I. Right to be heard
   a. Fuentes v. Shevin: P has right to be heard (due process) before action is taken
   b. Mitchell v. W.T. Grant: writ of sequestration (taking property) is constitutional when it goes into a “court holding” (pending outcome of case)
      i. Two more conservatives joined court, reason this is different from (a)
   c. N. Georgia Finishing Inc. v. Di-Chem: if official seizures are carried our w/o notice and opp for hearing, it is a violation of Due Process.

Getting D into court
II. Personal Jurisdiction:
   a. First thing on exam: (1) ask – is there a statute governing this jurisdiction? (2) then do constitutional analysis (due process – fairness, etc.)
      i. In either state or federal, ct must have power over something over D’s person or property.
   b. Old law re in personam jurisdiction: In what states can P sue D? Pennoyer v. Neff (physically must be in the state, must have proper notice, must be kind of case that court hears) Held: notice by publication is not good enough for in personam jurisdiction, lack of personal notice violates due process, immaterial that judgment involved land.
      i. Four traditional bases for personal jurisdiction from Pennoyer
         1. D served w/ process in the forum (general jurisdiction)
         2. D’s agent served w/ process in the forum (general)
         3. D is domiciled in the forum (gives general jurisdiction)
         4. consent (waive due process)
      ii. “full faith and credit”: valid judgment is enforceable everywhere and validity is determined by limitations on state’s sovereignty.
      iii. Hess v. Pawloski: Mass statute implies jurisdiction if one drives on the highways for any reason, statute promotes care for all who use roads.
          1. Mass, therefore, has jurisdiction over you for driving actions
          2. consent theory: foreign corporation could be required to consent to service of process in the state by appointing an agent to receive process within the state, as a condition of obtaining permission to do business there. implied consent here
      iv. International Shoe: solicitation within a state qualify as “minimum contacts” which establish presence; corporation benefits from the laws and is therefore amenable to suit; continuous and systematic operations w/in state – not an isolated event.
          1. factors to consider: extent of business in area, relatedness of activities, benefits to business of being in state, convenience, state’s interest in suit.
          2. must have (a) min contacts so as not to offend (b) justice, fairness
          3. presence theory: foreign corp is amenable to process if it is doing business within the state in such manner and to such extent as to warrant inference that it is present there.
   c. Modernization of minimum contacts test
i. **Long-arm statutes**: provide personal jurisdiction over nonresidents who cannot be found and served in the forum; base jurisdiction over D’s general activity, or commission of certain acts within state or acts outside of state which have effects in state.

ii. **Gray v. Am Radiator**: (negligent valve constructed by Titan caused injuries in state) when a product is used in state during **normal course of business**, that is enough to render corp to pers service, strikes down jurisdictional barriers and finds factors that favor P – i.e. D can travel more easily.

iii. **World Wide Volkswagon**: if D has no “contacts, ties or relations” with the state, there is no jurisdiction. (car accident in Okie)

   1. contact with the state must be either directly related to the forum or substantial must be predictability otherwise
   2. D could not reasonably anticipate going into court in Okie
      a. No purposeful availment of Okie
   3. foreseeability, predictability

iv. **test used by cts**: (1) contact with the forum that is purposeful and is either substantial or directly related to the cause of action; (2) only if that contact exists, determine if personal jurisdiction will be fair given the balancing of the interests (fairness to D, generally)

   1. consider quantity, relatedness of the K
   2. fairness
   3. VW adds another aspect to K \( \rightarrow \) control/purposeful availment

v. **Keeton**: (Hustler magazine sold in NH, P brought defamation suit there even though she had no relation – NH has statute of lim which benefits her): D’s relation to jurisdiction, not P’s, is the salient point when determining personal jurisdiction; determine if NH stat of lim should be applied for natl injuries

vi. **Kulko** (father buys plane ticket for daughter) Held: no jurisdiction in CA b/c D did not “purposefully avail” himself or the “benefits and protections” of CA

vii. **Burger King**: D has substantial/continuing relationship with P, he is on fair notice from K/course of dealing that he is be subject to suit in P’s forum; K requirement for suit in Fla helpful but not dispositive in for requisite contacts

   1. consider **foreseeability** that D will get sued in this forum, NOT foreseeability that product will end up there.
   2. **Alchemie**: if D conducts business over the phone, that is minimum contacts enough to justify jurisdiction

viii. **Asahi**: deference to international context and slight interest of forum state can make personal jurisdiction unreasonable and unfair

   1. **theory one**: merely introducing something into stream of commerce is not enough; substantial connection b/t D and forum state must come about by an action of D purposefully directed toward forum state (*plurality* – Brennan) (i.e. advertise in state – see Disney case)
   2. **theory two**: you need the above + intent or purpose to serve state (O’Connor + 3 others)

ix. **Perkins v. Benguet**: based on circumstances, man who slightly runs Phillipine corp from his home in Ohio may or may not be held to jurisdiction in Ohio.
Held: finding of in personam jur does not violate due process; there is sufficient contact for genl jurisdiction case even though incident is foreign.

x. **Helicopteros:** Helicol’s contacts in Texas were insufficient to satisfy due process and thus no jurisdiction in Texas. Rule: Contacts must be sufficiently systematic, continuous so that bringing D to that state does not violate 14th.
   1. **general jurisdiction:** jurisdiction relating to general activities, i.e. where your headquarters are
   2. **specific jurisdiction:** your specific acts within one place

xi. Internet: sliding scale rule – personal jurisdiction over web stuff is proportional to quality of commercial activity being conducted
   1. active websites: D conducts business over Internet
   2. passive websites: website only makes info available, no grounds for jurisdiction
   3. interactive websites: middle ground ➔ lets user exchange info, maybe jurisdiction

xii. “Bulge Rule” (Rule 4K(B)): may reach out 100 miles to bring in impleaded party; fedl rules go beyond what state ct would do in similar situation.

d. **In rem jurisdiction and other single-factor tests**
   i. Terms: *in rem* – dispute over ownership of property; *quasi in rem* – we know who owns it, dispute is a regular case and would go “in personam” if possible
   ii. **Tyler:** (bank acct can be tangible/intangible property) proceeding in rem can be carried out without personal jurisdiction, gives court power to adjudicate over piece of land
   iii. **Harris v. Balk:** Obligation of debtor goes wherever he goes. ➔ if the property is attached at the beginning, even intangible property.
   iv. **Quasi in rem:** (Pennington) action is begun by seizing property owned by or debt owed to D, within the forum state. The thing seized is a pretext for the court to decide the case w/o having jurisdiction over D’s person. Any judgment affects only property seized and judgment cannot be sued upon in any other court; based on attachment or seizure of a property present in jurisdiction, not on contacts b/t D and State.
   v. **Shaffer v. Heitner:** throw out Harris, Pennoyer etc for in rem and say International Shoe for in rem (property) jurisdiction issues. ➔ suggests that the presence of the property will satisfy min contacts esp if it is real property!
   vi. **Jurisdiction based on physical presence:** **Burnham** (father goes to Cali for business): regardless of minimum contacts, if you’re in the state, they have jurisdiction over you – b/c he is in state, he is subject to state’s jurisdiction.
      1. **theory one:** (Scalia + 3) it’s okay b/c presence when served has a historical pedigree.
      2. **theory two:** (Brennan + 3) assess minimum contacts ➔ believed three days in the state was enough b/c he soaked up min. contacts.
      3. **transient jurisdiction** passes the fairness test b/c it passes both minimum contacts and reasonableness subtests.
   vii. **Milliken:** cts assume it is still good law ➔ domicile remains enough to establish jurisdiction in the forum state.
viii. **Forum selection clauses** in K: as long as the forum choice clause is fair, courts will give deference to it (*Zapata* and *Carnival*)

e. **Personal jurisdiction in federal court**  
   i. **FRCP 4(k)** Territorial Limits of Effective Service  
      1. **(1a)**: service of summons is effective over D if D could be subjected to jurisdiction of a court of general jurisdiction in the state in which the DC is located  
      2. **(2)**: if company has contacts with US as a whole, then you can go to any state → only when corp does not have requisite contacts with any one state.
   
   ii. See *DeJames v. Magnificence Carriers*: If there is no federal statute authorizing nationwide service of process in admiralty actions and DC is subject to FRCP, the minimum contacts rule is the law, Held: no jurisdiction

f. **Challenging personal jurisdiction**  
   i. **Rule 12(b)**: no defense or objection is waived by being joined with one or more defenses or objections → eliminates the content of special appearance, you can file your jurisdictional objection and any other waivers at the same time.
   
   ii. **(g)**: all motions must be at the same time
   
   iii. **(h)**: (1)(B) if you are raising defenses (lack of jurisdiction, improper venue, insufficiency of process/service of process) you have to do it at the beginning or else it is waived; (3) if it appears that cts lack jurisdiction, ct shall dismiss action – may remove action at any time for lack of jurisdiction
   
   iv. **Rule 19**
   
   v. See *Data Disk*: DC have wide latitude on what procedures (i.e. pleadings, affidavits, witnesses) they will use to establish personal jurisdiction

vi. See *Baldwin v. Iowa State Traveling Men’s Association*: If challenge or jurisdictional ruling is denied, you have submitted yourself to litigation of the dispute. Could have appealed to the OK SC or USSC. Public policy states that there must be an end to litigation. Otherwise, car dealer could continue indefinitely to contest jurisdiction. *Baldwin* drawing distinction b/t if you contest jurisdiction unsuccessfully and you never show up.

vii. See *Orange Theatre Corp*: D need no longer appear specially to attack the court’s jurisdiction over him. The defense of jurisdiction of the person must be raised by motion before answer or else it is waived.

