and NOT a requirement in many courts. A party is allowed to take advantage of an issue fully litigated and determined through issue preclusion when the victim of issue preclusion had a full and fair opportunity to litigate the matter in a prior suit.

2. Definitions:
    a. Offensive issue preclusion: when P2 seeks to foreclose the D from litigating an issue the D1 has previously litigated unsuccessfully in an action with another party P1.
        i. Used as sword by P2 against D1.
        ii. P raises the action
        iii. Avoid inconsistent judgments. (NOT efficient bc it encourages strategic sidelining, which leads to additional suit.)
    b. Defensive issue preclusion: when D2 seeks to prevent P1 from asserting a claim the P1 has previously litigated and lost against another D1.
        i. Used as shield by D2 against P1.
        ii. D raises the action.
        iii. Rationale: promotes judicial economy by preventing a P from relitigating identical issues by merely switching adversaries.

3. Reservations about allowing non-mutual issue preclusion:
    a. Strategic Sidelining: If there is a suspicion that party trying to invoke issue preclusion is engaging in strategic behavior of "wait and see," non-mutual issue preclusion should NOT apply.
        i. Discourages P2 from joining in the first suit bc if P1 loses, P2 won't be bound to loss, but if P1 wins, P2 can piggy back onto victory. No incentive to join in the first suit.
        ii. Why is this bad?
            - Efficiency: Want to encourage joining claims to save court time. Court only has to hear case once.
        iii. Offensive: good to apply exception bc we want to incentivize P1 and P2 to sue together for efficiency.
        iv. Defensive: exception does not apply. D is not choosing when to be hailed into court.

    b. Inadequate Incentive to litigate fiercely: If first action brought was seeking small damages, and party against whom issue preclusion is sought did not have incentive to defend vigorously, especially if future suits were not foreseeable, and non-mutual issue preclusion should not apply.
        i. We don't necessarily have confidence in the way the issue was resolved if it was not fiercely fought over.
        ii. Offensive: good to apply bc D didn't try hard bc would only lose nomimal amount.
        iii. Defensive: Not as much of a problem bc party against whom issue preclusion is brought is the plaintiff, and plaintiff is always fighting hard bc they chose to be there in the first place.

    c. Inconsistent Determination in Prior Actions: Where the judgment as to which issue preclusion is sought is inconsistent with other judgments on that issue, issue preclusion should not apply.
        i. We are not free to overlook incongruous results when they look us in the eye.
        ii. Curry Ex. P1-P25 lost. P26's winning (oddball) judgment should not have issue preclusive effect.
        iii. Curry's extreme view: first P's win should not have issue preclusive effect bc just as likely that first judgment could be the oddball one.
            - Counter to the extreme view: It is one thing to acknowledge the possibility that the judgment is anomalous, especially when there is evidence, but we should not

assume it is an anomaly when there is no evidence. It fails to recognize that every notion of issue preclusion demands and assumes a certain confidence in the integrity of the end result of the adjudicative process.

d. Lack of Procedural Opportunities: When action 2 affords party against whom preclusive action is sought (D) procedural opportunities unavailable in the first action that could readily cause a different result from that of action 1, non-mutual issue preclusion should not apply.
   i. Ex. the forum or circumstances might not make D defend the first suit as rigorously (bc damages are limited in small claims) an therefore it would be unfair to hold them to that forever.

e. Restatement of Judgments codifies theses and adds some.

4. CASE: Blonder Tongue
   a. F: First suit: P1 sues D1: P1 loses for patent validity claim. Second suit: P1 sues D2 and D2 wants to invoke issue preclusion on patent validity claim.
   b. Non-Mutual Defensive issue preclusion applies bc D2 wants to use it as a shield.
   c. Basic idea: Can relax mutuality requirement as long as party against whom issue preclusion is sought has had fair day in court.

