I. Personal Jurisdiction – in what state can P sue D

A. Generally
1. The court must have power over something w/in its borders
   a. Over D – in personum
   b. Over D’s property – in rem, quasi in rem
2. Two part test for PJ
   a. Must fall w/in due process clause circle
      i. this is second step, jurisdiction must be constitutional
   b. ct. must have statute which gives it jurisdiction (long arm)
      i. this is first step, if not stat. then no pj

B. In Personum – ct. has power over D herself
1. Two types
   a. general – D can be sued in the forum for claim that arose anywhere in
      the world, does not need to arise out of D’s contacts w/ forum
   b. specific – D can be sued over claim that has some connection w/ the
      forum
2. Due Process analysis – second step in determining PJ
   a. Traditional basis for PJ (Pennoyer)
      i. Citizenship (gen’l) – if get benefits from state, then subject to
         power of the state
      a. can serve that citizen anywhere in the world
      ii. Consent
         a. agree to forum’s power
         b. if P sues in that forum, they have consented to its
            jurisdiction and are subject to counterclaims
      iii. Presence (gen’l)
         a. of property
            i. in rem – suit for prop.
            ii. quasi in rem – judgment only good for value of prop.
               and must attach to suit
         b. of person
            i. even if just passing through (Grace-service on plane)
            ii. through agent
   b. Implied consent (legal fiction)
      i. Hess - expands traditional notion of consent to include
         conditioning privileges enjoyed by presence in state (driving) to
         submit to consenting to appointing Register as agent
         a. still must mail P notice, but agent can accept real service
         b. makes more sense to have trial in state where tort
            committed b/c that’s where witnesses and evidence are
      ii. developed b/c traditional basis was rigid, P could commit wrong
         in state and leave borders b/f being served.
   c. Minimum Contacts – new basis that gets away from rigidity of
      Pennoyer and legal fiction of Hess (D can be served outside of forum)
i. Int’l Shoe – D has such minimum contacts with forum such that exercise of jurisdiction doesn’t offend traditional notions of fair play and substantial justice (two part test)
   a. minimum contacts
      i. connections w/ forum state
         a. spectrum b/t continuous and systematic (gen’l juris) and isolated act (qualitative not quantitative)
      ii. cause of action
         a. spectrum b/t cause of action arising out of instate activ. (specific juris) and cause of action not arising out of instate activ.
   b. fairness
ii. changes PJ tree to look like
   a. Citizenship – gen’l/traditional
   b. Consent – traditional
   c. Presence
      i. property - minimum contacts (modern)
      ii. person
         a. in-state – split was to whether presence alone is enough or need min. contacts
         b. out-of-state – min. contacts
iii. expansion of min. contacts considerations
   a. promote interests of state to protect citizens – McGee: P only had one contact (sent ins. K) but cause of action arose from contact.
      i. don’t make citizen go to another state to sue (convenience)
   b. stream of commerce – Gray: P put one valve into stream, wound up in forum and cause injury. Burden on P to show no min. contacts. Held tort committed where injury took place (could also arg. tort committed where neg’l happened)
      i. 4 justices of Asahi ct. and lower ct. split and require stream of commerce + purposeful availment
   c. P need not have min. contacts w/ forum: Keeton P brought defamation suit in N.H. b/c of extended SOL. Min. contacts satisfied even though D had no contacts and P sold very few mags. there.
iv. limits of min. contacts considerations
   a. must be purposeful availment – Hanson: P and D contracted, then D moved to forum. no min. contact b/c relationship w/ forum can’t be unilateral.
   b. must be foreseeable that D could be haled to forum – WWVW: stream of commerce only extends to D’s expectation that product will be purchased by consumer of forum state.
      i. D must reach out to forum state
c. causing effect in forum w/out purposeful availment of benefits and protections of forum’s law is not enough – Kulko: father sending kids to CA didn’t bring him w/in CA jurisdiction
   i. if effects alone was enough, anybody could be haled anywhere
v. fairness considerations
   a. must have min. contacts b/f look at fairness
   b. fairness factors can either defeat jurisdiction where min. contacts est. or support jurisdiction where contacts are very minimal.
      i. burden on D to show fairness defeats min. contacts: BK - very difficult to prove but proved in Asahi where D forgien corp., CA had little interest, and neg’l act took place overseas
   b. factors from BK
      i. “grave” inconvenience for D that puts him at severe disadvantage to P
      ii. P’s interest in convenient/effective relief
      iii. state’s interest in providing forum for citizens
      iv. legal systems interest in efficiency
      v. interstate interest in shared substantive policies
NOTE on BK (ct. held forum clause in K alone not enough to est. min. contacts but showed it was foreseeable for D to be haled to forum even though D not aware of clause– Drobak disagrees, from policy standpoint the little guy shouldn’t have to go to big guy’s forum)
d. gen’l jurisdiction
   i. test – if D’s contacts are continuous and systematic, then can be sued in forum for cause of action that does not arise from contacts
      a. examples (Perkins)– directors meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, maintaining offices/files
   ii. strong argument either way on these factors b/c on similar facts in Helicopteros Ct. found no continuous/systematic contacts
      a. unspoken factor in Heli, D was a foreign corp., finding juris. would dissuade foreign corps from doing bus. in U.S.
e. technological contacts
   i. email and phone calls
      a. count as contacts, but can’t be unilateral, D needs to reach out to P somehow/purposefully avail himself to forum or foresee being haled there
         i. return or solicit emails/phone calls
   ii. websites
      a. active sites – D conducts business w/ forum
         i. satisfies minimum contacts
b. passive sites – D makes info available to interested ptys  
   i. doesn’t satisfy min. contacts

c. interactive sites – permits user to exchange info w/ comp.  
   i. gray area – some ct.’s it is enough, other ct.’s require  
      something more

f. presence alone  
   i. Supreme Ct. split whether D’s presence in state is alone enough  
      to give PJ – Burnham: Couple divorced in NJ, husband went to CA  
      to visit kids and wife served him while there  
      a. Scalia – traditional “tag” rule is good (Grace – service on  
         plane)  
      b. Brennan – D must have min. contacts  
         i. but presence usually meets purposeful avialment test

g. consent  
   i. if appear w/out a “special appearance” or don’t answer claim,  
      then you have consented  
      a. default judgment entered in forum, P can try to enforce in  
         your forum, if find forum had jurisdiction then will give  
         judgment full faith and credit.  
      b. say something about collateral attack? pg. 181
   ii. forum selection clauses – ct. has held enforceable  
      a. Drobak disagrees – could argue fairness under Int’l Shoe

C. In Rem/Quasi in Rem  
   1. Def.  
      a. In Rem – suit over ownership property  
      b. QIR – suit for liability but attach property to get jurisdiction,  
         judgment only good for amount of property