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### III. **Notice and Service of Process**

a. **Reasonableness of notice**: efforts must be reasonably calculated to give actual notice, must convey actual info and give those interested reasonable time to make appearance (*Mullane*, published notice in a newspaper)

b. **Opportunity to be heard**: often comes up in commercial transaction – i.e. buy something on installment, miss a payment and we don’t want seller to instantly sell property w/o giving D a chance to be heard.

c. **FRCP 4 (Summons):**
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i. (a) Form: notice must contain clerk’s sig, party/court names, directed to D, name/address of P’s attorney, time when D must appear, and notification of failure to do so.

ii. (b) Issuance: if it is in proper form, clerk may sign/issue it.

iii. (c) Service with complaint, by whom made:
   1. summons served with copy of complaint, P is responsible for service within time allowed, furnish others with copies
   2. service may be effected by any person who is not a party and is at least 18, may be done by US Marshal at P’s request

iv. (d) Waiver of Service:
   1. D who waives service does not waive any objection to venue or jurisdiction over him
   2. duty to save costs of service: to save costs, P may notify D of action and request that D waive service of summons
      a. notice and request shall be in writing, addressed to D (or agent), sent through first-class mail, accompanied with copy of complaint identifying court, inform D of consequences of noncompliance, allow D enough time to return the waiver and provide D with extra copy of notice and request
      b. If D is in US and fails to comply with request for waiver, costs will be imposed on him for failure
   3. If D returns a waiver within proper time he is not required to serve an answer.
   4. When P files a waiver of service, action will go on as if summons/complaint had been serviced, no proof required
   5. costs to be imposed on D for failure are costs of effecting service and costs of motion, plus attorney’s fees.

v. (e) Service on Ind w/I jurisdictional district of US: service can go in any district in the US → under law of state of DC, there are three ways: (1) personal service anywhere in the state, (2) substituted service – not serving D but a substitute – however, must (a) be at D’s usual abode and (b) be someone of suitable age, (3) D’s agent

vi. (f) Service upon foreigners – (1) Hague Convention, (2) as directed by foreign authority or in accordance with foreign law or, if not prohibited, by mail, (3) as the court may direct

vii. (g) Service upon infants and incompetents shall conform to rules of the judicial district (in the US) or (f) (not in the US).

viii. (i) Serving the US government, p 15

ix. (j) serving foreign governments, p 16

x. (k) Territorial limits of effective service: (1) a summons is effective to establish personal jurisdiction if (a) state court, through the statute, could do so, (b) a Rule 14 or 19 party is cited within the US but not more than 100 miles away from the issuance of summons, (c) subject to 28 USC 1335, (d) authorized by federal statute; (2) if a federal question then it must be consistent with the Constitution’s Due Process clause (minimum contacts).
d. see Maryland Firemen: D must return the waiver or be served through certified, first-class mail or the suit cannot proceed against him (Maryland Firemen)

e. see Rovinski: (serving his mother at her house for him) Held: “Usual place of abode” qualifies as a place where D can receive service → Rule 4e2: allows for flexibility and service

f. see Hellenic Challenger: (asst claims manager can receive service of process) Held: the requirement that corporation’s managing officer must be served is loosely interpreted under Rule 4h; also, asst had already received several other summons.

g. See Wyman: (woman dragged man to Fla) Held: Fraudulently obtained jurisdiction is not valid, does not satisfy due process

IV. Federal subject-matter jurisdiction

a. Federal question jurisdiction

i. USC 1331: DC shall have original jurisdiction over all civil actions

ii. USC 1337: DC have original jurisdiction over anti-trust stuff

iii. USC 1442: civil/criminal action filed in state court against the US or an officer, property holder whose title came from an officer is removable to federal court. (B)if action if brought by an alien against a civil officer who is a nonresident of the state, the action can be removed to federal court.

iv. See Louisville & Nashville R. Co. v. Mottley: well-pleaded complaint law → if P writes a well-pleaded complaint then allows P to get into fedl ct. P’s complaint must allege or show that an essential element of P’s breach arose under law or treaty of the US.

v. See Bright v. Bechtel Petroleum: allowed removal to fedl’ ct. Found that P had used artful pleading in an effort to keep the case in state ct when P was really claiming D had violated a fedl tax law.

vi. See Smith v. Kansas City Title & Trust: (re bond issuance) When a claim arises under laws of the United States (Constitution), DC has jurisdiction → this case arose from state-created cause of action and turned on issues of fed law; it is a fedl question b/c fedl law had to be construed. Counter-argument: even though fedl law has to be addressed, doesn’t mean claim itself arises under fedl law: contractual issue.

vii. But see Moore v. Chesapeake: (more recent decision, contra Smith) When a cause arises out of state law turning on a federal question (interstate commerce, tort liability), no jurisdiction.

viii. See Shoshone, under Smith model: When a federal cause of action turns on a state law issue, it is a state case and there is no jurisdiction

ix. Modern Implied Remedy doctrine → determine if fed law implies a cause of action

1. Is the P part of a class that Congress meant to protect?
2. Did Congress intend to create such a remedy?
3. Is it consistent with the statute to apply such a remedy?
4. Is the issue traditionally of state or federal jurisdiction?

x. See Merrel Dow Pharmaceuticals: (theory for fedl jurisdiction: mislabeling the drug violated FDCA) Held: If there is a state cause of action that turns on
a fedl issue and Congress has pre-determined that there is no fedl cause of action, there is no fedl jurisdiction. (but see Modern doctrine for exceptions)

b. Diversity jurisdiction

i. § 1332: (a) DC have original jurisdiction when matter in controversy > $75000 and is b/t (1) citizens of different states, (2) state citizens and subjects of foreign state, (3) citizens of different states where citizens of foreign states are also parties, (4) a foreign state as P and citizens of (different) states

1. (b) when P is set to receive < $75000 (regardless of counterclaim or costs), DC may deny jurisdiction to P and may impose costs.

2. (c) (1) corp = citizen of state of incorporation or wherever it has its “principal place of business.” Suit against insurance company, the insurer will be considered citizen of wherever insured is a citizen, as well as any state of incorporation and principal place of business; (2) executors of estates are citizens of decedent, legal reps of infants or incompetents are citizens of state of infant/incompetent.

ii. See Mas v. Perry (alien students) When does diversity exist?

1. when each D is domiciled in a different state than each P
2. domicile: more than residence, it is fixed and perm home. Not destroyed until a new one has been established.
3. to create a new domicile: (1)create a new residence and (2) plan to stay there. Held: look at intention of individuals. (see also when the lawsuit was filed → look to subsequent events to determine intent)

iii. §1359: no jurisdiction over civil action fraudulently/collusively made in order to obtain jurisdiction

1. jurisdiction should not be based on a nominal party (Rose case)

c. Jurisdictional amount

i. §1332: see above (> $75 000)

ii. see Tongkok America v. Shipton Sportswear: facts revealed during discovery disclosed that jurisdictional amount could never have met required threshold so suit should be dismissed even after trial; P is responsible for knowing if claim is w/l statutory jurisdictional amount.

1. two tests: good faith test (amount must be claimed in good faith) and legal certainty (P must be able to recover it)

iii. See Snyder v. Harris: (woman wants to aggregate all claims to get jurisdictional “amount in controversy;” Held: cannot aggregate) Aggregation of claims is permitted when (1)single P wants to bring together two or more of his own claims and (2)two or more P try to enforce a single title in which they have common interest.

iv. Viewpoints on determining amount in controversy (McCarty v. Amoco Pipeline)

1. plaintiff viewpoint: use value to P to determine amount
2. view the amount in controversy from party who wants fedjur
3. either viewpoint: look to object sought to be accomplished by P’s action, test is pecuniary result to either party from result

d. Federal and nonfederal claims in combination (supplemental)

i. Pendent jurisdiction: when P, in her complaint, attaches a claim lacking an independent basis for fedl jurisdiction to a claim with such a basis
1. considerations of judicial economy
2. convenience and fairness to litigants

ii. **Ancillary jurisdiction**: when either P or D injects a claim lacking an ind basis for jur through a counterclaim, cross-claim or 3rd party claim

iii. See United Mine Workers of America v. Gibbs: If there is a **common nucleus of operative fact** between the state and the federal claim then the fed court has jurisdiction...if fed claim substantially predominates, at discretion of court
   1. reasons not to use pendent jurisdiction in all situations: if fedl issue is dismissed before trial, if jury would be confused by the assertion of jurisdiction over both claims, if state issues predominate, comprehensiveness of remedy sought

iv. §1367: (a) Under federal question jurisdiction, Federal courts shall have supplemental jurisdiction over state claims that arise out of the same case or controversy, (b) under diversity jurisdiction, the courts shall not have supplemental jurisdiction over parties 14, 19, 20, or 24, (c) the district courts may decline supplemental jurisdiction if (i) the claim raises a novel or complex issue of state law, (ii) the claim substantially dominates over federal law, (iii) the district court has dismissed all claims over which it has original jurisdiction, (iv) in exceptional circumstances when there are other compelling reasons for declining jurisdiction.

v. See Owen v. Kroger: (P sues D in fedl ct on diversity; D impleads another D necessary to suit who ruins diversity – ct worried that P will purposefully not implead a D so as to achieve diversity jurisdiction) Kroger is codified in 1367b: courts do not want fortuitous joinder to defeat diversity

**e. Removal**

i. §1441: (a) Any civ action can be removed b/c fed courts have original jur, (b) any other action is only removable if no party joined as D is a citizen of state where action is brought, (c) when ind, separate claim is joined with nonremovable actions, entire case can be removed and DC can throw out issues, (d) any action against a foreign state can be removed, tried without jury and (e) if I bring a federal question in state court, D can remove it immediately and there will be fed jur

ii. Once a federal court acquires jurisdiction of the case on removal, it also acquires jurisdiction on the pendent state law claims.
   1. **well-pleaded complaint doctrine**: cannot artfully plead yourself in or out of court; sets forth objective criterion for setting our jurisdiction (Bright v. Bechtel Petroleum)

