I. PERSONAL JURISDICTION

A. ORIGINS

a. *In personam jurisdiction*: power over persons
   1. A state has power over people within its territory (both residents and visitors)
   2. The non-resident must be served with process in the state
   3. Anyone who consents to the jurisdiction of the court grants them power to adjudicate their rights (the Π, for example)
   4. Anyone who appoints an agent within the state can be served through that agent (*Hess v. Pawlowski*)
   5. EXCEPTION: “status” claims (divorce suits, child custody, etc.) between a resident and a non-resident are usually subject to in personam jurisdiction regardless of residency, notice, property, etc.
   6. EXCEPTION: persons doing business in the state may be required to consent to jurisdiction as a condition of being allowed to do business

b. *In rem jurisdiction*: power over property
   1. A state has power over property within its territory

c. *Quasi-in rem jurisdiction*: power over a non-resident who owns property within the state (IF that property is attached beforehand)
   1. The fact that a non-resident has property in the state gives the state power over his interest in that property

d. Notice / Service of Process
   1. Must be given within the state to non-residents
   2. Emphasis on notice is about risk of fraud and unfairness
   3. Constructive notice (by publication) is not allowed

<table>
<thead>
<tr>
<th>In personam jurisdiction</th>
<th>In rem jurisdiction</th>
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<tbody>
<tr>
<td>Remedies sought:</td>
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</tr>
<tr>
<td>Money damages</td>
<td>Determine ownership/interests in property</td>
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<tr>
<td>Injunction</td>
<td></td>
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<tr>
<td>Source of power:</td>
<td>Source of power:</td>
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<tr>
<td>Presence of person in the state</td>
<td>Presence of property in the state</td>
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<tr>
<td>Consent</td>
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<tr>
<td>How notice is given:</td>
<td>How notice is given:</td>
</tr>
<tr>
<td>Service of process</td>
<td>Attachment before the lawsuit</td>
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</table>

e. *Pennoyer v. Neff*: Neff (a non-resident) was summoned constructively by publication, SCOTUS found due process violated
   1. In an action *for money or damages*, where Δ is not a resident AND does not make an appearance, the court ONLY has jurisdiction over property which was attached before the lawsuit
   2. The law assumes that property is always in possession of its owner – so its seizure will inform him
   3. Constructive service is ineffectual for any purpose

f. *Hess v. Pawlowski*: MA law allows service upon the state registrar as an agent whenever a non-resident is involved in a car accident in the state. SCOTUS approves this exercise of jurisdiction.
   1. There must be actual service of process in the state upon the Δ, OR someone authorized to accept service for him
   2. The state’s power to regulate the use of its highways extends to their use by non-residents as well as residents
B. THE MODERN FORMULATION

a. **Milliken v. Meyer**
   1. If a Δ has a domicile within the state, that is enough to bring an absent Δ within in personam jurisdiction
   2. A resident of the state enjoys the benefits of citizenship, so mere absence does not terminate that state’s juris. over the resident

b. **International Shoe Co. v. Washington**
   1. Instead of presence within the state, the Δ must have minimum contacts, such that the suit does not offend traditional notions of fair play and substantial justice
   2. Corporations establish “presence” when their activities in the state are continuous and systematic.
   3. Consent can be implied from the corporation’s “presence” or through the acts of its authorized agents inside the state.
   4. When a corporation does most/all of its business in one state, then they can usually be sued for ANY claim in that state (as long as it’s related to their business)
   5. If a corporation is “present” inside the state, service of process can occur either by mail or upon an authorized agent within the state

c. Rationale for “minimum contacts” test:
   1. The corporation is profiting from doing business there, so they should be subject to the state’s laws (reciprocity)
   2. Focus on fairness should dominate a due process claim
   3. Reasonability concerns
   4. Concerns about inconvenience or placing an unreasonable burden on the defendant
   5. **SHIFT IN THOUGHT FROM POWER OF THE STATE TO REASONABILITY OF MAKING A Δ SHOW UP IN A DISTANT COURT**

d. What’s at stake when the parties argue about personal jurisdiction:
   1. Is there an alternative forum where a party could sue?
   2. Which forum is most convenient?
   3. Strategy, which law will apply, etc. (background factors)

e. **McGee v. International Life Insurance Co.**
   1. It is sufficient for due process that a suit is based on a contract which had substantial connection with the state
   2. States can claim jurisdiction over insurance claims involving their residents
   3. The state has an interest in protecting its residents – shifts concern to Πs instead of Δs!