5. CASE: Parklane Hosiery Co. v. Shore
   a. F: SEC=P1; Parklane = D1; Shore = P2
      i. Action 1: SEC sued Parklane in federal court for misleading proxy statement (no jury). SEC won.
      ii. Action 2: Shore sued Parklane for damages from relying on misleading proxy statement. Shore wants to apply issue preclusion to disallow Parklane from litigating misleading proxy statement.
   b. Non-Mutual Offensive Issue Preclusion bc Shore was not party in first suit and Shore (P2) is trying to use issue preclusion as a sword against Parklane (D1).
   c. ISSUE PRECLUSION IS ALLOWED.
      i. It is invoking an issue resolved in the first action.
      ii. AND bc none of the caveats applies:
         - No strategic sidelining. P2 could NOT have used wait and see approach bc first action was brought by SEC, and Shore can't join SEC suit without SEC's consent.
         - No inconsistent determinations in prior actions.
         - P was not denied any procedural opportunities.
            1. Parklane argues that first action did not afford a jury, which should count as a lack of opportunity that could bring a different result.
            2. Court rejects. Lack of jury is not a big enough procedural difference. It is a neutral difference bc it only changes who is the finder of fact.
   d. Dissent: Rehnquist: This is inconsistent with the importance we place on a jury, as discussed in the 7th Amendment cases. Judges and juries are NOT interchangeable – the difference DOES affect the outcome.

6. CASE: State Farm v. Century Home Components
   a. F: A fire started. There were multiple cases suing D for negligence.
   b. Because there were several suits with varying verdicts, issue preclusion should not apply.
   c. Rejected the extreme Curry rule for reasons listed above.
   d. Issue preclusion is NOT just about efficiency: it is about underlying confidence that full and fair litigation leg to a substantially correct result. If there are prior judgments going each way, that confidence is unwarranted.

7. Exception to Allowing Non-Mutual Issue Preclusion:
    a. US v. Mendoza: US CANNOT be subjected to Non-Mutual Issue Preclusion. Why?
        i. Practical problem: US is a repeat player, often litigates important constitutional issues, and only appeals selectively. In applying issue preclusion against the gov, the gov would be forced to appeal virtually every case lost for fear of its effect in subsequent cases. (only a problem for offensive non-mutual issue preclusion.) Alternatively, it would NEVER have a chance to convince a court in any other setting that the legal issue should be resolved any other way. Preclusion is iron-clad.
        ii. Precedent, on the other hand, can be overruled and is not unbreakable. Preclusion is permanent on a certain issue and the safety valve of limiting to actual party breaks down when that party is the government. Vertical precedent is iron-clad (cannot change law of a higher court.) Horizontal precedent is not iron-clad (CAN change law of own court.)

IV. Boundaries on Preclusion:

A. Claim Preclusion: more stringent requirements. Less exceptions.
1. Claim preclusion does not apply when: (R2d Judgments)
    a. Parties have agreed to allow claim splitting.
    b. In first action, court has reserved P's right to bring a second action
    c. Jx limitations prevent P from seeking certain forms of relief now sought.
    d. Judgment in first action was plainly inconsistent with the fair and equitable implementation of law or it is the sense of the law that P should be permitted to split his claim.
    e. For reasons of substantive policy in a case involving a continuing or recurrent wrong, the P is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages, and P chooses the latter.
    f. It is clearly and convincingly shown that the policies favoring preclusion are overcome for an extraordinary reason.

B. Issue Preclusion: more exceptions.
1. Issue preclusion does not apply when:
    a. Party against whom preclusion is sought could not, as a matter of law, obtain review of the judgment in the initial action.

    b. Issue is one of law and the 2 actions involve claims that are substantially unrelated OR a new determination is warranted in order to take account of an intervening change in the applicable legal context or to otherwise avoid inequitable administration of law.
        i. CASE: Commissioner v. Sunnen:
            - F: Taxpayer who has a device to keep taxes down by allocating them to his wife is sued by IRS. Meanwhile, change in scheme of law. IRS has won cases that undercut the reasoning used in action 1. IRS wants to sue D again for subsequent year, but D claims preclusion.
            - Claim preclusion does NOT apply: tax violation against the same entity in a different year is a different transaction.
            - Issue preclusion does NOT apply:
                1. Not fair to apply issue preclusion bc change in applicable law occurred.
                2. NOT bc Mendoza exception, bc Mendoza exception for government only applies to non-mutual situations.

    c. A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the 2 courts or by factors relating to the allocation of jx between them.

    d. Party against whom preclusion is sought had a significantly heavier burden of persuasion wrt to the issue in the initial action than in the second action.

    e. Clear and convincing need for a new determination of the law bc:
        i. Potential adverse impact of the first action on public interest or interests of non-parties.
        ii. It was not sufficiently foreseeable at the time of the initial action that the issue would arise in a context of a subsequent action
        iii. The party sought to be precluded did not have an adequate opportunity or incentive to obtain full and fair adjudication in the initial action.