**f. Attacks on subject-matter jurisdiction**

i. See Capron v. Van Noorden: (P lost the case and the said later that there was no jurisdiction) Federal jurisdiction cannot be created by consent or agreement → 12h: cannot question personal jurisdiction after the fact but can question subject-matter jurisdiction, ct allows attack.

ii. §10 Restatement: permissibility of collateral attack, based on
   1. lack of subject-matter jurisdiction is clear
   2. determination of jur depends on question of law rather than fact
   3. court is of limited, not general, jurisdiction
4. question of jurisdiction was not actually litigated
5. policy against court acting beyond its jur is strong
   iii. §12, 69 Restatement: judgment in action, regardless of whether or not s-j was litigated, if nobody is justifiably relying on the decision, then the court will consider coll.attacks
   iv. Subject matter jurisdiction can be attacked directly on appeal but not in a collateral attack. (Chicot County)
   v. But see Kalb v. Feuerstein: allowed a collateral attack on a state ct judgment in a matter that was federal ct jurisdiction.
   vi. c/a is not allowed if the issue was fully and fairly litigated in DC (Durfee v. Duke, re dispute over land in Missouri)

V. Venue and Forum Non Conveniens
   a. §1391 Venue Generally: (a) civil action founded on div of citizenship may only be brought where (i) district where any D resides (ii) district where substantial part of events on claim occurred or where substantial property is (iii) district where any D is subject to personal jur. at time action begins
      i. (b) civil action where jur is not found only on div of citizenship maybe brought (i) district where any D resides, if all D live in same state (ii) where substantial part of action/property is (iii) district where any D may be found if there is not district in where action can be brought.
      ii. (c) corporation D resides in any district where it is subject to personal jur at beginning of action or if there is more than one such jurisdiction, based on contacts sufficient to subject it to personal jur and if no such district, place will be one with most significant contacts
      iii. (d) alien may be sued in any district
      iv. (e) civil action against officer of US may be brought (i) where D resides (ii) where substantial portion of action/property is (iii) where P resides if no real property is involved
      v. (f) action against foreign state may be brought (i) district where substantial events/property is (ii) where foreign vessel or cargo is (iii) where agency is licensed to do business (iv) in US DC or Dis of Columbia if action is brought against foreign state
   b. see Bates v. C & S Adjusters: (man with debt, letter sent to P in PA and then forwarded to NY, NY found to be okay venue) Under §1391(b)(2), venue focuses on location where events occurred, not deliberate contact (personal jurisdiction factor)
      i. Forwarded letter qualified as a substantial event
   c. §1404: for convenience of parties/witnesses, DC may transfer the action to any other district where it may have been brought in the interest of justice
      i. see Hoffman: transfer of action to another district depends on whether the transferee district is one where action may have been brought by P
      ii. Ruling has been criticized extensively by other courts/SC
      iii. Hypo: suppose DC thinks IL is the most convenient forum, but D objects, what will the IL ct do? Don’t have jurisdiction under rule 12(b)(2) so a ct will dismiss it or transfer it to another ct with jurisdiction §1406(a)
   d. Forum non conveniens: court may resist imposition on its jurisdiction even when jurisdiction is authorized by letter of general venue statute
i. **Factors to consider**: ease of access to evidence, availability of compulsory process for attendance of unwilling, cost of obtaining attendance of willing witnesses, possibility of view of premises and any other practical matters that may make a case easier/harder

ii. Balancing of interests (Gulf Oil)

iii. **Factors re public interest to consider**: congestedness of forum ct, burden of jury duty w/ respect to the relatedness of the community to the lit., if it affects many then trial should not be in remote location, public interest, local interest in local controversy, diversity (go to the state whose laws you’re using)

e. **§1406: cure or waiver of defects**: (a) DC where case filed is in wrong venue should dismiss it or transfer it to where it should have been brought
   i. see Piper: (airplane accident in Scotland, suit brought in US): balance public and private interests and therefore no forum; presumption that P’s choice is valid is a strong one but less so if P is a foreigner

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**The Erie Doctrine**

I. **Fedl v. State law in Diversity cases**

a. **Old rule**: (Swift v Tyson) Rules of Decision Act made fed courts follow only the statutory law of the states b/c decisions of courts do not constitute laws!!!

b. **Erie Doctrine**: Federal courts must apply state, statutory and common law in diversity matters; Swift is unconstitutional (see also §1652, same idea)
   i. Kentucky common law held against taxi cab co, so it reincorporated in Tenn and when they got sued they went into federal courts b/c fed courts were inconsistent → example why we need Erie, **consistency**
   ii. Swift led to discrimination by noncitizens upon citizens b/c enforcement of general laws will vary; led to manipulation of laws
   iii. **Twin aims**: Want to discourage forum shopping & inequitable admin. of law

c. See Hinderlader: (re borders of states, rivers) apply only federal law in truly interstate issues (question of rights b/t two states rather than just people); under supremacy clause, federal law supercedes state law.

d. See Guaranty Trust v. York: When a federal court adjudicates a state-created right, fed court cannot afford any recovery that would not be available in state court → fedl cts can control procedure, Erie majority did not deal with dif b/t substantive and proc.
   i. Too simplistic of a test → ind can mandate fed rules based on state court doctrine (i.e. $10 filing fee in state court v. $50 in fed court)
   ii. **Substantive rule** should be **outcome-determinative** → if a state rule will determine the outcome of a case, it is viewed as substantive

e. See Byrd v. Blue Ridge: (fedl law requires a jury trial and state rule did not allow it) When state rules fundamentally alter the functioning of a federal court, fed should apply their own rules; esp when state’s substantive interest in situation is minimal, strength of federal procedural interest (balancing test)

f. **§2072**: rules cannot modify, abridge or substantially alter rights; all laws that were previously effective that are now covered by rules are no longer in effect
   i. **Rules Enabling Act** → allows fed courts to set their own procedural rules

g. See Hanna v. Plumer: (re leaving service with D’s wife in comport w/ a fedl rule) When Congress has enacted **rule (4d)** to control service, test is not outcome-
determinative. Held: Test is whether rule is within scope of Rules Enabling Act and, if so, within a constitutional grant of power such as Nec/Proper Clause

h. See Sibbach: Inspection of one’s physical body is not a substantive right → test must be whether a rule really regulates procedure

i. See Walker v. Armco: (ct used state statute for tolling of statute of limitations) Cannot give a cause of action longer life in fed court than it would have in state court if nothing is added to cause of action; service of summons is integral part of state statute of lim and is part of state cause of action

   i. Rule 2 not intended to toll state statutes of lim or displace state tolling
   ii. Different b/c Hanna is based on “direct collision” b/t fed and state law → Two steps to Hanna test: (1) are state and fedl laws in direct conflict/of equal breadth? (2) if so, if the rule a proper exercise of Congress’ rule-making power under the Rules Enabling Act and the Const’s Nec and Proper Clause?
   iii. If there is no fed rule covering issue in dispute, Erie requires state law

j. See Burlington v. Wood: (tacked on % if suit was unsuccessful, Ct didn’t allow state-tacking – claimed conflict w/ fedl law) Held: when rule is sufficiently broad, it’s a policy-laden judgment.

   i. Scope of rule if “sufficiently broad” is a valid exercise of fed authority (Hanna analysis)

k. ***Statute rather than rule → when the federal rule to be applied is a statute and statute applies to issue before the court, statute will be applied if it was enacted within the limits of constitutional authority (Stewart, court applied §1404 rather than Ala common law → do not have to honor state procedural preferences)

l. see Gasperini: (photographer getting money back, re jury awards) Held: award given out in federal court on “shocks the conscience” test cannot “deviate materially” from award in state court, gives AC right under 7th amend to review.

   i. this is a substantive issue, falls under second prong of Hanna test → consider what fed/state interests are at stake and if it will alter outcome

II. Ascertaining state law

a. Conflict-of-law: State has right to pursue policies different from other states, not for fed courts to thwart local laws → in order to promote uniform app of substantive law, fed court must apply conflict-of-laws rules of states they sit in

b. See Mason v. American Emery Wheel Works: (Neg case for injuries in Miss caused by object made in foreign state; DC dismissed the case based on Ford rule (manufacturer is not liable for injuries suffered when there is no privity of K) – good law in Miss but changed by modern rule in rest of country.) Held: Fed court applied state law as it believed SC would hold rather than how it presently existed – Fed courts can look to what states would rather than what they have done.

c. See McKenna v. Ortho Pharmaceutical Group: (Penn borrows Ohio law re the negligence case) Borrowing statute: Fed court asks what would the state in which they sit do? When a cause of action is barred by the law of the state in which it arose, that bar is a complete defense.

d. See Van Dusen: Law applicable in transferor court applicable in transferee court

e. See Ferens: In a diversity suit, transferee forum is required to apply the law of the transferor court
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Pleading

I. Complaint (and Motion to Dismiss)
   a. **Rule 8a**: No pleading requirement of stating “facts sufficient to constitute a cause of action” – only required to be a “short and plain statement of the claim showing that pleader is entitled to relief” (Dioguardi, crazy immigrant)
   b. **Heightened pleading standards**: In complex cases, pleading cases such as antitrust and corporations, pleading standards are more stringent → have to state more than just notice
      i. But see Leatherman: fed court may not apply a more stringent pleading standard in civil rights cases alleging municipal liability
   c. P’s complaint should not be dismissed for **12b6** unless it appears beyond doubt that P cannot provide support for her claim. (Am Nurses, c/a for disc)

II. Answer
   a. **8b**: In good faith, D must identify himself as the wrong defendant (specific denial rather than general), or court will still award declaratory judgment for P (Zielinski, D did not definitely say he did not own harm-causing truck)