   2. Traditionally  
      a. just attach property to suit at outset to get jurisdiction (property in  
         forum counted as presence)

   3. New Standard  
      a. everything must meet Int’l Shoe min. contacts test  
         i. In Rem – by definition allows meets Int’l Shoe, cause of action  
            arises out of property in the forum and is at least an isolated act  
         ii. QIR – presence of property is not enough b/c not related to  
            action, D herself needs to meet min. contacts test.  
            a. still use QIR when state long arm doesn’t reach constit.  
               limits  
            b. some ct.’s still allow traditional QIR rules where property  
               attached is land

II. Notice – in addition to PJ there must also be notice and reasonable opportunity to be  
   heard to satisfy due process  
   A. checklist for starting lawsuit- Rule 4(k)(1)(A)  
      1. Satisfy due process clause in terms of Int’l Shoe AND
a. to serve foreign corp. who has min. contacts w/ U.S. but not with any particular state this is all you need (don’t need stat. auth. service) – Rule 4(k)(2)

2. Does statute reach D for purposes of service?
   a. personal service anywhere in state (tag)
   b. fed. ct. can piggyback state ct. long arm statute – Rule 4k1A OR
      i. diversity cases, treat fed. ct. like state ct. (limits P’s choice of forums)
   c. service may be authorized by fed. statute – Rule 4(k)(1)(D)
      i. for fed. q. cases only, give fed. ct. full power

B. Service of Process – consists of summons and copy of complaint – Rule 4(a), (b)
   1. Service can be made by any non-pty who is at least 18 yrs/old – Rule 4c2
   2. Gen’l Rule – Service must be reasonably calculated to give notice to ptys
      a. must be a means done by one reasonably desirous of giving actual notice.
         i. competing interests b/t insuring all ptys get notice and not putting too high a burden on P
         ii. anything under Rule 4 is okay
      b. judged by the “practicalities and peculiarities” of each case
      c. actual notice not required

NOTE: notice by publication (constructive notice) is almost always invalid but may be okay as a last resort when not all ptys may be readily identifiable
   a. may especially be effective where property attached b/c owners assumed to be aware of the status of their property

3. How to serve an individual (three choices) – Rule 4e2
   a. personal service in state
   b. substituted service (not serving D herself)
      i. serving someone of suitable age and discretion residing at D’s usual place of dwelling or abode
   c. serve D’s agent
      i. appointed by K or by law (non-res. motorist statute)
      ii. Cognovit Note – where debtor submits to a jurisdiction chosen by creditor and appoint creditor as agent to confess judgment
         a. ct.s split on whether this is valid appointment
      d. any other method that is authorized by law of forum or law of state where service taking place – Rule 4e1

NOTE: Actual notice is not enough, must comply strictly w/ rules

4. How to serve a corporation – Rule 4h
   a. must serve an officer or managing or general agent
      i. somebody w/ sufficient responsibility that can be expected to transmit papers

5. Geographical limits
   a. narrow exceptions to long arm requirements
      i. bulge rule – may serve add. 3d ptys w/in 100 miles of the court – Rule 4k1B
      ii. federal question– don’t need a state long arm - Rule 4k1C,D
6. Waiving service – Rule 4d
   a. can waive service by mail
      i. D not required to waive service but if doesn’t, she may have to pay for service to be effectuated
7. Return of Service – after process server serves, must file a return of service stating facts of service
   a. majority rule – return of service only presumptive evid. of service
8. Immunity from service – if in a state involuntary/without compulsion of law, then immune from personal service
   a. involuntarily includes: in state to testify in ct. proceedings, lured into state by fraud
9. Improper service – when service improper, ct.’s have option to quash service if service can be made again, or dismiss if service unlikely to be made
   a. fed. ct. can dismiss if service not made w/in 120 days of filing compl. – Rule 4m
   b. SOL
      a. fed. ct.- suit commenced when compl. filed w/ clerk – Rule 3
      b. state ct. – state law governs

III. Subject Matter Jurisdiction (SMJ) – Are we going to state or federal court system in the state where PJ exists: PJ exists over pts, SMJ exists over claims
   A. Generally
      1. Fed ct.’s – have limited jurisdiction (policy goal of giving state as much auth. as possible), can only hear two kinds of claim
         a. federal questions
         b. diversity
      2. State ct.’s – have gen’l jurisdiction, can hear any kind of claim
   B. Diversity of Citizenship - §1332: created to prevent bias of state ct. against non-residents
      1. Two requirements
         a. ALL adverse pty’s must be citizens (not residents) of diff. states AND
         b. amount in controversy must exceed $75,000
         c. exception – usually decline SMJ, even if diversity is met, if probate or domestic relations matter, except will hear divorce, alimony, or custody
      NOTE: any pty (even P) can challenge diversity at any time, even at appeal
      2. Citizenship of pts
         a. complete diversity – stat. interpreted to mean any P can’t be a citizen of the same state as any D (Strawbridge)
         b. determining citizenship of individuals
            i. citizenship determined by state of domicile at time law suit is filed, not when action giving rise to suit took place.
            ii. domicile – true, fixed, and permanent home and principal establishment, which he has the intention of returning when absent
               a. can have only one domicile at a time
               b. must always have a domicile
               c. domicile is w/ parents until:
i. take up domicile in different state WITH
ii. intention to remain there
   a. even if don’t plan on returning to domicile,
      haven’t established new domicile until demonstrate
      intention to stay elsewhere
   b. intention determined by totality of circumstances
      ex. where: paying taxes, possessions, reg. to vote
iii. permanent resident aliens – citizens of state of domicile
   a. split as to whether perm. res. alien can sue non-res. alien
iv. legal representative is citizen of same state as decedent/infant
   c. determining citizenship of corporations (guaranteed to be on test)
      i. can be a citizen of more than one state at a time
      ii. all states where incorporated AND
      iii. single principal place of business, determined by one of 3 tests
         a. nerve center – locus of corp. decision making and overall
            control
         b. corp. activities – location of production/services activ.
         c. total activity – totality of circumstances, balancing factors
iv. unincorporated ass’n determined by residency of each members
   a. ex. partnerships, unions, charitable organizations
v. foreign corp. can’t assign its rights to citizen just to bring suit in
   US ct. against another foreign corp (Kramer – against legis. intent)
   d. complete diversity determined only by real pty’s in interest to suit
      i. real pty in interest – D who has legal duty sought to be enforced
      ii. P can’t name a citizen of same state just to keep out of fed. ct.
         a. nominal pty – pty who has no genuine legal interest in suit

