

**14<sup>th</sup> Am. / DUE PROCESS CLAUSE**

- I. Before court may render valid judgment on D
  - A. Requirements (3x)
    - 1. Subject matter jurisdiction
    - 2. Personal jurisdiction
    - 3. Fair notice and an opportunity to be heard

**JURISDICTION**

I. **Subject-Matter Jurisdiction** (SMJx)

A. Jurisdiction over the issues

- 1. Power of court to render judgment concerning certain subject matter

B. When federal court has SMJx

1. **Diversity Jurisdiction**

- a. Amount in controversy and diversity
  - i. Claim for relief exceeds \$75,000
  - AND
  - ii. Opposing parties (P + D) are
    - (A) Citizens of two different US states
    - OR
    - (B) Citizen of one US state and citizen of foreign country

2. **Federal Question Jurisdiction**

- a. Claim is based upon federal statute or US Constitution

3. **Supplemental Jurisdiction** [Title 28 U.S.C. Section 1367]

a. Pendant Jurisdiction

- i. Original jurisdiction → federal question suit
  - (A) Parties from same state → additional state claims

b. Ancillary Jurisdiction

- i. Original jurisdiction → diversity
  - (A) Parties from different states → additional third-party state claims that would defeat diversity

c. [Section 1367(a)] → Rule

- i. Federal court may hear additional state claims
- ii. That form part of same case or controversy
  - (A) Arises from same nucleus of operative facts
- iii. Even though it could not exercise SMJx independently

d. [Section 1367(b)] → EXCEPTIONS

- i. When additional claim defeats diversity jurisdiction
  - (A) Parties from same state
- AND
- ii. Claims by original P against persons made parties by
  - (A) Impleader [14]
  - (B) Compulsory joinder of parties [19]
  - (C) Permissive joinder of parties [20]
  - (D) Intervention [24]

OR

- iii. Claims by persons made plaintiffs by
  - (A) Compulsory joinder of parties [19]
  - (B) Intervention [24]

e. [Section 1367(c)] → Court's discretion to decline

- i. Novel or complex issue of state law
- ii. Additional claim substantially predominates over original claim
- iii. Court has dismissed all claims over which it had original jurisdiction

iv. Any other compelling reason

C. When state court has SMJ

**1. Concurrent Jurisdiction**

a. Over most federal claims

b. EXCEPTION

[NOTE: Prior Jurisdictional Competency Rule]

i. Claims within exclusive jurisdiction of federal courts

(A) Ex. –

(1) Fed. bankruptcy claims

(2) Copyright/patent infringement

(3) Fed. antitrust claims

II. **Personal Jurisdiction** (PJx)

A. Jurisdiction over the parties

1. Power of court to render judgment against particular D

**PROVIDING NOTICE AND AN OPPORTUNITY TO BE HEARD****I. Reasonable Notice****A. [14<sup>th</sup> Am. / Due Process Clause]**

1. Notice must be
  - a. Reasonably calculated under all of the circumstances
    - i. To apprise interested parties of pendency of action  
AND
    - ii. To afford them an opportunity to present their objections

**II. Methods of Giving Notice [RULE 4]****A. Process / Service**

1. Copy of the P's complaint and summons directing D to answer (C+S)

**B. Method chosen**

1. NOT substantially less likely to bring notice than other feasible and customary substitutes
  - a. Ex. // *Mullane* (p. 183)
    - i. If unknown addresses and interests of trust beneficiaries
      - (A) Publication → adequate
        - (1) Nature of interests → may require investigation
    - ii. If known name, addresses, and interests
      - (A) Mail or personal service
    - iii. If name and addresses may be obtained by public record
      - (A) Mail or personal service

**C. Waiver of Service / Service by Mail [RULE 4(d)]**

1. P may send D
  - a. Notice of commencement of action  
AND
  - b. Request that D waive service of summons
2. Incentive
  - a. If D complies
    - i. D may file answer within 60 days after request is sent
  - b. If D fails to comply
    - i. Court may impose on D costs incurred in effectuating service
    - ii. D must file answer within 20 days after service
  - c. Ex. // *Chaves* (p. 199)
    - i. If D receives but does not respond → no default judgment

**D. Serving an Individual [RULE 4(e)]**

1. P may serve D by
  - a. Valid service under state law
    - i. Where district court is located  
OR
    - ii. Where service is made
2. Types (3x)
  - a. Personal service [RULE 4(e)(2)(A)]
    - i. Physically deliver C+S directly to D
      - (A) Ex. – process-server → “place and leave with”
  - b. Abode service [RULE 4(e)(2)(B)]
    - i. Leave C+S at D's dwelling or usual place of abode
      - (A) With someone of suitable age and discretion
  - c. Substitute service [RULE 4(e)(2)(C)]
    - i. Deliver to agent authorized by appointment (or by law) to receive service of process

- (A) Ex. // *Szukhent* (p. 205)
  - (1) Permissible → private K b/w two parties appointed agent
    - (a) Not personally known to party
    - (b) Not expressly agreed to transmit notice
  - (2) Agent had single purpose of receiving notice
    - (a) Limited authority → no conflict of interest
  - (3) Agent gave prompt notice to party
    - (a) Different holding if no prompt notice
- (B) Ex. – click-wrap, shrink-wrap, browse-wrap products
  - (1) (?)

E. **Serving a Corporation, Partnership, or Association** [RULE 4(h)]

- 1. Delivery of process to
  - a. Officer, managing agent, or general agent
    - i. Ex. // *S/S Hellenic Challenger* (p. 209)
      - (A) Reasonably calculated
        - (1) Any representative so integrated with organization
        - (2) That he will know what to do with C+S
      - (B) Permissible → adjuster not expressly authorized, received two C+S before

F. **Serving an Individual in a Foreign Country** [RULE 4(f)]

- 1. Hague Convention
  - a. Internationally agreed means of service of process

G. **Return of Service**

- 1. Actual service of process → prerequisite for court's jurisdiction
- 2. Return of service → requirement for court's jurisdiction
  - a. Proof of service
    - i. Return by process-server (who discloses facts)
    - ii. Affidavit by person performing service
    - iii. Sworn statement by officer (marshal, sheriff, deputy)

H. **Service of Process and Statutes of Limitations**

- 1. Suit commenced
  - a. Cause of action → federal law
    - i. When copy of complaint filed with district court
  - b. Cause of action → state law (diversity suits)
    - i. When process served on D
    - ii. When...(other)
- 2. **Time Limit for Service** [RULE 4(m)]
  - a. D must be served within 120 days of filing complaint
    - i. Otherwise → court dismisses without prejudice
      - (A) Unless P shows good cause for not completing service
- 3. If service promptly attempted but improperly made
  - a. When P has little chance of effecting proper service → dismiss
  - b. When P can make proper service quickly → serve again

III. **Opportunity to Be Heard**

- A. [14<sup>th</sup> Am. / Due Process Clause] → Right to be Heard
  - 1. D must receive notice long enough in advance of time when he is required to respond so
    - a. D can obtain counsel
    - AND
    - b. D can prepare defense

B. **Due Process Protection**

1. Adequate opportunity for D to present side of dispute in light of circumstances
2. EXCEPTION
  - a. Provisional (Pre-Judgment) Remedies
    - i. Temporary restraining order
    - ii. Preliminary injunction
    - iii. Pre-judgment attachment

C. Pre-Judgment Attachment

1. Balancing Test – (b/w private parties) // *Doehr* (p. 235)
  - a. Factors (3x)
    - i. Interest of party seeking attachment
      - (A) Counter-Ex. – no pre-existing interest in property
      - (B) Counter-Ex. - assault/battery suit not involve property
    - ii. Any harm to that interest from providing additional or alternative safeguards
      - (A) Counter-Ex. – property was not going to be transferred or unavailable
    - iii. Fiscal and administrative burden on government in providing additional or alternative safeguards
      - (A) Counter-Ex. – no additional burden to include pre-attachment hearing if post-attachment hearing already available

WEIGHED AGAINST

- b. Factors (3x)
  - i. Interest of party affected by pre-judgment measure
    - (A) Ex. – real property → significant value
  - ii. Any harm to that interest resulting from pre-judgment measure
    - (A) Ex. – temporary impairments to property rights (right to alienate)
    - (B) Counter-Ex. – no deprivation of use or possession (unlike other cases of personalty → physical seizure)
  - iii. Risk of erroneous deprivation through procedures in place and probable value of additional or alternative safeguards
    - (A) Ex. – one-sided affidavit without any documentary proof
    - (B) Ex. – post-attachment hearing does not cure temporary attachment
    - (C) Ex. – double damages remedy does not make up for lack of bond
2. “Perfect” Pre-Judgment Attachment Statute
  - a. Pre- or prompt post-attachment hearing
  - b. Judge issues writ (not clerk)
  - c. P posts bond
  - d. P sets forth specific facts in affidavit
  - e. D able to regain property by counter-bond
3. EXCEPTIONS → seizure w/o prior hearing
  - a. Seizure directly necessary to secure important governmental or general public interest
  - b. Special need for prompt action
  - c. State has kept strict control over its monopoly of legitimate force
  - d. Person initiating seizure has been government official responsible for determining that it was necessary and justified in particular instance
4. **\*PURPOSE\*** - safeguards
  - a. Reduce risk of error when it doesn’t cost too much to party seeking attachment or to party seeking additional safeguards
  - b. Promote fundamental social values (fairness, dignity, self-respect)
  - c. Maintain value and satisfaction in participation (having one’s voice heard)
  - d. Protect process → intrinsically significant and valuable (essence of justice)

**PLEADINGS AND MOTIONS - MODERN PLEADING**

## I. Code Pleading vs. Notice Pleading

A. Code Pleading

1. Set forth ultimate facts (no evidentiary facts or conclusions of law)
  - a. No clear cut distinction b/w ultimate facts and conclusions of law
  - b. Defective complaints b/c pled evidentiary not ultimate → right facts, wrong form
2. If P fails to set forth sufficient facts
  - a. D → general demurrer
3. **\*PURPOSE\***
  - a. Allows more cases formed on merits of claim (compared to common law pleading)

B. Notice Pleading

1. Short and plain statement of claim or defense
  - a. Provides reasonable notice of nature of claim or defense
  - b. Requires less specificity and details than code pleading
2. If P fails to set forth sufficient facts
  - a. D → motion to dismiss
3. **\*PURPOSE\***
  - a. Eliminates needless battles over forms of statements
  - b. Provides fair notice to D of general summary of P's position and events and transactions upon which claim is based (complaint)

II. Pleadings [RULE 7]A. Formal statements by parties of their claims and defenses

1. Complaint
2. Answer to complaint
3. Answer to counterclaim designated as counterclaim
4. Answer to cross-claim
5. Third-party complaint
6. Answer to third-party complaint
7. Reply to answer if court orders one

**PLEADINGS AND MOTIONS – COMPLAINT**I. Pleading the Details of a Right to Relief [RULE 8(a)(2)]

## A. P must state in the pleading

1. Short and plain statement of claim showing that he is entitled to relief
  - a. In order to give D fair notice of
    - i. What P's claim is
    - AND
    - ii. Grounds upon which it rests

B. Insufficiency of Complaint

1. **Motion to Dismiss for Failure to State a Claim** [RULE 12(b)(6)]
  - a. When pleading does not set forth sufficient facts
    - i. Cause of action  
(A) Non-existence of element
    - ii. Cause of action  
(A) No legal remedy available
2. **Motion for More Definite Statement** [RULE 12(e)]
  - a. When pleading is vague and ambiguous that D cannot reasonable frame answer  
HOWEVER
  - b. Disfavored → denied if information sought is available to moving party through discovery

C. **\*PURPOSE\*** (of Summary Judgment and Discovery → Not Complaint)

1. Define disputed facts and issues
2. Dispose of unmeritorious claims

II. Pleading the Details [RULE 8(a)]

A. Complaint → to survive a motion to dismiss

1. P must state enough facts to show claim to relief that is plausible on its face
  - a. Plausible, not conceivable
  - b. Counter-Ex. // *Twombly* (p. 527)
    - i. No allegation or inference of anti-competitive agreement b/w companies  
(A) Only bare assertion of conspiracy
    - ii. Allegation of parallel conduct  
(A) Only assertion of unfavorable conduct (not illegal)
  - c. UNLESS
    - i. Facts are within knowledge of D (?)

