1) Introduction to the Civil Process

a) Introductory Notes:
   i) Substantive Law: Defines legal rights and duties in everyday conduct
   ii) Procedural Law: Sets out rules for enforcing substantive rights in the courts; 
       provides mechanism for applying substantive law to concrete disputes; 
       provides standardized method of litigation
   iii) Litigation today is mostly a wide-ranging process of dispute resolution (i.e. 
       arbitration, summary presentation of the case to neutral observers)
   iv) Ours is a “common law” system – adversary system
   v) Modern trend: Expansion of substantive law doctrines permit judicial relief in 
       a wider range of situations and a growth of procedural mechanisms allowing 
       complicated multi-party suits (“complex litigation”)
       (1) As a result, judges now exert greater control over litigation 
       (2) We need increased cooperation and coordination in modern litigation
   vi) A crucial feature: Degree of control over the selection and presentation of 
       information given to litigants → procedure largely governs what info will be 
       provided to the decision maker 
       (1) Attorneys’ role is to exercise the control that is given to the parties over 
           what info will be provided
   vii) Objectives of the Legal System:
       (1) Truth 
           (a) Truth = facts
       (2) Justice: 
           (a) Justice = policy values – how rights, assets or losses are to be 
               apportioned as determined through trial
       (3) Fair Process: 
           (a) Procedure allows parties to feel that they have had their “day in court” 
               → procedure serves to validate the integrity of the legal system as a 
               whole by providing a remedial process that replaces much more 
               destructive motivations like self-help and personal retribution
               → What system of procedure is best suited to accomplishing these objectives?

b) Band's Refuse Removal, Inc. v. Borough of Fair Lawn (1960): A judge may not 
   assume the role of advocate (lawyer) in the trial over which he presides. The 
   power of a judge to take an active role in the trial of a case must be exercised w/ 
   the greatest restraint. A judge may take an active role to move a trial along.
   Courts must be impartial, and give the appearance of so being. A judge should not 
   prejudice a case.
   → Notes:
(a) A trial judge can call witnesses in civil cases “under limited circumstances.”

(b) If the judge is a zealous participant in the trial, this could diminish the “moral force of the judgment”
   (i) Plus, judges make mistakes when they get overly involved
       1. Judge must give parties affected by new issues full and fair opportunity to meet those issues

(c) The amicus serves as a proxy for the judge and others

c) Fuller:
   i) The moral force of a judgment or decision will be at a maximum when the following conditions are satisfied:
      (1) The judge does not act on his own initiative, but on the application of one or both of the disputants.
      (2) The judge has no direct or indirect interest (even emotional) in the outcome of a case.
      (3) The judge confines his decision to the controversy before him and attempts no regulation of the parties’ relations going beyond that controversy.
      (4) The case presented to the judge involves an existing controversy, and not merely the prospect of some future disagreement.
      (5) The judge decides the case solely on the basis of the evidence and arguments presented to him by the parties.
      (6) Each disputant is given ample opportunity to present his case.
   ii) Some of this moral force may wisely be sacrificed when other considerations dictate a departure from the conditions enumerated

d) Kothe v. Smith (1985): A court may not sanction a party for refusing to settle. Although the law favors voluntary settlement, judges may not coerce such settlements. Judges DO have the power to bring parties together to discuss settlement – under Rule 16, a judge can “require a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.”

  ➔ Notes:
  o Rule 16-c(9)
  o Rule 16(f): authorizes sanctions if a party is unprepared or fails to participate in good faith
  o Role of insurance companies: judge in this case wanted to get the attention of the insurance company. Insurers may play a critical role in controlling settlements. Yet, there is some doubt about whether courts can require their participation in settlement conferences.
  o Settlement amount: an amount both parties will accept, or try to identify a figure that is “right”? And, how do you know what figure is “right”?
“Since settlement is the outcome of more litigated cases than judicial resolution, you should have the question of the relation b/w formal litigation and settlement in the back of your mind throughout the course.”

**Settlements:**
- **Pros:**
  - Allows more cases to go through the court system
  - Act as benchmarks
- **Cons:**
  - Not the same sense of vindication for the parties.
  - No rule established
    - Can be confidential: nobody will know what the case settled for; people don’t know what their rights cost (but remember, Bracey said nothing is really confidential → could get this info from other lawyers and then you’d know what to settle for or not to settle for)

Court recognizes a gap b/w substantive rights and the outcome of litigation (being in the right is not always sufficient to receive your due in the legal system: raises questions about the meaning of the legal process)
- Need to think about how confident you are in your ability to persuade others of the truth (not just whether you are right)
- Going through litigation forces people to contemplate settlement → more information is revealed; more pressure from judges, etc.
2) **Stakes of Litigation**

a) **Damages**

i) *Carey v. Piphus:* In an action based on denial of procedural due process, only nominal damages may be awarded in the absence of actual inquiry. *In the event that P does not put on evidence of injury due to denial of due process, in most situations he will be awarded only nominal damages, but no compensatory damages.*

(1) The basic purpose of §1983 is to compensate individuals for injuries caused by the deprivation of constitutional rights. Just as tort law requires injury for compensation to be merited, so does §1983. Denial of due process cannot be assumed in itself to be an injury. Many will suffer no distress when such denial leads to no injury, and in such cases, compensation would be inappropriate. It is the injury caused by the deprivation, not the deprivation itself that is compensable. Here there was no evidence on the issue of injury put forth, so actual damages would be inappropriate.

(2) Procedural due process: Constitutional mandate that if the state or federal government acts so as to deny a citizen of a life, liberty or property interest, the individual is first entitled to notice and the right to be heard.

(3) The nature of the procedural violation here:

   (a) Lost accuracy of the outcome
   (b) Lost feeling that the government has dealt with you fairly

(4) Is due process a right w/o a remedy? What value is procedural due process in and of itself? Do we care so little about this constitutional right that if you can’t attach something to it, it’s not worth anything?

   (a) No – even if compensatory damages are nominal, something can be had – may get attorneys’ fees.
   (b) What about the dignitary interests at stake? Can recover for emotional distress if you can prove it.

(5) Preliminary injunction: issued only after notice (and opportunity to be heard) to the adverse party and can last indefinitely.

   (a) Should only be granted when:

      (i) P has shown a strong likelihood of success on the merits
      (ii) Irreparable harm will result if preliminary relief is denied
      (iii) The balance of the hardships favors the P
      (iv) Issuing the injunction will advance the public interest

(6) Temporary restraining order: can be granted w/o notice and cannot remain in effect for more than 10 days.

(7) Punitive damages: measured by the outrageousness of D’s conduct and D’s wealth (so that the award is large enough to prompt a change in behavior). There are due process limits on punitive damages. Compensatory damages for emotional distress also contain the punitive element. Sometimes a windfall punitive damages award will be awarded only partially (this is by state statute).
(8) Money damages are hard to enforce b/c a money judgment is not an order to D, it is an adjudication of his rights or inabilitys. No one can be held in contempt of court for failing to pay some debt as adjudicated by the law court. See pages 82-84.

b) **Equitable Remedies and Contempt**

i) *Smith v. Western Electric Co.* (1982): An employee may seek an injunction mandating that he be provided with a safer workplace. *It is well established that, where monetary damages would prove inadequate, an individual may seek an injunction enforcing some right he claims has been violated.* An employee contending that his workplace is unsafe has, as a legal remedy, the option to wait until an injury occurs and then sue for damages – but this is unreasonable. As a result, an action to compel a safe environment through injunction is appropriate.

(1) **Criteria for granting a preliminary injunction:**

   (a) Strong likelihood of success on the merits
   
   (b) Likelihood of irreparable harm
   
   (c) Balance of hardships
   
   (d) Advancing public interests

(2) **TRO’s:** unlike Preliminary Injunction, both sides don’t have to have notice and can only last ten days (Preliminary injunctions can turn into permanent injunctions)

ii) *Walker v. City of Birmingham* (1967): **Facts:** B’ham officials received temporary injunction of petitioners from participating in parade demonstrations without a permit. Petitioners had made a request for permits but were denied. Petitioners violated the injunction and paraded. The parade resulted in violence. Motion to dismiss the injunction was filed AFTER the parade. Petitioners were found in contempt of court. *In the fair administration of justice, no man can be the judge of his own case. Challenging the order should be done by motion to dissolve the injunction before violation of the injunction. (Validity of the underlying merits should be challenged at another proceeding.)*

iii) **MLK’s Letter from a Birmingham City Jail:** “[If a judge articulates an unjust law, I don’t have to follow it.]”

c) **Costs of Litigation**

i) *Venegas v. Mitchell* (1990): **The plaintiff in a civil rights action may enter into a contingency-fee agreement with his attorney, even where such a fee exceeds subsequent court-awarded attorney fees.**
(1) “The American Rule” – American courts don’t make the loser pay the
winner’s attorney’s fees – this is the requirement that each party bear its
own attorney’s fees.
(a) Cons:
   (i) Compensation rational: A damage recovery depleted by attorney’s
       fees seems incomplete
   (ii) Allowing the winner to recover fees would seem likely to deter the
       assertion of groundless claims and defenses
(b) Pros:
   (i) If the parties have to pay their own attorney’s fees, it makes sense
       for them to be frugal – an indemnity principle tends to erode
       resistance to costs
(c) Exceptions: Various. E.g. Parties may be contract provide that in the
   event of a dispute the prevailing party is entitled to recover attorney’s
   fees. Also, the “private attorney general” concept: CA, a statute
   provides that attorney’s fees can be awarded to a party whose action
   has resulted in the enforcement of an important right affective the
   public interest.”
(2) Fee-shifting statutes –
   (a) These statutes authorize the award of a “reasonable” fee
   (b) Lodestar method: multiply the hours worked by the lawyer times the
       lawyer’s hourly rate
       (i) Court may disallow hours that were spent on unsuccessful claims
           or inefficiently used
       (ii) If the attorney doesn’t have a customary rate, the court may look to
           comparable lawyers
       (iii) An increasing number of courts in “common fund” class action
            situations have rejected the lodestar method and use the percentage
            method. This is because the lodestar method forced the court to
            review attorney billing info, lessened attorney’s motivation to
            settle early, and penalizes expedient success.
   (c) Percentage method:
       (i) Typically 25-35%, reduced if the amount of recovery is very large
       (ii) Uniquely American
       (iii) Common in personal injury claims
       (iv) Make it possible for a P who can’t afford to pay a lawyer by the
           hour to obtain representation
       (v) May result in “excessive” compensation for the attorney
   d) Note: Justiciability
      i) Requirement under Federal Law that a case be definite and concrete, that the
         parties have real and adverse legal interests, and the dispute itself is admitting
         of specific legal relief through a decree of conclusive character
   (1) Ripeness: controversy has already erupted; the legal issue is in a concrete
       context
(a) **Imminence** is necessary:
   (i) Society should not be reactionary but should wait for the harm to have occurred
   (ii) Waiting for full-blown injury means you don’t have to engage in a worst case scenario prediction
(b) **Standing**: whether or not P has demonstrated that he or she is among the injured
(c) **Mootness**: must have standing which continues for the duration of the lawsuit
(d) **No feigned or collusive cases**: P must actually desire to assert interest; no test/hypothetical cases
3) **Pleading**

a) **Historical Evolution of Pleading**

i) History of Pleading – see pages 121-126 for a general overview

ii) *Gillespie v. Goodyear Service Stores* (1963): *Facts must be alleged in P’s complaint. Pleadings which contain only conclusions of law cannot state a proper cause of action.* There can be no recovery except on the case made by the pleadings. When there are no facts, there is no factual basis to which the court can apply the law.

1. A complaint must be fatally defective before it will be rejected as insufficient – If in any portion of it or to any extent it presents *facts* sufficient to constitute a cause of action, the pleading will stand. But remember, the complaint is meant to allege legal conclusions, not JUST facts.

   (a) **Complaint includes:**
   
   i) What occurred
   ii) When it occurred
   iii) Where it occurred
   iv) Who did what
   v) Relationship b/w P and D or D’s inter se

2. General purposes for pleading requirements:
   
   a) Notice to D
   b) Notice to the Court
   c) Deciding the merits – legal analysis may sometimes show that P has no right to relief against D, permitting the termination of the suit at an early stage
   
   i) Court will ask whether the P has adequately pled the elements of the claim, which are defined by substantive law.

3. Even if the complaint is deficient, courts will usually grant the P an opportunity to file an amended complaint before dismissing the suit = leave to amend. In federal court, it is sometimes said that courts MUST provide a chance to replead. However, it is proper to deny leave to amend if the amendment would be futile because it would be subject to dismissal.

4. Doctrine of incorporation by reference: e.g. when a P’s claim about insurance coverage is based on the contents of a coverage plan, the court may treat such a document as part of the complaint.

b) **Articulating a Claim**

i) **Rule 7: Pleadings Allowed; Form of Motions**

ii) **Rule 8: General Rules of Pleading**

iii) **Rule 12: Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on the Pleadings**

   (1) a: When Presented
(2) b: How Presented
   (a) Lack of jurisdiction over the subject matter
   (b) Lack of jurisdiction over the person
   (c) Improper venue
   (d) Insufficiency of process
   (e) Insufficiency of service of process
   (f) **Failure to state a claim**
      (i) D move’s to dismiss P’s complaint on the ground that it fails to state a claim that entitles P to any form of relief
         - Basically, saying that the “wrong” the P describes in its complaint is not recognized as a violation of any legal rights
         - If that’s true, the court wouldn’t be able to grant damages or any other relief to P even if he proved all the facts alleged
      (ii) Purpose: test whether P’s allegations (assuming they can be proved) state a claim for which a court might grant relief
         - Only question to ask: “does the complaint itself state a LEGALLY SUFFICIENT claim?”
         - The court does NOT consider any other pleadings or evidence in deciding the motion.
         - The court does NOT consider or determine whether the facts alleged in the complaint are true
      (iii) This is a drastic measure → P will never have the opportunity to go to the jury or get evidence through discovery that might demonstrate he has suffered a legally cognizable injury
         - So, COURTS GIVE P THE BENEFIT OF THE DOUBT HERE
         - Note: in considering the motion, the pleadings must be liberally construed in favor of sustaining the complaint: if the allegations in the complaint are susceptible of two constructions, one of which would support relief while the other will not, the Court should not grant the 12(b)(6)
         - Note: Before the complaint is dismissed, the court will ordinarily give the P at least one opportunity to amend to cure defects in the original complaint (see E&E, page 391).
   (g) Failure to join a party under rule 19

(3) c: Motion for Judgment on the Pleadings
(4) d: Preliminary Hearings
(5) e: Motion for a More Definite Statement
(6) f: Motion to Strike

iv) Describing and Testing Plaintiff’s Claim
   (1) “Liberal ethos” – preferred disposition of cases is on the merits, by jury trial, after full disclosure through discovery – installed by the procedural rules
      (a) A central ingredient to this shift = generalized pleading
(2) “notice pleading” – idea that the Federal Rules just restrict the pleadings to the task of general notice-giving – resisted by some federal courts
(3) Generally, probably incorrect to characterize the adoption of notice pleading as the signal that wholly unsupported, conclusory factual allegations would render a pleading sufficient to withstand a MD.

e) Specificity

i) Rule 12

ii) United States v. Board of Harbor Commissioners (1977): A complaint need not allege the specifics of the transaction of which complaint is made. (It is improper to use a Rule 12(e) motion to obtain admissions from a claimant in the hopes of clearing the way for a later Rule 12(b)(6) MD for failure to state a claim.
(1) We don’t require P’s to tell more because at this point in the litigation process, the emphasis is on procedure.
(2) In practice, can get a 12e every time – the denial of 12e in this case is exceptional.

iii) Mitchell v. Archibald and Kendall (1978): Facts: P shot sitting in his truck after being directed to park the truck across the street from the D’s loading dock. P alleges the loading dock was an extension to D’s premises. Where P refuses to file a Rule 15 motion to amend the complaint and instead elects to stand on a flawed original complaint, he has relinquished any alternative legal theory on appeal.
(1) The court will not supply P with the alternative legal theory. He must supply it himself.
(2) The sufficiency of a complaint rests on the sufficiency of some legal theory: P’s duty to supply a legal theory.
(3) Pleading specifically: If attorney is working on contingent fee basis; he will know sooner rather than later whether legal theory will be tossed
(4) Pleading generally: Force the other side to do more research and delay the case
(5) Remember, litigation is organic: you don’t know all the details or what the winning argument is up front!

iv) Rule 9: Heightened Requirements for Specificity
(1) Rule 8 sets out the general rules; Rule 9 creates exceptions
(2) Rule 9(b): “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.”
(3) Rule 9 encourages:
   (a) Innovation and investment in innovation, absent some sort of check
(b) Lawsuits hurt investors in corporations
(c) Reputation interests

(4) Rule 9 tries to limit:
(a) In terrorem value of lawsuits; the court wants to throw out frivolous lawsuits; e.g. it doesn’t like the idea of shareholders being able to cripple companies

d) Consistency and Honesty in Pleading

i) Rule 11: Signing of Pleadings, Motions, and other Papers; Representations to Court; Sanctions
(1) Purpose: provide sanctions for litigants and attorneys who attempt to thwart the goals of the Rules of Civ Pro
(2) 1993 Amendment:
(a) Purpose: reduce the large number of motions for sanctions presented under the old Rule
(b) Factual contentions in initial pleadings which fail to be sustained by info obtained through discovery may not, under the new Rule, continue to be advocated.
(c) Two provisions to limit the volume of motions for sanctions:
(i) Safe Harbor Provision: Motions for sanctions under the rule will be served but not filed with the court unless the attorney fails to withdraw or appropriately correct the challenged document/contention – can voluntarily avoid sanctions
(ii) Sanctions are no longer mandatory

ii) McCormick v. Kopmann (1959): Where P does not know which of the inconsistent averments is true and which is false, a complaint may contain inconsistent allegations, even though the proof of one negates any fault on the basis of the other.