f. **Hanson v. Denckla**
   1. However minimal the burden of defending in a different state, there MUST be minimum contacts
   2. The Δ must have purposely availed himself of the benefits of conducting business in the forum state
C. **IN REM JURISDICTION**
   a. **Harris v. Balk**: established the right of individuals to transfer debts owed to them directly to their own creditors – via attachment in the 3rd party debtor’s state of residence (gets rid of the middle man!)
   b. **Shaffer v. Heitner**
      1. The standard for determining whether ANY exercise of jurisdiction is consistent with due process is now the International Shoe *minimum contacts* test
      2. **Presence of property alone is no longer a determinant of jurisdiction – property is relevant, but must be subjected to the minimum contacts test**
      3. Quasi in rem jurisdiction is no more!
   c. Minimum contacts factors:
      1. Business contracts
      2. Residency
      3. Agents in the state
      4. State of incorporation
      5. Principle place of business
      6. Whether the Δ solicits business within the forum state
      7. Whether the Δ has reason to know their goods would be used in the forum state

D. **CHALLENGING JURISDICTION**
   a. **Collateral lawsuit** – when Δ does not appear, a default judgment is entered, and Δ brings a suit in a different jurisdiction attacking the first judgment for lack of jurisdiction
   b. **Special appearance** – when a Δ appears ONLY for the purpose of challenging jurisdiction
   c. **Interlocutory appeal**: a preemptory appeal at the federal level
   d. **Writ of prohibition**: a preemptory appeal at the state level
   e. **Data Disc Inc. v. Systems Technology Assoc.**
      1. When PJ is determined *pre-trial*, dismissal is at the judge’s discretion
      2. When the jurisdictional facts are intertwined with the merits of the case, the judge may have a plenary pretrial proceeding to determine the issue
         a. When the PJ question requires a full-blown evidentiary trial, the judge is bound to dismiss only upon a *preponderance of the evidence*
         b. Full-blown hearings are uncommon
   f. **Rule 12**
      1. In order to contest personal jurisdiction, the Δ must file a 12(b) pre-answer motion OR list any personal jurisdiction objections in their answer
      2. If the Δ fails to bring a PJ defense in their first communication with the court, they have *waived* any objection to PJ
      3. Rationale
         a. Consent: if you show up and don’t say anything, you’re consenting to jurisdiction
         b. Limits wastefulness: PJ is a threshold issue, nothing should go forward until it is resolved

E. **SPECIFIC JURISDICTION**

<table>
<thead>
<tr>
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<tr>
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<td>Substantial contacts</td>
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<tr>
<td>Suits connected w/ in-state activities</td>
<td>Suits need not be connected w/ in-state activities</td>
</tr>
</tbody>
</table>
a. **World-Wide Volkswagen Corp. v. Woodson**
   1. Consider the burden on ∆ as well as the following factors:
      a. The forum State’s interest in adjudicating the dispute
      b. The Π’s interest in obtaining convenient and effective relief
      c. The interstate judicial system’s interest in obtaining the most efficient resolution of controversies
      d. The shared interest of the several states in furthering fundamental substantive policies
   2. Foreseeability that the ∆’s product will find its way into the forum state is not enough
   3. It must be foreseeable that the ∆ could be subject to a lawsuit in the forum state – MUST BE FORESEEABLE THAT THEY MAY BE CALLED INTO COURT IN THAT STATE

b. **Burger King v. Rudzewicz**
   1. The “fair warning” requirement is satisfied if ∆ purposely directs his activities at the forum state
   2. Where the ∆ has purposely availed himself, there must be a compelling “fair play and substantial justice” argument to defeat PJ
   3. When ∆s are sophisticated businesspersons, they are presumed to have fair warning that contracts may bind them to appear in a distant state
   4. It is unclear whether this case was decided on a “minimum contacts” or a “fair play and substantial justice” theory
   5. NEW RULE: the two concepts (“fair play and substantial justice” and “minimum contacts”) are independent considerations. **If something is really fair, minimum contacts need not be strongly proven and vice versa.**

c. **Asahi Metal Industry Co. v. Superior Court**
   1. Divided court: placement of the product into the stream of commerce MAY or MAY NOT be enough to create the minimum contacts required for exercise of specific jurisdiction
   2. Acts which are sufficient to constitute a “purposeful act” (JUSTICE O’CONNOR):
      a. Designing the product for a specific market within the forum state
      b. Advertising in the forum state
      c. Establishing channels for providing regular advice to customers in the forum state
      d. Marketing the product through a distributor who has agreed to serve as the sales agent in the state