III. Pleading Special Matters [RULE 9]

A. Fraud or Mistake → heightened pleading standards [RULE 9(b)]

1. P must state with particularity
  - a. Circumstances constituting fraud or mistake
2. P may allege generally
  - a. Malice, intent, knowledge and other conditions of person's mind
3. Loose interpretation
  - a. P must state sufficiently circumstances constituting fraud
  - b. So D can prepare adequate answer to allegations
    - i. Ex. // *Denny v. Carey* (p. 544)
      - (A) Rule 9(b) harmonized w/ Rule 8
      - (B) Impossible for P to state w/ particularity w/o access to discovery
        - (1) Esp. when facts within particular knowledge of D
        - (2) Particularity → who, what, when, where, how of D's acts
      - (C) Strict application → substantial unfairness to victims of fraud
4. Strict interpretation
  - a. P must state with particularity
  - b. Facts giving rise to inference of fraudulent intent
    - i. Ex. // *Denny v. Barber* (p. 546)
      - (A) More than vague allegations → cases w/o merit
      - (B) Loose application → increasing settlement value
5. Securities-Fraud → super-heightened pleading standards [PSLRA]
  - a. P must state with particularity
  - b. Facts giving rise to strong inference that D acted with required state of mind
    - i. Scienter → D's intent to deceive, manipulate, or defraud
  - c. Ex. // *Tellabs* (p. 547)
    - i. To determine strong inference – Steps (3x)
      - (A) Accept all factual allegations in complaint as true
      - (B) Consider complaint in its entirety
        - (1) All facts alleged collectively give rise to strong inference
      - (C) Take into account opposing inferences of non-fraudulent intent
        - (1) Inference must be convincing and at least as compelling as any opposing inference from facts alleged → does not need to be more
6. **\*POLICY\***
  - a. Protection of reputation
  - b. Deterrence of frivolous or strike suits
  - c. Defense of completed transactions
  - d. Providing adequate notice

B. Other actions → heightened pleading standard

1. Civil rights
2. Federal antitrust
3. Complex litigation

IV. Pleading Alternative and Inconsistent Claims [FRCP 8(d)]

- A. When pleader is genuinely in doubt about what evidence will show
  1. Made in good faith
- B. Pleader may state as many alternative and inconsistent claims as it wants
  1. Relationship b/w claims → not necessary
- C. If one claim is insufficient
  1. It does not negate entire pleading

V. Pleading Damages [X + ?]

- A. Damages – Types (2x)
  1. General Damages
    - a. Ordinarily or necessarily flowing from a particular legal wrong
      - i. Ex. – non-monetary aspects → pain and suffering damages in personal injury action
  2. Special Damages
    - a. Peculiar to particular P  
AND
    - b. Not ordinarily or necessarily flowing from particular legal wrong
      - i. Ex. – increased blood pressure from car accident // *Ziervogel*  
(A) Not inevitable result
  3. Interpretation → General vs. Special
    - a. Varies from jurisdiction to jurisdiction
      - i. Ex. - medical expenses or lost earnings are general or special
- B. Pleading Special Damages [RULE 9(g)]
  1. When P seeks to recover items of special damages
  2. Such items must be specifically stated in the pleading
    - a. D is put on notice that special damages are being sought
      - i. Ex. // *Ziervogel* (p. 552)
        - (A) P stated specific physical injuries resulting from car accident but did not state increased blood pressure or shoulder injury
        - (B) P did not amend or ask leave to amend
        - (C) Does not matter that D was aware of increased blood pressure
- C. Pleading General Damages
  1. (?)

VI. Prayer for Relief [RULE 8(a)(3)]

- A. P must state in the pleading
  1. Demand for the relief sought , which may includes
    - a. Alternative  
OR
    - b. Different types of relief
- B. Actual relief may be greater than amount in prayer for relief
  1. UNLESS
    - a. Default Judgment [RULE 54(c)]
      - i. Award is limited to amount and kind of relief prayed for in pleading
      - ii. D may have relied on amount prayed in deciding not to appear and defend action
    2. Ex. // *Bail* (p. 555)
      - a. Verdict did not reflect arrival at figure in excess of what P entitled to
      - b. No prejudice to D → verdict stands
- C. CA - Rule
  1. If action to recover for personal injury or wrongful death

- a. P does not state amount of damages
2. \*PURPOSE\*
  - a. Protects D from bad publicity from large damages claim

**PLEADINGS AND MOTIONS - ANSWER / RESPONDING TO COMPLAINT**

I. **Time Permitted to Respond** [RULE 12(a)]

- A. D has within 20 days after being served
  1. UNLESS
    - a. D waived service → within 60 days after request sent

B. **Extending Time** [RULE 6(b)]

1. Courts grants extension
- OR
2. P consents to extension

II. **Motions to Dismiss** [RULE 12(b)]

- A. D may assert certain defenses by motion → optional for D
  1. In pre-answer motion
  - OR
  2. In answer
- B. If D does not raise these defenses → deemed to be waived
  1. EXCEPTION
    - a. If responsive pleading not required
      - i. Lack of SMJx → may be raised at any time (?)

C. Motions (7x)

1. Lack of SMJx
2. Lack of PJx
3. Improper venue
4. Insufficient process
5. Insufficient service of process
6. Failure to state a claim upon which relief can be granted [RULE 12(b)(6)]
7. Failure to join a party under Rule 19

III. Answer

A. Answer

1. D must state defenses to each claim asserted (in plain and short terms)
2. D must admit or deny allegations asserted against it by an opposing party

B. **Failure to Deny Allegations** [RULE 8(b)(6)]

1. Any allegation that D does not specifically respond to
  - a. If responsive pleading required
    - i. Allegation → admitted
  - b. If responsive pleading not required
    - i. Allegation → denied or avoided
2. D usually includes all-inclusive paragraph
  - a. Denying all allegations unless otherwise admitted

C. **Denials** [RULE 8(b)]

1. General Denial → disfavored
  - a. D generally denies entire complaint

- i. w/o disclosing defenses or facts of allegation
    - b. Allowed if
      - i. In CA state court
        - (A) Complaint not verified (i.e. sworn under oath)
      - ii. In federal court
        - (A) D denies each and every allegation of complaint
          - (1) Including allegation referring to SMJx
        - OR
        - (B) D denies entire complaint except allegations specified
    - c. Not allowed if
      - i. Inaccurate or misleading
        - (A) Ex. // *Zielinski* (p. 569)
          - (1) Specific denial would have warned P that he sued wrong D
          - (2) D knew or should have known statements to be inaccurate
2. Specific Denial → favored
  - a. D denies parts of pleading
    - i. D can specifically deny or admit parts and then deny the rest
3. Improper Forms of Denial (?)
  - a. Denial for Lack of Information → allowed → denial
    - i. D lacks knowledge or information sufficient to form belief about truth of allegation
    - ii. EXCEPTIONS
      - (A) When information presumptively within D's knowledge
      - (B) When information available in public record
  - b. Negative Pregnant Denial → not allowed → admission
    - i. Affirmative implication which is favorable to adversary
    - ii. Denies qualification of allegation and not allegation itself
      - (A) Ex. - when P alleges \$400 is owed, D denies owing \$400
        - (1) Admission that D owes \$399.99
  - c. Conjunctive Denial → not allowed → admission
    - i. D denies allegations specifically, using identical words of complaint
      - (A) Evasive → don't know what allegations denied or admitted
4. Amendments to Improper Denials
  - a. Allowed if
    - i. Parties acted in good faith w/o intent to deceive
  - b. Not allowed if
    - i. P deprived of right of action → Statute of Limitations
      - (A) Ex. // *Zielinski* (p. 569)
        - (1) P barred by statute of limitations to bring action against proper party if allowed P to amend complaint
    - ii. If not amended → any improper denial deemed admitted
- D. Affirmative Defenses [RULE 8(c)]
- 1. Types of Pleading (2x)
    - a. Response admits to allegations of complaint
      - i. BUT some reason why no right of recovery
    - b. Response where allegations outside of P's prima facie case
      - i. So D cannot raise by simple denial in answer
  - 2. Failure to raise an affirmative defense timely
    - a. Constitutes a waiver
      - i. Counter-Ex. // *Ingraham* (p. 574)
        - (A) D cannot raise affirmative defense in post-trial motion
  - 3. Specific Defenses (19x)

- a. Accord and Satisfaction, Arbitration and Award, Assumption of Risk, Contributory Negligence, Discharge in Bankruptcy, Duress, Laches, License, Failure of Consideration, Illegality, Injury, Injury by fellow servant, Payment, Release, Statute of Frauds, Waiver, Estoppel, Fraud
- b. Statute of Limitations
- c. Res Judicata
- 1. When affirmative defenses not listed and must be raised
  - a. In federal question cases
    - i. Courts look to federal statutes
  - b. In diversity cases
    - i. Courts look to state practice
- 2. Determination of Affirmative Defense (?)
  - a. Convenience → which party, if either, has better access to relevant facts
  - b. Policy → should matter be indulged or disfavored
  - c. Whether matter at issue constitutes necessary or extrinsic element in P's cause of action
- 3. **\*PURPOSE\***
  - a. Provide P with notice of
    - i. Possible existence of defenses  
AND
    - ii. D's intention to advance them

### PLEADINGS AND MOTIONS – ETC.

#### I. **Reply** (to the Answer) [RULE 7(a)]

- A. If answer contains counterclaim or affirmative defense
  - 1. P must reply
- B. If answer does not contain
  - 1. P may reply only when a court mandates one
- C. Allegations in pleading to which no responsive pleading is required (?)
  - 1. Allegations are deemed to be denied

#### II. Amendments [RULE 15]

##### A. **Amendments Before Trial** [RULE 15(a)]

- 1. Party may amend pleading once
  - a. Before responsive pleading is served  
OR
  - b. Within 20 days if no responsive pleading is required  
OTHERWISE
- 2. Party may amend pleading with
  - a. Court's permission → freely given leave by court when justice so requires  
OR
  - b. Written consent of adversary
- 3. Court's discretion → when justice so requires
  - a. Moving party shown good reason for not getting pleading right first time
  - b. Objecting party must show bad faith, prejudice, and undue delay
    - i. Ex. // *Aquaslide* (p. 579)
      - (A) More prejudice to D if not allowed to amend
      - (B) No death knell of litigation for P

##### B. **Amendments During and After Trial** [RULE 15(b)]

- 1. If party introduces issues or evidence not within issues raised by pleadings
  - a. Opposing party objects
    - i. Court will grant leave to amend
      - (A) If new information will facilitate trial on merits

- ii. Court will grant continuance to prepare new evidence for objecting party
  - (A) If evidence may prejudice objecting party
- 2. If issue not raised by pleadings has been tried by implied or express consent
  - a. Court will treat issue as though it was raised by pleadings
    - i. Determine implied consent → record showing that objecting party
      - (A) Received actual notice of injection of unpleaded matters
      - (B) Had adequate opportunity to litigate such matters
      - (C) Had adequate opportunity to cure any surprise
        - (1) Ex. // *Moore* (p. 582)