III. Amendments
   a. **Rule 15**: amendments allowed any time before responsive pleading is served or when justice requires; issues that are tried by express or implied consent of the parties can be included by amendment even after the trial; rule turns on practical considerations such as notice and brevity of trial
   b. **15b**: Amendments are allowed if D is on timely notice and should expect issue to come up (Moore v Moore, child custody case); reasonable expectations
   c. see Aquaslide: (D wanted to deny manufacture of water slide) D can have leave to amend as justice requires → different from Zielinski b/c Zielinski specifically violated rule 8b whereas in Aquaslide they did not violate 15b; also BAD FAITH not here
   d. **15c**: relation back of amendments → show that D knew about it all the time and was able in a timely way to start preparing a defense; Worthington does not allow an amended complaint b/c statute of limitations has passed and it is not mistake but lack of knowledge (police officer case → amend filed after the statute of lim had tolled to name previously unnamed Ds not allowed under 15(c)(3) b/c they would not be on notice that action was being brought against them.
   e. See Ingraham: (many sued govt for medical malpractice and statute has aff defense capping damages in federal govt tort claims.) Held: Under **8C**, party must plead aff defense during initial allegation proceedings or else barred.
   f. See Taylor: same idea as Ingraham (limit on tort claim) but court calls it a limit rather than an aff defense and allows it. (though slightly different procedure)
      i. **Rule 59e**: motion to alter amended judgment no later than 10 days
   g. **Rule 60**: (motion from Ingraham) SEE RULES!
   h. See Hadges v. Yonkers: (stupid jockey): AC reverses sanctions on lawyer, finding that he only has to conduct inquiry reasonable under the circumstances (rule 23.1); **Rule 11**: counsel must check out the validity of a complaint.
      i. Jockey (Hadges) was not afforded a 21 day safe harbor period under rule 11 and therefore sanction should be reversed (rule has been abused and sanctioning used to freely → must give them Safe Harbor of 21 days after error called to attn to fix complaint or withdraw
Joinder

I. Joinder of Claims by P
   a. **Rule 18a**: P can join everything in claim (to expedite); **(b)**: P has to win claim A to recover on claim B but you can try them together and once you figure out A, you can deal with B (but may try them together).
   b. See Avery v. Harris: (P wanted to sue D for f.imprison and slander) Joinder of pleas is proper when the same transaction forms the basis of two or more causes of action
   c. **Rule 20** (permissive joinder of parties): all persons may join together as P if they have a right to relief jointly, severally or arising out of the same transaction; may be joined together as D if rights are asserted against them jointly, severally or same transaction/common questions of fact for them; Judgment may be given to one or more P or against one or more D based on respective liabilities; **(b)**: ct may make separate trials to avoid prejudice
   d. **Rule 42** Consolidation: **(a)** When actions involve a common question of law or fact, the court may order a joint hearing or trial and make orders to avoid delay costs. **(b)** Separate Trials – the court may order separate trials when justice and economy demand it for any claims, cross-claims etc.
   e. One claim prevents adjudication of the other when they arise from the same general tort, therefore you must try them together. **(Rush v. City of Maple Heights)**; res judicata: get one go in court and then it is finished.

II. Counterclaims
   a. **Rule 13a**: counterclaim is compulsory if it arises out of the same transaction to the opposing party’s claim
   b. see Mitchell v. Intermediate Fedl Credit Bank: (D sues Mitchell for payment of notes and Mitchell says, as defense, that D owes him money also) Held: can’t use same defense first as a shield and then as a sword – Mitchell should have counterclaimed for the money owed him.
   c. See Great Lakes Rubber Corp. v. Herbert Cooper: (Great Lakes sued Herbert Cooper claiming D had left P taking trade secrets, etc and D counterclaimed saying P violated Sherman Act; P said court had ancillary jurisdiction over compulsory counterclaim) existence of ancillary jurisdiction and whether a counterclaim is compulsory are answered by same test of **rule 13a** → Held: counterclaim that arises out of the transaction that is subject of opposing party’s counterclaim is compulsory.
   d. **Rule 13b** (permissive counter claims): pleading may state counterclaim against opposing party any claim not arising out of the transaction or is subject of opposing party’s claim.
   e. see Zeltser v. Carte Blanche Corp.: Reason not to allow fedl jurisdiction of a counterclaim: would discourage people from bringing suit in the truth in lending act. Congress indicated that it wants to underwrite deadbeats so there is public purpose.
      i. Leniency is general policy but not absolute – will be restricted as in above.

III. Cross-claims
   a. Claim against a third party after you have been sued
b. See *Lasa v. Alexander*: (marble in Memphis) Words “transaction or occurrence” should be liberally interpreted → if there is a logical relationship b/t P’s claim and D’s cross-claims
   i. **Rule 13g**: cross-claim must be arising out of the transaction or occurrence

c. **Rule 14a**: when can a D bring in a 3rd party? w/i 10 days of receiving suit, however if it’s longer than that, they have to get leave of the court.
   i. Third party D may assert any defenses to relieve itself of liability and any claims against the P arising out of the same transaction; any party may move to separate any third party D’s trial; third party Ds may bring others according to this rule.

IV. **Implieder**
   a. **Rule 14**
   b. See *Jeub v. B/G Foods*: (Jeub poisoned by ham in D’s food and D wants to implead others) Held: Although indemnity is determined by state law, the right to implead is a “procedural” matter in DC and is therefore governed by Fedl Rules
   c. See *Miskell*: ct’s abilities to separate trials relieves potential prejudice towards P
   d. See *Goodhart*: D’s ability to bring separate suits against third party Ds protects D’s rights when a court allows impleader.
   e. See *Revere*: P brings suit and D impleads a third party → A P’s claim against a third party D must have an independent jurisdictional ground; this is to allay fears for fortuitous impleading defeating fedl jurisdictional requirements. W/in core of aggregate facts. P has opportunity to choose venue, possibility of collusion (Kroger situation). However, when it comes to bringing D into court, take more liberal view.
   f. *Kroger v. Owen* decided correctly b/c there must be complete diversity if P knows, to begin with, that D will cross-claim against a citizen (Policy: accommodate a D who was dragged into ct but not a P who chose the venue)
   g. See *Guaranteed Systems: 1367b* → Fedl courts do not have supp jurisdiction over persons made parties under rules 14, 19 or 24. Even though the court would have heard the claim, it was barred by statute (liberal approach).

V. **Interpleader**
   a. **Rule 22**: when two parties are involved in a lawsuit over the right to collect a debt from a third party, who admits the money is owed but does not know which person to pay. The debtor deposits the funds with the court ("interpleads"), asks the court to dismiss him/her/it from the lawsuit and lets the claimants fight over it in court.
   b. Names all claimants as Ds and they have to compete against each other for the claim OR doesn’t concede that anyone owns it.

VI. **Necessary and Indispensable parties**
   a. **Policy considerations**: necessary = does not have to be brought in; indispensable = must be brought in. if a person deemed indispensable cannot be joined, the must dismiss the action.
   b. See *Bank of Cali v. Superior Ct*: (P named a lot of Ds, wanted inheritance. Ct held that other Ds weren’t necessary since named Ds comprised majority of estate)
Indispensable parties are those that will be directly affected and they must be included; necessary may be affected but they have some separable right.

c. **Rule 19**
   i. (a)(2)(i) and (ii): necessary and indispensable party classifications. Person must be included unless disposition of action will impede indi’s ability to protect his interest in action or if it will leave any person subject to a substantial risk open to incurring multiple/inconsistent obligations b/c of claimed interest. (joinder for persons needed for just adjudication)
   ii. Joinder only speaks to another joinder mechanism, whether or not it should be used. Rule 19, in and of itself, is not a joinder mechanism.
   iii. (b): determination by ct whenever joinder not feasible: if a person cannot be a party, ct decides whether in equity or good conscience action should proceed w/o this “indispensable person.” Consider:
      1. whether or not judgment would be prejudicial to other parties
      2. extent to which prejudice can be avoided
      3. whether judgment in person’s absence will be adequate.
      4. whether P will have adequate remedy if action is dismissed for nonjoinder.

d. **Warner v. Pacific Tel Co** (new wife wanted old MRs. Warner out of directory) Ct finds that old wife is an indispensable party.

e. **Haas v. Jefferson Natl’ Bank** (Haas claims he owns ½ of Gluck’s stock and Gluck is a necessary party.) Held: If D could be subject to double liability, then both parties must be joined:

VII. **Intervention**

a. **Rule 24(a):** Intervention of Right (involves judicial discretion)
   i. Potential intervenor must have interest in transaction
   ii. He must be impeded by protecting his interest by the action
   iii. His interest must not be adequately represented

b. See **Smuck v. Hobson:** (school board member attempts to intervene in discrim suit that had been found for D) → found that Superintendent, who resigned following initial judgment, has no interest that will be affected by the appeal and therefore cannot appeal or intervene.

c. **Rule 24(b):** (PERMISSIVE INTERVENTION) Anyone can intervene when (1) statute confers the right or (2) when applicant’s claim or defense and the main action have something in common. Ct considers prejudice and the rights of the original parties.

d. **Natl Resources Defense Council** group wants to intervene on grounds that it has a different interest than NY (economic as opposed to environmental) → ct finds that if one group demonstrates sufficient motivation to argue all colorable contentions, then interests of intervenor are represented.

e. Whether stare decisis is a d/a that warrants intervention of right (Atlantis → constructing on property claimed to be owned by US). Ct finds that stare decisis is reason to allow intervention → b/c panels of 5th circuit have to follow each other (hence stare decisis), must allow intervention.