3. Amount in controversy must exceed $75,000 not counting interest on the
claim or cost of litigation – tries to limit suits that can be brought in fed. ct.
   a. P’s claim controls the amount if made in good faith unless appears to
      legal certainty P can’t recover that much
      i. look to evd. of damages ex ante, tough standard for D to top
      ii. watch out for statutorily imposed ceiling on damages
   b. aggregation of claims to reach amount in controversy
      i. if one P v. one D or jointly liable Ds, then P can aggregate
         a. promote efficiency of bringing all claims in one suit
         b. any one of the joint Ds could be liable for entire amount
      ii. if multiple P’s, they can’t aggregate unless there is a single
         indivisible harm (joint ownership of property)
   c. determining amount in controversy for injunctive relief – 3 diff. tests
      i. value to P of the injunctive relief
      ii. value to the pty seeking to invoke fed. juris (either P or D
         if the case has been removed)
      iii. value to either pty which the judgment would directly produce

C. Federal Question - §1331: a claim that arises under federal law (U.S. constit.,
statutes or treaties), power invoked from Art. III, sect.2
1. Well pleaded compl. rule – to determine fed. question, look only to P’s prima facie case.
   a. Artful pleading rule – P can’t try to turn state claim into fed. claim by alleging anticipated federal defenses (Motley – RR case)

2. How to plead a federal question
   a. P must be invoking a right under federal law OR
      i. creation test – a suit arises under the law that creates the cause of action
   b. where fed. claim is “nested” in state claim (Grable)
      i. fed. issue must be stated, disputed, substantial, and necessary to claim AND
      ii. allowing fed. juris. wouldn’t be against congressional intent
      iii. look to totality of circumstances to decide congress. intent (state/fed. interest in hearing the claim, whether cause of action provided by congress for the fed. claim)

2. Declaratory judgment - §2201
   a. must be 1331 jurisdiction first Can get declaratory judge juris. under diversity?
   b. look to the coercive suit (what Ds’ claim would be)
      i. there must be a federal question in the coercive suite

D. Supplemental Jurisdiction – §1367
Note for test: don’t touch SJ unless 1331 and 1332 discussed first
1. Original claim by P must meet 1331 or 1332 jurisdiction
2. If there are addit. claims (by P, counter claim by D, or cross claim to 3d pty) that don’t meet 1331/1332, then look to SJ.
   a. §1367(a) grants SJ if “claim arises out of common nucleus of operative facts” as orig. claim (codifies Gibbs) look to relatedness of claims
      i. rat. – ArtIII, sect. 2 grants juris. over all fed. “cases” and avoids piecemeal litigation
   b. grant of SJ is discretionary – 1367(c) provides factors
      Always look to factors?
      i. supp. claim raises novel issue of state law
      ii. supp. claim predominates over orig. claim
      iii. org. claims have been dismissed
      iv. other compelling reasons (Exec. Software – must be a good reason/same nature as 1-3 (Gibbs factors), not unlimited discretion
   c. §1367(b) takes away SJ if:
      i. orig. jurisdiction is under 1332 AND
      ii. addit. claim by P is pursuant to Rule 14, 19, 20, or 24 OR
      iii. addit. claim brought by joined P under Rule 19 or intervening P under Rule 24 AND exercising SJ would destroy diversity
      a. SJ can’t destroy amount in controversy so long as at least one P retains over $75,000

E. Removal – allows D choice to move from state to fed. if meet 1331/1332 req.
1. General test – 1441(a)
a. if original claim could have been brought in fed. ct. (1331/1332),
then ct. must allow D to remove
   i. P can’t make a counterclaim (and become a D) to remove

2. Exceptions
   a. 1441(b) - if original jurisdiction is diversity, D can’t remove if citizen
      of forum state
   b. 1441(c) - if separate and indep. 1331 claim joined, then can
      remove entire thing – note: if it meets supp. juris. test, then it isn’t
      a “sep. and indep.” claim
         i. dist. ct. also has discretion to remand the state claims that
            predominate
   3. see 1446, 1447 for procedures on removal

IV. Venue – third hurdle in selecting forum (in addition to PJ and SMJ)
   A. Answers the question of exactly which fed. dist. ct. in the state suit can go to.
   B. State ct. – 13 different tests all using combination of ptys involved and where
      subject matter of suit occurred.
      1. Local action rule – must bring suit for property damages in state where
         property is located (applies to cross compl. by D too)
         a. ptys can waive if they want (unlike SMJ where ptys can’t waive)
   C. Federal ct. - §1391
      1. any dist. where a substantial part of claim arose OR
         i. substantial event can take place in more than one state (Bates)
      2. any district where D resides – if all D’s reside in same dist. OR
         i. if corp. – residency in any state where subject to PJ
      3. if neither 1 or 2 apply
         a. diversity only (1391a3) – venue in any dist. where any D is subject to
            PJ
         b. not based on diversity alone (1391b3) – venue in any dist. where any
            D can be found
      NOTE: 1391 doesn’t apply if case has been removed (1441 is venue stat.)
   D. Transfer of Venue – from one fed. dist. to another fed. dist. (different from
      removal)
      1. 1404(a) – applies when transferor ct. is proper venue
         a. for convenience and interest of justice, can transfer to another dist.
            where suit could have originally been brought
         b. P’s choice is rarely disturbed (Hoffman – wouldn’t allow D to
            transfer where transferee ct. wouldn’t have originally had PJ over D)
         c. transferee ct. must apply transferor’s law when hearing case
      2. 1406(a) – applies where transferor ct. is improper venue (no PJ over D)
         a. ct. can dismiss or in interest of convenience/justice transfer to any
            dist. ct. where could have originally been brought
   E. Forum Non Conveniens – a ct. dismisses b/c litigation would be more appropriate
      elsewhere (can’t transfer b/c more convenient ct. is in another judicial system)
      1. Typically only applies to suits which should be brought in another country
         (although can use b/c suit should be brought in state ct.)
a. Factors to consider (must be a strong showing)
   i. Private interests of litigants:
      a. where evid./witnesses are located
      b. where 3d pty Ds are located
   ii. Public interests
      a. avoidance of conflict of law or applying foreign law
      b. local interest in having local controversies decided at hometown
      c. congestion of ct.s
2. Sometimes judges condition dismissal on D waiving certain rights (PJ, SOL, etc.) so P can bring suit in foreign ct.
3. Where 2 foreign ptys try to bring suit in US, ct. may dismiss even if no alt. forum