C. **Relation Back of Amendments** [RULE 15(c)]

- 1. Amendment relates back to date of original pleading if
  - a. Amendment is permitted by law that provides statute of limitations applicable to action
    - i. Ex. - if diversity suit → use state law
  - OR
  - b. Amendment asserts claim or defense related to original claim
    - i. Arises out of same conduct, transaction, or occurrence set forth in original complaint
  - OR
  - c. Amendment changes mistaken party or naming of party against whom claim is asserted
    - i. Arises out of same conduct, transaction, or occurrence set forth in original complaint
    - ii. Proper party must be put on notice
      - (A) Within time allowed for service of process → 120 days
      - (B) Party is not prejudiced
        - (1) Prepared to defend any and all claims arising from that conduct
    - iii. Proper party knew or should have known that action would be brought against it
      - (A) But for a mistake regarding identity
- 2. Amendments do not relate back when
  - a. Amendment asserts claim or defense (?)
    - i. New state of action, new facts, new legal theories
    - ii. Different cause of action → different conduct, transaction, occurrence
  - b. Amendment replacing unknown party (not mistaken) with actual parties
    - i. Ex. // *Worthington* (p. 585)
      - (A) P unaware of police officers' identity at time
    - ii. EXCEPTION → CA state
      - (A) Allows P to state fictitious names if unknown ("John Doe 1")

D. **Supplemental Pleadings** [RULE 15(d)]

- 1. Party may file supplemental pleading that
  - a. Sets forth facts that happened after date of pleading
- 2. If party wants to
  - a. Cure defects in original pleading
  - OR
  - b. Add new claims (if trial convenience)
  - OR
  - c. Provide additional facts that update complaint

III. **Provisions to Deter Frivolous Pleadings + Ensure Truthful Allegations / Sanctions** [RULE 11]

A. **Safe Harbor Provision**

- 1. Before motion for sanctions can be filed with court
  - a. Party must have received other party's notice of intent to file Rule 11 motion
  - b. Party has 21 days after notice to withdraw or correct challenged pleading

B. **Representations to Court** [RULE 11(b)]

- 1. Attorney's signature on pleading
- 2. Implies that

- a. To best of signer's knowledge with reasonable inquiry
- b. Pleading meets standards (4x)
  - i. For proper purpose (not to harass or cause unnecessary cost or delay)
  - ii. Consistent with current law or makes non-frivolous argument for change in law  
(A) If good faith but frivolous challenge → sanctions imposed on attorney
  - iii. Well-grounded in fact or likely to be reasonably supported by facts
  - iv. Based on evidence or reasonably based on lack of information
- c. Ex. // *Hedges* (p. 597)
  - i. Attorney allowed to reasonably rely on P's representation  
(A) When relevant information in control of D

C. **Sanctions** [RULE 11(c)] → if Rule 11(b) violated

- 1. Sanctions available by motion or by court's initiative
  - a. Non-monetary damages  
[NOTE: law firm is held jointly responsible for violation committed by own attorney]
  - b. Penalty payable only to court
  - c. Payment of another party's expenses or attorneys' fees
    - i. If imposed by motion and warranted
  - d. Limitations of monetary sanctions [RULE 11(c)(5)]
    - i. Monetary sanctions cannot be imposed  
(A) On party who is represented by attorney for making frivolous contentions
    - ii. Monetary sanctions can be imposed  
(A) Only after court's initiative ordering attorney or party to show cause  
(1) Limited to penalty payable to court

D. **\*PURPOSE\***

- 1. Deter misconduct and repetition

**JOINDER OF CLAIMS AND PARTIES**I. Approach to JoinderA. Steps (2x)

1. Does FRCP permit assertion of this claim?
  - a.
2. Does the federal court have SMJx over this claim?
  - a. Diversity
  - b. Federal Question
  - c. Supplemental

[NOTE: parties can move for dismissal for lack of SMJx at any point]

II. (Permissive) **Joinder of Claims** [RULE 18]A. Once party has been properly joined in suit

1. Or once party has stated claim related to original claim (?)

B. Party may join as many additional claims as it has against the opposing party

1. Related or unrelated claims
  - a. Including
    - i. Original claims
    - ii. Counterclaims
    - iii. Cross-claims
    - iv. Third-party claims

III. **Consolidation** of Actions [RULE 42(a)]

## A. If actions involve

1. Common question of law or fact
    - a. Ex. // *Tanbro Fabrics* (p. 636)
      - i. P had two different Ks with two Ds
      - ii. Consolidated actions to determine who responsible for defective goods
- [NOTE: no same transaction or occurrence requirement]

## 2. Court may

- a. Order joint hearing or trial of any issue in the action  
OR
- b. Order complete consolidation of actions  
OR
- c. Make any other orders to avoid unnecessary costs or delay

B. Consolidation vs. Joinder

1. Requires court to exercise discretion
  - a. Balance → justice and convenience

C. **\*POLICY\***

1. Prevent unjust, illogical, or inconsistent results if order separate trials or suits
  - a. Ex. – prejudicial to P if two different juries find goods defective but each held other D is responsible // *Tanbro Fabrics*

IV. **Separate Trials** / Severance of Claims [RULE 42(b)]A. If one or more issues or claims

1. Are different in
  - a. Legal rules
  - b. Testimonies
  - c. Measure of damages
2. Then court can sever claims into separate suit

OR

3. Then court has discretion to order a separate trial
  - a. For convenience
  - b. To avoid jury confusion or prejudice
  - c. To expedite and economize
4. Advantage of separate trials over severance of claims
  - a. Discovery done altogether / at once

V. Counterclaims → against opposing party [RULE 13]

A. Compulsory Counterclaim [RULE 13(a)]

1. Party must state counterclaim in pleadings if
  - a. Arises out of same transaction or occurrence as opposing party's claim  
[NOTE: different interpretation of "same transaction or occurrence" than in Preclusion]
    - i. Test - Logical Relationship
      - (A) If separate trials of the claims would lead to substantial duplication of time and effort by parties and courts → claims are logically related
        - (1) Ex. // *Heyward-Robinson* (p. 612)
          - (a) Payments could not be allocated b/w two jobs
    - b. EXCEPTIONS
      - i. Claim is already subject to another pending action
      - ii. P brings suit by attachment or process without court's PJx (?)

[NOTE: if compulsory counterclaim → federal court has (automatic) SMJx] (?)

2. Failure to plead a compulsory counterclaim
  - a. Party who should have asserted counterclaim in 1<sup>st</sup> suit
    - i. Will not be allowed to assert counterclaim as an original claim in 2<sup>nd</sup> suit in fed. court
      - (A) Compulsory Counterclaim Rule
      - (B) Defense Preclusion
  - b. Applies against someone whom claim or counterclaim is asserted against
    - i. Ex. –
      - (A) D should have asserted counterclaim in 1<sup>st</sup> suit in response to P's claim
      - (B) P should have asserted counterclaim in 1<sup>st</sup> suit in response to D's counterclaim
    - ii. EXCEPTION
      - (A) Default judgment in 1<sup>st</sup> suit → D can assert counterclaim as claim in 2<sup>nd</sup> suit
3. **\*PURPOSE\***
  - a. Convenience to parties and court, not the relationship of facts and issues
  - b. Flexible but may be unduly broad or uncertain in its application
4. **\*POLICY\*** → judicial economy
  - a. Prevent multiplicity of suits
  - b. Allow all claims arising out of single set of facts to be litigated in one suit

B. Permissive Counterclaims [RULE 13(b)]

1. Party may state any counterclaim (that is not compulsory) in pleadings if
  - a. There is an independent basis for federal court to have SMJx
    - i. Counter-Ex. - D asserting unrelated state claim and P and D are same state citizens

VI. Cross-Claims → against co-party [RULE 13(g)]

A. Party may state cross-claim if

1. Arises out of the same transaction or occurrence that is subject-matter of

- a. Original action  
OR
- b. Counterclaim
  - i. Test – Logical Relationship  
(A) Ex. // *LASA* (p. 621)
    - (1) Issue → who is responsible for marble problem
      - (a) Closely-related factual or legal issues will be presented
      - (b) Similar evidence used

OR

- 2. Claim relates to property that is subject matter of original claim

B. “Co-Parties” → split interpretations

- 1. Only D can assert a cross-claim against co-party
  - a. Ex. // *Danner* (3<sup>rd</sup> Cir.)
- 2. P or D can assert a cross-claim against co-party
  - a. Ex. // *Harrison* (5<sup>th</sup> Cir.)

C. \***POLICY**\* - permissive (not compulsory)

- 1. Compromise b/w judicial efficiency and over-complication of litigation

VII. **Joinder of Additional Parties** [RULE 13(h)]

A. Additional parties may be joined in counterclaims and cross-claims

- 1. As long as Rule 19 or Rule 20 satisfied
  - a. Compulsory or permissive joinder of parties

VIII. **Permissive Joinder of Parties** [RULE 20] → for the parties already in suit

A. Persons may join in action as plaintiffs if

- 1. Assert claim in pleading which both
  - a. Arises out of
    - i. Same transaction or occurrence  
OR
    - ii. Series of transactions or occurrences  
(A) Test – Logical Relationship  
(1) Ex. // *M.K. v. Tenet* (p. 634)
      - (a) D’s repeated pattern of obstruction of counsel against Ps by denying records is “logically related”

AND

- b. Has common question of law or fact to all plaintiffs will arise in action
  - i. Ex. // *M.K. v. Tenet* (p. 634)  
(A) Common question of law → whether D engaged in pattern of behavior that denies Ps’ right to discuss claims w/ counsel
- 2. Assert claim → jointly, severally, or in the alternative

B. Persons may be joined in one action as defendants if

- 1. Subject to claim in pleading which both
  - a. Arises out of
    - i. Same transaction or occurrence  
OR
    - ii. Series of transactions or occurrences  
AND
  - b. Has common question of law or fact to all defendants will arise in action
- 2. Claim asserted against them → jointly, severally, or in the alternative  
[NOTE: there must be PJx over all Ds]

- C. Parties not required to have interest in all claims
  - 1. P not obtain all relief demanded
  - 2. D not defend against all relief demanded

IX. **Compulsory Joinder of Parties** [RULE 19]

A. Issues / Possibilities

- 1. Whether court should compel joinder of additional parties to suit
  - a. If possible to compel joinder  
OR
  - b. If not possible to compel joinder
    - i. Whether court should proceed without them  
(A) Party → necessary but not indispensable  
OR
    - ii. Whether court should dismiss suit for inability to join missing parties  
(A) Party → necessary and indispensable

B. **Necessary Party** [RULE 19(a)] // *Clinton v. Babbitt* (PDF)

- 1. Necessary if
  - a. Complete relief cannot be afforded between existing parties in person's absence
    - i. Ex. – if Hopi not joined → judgment against Secretary not binding on Hopi  
OR
  - b. Judgment rendered in person's absence would impair person's ability to protect interests in a practical way
    - i. Ex. – if injunction against Secretary → Hopi not able to get compensation
- 2. Feasible if
  - a. Court has jurisdiction
    - i. Counter-Ex. – sovereign immunity not waived

C. **Indispensible Party** [RULE 19(b)]

- 1. Indispensible if
  - a. Factors (4x)
    - i. Extent to which judgment rendered in person's absence might be prejudicial to person or existing parties
      - (A) Ex. – Hopi could lose a lot of money if plaintiff prevails
      - (B) Ex. – practical harm + immediate/serious vs. remote/minor
    - ii. Extent to which any prejudice could be reduced or avoided by
      - (A) Including protective provisions in judgment  
OR
      - (B) Shaping relief  
OR
      - (C) Other measures
        - (1) Ex. – any change would still violate sovereign immunity interest
        - (2) Ex. – shape belief by money damages and not specific performance
    - iii. Whether judgment rendered in person's absence will be adequate
      - (A) Ex. – Hopi is primary party to dispute
      - (B) Ex. – extend of relief between existing parties
    - iv. Whether plaintiff would have adequate remedy if dismissed of case for nonjoinder
      - (A) Ex. – alternate forum for plaintiff → state court
      - (B) Ex. – if plaintiff could sue effectively in another forum