V. Repose: Collateral Attack and Reopened Judgments:

A. Doctrines of former adjudication, reinforced by full faith and credit, have the potential to work injustice if they perpetuate D's fraudulent concealment of evidence in a second case. To prevent that, legislatures have created the opportunity, in limited circumstances, to reopen a judgment.

B. Full Faith and Credit as Bar to Collateral Attack:

1. CASE: Durfee v. Duke:
   a. F: Main channel of river forms boundary between states. Q of fact whether land is in NE or MO (so Q of fact over whether NE or MO has SMJ).
      i. Action 1: Durfee sues Duke in NE state court for land. NE only has jx if land lies in NE. NE court decides land is in NE, and rules in favor of Durfee. Default against Duke. SMJ was challenged and rejected.
      ii. Action 2: Duke appeared in MO court and asked for same relief. Removed to federal court for diversity. District court found that judgment in NE state court was binding under res judicata. Duke appealed. Court of Appeals said no preclusive effect bc there is an issue over whether NE court had jx in the first place.
   b. Res judicata DOES apply.
      i. A judgment is entitled to full faith and credit, even if it is a question of SMJ, when the second court's inquiry disclosed that those questions had been fully and fairly litigated and final judgment had been entered.
      ii. Here, Duke already had a bite at the SMJ apple.
   c. Preclusion and SMJ
      i. If SMJ litigated, even though improper forum, then preclusion.
         - Also true for PJ (See Baldwin)
      ii. If default/not litigated, answer is less clear.
         - Amar believes this will track holdings on PJ whereby:
           1. if default, then may collaterally attack (no preclusion)
           2. if show up, but don't litigate, then waived (preclusion)
         - Issues with this extension:
           1. SMJ is presumably more sacrosanct than PJ, as it concerns separation of powers rather than mere waiver of personal rights.
              a. Remember that SMJ can be raised sua sponte and is normally non-waivable. So, why would we allow waiver of SMJ here?
           2. Perhaps the public policy of requiring that there be an end to litigation trumps this. Concern. At some point, interest in finality takes over.

JOINDER

I. General:

A. Historically: could join two claims as long as same legal theory, even if factually unrelated..

B. Today: Broader and more generous joinder rules under FRCP, but checked by jx issues.

1. Must check Rules for permissibility of joinder
2. Must check doctrines of preclusion.
3. Must check jx: SMJ, PJ, Venue.

II. Joinder of Claims:

A. Claims Brought by P: RULE 18:

1. 18(a): a single P can join any and all claims he has against a single D, whether related or unrelated.
    a. Ex. A sues B for federal Q. A wants to add claim against B for breach of K (related or unrelated).
    b. Allows, but does not require.
    c. Preclusion: Would Preclusion Bar Second Claim From Being Brought Later?
        i. If the second claim arises under the same transaction or occurrence, claim preclusion requires it to be brought in the first suit, preclusion would bar the claim. (So must be brought to avoid waiver).
        ii. If not, then preclusion does not bar the claim later. (So does not have to be brought to avoid waiver).
        iii. Federal preclusion law uses transactional approach.)
    d. SMJ: Is there SMJ for court to hear second claim?
        i. If claim arises out of the same transaction, then SMJ is taken care of in §1367 through supplemental jx.
            - Bc §1367 dovetails with federal law of preclusion. It grants claim arises out of same case or controversy.
        ii. If claim does NOT arise out of same transaction, then SMJ must be established independently.
    e. NOTE: 18(a) Can create manageability problems.
        i. Solution: problem is mitigated by RULE 42b which gives judges discretion to sever and treat as separate claims.

B. Counter Claims and Cross Claims: Claims Brought by D: RULE 13:

1. 13(a): Compulsory: Party must assert a counterclaim against the opposing party for any claim arising out of the same transaction or occurrence, or else it is waived.
    a. Ex. If A sues B, B must sue A for all those claims that arise out of the same transaction or occurrence, else they are waived.
    b. Requires!
    c. Preclusion: Would Preclusion Bar Second Claim From Being Brought Later?
        i. Yes. By definition it arises under the same transaction or occurrence, so claim preclusion would also bar it from being brought later.
    d. SMJ would NOT be a problem bc it is covered under supplemental jx.
        i. Even if second claim is state claim, and original claim is based on diversity, §1367 grants SMJ if the claim arises out of the same case or controversy. (works only for D, not P).
    e. Reminder: Pleading marks the point when the interest in judicial economy outweighs the interest of the convenience/automomy of the party. So, you don't have to file a counterclaim unless you have pleaded. If you have pleaded, all counterclaims must be mentioned or else waived. (See Martino above.)