V. Challenging forum – how D raises challenge to P’s choice of court and other defenses
   A. Direct attack – challenging b/f final disposition of suit
      1. Rule 12 – when served, must respond w/in 20 days
         a. respond by motion OR
            i. making a request for ct. order
         b. respond by answer
      2. Seven defenses that can by raised by motion or answer – 12(b)
         a. SMJ – (b)(1)
            i. can be raised at anytime, even on appeal – 12(g),(h)
            ii. can also be raised by the ct. sua sponte
         b. PJ – (b)(2)
            i. must be raised in first Rule 12 response – 12(g),(h)
         c. venue – (b)(3)
            i. must be raised in first Rule 12 response – 12(g),(h)
         d. insufficient process (rare) – (b)(4)
            i. must be raised in first Rule 12 response – 12(g),(h)
         e. insufficient service (common) - (b)(5)
            i. must be raised in first Rule 12 response – 12(g),(h)
         f. failure to state a claim (common) – (b)(6)
            i. can be raised anytime throughout trial - 12(g),(h)
         g. failure to join an indispensable pty – (b)(7)
            i. can be raised anytime throughout trial - 12(g),(h)
      Note: if not raised in manner described in 12(g),(h) → waived
   3. State ct.’s - Special Appearance to challenge PJ
      a. D appears specially to challenge PJ w/out consenting to gen’l juris.
      b. typically can only raise PJ defense, if raise others, then waive PJ
      c. ct. holds special trial to determine PJ, if ct’s finds PJ, D can challenge on appeal
   B. Collateral attack – challenging PJ or SMJ after final judgment entered
      1. PJ
         a. if D fails to appear, then default judgment entered against him.
            i. P may seek to enforce judgment in D’s home state pursuant to full faith and credit clause.
ii. D may challenge PJ in home state only on basis of whether issues were fully and fairly litigated and finally decided
b. if D appears and losses PJ arg:
i. he can’t collaterally attack when P tries to enforce judgment in D’s home state

2. SMJ
a. if pty doesn’t appeal finding of SMJ b/f final judgment entered, he can’t collaterally attack even if find later than no SMJ existed b/c of interests of finality.
i. restatements say can collaterally attack if default judgment was entered for failure to appear

VI. The Erie Doctrine
A. Applying federal or state law in diversity cases
1. Black ltr. Erie Rule – fed. ct.’s sitting in diversity must apply state **substantive** law (statutory and common law)
a. reasoning:
i. Rules of Decisions Act – laws of the several states, except when fed. law applies, shall be considered the rules of decisions in fed. ct.s hearing diversity cases.
ii. 10th Amend concern for preserving federalism
b. but federal procedural law still applies
2. How to tell if state law speaks to “substantive” issue
a. Questions of liability, elements of claim or defense (easy questions)
i. Erie itself was a question of duty
b. Questions that aren’t easy (SOL, burden of proof, etc), two part test
i. Hanna Prong – if there is a direct conflict b/t fed. law or FRCP then must apply the federal law as long as it is valid.
a. comes from Supremacy Clause
b. validity determined under Rules Enabling Act – rules are okay as long as don’t modify state substantive rights.
i. S. Ct. has never stricken a FRCP
c. if REA says doesn’t effect a sub. right (strictly procedural) then it is unlikely to damage the twin aims of Erie
i. avoid forum shopping
ii. prevent inequitable dist. of laws
a. i.e, applying fed. law over state will cause litigants to flock to fed. ct.’s and give them advantage over state ptys that can’t get to fed. ct. b/c no diversity
ii. Erie Prong – if no FRCP on point, must apply state law if substantive (over fed. common law). Substantive tests
a. outcome determinative (York – ct. held state SOL was substantive law and must apply)
i. failing to apply state law would change outcome of case
a. problem – almost everything changes outcome
d. the law changes pts behavior OUTSIDE the ct.
ii. the law changes ptys behavior OUTSIDE the ct.
room (procedural rules only change behavior INSIDE
the ct. room)
b. Balancing of interests (Byrd – applied fed. law of jury trial
to determine whether P was employee over state rule of
having determined by judge)
i. apply state law unless fed. interests in doing things
differently out weights state interests
a. fed. interests (7th Amend.) in allowing jury trial?
b. any good reason why state wouldn’t want jury
trial?
3. Other consideration
a. “Avoidance Cannon” – ct. may read fed. law (FRCP or otherwise)
narrowly to avoid a direct conflict with state law
i. Walker – read Rule 3 to not govern tolling of SOL so wouldn’t
provide cause of action for P where state SOL had run out
ii. Gasperini – found Rule 59 which provides for trial judge to
review damage awards not in conflict w/ state rule for only appl.
judge to review damage awards.
. b. But Stewart upheld §1404 over a state law the prohibited forum
transfers
B. Ascertaining State Law
1. General Rule – dist. ct. sitting in diversity follows applies state law,
including state choice of conflicts of laws(when to apply laws of another state)
2. What if state law is unclear?
a. dist. ct. judge can decide state law as it believes state’s highest ct.
would decide it (Mason). factors:
i. modern trend in other states
ii. decisions of that state indicative of going towards the trend
b. abstention – dist. ct. can stay proceedings to get state’s highest court’s
to interpret a law.
c. certification – S. Ct. or Cir. Ct. can petition state’s highest ct. for an
unresolved legal question.

VII. Pleadings – sets for the claims and defenses
A. Complaint (Rule 8a) – filing complaint commences law suit (Rule 3)
1. Short and plain statement of SMJ
2. Short and plain statement of claim showing entitlement to relief
   a. notice pleading rule – need only put other side on notice of what
      plaintiff’s claim is and the grounds upon which it rests (Diogaurdi)
      i. don’t have to plead elements so long as they can be inferred
      ii. test – if all facts taken as true, is it possible P could make out
         some claim for relief at trial?
ii. don’t want to allege too many facts b/c gives D more chances to
dismiss or could turn out to be wrong (b/c pleading occurs b/f
discovery)
b. exceptions to notice pleading rule
   i. 9(b) – claiming fraud or mistake, need to give circumstances
   constituting the fraud “be stated w/ particularity”

3. Demand for judgment for relief

B. Answer (Rule 12) – response to pleading (also includes motions)
1. Must respond to the allegations of the complaint – 8b
   a. responses – admit, deny, or lack sufficient knowledge to admit or
deny
   b. failure to deny is treated as an admission – 8(d)
      i. inappropriate denial – denial that of info that is within D’s
         knowledge (Zielinski – misleading denial cause SOL to run out and
         P couldn’t sue true torfeasor so judge treated denial as admission)
2. Must raise certain affirmative defenses or else they are waived – 8c
   a. almost all other affirmative defenses must be raised in a pleading (b/f
      final judgment entered)
      i. Ct.’s differ as to what constitutes an affirmative defense, other
         than those enumerated, that must be raised in pleading
   a. see sect. V above for Rule 12(b) affirmative defense that can be raised
      via motion OR pleading

C. Pleadings generally
1. Rule 12(f) and 12(c) are methods of attacking sufficiency of other pty’s
   pleadings
2. 12(e) – move for more definite statement if pleading is vague or ambiguous
   a. negative pregnant – when P pleads a specific dollar amount and D
      denies b/c actual amount is just under or just over