X. **Impleader / Third-Party Claims** [RULE 14]

- A. D may assert claim against non-party
  - 1. Who is or may be liable
  - 2. If D found liable to P

a. Then non-party is liable to D

i. In part or whole

[NOTE: D becomes third-party P and non-party becomes third-party D]

B. P may assert claim against non-party

1. If D filed counterclaim against P

C. Impleader cannot create substantive rights which don't exist

1. Can only accelerate determination of already existing rights of parties

a. Contribution

i. Original D is partially liable

(A) Ex. // *Too* (p. 656)

(1) D is clothing manufacturer, third-party Ds are former employees who infringed on copyright

b. Indemnity

i. Original P is not liable at all

(A) Ex. // *Jeub* (p. 654)

(1) D is restaurant, third-party D is food manufacturer who provided contaminated hand

ii. Ex. – by K → insurer = third-party D

D. \*POLICY\* → Judicial Economy vs. Fairness

1. Resolving controversy in single proceeding

a. Without harming existing substantive rights of parties

2. Potential prejudice to P and third-party D

XI. Intervention [RULE 24] → for outsider to interject himself into suit

[NOTE: Court still has discretion to allow or deny intervention]

[NOTE: Court considers whether intervention will delay or prejudice rights of original parties]

A. Intervention of Right [RULE 24(a)]

1. Non-party is allowed to join suit if

a. Non-party makes timely motion

i. Factors (2x)

(A) Non-party in position to seek intervention earlier in proceeding

(B) Time lag will prejudice rights of existing parties as result of delay

ii. Ex. – if submitted before trial → timely

iii. Counter-Ex. – if submitted after judgment → not timely

b. Federal statute allows (unconditionally)

c. Non-party has direct interest → related to property or transaction which is subject of action

i. Test – Requirements (3x)

(A) Interest is sufficient → protectable interest in outcome

(B) Now allowed to intervene will impede non-party's ability to protect interest

(C) Interest is not being adequately represented by original party in suit

2. Ex. // *Smuck* (p. 681)

a. Parents had interest in children's education and allowed to intervene since Board of Education decided not to appeal

B. Permissive Intervention [RULE 24(b)]

1. Non-party is allowed to join suit to assert claim or defense if

a. Non-party makes timely motion

[NOTE: Court less likely to find permissive intervention as timely]

b. Federal statute allows (conditionally)

c. Non-party's claim or defense shares a common question of law or fact with main action

**CLAIM AND ISSUE PRECLUSION****I. Claim Preclusion (Res Judicata)****A. Rule**

1. Once claim has been presented for adjudication
  - a. Or should have been presented → (no issue preclusion)
2. And valid and final judgment on the merits has been rendered
3. That same claim cannot be relitigated in subsequent suit

**B. EXCEPTIONS (2x) – RJ does not operate when**

1. Prior judgment obtained by fraud  
OR
2. There is clear and fundamental jurisdictional defect that should have prevented court from hearing first case
  - a. Lack of SMJx or PJx over D

**C. Merger / Bar**

1. If P won first suit
  - a. Claim merged into judgment
2. If P lost first suit
  - a. Claim barred from relitigating

**D. “Claim”**

1. Same primary rights (Min. → CA state)  
OR
2. Same transaction or occurrence (Maj.)

**E. Same Primary Rights**

1. RJ operates if
  - a. Single set of facts
    - i. Same transaction or occurrence  
AND
    - b. Single violation of primary right which those facts demonstrate
      - i. Significant factor → harm suffered
2. Ex. // *Takahashi* (PDF)
  - a. Contractual right of employment

**F. Same Transaction or Occurrence**

1. RJ operates if
  - a. Single set of facts (or same nucleus of operative facts)
    - i. Same transaction or occurrence  
OR
    - ii. Series of connected transactions
  - b. Factors (3x)
    - i. Whether facts are related in time, space, origin, or motivation
    - ii. Whether facts form convenient trial unit
    - iii. Whether their treatment as a unit conforms to
      - (A) Parties’ expectations  
OR
      - (B) Business understanding or usage
  - c. Regardless of
    - i. Number of primary rights invaded (or legal theories)
    - ii. Variations in evidence needed to support theories
  - d. Ex. // *Rush* (p. 1148)
    - i. Two rights → right of bodily security + right of security of property
      - (A) BUT one set of facts → single accident falling from motorcycle
  - e. Ex. // *Mathews* (p. 1154)

- i. 1<sup>st</sup> suit → theory of assault and theory of libel
- ii. 2<sup>nd</sup> suit → theory of false arrest and theory of malicious prosecution
  - (A) Different theories BUT same actions and statements (set of facts)

**G. Same Evidence**

- 1. RJ operates if
  - a. Same evidence will support both actions
- 2. Ex. // *Jones* (p. 1159)
  - a. Same evidence on two installments of 1<sup>st</sup> suit and all installments in 2<sup>nd</sup> suit

**H. Certain Circumstances**

- 1. Breach of K
  - a. Entire → single indivisible promise that can be breached once
    - i. Single breach of K → one claim
      - (A) Ex. – acceleration clause
  - OR
  - b. Several/Divisible → multiple promises that can be breached separately
    - i. Each breach of K → separate claim
      - (A) Ex. – each month in continuing K
      - (B) Ex. – series of notes or bonds w/ interest coupons
        - (1) Intent of parties → notes or bonds to be held by different people
    - ii. Rule of Accumulated Breaches
      - (A) Once bring suit for breach for continuing K
        - (1) Bar/merge all claims that arose prior to when suit brought

**I. \*PURPOSE\***

- 1. Prevent splitting of single claim into two separate suits

**J. \*POLICY\***

- 1. Relieve parties of cost and vexation of multiple lawsuits
- 2. Conserve judicial resources
- 3. Encourage reliance on adjudication by preventing inconsistent decisions

**II. Defense Preclusion**

**A. Compulsory Counterclaim**

- 1. Supersedes rules of preclusion if it applies

**B. Possibilities (3x)**

- 1. Once D asserts counterclaim against P in 1<sup>st</sup> suit
  - a. D cannot assert same counterclaim in 2<sup>nd</sup> suit
- 2. Once D fails to raise defenses against P in first suit
  - a. D cannot assert claim in 2<sup>nd</sup> suit that is essentially defense that was not raised in 1<sup>st</sup> suit
- 3. (Maj.) Once D uses set of facts as defense against P in 1<sup>st</sup> suit
  - a. D can use same set of facts for affirmative relief in 2<sup>nd</sup> suit
    - i. Ex. // *Linderman* (p. 1165)
      - (A) 1<sup>st</sup> suit → D raised defense that K obtained by fraudulent misrepresentation
      - (B) 2<sup>nd</sup> suit → D asserted claim of fraud
        - (1) 1<sup>st</sup> suit did not deal with right of D to recover expenses
      - (C) Same set of facts → but not precluded
    - b. Rationale
      - i. Judgment is not conclusive as to D's right to affirmative relief which he did not seek
      - ii. Should not force D to assert claim in forum chosen by P
    - c. EXCEPTION
      - i. If 2<sup>nd</sup> judgment would nullify 1st judgment → RJ operates

OR

4. (Min.) Once D raises defenses against P in 1<sup>st</sup> suit
  - a. D cannot use same set of facts in 2<sup>nd</sup> suit
    - i. Ex. // *Mitchell* (p. 1163)
      - (A) D should have asserted counterclaim in 1<sup>st</sup> suit
      - (B) D can't split → shield and then sword
  - b. If D did not raise issue as defense in 1<sup>st</sup> suit
    - i. Not compelled to bring counterclaim in 1<sup>st</sup> suit → no bar

C. **\*POLICY\*** → conflicting

1. Fairness
  - a. Unfair to D to litigate claim in forum selected by P
2. Judicial efficiency
  - a. Resolving controversy in one suit

III. **Issue Preclusion** (Collateral Estoppel)

A. Rule

1. Once an issue between parties
2. Has been actually litigated and decided
3. And was essential
4. To valid and final judgment on the merits
5. That issue cannot be relitigated in a subsequent suit

B. CE operates as long as

1. Party against whom CE is being asserted had
  - a. Full and fair opportunity to litigate  
AND
  - b. Incentive to litigate issue in 1<sup>st</sup> suit  
AND
2. Use of CE would not be unfair in the 2<sup>nd</sup> suit
3. Factors
  - a. Party had every incentive to vigorously litigate 1<sup>st</sup> suit
    - i. Subsequent suits was foreseeable
  - b. Judgment in relied upon not inconsistent with any previous decision
    - i. Ex. – Professor Currie's hypo
  - c. No procedural opportunities available to party that were unavailable in 1<sup>st</sup> suit
    - i. Ex. – inconvenient forum, full scale discovery, unable to call key witnesses
    - ii. Ex. – compromise verdict
    - iii. Counter-Ex. - jury vs. non-jury → neutral factor

C. “Issue”

1. CE operates if
  - a. Issue is identical in all respects
    - i. Not just similar
  - b. Facts are not separable (and identical) → mixed issue of law and fact
    - i. UNLESS
      - (A) Significant change in legal climate
        - (1) Change in how courts think about issues → possible different result in subsequent suit
      - (B) Ex. // *Sunnen* (p. 1178)
        - (1) 1937 royalties from same K as 1<sup>st</sup> action → tax law changes
  - c. P's failure to establish existence of fact
    - i. If party with burden of persuasion fails to establish existence of a fact
      - (A) Establishes non-existence of that fact for CE purposes
2. CE does not operate if
  - a. Facts are separable (but identical) → pure issue of law



i. General Verdict → (Yes or No)

(A) Unclear or uncertain what was actually decided in 1<sup>st</sup> suit

(1) Ex. // *Russell* (p. 1173)

(a) Record not disclose nature of infringement

(b) Two patent claims → infringe on one, other, or both?

(B) EXCEPTION

(1) When court use extrinsic evidence to determine what issues were actually decided

(a) Ex. – if two claims and P does not offer evidence on one

[NOTE: Avoid problem of general verdict → jury uses Special Verdict form → jury answers specific questions [RULE 49]]

c. Issue decided but not essential to judgment

i. Unessential Finding

(A) Finding by court that does not become basis of judgment rendered

(1) Ex. // *Rios* (p. 1175)

(a) 1<sup>st</sup> suit – P negligent, D contributory negligent in car accident → no damages for P

(b) 2<sup>nd</sup> suit – D not precluded since essential finding was P (not D) negligent → affirmative defense

[NOTE: D's suit should be precluded → compulsory counterclaim]

(2) Ex. - third-party claims where 3<sup>rd</sup> D found liable

(a) If D found liable to P, then 3<sup>rd</sup> D is liable to D for part or all amount of damages to P

(b) Essential finding → 3<sup>rd</sup> D's liability in determining D not liable (not D's liability)

3. Certain Circumstances

a. Alternative and Independent Grounds

i. Rest 2d Judgments

(A) CE does not operate

(1) Jury did not examine carefully both if there was only one decision

(B) EXCEPTION

(1) Ex. // *Malloy* (p. 1175)

(a) Judge gave complete discussion of holding on each ground

ii. Rest 1st Judgments

(A) CE operates

(1) Each ground is sufficient

(B) Ex. – 1<sup>st</sup> suit → finds D not negligent, P negligent; D brings 2<sup>nd</sup> suit