Class Action
I. Certification

a. Rule 23: (a) Prerequisites to a Class Action \(\rightarrow\) class action only allowed if (i) class is so numerous that joinder of all parties is impracticable, (ii) questions of law or fact common to class, (iii) claims or defenses of rep parties are typical of the whole class and (iv) rep parties will fairly adequately protect interests of the class.

ii. (b) Class Actions Maintainable \(\rightarrow\) if (a) is satisfied and if (i) prosecution of separate actions would create risk of inconsistent adjudications/incompatible standards of conduct for party opposing class OR adjudications for ind members of class would substantially impair or impede ability of other members to protect their interests; or (ii) if injunctive relief will not be adequate for the whole class, cannot certify under b(ii) OR (iii) ct finds that questions of fact/law common to whole class predominate over ind questions therefore making class action superior \(\rightarrow\) factors include: (a) interest of members in individually controlling separate actions, (b) extent of litigation concerning controversy already brought against members of the class, (c) desirability of focusing litigation in particular forum, (d) difficulties involved in managing a class action.

iii. (c)

1. Determination by Order Whether CA to be Maintained \(\rightarrow\) ct determines if it should be maintained, order may be conditional, alterable or amended before decision on merits;

2. Notice, under b3 \(\rightarrow\) ct directs best notice practicable, including ind notice to members who can be identified with reasonable effort, notice advises them that (a) ct will exclude him if he requests it by a particular date, (b) judgment will include anybody who did not ask for exclusion, (c) any member who does not request exclusion may enter appearance through counsel;

3. Judgment \(\rightarrow\) shall include everyone ct thinks is member of class, whether favorable or not (under b1 or b2) and judgment under b3 shall include those to whom notice has been provided under c2, who have not requested exclusion and who ct thinks is a member of class;

4. Actions conduction partially as CA \(\rightarrow\) when appropriate, (a) action may be brought as CA w/ respect to specific issues or (b) class may be divided into sub-classes and each sub-class = a class

iv. (d) Orders in Conduct of Actions: (i) determine course of proceedings to prevent complication of evidence in presentation; (ii) ct can order notice to be given to class member at any point if necessary; (iii) impose conditions on members of rep parties or intervenors; (iv) require pleadings to be amended to leave out allegations re rep of absent persons; (v) dealing with other procedural issues

v. (e) Dismissal or Compromise: CA can’t be dismissed w/o approval of ct and notice must be given to all members in manner as ct directs

vi. (f) Appeals: AC may grant appeal at its discretion granting/denying CA cert if app for it is made w/i 10 days. Proceedings do not stop for appeal unless TC judge expressly says so.
f. See Holland v. Steele (people in prison want access to legal counsel) → although not all people identified (23a1), they all have same rights and are seeking same injunctive relief (23b2); facts for one case will resolve majority of questions (common questions of law/fact – 23a2); one rep’s claims are typical of whole class even though not all claims are identical (23a3 → typicality is met when class rep is part of class, has same interest and suffers same injury as class members); P’s motion is rep of interests of class (23a4); re relief – injunctive relief will solve problems of all (23b3)
   i. Re numerosity: future Ps must be accounted for
   ii. Ct finds that class can be certified

g. See Causey v. Pan Am (P wants to bring class action suit on behalf of all deceased from plane crash) – ct finds that CA is not appropriate b/c (i) conflict of law problems would be large, (ii) these claims are central to ind lives, hence ind would probably opt out of class and (iii) VA cts have little interest in adjudicating the claim

VI. Due Process

a. See Hansberry v. Lee (P sought to enforce racially restrictive covenants) → when does a CA bind a member of the class who is not a party to the suit? Rule: where those not joined have the same interests as those are joined and the joined members adequately represented their interests, then the unjoined are considered members.

b. See Gonzales: two times that representativeness is measured → (i) upon the outset by the TC and (ii) upon collateral attack after the suit.

c. See Martin v. Wilks: (group of black firefighters sued to prevent racial discrim, white firefighters sued to prevent enforcement of consent decree) → Rule 19 indicates that existing parties to lawsuits bear burden of adding new parties, therefore joinder is necessary and intervention under rule 24 is permissive. Third parties not precluded from challenging a judgment → law creates no obligation to intervene, therefore use joinder.

VII. Class Action Practice

a. App of 23c2 under a 23b3 class: see Eisen v. Carlisle (notice was given to class of 6 million through newspaper adds and D bore cost). Held: P must bear cost of notice to members of his class, part of ordinary burden of financing his own suit;
   rule23c2→ind notice, including right to exclude, should be sent to all who can be identified with reasonable effort.
   i. Constitutional background of Mullane: if you had addresses then you must use them but consider practicality.

b. See Wetzel v. Liberty Mutual Ins. Co.: (female claims reps who wanted to be claims adjusters brought Title VII action alleging discrim, brought class action including all women who had been discriminated against in some form, including pregnant women, hiring practices, etc) Held: Actions maintainable as 23b2 (injunctive relief not appropriate for whole class) or 23b3 actions should be brought as 23b2 for binding effect. Ct agrees that it is a b2 class but decides that injunctive relief is not appropriate b/c policies changed.

c. Compare Genl Telephone v. Falcon: Hispanic man could not serve as class rep for all workers who had been discriminated against in hiring, promotion or pay → ct says those are several interests and this man cannot stand for all groups, therefore not a 23b2 action. (he would not be able to rep those with hiring claims b/c he did not feel that, he would focus on promotions…)
VIII. Mass Tort Class Actions
   a. Amchem Products v. Windsor: Group brought suit to settle asbestos claims for present/future injuries; D conceded liability and waived statute of limitations defense; in exchange, P did not take increases for inflation, accepted lower avg recoveries and some injuries were excluded. Held: SC looked to settlement to determine that class was no good (b/c future injuries were not covered). Ct finds that common claims do not dominate (23b3 and 23a); 23b3’s predominance clause subsumes 23a3’s typicality requirement
   b. Ortiz v. Fireboard Corp.: must meet 23a requirements but to be a 23b1b class, must demonstrates limited funds \( \rightarrow \) SC held that P must show that D has limited funds to make it binding class and not impair future interests.

IX. Jurisdictional complications
   a. Ben Hur: In CA, diversity of citizenship should be based on the citizenship of the named parties only. (1921)
   b. Snyder v. Harris: (1969) separate and distinct claims could not be aggregated; aggregation permitted when (1) single P seeks to aggregate two or more of his claims against a single D and (2) in cases where two or more Ps unite to enforce a single title/right in which they have a common/undivided interest
      i. Rule 82 prohibits using Fedl Rules to expand DC jurisdiction
   c. Zahn v. International Paper Co: (1973) Each P, even unnamed, in 23b3 CA must satisfy the jurisdictional-amount requirement.
   d. Abbot Labs: atty’s fees can count as part of the matter in controversy
   e. Leonhardt v. Western Sugar: 1998 (circuit split on whether to require “matter in controversy” under Zahn to meet jurisdiction requirement) 10th circuit finds that §1367(a) and (b) can be read literally, unambiguously to require each P to individually meet $75000 requirement (contrary to 5th/7th circuits)
      i. One P meets requirement for original jurisdiction in fedl ct and wants everyone else brought in under 1367, 10th circuit reads it literally to say that those P who cannot meet amount must go to state ct.
      ii. §1367: in fedl ct b/c of diversity, therefore must meet jurisdictional amount requirement \( \rightarrow \) (b) if original jurisdiction is found under 1332 (jurisdictional amount requirement) then it must be applied to each P
   f. Phillips Pet v. Shutts: (Ps in CA suit for interest payments under natl gas leases, brought in Kansas) Held: forum state may exercise jurisdiction over the claims of absent class action Ps under certain circumstances; safeguards for CA: good rep, opt out provision and notice = due process is satisfied. NOTE: not the same contacts required underIntl Shoe paradigm, P class members will do all the work. Theory is that adequate P reps will adequately rep absent P’s interests, whereas we want to look out more for absent Ds (strictor standard under Intl Shoe)

Discovery
I. General Scope of Discovery
   a. Three purposes of discovery: (i) preservation of relevant information that might not be available at trial; (ii) ascertain and isolate those issues that actually are in controversy b/t the parties; (iii) find out what testimony and other evidence is available on each of the disputed factual issues.
b. Rule 26: General provisions governing discovery. (a) Required disclosures → (1)(A) name and address/number of each ind likely to have discoverable info that disclosing party may use for its claims/defenses, unless being used for impeachment, (B) copy /description of all docs, data complications and tangible things in possession of party and that disclosing party may use for claims/defenses, unless only for impeachment, (C) computation of category of damages claimed by disclosing party, and (D) for inspection copying, any insurance agreements that are relevant. Under 26(a)(1)(E), the preceding rules are not required: review of an admin record, petition for habeas corpus, action brought w/o counsel by a person in custody of US, action to enforce/quash admin summons, action by US to recover benefit payments, action by US to collect on student loans, proceeding ancillary to proceedings in other cts, action to enforce arbitration award
   i. Disclosures must be made within 14 days unless different time is set by ct under 26f; party must make initial disclosures based on info it has reasonably available
   ii. Re expert testimony: must be accompanied by a document including all opinions to be expressed, compensation
   iii. Re pretrial disclosures: in addition to above (26a1), (A) names/ addresses, including who will be presented and who they will call if need arises, (B) designation of those whose testimony will be given by deposition, (C) identification of each document, identifying which ones party will offer and which ones offered only if need arises. (shall be made w/i 30 days before trial
   iv. form of disclosures: made in writing, signed, served
   v. methods to discover addl’ matter: may obtain discovery by: depositions on oral/written questions, written interrogatories, production of docs/permission to enter land, physical/mental exams, requests for admission
c. Rule 26(b): Discovery Scope and Limits. (1) in general: parties can discover anything, not privileged, that is relevant to claim/defense of any party; info does not have to admissible at trial if discovery will reasonably lead to admissible evidence, subject to limitations under 26(b)(2)(i),(ii),(iii)
d. (2) Limitations: by order, ct can alter limits in rules on # of depos/interrogs or length of depos under rule 30. ct can also limit requests under rule 36. use of these rules are limited if (i) discovery sought is unreasonably cumulative or duplicative or can be gotten from some other more practical source, (ii) party seeking discovery has had ample opp by discovery in action to obtain info, (iii) burden of proposed discovery outweighs its likely benefit – factoring needs of case, amount in controversy, parties’ resources, importance of the issues at stake and importance of discovery in resolving those issues
e. (3) Trial preparation: Materials: party can only make discovery by showing that they have a substantial need of materials to prepare their case and that the party is unable, w/o undue hardship to get the substantial equivalent by other means, ct shall protect against disclosure of mental impressions, conclusions, opinions or legal theories of attys; parties can also obtain statements previously made that are relevant including (A) written statement signed or otherwise approved by person who made it, or (B) some other recording that is essentially a verbatim recital of an oral statement by such person.
f. (4) re expert witnesses: questions can be asked of expert witnesses during discovery by interrogatory or deposition. However, reasonable costs may be charged for expert’s time so long as it would not lead to undue injustice.