D. Burdens
1. P had burden of pleading claim and proving elements at trial
2. D had burden of pleading affirmative defenses and proving elements at trial
3. Burden shifts back to P to introduce evid. to avoid D’s defense
4. Potential problems – a state law may require a P to prove affirmative
defenses don’t exist but 8(c) requires D to allege the aff. defense
   a. under Hanna – 8(c) would govern requiring D to plead the def.
   b. but state substantive law would take over after pleading stage and
      require P to prove the affirmative defense elements don’t exist

F. Amendments to Pleadings
1. Rule 15 – three circumstances
   a. basis rules – 15a
      i. P has right to amend once b/f D serves answer (motion doesn’t
count)
      ii. D has right to amend once w/in 20 days of serving answer
      iii. if there is no right to amend, pty can seek leave of ct. to amend
          a. leave freely given if justices so requires
             i. pty hasn’t acted in bad faith
ii. other pty won’t be prejudiced
b. amendments to conform to evid. presented at trial but not in the
pleadings – 15b
   i. if opposing pty doesn’t object to the evid. at trial, it is treated as
      if it were pleaded (implied consent)
   ii. if opposing pty does object to the evid. at trial, ct. will allow
      pleading to be amended if
      a. necessary to merits of the case OR
      b. opposing pty doesn’t show it will suffer prejudice
c. amending after SOL runs out – 15c
   i. relation back – treat amended compl. as if filed before SOL ran
      a. test to add a new claim – arises from same conduct,
         transaction or occurrence as orig. compl
      b. test to add a new D or change D
         i. new D must have had actual notice w/in 120 days of
            filing orig. compl. (in accordance w/ Rule 4m) AND
         ii. knew or should have know that he was subject to the
            suit
G. Supplemental pleadings
   1. Rule 15(d) – P may submit supplemental pleadings setting forth
      occurrences since the original compl.
      a. may be used to cure defects or allege additional claims
   2. 13(e) – D may use supplemental pleadings to assert counter claims that
      arise after filing of answer
F. Sanctions
   1. Derivative suits (stock holders) – P must verify compl.
      a. ct. can dismiss if clear that P doesn’t know what compl. is all about
   2. Rule 11
      a. By signing a filing, attny represents made an inquiry reasonable
         under the circumstances into the:
         i. evidentiary support of the allegations
         ii. legal support of the claim (not frivolous)
         iii. suit not meant to harass
      b. Sanctions
         i. 21 day safe harbor – attny may withdraw filing w/out censure
         ii. sanctions:
            a. discretionary – limited to what is needed to deter
            b. monetary – against lawyer or firm
            c. any other type of sanction – against attny, firm, or client
VII. Joinder – avoids piecemeal litigation
   A. Jurisdiction (important for test) – always need to make sure there is jurisdiction
      (orig or supplemental) and 1376(b) doesn’t take it away
      1. “transaction/occurrence” construed broadly to promote efficiency
      2. but need to make sure 1376(b) doesn’t take it away
CLAIMS ASSERTED AMONGST PTYS ALREADY PRESENT
B. Claim Joinder by P – Rule 18(a)
   1. P may join any claims she has against D, no relation needed
      a. if one or more claims arise out of same transaction, P must bring all
         claims or else subject to claim preclusion unless one or more claims has
         been subrogated to an ins. co. (Rush)
   2. Then assess SMJ
C. Claim Joinder by D
   1. Counter Claim (13a,b) – claim against an opposing pty (pty that has already
      sued you)
      a. file it w/ you answer
      b. Two types
         i. Compulsory counter claim – 13a
            a. arises from same transaction or occurrence (seen in fact.
               terms)
            b. D must assert claim or else it is waived
            c. likely state will not bar a compulsory cc by SOL b/c
               functions still served, but may choose to only allow cc to
               serve as set off to D liability and not allow recovery greater
               than amount owed to P
               NOTE: state counter claims can’t be compulsory under
               FRCP but likely barred by claim preclusion if not brought.
         ii. Permissive counter claim – 13b
            a. does not arise out of same transaction or occurrence
            b. D may assert as counter claim but doesn’t have to
            c. unlikely ct. will allow after SOL has run
   2. Cross claims (13g) – claim against a co-party
      a. must arise from same transaction or occurrence from underlying case
         i. not compulsory
      b. Circuits split as to whether co-Ps can bring cross claims
PTY’S PRESENT BRINGING IN THIRD PTYS
D. Impleader (Rule 14) – deals on w/ indemnity
   1. Applies when defending pty (either D or P on a counter claim) brings in a
      3d pty who may be liable to them for the claim asserted against them
      a. usually applies to an insurer or joint tort feasor
   2. Other claims
      a. pty who did not implead the 3d pty D and the 3d pty D may assert any
         claims against each other if they arise out of the same transaction or
         occurrence as original claim
E. Mandatory Joinder of Parties – Rule 19 who has the burden of bring them in?
A. Necessary and Indispensable pts
   1. Necessary pty – must be joined if meets PJ and SMJ AND – 19a
      a. without absent pty ct. can’t accord complete relief OR
      b. absent pty’s interests may be harmed if not joined
      c. absent pty’s interests may subject present pty multiple or
         inconsistent obligations
2. Indispensable pty – if necessary pty can’t be joined by lack of PJ or SMJ, then must choose to dismiss case or proceed w/out absent pty
   a. hardly ever dismiss, only if causes prejudice (indemnified pty won’t be able to bring sep. suit elsewhere)

F. Permissive Joinder of Parties (Rule 20) – pty may bring in a 3d pty
1. Test for whether an indiv may be joined as co-P or co-D by opposing pty
   a. claim asserted by or against them arises out of same transaction or occurrence
   b. share at least one common question of law or fact
2. If pty improperly joined (Rule 21)
   a. just sever the claim don’t dismiss the case

THIRD PTY’S JOINING SUIT ON THEIR OWN VOLITION

G. Intervention – Rule 24
1. Intervention as a right
   a. if intervener’s interest would be harmed if not joined AND
   b. intervener’s interest not adequately represented by existing ptys
2. Permissive intervention – up to ct.’s discretion
   a. intervener’s claim or defense has at least one common question of law or fact w/ the orig. claim

VIII. Class Actions – Rule 23
A. Initial requirements all class suits must meet – 23a
1. Numerosity – joinder of all members must be impractical
   a. typically b/t 25 - 350
2. Commonality – questions of law or fact common to the class
   a. test: whether factual differences of background will affect outcome of legal issues
3. Typicality – representative’s claim must be typical of class
   a. representative must “feel their pain” (Falcon – rep. passed over for promotion couldn’t represent class of ppl. who hadn’ been hired for discriminatory employment practices)
4. Representativeness – representative will fairly and adequately represent interests of the class
   a. unless absent pty is adequate represented to get a figurative “day in ct.” due process concerns kick in.