(1) Sound policy weighs in favor of alternative pleading so that controversies may be sealed and complete justice may be accomplished in a single action. We allow for inconsistent pleading if P doesn’t know in advance of trial which of the averments is true. Otherwise, we would force P into an election of theories for recovery, which is not the aim of the pleading laws.
(a) This is nearly a universally permitted procedure in pleading. Since the trial portion of litigation is meant to be a fact-determining event, it would not be logical to require a P to choose which set of facts is “true” before trial when different possibilities exist.

(2) Benefits:
(a) Efficiency in use of judicial resources – saves the court the effort/time/expense of trying the same case twice
(b) Put pressure on the D’s to resolve the issue among themselves – D’s may help create the case
(c) Likely that one of the D’s will be held liable – lawyer would set it up so that one of the two is guilty – jury can’t split the liability unless it’s a comparative fault state.
(d) We want the outcome of the trial to be the same as the truth – joinder of D’s makes this possibility much higher – by combining the suits, we only get one outcome – and, it’s more likely to match the truth. Less chance that two courts will come up with competing versions of the truth.

(3) Note: Contradictory pleadings are forbidden if P knows that one is false, but also note that it’s very difficult to tell whether P knows that one of the claims is false.

iii) **Zuk v. Eastern Pennsylvania Psychiatric Institute of the Medical College of Pennsylvania** (1996): Sanctions may be imposed upon an attorney pursuant to 28 U.S.C.A. §1927 where the attorney multiplies the proceedings unreasonably and vexatiously in willful bad faith. When imposing sanctions under Rule 11, the Court must take into account both P’s and his attorney’s investigations into both fact and law, and should consider a wide range of possible sanctions to offer minimum punishment.

(1) **Purpose:** to deter intentional and unnecessary delay.
(2) Here, the court imposed sanctions for failure to a make a reasonably adequate inquiry into the facts and law before bringing suit.
(3) 1983 Amendment to FRCP 11 deleted the willfulness requirement and imposed a duty on counsel to reasonably inquire as to both the facts and law.
(4) Notes:
   (a) Have to be careful w/ Rule 11 – it’s a kick when the other side is down – you only really file it when you already think that the other side is losing. Don’t the other side to file a Rule 11 about your Rule 11.
   (b) Counsel is the one on the hook – he’s the one who signed the documents, saying that there had been adequate factual and legal inquiry.
   (c) This is not a bright line standard – it requires some discretion on the part of the judge.
   (d) Novice lawyer are hurt by this system. The big guy wins.

e) **Scrutinizing the Legal Sufficiency of Plaintiff’s Claim**
i) *Mitchell v. Archibald & Kendall:* A complaint failing to include facts constituting a cause of action may be dismissed under FRCP 12(b)(6). P in this case appealed before the dismissal became final, thereby destroying any right to file an amended complaint by electing to stand on the original deficient complaint.

(1) Notes:

(a) FRCP: pleadings are to be liberally construed. This case may represent an unduly narrow reading of the pleading requirements.

(b) The legal sufficiency of a complaint must be assessed with reference to some legal theory, and it is P’s duty to supply that legal theory. (In this case, it was torts based.)

(c) General vs. Specific Pleading:

(i) General: if you don’t want the case dismissed right away, good for if you think new facts will develop and allow you to proceed under a new or different theory of liability.

1. Keeps you in the game longer.

2. Best to go w/ general pleading on the whole.

3. Problems:

   a. A lot for the defense to reply to — difficult to narrow it down to specific issues.

f) **Heightened Requirements of Specificity**

   i) Rule 9: Pleading Special Matters

   ii) *Ross v. A.H. Robbins Company:* A complaint alleging fraud must contain specific evidentiary factual allegations. Rather than adhere to the usual rule that complaints need only allege ultimate facts, Rule 9b requires detailed evidentiary pleading w/ respect to fraud.

(1) **Purpose:** fraud allegations accuse a D of serious moral turpitude, and a D is entitled to know specifically that of which he is accused.

(2) An argument can be made that FRCP 9b is superfluous — the specific facts upon which a fraud action are predicated can always be ascertained via discovery. The rebuttal to this argument would appear to be that a D should not have to submit to discovery on a merit less fraud claim.

(3) **Reasons for special pleading requirements** for cases involving fraud and mistake:

   a. Notice: these cases may involve more complicated transactions and numerous parties so that more detail could be important in providing notice.

   b. Injury to reputation: Fraud may be especially injurious to reputation

   c. Limiting the “in terrorem” value of suit
(4) Consider whether specificity can really help the court make an accurate assessment of the validity of a claim.

(5) Is there an advantage to D? Could the insistence on detail undermine the substantive law by impeding prosecution of meritorious claims? 
(a) If the case is based on speculation, P may be unable to allege sufficient facts to sustain the complaint.

(6) Even if the complaint is sufficient, it necessarily narrows the range of facts that the P will be allowed to discover and to prove at trial – could keep out vital facts on the ground that they were not pleaded and therefore not relevant.

(7) This ruling was inconsistent w/ Rule 9, which says that knowledge needs only to be pled generally.

(8) Rule 7(a): A court may order a reply to an answer; the court can then require greater specificity in the answer

iii) Cash Energy, Inc. v. Weiner (1991): Despite the wording of Rule 8(a), in regards to pleading, particularity in pleading which involves an outline or summary of facts, is necessary in today’s courtroom. A higher standard of particularity of pleading will be required where a heightened concern for due process arises by reason of the drastic nature of the remedies sought. A tension exists b/w the short and plain statement of the facts prescribed in Rule 8a and Rule 9b’s exception for allegations of fraud and mistake, requirement more than statements of mere conclusion.

(1) The cost of establishing that a claim lacks merit is more likely to be subject to reasonable controls if some standard of specificity in pleading is enforced.

(2) The trend toward the requirement of higher standards of particularity has accelerated in recent years due to the rising costs of litigation and the caseload crisis in the federal courts.

(3) Rule 8(a)(2): “a pleading which sets forth a claim for relief shall contain a short and plain statement of the claim showing that the pleader is entitled to relief.”

(4) Rule 8(f): “All pleadings shall be so construed as to do substantial justice.” → require some judicial discretion
iv) **Swierkiewicz v. Sorema, NA:** An employment discrimination complaint need not contain specific facts establishing a prima facie case. Instead, it must only contain a “short and plain statement of the claim showing that the pleader is entitled to relief” as required by FRCP 8a2. The prima facie case is an evidentiary standard, not a pleading requirement. Given the FRCP simplified standard for pleading, a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent w/ the allegations.

(1) This case continues the trend of repudiating heightened pleading requirements in all types of federal cases.
(2) The standard is higher for proof requirements, like the PFC, than for pleading requirements.
(3) This case conflicts with *Cash Energy*, which requires a heightened standard of pleading in discrimination cases (this is also a discrimination case).
(4) Justice Thomas says that judges can expand the requirements of rule 8a2 based on the specific D.
   (a) Where rule 9 contains an exception to the general rule, all other exceptions are presumed not to exist.
   (b) No other heightened specificity required at all.

**g) The Future of Pleading Practice**

i) Marcus Excerpt:
   (1) 2 Models of Litigation:
      (a) Dispute Resolution – mistrusts judicial resolution. Settlement is usually the avenue that allows a more just result than trial.
      (b) Public Interest – any resolution of a lawsuit except by judicial decision represents a failure of the judicial system.
   (2) Core Problem: Are pleadings decisions or settlements better?
   (3) The settlement model breaks down when the D’s payment to P is based mainly on factors other than the substantive merits of the suit.
   (4) Debate about the extent to which nuisance settlements are in fact extracted.
   (5) More flexible use of summary judgment, in tandem with case management, seems the most promising course.

**h) Defendant’s Pre-Answer Motions**

i) **Rule 12(g):** Consolidation of Defenses in Motion
   (1) If a party makes a pre-answer motion, but omits one of the Rule 12 defenses then available, it cannot make any further pre-answer motions.

ii) **Rule 12(h):** Waiver or Preservation of Certain Defenses (sets up the timing for certain defenses)
   (1) Four Disfavored Defenses:
(a) Lack of Personal Jurisdiction
(b) Improper Venue
(c) Insufficiency of Process
(d) Insufficiency of Service of Process
   (i) These will be waived FOREVER if omitted from a pre-answer motion or, if no motion is made, from the answer

(2) Three Favored Defenses:
   (a) Failure to State a Claim
   (b) Failure to Join an Indispensable Party
   (c) Failure to state a Legal Defense to a Claim
      (i) These can be made in any pleading, or by motion for judgment on the pleadings, or at trial on the merits

(3) Most Favored Defense:
   (a) Lack of Subject Matter Jurisdiction
      (i) Can be made at ANY time before final judgment is entered
         1. WhPurpose of 12(g) and 12(h): prevent the pleader from using multiple pre-answer motions for different defenses and from omitting certain defenses from motions or answers.

   iii) Pre-Answer Motions Under Rule 12:
   (1) Seven defenses set out under Rule 12(b), except for failure to state a claim, are all procedural defenses
       (a) Lack of Subject Matter Jurisdiction
       (b) Lack of Personal Jurisdiction
       (c) Improper Venue
       (d) Improper Service of Process
       (e) Failure to Join a Necessary Party
   (2) The filing of a pre-answer motion under Rule 12 affects the time periods for filing responsive pleadings.
       (a) If Pre-Answer Motion filed w/in 20 days following service of the summons and complaint, the deadline for filing an Answer is extended.
       (b) If the Court DENIES the motion, or POSTPONES its disposition, the D has until 10 days after the notice of the Court’s action to file an Answer.
       (c) If the Court GRANTS the motion, P will usually be granted leave to amend (which restarts the process), or the suit will be dismissed.
          (i) BUT, if a Motion for a More Definite Statement is granted, D has until 10 days after service of an amended complaint to file its answer.

i) Defendant’s Default Judgment

   i) Rule 55: Default Judgment → D fails to answer the complaint; forecloses litigation about D’s liability, but leaves open the question of how much liability
ii) Shepard Claims Service, Inc. v. William Darrah & Associates (1986): Where a P will not be prejudiced and a meritorious defense is shown, a default should be set aside if it was the result of mere negligence. Where there is no evidence of culpable conduct on behalf of the D, the court leans on the side of leniency in assessing whether to grant a default judgment.

(1) Under Rule 55, a default entry may be set aside for “good cause”
   (a) Test for deciding whether there is “good cause”:
      (i) Will P be prejudiced?
         1. Specific connotation – we’re talking about preparation prejudice. Has the delay by D caused P to do something different w/ respect to its case? Have some of the witnesses disappeared, etc.?
      (ii) Does D have a meritorious defense?
         1. Fairly lenient standard – just look at the answer to see whether it adds up.
      (iii) Did culpable conduct of D lead to the default?
         1. Culpable conduct is something worse than mere negligence.
         2. A willful disregard for the rules of civil procedure has generally been required to conduct to be considered culpable.
         → Thus, if parts i and ii are answered in favor of D, and the D is only guilty of negligence, it is an abuse of discretion not to set aside a default entry (this was the case here).
   (b) The terms for setting side default judgments are more stringent than for a mere entry of default. This is due to the judicial policy favoring the finality of judgments. The reason that it’s relatively easy to set aside an entry of default is because policy favors trials on the merits.

j) Defendant’s Answer
   i) Admitting or Denying the Averrments:
      (1) David v. Crompton & Knowles Corp (1983): A denial based on lack of information will be deemed an admission if the facts relevant to the issue are within the denying party’s knowledge and control.
      (a) Normally, a denial on lack of information will be deemed the same as a denial.
      (b) Some states permit D’s to generally deny all allegations on a P’s complaint. This is not the case under the FRCP. Thus, each paragraph must be separately denied, admitted, or denied on lack of information.
      (c) A bad faith denial can lead to subsequent sanctions.
      (d) This is a very rare case.
      (e) You should always be in denial mode – admit only the things that you can’t possibly deny.
      (f) When D admits an allegation of the complaint, that allegation is taken as true for purposes of the litigation whether or not it is accurate in fact.
(g) This case indicates that pleading lack of knowledge may be taken as an admission when the matter is one as to which D has knowledge or info.

(h) A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

(i) If, after further investigation or discovery, a denial is no longer warranted, the D should not continue to insist on the denial. Note: DO YOU AMEND AT THIS POINT?

(j) Some courts have said that the existence of a poorly drawn complaint gives D no excuse unless D has objected to the complaint under Rule 12.

(k) D generally may not excuse defects in the answer by relying on defects in the complaint.

(l) Negative pregnant: old rule of construction under common-law pleading practice – e.g. “Crompton denies that it designed, manufactured and sold a shredding machine to P.” B/c of the conjunction AND, this negative is “pregnant w/ admission.” Courts might find this tactic misleading and treat it as ineffective.

k) Defendant’s Affirmative Defenses

   i) Gomez v. Toledo (1980): “Since qualified immunity is a defense, the burden of pleading it rests w/ D.” The person who is in the best position to know the facts bears the burden of pleading them.

   (1) Policy:
   (a) Avoid fishing expeditions
   (b) Fairness (does it seem right to impose the burden of pleading AD’s on D?)
   (c) Probability (in the normal lawsuit, what is typically pled?)
   (d) If D does not assert AD’s, they are waived Æ may be added in an amended answer

   (2) The explicitly listed AD’s (19) have to plead separately under Rule 8(c)

   (3) For purposes of this class, you can always amend if justice requires – this includes omitted AD’s

   (4) It’s not always easy to tell whether a matter is an AD that must be pleaded by the responding party, or simply relates to an element of the claim. Statutory language can sometimes determine who has pleading responsibility – this was the case in Gomez.