F. **GENERAL JURISDICTION**

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</tr>
</tbody>
</table>

a. Easy cases of general jurisdiction:
   1. Individual: state of domicile
   2. Corporation: state of incorporation (and sometimes principal place of business)

b. **Coastal Video Communications Corp. v. The Staywell Corp.**
   1. Even if the suit is not related to the ∆’s in-state activities, the court may exercise general PJ over a ∆ as long as the continuous corporate operation is so substantial as to justify it
2. Indicators of substantial enough operations:
   a. How many people access the website
   b. The design of the website (is it designed to be a national portal?)
   c. Volume of sales within the forum state
   d. Number of transactions with in-state vendors

G. TRANSIENT JURISDICTION
   a. Burnham v. Superior Court: can Δ’s presence alone in the state create PJ without a showing of minimum contacts?
      1. Divided court: mere presence in the state without minimum contacts MAY or MAY NOT provide grounds for PJ
      2. SCALIA: transient jurisdiction alone is enough, because it is part of the traditional, historical rules that make up our legal system
      3. Transient jurisdiction: usually refers only to individuals (not corporations) because it has to do with their physical presence within the state

H. NOTICE
   a. Mullane v. Central Hanover Bank & Trust Co.
      1. Distinctions between in rem and in personam jurisdiction for notice requirements are illegitimate
      2. Due process requires:
         a. NOTICE (real notice, reasonably calculated to be apprise Δ of the suit)
         b. OPPORTUNITY TO BE HEARD (giving the Δ a reasonable amount of time and a chance to show up)
      3. Process which is a “mere gesture” does not satisfy due process
      4. In the case of missing or unknown persons, indirect and probably futile notice is all that is available – so it must be OK
      5. Notice reasonably certain to reach most of those interested in objecting is OK
         a. Each person in the group would be representing the whole if they objected, so each person’s interests are represented
         b. It would be cost prohibitive to inform everyone
   b. **Service does NOT create jurisdiction where it otherwise does not exist** (but in order to exert jurisdiction over a person you have to serve them with process)

I. LONG-ARM STATUTES
   a. Long-arm statute: the statute defining PJ for the courts within that state
      1. Types of long-arm statutes:
         a. Very often simply defines PJ by the federal requirements
         b. Often more restrictive than the federal PJ requirements
         c. Sometimes states create a regime that includes the constitutional requirements AS WELL AS other things that are NOT constitutionally authorized. The state then opens itself up to being overruled by a federal court.
      2. In order to exercise PJ in a state court, there must be BOTH:
         a. Constitutional jurisdiction, AND
         b. A long-arm statute that authorizes PJ in that instance
   b. Gibbons v. Brown: A current Δ’s prior decision to bring a suit in the state court should NOT act indefinitely as a “sword of Damocles” to bar that Δ from challenging PJ in a later suit (even if the later suit arises from the same nucleus of operative facts!)
   c. Northwest Airlines, Inc. v. Friday
      1. State long arm statute only extended to acts committed within the forum state.
      2. E-mailing to a recipient in the forum state does NOT constitute an act in the forum state. Rather, it constitutes an act in whatever state the sender resides.
3. E-mail is akin to soliciting business in the state, so under the federal minimum
contacts test the state WOULD probably have PJ. But the state long-arm
statute is more restrictive.

J. VENUE: a purely statutory doctrine, set out by federal or state courts
   a. Inquiry almost always closely parallels PJ (examines the connection between the ∆,
      the litigation, and the forum court)
   b. Locates a case within a particular district within a state