g. Rule 26(c): Protective orders. Upon motion by person from whom discovery is sought, ct in district where depo is to be taken can make any order which justice requires to protect party from annoyance, embarrassment, oppression, or undue burden or expense including orders that (1) no discovery allowed, (2) discovery limited to specified terms and conditions, including time/place designations, (3) discovery limited to some method other than that chosen, (4) certain matters cannot be asked about – limited scope, (5) discovery only conducted with no one present except people designated by ct, (6) depo, after being sealed, can only be opened by ct, (7) trade secret or other confidential info not be revealed or revealed in designated way, (8) parties simultaneously file specified docs in sealed envelopes to be opened by ct.

h. Rule 26(d): Timing and Sequence of Discovery. Judge can order timing and sequence as justice requires.

i. Rule 26(f): Conference of Parties. There will be a conference before discovery starts and a plan developed for discovery.

j. see Blank v. Sullivan & Cromwell: (re whether or not D has to answer P’s interrogatories) Held: Under rules 26, party is entitled to discovery, not only of material evidence which is admissible at trial, but also of info which appears reasonably calculated to lead to discovery of admissible evidence.

  i. Relevance: tending to prove a claim in issue → evidence is relevant if it makes a claim more likely true or false. Fedr Rule of Evidence 401.

k. See Marese v. Am. Academy of Ortho Surgeons: (two surgeons denied membership and ask for membership files, reasons for previous denials of membership) Held: Under rule 26c, discovery is limited when relative hardship to parties is examined; Posner said that info could have been reviewed in camera or redacted and pleased (sort of) both parties.

II. Specific Discovery

a. Rule 30, Depositions Upon Oral Examination: (a) when depositions may be taken – (1) party can orally depose anyone, (2) party must obtain leave of ct to depose if the witness is in jail or if, w/o written note of parties, (A) proposed deposition would result in more than 10 depos, (B) person to be examined has already been deposed, (C) if you want to depose ind before ct says it’s time

b. (b) Notice of Examination: Genl Requirements → (1) must give reasonable notice stating time/place of dep and name/address of each person, if subpoena is served then list of materials set forth in subpoena should be included in notice; (2) Method of Recording → party taking dep should say how it will be recorded, including by sound, sound-and-visual, stenographic, party requiring depo pays for it and any party can arrange for transcription; (3) Production of Documents and Things → w/ prior notice, any party can ask for another method to record dep in addition that already specified and must bear expense; (4) dep has to be given before an officer; (5) notice to party must be accompanied by request for documents; (6) Deposition of Organization → w/ notice, may name a corporation/govt agency and describe with particularity matters on which exam is requested, corp can designate officers to
testify on its behalf; (7) Deposition by Telephone → may stipulate in writing to do depo by phone

c. (c) Examination and Cross-Examination → may proceed as permitted by FRofE
d. see Haviland: (old man can’t travel for depositions) Held: If old man won’t travel, then D has to bear costs to get to him.

e. **Interrogatories**
   i. See Leumi: P suffered losses due to conduct of VP b/c VP failed to give notice of losses, issue as to what interrogatories VP must answer. Held: strict construction of rule 30 would make objectionable most interrogs requiring opinions or conclusions as answers since they would neither be relevant nor lead to discovery of admissible evidence; balancing test → possibility of prejudice outweighs the advantages to P (ct says he does not have to answer interrogs)

f. **Production of things**
   i. See Hart v. Wolf: (P sued D for defamation, D was agent for corp that held docs P wanted; D couldn’t produce docs if corp wouldn’t let him, but ct said he had to try and that he might be able to produce them.) Held: P must show a prima facie case of control to justify ct order requiring production of docs, P showed D’s relation to corp and D could not rebut; RULE: influence test (if you have influence over production of docs, that is prima facie control)

   1. See rule 34(c): a person not a party may be compelled to submit evidence

   2. See rule 34(c): a person not a party may be compelled to submit evidence

   1. Want to balance necessity of an invasive physical/mental exam, exam must be germane to the issue at hand.

h. **Requests for Admissions**
   i. **Rule 36**: party may serve request for admission for the truth of any matters w/i scope of Rule 26b1 that relate to statements, including genuineness of docs. Each requested matter set forth separately and is admitted w/i 30 days unless party challenges it, cannot be denied for lack of knowledge unless party has made reasonable inquiry into issue. Request for admissions shall be served separately on each issue.

   ii. **Rule 37c2**: if party fails to admit truth and requesting party later finds out that it is true, requesting party may get failing party to pay reasonable expenses incurred in making proof, including atty’s fees. Ct gives order unless (A) request was objectionable under 36a, (B) the admission sought was not substantially important, or (C) the failing party reasonably believed it could prevail on that matter or (D) any other good reasons.

   iii. See McSparran v. Hanigan: (P admitted that D did not have control of premises where accident occurred.) Held: if the issue is removed from
controversy (such as by P’s admission of D’s request), then it is clear that JNOV for D should be granted.

III. Mandatory Disclosure
   a. See Comas v. United Telephone Co of Kansas: (P wanted D to produce personnel files for treatment of its employees as an alternative to formal discovery, D wanted to do it under formal discovery.) Ct requires D to produce redacted files; D also has 25 days to prove why it should not pay P’s atty fees under Rule 37
      i. Penalty applies if D doesn’t conform with mandatory disclosure, application of Rule 26 is required → all districts must follow
   b. No mandatory sua sponte of things that will help other party’s case – only have to disclose things that help your case (part of adversarial process)

IV. Work Product
   a. See Hickman v. Taylor: (lawyer privately talks to survivors of railroad tow and gets information which P wants) Held: P must show necessity and justification to access materials; in this case, files were work product of atty’s mind, etc and thus P could not just have it. To require attys to turn everything over destroys the adversarial system. **famous case in area of discovery!
      i. See 26b3 codifies higher standard that you can only get work product info on a substantial showing of hardship or prejudice
      ii. Distinction b/t docs and facts in docs → can discover facts from a doc w/o discovering the document itself.

V. Sanctions
   a. Rule 37 Failure to Make or Cooperate in Discovery. (a) Motion for Order Compelling Discovery or Disclosure → party may apply for order w/ reasonable notice as follows: (1) must be made in the appropriate court, where discovery is being taken; (2) if party fails to make disclosure, party may move to compel it and for sanctions showing good faith; fail to answer question in depo or fail to appoint an agent if you’re a corp, moving party can move to compel those actions; (3) re evasive or incomplete disclosure: treated the same as failure to disclose; (4) re expenses and sanctions: (A)if granted, may require party to pay reasonable expenses incurred in making motion including atty’s fees unless ct finds motion was filed w/o movant’s first making a good faith effort to obtain the disclosure w/o ct action or that nondisclosure was justified, (B) if motion is denied, may making moving party pay opposing party reasonable expenses, (C) if granted in part and denied in part, may apportion reasonable expenses incurred.
   b. (b) Failure to Comply with Order. (1) sanctions by Ct in District Where Depo is Taken: if deponent fails to answer, ct can consider it a contempt of ct; (2) sanctions by ct in which Action is Pending: if party, agent or person designated fails to obey an order, ct can make orders including: (A) ct can just say that requested facts have been admitted; (B) refuse to allow opposing party to introduce evidence or support/oppose claims/defenses; (C) strike out pleadings until order is obeyed or render judgment by default against disobedient party; (D) contempt of court
   c. (c) Failure to Disclose. (1)party that fails to disclose info w/o substantial justification cannot use such evidence at trial and the ct may impose other appropriate sanctions; (2) see above
d. (d) Failure to Attend your Own Depo or Serve Answers to Interogs or Respond to Request for Inspection. Ct can make the same orders as under 37b2a,b,c
e. see Cine 42nd Street: (Cine alleged conspiracy by other theatre owners and he wants them to answer interogs which they take forever to do and then the answers are bad). Held: If opposing party acts with gross negligence, then the claim can be dismissed.

**Adjudication without Trial**

I. **Rule 56 Summary Judgment:** (a) for claimant → any party seeking to recover upon a claim, counterclaim or cross-claim may, after 20 days from the start of the action or motion for SJ by adverse party, move for SJ; (b) for defending party → may move with our w/o supporting affidavits for SJ in its favor as to all or any part of claim; (c) Motion or Proceedings Thereon → if there is no genuine issue as to any material fact than moving party is entitled to judgment as a matter of law; (d) Case Not Fully Adjudicated on Motion → can decide part of the case on motion for summary judgment w/o deciding the whole case; (e) Form of Affidavits, Further Testimony, Defense Required → adverse party cannot rest on affidavits or pleadings but must set forth specific facts that show a genuine issue for trial; (f) When Affidavits are Unavailable: If party cannot present affidavit facts essential to its opposition, ct can refuse app for judgment or order continuance as justice requires; (g) Affidavits Made in Bad Faith: if affidavits are presented in bad faith, judge can require reasonable expenses to be paid by bad faithers

a. see Lundeen v. Cordner: (children try to get dead father’s money and block new wife/child (intervenors) from it; intervenors present affidavit supporting position. Held: see 56c, if intervenor can prove no genuine issue of material fact, get SJ. Also, were this to be tried, there would be a directed verdict pursuant to rule 50a (→ no legally sufficient reason to find otherwise, therefore directed verdict)
b. see Cross v. US: (traveling profs want reduction for expenses incurred from IRS) Held: Govt is entitled to a trial in which all circumstances may be developed for the consideration by a trier of fact.
c. See Adickes v. SH Kress: where evidence presented in favor of SJ does not establish the basis for SJ then SJ must be denied even if no opposing evidence is produced.
d. See Celotex Corp. v. Catrett: if there is no evidence whatever as to whether Mr. Catret was exposed to asbestos made by Celotex, then Celotex will win SJ. Cts can rule on SJ sua sponte (w/o motion)
   i. If the burden was on the nonmoving party, then he can prove evidence or that the other side has no evidence
   ii. If moving against the party w/ burden of proof, don’t have to produce evidence of your own b/c they will have to prove it at trial; don’t have to support a motion by evidence, although you can.
   iii. If moving party can show that the other party will never had enough to show admissible and support a verdict, then will award SJ.
e. **Rule 55 Default judgment:** (a) Entry → when a party has failed to plead, ct can enter party’s default; (b) Judgment → judgment by default as follows (i) by clerk: if for a sum, ct can enter default judgment for that amount; (ii) by the ct: ct can enter judgment against all those w/o excuse (incompetent, young), before judgment is entered if the person has appeared, the defaulting party must be given 3 days notice in writing before judgment is entered, ct may conduct hearings abiding by parties’ right
to jury trial re damages; (c) setting aside default → for good cause, ct may set aside judgment of default; (d) Plaintiffs, Counter-claimants and Cross-claimants → everyone is covered by this rule; (e) Judgment Against US → no judgment against US unless claimant establishes a right to relief by satisfactory evidence.