   (5) Concerns affecting burden allocation:
   (a) Policy – encourage or discourage litigation
   (b) Fairness – one party may have all the evidence, so it would be fair for him to bear the burden (but, don’t over generalize on this point)
(c) Probability – (nonstatistical) – judicial estimate of the probabilities of the situation, with the burden being put on the party who will be benefited by a departure from the supposed norm.
   (i) May relate to the type of situation out of which the litigation arises
   (ii) May relate to the type of litigation itself

(6) Burden of proving an AD at trial usually follows the burden of pleading, but this result does not always follow

(7) Effect of failure to plead an AD: If an AD is not pleaded, the issue is not in the case, and evidence relating to it is not admissible at trial (unless such evidence is independently relevant to an essential element of the case)

(8) Note: Because there usually need not be a reply to an answer even if it contains AD’s, the allegations supporting them are taken as denied by the opposing party. Assumption: Opposing party denies the AD allegations.

(9) If an AD is not pleaded, the D may not rely upon it. But, this isn’t the same as Rule 12(h)(1) waiver, which is designed to force parties to raise certain kinds of objections early or lose them.

(10) An amendment to add an omitted AD would be governed by Rule 15(a), which states that leave to amend “shall be freely granted when justice so requires.”

(11) From the perspective of D, a Rule 12(c) motion for a judgment on the pleadings is essentially the same as a Rule 12(b)(6) motion to dismiss.

1) Defendant’s Counterclaims

   i) Rule 13: Counterclaim and Cross-Claim

   ii) Wigglesworth v. Teamsters Local Union No. 592 (1975): A party sued for violation of federal labor laws may not raise defamation as a compulsory counterclaim. Where the same evidence cannot support or refute the opposing claims, the counterclaim is permissive; not compulsory.

   (1) Rule 13 makes a counterclaim compulsory if it arises out of the transaction or occurrence forming the basis of the complaint.
   (2) A counterclaim not having a basis for federal subject matter jurisdiction may nonetheless be adjudicated in federal court.
   (3) Whether a counterclaim arises out of the same transaction depends mainly upon their logical relationship. (Here, the two separate events complained of are distinct, separated by both time and distance. One was in reaction to the other, but this isn’t enough → they can’t be considered the same transaction.)
   (4) The counterclaim in this case was dismissed because there was no independent basis for federal jurisdiction.
   (5) There are two basic types of counterclaims:
(a) Compulsory – must be brought at the time of the answer, or it is waived; does not require independent federal subject matter jurisdiction
(b) Permissive – does not need to be brought at the time of the answer; requires independent federal subject matter jurisdiction

(6) **Tests**
(a) used - “Same Evidence Standard” – Would the same evidence support or refute the opposing claims? If yes, then the counterclaims are compulsory. If no, they are permissive.”
(b) This court refuses to apply the more liberal test for compulsoriness: There doesn’t have to be “an absolute identity of factual backgrounds for the two claims, only a logical relationship b/w them”… “transaction is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.”
(c) Four tests in general:
   (i) Are the issues of fact and law raised by the claim and counterclaim largely the same?
   (ii) Would res judicata bar a subsequent suit on D’s claim absent the compulsory counterclaim rule?
   (iii) Will substantially the same evidence support or refute P’s claim as well as D’s counterclaim?
   (iv) Is there any logical relation b/w the claim and the counterclaim?

(7) Situations dealing with the general question of “how many events can be grouped together as part of a common transaction”:
(a) Compulsory counterclaims (Rule 13(a))
(b) Relation back of amendments (Rule 15(c))
(c) Permissive joinder of parties (Rule 20)
(d) Supplemental jurisdiction
(e) Res Judicata

**m) Voluntary Dismissal**

i) **Rule 41:** Dismissal of Actions
   (1) Limits circumstances where P can dismiss her own lawsuit
      (a) 41(a): Voluntary dismissal
          (i) Allowed before answer or MSJ
          (ii) Must be signed by all parties or court order
      (b) 41(b): Involuntary dismissal

   ii) **D.C. Electronics, Inc. v. Nartron Corp.** (1975): Rule 41(a)(1)(i) is clear and unambiguous on its face and admits of no exceptions that call for the exercise of judicial discrimination by any court. *The court’s decision on a TRO has no impact on a motion for voluntary dismissal.*

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(1) Court rejected the policy argument that if a P could always dismiss so long as an answer or motion for summary judgment had not been filed, the D would be rendered ‘defenseless against the whim and caprice of the P.’ This Court says that D could protect itself by merely filing an answer or motion for summary judgment.

(2) Once a P has filed a notice of dismissal, it may NOT unilaterally withdraw or amend the notice. BUT, it may move to vacate it under rule 60(b) for mistake, surprise, inadvertence or excusable neglect, or on a showing of good cause.

(3) Once D’s Answer or MSJ has been filed, P can dismiss only upon stipulation of all the parties or by order of court upon such terms and conditions as it deems proper. Courts usually allow dismissal without imposing conditions unless the D has suffered prejudice.

(a) Note: the mere prospect of having to defend against suit in another form is not prejudice.

(4) A P may want a voluntary dismissal to attempt to avoid Rule 11 sanctions. The 1993 amendments to Rule 11 preclude sanctions if the complaint is dismissed w/in 21 days after service of a motion for sanctions.

n) Amendment of Pleadings

i) Rule 15(a): Amendments

ii) Rule 15 (b): Amendments to Conform to the Evidence

iii) David v. Crompton Knowles Corp. (1973): If a party waits a lengthy period of time b/w discovery of facts making an amendment appropriate and moving to amend, the motion may be denied. Where P would suffer prejudice from an amended complaint, including a barring from instituting an action against another party, and the P has been lead to believe the D’s pleadings, an amended complaint will not be granted.

(1) Generally speaking, the law favors liberality of amendment.

(2) However, when such amendment will prejudice the opposing party, leave to amend will be denied.

(a) Where a lengthy period of time has passed, it is common for prejudice to exist.

(i) For instance, loss of evidence or running of the statute of limitations.

(ii) In this case, the statute of limitations had run on P’s claim, and D had access to the contract since its execution. Thus, D cannot say it is relying on newly discovered information. As a result, to permit the denial would reward D for lack of diligence, which would prejudice P.

(3) Review of decisions whether to allow amendments is governed by an abuse of discretion standard; an appellate court will only reverse if the
TC’s decision is outside the bounds of reasonable decisions. This standard lends itself to decisions tailored to the unique facts of a given case. May also reward good lawyering b/c judge’s reaction depends on counsel’s ability to emphasize certain facts and make others seem unimportant.

iv) **Amendments at trial:**

1. **Rule 15b** – automatic amendment of the pleadings when issues not raised by the pleadings are tried by express or implied consent of the parties. (Implied consent: if the other party does not object to your bringing up the issue, then it has effectively waived its right to do so and the issue can be automatically amended into the pleadings) → this is a very liberal policy
   
   a. So, once evidence is admitted w/o objection as to a claim not pleaded in the complaint, that claim will be treated as though it were raised in the complaint.
   
   b. Amendment of the pleadings may be made to conform them to the evidence, but “failure so to amend does not affect the result of the trial of these issues”
   
   c. Even if the opposing party objects, the court should allow amendments “freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining its action or defense.”
   
   d. Reality: courts become more restrictive about amendments as the trial date draws near, at least where the proposed change may disrupt preparation for, or conduct of, the trial.
   
   e. Supplemental pleadings: for after occurring transactions, occurrences and events – have been interpreted as intended to be in aid of the claim already made and not to allege a new claim.

v) **Swartz v. Gold Dust Casino, Inc.** (1981): *When a newly added D has been aware of litigation, the statute of limitations may not apply to him.*

1. Under Rule 15c, an amendment adding a new D will relate back to the original filing date if:
   
   a. The new D’s potential liability arises out of the same transaction as that of which the complaint is originally made, AND
   
   b. The new D was aware of the original litigation before the limitations period ran, (formal notice is not necessary – real notice of any kind will suffice) AND
   
   c. The new D knew or should have known that he was a proper D.
      
      i. When these conditions are met, the statute of limitations will not bar the addition of a new D.
   
2. This is a liberal view of relation back – recently there is some increased strictness.

3. This case is complicated b/c the statute of limitations had already run – see class notes.
4) Establishing the Structure and Size of the Dispute

a) Joinder of Claims

i) Rule 18(a): Joinder of Claims
   (1) A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.

ii) Note:
   (1) Rule 18(a) is completely permissive as to joinder of claims against the same party in a single suit.
      (a) The claims need not even be related
      (i) Theory: there is no point in requiring multiple law suits once parties are in court against each other.
      (b) Doesn’t mean that unrelated claims will be tried together in the same suit. It’s only a pleading rule. A court may sever the unrelated claims and order separate trials when it would be “in furtherance of convenience or to avoid prejudice, or when separate trials would be conducive to expedition and economy” (Rule 42(b)).

b) Permissive Joinder of Parties

i) Rule 20: Permissive Joinder of Parties
   (1) Initial joinder of parties
   (2) P’s are allowed to join if:
      (a) Same transaction or occurrence
      (b) Their claims against D involve a common question of law or fact
   (3) P’s can sue multiple D’s if the above criteria are met

ii) Kedra v. City of Philadelphia (1978): The fact that certain claims and parties relevant thereto span a lengthy period of time will not, in itself, prevent joinder.
   (1) The joinder provisions of the Federal Rules are very liberal.
      (a) The impulse is toward entertaining the broadest possible scope of action consistent w/ fairness to the parties.
      (i) As long as a claim or party is “reasonably related” to the main claim, joinder will be appropriate.
      (ii) Here, the various acts of which complaint is made span a considerable period of time, but are part of an alleged pattern = sufficient relationship for joinder.
   (2) Joinder rules often interact with jurisdictional mandates – state law claims are often joined to the claim brought in federal court, even though they could not originally have been brought there. This = pendent jurisdiction.
iii) **Insolia v. Philip Morris, Inc.** (1999): *Parties may be joined under FRCP 20 only if they involve the same transaction, series of transactions or a common question of law or fact predominates.*

1) Reasons the court lists for not joining the D’s:
   a) Jury Confusion
      i) Waste of Judicial Resources
      ii) Possible Prejudice

2) “Same Transaction or Occurrence” Standard:
   a) 13(a) (Wigglesworth): Would the matters make a convenient trial package?
   b) 15(c) (Gold Dust Casino) Was there adequate notice at the time of filing so that the D can be said to have been aware that the suit included the amended matters?
   c) 20 (Insolia) Efficiency and economy?

3) Remedy for misjoinder: Not dismissal, but drop or add parties by order of the court, or sever and proceed w/ claims separately

c) **Compulsory Joinder of Parties**

i) **Rule 19:** Joinder of Persons Needed for Just Adjudication

1) Necessary Parties: A party is “necessary” when:
   a) In the party’s absence, complete relief could not be granted.
   b) The absence of the party would impair or impede his ability to protect his interest in the controversy (absent-party oriented concern)
   c) Not joining the party would put the existing parties at risk of incurring double/multiple/inconsistent obligations
      i) Joinder of necessary parties is excused when it is impossible, impractical or involves undue complications.
         1. Joinder is infeasible when:
            a. **Joining the party would destroy diversity** (i.e. subject matter jurisdiction)
            b. **The court would not have personal jurisdiction over the party to be joined**
            c. **Venue would be improper**
      ii) A person who is not a party, unless represented by one who is a party, is not bound by a decree.

2) Indispensable Party Rule [no longer good law]: Based on the premise that the court should do complete justice, or no justice at all – if a party found to be necessary could not be joined, the suit had to be dismissed.
   a) Problem: fallacy – b/c the court doesn’t have jurisdiction over the absentee, it can’t act w/ respect to the party properly before it.
(3) NOW – Rule 19 as amended in 1966 says that those persons who are needed for just adjudication will be joined if feasible.

(a) The usual reasons that a party meeting the criteria can’t be joined:
   (i) Absentee comes f/ same state as opposing party and joinder would destroy diversity jurisdiction
   (ii) Absentee has insufficient contacts w/ the forum to permit personal jurisdiction
   (iii) Venue would be improper

(b) If a “necessary” party can’t be joined, instead of dismissing the case, analyze four factors to see whether the action can proceed anyway:
   (i) **To what extent would a judgment rendered in the person’s absence be prejudicial to the person or those already parties?**
   (ii) **Could the judge, by shaping the relief/putting protective provisions in the judgment/other measures, mitigate or avoid that prejudice?**
   (iii) **Would a judgment rendered in the person’s absence be adequate?**
   (iv) **Would the Plaintiff have an adequate remedy if the action is dismissed for non-joinder?**

(c) Rule 19 uses FUNCTIONAL and PRAGMATIC tests for determining who falls under (a) and (b).
   (i) A case-by-case analysis must often be made to determine the requirements of compulsory joinder.

   ii) *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.* (1993): *If a contract imposes joint and several liability on its co-obligors, complete relief can be granted in a suit when only one of the co-obligors has been joined as a D.*

   (1) FRCP 19 determines when joinder of a party is compulsory:
      (a) Court first determines whether a party should be joined if feasible
         (i) If yes, but joinder is not feasible b/c it would destroy diversity, the court must then determine whether the absent party is “indispensable” under Rule 19b.
            1. If the party is “indispensable”, the action cannot go forward.
      (b) Analysis of whether joinder is “feasible,” i.e., which parties are “necessary” under Rule 19(a) is a multi-step process.
         (i) First, the Court must inquire whether complete relief can be granted to the persons who are already parties to the action.
            1. There is a strong trend in favor of the principle that co-obligors on a contract are jointly and severally liable for its performance.
               a. Here, since the agreement b/w D and Underwood can’t be construed as joint and several liability, Underwood is not a necessary party under Rule 19(a)(1).
b. But, even though Underwood wasn’t a necessary part under 19(a)(1), it’s joinder was still compulsory under 19(a)(2)(i) and 19(a)(2)(ii).
   i. 19(a)(2)(i): Underwood was a necessary party b/c any decision in a federal

**d) Impleader**

i) **Rule 14:**
   
   (1) Two requirements:
      (a) Party to be joined is not already a party to the action
      (b) Party to be joined “is or may be liable” to D IF D is liable to the original P
   
   (2) Most common theories for impleader:
      (a) Third-party D has a duty to indemnify the D
      (b) Third-party D has a duty to contribute to the payment of P’s damages
   
   (3) Third-party D does NOT have to be directly liable to P, just needs to have legal liability toward D
   
   (4) Avoids time lag b/w judgments if D had to wait to file suit against the third-party
      (a) Increases the likelihood of consistent results
   
   (5) Third-party D may assert both defenses to the impleader claim AND defenses on the main action that the original D may have omitted (this protects the third-party from liability if the original D is lax AND f/ potential collusion b/w the original P and D.
   
   (6) Third-party D may assert claims against any of the other parties to the action – (as long as it arises out of the same transaction or occurrence??)
   
   (7) Other parties to the suit can assert additional claims directly against the impleaded D if those claims meet the jurisdiction requirement.
      (a) This promotes judicial economy b/c it allows the court to decide the entire dispute in a single action.
   
   (8) The decision whether to permit impleader, and the filing of any additional claims, is left to the court’s discretion.
   