2. 13(b): Permissive: A party may assert a counterclaim against the opposing party even if it does not arise out of the same transaction or occurrence.
    a. Ex. A sues B for breach of K. B counterclaims against A for negligence in car accident.
    b. Allows, but does not require.
    c. Preclusion: Would Preclusion Bar Second Claim From Being Brought Later?
        i. No. §1367 grants SMJ if the claim arises out of the same case or controversy. If permissive, it means the second claim does not arise out of the same transaction.
    d. **SMJ for second claim must be established independently!** This is NOT covered by §1367 Supplemental Jx bc it does not arise out of the same transaction or occurrence.

3. 13(g): A party may cross claim against a co-party for any claim arising out of the same transaction or occurrence as the original claim or a counterclaim.
    a. A sues B and C for negligence in car accident. B cross claims against C for negligence in car accident.
    b. Allows, but does not require. Why does interest in autonomy outweigh economy in this instance, but not on 13(a)?
        i. 13(a): parties are already in an antagonistic lawsuit with each other. 13(g): parties are not necessarily at odds with each other. In fact, may be working together, creating united defensive front.

4. NOTE: RULE 13 claims must be raised in pleading to be preserved.

5. CASE: Plant v. Blazer Financial Services (5th Cir):
    a. F: Plant sues Blazer for violation of Federal Truth and Lending Act. Blazer counterclaims against Plant for balance of debt (breach of K – state claim). Issue: is this permissive or compulsory counterclaim? If compulsory, jx is satisfied. If permissive, must establish independent jx.
    b. 4 Tests:
        i. Are the issues of the fact and law raised by the claim and counter claim largely the same?
        ii. Would res judicata bar a subsequent suit on the Ds claim absent the compulsory counterclaim rule?
        iii. Will substantially the same evidence support or refute Ps claim as well as D's counterclaim?
        iv. Is there any logical relation between the claim and the counterclaim?
    c. Tests all say pretty much the same thing.
    d. Court used the logical test. Found the claims did arise out of the episode: the signing of the K, the entering of the agreement that imposed obligation on Blazer to disclose and Plant to pay. Same commercial exchange.
    e. Conclusion: counterclaim is compulsory.
    f. Court mentions reasons why it should be found to be permissive:
        i. Policy: Truth in Lending Act relies on private people for enforcement. People may be deterred from brining suit in fear that they will be counterclaimed for balance. So, in order to follow intent of Congress and uphold purpose of Truth in Lending Act, should consider this permissive.
            - Court rejects: if Congress wanted it to be clear that the Truth in Lending Act was an exception to Rule 13, the statutes would have specified.

6. NOTE: The transactional test is NOT self-enforcing / self defining:
    a. It is possible to focus on just the logical relationship and find that claims relating to the same story do not arise out of the same transaction or occurrence:
        i. Ex. Plant enters loan agreement with Blazer. Blazer sexually harasses Plant while Plant is filling out the forms. May be the same episode, but not logical relationship.
    b. Whigham v. Beneficial Finance (4th Cir came out the other way).
        i. Same facts as Plant.
        ii. Court focused on the differences:
            - the claims raise different issues of fact and law (whether lender disclosed v. the obligations of the loan K)
            - the evidence needed for each claim differs (loan documents and disclosure v. proof of default)
            - the claims are not logically related (arises under federal requirements v. arises under obligations in the K.)

III. Joinder of Parties:

A. Permissive Joinder of Parties: RULE 20:

1. 20(a): Ps and Ds can always be joined if their claim (or claim asserted against them) arises out of the same transaction, occurrence, or series of transactions or occurrences AND there is a common question of law or fact.
    a. Ex. A sues B for sexual harassment at work. A adds C and D for sexual harassment at work.
    b. Allows, but does not require.
    c. Preclusion: Would Preclusion Bar Second Claim From Being Brought Later?
        i. No. Does not apply unless same parties or privities.
    d. SMJ: Is there SMJ for the court to hear second claim?
        i. If in federal court bc federal Q: Yes. §1367 grants SMJ if the claim arises out of the same case or controversy, even if new parties are involved.
        ii. If in federal court bc diversity, any D can sue under §1367. Supplemental jx.
        iii. If in federal court bc diversity, P must establish independent SMJ.
    e. PJ: Is there PJ for court to hear second claim?
        i. May have a problem. Depends on the minimum contacts of the joined party.