i. See Coulas v. Smith: (trial date kept changing, but D knew about it and then D never showed up on the actual date) Held: Once an answer on the merits is filed and case is at issue, default judgment is not proper and if D fails to appear then a judgment on the merits may be entered against him.

ii. But see LEVIN: judgment on the merits was improper, should have been default; should have been under 55b and should have given 3 days notice.

Trial Stage

II. Trial by Jury

a. Right to a jury trial

i. Rule 42: see above

ii. Rule 38: (A) right granted under 7th amend; (B) party must demand it in writing within 10 days after service of last pleading; (C) in demand, party must specify issues to be tried otherwise all will be tried, if demand is only for some issues, other party may file within 10 days for any/all issues; (D) failure to file demand constitutes a waiver.

iii. Rule 57: Declaratory Judgments → existence of another adequate remedy does not preclude judgment for declaratory relief where appropriate.

iv. see Beacon Theatres v. Westover: (Beacon tells Fox that its K to be sole distributor of first-run films violates Sherman; Fox brought suit claiming duress, Beacon said there was conspiracy b/t Fox and distrib – asked for jury trial of factual issues in case) Held: SC reversed, saying 7th amend must prevail – whenever possible, a jury trial must take precedence; try jury matters first and then try judge matters. A party’s right to trial by jury cannot be taken b/c another party has asked for decl’ judgment.

v. Issue now: must determine if issue would have been law or equity as per 1791 7th Amendment terms. If it would have been an equity issue in 1791, you do not get a jury trial now.

vi. See Dairy Queen v. Wood: (DQ said Wood breached K and brought suit for injunction to restrain Wood from using trademark and also for damages) Issue as to jury trial of purely equitable case or legal issues incidental to equitable issues. Held: It does not matter whether legal issues are incidental to equitable issues (see also Beacon); even though ct focuses on word choice of “equitable,” this is an action for breach of K and therefore a legal issue.

vii. See Ross v. Bernhard: 1970 (P shareholders of investment company brought a derivative suit in fedl ct against directors, alleging excessive broker fees) Held: Actions no longer brought as actions at law or suits in equity – now there is only one action, “civil action” in which all claims can be joined and all remedies are available. Test: “legal” nature of an issue determine by considering (1) pre-merger custom re such questions, (2) remedy sought and (3) practical abilities and limitations and juries.
viii. **complexity exception**: (whether or not juries can handle certain issues) (1) recognized at common law at time of adoption of 7th amend, may be consistent with Const; (2) practical limitations on jurors’ knowledge, experience, ability → complex cases may be best left to experienced fact-finding capacity of trial judge (see Japanese Electronic); (3) some say that to send an issue to a jury that can’t handle it is a denial of litigants’ due process
   1. **7th circuit**: says you should not take a trial away regardless of complexity issues (see US Financial Security)
   2. **3rd Circuit**: there are exceptional circumstances to deny a jury trial (see Japanese Electronics) and offers test: (1) ct should examine factors that make suit complex; (2) ct should explore all possibilities of reducing complexity or making it possible for jurors to understand it; (3) consider unique adv of having jurors scrutinize complex issues
ix. See Teamsters v. Terry: (Union says there is no right to jury trial in a fair representation suit) Held: SC looks to history of fiduciary duty and trustee actions to determine what this case is more like but finds it’s too close to tell; finally, determine that party wants money, therefore this is a jury trial. Kennedy, dissenting: decide solely on history
x. See Indianhead: restitution is an equitable form of relief even though money is at stake b/c party wants specific performance, essentially.
xi. **six member juries**: consider whether or not it’s constitutional, want a cross-section of the public
   1. **Rule 48** # of Jurors → not fewer than 6 and not more than 12 and all must participate in verdict. Unless otherwise stipulated, (1) verdict must be unanimous and (2) no verdict from less than 6 people
   2. SC: held that 6 is okay but anything less is not constitutional
   3. **re state cts**: 7th amend does not apply, selective incorporation
b. **Jury Selection**
   i. **USC 1861**: Declaration of policy → all litigants entitled to a jury trial will have right to grand/petit juries, fair cross-section in their district. Further, all ind have right to be considered to serve on a jury and all ind have a duty.
   ii. **USC 1862**: Exemptions → no citizen is exempted from service on account of race, sex, origin or economic status.
   iii. **USC 1863**: Plan for random jury selection → (a) DC draw up their own plans for jury selection, checked over by a reviewing panel, can be modified at any time, official copy submitted to Admin Office of US Cts, Judicial Conference of US may at time adopt rules, (b) specifications of the plan → (5)(A) specify those who can be excused only on account on undue hardship or extreme inconvenience, (B) specify that volunteer safety personnel are excused → ind serving a public agency in official capacity w/o pay; (6) following are exempt from jury duty: active members of Armed Forces, fire/policemen, public officers in exec/leg/judicial branches of any govt; (c) enactment provisions → when enacted, have 120 days to submit and plan will be reviewed; (d) must make voter registration lists available to jury commission.
   iv. See Thiel v. So. Pacific Co.: (P wanted jury panel struck on grounds of unfair selection, b/c all daily wage earners had been excluded) Held: Inds can be
excluded for undue hardship, a total exclusion prior to meeting them does “violence to the democratic nature of the jury system.”

v. See Flowers v. Flowers: (custody suit where one juror demonstrated extreme bias towards people who drink and this woman in particular) re drinking bias: too extreme, idiosyncratic a view. To disqualify a juror, bias must lead to the natural inference that he will not act impartially. Juror’s previous knowledge (statements of her knowledge about this woman) exempted her.

vi. Two challenges: peremptory challenges → may strike for any reason whatsoever; challenge for cause → must show bias or some other good reason

1. peremptory can be challenged if it is racially motivated → do not want to discriminate rights of jurors under 1861 (cross section policy) and 1862 (no exclusion for race, etc.).

III. Judicial Control over Jury Decision

a. Province of the Jury

i. See Markman v. Westview Instruments: (unclear whether judge or jury should rule on issue of patent claim) Held: ct looks at (1) practice before the constitution existed, (2) look to precedent, (3) look to sound judicial administration. In this case, (1) and (2) are out so ct looks to who is better equipped – say needs for efficiency and uniformity outweighs the “earthy viewpoint of the common man.”

b. Jury Misconduct

i. Rule 49 Special Verdicts and Interrogatories. (a) Special Verdicts → jury makes special finding on each issue of fact, based on questions ct submits to jury, ct gives jury explanations and instructions re each issue of fact, if an issue is omitted by judge in its instruction such issue is waived by parties unless parties request it; (b) Genl verdict accompanied by answer to interrogs → hybrid b/t special and general verdict, when answers are consistent w/ each other but not the verdict, ct can enter JNOV consistent with answers or ct can return verdict for further consideration of answers or new trial

ii. see Robb v. John C. Hickey: (negligence suit that does not allow for comp neg, but then jury finds, in two line verdict, that both parties were neg and still awards P money) Held: Jury cannot come to conclusion that P was neg and still award him damages; TC ordered a new trial.

iii. See Sopp v. Smith: (whether juror testimony after a verdict should be allowed to impeach the verdict) applied CA rules of evidence. Held: Majority rule → No, never b/c (1) sanctity of jury room, (2) to protect verdicts and (3) to avoid uncertainty. Iowa rule → allow testimony re overt acts, such as gathering outside evidence but not on internal acts, such as their confusion, mistake, duress.

iv. See Hukle v. Kimble: (use of a quotient verdict) Held: ct threw out verdict; issue → how much do we want to inquire into jury process of finding verdicts. If we allow this level of inquiry, we might attack too many verdicts which would undermine verdicts and certainty of judicial process.