   (9) Reasons the court may not allow impleader, even if the claims fall within the rule and jurisdictional requirements:
      (a) Unduly complicate the action
      (b) Improperly delay the determination of the main claim to the detriment of the original P
      (c) Confuse the jury

   ii) **Clark v. Associates Commercial Corp.** (1993): Impleader is proper only if the third-party D is or may be liable to the third-party P for all or part of the P’s claims against the third-party P.
   
   (1) A proper third-party complaint does not depend upon the existence of a duty on the parts of the third-party defendants toward the plaintiff.
(2) A third-party D need not be necessarily liable over to the third-party P in the event the third-party P is found liable toward P.

(3) Rule 14a expressly allows impleader of a person who is or may be liable to the third-party P for all or part of the P’s claim against the third-party P.

(4) The third-party claim need not be based on the same theory as the main claim.

(5) Impleader is used to resolve like questions of fact and law, but accomplishes it in one lawsuit w/o delay or inconsistent results.

e) **Interpleader**

i) The basics: **Rule 22**

(1) An equitable proceeding whereby a person holding property (the “stakeholder”), which is subject to the claims of multiple parties, may require such parties to resolve the matter through litigation.

(2) Two stages:
   
   a) Court determines if impleader is proper.
      
      i) If yes, the stakeholder is dismissed f/ the suit.
   
   b) Court determines the rights to the property.

(3) Persons served w/ fair notice and given an opportunity to litigate are bound both against the stakeholder and among themselves.

(4) The stakeholder has to show a legitimate fear of multiple vexation by adverse claimants.

(5) Limitations:

   a) Equitable restrictions (e.g. the stakeholder contributed to the development of the adverse claims)
   
   b) S.Ct. has said that an interpleader motion is in personam and that it is necessary for the court to obtain personal jurisdiction over each of the claimants

ii) **Two means of invoking interpleader:**

(1) **Rule -- 22**

(2) **Statute -- 28 U.S.C.A. §1335 (more liberal as to jurisdiction)**

(3) Similarities:

   a) Neither requires that the stakeholder be disinterested or not be subject to independent liability

   b) Under each, the stakeholder must show a threat of multiple suits (rule: “multiple liability”; statute: “multiple vexation”)

   c) Stakeholder may invoke either the rule or the statute on the basis of the possibility of future claims against the property (i.e. the stakeholder does not need to wait until claims have been filed before bringing suit)

(4) Differences:

   a) Different jurisdiction requirements:
(i) Rule 22 – like all other rules, actions utilizing it must meet the normal jurisdiction and venue requirements –
   1. More than $75K at issue – or $10K???
   2. Must be complete diversity (no claimant may share the same citizenship w/ the stakeholder)
   3. Personal jurisdiction: restricted to that which is authorized under state law in which the court is sitting
      a. Note: FRCP 4 authorizes the federal courts to use state long-arm statutes to go outside the forum court’s borders, but most of these statutes do not fit the interpleader situation b/c they are premised on the nonresident conducting some activity in the state, not simply being a claimant to funds deposited in the state.
         i. So, a Rule 22 action is typically territorially restricted: all the claimants must reside in the forum state. BUT, nationwide service of process is available in statutory interpleader actions.

(ii) Statute –
   1. Minimal diversity applies (what’s this?)
      a. BUT, diversity MUST exist b/w at least two of the claimants (see State Farm, below)
   2. Stakeholder’s citizenship is irrelevant
   3. Only $500 has to be at issue

(b) Venue:
   (i) Rule 22 –
      1. Proper under the general venue statute where any claimant resides, if all claimants reside in the same state, where a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or where any claimant is subject to personal jurisdiction, if no other district exists where suit may be brought.
   (ii) Statute –
      1. Venue may be laid where any claimant resides

(c) Deposit:
   (i) Rule 22 – No deposit requirement, although the court may allow the stakeholder to do so if the stakeholder desires (so, the stakeholder prefers the Rule on this issue)
   (ii) Statute – Stakeholder must deposit the property in issue w/ the court or post a bond for its value when suit is filed.

(d) Injunction?:

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(i) Rule 22 – generally can’t enjoin state proceedings in the absence of specific statutory authority – only exception: if the interpleader court would consider the injunction to be “in aid of its jurisdiction” – this is not a certain exception though
(ii) Statute – Court can enjoin claimants f/ suits elsewhere (protects stakeholder f/ the harassment of multiple suits)

iii) State Farm Fire & Casualty Co. v. Tashire (1967): Insurance companies can invoke the federal interpleader before claims against them have been reduced to judgment. A party in a multiparty litigation can only interplead the claimants seeking the funds of that party. The interpleading party has to show that there is a risk of multiple liability.

(1) Interpleader was not made to force all the litigants in multiparty litigation to bring their actions in a particular court.
(2) Interpleader is to control the allocation of a fund among successful tort P’s and not to control the underlying litigation against alleged tortfeasors.
   (a) The DC in this case was made to modify the injunction prohibiting the bringing of all other actions connected w/ the accident in any court except the interpleader proceedings. The injunction should only restrain claimants from seeking to enforce against the insurance company any judgment obtained against its insured, except in the interpleader proceeding itself.
(3) This case points up the general nature of federal interpleader. Generally, the interpleader device allows a party to join all adverse claimants asserting several mutually exclusive claims (regarding the same property or debt) against him and require them to litigate to determine their own interests.

f) Intervention

i) The basics: Rule 24
   (1) Intervenor: a person who is not already a party to an ongoing action but who seeks to be made a party, typically because she shares some interest in the litigation and is concerned that in her absence the interest will not be adequately protected
   (2) Deciding whether to allow intervention:
      (a) Balancing test:
         (i) Needs/interests of the intervenor vs. possible burdens on the existing parties if intervention is permitted
         (b) The more the intervenor is attempted to inject new issues, the greater the potential prejudice and delay to the original action
         (c) An intervenor does NOT have to argue that she will be prejudiced b/c she will be bound by the judgment – intervention is permissible if she
can show that her INTEREST WILL BE IMPAIRED as a PRACTICAL MATTER

(d) Timeliness: the greater the delay by the intervenor, the greater the likelihood of prejudice to the existing parties

(3) Two types of intervention:
(a) By right (24(a))
   (i) If the intervenor demonstrates an interest in the action that might be impaired if intervention is not allowed, and the opposing parties do not show that the interest is already adequately represented, intervention will be allowed.
      1. Courts liberally interpret these requirements to accommodate multiparty litigation that will resolve finally a particular controversy
         a. E.g. the interest does NOT have to be an economic one
      2. Inadequate representation may be found when:
         a. Clearly conflicting interests b/w the intervenor and the existing parties
         b. Intervenor’s claim is sufficiently different f/ those already in the action that no one currently in the action is likely to vigorously pursue it.
      3. Courts have considerable leeway in deciding what constitutes a sufficient interest or whether the interest is already protected, but there are some limitations on this discretion:
         a. Intervention can’t be denied just b/c it would delay the action or prejudice the parties
         b. As long as the standard is met, intervention must be granted so long as the presence of the intervenor does not destroy diversity jurisdiction.
            i. Intervenors are excluded f/ supplemental jurisdiction by the 1990 supplemental jurisdiction statute.
   (ii) Appealable immediately
(b) Permissive (24(b))
   (i) If there is a common question of law or fact, OR
   (ii) If a statute gives a conditional right to intervene
      1. In either case, the intervenor has the same status in the litigation as an original party, but she CANNOT raise any new issues.
      2. Ancillary jurisdiction attaches over the intervenor (ancillary jurisdiction: authority of a federal court to hear and determine issues related to a case over which it has jurisdiction, but over which it would not have jurisdiction if such claims were brought independently)
   (iii) Court has complete discretion to deny intervention even if the standard is met
(iv) Timeliness: Courts are much more likely to grant a late motion to intervene as a matter of right than to intervene permissively.
(v) Appealable only if the appellate court finds that the trial court abused its discretion in denying intervention.

ii) *Natural Resources Defense Council, Inc. v. United States Regulatory Commission* (1978): *A party may intervene in an action if he has an interest upon which the disposition of that action will have a significant legal effect.*

(1) The effect must “as a practical matter” impair or impede the ability to protect the right. The effect upon the movant’s right does not have to be a res judicata effect.
(2) The effect does not have to be a strictly legal effect.
(3) In this case, KM and MAC each had rights, not protected by other parties to the litigation, which will be thus effected – thus, they have a right to intervene.
(4) Impairments: Rule 24(a)(2): the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

g) **Class Actions**

i) *Rule 23*

(1) A member of the class may request exclusion from the class, and will not be bound by the judgment.
(a) Since a party must receive notice of the class action before he can request exclusion, the court must determine whether that received sufficient notice of the action or if sufficient effort was made to notify him of the action.
(i) If a party did have sufficient notice, and was a member of the class, he is bound by the judgment.
(2) This device allows one or more persons to sue or be sued on behalf of themselves and other individuals who allegedly possess similar grievances or have been harmed in a similar way.
(a) Allows the assertion of legal rights in situations in which the numbers of people involved and, in some instances, the small individual amounts involved, would otherwise effectively prevent the vindication of those rights.
(b) Efficient
(c) Economical
(3) Adequacy of Representation: fluid concept embracing any matter that might influence how vigorously the named party will prosecute or defend the action on behalf of the class.
(a) Do the interests of the class members and the representative conflict, or are they antagonistic?
(b) Is the attorney competent?
(c) Does the representative have adequate financial resources to pursue the litigation to its end?
   (i) This is such an important issue that the court is obliged to consider it throughout the course of the suit, not just at the certification stage.
   (ii) Adequacy problems don’t necessarily result in a dismissal. The court can:
        1. Add representatives
        2. Redefine or subclass the action to avoid or eliminate conflicts
        3. Appoint new counsel if that will permit the action to proceed w/ adequate protection for the absent members

   ii) Hansberry v. Lee: There must be adequate representation of the members of a class action or the judgment is not binding on the parties not adequately represented.
      (1) It is not necessary that all members of a class be present as parties to the litigation to be bound by the judgment if they are adequately represented by parties who are present.
      (2) In regular cases, to be bound by the judgment, the party must receive notice and an opportunity to be heard. If due process isn’t afforded the individual, then the judgment is not binding. Class actions are an exception; it is enough if the party is adequately represented by a member of the class with a similar interest.

   iii) Walters v. Reno: Aliens are constitutionally entitled to adequate notice before deportation may occur, and aliens receiving constitutionally defective notice may be certified as a class.

   iv) Rhone-Poulenc Rorer, Inc.: A judge may issue a writ of mandamus directing a lower court to decertify a class action if allowing the class action would cause irreparable harm to the defendant.
      (1) Dissent: The majority overstepped its bounds by issuing a writ of mandamus b/c there is not sufficient evidence to show that the D’s will suffer irreparable harm.
      (2) Ordinarily, the decision of a DC judge to certify a class is a non-appealable interlocutory order – Posner uses his mandamus power to get around this rule. This decision sets a dangerous precedent b/c most class actions involve the possibility of large damages awards.

5) Discovery
   a) If the case cannot be dismissed, claims of the parties have been identified through pleading, and structure of litigation has been set up → move to discovery
b) Background:
   i) The Basics:
      (1) **Purpose:**
          (a) Preserve evidence of witnesses who may not be available at the time of trial
          (b) Reveal facts
          (c) Aid in formulating issues – narrows the issues
          (d) Freeze testimony so as to prevent perjury
          (e) Prepare a case for MSJ when the parties discover that only issues of law are in contention
          (f) Promote settlement
          (g) Produce a crystallized trial
              (i) Savings for the judicial system
              (ii) Fairer/more just trial
                  1. Thus, most courts provide for liberal discovery – few limitations
          (h) Eliminate the surprise factor
      (2) Only time the parties appear before the court during discovery is when some problem or disagreement arises concerning the valid scope of an inquiry.
      (3) **Scope:**
          (a) Modern philosophy of full disclosure
          (b) Generally, a party may seek any info that is relevant, so long as it is not privileged.
              (i) Info sought must be reasonably calculated to lead to admissible evidence.
      (4) **Process:**
          (a) Scrutinize the complaint \(\rightarrow\) will give D just enough information to put him on notice, nothing more
              (i) Manage discovery in what you expose; other side is trying to get a peek at your hand
          (b) Initial Disclosure: **Rule 26**
              (i) Don’t have to turn over facts that are harmful to your case, but you have to disclose “relevant” material
                  1. **Rule 37(c)(1):** failure to disclose in the initial disclosure will prevent you from using the evidence later
                  2. **Rule 26(e):** Duty to supplement \(\rightarrow\) constantly have to turn new, relevant info over
              (ii) Give over any piece of info that SUPPORTS YOUR CASE; determined by facts and circumstances.
   ii) Production of Documents and Inspection of Land:
      (1) **Get documents first, they don’t lie and can be destroyed easily**
          (a) Try to describe documents by category \(\rightarrow\) a lot of time you don’t even know what you are looking for
          (i) Subject matter related
(b) Helpful documents: calendar, expense reimbursements, things which can pinpoint a person at a particular place (travel schedules, phone records, etc.)
(c) Rule 11: file when you don’t get the documents you asked for
(d) Your opponent must give you every document that supports the substance of their pleadings
(e) Responding party needs to provide a written response of what will be provided and what will not be provided
(f) Assemble and review your documents before they are distributed:
   (i) Document review: cull out privileged material and anything that may not be responsive to the request

iii) Interrogatories – Rule 33:
   (1) Notes:

iv) Depositions:
   (1) Rule 27: Depositions Before Action or Pending Appeal
   (2) Rule 28: Persons Before Whom Depositions May Be Taken
   (3) Rule 29: Stipulations Regarding Discovery Procedure
   (4) Rule 30: Depositions Upon Oral Examination
   (5) Rule 31: Depositions Upon Written Questions
   (6) Rule 32: Use of Depositions in Court Proceedings
   (7) Notes:

v) Physical and Mental Examinations – Rule 35:
   (1) Notes:

vi) Request for Admissions – Rule 36:

vii) Timing and Sequence – Rule 36:
   (1) Notes:

c) Managing Scope and Burden

i) Davis v. Ross (1985): Information on a D’s net worth may not be discovered until a verdict awarding punitive damages is made. Also, where the mental or physical condition of P is at issue, the physician-patient privilege is waived.

   (1) When punitive damages are alleged, D’s net worth becomes relevant as to the appropriate damage amount.
   (2) The law recognizes the confidential nature of a person’s finances. This, plus the ease of alleging punitive damages, has led to the rule that info regarding a D’s net worth may not be forcibly disclosed until a jury has decided that punitive damages would be awarded.
   (3) This is a common rule.

ii) Kozlowski v. Sears, Roebuck & Co. (1976): If difficulty in locating records is the fault of the party requested to produce, production will not be excused.

   (1) Under FRCP 34, the party from whom discovery is sought has the burden of showing some sufficient reason why discovery should not be allowed
once it has been shown that the items sought are within the scope of discovery.
(a) While burdensomeness may be a reason, it won’t be considered to be a good enough reason if it is the responding party’s own actions or inaction that created the burden.
   (i) Here, Sears used an indexing system that made compliance difficult, so they still had to produce.
   (ii) Here, Sears offered to open its records warehouse to let P’s attorneys search for the record – the court saw this is simply shifting the burden onto P.

iii) *McPeek v. Ashcroft*: The “marginal utility” approach to discovery is appropriate by which likely relevant evidence in digital format will be produced at the responding party’s request, and no production is necessary if relevant evidence is not likely to be found.

d) Exemptions from Discovery

i) **Rule 26(b)(3)**

ii) *Hickman v. Taylor* (1947): Material obtained by counsel in preparation of litigation is the work product of the lawyer, and while such material is not protected by the attorney-client privilege, it is NOT discoverable upon mere demand w/o a showing of necessity or justification. (A party seeking to discover material obtained by an adverse party’s counsel in preparation for possible litigation has a burden to show a justification for such production.)