IV. Quality of 1<sup>st</sup> Judgment → “Valid,” “Final,” and “On the Merits”

A. Validity

1. Judgment presumed “valid”

a. UNLESS

i. Lack of SMJx over issues

(A) Never waived

ii. Lack of PJx over D

iii. Lack of reasonably calculated notice

2. Unavailable defenses

a. If D in 1<sup>st</sup> suit failed to raise defenses

i. Defenses waived

b. If D raised defenses in 1<sup>st</sup> suit but decided against

i. Defensive Preclusion

B. Finality

1. Judgment is “final” when

a. All issues which judgment is based have been decided

AND

- b. Nothing remains for judge to do but order entry of judgment for winning party
- 2. Certain Circumstances
  - a. Judgment on appeal
    - i. Final for preclusive purposes (Maj.)
      - (A) If 1<sup>st</sup> judgment overturned → set aside 2<sup>nd</sup> judgment
    - OR
    - ii. Not final until (Min. → CA)
      - (A) Time to final appeal has expired
      - OR
      - (B) All appeals have been exhausted or determined
  - b. Preliminary injunctions
    - i. Not final
  - c. Temporary restraining orders
    - i. Not final
  - d. Modifiable judgments
    - i. Final until modified
- 3. RJ vs. CE
  - a. Traditional
    - i. Same test for CE and RJ
      - (A) Not final until all issues decided
  - b. [Rest 2d Section 13 (Judgments)]
    - i. Test for CE (not RJ)
      - (A) Decision for issue is adequately delivered and firm
      - (B) Treat as final
        - (1) Even though not final → appeal filed

C. On the Merits

- 1. Judgment is “on the merits” when
  - a. Based on substance of P’s claim
    - i. Not some technical, or procedural ground
- 2. For RJ (not CE)
  - a. Every judgment in favor of P
    - i. On the merits
  - b. Every judgment in favor of D
    - i. NOT on the merits
- 3. Certain Circumstances
  - a. Summary Judgment
    - i. On the merits
  - b. Voluntary dismissal
    - i. Without prejudice → not on the merits
  - c. Dismissals [RULE 41(b)]
    - i. On the merits
      - (A) EXCEPTIONS
        - (1) Dismissal for lack of jurisdiction
        - (2) Dismissal for improper venue
        - (3) Dismissal for failure to join indispensable party

V. Persons Benefited by Preclusion

- A. Parties (in previous suit) or person “in privity”
  - 1. Benefited from prior judgment
- B. Non-Parties
  - 1. Not Benefited → Traditional Mutuality Requirement → (Min. → states)
    - a. EXCEPTION

- i. Derivative / vicariously liable parties
  - (A) Allowing party to rely on issue determined and litigated by party whose liability is primary
    - (1) Ex. // *Matthews* (p. 1196)
      - (a) Employer took advantage of judgment for its 2 employees
  - ii. Ex. – employer/employee, indemnitor/indemnitee, principal/agent

OR

- 2. Benefited → Modern - Non-Mutuality (Fed + Maj. → CA)
  - a. If party in previous suit litigates an issue with one party and loses
    - i. Party cannot relitigate same issue with new party
  - b. **Nonmutual Defensive Collateral Estoppel** (NDCE)
    - i. New D can assert NDCE to
      - (A) Preclude P from relitigating issue
      - (B) That P lost in previous suit against Old P
        - (1) Ex. // *Bernhard* (p. 1196)
          - (a) P had one full and fair opportunity to litigate in 1<sup>st</sup> suit
        - (2) Ex. // *Blonder-Tongue* (p. 1200)
          - (a) P cannot pick new Ds
    - ii. Criticism
      - (A) Equivalent to coin flip → chance
      - (B) Unfair to allow anyone w/ no risk to take advantage of profits if flip is good
  - c. **Nonmutual Offensive Collateral Estoppel** (NOCE) // *Parkland Hosiery* (p. 1202)
    - i. New P can assert NOCE to
      - (A) Preclude D from relitigating issue
      - (B) That D lost in previous suit against Old P
      - (C) Ex. // *Parklane Hosiery* (p. 1202)
    - ii. New P cannot assert CE when
      - (A) New P could have easily joined 1<sup>st</sup> suit
        - (1) Ex. – New P waits and sees
        - (2) Counter-Ex. – no SMJx (?)
      - (B) Use of NOCE in 2<sup>nd</sup> suit would be unfair to D
        - (1) Little incentive to vigorously litigate issues in 1<sup>st</sup> suit
          - (a) Especially if subsequent suit was not foreseeable
        - (2) Procedural opportunities in 2<sup>nd</sup> suit not available in 1<sup>st</sup>
          - (a) Ex. – inconvenient forum for D → less witnesses
        - (3) Judgment relied upon is inconsistent w/ one or more previous judgments in favor of D
          - (a) Ex. // *Professor Currie's hypo*
            - (i) First 25 victims lose suit against D
            - (ii) 26<sup>th</sup> victim wins → 27-50 victims take advantage
            - (iii) Inconsistent and unfair to D
          - (b) Criticism → 26<sup>th</sup> or 1<sup>st</sup> judgment might be anomaly
    - iii. Court exercises discretion to allow New P to use NOCE (less likely than NDCE)

## VI. **Persons Bound** by Preclusion

- A. Parties (in previous suit)
  - 1. Bound by prior judgment
- B. Non-Parties
  - 1. Not bound → violation of due process
  - 2. **EXCEPTIONS**
    - a. When non-party is in “privity” with party in previous suit
    - b. “Privity” – Interpretations (3x)
      - i. Any relationship that justifies preclusion
        - (A) Fiduciary relationship

- (1) Ex. – beneficiary bound by judgment against guardian
- (B) Class action / mass tort action
  - (1) Ex. // *In Re Dayton Ohio Disaster* (PDF)
    - (a) P had opportunity to ascertain and develop all relevant facts
    - (b) P received advantage of discovery efforts of other attorneys
    - (c) P had opportunity to frame issues for trial
- (C) Persons who control litigation in which they have direct financial interest
  - (1) Ex. // *Montana* (p. 1211)

OR

- ii. Concurrent or successive relationship to same rights of property
    - (A) Ex. – subsequent servient estate owners
- OR
- iii. After judgment, one who has acquired interest in judgment’s subject matter
    - (A) By inheritance, succession or purchase

C. Co-Parties (in previous suit)

- 1. Not bound by CE → traditionally
  - a. UNLESS
    - i. Co-parties were formal adversaries (cross-claimants)
- HOWEVER
- 2. Bound by CE → modern
  - a. Not formal adversaries → BUT actual adversaries
    - i. When co-parties are drawn into controversy on material issues b/w themselves regarding rights and obligations to each other
      - (A) Treated like formal adversaries

VII. Intersystem Preclusion

A. Interstate Preclusion (1<sup>st</sup> suit in state court → 2<sup>nd</sup> suit in different state court)

- 1. Full Faith and Credit Clause / Article IV
  - a. Enforcement
    - i. If one state makes a valid judgment
    - ii. Then can enforce that judgment in any other state by
      - (A) Registering judgment
      - (B) Bringing suit to enforce judgment in sister state
    - iii. Enforceable even though sister state not recognize cause of action
  - b. Preclusive Effect
    - i. All state courts must give
      - (A) Same preclusive effect to state judgments
      - (B) According to laws of state rendering it
- 2. State Courts → split
  - a. State court must give same CE effect as sister state rendering court (Maj.)
  - OR
  - b. State court follows its own CE effect rules, not sister state rendering court (Min.)
    - i. Give greater CE effect by allowing non-mutual CE when sister state court has mutuality requirement
      - (A) Ex. // *Hart* (p. 1217)
      - (1) NY court → allow NMCE when TX law requires mutuality
- 3. Certain Circumstances
  - a. Child custody determinations
    - i. PKPA / Title 28 U.S.C. Section 1738A → extension of FFC
      - (A) State court must enforce same custody order entered by rendering state court as long as custody order met Act requirements
      - (B) Once state exercised jurisdiction over dispute → another state cannot step in
        - (1) Cannot exercise concurrent jurisdiction over custody dispute
      - (C) Ex. // *Thompson* (p. 1221)

B. **State-Federal Preclusion** (1<sup>st</sup> suit in state court → 2<sup>nd</sup> suit in federal court)

1. **[Full Faith and Credit Statute / Title 28 U.S.C. Section 1738]**
  - a. All federal courts must give
    - i. Same preclusive effect to state judgments (cannot give greater)
    - ii. According to laws of state rendering it
  - b. Full Faith and Credit Statute → might be supervened
    - i. Only if state court unable or unwilling to protect federally guaranteed rights
      - (A) No full and fair opportunity to litigate claim or issue decided by first court
        - (1) Ex. – no fair procedure for litigation of constitutional claim
        - (2) Ex. - failure to acknowledge existence of constitutional principle
2. Ex. -
  - a. Title 42 Section 1983 Civil Rights claims and issues
    - i. Whether P had full and fair opportunity to litigate issue in earlier state action
      - (A) Ex. // *Allen* (p. 1225) → CE
        - (1) Precluded P from asserting fed. claim after convicted in state court
        - (2) Issue of illegally obtained evidence in earlier case
    - ii. Whether P failed to raise but could have raised claim in earlier state action
      - (A) Ex. // *Migra* (p. 1129) → RJ
3. **EXCEPTIONS**
  - a. Federal court has exclusive jurisdiction → FFC does not apply
    - i. **Prior Jurisdictional Competency Rule**
      - (A) Prohibits preclusion of claim beyond rendering court's jurisdiction
    - ii. Federal court not bound by state' reasoning when state court did not have SMJx
      - (A) Ex. – P brings claim in state court alleging violation of state anti-trust law
        - (1) Not precluded for second suit for violation of federal anti-trust law
        - (2) **BUT issue preclusion applies** → factual determinations binding

C. **Federal-State Preclusion** (1<sup>st</sup> suit in federal court → 2<sup>nd</sup> suit in state court)

1. If 1<sup>st</sup> suit → federal question
  - a. State court usually gives same preclusive effect as federal preclusion rules
2. If 1<sup>st</sup> suit → diversity
  - a. State court gives same preclusive effect as state in which rendering federal court sits

**DISCOVERY / PRE-TRIAL PROCEDURE****I. Discovery Plan [RULE 26(f)]**

- A. Parties must confer (not meet) at least 21 days in advance of scheduling conference in order to
  - 1. Arrange initial mandatory disclosure
  - AND
  - 2. Propose discovery plan
  - AND
  - 3. Consider possibilities of settling or resolving case promptly
    - a. Additional expectation
- B. After parties' conference
  - 1. Within 14 days
    - a. Parties required to disclose discovery plan to court
    - b. Parties required to provide initial disclosure

[NOTE: rules subject to negotiation and stipulation by parties or contrary order by court]

**II. Mandatory Initial Disclosures [RULE 26(a)(1)]**

- A. Party need not to disclose
  - 1. Any witnesses or documents that
    - a. Are unfavorable (not support its claims or defenses)
    - OR
    - b. It does not intend to use at trial
      - i. Whether favorable or unfavorable
  - 2. Ex. // *Cummings* (p. 783)
    - a. GM not required to automatically disclose
      - i. Six videos of child safety seat acceleration tests → children thrown from car
- B. Party must disclose before requested
  - 1. All witnesses or documents that
    - a. May be used to support its claims or defenses
    - b. UNLESS
      - i. Use would be solely for impeachment
    - c. Based on information then reasonable to party
  - 2. Within 14 days after parties' conference
- C. **What to Disclose** (4x) [RULE 26(a)(1)(A)]
  - 1. People likely to have discoverable information
    - a. Names
    - b. Addresses
    - c. Phone Numbers
  - 2. Copy of or description of
    - a. Documents,
    - b. Tangible things,
    - c. Electronically stored information
  - 3. Computation of any category of damages
    - a. Along w/ documents which computations are based
  - 4. Any insurance agreement
    - a. In which insurance company is liable to satisfy part or all of judgment entered in case
- D. **Failure to Make Disclosure** [RULE 37(c)]
  - 1. If party fails to disclose information (documents) or witnesses
    - a. Party not allowed to use that information or witness
      - i. At trial or before
    - b. UNLESS