2. CASE: Mosely v. GM
    a. F: T7 sex and race discrimination claim brought against GM and UAW. 9 Ps. District court rules they can be split bc unwieldy.
    b. Court finds them all to be of the same transaction.
    c. RULE 20 applies (Parties should be joined) bc:
        i. There is one transaction or series of transaction: all involve GM's policy of discrimination
        ii. There is one Q of fact or law common to all: whether or not there was a pattern of discrimination.
            - NOTE: usually these go hand in hand.
            - Rejects the argument that they should be separate claims bc involves different times, different managers, different facilities, different actions/behavior, some racial/some sexual.
    d. Probably the broadest interpretation of RULE 20 ever. Why?
        i. Early in the litigation of the statute and courts were not claim about what would make claims similar. (ex. by the 80's, courts had more case law showing that sex and race claims can be very different.) Also, at a time when pattern and practice theory was at its zenith.
    e. NOTE: classifying this as the same transaction/Q of fact or law may lead to preclusion problems for other Ps. Next P may want to bring claim of failure to give maturnity leave. Court may claim preclude bc already litigated.

3. How would Joinder under RULE 20 Hurt D / Help P? (A, B, C, v. D)
    a. Hurts D: Divide and conquer: Some Ps might go away if they have to sue on their own. If they are allowed to sue together, they can share the costs.
    b. Helps P: Joinder of claims makes it easier to show pattern and practice. By multiple Ps telling stories to jury, it makes their case stronger. Makes D look worse.
        i. Ps could always serve as witness in individual suits, but there would be less incentive for them to be convincing if they are only witnesses and not Ps bc they don't benefit from being convincing.

4. How would Joiner under RULE 20 Hurt P / Help D?
    a. Ps then have to worry about claim preclusion. If new P has a claim for maternity discriminatory practices, P may be claimed barred if found that P was in privity (if found that the original Ps represented P's interests.)

B. Impleader: RULE 14 (when D can bring a 3rd party)
1. General: Although the rules seem to give Ps a lot of autonomy and discretion about which claims and parties to include in their suit, it does not mean P always has the last word.

2. RULE 14: A 3rd party complaint is appropriate only where the 3rd party would be secondarily or derivatively liable to the D in the even the D is held liable to the P.
    a. 14(a): A defendant, as a 3rd party P, may implead another party to the action who may be partially or fully liable to the 3rd party P.
        i. Ex. P v. D1; then D1 brings in D2
        ii. Also, D2 can assert any claim against P, but does not have to. BUT, P must establish jx independently to bring claim against D1. (this is a little fuzzy).
        iii. 3rd party P must show that 3rd party D is secondarily liable to the original D (does not count if only liability of 3rd party D is to 3rd party P. .
    b. 14(b): When D counterclaims against P, P may bring in a 3rd party D to the action who may be partially or fully liable to P.
        i. Ex. P v. D1; then D1 counterclaims against P; P then brings in D2.

3. TEST for impleader: Impleader is possible by D if he can say "If I am liable to the P based on P's theory, then D2 is liable to me for all or part." CANNOT be "It was him, not me."

4. Policy: Benefits to impleading:
   a. More efficient
   b. Avoid the risk of inconsistent judgment if the same jury looks at the whole thing
   c. Avoids the risk that in waiting to bring a suit against the other party, the 3rd party D might become judgment proof (no money) in which case you could get a judgment against them, but they would not be able to pay.

5. CASE: Watergate Landmark Condominium Unit Owner's Association v. Wiss Janey Elstner Associates:
   a. F: Condo Association hired Real Estate management firm to oversee maintenance. RE hires engineers to create plans for balcony. RE hires Brisk to do work. Condo Assoc. sues RE for negligent plans. RE wants to implead Brisk.
   b. Court does not allow impleader bc Condo Association did not claim negligence in the work of the balcony, only in the design.
   c. RE would have been able to implead Engineers bc they contributed to the negligence of the design. RE has right of contribution against engineers wrt the plans.
   d. Hypo: If Brisk was impleaded, Brisk could bring all claims against RE, but RE could not bring all claims against Brisk without establishing independent jx..