(1) Limitations on discovery arise when:
   (a) Showing of bad faith
   (b) Showing of harassment
   (c) Irrelevant information
   (d) Privileged information
(2) General policy against invading the privacy of an attorney in performing his various duties is well recognized and essential to the orderly working of our legal system.
(3) Work product: interviews, statements, memos, correspondence, briefs, mental impressions, etc. obtained in the course of preparation for possible or anticipated litigation
(4) Where relevant and nonprivileged facts remain hidden in an attorney’s work file and production is essential, discovery may be had – but you need to show necessity and justification.
(5) Concurrence: primary effect of the practice advocated would be to require attorneys to act as witnesses
iii) *Upjohn Co. v. United States* (1981): *The attorney-client privilege may be applied to communications b/w all corporate employees and corporate counsel.*

(1) Purpose of the privilege is not only to protect the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice.

(2) The control group test adopted by the USAC frustrated the purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.

(3) Concurrence: As a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct w/in the scope of employment.

iv) *In Re: Shell Oil Refinery*: *The facts known and opinions held by non-testifying experts who are retained or specially employed in anticipation of litigation or preparation for trial are subject to discovery only in exceptional circumstances.*

(1) Rule 26(b)(4)(a)

(2) Here, P had access to the materials tested by D and could conduct its own expert tests.

(3) The parties could also discover the basis for each other’s expert’s conclusions during the period set aside for expert discovery.

(4) Exceptional circumstances requirement has been read by the courts to mean an inability to obtain equivalent information from other sources.

(5) Nothing really explains when an employee may become “specially retained or employed.”

e) **Enforcing Discovery Rules – Sanctions**

i) **Rule 26(c)**

ii) *Cine Forty-Second Street Theater Corp. v. Allied Artists*: *A grossly negligent failure to obey an order compelling discovery is sufficient to justify the severest disciplinary measures available under FRCP 37.*

(1) Negligent, no less than intentional, wrongs are fit subjects for general deterrence.

(2) Gross professional incompetence no less than deliberate tactical intransigence may be responsible for the indeterminable delays and costs that plague modern lawsuits.
(3) Concurrence: an unknowing client should not pay for the sins of his counsel.

(4) Under Rule 37, court can hold the party in contempt, imprison or fine it. OR, the court can strike or dismiss any or all of that party’s claim or defense, preclude the introduction of evidence in support of such, or hold certain facts to be established.
6) **Summary Judgment:** adjudication on evidence before trial → “no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.”

   a) Note: Devices that D’s may use to challenge the merits of P’s case before trial →
      i) 12(b)(6) motion: Failure to State a Claim
      ii) MSJ

b) **Rule 56:** Summary Judgment
   
   (1) The basics:
      (a) Opportunity for either party to win a case prior to trial by demonstrating that there “is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”
      (b) Used in two categories of cases:
          (i) When there are NO GENUINELY CONTESTED ISSUES OF MATERIAL FACT
          (ii) Parties agree on the facts, but DISAGREE ABOUT THE LEGAL IMPLICATION of those facts → in this case, the motion has framed a single, dispositive legal issue for the court
      (c) Usually used to identify claimants who lack evidence sufficient to reach the jury and who will therefore probably suffer a MDV or its equivalent at trial.
      (d) MSJ (unlike MD) identifies factually deficient claims or defenses
      (e) MSJ is also used to resolve individual claims in a multi-claim lawsuit. (Rule 56, (c) and (d))
      (f) MSJ is also used to resolve claims by or against one party, leaving others for trial
      (g) NOTE: Evidence presented in support of or in opposition to a MSJ must be evidence that would be admissible at trial.

   ii) “The Concept of Burden of Proof”
      (1) Two concepts of Burden of Proof
          (a) Burden of Persuasion: which party must convince the trier of fact at trial of the accuracy of his factual assertions
          (b) Burden of Production: whether a party has sufficient evidence to go to trial in the first place
              (i) SUMMARY JUDGMENT IS CONCERNED EXCLUSIVELY WITH BURDEN OF PERSUASION

   c) **Burden Shifting**
      i) Burden of persuasion and production lie with P at the beginning of the suit
         (1) Burden shifts to D when he presents an Affirmative Defense
         (2) When P presents enough evidence that a reasonable trier of fact could find for him, and there is no rebuttable evidence coming from D, the trier of fact must find for P → judgment as a matter of law: judge steps in and
tells D it loses (Rule 50); non-movant fails to meet the burden of production
(3) If D meets the burden of production, the trier of fact has the opportunity to
decide the case
(4) If D provides so much evidence that it’s not liable, burden is back to P to
push it back so the case can be decided by the jury

d) “Summary Judgment and Judgment as a Matter of Law Contrasted”
(1) Has the non-moving party met the burden of persuasion → if not, then
there is no genuine dispute of material issue of fact
(a) Distinguishing features:
   (i) TIMING:
      1. Summary judgment occurs typically pre-trial
      2. Judgment as a matter of law (MDV): occurs after P has
         presented its case in chief
   (ii) WHAT THE MOVING PARTY MUST SHOW:
      1. Summary judgment: affirmative representation → cannot
         simply require disclosure of the non-movant’s case
      2. Judgment as a matter of law (MDV) → doesn’t require
         affirmative showing on the part of the moving party

ii) Adickes v. S.H. Kress & Co.: Facts: P sued D alleging conspiracy b/w D and
police to arrest her b/c she was in company w/ blacks. D moved for MSJ w/
the following facts: 1. manager of store had no communication w/ PO 2.
affidavits of two PO’s stated there was no request by the manager for P to be
arrested 3. P in deposition said that she had no knowledge of communications
b/w D’s employees and police. Held: MSJ inappropriate b/c D faield to show
the absence of genuine issue of material fact – it didn’t foreclose the
possibility that a PO had an understanding w/ D’s employee. Inference here
went to “state of mind,” which is difficult to refute. → In an action based on
conspiracy, summary judgment may not be granted unless a D can show that
no evidence of it exists. Where the evidentiary matter in support of the motion
does not establish the absence of a genuine issue, MSJ must be denied, even if
NO OPPOSING EVIDENTIARY MATTER IF PRESENTED. (This court
adopts the maximal approach → see Celotex)

(1) In MSJ, the burden is on the moving party to affirmatively show the
absence of a genuine issue as to any material fact. The fact that the burden
would be on the other party on the same fact at trial is of no matter.
(a) This rule was liberalized by Celotex, see below.
(2) Justification for requiring P to come forth w/ evidence before trial:
   Judicial Economy
(a) Theory; If the case would not survive at trial b/c there is not sufficient
evidence, it’s more efficient and economical for the court to find that
out in advance.
(i) This saves $ for P; P probably does not want to posture a case for dismissal → longer the case hangs, more chance of settlement and anything can happen with a jury

1. Summary judgment & work product → isn’t allowing the court and moving party to take a peek at trial preparation a bit like letting them get at the work-product?

iii) Three approaches to MSJ:
   (1) **Traditional**: D has to offer so much evidence that no reasonable jury could find for it. (MAXIMAL APPROACH – SEE ADICKES)
   (2) **Currie**: D needs to do nothing more than move for MSJ; D does not have to show much of anything; P has to come forward and show that it has enough evidence to get to a jury (puts the other side on notice if they have the burden of production) (MINIMAL APPROACH)
   (3) **Louis**: Minimal approach says it is too easy for D to move MSJ (it will become a tool for harassing P) → “if you are a party who is moving who does not have the initial burden of proof, you must put enough evidence on to support a verdict in your favor”

iv) **Celotex Corp. v. Catrett** (1986): **Facts**: P’s husband died from exposure to asbestos from fifteen corporations. D granted summary judgment b/c P was unable to produce evidence in support of her allegation in her wrongful death complaint that decedent had been exposed to D’s asbestos products. Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to his case and on which he bears the burden of proof at trial. *The burden on the moving party may be discharged by “showing” that there is absence of evidence to support the non-moving party’s case.* (Adopts a standard closer to the minimal approach, liberalizes Adickes)

   (1) Court: MSJ should NOT be a rare occurrence → it’s a useful tool and the court shouldn’t make it so hard to get it
   (2) Brennan’s dissent: If the burden of persuasion at trial would be on the non-moving party, the party moving for MSJ may satisfy Rule 56 burden of product in two ways:
      (a) Moving party may submit affirmative evidence that negates an essential element of the nonmoving party’s claim
      (b) The moving party may demonstrate to the Court that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim (under this, D would have had to show an absence of proof that P’s husband was exposed to its products)

v) **Today’s MSJ Standard**: D won’t come forward with much of anything, and P will be put to the test
vi) **Rule 56(f):** If someone files MSJ based on little evidence and says you don’t have enough evidence to get to the jury (i.e. you haven’t met your burden of production), under Rule 56f, you can claim that MSJ is premature.

1. P has no right to Rule 56f discovery \(\rightarrow\) judge’s discretion to say yes or no
2. P must specify a specific area he will search which relates directly to the summary judgment
3. Unlike general discovery, you must persuade the court that discovery is going to lead to something
4. Negative: when you file Rule 56f, you are conceding that you don’t have the requisite information to respond to summary judgment \(\rightarrow\) essentially, you’re telling the court that your case is weak
5. P tips hand about everything he has in the case

vii) Interaction w/ **Rule 11:** There must be sufficient investigation to justify a motion for summary judgment, or the moving party will be sanctioned

e) **Meeting the Burden of Production:**

i) **Arnstein v. Porter** (1946): **Facts:** P alleges numerous songs by D were taken from P’s copyrighted songs. **Held:** MSJ improper: P’s credibility and denials should be left to the jury. *When credibility of the witnesses is a vital factor to a case, P is entitled to a trial where the jury can observe the witnesses while testifying.*

1. MSJ would have been proper only if D w/o a doubt did not have access to P’s composition; if there is the slightest doubt, MSJ is improper \(\rightarrow\) not good law anymore
2. Inference here similar to that in *Adickes:* “meeting of the minds” \(\rightarrow\) this is a strong inference to rebut
3. **Bottom line:** speculation of the possibility of new evidence undermines the utility of MSJ \(\rightarrow\) means that MSJ would be routinely denied
   a. Demeanor evidence disappears w/ the witness and reviewing court can’t access it anyway, so an appeal would go D’s way anyway
   b. Disbelief evidence alone cannot possibly satisfy burden of production; otherwise the burden of production is no burden at all.
   c. D has met the *Celotex* requirement
   d. This decision puts things out of balance \(\rightarrow\) going back to *Adickes* – general lack of enthusiasm for MSJ as a proper means of resolving disputes

ii) **Dyer v. MacDougall** (1952): [restoration of balance]: **Facts:** P filed complaints for libel and slander. Witnesses each denied any instances of libel and slander, and P chose not to depose any of them. *Where the possibility exists that P may extract admissions in open court which he was not able to get through depositions, P must still depose witnesses in order to see if there is any basis for witnesses admitting to a possibility they will admit in court (“awe of judge”).*
(1) **Court**: no reason to expect that witnesses would change their tune at trial → additional depositions could show that witnesses were crafty or defiant, and that would suggest to the court that witnesses would change at trial
(a) D must supply extrinsic evidence → circumstantial evidence to create the inference that discrimination was present
(2) Where *Porter* said we could indulge in a certain amount of speculation, *Dyer* says we shouldn’t → restores the importance of summary judgment
7) **Motions for Judgment as a Matter of Law (MDV)**: Evidence is so compelling that only one result can follow

a) **Rule 50:**
   i) Directed verdicts take cases away from juries
      (1) Constitutional argument: b/c we have always taken cases away from juries, there is nothing unconstitutional about awarding MDV \( \rightarrow \) historical argument

b) Notes:
   i) **Timing:**
      (1) **D:** may MDV at the close of P’s case in chief (saying P hasn’t put on enough evidence for the jury to find for it); and after D finishes its case in chief (challenging the sufficiency of all the evidence, both P’s and D’s)
      (2) **P:** may MDV only at the close of D’s case in chief (challenging the sufficiency of all the evidence and saying that D hasn’t done enough to rebut P’s case that any jury would find for it.

   ii) **MJNOV = renewed MDV at the close of trial:** post-verdict
      (1) Standard is the same as for MDV at any other point
      (2) We allow the judge to grant a renewed MDV after the jury has deliberated b/c reasonable judges differ about whether a given case is strong enough to go to a jury
      (a) Because the decision that the evidence is too weak to go to the jury is often debatable, the judge’s entry of judgment as a matter of law before the jury deliberates will frequently be appealed.
      (i) If reversed on appeal, wasteful repetition of the first trial.
      (b) Usually, if judge believes that evidence is so weak, jury will agree and return a verdict for the moving party anyway.
      (i) This is the best possible result \( \rightarrow \) avoids the appeal that would like follow if a judge had taken the case from the jury in many cases
      (c) If the jury returns a verdict for the party against whom the judge considered directing the verdict, the judge can still enter judgment as a matter of law (JNOV)
      (i) BUT HERE, if the party appeals and the appeals court agrees and reverses the judge’s order, it can just order that the jury’s verdict should stand! \( \rightarrow \) more efficient.

   (3) Prerequisites:
      (a) Motion must be filed w/ in 10 days of entry of judgment on jury’s verdict
      (b) Party may only MJNOV IF HE MADE THE SAME MOTION (MDV) BEFORE THE VERDICT \( \rightarrow \) this is why we say it’s a “renewed” MDV
      (i) This requirement keeps a party from “sandbagging” his opponent by raising defects in the opponent’s evidence after the jury has been discharged, when it is too late to cure those defects.

   (4) Contrasted w/ MNT:
      (a) Judge may also deprive a party of a verdict by granting MNT
(b) Grant of MNT DOES NOT end the case, but leads to a second trial on all or part of a case → MJNOV leads to a judgment for the moving party.

(c) MNT: Judge may consider the credibility of the witnesses (judge gets to be the thirteenth juror – less stringent standard for granting);
   MDV/MJNOV: requires the judge to assume the truth of the evidence for the nonmoving party.