v. See Tanner v. US: SC finds that drug use during the trial by jury members is not an “external influence” → not something that can be reviewed. People will not serve on juries if they think they are always open to scrutiny.
c. Judicial Power to Override the Jury
   i. **JNOV:** attacks jury verdict not for misconduct but for verdict which seems dubious in and of itself.
   ii. See *Denman v. Spain*: (car crash where one witness testifies that D was speeding – is that testimony enough to base verdict on?) Held: Not enough to support a verdict so it must be set aside.
   iii. **Rule 50(a)(1) Judgment as a Matter of Law**
   iv. See *Kircher v. Atchison*: (D tripped, rolled over track and passed out when his hand got run over by train) Held: ct said that jury had a legally sufficient standard for finding the way it did.
   v. Why judges allow juries to take cases even though judge knows that he would direct the verdict: (1) b/c he trusts juries to do the right thing and (2) and the jury finds the wrong way and it is overturned on appeal, no new trial necessary (whereas if judge directed a verdict, new trial would be required).
   vi. **Rule 50 New Trials. (a) Grounds**
      (i) in an action of trial by jury for any reasons in which new trials have historically been granted, (ii) action tried w/o a jury for any reasons that have historically been followed, ct can also take addl testimony and enter a new judgment. (b) motion for new trial should be filed within 10 days; (c) opposing party has 10 days to file affidavits which may be extended up to 20 days for good cause or with parties’ written stipulation; (d) the ct, on its own initiative, may order a new trial that would justify granting one on a party’s motion
   vii. **Rule 50:** remember ct cannot and will not enter JNOV if there was not a prior motion for a directed verdict (historical reasons b/c facts found by jury are not reviewable so JNOV is just a delayed ruling on directed verdict to get around that rule)
   viii. See *Aetna v. Yeatts*: granting/refusing a new trial rests in sound discretion of trial judge and that action is not reviewable on appeal except on extreme error.

 d. Conditional and partial new trials
   i. **Remittitur:** an order denying D’s app for new trial on condition that P consent to specified reduction in jury’s award
   ii. **Additur:** an order denying P’s app for a new trial on condition that D consent to a specified increase in jury’s award
   iii. Historically, SC found that remittitur is permissible in fedl cts, additur is prohibited by the 7th amendment. (think, cap on allowable amount has been established by jury and we work down, versus working up from what the jury conclusively capped it at…)
   iv. see *Gorsalitz v. Olin Mathieson*: (ct denies D’s motion for JNOV, decreases P’s award amount, conditioned on P filing remittitur which P filed under protest) Held: standard that the jury’s maximum amount should be lowered to a reasonable amount followed in this case
   v. see *Fisch v. Manger*: (P applied for new trial b/c of low verdict and judge raised award on additur theory, P appeals) Held: SC of NJ reverses b/c judge’s new amount was still too low – consider SC’s standard that additur violates 7th amend.
vi. see Doutre v. NIEC: (P got injuries in beauty shop, new trial granted but limited to questions of liability) Held: if damages are to be retried, liability can be left undisturbed but if liability is to be retried, damages must also – so closely intertwined. Want juries to account for relative faults.

e. **Extraordinary Relief from Judgment**:
   i. **rule 6** (a) time is counted in business days for filing motions; (b)
   ii. see Hulson v. Atchison: (moved for new extension for motion to file JNOV which ct granted and D later objected saying time had passed) Held: ignorance of the rules is no excuse – extension cannot stand. (no “excusable neglect.”)
      1. ct wants finality, can’t keep extending
   iii. see Briones v. Riviera Hotel and Casino: (P claimed he never knew his case might be dismissed b/c he failed to inform translator/typist) Held: “excusable neglect” is an “elastic concept” under 60b and not limited to omissions caused by circumstances beyond control of movant. Four factors to be considered in determining in neglect is excusable in bankruptcy case: (i) danger of prejudice to opposing party, (ii) length of delay and its potential impact on the judicial proceedings, (iii) reason for the delay, (iv) whether the moving party acted in good faith.

**Binding Effect of Decisions**

1. **Res Judicata (Claim Preclusion)**
   a. See Rush under Joinder (claims should have been joined and not joining them means if you come back later to try one, it will be res judicata)
   b. See Moite: (two of seven antitrust claims brought in fedl ct, dismissed and then brought again in state ct, removed to fedl and then dismissed by way of res judicata; the other five appealed the initial fedl ct decision and won.) Held: the case has already been tried at the fedl level, hence res judicata – Moitie gets screwed!
   c. See Jones v. Morris Plan Bank: (P wants money for conversion of his car, claims when bank asked for monthly payments, acceleration clause made whole payment due at once, D never asked for the full amount therefore does not own car) Held: One law suit per fact situation; once D sued for first payments and acceleration clause kicked in, issue fell under res judicata.
      i. See also Nesbit rule: (re bonds with a number of interest coupons attached) each coupon is a separate K that gives rise to a separate cause of action.
   d. **Rule 8e2**: Parties can claim separate claims or defenses even if they conflict (i.e. I didn’t steal your glass but if I did, it was already broken when I stole it…)
   e. **Restatement 24**: consider whether it is all of the same transaction or not
   f. See Smith v. Kirkpatrick: (P brought claim saying poor compensation and it was dismissed, then he brought a claim under different K theory which was dismissed, then he brought a third claim under restitution) Held: Restitution was a different cause of action which did not impair the interests the ct intended to protect.
      i. SC has broadened principles of res judicata due to flexibility of fedl cts to hear many claims in one hearing (i.e. equity and legal causes of action)
   g. **Rule 54b**: On multiple claims of recovery, judgment can be made or one or more but not all and if judgment is made on but not and all final judgment is not entered on the remainder, judgment on one can be revisited.
h. See Heaney v. Board of Trustees: (P sued for writ of mandamus (injunction) which was denied and then he brought suit for damages on breach of K) Held: P did not forfeit his right to damages just b/c he did the writ of mandamus...ct finds he can sue.

i. See Bogard v. Cook: (P sues prison for maltreatment and prison claims res judicata b/c prisoner was formerly part of a CA which got injunctive relief, ct says it is a different cause of action) Held: This prisoner was not on notice that money claims had to be part of the CA suit; additionally, if all prisoners knew and brought forward their ind money claims, suit would have been unmanageable.

II. Issue Preclusion

a. Issue preclusion: a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of discovery and cannot be disputed in a subsequent suit b/t the same parties or their privies.

i. Even if the second suit is for a different case of action, the right, question or fact once so determine must, as b/t the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. (see S. Pacific Railroad Co. v. US)

ii. Benefits: helps secure the peace and repose of society by settlement of matters, enforcement is essential to maintenance of social order

b. Differences b/t claim and issue preclusion

i. Claim preclusion: claim may be barred or “merged” by party’s failure to raise it in a prior action

ii. Issue preclusion: applies only to matters argued and decided in an earlier lawsuit proceeding must involve the same issue as a previous suit.

1. judgment must have been valid, final and on the merits

2. issue must have been litigated in 1st action and decided by 1st court

3. can be invoked offensively or defensively

c. see Cromwell v. County of Sac: (action to collect bonds; earlier suit Cromwell’s guardian sued on fraudulent bonds and D claimed P was collaterally estopped b/c the issue had already been litigated) Held: Each bond is an independent promise, therefore each bond constitutes its own issue.

i. LEVIN: If you move to a new claim, a new suit, then the only matters that carry forward by way of issue preclusion are those that were argued

d. See Russell v. Place: (suit on a patent and won, D kept violating; P brought a second suit and D wanted to bring up new issues – it was unclear what the justification for the original holding had been) Held: D has a right to another trial on his new arguments if all you know there is recovery and there could have been two grounds for the recovery. (but see NJ SC – if both matters could have been the basis for the judgment, then both are estopped).

e. See Rios v. Davis: (P wanted to recover damages from car crash; first suit: Pop brought suit against D, D cross-claimed against P and jury found that everyone was guilty of negligence and therefore no recovery. Now D says P is collaterally estopped based on first suit) Held: If the judgment regarding P was immaterial in the first case and P did not have the right to appeal then P cannot be collaterally estopped.

i. General rule: If parties are not adversaries in the first case (no claims against each other) then no CE.
ii. In fedl proceeding, we would never have this problem b/c there are mandatory counter-claims, i.e. Rios would have had to counter-claimed in the first suit.

f. See Patterson v. Saunders: (P wanted money back from Ds wrongful cutting of timber from his land. First suit: P wanted Ds enjoined and TC found that P did not establish ownership of land. Ds claim CE b/c ct had already found that P had no title.) Held: Ct did its fact-finding in 1st case and determined P not to be the owner, and P took no appeal, 1st case was decided on the merits, P not now alleging any addl rights.
   i. Consider: 1st suit may not be reliable b/c there was not a full trial on the issue
   ii. Consider: when a prior judgment rests on two or more alternative and independent grounds, it may not be conclusive as to any fact issues (from Halpern v. Schwartz, see also Russell v. Place)

g. Doctrine of Mutuality
   i. See Ralph Wolff & Sons v. New Zealand Ins. Co.: (fire in P’s store and in first suit, insurance companies are proportionally liable, in second suit, other insurance companies want to be bound by that decision) Held: Both parties must be bound by the first case in order to have mutuality – consider, if the first decision were bad, D would not want to have been bound by it.
   ii. See Bernhard v. Bank of America: (Decedent gave Cook control of her savings and he got some of her money. First suit: TC determines money to be a gift. Second suit: Administratix of estate wants the money back from bank and bank says issue is CE based on first suit) Held: Person asserting claim of CE does not have to be a party or in privity. Offers three rules for determining if an issue is RJ:
      1. Was the issue decided in the 1st suit identical with the one presented in the current action?
      2. Was there a final judgment on the merits?
      3. Was the party against whom the plea of RJ asserted a party or in privity w/ a party in the first suit?
      4. **note: distinguishing b/t having CE claim brought against you and you bringing the CE claim…
   iii. estoppel can be used against a party in privity, but not against a party who was not around for the first suit → PROBLEM with not requiring mutuality
   iv. see Parklane Hosiery Co. v. Shore: (stockholder’s CA suit against P claiming that proxy statement was materially false and misleading. First suit: brought by SEC against D for same reasons. Second suit: P claims D is CE from arguing same issues which had already been resolved against them.) Held: B/c D received a “full and fair” opportunity to litigate his issue the first time, he is CE; offensive CE should be allowed if (safeguards are in place):
      1. If D did have the opportunity/incentive to litigate first suit fairly, vigorously
      2. If judgment in first action was consistent with prior actions
      3. D is not presented w/ unique procedural opportunities in the second suit
      4. P does not have opportunity to adopt a “wait and see” attitude