- i. Failure to disclose was justified or is harmless  
AND/OR
  - c. Upon motion, court may
    - i. Impose sanctions under Rule 37  
AND
    - ii. Inform jury of party's failure to make closure
- 2. **Unacceptable Excuses** [RULE 26(a)(1)(E)]
  - a. Party not fully investigated case
  - b. Party challenges sufficient of another party's disclosure
  - c. Another party not made its disclosure

E. **\*PURPOSE\***

- 1. Reduce cost, time, delay of discovery process
  - a. Reduce parties' dissatisfaction or frustration
- 2. Prevent front loading litigation
  - a. Prevent parties waiting till last minute
- 3. Give lawyers more power to get discovery early in litigation
  - a. Reward them if they are prepared

III. **Materials Prepared in Anticipation of Trial** [RULE 26(b)(3)]

A. Party cannot discover

- 1. Documents and tangible things
- 2. Prepared in anticipation of litigation or trial
  - a. By party, party's attorney, and party's representation

B. Party allowed to discover by showing that party

- 1. Has substantial need for materials in preparation of case  
AND
- 2. Cannot, without undue hardship, obtain substantial equivalent through other means

C. **Attorney Work Product** [RULE 26(b)(3)(B)]

- 1. Party cannot discover
  - a. Opposing party's attorney's or representation's
    - i. Mental impressions
    - ii. Conclusions
    - iii. Opinions
    - iv. Legal theories
  - b. Ex. // *Hickman* (p. 831)
    - i. Counsel's written and oral statements of witnesses
  - c. Ex. – attorney's selection process of a few documents out of thousands
    - i. Attorney's impressions and legal opinions as to how documents relate to issues
  - d. Counter-Ex – attorney malpractice suit
    - i. Documents related to misrepresentation by attorney if client is seeking documents
      - (A) Federal courts → allow discovery
      - (B) State courts → split
        - (1) Some apply AWP in every circumstance
- 2. **EXCEPTION**
  - a. Opposing party must produce written witness statements if
    - i. Witnesses are not available  
OR
    - ii. Witnesses can only be reached w/ great difficulty
- 3. **\*PURPOSE\***
  - a. Disfavor hearsay of information
  - b. Prevent information to be used to impeach witnesses
    - i. Requires attorney to become witness in trial

- c. Prevent inefficiency
  - i. Requires attorney to write out statements that have not been written down
- d. Eliminate “lazy lawyer problem”
  - i. Undermine adversary system → attorney cannot investigate matters unfavorable to client

#### IV. Discovery

##### A. **Scope of Discovery** → Broad [RULE 26(b)(1)]

1. Rule (Pt. I)
  - a. Unless otherwise limited by court’s discretion
  - b. Parties may obtain discovery regarding
  - c. Any matter
    - i. Existence and location of any tangible thing  
AND
    - ii. Identity and locations of persons having knowledge discoverable
  - d. That is
    - i. Not privileged  
AND
    - ii. Relevant to any party’s claim of defense  
AND
    - iii. Either
      - (A) Admissible at trial  
OR
      - (B) Reasonably calculated to lead to discovery of admissible evidence
2. Rule (Pt. II)
  - a. Upon showing of good cause
  - b. Court may permit discovery to any matter relevant to the subject matter involved in the action
    - i. Parties cannot
      - (A) Obtain information on new claims or defenses which had not been set forth in pleadings  
[NOTE: if producing party inadvertently produces incriminating but irrelevant information, then requesting party should move to amend complaint]
    - ii. Parties can
      - (A) Obtain information not directly pertinent but may still be relevant to claims or defenses
        - (1) Ex. – other incidents of the same type or conduct
      - (B) HOWEVER
        - (1) To distinguish b/w relevant and irrelevant → unclear

##### B. **Limits of Discovery**

1. Since discovery rule is so broad
  - a. Court given discretion to limit discovery
2. **Protective Orders** [RULE 26(c)]
  - a. Rule
    - i. To protect moving party from (as a result of discovery request)
      - (A) Annoyance
      - (B) Embarrassment
      - (C) Oppression
      - (D) Undue burden or expense
    - ii. Upon showing of good cause
      - (A) Moving party made good faith effort
      - (B) To resolve controversy w/ requesting party
    - iii. Court may issue a protective order
      - (A) Limited to information obtained through discovery process
  - b. **Balancing Test**

- i. Hardship to party against whom discovery is sought if discovery is allowed
    - (A) Ex. – safeguard against coercing settlement w/o merit
      - (1) Moving party rather settle than disclose
    - (B) Ex. // *Marrese* (p. 774)
      - (1) If disclose deliberation of membership applications → undermines voluntary nature of association + harms worthy interests
      - (2) Members don't want to deny new applications after being deposed
    - (C) Ex. // *Seattle Times* (p. 780)
      - (1) If publicly release donor list → damages reputation and privacy
  - VERSUS**
  - ii. Hardship to party seeking discovery if discovery denied
    - (A) Counter-Ex. // *Seattle Times* (p. 780)
      - (1) No 1<sup>st</sup> Am. violation → where protective order does not restrict dissemination of information if gained through other means
  - iii. More weight given to interest w/ distinctively social value than purely private interest
3. Alternatives – Ex. // *Marrese*
- a. Change of Timing and Sequence of Discovery [RULE 26(d)]
    - i. Requesting party complete non-sensitive discovery first
      - (A) If cannot establish jury issues on essential elements based on non-sensitive information → discovery of sensitive information is moot
    - ii. Balancing Test → same as Rule 26(c)
  - b. In Camera Review
    - i. Trial judge examines files himself in his chambers
  - c. Redaction
    - i. Names on file redacted and counsel can read files privately

C. \*PURPOSE\*

- 1. Facilitate fair and efficient conduct of individual litigation → eliminate surprise
  - a. Preserve relevant information that might not be available at trial
  - b. Ascertain and isolate issues that are actually in controversy b/w parties
  - c. Find out what testimony and other evidence is available on each disputed issue
- 2. Promote important public interests
  - a. (?)

**DISCOVERY DEVICES**

I. Depositions [Oral → **RULE 30**] [Written → **Rule 31**]

- A. Discovery device → most effective and expensive
  - 1. Questions are asked of a witness under oath  
AND
  - 2. Both questions and answered are recorded

B. Deposing

- 1. Parties
  - a. If no comply w/ request → sanctions under Rule 37
    - i. Possible sanctions
      - (A) Establishing certain facts
      - (B) Dismissing lawsuit or part of lawsuit
      - (C) Rendering default judgment
- 2. Non-Parties
  - a. If no comply w/ request → compel by subpoena under Rule 45
  - b. If no comply w/ subpoena → citation for contempt of court
  - c. Requesting party must pay expenses incurred by non-parties and their lawyers who attend depositions (?)
- 3. Organizations [**RULE 30(b)(6)**]

- a. Party may name as deponent
  - i. Public or private
  - ii. Corporation, partnership, association, government agency, other entity
- b. Party must describe
  - i. Matters upon which are to be investigated in trial
  - ii. With particularity
- c. Organization must designate
  - i. One or more persons to testify on its behalf  
(A) Testify → matters known or reasonably available to organization

C. **Notice** [RULE 30(b)(1)]

1. If party wants to depose person
  - a. Must give reasonable written notice to every other party
2. Includes name, address of deponent (if known); date, time, and place of deposition

D. **Producing Documents** [RULE 30(b)(2)]

1. Both parties and non-parties can bring
  - a. Documents or other materials to disposition
2. To request
  - a. Parties
    - i. Request by notice under Rule 34
  - b. Non-Parties
    - i. Request by subpoena under Rule 45

E. **Method of Recording** [RULE 30(b)(3)]

1. Unless court orders otherwise
2. Deposition testimony may be recorded by
  - a. Sound, sound and visual, or stenographic means
  - b. Method used must be stated in notes
3. If party wants to use additional method
  - a. Party must do so at its own expense
  - b. Party must give notice to deponent and other parties
4. If deposition going to be used as evidence in trial
  - a. Transcription required during deposition

F. **Objections** [RULE 30(c)(2)]

1. Objections to
  - a. Evidence
  - b. Party's conduct
  - c. Officer's qualifications
  - d. Manner of taking deposition
  - e. Any other aspect of deposition
2. If deponent does not make objection at time of deposition
  - a. Deponent waived right to object
3. If deponent makes objection and is instructed to answer anyways
  - a. Deponent must answer
  - b. If opposing party tries to use answer at trial
    - i. Objection on record and can be reviewed by court
4. Counsel may instruct witness not to answer
  - a. When necessary to protect attorney-client privilege
  - b. When court issued protective order that certain information is privileged
  - c. When move to terminate or limit deposition

G. **Motion to Terminate or Limit** [RULE 30(d)(3)]

1. Deponent or party can motion to terminate or limit deposition
  - a. Grounds that deposition conducted

- i. In bad faith  
OR
- ii. In manner that is unreasonably annoying, embarrassing or oppressing

H. Limitations

- 1. **Duration** [RULE 30(d)(1)]
  - a. Unless stipulated or ordered by court
  - b. Limited to 1 day of 7 hours
- 2. **Number of Depositions** [RULE 30(a)(2)]
  - a. Unless stipulated by parties or ordered by court
  - b. Limited to 10 depositions per side

I. \*PURPOSE\* – attorney can

- 1. Observe demeanor of witness when answering questions
- 2. Ask follow-up questions
- 3. Evaluate potential effectiveness of particular witnesses at trial

II. Interrogatories [RULE 33] [X + ?]

A. Written requests for information → ineffective

- 1. Served on parties to lawsuit
  - a. Series of questions to be answered
  - b. Under oath
  - c. Within specific time
- 2. No court order or officers → entire exchange by mail

B. Responding Parties [RULE 33(b)(1)]

- 1. Party has duty to answer
  - a. Give personal knowledge
    - i. Applies to individuals and corporations/associations
  - b. Give other knowledge of other persons that reasonably can be obtained through investigation
    - i. If taken literal → only applies to corporation/associations  
(A) Lawyers, current and former employees, other agents

C. Option to Produce Business Records [RULE 33(d)]

- 1. Party may answer by
  - a. Opening up its business records
- 2. If burden of ascertaining answer will be substantially same
  - a. (for party serving interrogatory as party answering it)
  - b. Then answering party may
    - i. Specify records and make them available  
(A) For requesting party to locate and identify records as readily as answering party could

D. Contention Interrogatories [RULE 33(a)(2)] (?)

- 1. Party may ask questions
  - a. Responses → legal contentions, theories, and facts supporting them
    - i. NOT → fact or identification interrogatories
- 2. Allowed when
  - a. Used early
  - b. Serves considerable goals → narrowing issues
- 3. Denied when
  - a. Early answers would not contribute enough
    - i. To justify burden of answering them
- 4. Ex. // In Re Convergent (p. 800)
  - a.