(d) Judge may grant PARTIAL new trials.

iii) Standard:
   (1) Rule 50: “No legally sufficient evidentiary basis for a jury to find for” the non-moving party.
   (2) Three approaches:
      (a) Case must go to the jury even if there is a “scintilla” of evidence to support the opposing party’s case.
      (b) Judge must consider ONLY the evidence that supports the non-moving party (usually P) → i.e. judge must assume the truth of all the evidence offered by the non-moving party and take all inferences from the evidence in the light most favorable to that party.
      (c) Judge must consider the nonmoving party’s evidence in the most favorable light (see (b)), BUT ALSO consider any evidence put forward by the moving party that is not impeached or contradicted by the opposing party’s evidence.

c) **Galloway v. United States** (1943): Facts: P seeks insurance benefits because he went crazy in the army. P must show continuous disability; however, five year gap exists for which he has no evidence of insanity. Neither P, nor wife can testify. No one examined P during the gap. MDV proper. *Where the inference to reach P’s conclusion is great, and the P had the ability to provide evidence in support of the inference, MDV against P will be granted.*
   i) This case illustrates that court’s don’t like D’s to sit on errors that could have been remedied early on; if there is a fatal defect to P’s case, we like D’s to raise that early on
      (1) Why?
         (a) Judicial economy
      ii) Reason for the court’s decision: court struggles w/ how to make sense of the gap in time; essentially saying "we don’t think we can fill this in and neither can a jury" → judge denies the reliability of the expert conclusion → b/c speculation and conjecture should not do the work of probative facts
      iii) Note: Even if government had info (helpful or harmful) that would get P to the jury, it’s under no obligation to provide that info to P (should have figured out how to get it in discovery)

d) **Lavender v. Kurn** (1946): Facts: P hit by mail hook of mail car or backing train. P puts on evidence that he might have been hit by the mail hook. D’s theory is that P was attacked. Court said sufficient evidence of negligence on the part of D
exists to justify submission of the case to the jury. Where facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required which is left for the jury.

i) Speculation and conjecture not a problem

ii) Standard in this case → just a scintilla of evidence needed to defeat a MDV [probabilities don’t matter much]; “in light of all the evidence, a reasonable jury could find for P,” if not, MDV for D.

iii) Court: this case should go to the jury b/c reasonable minds may differe; a jury can ignore what evidence it wants

e) Guenther v. Armstrong Rubber Co. (1969): Facts: P remembers the tire to be a 15” back wall tire, but the defective tire presented in court was a 13” white wall tire. No proof that D had anything to do w/ black wall tires, except that D was responsible for 75-80% of the black wall tires the shop sold. Where there are two conflicting testimonies which go to the crux of the case, it is left for the jury to resolve the problem.

i) Note: P could amend his complaint: party is not bound by its representations in complaint
8) **Motions for a New Trial**: The court is in the position of weighing evidence when considering motion for new trial

   a) **Rule 59:**
   i) If a jury trial \( \rightarrow \) MNT granted “for any of the reasons for which new trials have heretofore been granted in actions at law in courts of the U.S.”
   ii) If a bench trial \( \rightarrow \) MNT granted “for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the U.S.”
      (1) Court may open the judgment if entered, take additional testimony, amending findings of fact and conclusions of law OR make new findings and conclusions, and direct the entry of a new judgment.
   iii) **Timing**: Must MNT no later than 10 days after the entry of the judgment.
   iv) **NOTE**: The court may of its own initiative order a new trial for any reason that would justify granting one on a party’s motion! (same timing as above)

   b) Two categories in which the courts have traditionally granted new trials:
   i) Errors in the trial process (offends Due Process)
      (1) Standard of appellate review: de novo
   ii) Trial process was fair, but the result is clearly wrong!
      (1) Balancing of evidence, usually including live testimony; rare for appellate judges to second-guess the trial judge’s on-the-spot judgment that a new trial is warranted on this ground.

   c) **Ahern v. Schotz** (1996): **Facts**: Breach of K. Jury found D in breach of K, owing P $500k. Trial court found breach of K as well, but said P’s breach was not material b/c the provision that he was alleged to have breached was subject to multiple interpretations or damages associated w/ breach were not material (same conclusion as jury). *Where the ruling is not against the clear weight of the evidence or based on evidence which is false and a reasonable basis exists for the jury’s verdict, the court will not grant a new trial.*
      i) **Standard of review**: (TC): deferential to jury finding
      ii) **Standard of review**: (Appellate level): will reverse only if clear abuse of discretion by TC
         (1) TC and jury are on the “frontlines” of litigation \( \rightarrow \) they heard the evidence first hand and are in the best position to decide whether the verdict is against the clear weight of the evidence.

   d) **Rule 60(b):**
   i) Motion for relief \( f/ \) judgment; KEY: must point to some newly discovered evidence; it is evidence that did not exist before
      (1) Newly tendered evidence is not the same as newly discovered evidence: this is to discourage counsel \( f/ \) withholding evidence during the trial
      (2) The new evidence must be admissible; must be able to overturn the result; must have been discoverable but not discovered (AND, there must be a good reason why it was discovered).

   e) **Notes on Relief from Judgment Under Rule 60(b):**

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*Andrea Perry*
f) **Rule 50 MDV & Rule 59 MNT:**

i) **Rule 50(b):** MDV after both P and D have finished their cases in chief AND IN THE ALTERNATIVE file MNT under **Rule 59**
   
   (1) **Rule 50 standard:** no rational trier of fact could find for the non-movant; more stringent
   
   (2) **Rule 59 standard:** verdict entered against the movant is against the clear weight of the evidence
   
   (a) **A court may be unconvinced that no rational finder of fact could find for the non-movant, but convinced that the verdict in favor of the non-movant would be against the clear weight of the evidence.**

ii) **Rule 50(c)(1):** If the court grants a MDV, ruling for MNT should be granted at the same time ➔ court should grant the MNT in the alternative, in case the ruling on the MDV is reversed upon appeal ➔ that way there is an alternative ruling already in place ➔ remedy would be a new trial.

iii) **Rule 50(c)(2):** Allows a party that prevails by jury trial but loses on directed verdict to MNT
9) Personal Jurisdiction

a) Traditional Approach

i) **Pennoyer v. Neff:** Where the object of the action is to determine the personal rights and obligations of the parties, service by publication against nonresidents is ineffective to confer jurisdiction on the court. **Rule:** *Judgment in personam requires personal service of process in state. Substituted service by publication is allowed where 1. property is brought under court by seizure or some equivalent act. 2. judgments in rem. No state can exercise direct jurisdiction over people or land outside of its territory.*

(1) Notice: in regards to property (in rem), notice is unnecessary. The law presumes that property is always in the possession of the owner/agent. (Constructive notice)
   (a) Power: personal jurisdiction is more concerned w/ power than notice.
      (i) The court has power to issue binding rulings against a particular D

(2) Every state possesses exclusive sovereignty over persons and property within its territory.
   (a) Following from this, no state can exercise direct jurisdiction and authority over persons or property outside of its territory.
      (i) However, the exercise of jurisdiction which every state possesses over persons and property within it will often affect persons and property outside of it.
      (ii) Note: A state may compel persons domiciled within it to execute, in pursuance of their contracts respecting property situated elsewhere, instruments transferring title.
      (iii) Note: A state may subject property situated within it which is owned by nonresidents to the payment of the demands of its own citizens.

1. Therefore, substituted service by publication or by other authorized means may be sufficient to inform the parties of the proceedings where the property is brought under the control of the court or where the judgment is sought as a means of reaching such property or effectuating some interest therein.
   a. Basically, service by publication is effect in proceedings in rem.
      i. This is because the law assumes that property is always in the possession of its owner or an agent – seizure of the property will inform the owner that he must look to any proceedings upon such seizure for the property’s condemnation or sale.

2. BUT, where the entire object of the action is to determine personal rights and obligations, or is in personam, service by
publication is ineffectual to confer jurisdiction over a non-resident D.

3. Process sent out of state to a non-resident is also ineffective to confer personal jurisdiction.
   (b) In an action to determine a D’s personal liability, he must be brought within the court’s jurisdiction by service of process within the state or by his voluntary appearance.
   (c) Without jurisdiction, due process requirements are not satisfied.
(3) Note: Personal service within the jurisdiction remains the basic method of acquiring jurisdiction over D.
(4) Note: It does NOT matter how transient the D’s presence is if she is served w/in the jurisdiction.
(5) Note: A voluntary appearance by a D also gives the court jurisdiction over her.
(6) Types of personal jurisdiction: power to exert personal jurisdiction rooted in the concept of presence
   (a) In personam: established through personal service (summons)
   (b) In rem: focus is directly on property, so that the result of the case determines what happens to property
      (i) Against the thing (property): disposition is over property regardless of who claims to have title to it
   (c) In the nature of in rem: Lawsuit that is directed at the propert, but the effects of it are limited to the parties of the lawsuit
      (i) E.g.: Suppose a sale of land and you want to enforce it; the proceeding would direct attention to the property and seek to resolve title of the property to you (concerned only about the specific rights to the property). Eye to the individual litigants in the case.
   (d) Quasi in rem: in personam proceeding, but you have no way of asserting jurisdiction → use property as a lure in order to reel in an individual using property (by attachment, garnishment, etc.); state has no authority; only have to defend yourself up to the value of the property
(7) Exceptions:
   (a) If you are inquiring into the status of a state’s inhabitants, you don’t need to use personal service → (status = marriage)
   (b) State might consent to jurisdiction in advance to allow an individual to engage in certain types of activities in the state (see Hess below)

ii) Harris v. Balk: Where there is a law of the state providing for the attachment (securing of a person’s property to seize a judgment) of the debt and the creditor of the garnishee could himself sue in that state, then, if the garnishee can be found in that state and the process generally served upon him therein,
the court thereby acquires jurisdiction over him and can garnish the debt due from him to the debtor of the P.

(1) Obligation of the debtor to pay his debt clings to and accompanies him wherever he goes

(a) Pretext of jurisdiction in MD is presence of property in the state of MD (Harris is the walking embodiment of the debt) ➔ this is quasi in rem jurisdiction

(b) Court opens itself to cases where the debtor is not a person, but a corporation

(c) Better limitation: distinguish b/w tangible and intangible property

(2) P had to give adequate notice to Balk

(3) This case shows that the problems w/ in rem and quasi in rem jurisdiction are deepening; the rule in Pennoyer was based on real property… it’s difficult to treat other forms of property in a manner consistent w/ Pennoyer

iii) Hess v. Pawloski: States may make and enforce regulations reasonably calculated to promote care on the part of all even if they provide implicit consent through implied appointments.

(1) This case is the “bridge” that connections the 19th and 20th Century approaches to personal jurisdiction

(2) Expansion of personal jurisdiction to allow for implied-consent to jurisdiction. This case demonstrates the demands of an increasingly mobile society, and that the law needs to keep up with these changes. Territorial restrictions may no longer be fair.

b) Shift to Minimum Contacts

i) Note: Personal Jurisdiction rules here are D-oriented. P’s contacts w/ the forum state will not do; the court must find some basis for forcing the D to appear before it. Converse ➔ if D has minimum contacts with the forum state, it is irrelevant (for PJ purposes) that P has none.

ii) International Shoe v. Washington: For a state to subject a nonresident D to in personam jurisdiction, due process requires that he have certain “minimum contacts” with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

(1) Historically, jurisdiction of courts to render judgment in personam is grounded on their power over the D’s person, and his presence within the territorial jurisdiction of a court was necessary to a valid judgment (see Pennoyer).

(2) BUT NOW, due process requires only that in order to subject a D to judgment in personam, if he is not present w/in the territorial jurisdiction, he have certain minimum contacts with the territory such that the
maintenance of the suit does not offend traditional notions of fair play and substantial justice.

(3) The contacts must be such as to make it reasonable, in the context of our federal system, to require a D corporation to defend the suit brought there.

(a) An estimate of the inconvenience to the D corporation from a trial away f/ its headquarters is relevant.

(i) To require a D corp. to defend a suit away from home where its contact has been casual or isolated is thought to lay an unreasonable burden on it.

(ii) BUT, even single or occasional acts may, because of their nature, quality and circumstances, be deemed sufficient to render a corporation liable to suit.

1. NOTE, therefore, the criteria to determine whether jurisdiction is justified is not simply mechanical or quantitative.

   a. Satisfaction of due process depends on the quality and nature of the activity in relation to the fair and orderly administration of the laws.

      i. In this case, D’s activities were systematic and continuous and the obligation sued upon here arose out of those activities.

(4) Two prong test:

   (a) First prong: What are the contacts?

   (b) Second prong: Estimate the inconveniences (this is a different analysis for corporations and individuals)

(5) Dissent: Every state has the power to open the doors of its courts for citizens to sue corporations who do business in the state.

iii) McGee v. International Life Ins. Co.: Even a few contacts may be meaningful enough to confer personal jurisdiction upon a D. Where a suit was based on a substantial connection (which may be established by only a few contacts) with a state, it is sufficient for purposes of due process and D, as a corporation from outside the state, to be subjected to suit in that state.

1. The judge here uses the flexibility inherent in the International Show minimum contacts test to expand jurisdiction, not to limit it. But, that’s good for Lulu McGee → the main focus is on the second prong of the due process test: fairness.

   (a) This case is the “high water mark” for personal jurisdiction → takes International Shoe and pushes it to its outer-limits.

      (i) Infusion of a vague due process standard → focus here was on fairness, balance of equities seems to favor P. ???

      (ii) Quality of the contacts is CRITICAL: Court is less concerned about the volume of the contacts

c) Long-Arm Statutes
i) **Long-arm statute:** A statute that specifically authorizes the state courts to exert extraterritorial jurisdiction over D’s who meet the conditions set out in the statute.
   
   (1) **Due Process still controls:** Outer boundary of state’s assertion of personal jurisdiction → can’t justify an extension of personal jurisdiction beyond the point where it seems fundamentally fair/where it offends due process.
   
   (2) Statute just acknowledges the authority that the court already has; state does this in case the court is not inclined to assert personal jurisdiction (qualifies as enabling legislation → tells court to extend jurisdiction in this trajectory)

ii) **Gray v. American Radiator** (1961): **Facts:** P injured by water heater explosion. D manufactures valves for the water heater. D does no business in IL, has no agent there, and sells completed valves to American Radiator.

   **Rule:** If a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products.
   
   (1) Commercial transaction: results from substantial use and consumption in the state. (stream of commerce)
   
   (2) Reading of the long-arm statute here: sets forth that the location of the tortious act is where the injury occurs → since the injury here occurred in IL, the tortious act “occurred” in IL.

**d) In Rem Jurisdiction**

i) **Shaffer v. Heitner** (1977): Jurisdiction cannot be founded on property within a state unless there are sufficient contacts within the meaning of the test developed by International Shoe. The fairness and minimum contacts standards of International Shoe apply to cases involving quasi in rem jurisdiction.

   (1) The Court here expressly rejects that line of cases represented by Harris v. Balk, which permits jurisdiction merely b/c property happens to be within the state.
   
   (2) If sufficient contacts do not exist to assume jurisdiction absent the presence of property within the state, it cannot be invoked on the basis of property within the court’s jurisdiction.
   
   (3) Concurrence: Real property should confer jurisdiction.
   
   (4) Concurrence: Purchase of stock in the marketplace should not confer in rem jurisdiction in the state of incorporation.
   
   (5) Concurrence and Dissent: There should be a minimum contacts test, but it’s misapplied in this case. The purpose of the statute in this case is to force in personam jurisdiction through a quasi-in-rem seizure. ???
   
   (6) This decision is only going to have a major impact in cases where the state really has no reason to want to adjudicate the issue.
(a) Real property would still be an exception.

(7) Sequestration of property violates Due Process: infringes on the rights of the property owner where there are no sufficient procedural safeguards in place → not fair

(8) Court wants minimum intrusion on rights of the property holder with an eye towards personal jurisdiction

e) Refining Minimum Contacts Analysis

i) World-Wide Volkswagen v. Woodson: A state court may exercise personal jurisdiction over a nonresident D only so long as there exist sufficient minimum contacts between him and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Where D’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there, there exists sufficient minimum contacts with the state for personal jurisdiction to be enforced.

(1) Here, VW had no contacts, ties or relations w/ OK, so personal jurisdiction could not be exercised.

(2) As to the idea that VW could foresee that cars sold in NY would wind up on OK, the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state.

(a) Rather, it is that D’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.

(3) Purposeful Availment: “seek to serve” theory → retailer should expect to be sued where it seeks to serve customers

(a) In this case, it’s foreseeable that cars move and will be driven across the country; it is not foreseeable in the “seek to serve” sense though

(b) “Seek to serve”: one seeks to serve by putting products into a stream of commerce with the ultimate expectation that they will be sold to consumers in the foreign state (if Audi sought to serve in this case, presumably the German gas tank manufacturer would also be liable)

(4) Four factors of reasonableness:

(a) Forum state’s interest in adjudicating the dispute

(b) P’s interest in obtaining immediate and effective relief

(c) Interstate judicial system’s interest in obtaining the most efficient resolution to controversies

(d) Shared interest among several states in furthering fundamental substantive social policies

(5) Dissent: The consumer’s intended use may provide jurisdiction to the state – especially when you consider that an auto is meant to travel f/ place to place.