B. Three types of class – 23b
1. Incompatible Standard/limited funds (b1)
   a. where multiple suits may yield diff. results leaving D uncertain as to how to treat the class as a whole (needs to be more than varying monetary judgments) OR
   b. if there is only a limited fund for D to pay damages to multiple claims of a class
2. Injunctive/Declaratory (b2) – D acts or doesn’t act w/ conduct that is generally applicable to class as a whole (ex. civil rights, employment discrim.)
   a. hybrid class – where also seek some punitive damages
      i. if money is at stake, due process requires some form of notice
3. Common Quest. of law or fact (b3) – loosest form (mass torts)
   a. common questions “predominate” and class action superior to other
      available methods of adjudication
   b. factors
      i. interest of indiv. members in individually controlling litigation
      v. efficiency/economy of common adjudication
      ii. nature/extend of existing litigation commenced by class member
      iii. desirability of concentrating claims in one forum
      iv. difficulties in managing the class – KEY FACTOR
         a. conflicts in choice of law, etc.
         b. size of the class
         c. difficulty in providing notice
   c. only type that requires mandatory notice and option to opt out
   d. other factors from cases
      i. imiture torts – ct.’s rarely certify a class where no est. law for D
         to evaluate chances of victory b/c unfairly pressures D to settle
         (Castono – tobacco users couldn’t certify nationwide class)
      ii. mass accident claims w/ members from multiple states tough b/c
         of difficulties in managing class/diff interests (case name? – class
         of representatives of plane crash victims couldn’t be a class b/c…)

C. Procedural Requirements
   1. Order certifying class (c1) – defines class, class claims, issues, and appoint
      class counsel
      a. class certification can be changed at anytime b/f final judgment
   2. Notice of class membership (c2) – provide absent members w/ opportunity
      to appear or opt-out.
      a. 23(b)(3) is only type of class where notice is mandatory
      b. must be intelligible to those who receive it
      c. costs of notice are subtracted from class recovery
   3. Appointment of Counsel (g) – in addition to representativeness, ct.
      considers: knowledge of law at issue, prior class action experience, and
      resources available to counsel
      a. counsel can claim “reasonable” atty’s fees

D. Pretrial/Trial (d)
   1. ct. sets forth timetable for proceedings
   2. may hold individual hearings for issues specific to individual class
      members, including issues of damages
      a. bifurcated trial – one for liability, one for damages
      b. sampling – combines outcome of randomly selected cases
   3. recovery
      a. fluid recovery - if award is greater than what can be distributed to
         indiv. members, then award may go to benefit class as a whole or to
         charity
      b. in kind – coupon payments (subject to greater judicial scrutiny)

E. Settlement (e) – ct. must determine its fair, reasonable, and adequate
   1. provides second opportunity to opt-out
F. Return to PJ/SMJ/Venue analysis
   1. Due Process analysis – inverse relationship b/t notice and representation
      a. not really a problem w/ 23b3 classes b/c everyone gets notice
         i. if member of class in state ct. and choose not to opt out, then
            same thing as consenting to jurisdiction and precluded from
            bringing claim separately.
            Note – if not using opt out, must find another way to get PJ (class
            of land owners = min. contacts)
      b. problem w/ 23b1,2 b/c nobody is required to get notice
         i. Reasoning – b1,2 classes seen as homogeneous, can’t opt out b/c
            an order affecting one person in the class affects everybody.
      c. How then to determine if class judgment is binding?
         a. if interests aren’t adequately represented (Hansbury – racial
            restrictive cov. case)
         b use Rule 19 (mandatory joinder) as test to determine if judgment
            is binding on absent members (Martin – black firefighters)
      d. adequacy of rep. looked at twice – once when certifying class and
         again when determining binding effects
         i. but trend away from this – very disturbing b/c of due process
            concerns
         ii. most ct.’s won’t allow b3 members who chose not to opt out
            challenge adequacy of representation
   2. SMJ
      a. 1332(d)(2) – jurisdiction extends if any class member is diverse from
         any defendant AND amount in controversy exceeds 5 million or one
         representative’s claim exceeds $75,000
         i. suppl. jurisdiction extends to the rest of the class members
      a. §1453 – any D can remove state tort to dist. ct., even if D is a citizen
         of that state, without consent of all Ds
   3. Venue
      a. only residence of named class members
G. Settlement Classes – limits on class actions
   1. When considering class bound by settlement, ct. must also look at 23a and
      b req. in addition to req. that settlement be fair reasonable and adequate
      a. Amchem – settlement for class of P’s w/ current injuries can’t include
         P’s w/ future injuries b/c interests are antagonistic
      b. lesson – D’s want to certify the class under b1 b/c can’t opt out and
         binding on everybody
   2. Limits on b1(limited funds) classes
      a. the funds must be limited b/f suit brought, suit can’t create limited
         funds
      b. D negotiating how much pay for limited settlement is inconsistent w/
         theory of limited funds
      c. Strategy for D – declare bankruptcy b/f suit brought b/c then limited
         fund and need to pay off creditors firs
   3. Common solution – divide class into subclasses based on commonality
H. Preclusive Effect
1. Gen’l rule: a member of a class is not required by claim preclusion to bring a claim arising from same transaction as claim of the class.
   a. if claim preclusion applied and all members brought all claims, common issues wouldn’t predominate
2. Exception – representative class members are bound by claim preclusion b/c named members have to bring all their claims

IX. Pretrial Adjudication
A. Dismissal – **Rule 41**
   1. Voluntary - 41a
      a. P can voluntarily dismiss any time b/f D responds or if D consents
         i. McCants – judge granted dismissal after SOL had ran and D has filed motion for sum. judge so P could file in dist. w/ greater SOL
         i. voluntary dismissal is not on the merits, unless D has already voluntarily dismissed the suit before
      b. Judge can allow voluntary dismiss at any time, unless D has filed counterclaim, then no dismissal unless counterclaim can stand on its own
   2. Involuntary – 41b
      a. dismissal if P “lacks due diligence to prosecute”
         i. showing of prejudice to D is not enough, must be action/inaction by P causing undue delay
         ii. dismissal is on the merits, unless dismissed for lack of jurisdiction, improper venue or failure to join Rule 19 pty
         iii. ct. not required to give notice of intention to dismiss to P

B. Motion for Summary Judgment – **Rule 56**
   1. Here ct. looks at evidence
   2. Standard – 56c
      a. moving pty must show
      b. no genuine issue of material fact AND
      c. moving pty is entitled to judgment as a matter of law
   3. Question being answered is if claim should go to trial
      a. use a directed verdict standard – if this is all the evid. that went to jury, would jury be able to find for non-moving pty?
   4. Burdens (from Brennan’s “mini-treatise” dissent in Celotex)
      a. two burdens
         i. burden of persuasion – stays w/ moving pty
         ii. burden of production – shifts from moving pty to non-moving
      b. if moving pty bears burden of persuasion at trial (usually P)
         i. must support its motion w/ credible evid.
      c. if moving pty does not bear burden of persuasion at trial (usually D)
         i. must support its motion w/ credible affirmative evid negating element of non-moving pty’s claim OR
         ii. must show. that evid. is insufficient to est. element of non-moving pty’s claim.
a. must be more than a conclusory statement

5. Evidence considered
   a. affidavits, depositions, interrogatories
   b. evid. must show a reasonable theory of D’s motive
   c. non-moving pty may rely on allegations in pleadings but the pleading or responsive evid. must set forth specific evid. showing genuine issue of material fact.
      i. if P moves for summary judgment, rare that she can meet the burden
   d. sufficiency of evid. judged by standard that would have to be met at trial (preponderance, clear and convincing, etc.)