E. Limitations

1. **Number of Interrogatories** [RULE 33(a)(1)]
  - a. Unless stipulated by parties and w/o leave of court
  - b. Limited to 25 interrogatories upon any other party
    - i. If subparts refer to same subject matter → not discrete  
(A) Do not count as additional interrogatories

III. Discovery and Production of Property [RULE 34] [RULE 45]

A. Party may request another party to lawsuit [RULE 34]

1. To produce and permit copying of any designated documents,
2. Inspection, copying, or testing of any designated tangible thing
3. Inspection, copying, or testing of any designated electronically stored information
  - a. Ex. – e-mails → particularly significant
4. Entry upon designated lands

B. Party may request non-party to lawsuit by subpoena [RULE 45]

1. To produce and/or permit
  - a. Same items

C. Requested items must be

1. Discoverable within meaning of Rule 26
  - a. Scope and limitations of discovery
- AND
2. Within possession, custody, or control of producing party
  - a. Court → fact-specific

D. Producing party must

1. For documents
  - a. Produce them as they are kept in usual course of business  
OR
  - b. Shall organize and label them in manner to correspond with categories in request
2. For electronically stored information
  - a. Produce it in form in which it is ordinarily maintained  
OR
  - b. Produce it in form in which is reasonably useful

E. **\*PURPOSE\***

1. Prevent hiding of critical documents

F. **Specific Limitations on Electronically Stored Information** [RULE 26(b)(2)(B)]

1. Producing party not required
  - a. To produce electronically stored information
  - b. Because of undue burden and cost
2. If requesting party challenges by motion to compel  
OR
3. If producing party defends by motion for protective order
  - a. Producing party has burden of showing that
  - b. Information is not reasonably accessible
4. Even if producing party has met burden
  - a. Court may still order discovery  
AND
  - b. Court may require requesting party to pay all or some costs of discovering inaccessible media
    - i. Cost-shifting

IV. Physical and Mental Examinations [RULE 35]

- A. Court can compel examination
  - 1. Upon showing of
    - a. Good cause
    - AND
    - b. Person's mental or physical condition is actually "in controversy"
  
- B. "Good Cause"
  - 1. Consideration of pain, danger, intrusiveness
  - 2. Importance and usefulness of examination
  - 3. Ability to get information from other sources
  
- C. "In Controversy"
  - 1. Condition mentioned in pleading
  - AND/OR
  - 2. Movant must make affirmative showing
    - a. That condition is really and genuinely in controversy
      - i. Ex. // *Schlagenhauf* (p. 815)  
(A) Specific facts showing that eyesight/vision in controversy
      - ii. Counter-Ex. // *Winters* (p. 820)  
(A) P willing to abandon claim about her condition
      - iii. Ex. – sexual harassment → emotional distress, mental anguish, anxiety, etc.  
(A) Only if conditions are ongoing
  
- D. If compelled
  - 1. Party may have attorney present at examination
    - a. Court prefers another doctor
  - 2. Party may move for protective order
    - a. Ex. – sexual harassment → no discovery of sexual history
  
- E. Court → strict standards
  - 1. Privacy concerns, personal autonomy, pain or discomfort, etc.  
[NOTE: only discovery device that requires court order]

V. Requests for Admission [RULE 36] → not a real discovery device

- A. Party may request another party
  - 1. To admit truth of certain matters related to
    - a. Factual statements, application of law to fact, or opinions of facts
    - OR
    - b. Genuineness of document or other evidence
  
- B. Responding Party
  - 1. If timely response
    - a. Object to matters
      - i. Improperly phrased
      - ii. Seeks privileged or protected information
    - b. Admits matters
      - i. Conclusively established for purposes of law  
(A) Cannot be contradicted at trial
    - c. Fails to admit (denies) matters
      - i. If subsequently proven at trial  
(A) Requesting party can seek order under Rule 37(c)  
(1) Responding party pays reasonable fees
  - 2. If no timely response

- a. Matters deemed admitted
- C. Court's discretion → requesting party
  - 1. Generally grants request for admission
  - 2. UNLESS
    - a. Admission has no substantial value
    - b. Party has reasonable grounds that it will prevail on matter
    - c. Other good reason for denial
- D. Court's discretion → responding party
  - 1. Admits or denies responses
  - 2. Allows late filing of responses
  - 3. Permits withdrawal or amendment of responses in certain circumstances

## VI. Supplementary Responses [RULE 26(e)]

- A. Party must update its disclosure or response (to discovery request) if
  - 1. Party learns that its disclosure or response is incomplete or incorrect in some material way
  - OR
  - 2. Updated information has not been made known to other parties
- B. Failure to update → sanctions

## VII. Sanctions / Judicial Supervision

- A. Major Problems in Discovery (2x)
  - 1. Failure to comply with discovery request
    - a. When requesting party compels discovery
  - 2. Overuse or abuse of discovery
    - a. When responding party seeks protective order
- B. Sanctions Available
  - 1. Most severe – “all or nothing” → disfavored b/c reluctant to deny litigant's day in court
    - a. Dismissal of P's complaint
    - b. Ordering entry of judgment against D (default judgment)
  - 2. Severe
    - a. Preclusion of defense
    - b. Dismissal of counterclaim
    - c. Inability to use evidence
    - d. Forfeiture
    - e. Jury instruction of party's failure to disclose
  - 3. Least severe
    - a. Continuances and stays
    - b. Contempt citations and monetary fines
    - c. Award of attorneys' fees
    - d. Court expense reimbursement
- C. Failure to Comply with Discovery Request
  - 1. Motion for Order Compelling Discovery [RULE 37(a)]
    - a. Requesting party may move to compel discovery
      - i. If responding party fails to comply with discovery request
        - (A) Evasive or incomplete response → treated as failure to comply
        - AND
      - ii. If requesting party attempted in good faith to obtain discovery material informally before
  - 2. Failure to Comply with Court Order [RULE 37(b)]
    - a. Court may impose sanctions

- i. If responding party fails to obey court order compelling response
        - (A) Failure → treated as contempt of court
      - AND
      - ii. If requesting party attempted in good faith to obtain discovery material informally before
    - b. Ex. // *Cine* (p. 852)
      - i. No required showing of willfulness or bad faith
      - ii. Counsel's gross negligence is sufficient → delays and costs
  - 3. Circumstances → Sanctions w/o Court Order Compelling Response
    - a. Failure to make mandatory initial disclosure
    - b. Failure to attend or appear for deposition after notice
    - c. Failure to serve answers or objections to interrogatories
    - d. Failure to serve written response to request for inspection under Rule 34
- [NOTE: requesting party must still attempt to obtain discovery material informally before]

D. Overuse or Abuse of Discovery

- 1. **Certification** [RULE 26(g)]
  - a. Attorney's signature on discovery request, response, or objection
  - b. Certifies that
    - i. To best of signer's knowledge after reasonable inquiry
    - ii. Discovery request, response, or objection meets standards (3x)
      - (A) Consistent with current law or makes good faith argument for change in law
      - (B) Not unreasonably or unduly burdensome or expensive given nature of cause, existing discovery, or amount in controversy
      - (C) Not being ordered for any improper purposes
- 2. Court imposes sanctions
  - a. Against signer, party on whose behalf signer was acting, or both
  - b. If signer violates certification
    - i. Seek evidence that is unnecessary
    - ii. Seek evidence for improper use
    - iii. Impose unnecessary costs in seeking necessary items

E. **\*PURPOSE\***

- 1. Enforce strict adherence to counsel's responsibilities owed to court and to opponents

**ADJUDICATION WITHOUT TRIAL OR BY SPECIAL PROCEEDING**I. Dismissal of Action [RULE 41]A. **Voluntary Dismissal** [RULE 41(a)]

1. By P → without a court order
  - a. P files notice of dismissal
    - i. Before adverse party serves answer or motion for SJ  
OR
  - b. P files stipulation of dismissal
    - i. Signed by all parties involved in the action
  - c. Dismissal is without prejudice (not adjudication on the merits)
    - i. UNLESS
      - (A) P has already filed notice of dismissal in another action
        - (1) Which includes same claim
      - (B) Stated otherwise in notice or stipulation
2. By court order
  - a. P cannot dismiss
    - i. If adverse party
      - (A) Has already served answer or motion for SJ  
OR
      - (B) Will not sign stipulation
  - b. Court → considerations (2x)
    - i. Expense and inconvenience to P
    - ii. D cannot show some kind of prejudice
      - (A) Other than possibility of second suit
  - c. Dismissal is without prejudice
    - i. UNLESS
      - (A) Stated otherwise in order

B. **Involuntary Dismissals** [RULE 41(b)]

1. D may move for dismissal
  - a. If P fails to prosecute
    - i. Ex. - P does not proceed to trial with “due diligence”  
OR
  - b. If P fails to comply with FRCP  
OR
  - c. If P fails to comply with court order
2. Dismissal is with prejudice (adjudication on the merits)
  - a. UNLESS
    - i. Stated otherwise in order
3. No notice or adversarial hearing required for P
4. Court has broad discretion in dismissing action

II. Default Judgment [RULE 55]A. **Default** [RULE 55(a)]

1. Entered by Clerk
  - a. When D has failed to plead or defend
    - i. Counter-Ex. // *Coulas* (p. 919)
      - (A) D filed answer on the merits → case was at issue
      - (B) D failed to appear at trial → judgment on the merits upon proof against D

B. **Default Judgment** [RULE 55(b)]

1. Entered by Clerk → P requests

- a. D completely failed to appear  
AND
- b. Amount due
  - i. Is certain  
OR
  - ii. Can be computed to be made certain  
(A) Amount → clear in form  
(1) Ex. - promissory note or bill

OTHERWISE

- 2. Entered by Court → P applies
  - a. D must be given notice of default hearing if appeared before
    - i. When D appears at default hearing  
(A) D can introduce evidence and make arguments on amount of damages

C. Setting Aside a Default or Default Judgment [RULE 55(c)]

- 1. Court may
  - a. Set aside entry of default
    - i. For good cause  
(A) Factors (4x)
      - (1) Amount involved
      - (2) Prejudice to P
      - (3) Importance of issues involved
      - (4) Whether D is entitled to have judgment set aside under Rule 60(b)
  - b. Set aside default judgment under Rule 60(b)
    - i. For miscalculation  
(A) Ex. – mistake by lawyer
    - ii. When D did not receive notice of default hearing

D. Limitation of Amount of Damages [RULE 54(c)]

- 1. P is limited to amount and kind of damages prayed for in the original complaint
  - a. If D does not appear

III. Summary Judgment [RULE 56]

A. Time to file motion for SJ

- 1. D may file motion
  - a. At any time (before trial)
    - i. With or without supporting affidavits
- 2. P may file motion
  - a. After 20 days have passed from start of action  
OR
  - b. After D files motion for SJ
    - i. With or without supporting affidavits

B. SJ will be rendered if [RULE 56(c)]

- 1. No genuine issue as to material fact exists
  - a. Based on pleadings, discovery and disclosure materials, affidavits
  - b. Material fact
    - i. One that affects outcome of suit under substantive law governing suit

AND

- 1. No sufficient evidence exists to support jury finding in favor of non-moving party
  - a. On issue that makes difference in outcome of case

AND

- 2. Moving party is entitled to judgment as a matter of law

B. SJ will not be rendered if

1. Substantial evidence exists on BOTH sides
    - a. Genuine issue of material fact is raised
    - b. Reasonable jury can return verdict in favor of non-moving party
- C. Burden of Proof
1. Perspectives (2x)
    - a. Burden of Production
      - i. If no evidence is introduced
      - ii. One party is going to lose and that party has burden of production  
(A) P has burden of introducing evidence to establish elements of claim
    - b. Burden of Persuasion
      - i. After evidence is introduced
      - ii. If finder of fact finds existence of fact is equally possible with non-existence of fact
      - iii. One party will lose and that party has burden of persuasion  
(A) P has burden of introducing persuasive evidence
- D. Moving Parties → initial burden + ultimate burden of persuasion
1. If moving party is D (no burden of proof at trial), it must
    - a. Point out that non-moving party has no sufficient evidence of an essential element of its claim
      - i. Ex. // *Celotex* (p. 901)  
(A) No affirmative showing or affidavits required  
(B) D points out discovery materials and pleadings to show absence of evidence