(a) The Constitution allows for a balancing of all factors to determine the fairness in bringing a D before a State court.
(6) Dissent #2: This case is analogous to an in personam jurisdiction case where it’s properly exercised over one who purposefully places his product into the stream of IC with the expectation that it will be purchased by consumers in other states.

ii) **Note:** Personal jurisdiction not based on most or best contacts; it is based on minimum contacts.

(1) It follows that D may be subject to minimum contacts jurisdiction in more than one state for a claim that arises from a transaction involving contacts with a number of states.

iii) *Calder v. Jones:* Where there is a tortious injury and the harm suffered by the tortious injury is within a particular state, and the aim of the tortious injuries is focused at an individual whose injuries would be felt at that particular state, jurisdiction over D’s is allowed → A D may have sufficient contacts WITH a state to support minimum contacts jurisdiction there even though she did not act WITHIN the state. If a D commits an act outside the state that she knows will cause harmful effects within the state, she will be subject to minimum contacts jurisdiction there for claims arising out of that act.

(1) In this case, D was held subject to personal jurisdiction in CA for an allegedly defamatory article written in FL, since it was circulated in CA and P lived there and P’s career was centered there.

(2) Seek to serve: National Enquirer did not object to this theory

(3) Effects Test: What are the potential effects of one’s conduct?
- D knew the impact of the harm would be in CA, brunt of injury would be felt by P where she lives and works
- D could reasonably anticipate being called into court


(1) Specific vs. General Jurisdiction:

(a) General: the contacts are enough that even though the claim doesn’t arise from them, jurisdiction is still conferred.

   (i) Purchase of the K in TX unrelated to the crash; moreover, purchase of the K was not systematic and continuous; training was part of a package of goods and services purchased by D; employees were present in TX for only a short time
      1. Alternatives here: can bring the suit in the forum where the claim arises or in D’s home state
      2. Home base approach: allow for a suit where D is headquartered

(b) Specific: systematic and continuous → minimum contacts where the contacts are related to the claim

   (i) P’s lawyer probably messed up at trial here; should have considered arguing specific jurisdiction; claim should have been
related to the pilot failing to do what he was trained to do – training would have been of elevated importance.

(ii) Fairly malleable standard → applied in McGee

(iii) Premised upon certainty: if P doesn’t want to take a chance in encountering problems, should always sue in D’s home state

(c) Another way to get Helicopteros into court → Consorcio could implead (would be for indemnity)

v) **Burger King Corp. v. Rudzewicz (1985):** Facts: P calls D into court through FL long-arm statute. D’s are MI residents owning franchise in MI who failed to make the franchise payments to P, a FL corporation. P brings suit in FL. D’s sent K to FL and made telephone calls there. Most of their dealings were w/ the FL headquarters. Boilerplate term on K: FL law applies. Where circumstances establish a substantial and continuing relationship with a forum state and indicate that there was a fair notice that a nonresident might be subject to suit in the forum state, the assertion of personal jurisdiction over the nonresident by the forum state, if otherwise fair, does not offend due process.

(1) When determining whether it is fair to determine that a nonresident reasonably could anticipate out-of-state litigation, a court should look to see if the nonresident purposefully availed himself of the benefits and privileges of conduct activities w/in that state.

(2) Once minimum contacts are established, other factors that may make the assertion of jurisdiction unfair can be considered in order to comport w/ fundamental fairness and substantial justice.

(3) Choice of Law:

(4) Standard:

(a) Purposeful availment: whether parties “reached out” beyond their own state to create a relationship and obligation with a citizen or entity of another state

(i) Look to the K here; knew they were dealing w/ headquarters in FL

(ii) Use any tools in the toolbox for purposeful availment: “reaching out,” foreseeable (careful), seek to serve, etc.

(b) Reasonableness: fair warning that particular activities might subject them to jurisdiction of a forum state [presumption of reasonableness where D has purposefully directed activities to the forum state]

(i) D’s has the burden of showing that jurisdiction is NOT reasonable

(ii) Case will only be dismissed if there is a compelling showing that assertion of jurisdiction is unreasonable

vi) **Asahi Metal Industry Co. v. Superior Court:** Minimum contacts sufficient to sustain jurisdiction are not satisfied simply by the placement of a product into the stream of commerce coupled with awareness that its product would reach the forum state. *D purposefully avails himself towards the forum state when D*
places the product in the stream of commerce and purposefully directs the product toward the forum state.

(1) Bracey calls this “stream of commerce plus”

(2) Remember the two prong test: purposeful availment + reasonableness
   ▪ Specific jurisdiction:
     ▪ Judges are split on whether the standard for specific jurisdiction should be stream of commerce or stream of commerce plus
     ▪ Rationale behind stream of commerce plus: it doesn’t make sense to bind you to actions you don’t know about
     ▪ Argument for stream of commerce: 100K units are finding their way into CA
     ▪ All three judges agree on the reasonableness prong: it would be unreasonable to call a Taiwanese manufacturer into court

(3) To satisfy minimum contacts, there must be some act by which the D purposefully avails itself of the privilege of conducting activities within the forum state.

(4) The unilateral act of a consumer’s bringing the product into the forum state is not sufficient.

(5) Concurrence: Minimum contacts analysis is unnecessary here; the Court has found by weight the appropriate factors that jurisdiction under these facts is unreasonable and unfair.

(6) Concurrence: The State Supreme Court correctly concluded that the stream of commerce theory, without more, has satisfied minimum contacts in most courts which have addressed the issue, and it has been preserved in the decision of this court. ???

vii) Burnham v. Superior Court: A D who has been personally served with process within the boundaries of a state may not assert that the state lacks personal jurisdiction over him merely because his contacts with the state are minimal or because the lawsuit is unrelated to his activities w/in the state. Pennoyer’s embodiment of service of personal jurisdiction survives even without minimum contacts.

(1) Personal service upon a physically-present D suffices in all cases to confer jurisdiction, regardless of whether the D was only briefly in the state or whether the cause of action was related to his activities there.

(2) P inappropriately attempted to apply the International Shoe standard (minimum contacts), which allows jurisdiction over a D if the D maintains “continuous and systematic” contacts w/ the forum, which applies only if the D is absent from the jurisdiction and cannot be physically served with process.
   (a) The International Shoe standard was developed by analogy to “physical presence,” and operates as a substitute for it.
   (b) But, if D is actually served w/ process while within the jurisdiction, the International Shoe standard is never applied.
(3) Scalia is basically saying that personal service amounts to a higher pedigree of jurisdiction than service under the Intl Shoe “minimum contacts” standard.

(4) Concurrence: The rule allowing jurisdiction to be obtained over a non-resident by personal service in the forum state is widely accepted.

(5) Concurrence: Both International Shoe and Shaffer held that all assertions of state-court jurisdiction must be consistent w/ traditional notions of fair play and substantial justice. Therefore, an independent inquiry into the fairness of each prevailing in state service rule is justified.

(6) Concurrence: All of the three prior approaches make sense – this is an easy case.

(7) Rumors of the death of “tag jurisdiction” are greatly exaggerated.

viii) Pavlovich v. Superior Court: Personal jurisdiction may not necessarily be acquired over a D based on a posting on a passive Internet Web Site.

(1) A court may exercise specific jurisdiction over a nonresident D ONLY IF:
   (a) D has purposefully availed himself of forum benefits
   (b) The controversy arises out of the D’s contacts with the forum, AND
   (c) The assertion of personal jurisdiction would comport with fair play and substantial justice.

(2) In a case like this, w/ a passive website, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.
   (a) P’s mere knowledge that his tortious conduct may harm industries centered in CA, while relevant to the determination of personal jurisdiction, alone is insufficient to establish express aiming at the forum state as required to establish personal jurisdiction in the forum state.

(3) The court makes clear here that creating a Web site, like placing a product into the stream of commerce, may be felt nationwide/worldwide, but without more, that is not an act purposefully directed at a forum state.
   (a) Otherwise: personal jurisdiction in Internet-related cases would almost always be found in any forum in the country.
      (i) This result would violate long-held and inviolate principles of personal jurisdiction.

(4) Dissent: P knew that at least two of the targets of his act were centered in CA. Thus, for purposes of specific personal jurisdiction, his intentional act, even if committed outside of CA, was directed at CA.

f) Litigating Jurisdiction
   i) Consent as a substitute for power:
      (1) Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee (1982): D who wrangles through discovery consents in essence to jurisdiction.
         (a) Options available to D:
(i) Do not wrangle, accept default judgment; concede the merits and contest jurisdiction → if you lose on jurisdiction, you’re in trouble because you’ve already got a default judgment against you.

(ii) Try to litigate jurisdictional question as a defense in court where the action is filed; if jurisdiction argument is rejected, D has to appeal

1. Rule 12(g): all Rule 12 motions should be made at the same time; you have to file an objection to personal jurisdiction as part of your pre-answer strategy.

(b) Conclusion by this court: D’s were already doing business in US and were litigating a discovery dispute all the way to the Supreme Court. It did not seem like they were inconvenienced by that…

(2) Carnival Cruise Lines, Inc. v. Shute (1991): (reverse of the issue of consent to jurisdiction; forum selection clause was “snuck in”); Facts: P’s bought tickets from a travel agent in WA for cruise on D’s ship. On back of tix, paragraph stated all disputes would be litigated in FL. Court held P’s request for jurisdiction in WA improper. Where companies provide for a forum selection clause and don’t have a bad-faith motive in including them, they are enforceable.

(a) Supreme Court said that the problem w/ the USCA’s decision was that it used reasonableness as a “trump card” → reasonableness only comes in after you’ve made your case for personal jurisdiction (the 9th Circuit said it would be unreasonable to force P’s to litigate in FL)

(b) Supreme didn’t care that P’s were old and can’t travel to FL → efficiency is key. It is efficient to have lawsuits in FL, and those efficiencies are transferred over to customers through lower prices.

ii) Consent:

iii) Forum Selection Clauses:

g) Notice Requirement

i) FRCP 3-6 & 17: 14th Amendment; requires reasonable notice and right to be heard

1. Rule 4: service of summons and complaint

2. Rule 5: once service of process has been achieved, all subsequent filings can be delivered through mailing

ii) This is NOT a jurisdictional requirement → it is an additional Constitutional requirement

iii) Mullane v. Central Hanover Bank & Trust, Co.: Facts: D is a bank in the business of managing trust funds. It is a trustee of particular common trust fund w/ 100 trust-holders. D sends notice out to all trust beneficiaries letting them know what happened to their trust over the course of the year. Holding: Income beneficiaries, whose interest revolved around high yield investments, required more notice than publication as compared to principle beneficiaries.
**Rule:** The method by which you provide notice has to be reasonably calculated to apprise interested parties of the litigation.

- Case does not fall under in rem or in personam for out-of-state beneficiaries, but it does seem more connected to in rem since P D processes property in NY
- States are more demanding in terms of requiring proper notice than federal courts

**h) Venue:** determines where within a particular court system a case can be brought

i) **28 U.S.C.A. §§1381, 1382**

**ii) Bates v. C&S Adjusters, Inc.: Facts:** P entered into credit transaction while living in PA and then moves to NY. Creditor employs C&S who makes collection notice to PA address. Post office subsequently forwards it to NY address. P wants venue in NY. Receiving notice in NY constitutes a substantial event sufficient to satisfy […] An action may be brought in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.

- Notes:
  - Venue may be waived → D MUST object to venue WHEN RESPONDING TO P’S COMPLAINT
  - Beware of special venue provisions
  - Certain interests in land are treated as “local actions”

**i) Decline of Jurisdiction**

i) **28 U.S.C.A. §1404:** In the event that you don’t have jurisdiction and the party moves to dismiss but states in the alternative to have the case transferred, you can transfer it.

**ii) Piper Aircraft Co. v. Reyno (1981): Procedural Facts:** P files claim in CA state court. D removes it to CA federal court. Piper moves to transfer its portion to federal court of PA b/c it is based in PA, records and witnesses are in PA. Court additionally transfers case for Hartzell to federal court in PA.

**Holding:** CA law applies to Piper, PA law applies to Hartzell. A P may not defeat a MD for forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favorable to him than that of the present forum.

1. CA court has jurisdiction over Piper b/c it purposefully availed itself to CA (had repair shops there)
2. Significant contacts analysis for Hartzell (Scottish law applies)
3. Determination of personal jurisdiction and venue will determine which body of state law applies
4. Governmental interest test: which state has the greatest interest in resolving this litigation?
(5) The Court here specifically noted that under some circumstances, the fact that the chosen state’s laws are less attractive to the D could be used to defeat a motion to dismiss for forum non conveniens.

(a) If the state chosen by the P has the only adequate remedy for the wrong alleged, then the motion may be denied.

(i) Forum non conveniens: An equitable doctrine permitting a court to refrain from hearing and determining a case when the matter may be more properly and fairly heard in another forum.
10) **Subject Matter Jurisdiction**

a) NOTE: A party does NOT have to make subject matter jurisdiction objection up front → it can be used later on even though it is in bad faith [cf: personal jurisdiction, which must be raised up front.

b) **Diversity of Citizenship**

i) 28 U.S.C.A. §1332(a): “provides for original jurisdiction in federal district courts of all civil actions that are between, inter alia, citizens of different states or citizens of a state and citizens of foreign states, and in which the amount in controversy is more than $75,000.”