6. Ct. can’t make a judgment as to credibility
   a. if evid. by an unbiased pty → ct. gives it deference
   b. if evid. by an interested pty → issue of credibility for jury
      i. prime example of credibility issue for jury is “he said/she said”

NOTE: trend towards relaxed standard for summary judgment

C. Default Judgment: Rule 55
1. steps:
   a. pty fails to “plead or otherwise defend”
      i. if pty files answer, motion, or any other prelim procedure than this rule does not apply but if fails to appear at trial, judgment may be entered against him on the merits (Coulas)
   b. clerk enters default (different from judgment)
   c. final default judgment entered in one of two way
      i. by clerk if:
         a. pty has failed to appear AND
         b. the claim is for a sum that can be calculated to a certainty
      ii. by judge if amount is uncertain
         a. holds hearing to est. amount due (take an accounting, determine damages, det. truth of evid. ect) AND
         b. if D has appeared, must give D three day notice of hearing
            i. test for appearance – duty to give notice if ct. doesn’t have to work to hard to do it (appearance makes it easy)
   d. default judgment may be set aside only for factors outlined in 60(b)
      i. ct.’s favor setting aside default so can hear case on the merits
         a. ct. may grant challenge to default if coml. doesn’t allege cause of action
         b. challenge must comply w/ time line in 60(b)

X. Trial
   A. Right to jury trial
      1. Right to jury trial (7th Amend.) only applies in civil cases in fed. ct.
      2. 7th Amend. preserves right (as was in 1791) to jury trial only at law
         a. Rule 2 - now law and equity merged into “one civil action”, how to tell whether right to jury trial when suit involves question of law and equity (either by cross claims or counter claims)
i. historical approach: “heart of the case” – really seeking equitable remedy (declaratory/injunction) or legal remedy (damages)?
   a. factors
      i. pre-merger custom – is it a suite that could only be brought in equity ct. (derivative)?
      ii. remedy sought – this trumps pre-merger custom
      iii. limitations of juries to hear complicated issues
         a. Rule 53(b) – allows experts to help juries figure out issues that would previously have to go b/f judge b/c so complicated.
   ii. modern approach (Beacon Theatres/Dairy Queen)
      a. Rule 13 requires all claims be joined
      b. right to jury trial determined issue by issue
      c. in an issue underlies both legal remedy sought and equitable remedy sought → get jury trial on that issue.
      d. jury trial issues go first, then judge decides equity claims
         i. rat. – jury trial is such an impt. right under const.

B. Other Jury considerations

1. Tactical considerations in exercising right to jury trial
   a. time
   b. cost
   c. ability of jurors to digest
   d. statistics – P more likely to win b/f judge but juries award higher damages
   e. psychological factors
      i. how case will appeal to the jury
      ii. background, predilections of judge
   d. type of lawyer
   f. inclination of success – judges give feedback throughout trial, juries don’t

2. Jury Size
   a. State
      i. criminal – right to jury trial but no limit on size b/c 6th Amend. is incorporated through 14th Amend
      ii. civil - no right to jury trial b/c 7th Amend. doesn’t apply
   b. Federal
      i. criminal – right to jury trial but no limit on size b/c 6th Amend.
      ii. civil – right to jury trial b/c of 7th Amend but size limited to six jurors (Rule 48)
         a. rat. – size doesn’t mean reliability
         iii. most districts have local rules on size

3. Jury Selection
   a. venire – potential jurors are assembled
   b. voir dire – potential jurors are questioned by judge and lawyers to determine if they can adequately decide case
      i. can be dismissed for any reason except:
a. race/gender/religion
b. physical handicaps if reasonable accommodations are poss.
c. can’t exclude a class of income earners from jury list

4. Jury Misconduct
a. special verdict (Rule 49) – jury makes findings of fact but doesn’t decide outcome of case
   i. alt. approach – gen’l verdict w/ answers to interrogatories
b. ambiguous/contradictory verdict – grant new trial
   i. but if juries intend can be determined, keep verdict
c. Rules of impeachment – improper conduct by juries that causes new trial
   i. Majority/Mansfield Rule – juries can’t impeach their own verdict by affidavits
   ii. Iowa Rule – juries can impeach their own verdict if it can be corroborated by extrinsic evidence “overt acts” (ex. juror going to the “scene of the crime”)
      a. can’t be proved by intrinsic evid. – juries own prejudices/misunderstandings, ect.
   iii. Fed. Rules of Evid. – juries can impeach their own verdict if testify that extemporaneous information brought to their attention outside the court room or they were subject to undue influence
d. quotient verdict (average of each jurors belief) – jurors can’t use to assess damages unless they discuss the total amount
   i. rat. – one person could throw average way off
e. Jurors failure to answer a voir dire properly will not require a new trial unless it severely biased the case
   i. lawyers job to weed out jurors b/c after trial diff. to impeach

C. Judicial Override of Jury Verdict
1. At trial stage – Rule 50
a. Motion for judgment as a matter of law (Direct Verdict)
   i. takes decision away from jury
   ii. standard – “substantial evidence”
      a. view all evid. and draw all “reasonable” inferences in favor of non-moving pty.
      b. if non-moving pty has more than a “scantila” but less than a preponderance
      c. such than reasonable men could disagree, judgment is not appropriate
   iii. courts careful about this b/c:
      a. if so sure, let jury aside
      b. if found erroneous on appeal, must grant new trial
b. Renewed motion for judgment as a matter of law (JNOV)
   i. overrides jury verdict
   ii same standard as directed verdict
   iii. better b/c if overturned on appeal judge can just enter judgment on jury verdict rather than having to grant new trial
c. Motion for new trial for insufficiency of evid.
   i. alternative to granting a JNOV
   ii. standard:
      a. if judge thinks verdict against clear weight of
evidence or based on false evidence/miscarriage of justice
      b. allows judge to sit at “13th juror” using his own
discretion/views
      c. allowed even if evid. sufficient to preclude direct verdict
d. better than JNOV b/c just lets another jury decide
   i. rule of thumb – only grant one new trial
e. only reviewed for abuse of discretion
   i. rarely overruled