OR

    - b. Negate non-moving party's essential element of its claim
  2. If moving party is P (burden of proof at trial), it must
    - a. Come forward with specific evidence
    - b. That demonstrates no reasonable jury could reach verdict in favor of non-moving party
      - i. Ex. // *Lundeen* (p. 891)  
(A) Provided affidavits of husband's intent to change beneficiaries
- E. Non-Moving Parties → burden of production
1. If moving party has met its initial burden
    - a. Non-moving party cannot rely on pleadings and discovery devices
      - i. Must provide new affidavits
    - b. Non-moving party must [**RULE 56(e)**]
      - i. Set out specific facts (sufficient evidence admissible at trial)
      - ii. Showing genuine issue for trial
    - c. Counter-Ex. // *Lundeen* (p. 891)
      - i. P did not specify some evidence that could be produced at trial
      - ii. P did not present counterevidence to show D's evidence is not worthy of belief
  2. If non-moving party has not had sufficient opportunity to set out specific facts
    - a. Court may [**RULE 56(f)**]
      - i. Deny motion  
OR
      - ii. Order continuance for affidavits, depositions, or other discovery  
OR
      - iii. Issue any other just order
    - b. Counter-Ex. // *Lundeen*
      - i. Did not allow P to cross-examine witness → no advantage to P
    - c. Ex. // *Cross*
      - i. Allowed P to cross-examine witness → facts within knowledge of witness
- F. Court → no discretion
1. Court should
    - a. Favor non-moving party's evidence
  2. Court should not

- a. Weigh evidence
- b. Determine which of several inferences can be drawn from evidence
- c. Consider credibility of witnesses
  - i. Up to the jury/finder of fact

II. **Partial Summary Judgment** [RULE 56(d)]

- A. If no judgment made for the entire action
  1. Court may withdraw from trial those aspects of the case that are established in summary judgment proceeding without substantial controversy

III. Judgment as a Matter of Law (in a Jury Trial)

A. Formerly

1. Directed Verdict
2. Judgment Notwithstanding the Verdict

B. **Judgment at a Matter of Law** (JMOL) [RULE 50(a)]

1. Motion for JMOL made
  - a. At any time before case submitted to jury
  - b. After parties fully heard on issue during jury trial
    - i. Party cannot move until opposing party has presented its case
2. Requirements
  - a. Reasonable jury would not have legally sufficient evidentiary basis to find for non-moving party on that issue
    - i. Ex. // *Galloway* (PDF)  
(A) P cannot show preponderance of evidence
3. Court can
  - a. Resolve issue against party  
AND
  - b. Grant motion for JMOL against party on claim or defense  
OR
  - c. Deny motion for JMOL and submit case to jury  
OR
  - d. Postpone judgment and allow jury to bring in a verdict
    - i. Subject to court's later deciding legal questions raised by motion

C. **Renewed Motion for Judgment as a Matter of Law** (RJMOL) [RULE 50(b)]

1. Motion for RJMOL made
  - a. After case submitted to jury
  - b. No later than 10 days after entry of judgment
2. Requirements
  - a. JMOL motion made before case submitted
    - i. Otherwise → violates right to trial by jury (7<sup>th</sup> Am.)
  - b. RJMOL motion supported only by arguments made in support of JMOL motion
  - c. May include alternative or joint request for new trial
3. Court can
  - a. Allow judgment on verdict (if jury returned verdict)  
OR
  - b. Order new trial  
OR
  - c. Direct entry of JMOL against party

D. \*PURPOSE\*

1. Test legal sufficiency of evidence
  - a. Reasonable people could not disagree to verdict in favor of moving party based on evidence without regard to witnesses' credibility

- i. Complete absence of proof on issue that is material to claim or defense
- ii. Facts and inferences drawn from them point strongly in favor of moving party
  - (A) No possible controversy

E. Court → no discretion

- 1. Court should
  - a. View evidence in light most favorable to non-moving party
- 2. Court should not
  - a. Judge credibility of witnesses
  - b. Grant JMOL merely b/c weight of evidence in favor of moving party
- 3. When trial court has any doubt
  - a. Postpone decision and allow jury to bring in verdict
    - i. If appellate court disagrees w/ trial court's decision
      - (A) Case does not have to go to new trial
      - (B) Case uses the original jury's verdict

IV. New Trial [RULE 59]

A. Harmless Error Rule [RULE 61]

- 1. Unless justice requires
- 2. Error by court or party → not grounds for granting new trial

B. New Trial

- 1. Grounds → any reason courts have allowed new trial
  - a. Mistake
    - i. If mistake was prejudicial  
AND
    - ii. If mistake was likely to have had impact on outcome of case
      - (A) To determine impact
        - (1) Circumstances of case
        - (2) Strength of case in support of verdict
      - iii. Party must object at time mistake is made → otherwise waived
  - b. Incoherent jury verdicts
    - i. Ex. // *Magnani* (p. 1035)
      - (A) Two separate causes of action → jury returned single form of verdict
        - (1) Verdict may apply to one count or both counts → ambiguous
      - (B) Court granted new trial for issues of liability and damages
    - ii. Ex. // *Robb* (p. 1039)
      - (A) Jury returned verdict finding P and D negligent and damages to P
        - (1) Verdict is self-contradictory, inconsistent and ambiguous
      - (B) Court granted new trial, denied motion to mould verdict  
[NOTE: To mould, court must ascertain clear intent of jury]
  - c. Verdict is against weight of evidence  
OR
  - d. Verdict is based on false evidence  
OR
  - e. Verdict will result in miscarriage of justice
    - i. Ex. // *Yeatts* (p. 1046)
  - f. Evidence as a whole is insufficient to support verdict
    - i. Ex. // *In Re Green's Estate* (p. 1050)
      - (A)

C. Conditional and Partial New Trials

- 1. Grounds
  - a. Issues of Liability and/o Damages
    - i. Intertwined → new trial on both issues

(A) Ex. // *Doutre* (p. 1057)

ii. EXCEPTION

(A) If no issue of liability exists

(1) Separable → partial new trial limited to issue of damages

b. Excessive or Inadequate Damages

i. If excessive damages

(A) Court can deny new trial → remittitur

ii. If inadequate damages

(A) Court cannot deny new trial → additur

(1) Ex. // *Fisch* (p. 1052)

(a) Jury not decide on higher amount

[NOTE: additur (disfavored) → order denying P's app. for new trial on condition that D consent to specified increase in jury's award]

[NOTE: remittitur (favored) → order denying D's app. for new trial on condition that P consent to specified reduction in jury's award]

D. Court → discretion

1. Court should

a. Weigh evidence

b. Consider witnesses' credibility

c. Grant new trial even if there is substantial evidence in support of jury's verdict

i. Greater latitude allowed for court to grant new trial than deny one

2. Court should not

a. Order repeated new trials → intrusion on institution of jury trial

E. **\*PURPOSE\***

1. Serves as check on juries / safeguard against jury trials

2. Prevents miscarriages of justice

3. Sends case to a new jury

V. Relief from Judgment [RULE 60(b)]

A. Court can set aside judgment

1. On grounds discovered

2. After judgment was rendered

B. Grounds (6x)

1. Motion must be made within one year of entry of judgment when

a. Mistake, inadvertence, surprise, excusable neglect [60(b)(1)]

i. Excusable neglect – Factors (4x)

(A) Danger of prejudice to opposing party

(B) Length of delay and its potential impact on judicial proceedings

(C) Reason for delay

(D) Whether moving party acted in good faith

ii. Ex. // *Briones* (p. 1060)

b. Newly discovered evidence [60(b)(2)]

i. Could not have been discovered in time with due diligence for new trial motion

(A) Factors (3x)

(1) Likely changes result on new trial

(2) Discovered since trial

(3) Relates to facts that were in existence at time of trial

ii. Both facts and evidence must be in existence at time

(A) Counter-Ex. // *Swift Agricultural* (p. 1060) → decided other way

(1) Reaction time (fact) available

(2) Means of measuring it (evidence) not available

- c. Fraud [60(b)(3)]
  - i. Extrinsic fraud
    - (A) Prevents litigant from making claim of defense
    - (B) Prevents party from having its day in court
      - (1) Ex. – party induces other party to file claim after statute of limitations has run
  - ii. Intrinsic fraud
    - (A) Fraud that trial is designed to discover
      - (1) Ex. – perjured testimony and evidence
  - iii. Allow relief
    - (A) If moving party establishes fraud by clear and convincing evidence  
AND
    - (B) Even if it does not show, absent of fraud, case would be decided differently
      - (1) Judgment unfairly obtained → not necessarily factually correct

2. Motion must be made within reasonable time when

- a. Judgment is void [60(b)(4)]
  - i. Lack of reasonably calculated notice
  - ii. No PJx or SMJx
- b. Current judgment is based on prior judgment that has been vacated or overturned [60(b)(5)]
- c. Any other reason justifying relief [60(b)(6)]
  - i. Most common → party has been prevented from obtaining any trial
    - (A) Default judgment
    - (B) Party failed to appear at trial with good reason

C. Rule 60 preserves right of trial court

- 1. To entertain independent equitable action to set aside judgment [RULE 60(d)]
  - a. Likely to be limited by historical restrictions

**RIGHT TO TRIAL BY JURY**I. State CourtA. Historical Approach

1. Preserves right to trial by jury that existed at common law
  - a. Determine
    - i. How action with
      - (A) Similar facts
      - (B) Similar legal theories
      - (C) Seeking similar relief
    - ii. Would be treated at time of common law
2. Sometimes difficult to apply – one modern action → multiple historical actions

B. Ex. // *Crouchman* (CA) (p. 710 in Supplement)

1. Time of common law → 1850 when CA Constitution adopted
2. Right of trial by jury not dependent upon legal nature of claim (type of damages)
  - a. Legal/equitable distinction → not relevant to special small claims proceedings
3. Does not confer right of jury by trial to any action that had not previously existed
  - a. Statutes + CA Constitution → do not expand right of trial by jury beyond common law scope

II. Federal CourtA. **Right to Trial by Jury** [7<sup>th</sup> Amendment]

1. Preserves right of trial by jury that existed at common law (1791)

## B. Approach

1. 1<sup>st</sup> inquiry → (less important)
  - a. Nature of the issues (not overall character of suit)
    - i. Historical basis → pre-merger custom with respect to similar suits
      - (A) Court of equity
      - OR
      - (B) Court of law
2. 2<sup>nd</sup> inquiry → (more important)
  - a. Remedy sought
    - i. Form of relief
      - (A) Money damages → court of law → right
        - (1) Ex. – actual or punitive damages
      - OR
      - (B) Injunction → court of equity → no right
    - ii. EXCEPTIONS – money damages → equitable relief
      - (A) Restitutionary relief
        - (1) Ex. - backpay that is wrongfully held by employer
          - (a) Disgorging unjust enrichment
      - (B) Monetary award incidental to or intertwined with injunctive relief
      - (C) Discretionary relief

## C. Certain Circumstances

1. Both legal and equitable issues
  - a. Legal issues tried first before jury
  - b. Equitable issues decided last by judge
    - i. In manner consistent with jury's determination
  - c. UNLESS
    - i. P expresses preference for equitable remedy → waives right
      - (A) Determination of legal issues → unnecessary
  - d. Ex. // *Beacon Theatres* → equitable claim + legal counterclaim

- e. Ex. // *Dairy Queen* → equitable + legal claims
- 2. Complex cases → no right (some courts)
  - a. Ex. – major securities and anti-trust
  - b. BUT court can appoint master [RULE 53(b)]
- 3. Derivative suit (suit by shareholders) → right
  - a. Asserting claim belonging to corporation against officers, directors of company, or third-party because corporation refuses to assert claim
    - i. Any recovery awarded goes to corporation
- 4. Specific statutory scheme – established by Congress
  - a. Finders of fact → specialized knowledge and expertise
    - i. Specialized courts of equity → no right
      - (A) Ex. - bankruptcy court → created by Bankruptcy Act
    - ii. Administrative agencies → no right
      - (A) Public Rights → government sues in its sovereign capacity to vindicate public rights by statute
        - (1) Ex. – violation of OSHA → administrative judges of OSHR Commission // *Atlas Roofing*