1) **Amount in controversy requirement: ($75K)**
   - (a) Determined by the amount claimed by P in good faith, unless it appears to a legal certainty that the claim is really for less; does not do a lot to keep you out of federal court…
   - (b) P’s claims CANNOT be aggregated to meet the amount in controversy requirement

2) **Complete diversity required**
   - (a) All P’s in a suit are from different states than all D’s at the time the suit is brought. (I.e. everyone on one side of the “V” is from a different state than everyone on the other side)
   - (i) Citizens of different states:
     1. State citizenship for diversity purposes equated to common law concept of domicile; [domicile = state where he has taken up residence w/ the intent to reside indefinitely, i.e. to make it his home]
     a. “Indefinitely” = no definite intent to leave to make a home elsewhere – no definite plans to move at a particular time or upon the occurrence of a particular event.

ii) **Corporations:**
   - (1) §1332(c)(1): corporations are now citizens for diversity purposes of both the state where their principal place of business is located and the state in which they are incorporated
   - (a) “Principle place of business” – definable center of productive activities of the corporation – manufacturing or other profit-making activity that the corporation is engaged in [“place of operations” or “bulk of corporate activity” test]
   - (b) “Nerve Center Test” – used for corporations whose day-to-day activities are so dispersed as to make it artificial to characterize one state as center of productive activities → look to site of corporate headquarters or home office from which activities are coordinated

iii) **Mas v. Perry:** Facts: Mas, French citizen, moved to LA w/ wife. Wife is citizen of MS. Both were married graduate students in LA. Landlord installed two-way mirrors in their apartment and watched them for four months. Held: Mr. Mas was domiciled in France; Ms. Mas domiciled in MS. Since Ms. Mas did not have the intention of remaining in LA, she was still domiciled in MS.
c) Federal Question
   i) 28 U.S.C. §1331:
   ii) Purposes: uniformity in interpretation; federal judges more sympathetic to federal law
   iii) *Louisville & Nashville R.R. v. Mottley* (1908): Facts: P’s given lifetime passes for free travel on RR in settlement of a claim for injuries suffered in RR accident. After honoring passes for 30 years, RR refused to renew b/c Congress passed statute barring RR’s from giving free transportation. RR defended on ground that the federal statute barred renewal. P’s argued (1) statute was prospective only (2) if statute were interpreted to bar P’s passes, it would be unconstitutional under the 5th Amendment.
      (1) **Well pleaded complaint rule:** The court, in deciding whether a case “arises under federal law” asks whether P would HAVE to raise the federal issue in a complaint which includes the elements she needs to prove to establish her claim, AND ONLY THOSE ELEMENTS. (If P doesn’t have to refer to federal law in her complaint, not a federal question \(\rightarrow\) can’t just get into federal court by referring to a federal law in your complaint)
         (a) P here didn’t have to refer to federal law in her complaint: there was an adequate claim for relief by alleging only breach of K
         (b) Doesn’t matter if P’s claim includes anticipated defenses of the D which involve federal law.
   iv) *Merrill Dow Pharmaceuticals, Inc. v. Thompson* (1986): [federal law creates a substantive right, but does not [expressly] authorize P’s to sue for violation of that right] Facts: P sued for damages allegedly caused by drug manufactured by D. P’s asserted claims all based on state law tort theories. One of the negligence theories was that Merril Dow did not meet warning requirements of the Federal Food, Drug and Cosmetic Act – i.e. complaint alleged state cause of action, but asserted that P’s could prove this state cause of action by showing a violation of the substantive standard governing warnings in the federal statute. *A statute that creates a federal substantive right, but is held not to create a private right to sue to enforce that right, will not support jurisdiction arising under §1331.*
      (1) The court must inquire whether Congress intended to authorize a private right of action for damages.
      (2) Note case: **Smith:** state cause of action can suffice, if there is proof of that cause of action requiring proof of a proposition of federal law.
         (a) Difference b/w Smith and Merrill Dow: Smith turns on the construction of federal law (federal issue was substantial/central to the case)

d) Supplemental Jurisdiction
i) A court must always have subject matter jurisdiction over a claim if it is to proceed (this comes up w/ using joinder rules)

(1) The “collision”: Rules favor broad joinder because their goal is efficiency; but, there MUST be subject matter jurisdiction in federal court – can only get this in categories of cases enumerated under Article III, Section 2

(a) Historically, two doctrines to support jurisdiction over related claims:

(i) PENDENT JURISDICTION: If P asserted a jurisdictionally proper claim against a non-diverse party and added on a related state law claim

1. *Once a P asserts a proper claim based on federal law, diversity or some other federal ground, the federal court has the power – at least the constitutional power – to hear other claims arising out of the same “common nucleus of operative fact”*

   a. **Two part test:**
      
      i. Determine whether the federal component of the suit is SUBSTANTIAL; colorable
      
      ii. Does the state law claim arise from a common nucleus of operative fact (similar to same transaction/occurrence analysis)?

   b. Once a judge has determined that he has the power to hear the related claim, he must then determine whether it makes sense to exercise that jurisdiction. **Factors to analyze:**
      
      i. Does state claim predominate?
      
      ii. Would exercising jurisdiction require the court to decide sensitive or novel issues of state law?
      
      iii. Would hearing the claims together confuse the jury?
      
      iv. Will the federal issues be resolved early in the case, leaving only state law claim for decision?

   c. **Bracey Rule:** COMMON SENSE balancing test used to compare the importance of common and different facts to support each set of claims

(ii) ANCILLARY JURISDICTION: When related claims are asserted by D’s or other additional parties after the initial complaint; rationale: close connection b/w the original, jurisdictionally proper claim and the added claim that makes them part of a single “constitutional case” – the claim just has to bear a logical relationship nowadays

1. **Counterclaim:** Courts typically uphold jurisdiction over the state law counterclaim if it arose out of the same transaction as the main claim

2. **Third party claim:** Courts typically extend jurisdiction to third party claims that bear a logical relationship to the main claim

3. **Cases which are likely to get supplemental jurisdiction:**
   
   a. Impleader 14(a)
b. Cross claims under 13(g)
c. Intervenors as of Right under rule 24(a)

4. Won’t get supplemental jurisdiction:
   a. Permissive Counterclaim → not logically related
   ii) 28 U.S.C.A. §1367: Requires a more sophisticated analysis… remember:
   FEDERAL JURISDICTION IS LIMITED NOT ONLY BY THE
   CONSTITUTION, BUT ALSO MUST BE CONVEYED TO THE
   FEDERAL DISTRICT COURTS BY CONGRESS IN A JURISDICTIONAL
   STATUTE.

(1) §1367(a): “Except as otherwise provided in subsections (b) and (c) or as expressly
   provided otherwise by Federal statute, in any civil action of which the district courts have
   original jurisdiction (i.e. federal question/diversity of citizenship), the district courts shall
   have supplemental jurisdiction over ALL OTHER CLAIMS THAT ARE SO RELATED
   TO THE CLAIMS IN THE ACTION within such original jurisdiction that they FORM
   PART OF THE SAME CASE OR CONTROVERSY UNDER ARTICLE III OF THE
   CONST’N. SUCH SUPPLEMENTAL JURISDICTION SHALL INCLUDE CLAIMS
   THAT INVOLVE THE JOINDER OR INTERVENTION OF ADDITIONAL
   PARTIES.”

   (a) Federal courts can hear all claims that arise out of a “common nucleus
       of operative fact” as the proper federal claim
   (i) This includes additional claims asserted by P AND claims asserted
       by other parties, such as cross-claims and counterclaims

(2) §1367(b): Limits on Supplemental Jurisdiction: Supplemental
   jurisdiction cannot extend to certain claims brought by PLAINTIFFS IN
   DIVERSITY CASES: …claims by P’s against persons made parties under Rule 14,
   19, 20, or 24 of the FRCP, or over claims by persons proposed to be joined as Platiniffs
   under Rule 19 of such rules, or seeking to intervene as P’s under Rule 24
   of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with
   the jurisdictional requirements of section 1332.

(3) Three-part analysis:
   (a) First, the court must determine whether there is constitutional power
       under Article III, Section 2 to hear the supplemental claim.
   (i) This analysis doesn’t come f/ the statute; just ask whether there is a
       proper claim within the jurisdiction of the federal court and the
       related claim arises from the same common nucleus of operative
       fact → if yes, then the court has constitutional power to hear the
       supplemental claim

   (b) Second, is there a statutory grant of jurisdiction over the related
       claim?
   (i) In most cases, the grant comes from §1367(a) → grants
       jurisdiction over all related claims that are part of the same “case”
   (ii) MUST CHECK §1367(b)! It may strip the court of jurisdiction in
       some claims in DIVERSITY CASES

1. NOTE: IF A COURT DECIDES IT DOESN’T HAVE
   JURISDICTION, IT WOULD DISMISS THE STATE LAW
   CLAIM, BUT NOT THE FEDERAL CLAIM
2. **NOTE:** If Federal court won’t hear your state claim, you have two options:
   a. Bring two suits, one in federal court and one in state court, OR
   b. Bring one suit in state court, b/c state courts have concurrent jurisdiction over state and federal claims unless Congress has made federal jurisdiction exclusive.
      i. **Policy:** Without supplemental jurisdiction, a P would have a strong incentive to sue in state court in order to have his whole case resolved in one proceeding, which would lead to many federal cases being heard in state court → BUT, the primary purpose of federal courts is to expound and develop federal law → supplemental jurisdiction assures that P’s who prefer the federal forum will have full access to it.

   (c) Third, once the court determines that is has constitutional and statutory authority to hear related claims, it must decide, based on the various discretionary factors (see above) whether to do so → §1367(c)

   iii) *Exxon Mobil Corp. v. Allapattah Services, Inc.:*
11) **Erie Doctrine – Choosing the Law to be Applied in Federal Court**

a) Choosing Between State and Federal Law

   i) **Swift v. Tyson**: Federal courts sitting in diversity are not obligated to follow state decisional precedent. Federal courts only have to follow local statutes and local usages of the character before stated, and not contracts or other commercial instruments whose interpretation and effect are only to be found in the general principles and doctrines of commercial jurisprudence.

   1. The decisions of courts are not laws; they are interpretations of laws and can be reexamined, qualified or overturned by courts.
   2. While Federal Courts sitting in diversity must follow state statutes, they don’t have to follow state court decisions.
   3. Defer to the legislature b/c it represents the will of the people – a “moment of democracy”
   4. Purpose of Swift was to get uniformity – a Federal Common Law – but it led in actuality to hyper-fragmentation
   5. This decision was overturned almost 100 years later in **Erie RR v. Tompkins**.

   a) Swift was decided purely as a matter of statutory interpretation.
   b) Erie found the creation of a Federal Common Law to be unconstitutional.

   ii) **Erie Railroad Co. v. Tompkins**: State law governs substantive issues. State law includes not only statutory law but case law as well.

   1. Completely overrules Swift

   a) Swift had numerous political and social defects

      i) No uniformity

         1. No way to distinguish b/w local and general law

      ii) Discrimination by noncitizens against citizens – the privilege of selecting the court for resolving disputes rested w/ the non-citizen, who could pick the more favorable forum.

      iii) Discrimination was due to the broad province accorded to “general law” in which many matters of seemingly local concern were included.

         1. Also, citizens could move/corps. could reincorporate in another state = forum shopping

   b) Swift is unconstitutional: except in matters governed by the Constitution or Acts of Congress, the law to be applied in any case is the law of the state. There is NO FEDERAL COMMON LAW. The federal courts have no power derived f/ the constitution or Congress to declare substantive rules of common law applicable in a state whether they be “local” or “general” in nature.

   2. Dissent: Since no constitutional question was presented here or in the lower courts, and a 1937 statute which required notice to the AG
whenever the constitutionality of an Act of Congress was raised was not followed, the court’s conduct was improper.

(3) Concurrence and Dissent: It is unnecessary to go beyond interpreting the meaning of “laws” in the Rules of Decision Act. Article III and the Necessary and Proper Clause of Article I of the Constitution might provide Congress with the power to declare rules of substantive law for federal courts to follow.

(4) As interpreted in subsequent decisions, this case held that while federal courts may apply their own rules of procedure, issues of substantive law must be decided in accord with the applicable state law, usually the state in which the federal court sits. (Problem is determining what is substantive and what is procedural).

(5) Later S.Ct. decisions have made inroads into the broad doctrine enunciated here.

iii) *Guaranty Trust Co. v. York:* Where a state statute that would totally bar recovery in state court has significant affect on the outcome, even the suit is brought in equity, the federal court is bound by state law.

(1) Highlights the problem of distinguishing between what is substantive and what is procedural.

(2) Outcome determinative test

iv) Effort to Apply York

v) Erie and Conflict Laws

vi) *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.:* A federal court sitting in diversity need not follow state law allocating the fact-finding roles of judge and jury. Federal courts should apply outcome-determinative state law even on procedural issues as to which there is federal constitutional authority to make its own rule, unless doing so is outweighed by countervailing federal policies that arise from the federal court’s status as an independent judicial system: *York + rule balancing test*

(1) Balancing test: state vs. federal interests

vii) *Hanna v. Plumer:* The Erie doctrine mandates that federal courts are to apply state substantive law and federal procedural law, but where matters fall roughly b/w the two and are rationally capable of classification as either, the Constitution grants the federal court system the power to regulate its practice and pleading (procedure).

(1) Return to the basic rationales of Erie.

(a) Considerations:

(i) Whether classifying a particular question as substantive or procedural will avoid “forum shopping”, which permits jurisdictions to infringe on the substantive law defining powers of each other
(ii) Avoid unfair discrimination – inequitable administration of the laws which would result in allowing jurisdictional considerations to determine substantive rights

(2) Outcome determinative test (Guaranty Trust) is rejected
12) Preclusive Effects of Judgments

a) Preclusive: Ways in which a final judgment in a case precludes re-litigation

b) Claim Preclusion (Res Judicata): Bars the same claim in a subsequent proceeding if the first proceeding has been reduced to final judgment (binding effect of previous judgment can bind something that was not necessarily decided)...

i) Virtues of Claim Preclusion:
   (1) Efficiency – promotes judicial economy
   (2) Incentive to join all theories of lawsuits into a single lawsuit
   (3) Prevents serial litigation that may be just for in terrorem value of the suit – just to harass → this presents a chance of inconsistent outcomes.

ii) Manego v. Orleans Board of Trade: P, a black person, filed initial claim which was conspiracy based on race. This first claim was against the Board of Selectmen, Bank and Willard. D’s MSJ was granted. P filed a second claim against the Board of Trade, Bank and Willard and based it on conspiracy/anti-trust. Held: Res Judicata bars the second claim. Where the same set of circumstances which were needed to try the first case is needed to try the second case, the second claim is precluded.
   (1) Transactional analysis: Time, space, origin motivation → depends upon how narrowly or broadly the court construes the situation (this is a pragmatically subjective exercise – use common sense)
   (a) If the court used a rights and duties analysis, the second claim would NOT have been barred → Duty not to discriminate in the first lawsuit vs. duty not to stifle competition in the second lawsuit
   (2) Manego COULD have added an anti-trust claim in the earlier lawsuit under Rule 20 (could have added Board of Selectmen as D’s)
   (a) Core events overlap – it would have been more convenient and efficient to bring both claims at the same time.

iii) Amending a claim:
   (1) Rule 15(a): if it happens before trial
   (2) Rule 15(b): if it happens after trial
   (3) Rule 60(3)(b): facts don’t come up until post-judgment; move to set aside the judgment w/ respect to new evidence → if you lose on this motion, you can still appeal

iv) Is a second claim denied if trial judge dismisses P’s motion for joining claims? → most likely

v) Other Action Pending

vi) Application of Res Judicata to Defendants

c) Issue Preclusion (Collateral Estoppel): Binding effect of a decision w/ respect to a particular issue in an earlier case. Once judgment has been made, a party cannot relitigate an issue even if subsequent litigation raises separate claims.
i) **Direct estoppel**: Works in a case which has not been conclusively decided on the merits (first lawsuit), but some issue in that case WAS decided, then the party is directly estopped from re-litigating the issue in the second proceeding? Check on this…

ii) **How to decide what issues were resolved in the first case:**

   (1) Pleadings
   (2) Transcripts
   (3) Justice of the Peace’s opinion (though not super useful)
   (4) Do not talk to jurors b/c they are not always logical (recall the Pepsi and Big Mac example)
   (5) Best way: Reason your way back from the ruling to the conclusion

iii) **Little v. Blue Goose Motor Coach Co.**:

   **Facts**: Little and BG get into an accident; Little dies as a result of injuries from the accident. Justice of Peace decided that Little was contributorily negligent. Little then sues BG in city court of East St. Louis. **Holding**: simple negligence claim is barred b/c he was contributorily negligent. Little’s willful negligence claim is not completely barred – however, first suit decided bus company was not negligent, thus if BG was negligent, it could not have recovered on b/c of contributory negligence doctrine.

   (1) Little should have raised his claim as a counter-claim
   (2) Widow/executrix is bound to the justice of the peace proceeding even though she wasn’t a party to it:

      (a) Privity: courts treat widow and P as same party; successor in interest
      (b) No privity: if widow was in the same car as P; difference b/w privity and proximity/participant

iv) **Hardy v. Johns-Manville Sales Corporation**:

   **Facts**: earlier case – 6 D manufacturer’s were found liable for asbestos related injuries b/c of P’s use of their products, which did not adequately forewarn them. Current case – P’s suit is against the same 6 manufacturers w/ “new set of claims.” **Holding**: P’s are not precluded from bringing suit. Where there are real differences b/w two sets of P’s, even if the decision effecting the initial P’s was a binding legal determination, the second set of P’s will not be collaterally estopped.