2. Timeline for dismissals
   a. Anytime after filing of compl. – 12(b)(6) motion for non-suit
   b. After P’s presentation of case – D can move for directed verdict
   c. After D’s presentation of the case – both ptys can move for directed
   verdict
d. After jury verdict – loosing pty can move for JNOV or new trial

D. Setting aside judgment on grounds discovered after trial – Rule 60(b)
   1. Motions that must be filed w/in 1 year
      a. mistake/excusable neglect – can sometimes include failure to meet
      filing deadline, factors:
         i. prejudice to opposing pty
         ii. length of delay/impact on judicial proceedings
         iii. reason for delay
         iv. whether moving pty acted in good faith
      b. newly discovered evidence
         i. must change result of trial
         ii. been discovered since trial
         iii. could not have been discovered at trial
         iv. material
         v. can’t be merely cumulative or impeaching
         vi. must relate to facts in existence at time of trial
      c. fraud – this is one area where ct. may reopen for perjury at trial
         i. will reopen for extrinsic fraud (what pty could not have discover)
         ii. will not reopen for intrinsic fraud (what pty could discover
         through depositions or cross-examination)
   2. Other motions
      a. void judgment
      b. judgment satisfied
      c. any other reason justifying relief

NOTE: Very difficult to re-open a judgment under 60(b) and changes in law don’t
count

X. Claim and Issue Preclusion – only involve situations where one case has been decided
and another case is pending a question from the first case
A. Generally – preclusion only applies if first case was decided on the merits
   1. doesn’t apply if dismissed w/out prejudice
   2. Default judgment arguably allows claim preclusion but never allows issue preclusion
   2. Policy rationale – pty gets only one chance to litigate an issue but must be a full and fair opportunity

B. Claim Preclusion – three elements
   1. Historically each theory of recovery was its own claim but now changed to factual inquiry
      ELEMENTS
      1. Both cases involve identical ptys
      2. Did first case end in a final judgment on the merits
         a. Rule 41(b) – all judgments are on the merits unless they are based on jurisdiction, venue, indispensable ptys or ct. specifies w/out prejudice
         b. S. Ct. found failure to meet a threshold (alleging an element of comp.) that caused dismissal fell under the “jurisdiction” exception of 41(b)
            i. but other cases hold that dismissal for anything short of the enumerated exceptions and w/out prejudice is an adjudication on the merits
            ii. Lesson – if involuntarily dismissed, need to appeal judgment b/c claim might otherwise be barred
         c. dismissal on the merits in fed. ct sitting in diversity, does not preclude claim from being brought in state ct.
            i. every state should give decisions of fed. diversity ct.’s the same effect it would give a decision of that state ct. in the state where the fed. ct. is sitting (ex. Semtek – CA dist. ct. applying CA law and dismissing b/c violated CA SOL, doesn’t necessary preclude P from bringing suit in MD state ct.)
            ii. WHAT ABOUT OTHER FED. CTS SITTING IN DIVERSITY?
   3. Do both cases involve claims stemming from the same transaction or occurrence
      a. transaction = common nucleus of operative fact
         i. relation in time space, orgin, or motivation
         ii. whether it can be treated as a convenient trial unit
         iii. whether treating as unit conforms to ptys expectations
   4. If pty fails to raise, then waive claim
   5. If claim not barred by res judicata make sure to check Rule 13
   6. Exception to general rule that can’t split claims
      a. when debt secured through series of notes or bond coupons
         i. each note/coupon is its own claim

C. Issue Preclusion - if issue has been previously raised, it is precluded from subsequent litigation
   1. Generally – issues are different b/c they can be split, no preclusion unless issue was actually raised (biggest diff. from claim preclusion)
      ELEMENTS
      1. Case one end w/ a final judgment on the merits?
a. remember “winners can’t appeal” – judgment for D in a cont’l neg’l scenario can’t be used against him if he brings suit

2. Same issue was actually litigated and determined in case one?
   a. just being presented is not enough
   b. must be able to determine that the precise question was litigated
      i. can determine through extrinsic evid. (jury awards, damages for all claims) b/c shows how jury came out on issues
   c. the judgment must be based on the issue, a finding of fact not enough

NOTE: remember same issue = same transaction or occurrence

3. Issue was essential to the judgment in first case
   a. needs to be clear from the facts
   b. Ct.’s split if judgment could have been based on more than one issue
      i. Restatements - if judgment is gen’l verdict or could be based on more than one issue raised but doesn’t specify which, none of the issues are precluded
      ii. Paterson Rule – if judgment could be based on more than one issue that was raised, all issues are precluded from subsequent lit.

4. Pty who preclusion being asserted against must ALWAYS have been a pty in first suit.
   a. required by due process
   b. exception:
      i. can’t be asserted against pty who won in first case b/c winners can’t appeal
      ii. co-ptys
         i. traditionally - co-ptys can’t claim preclusion for finding against one of them in later claims against each other
         ii. modern – co-pty may be able to claim offensive issue preclusion against liable co-D from first suit

5. Pty who is asserting the preclusion:
   a. traditional mutuality rule – only pts to the suit could benefit or be bound from judgment
   b. defensive issue preclusion – D precludes a P from relitigating issues which already raised and lost in previous suit w/ other pty
      i. ok if P had a full and fair opportunity to litigate it in first suit
      ii. this is the modern trend b/c encourages joinder
   c. offensive issue preclusion – P precludes a D from relitigating issues which already raised and lost in previous suit w/ another pty
      i. some ct.’s (not a majority) allow if:
         a. D had a full and fair opp. to litigate first suit (motivation to litigate to fullest extent possible)
         b. P could not have easily joined first suit
            i. impt. b/c otherwise allows Ps to adopt “wait and see” approach → discourages joinder
         c. D could foresee multiple. suits
         d. There are not inconsistent judgments against D
         e. No “harmless errors” in previous suits
ii. drawback
   a. if gov’t brings suit, coerces D to settle b/c if loose might be a multitude of private claims using offensive issue preclusion
   b. if allow in “mass disaster” first couple suits act as a class action

D. Preclusive effect among jurisdictional boundaries
   1. W/in a state or fed.’l ct. system – preclusion applies as normal
      a. What about Scalia’s opinion in Semteck – only bars bringing claim again in that fed. ct. house?
   2. Among states – under full faith and credit state ct. must give at least as much binding effect to a judgment of another state
      a. lesson – judgment in a state that req. mutuality can be given effect in a state that doesn’t require mutuality
   3. Between State and Fed. ct.’s
      a. State → Fed. claim stemming from same transaction can’t be decided in state. ct. then brought to fed. ct. under fed. q.
         i. diversity: - Semteck
         ii. fed. q. - ???