K. FORUM NON CONVENIENS
   a. Piper Aircraft v. Reyno: a Π’s choice of forum should rarely be disturbed.
      HOWEVER, when:
      1. An alternative forum has jurisdiction to hear the case, AND
      2. A trial in the chosen forum would establish oppressiveness and vexation to a ∆
         out of all proportion to Π’s convenience, OR
      3. When the chosen forum is inappropriate because of considerations affecting
         the court’s own administrative and legal problems,
         The court MAY, in the exercise of its sound discretion, dismiss the case.
   b. Private interests of the litigants:
      1. Relative ease of access to sources of proof
      2. Availability of compulsory process for attendance of the unwilling, and the
         cost of obtaining attendance of the unwilling
      3. Witnesses
      4. Possibility of a viewing of the premises where the event took place, if viewing
         would be appropriate to the action
      5. All other practical problems that make trial of a case easy, expeditious, and
         inexpensive
   c. Public factors bearing on the question of forum non conveniens:
      1. The administrative difficulties flowing from court congestion
      2. The local interest in having localized controversies decided at home
      3. The interest in having the trial of a diversity case in a forum that is at home
         with the law that must govern the action
      4. The avoidance of unnecessary problems in conflict of laws, or in the
         application of foreign law
      5. The unfairness of burdening citizens in an unrelated forum with jury duty
   d. If the ∆ is able to overcome the presumption in favor of Π’s choice of forum, then the
      fact that the alternative forum has a law more favorable to the ∆ should NOT enter
      into the decision calculus. (HOWEVER, if the law is so much more favorable to the ∆
      that the Π will not have a chance of recovery, then the court may consider this.)
   e. The presumption in favor of the Π’s choice of forum is weaker when the Π is foreign
      (a foreign Π’s choice deserves less deference)
   f. The trial court’s decision on forum non conveniens can be reversed ONLY when there
      has been a clear abuse of discretion
   g. Forum non conveniens is not a complete dismissal. The court can order that the statute
      of limitations be waived if Π desires to bring the suit in an appropriate forum
   h. This is NOT a motion frequently made or granted

II. SUBJECT MATTER JURISDICTION
   A. SUBJECT MATTER JURISDICTION (SMJ) - OVERVIEW
      a. Asks, “Does this court have power to hear this particular dispute?” (Judges are only
         empowered to hear certain types of disputes)
b. SMJ vs. PJ
   1. For any lawsuit, BOTH subject matter jurisdiction AND personal jurisdiction must be met
   2. PJ is about fairness, SMJ is about efficiency

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<thead>
<tr>
<th></th>
<th>Personal Jurisdiction</th>
<th>Subject Matter Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Direct Challenge</strong></td>
<td>By motion 12(b)(2)</td>
<td>By motion 12(b)(6)</td>
</tr>
<tr>
<td><strong>Waiver</strong></td>
<td>By motion 12(h)(1)</td>
<td>By motion 12(h)(3)</td>
</tr>
<tr>
<td><strong>If no jurisdiction</strong></td>
<td>Π must find another forum with sufficient contacts</td>
<td>Π may re-file in state court</td>
</tr>
<tr>
<td><strong>If Δ defaults, collateral attack allowed?</strong></td>
<td>Yes, but can attack jurisdiction only, not the merits</td>
<td>Probably not (rarely arises)</td>
</tr>
</tbody>
</table>

c. Article III enumerates the constitutional powers of the courts
   1. §1 sets up the court system
   2. §2 lists the types of cases that federal judicial power extends to:
      a. Federal question jurisdiction: cases arising under the Constitution or Laws of the United States
      b. Diversity jurisdiction: controversies between citizens of different states
d. §1331: the other source of power for federal courts (statute-based federal question jurisdiction)
e. §1367: supplemental jurisdiction (a.k.a. “pendent” or “ancillary” juris.)
f. Why should the litigant care whether cases go to federal court?
   1. Strategic concerns about the decision-maker (judge or jury-pool)
   2. Timeframe for judgment (court clog)
   3. Federal courts can transfer to state courts, but state courts cannot transfer to federal courts
   4. Different sets of substantive and procedural rules
g. Why should we care about whether cases go to federal court?
   1. Importance of maintaining state sovereignty over some issues
   2. Cases decided by federal courts become binding precedent
   3. Narrow disputes should stay in state court
   4. Some issues “feel” like they belong in state court (criminal issues, personal injury tort claims)

B. FEDERAL QUESTION JURISDICTION
   a. Louisville & Nashville Railroad v. Mottley
      1. A suit “arises” under federal law ONLY from the Π’s own cause of action (it is not enough that the Π anticipates a federal defense)
      2. FQ jurisdiction exists ONLY if the federal issue appears on the face of a well-pleaded complaint. (A “well-pleaded complaint” is one that is confined to stating the basis for a cause of action.)
      3. Is the well-pleaded complaint rule a good rule?
         a. It’s formalistic, so it tends to ignore when federal issues will nevertheless predominate
         b. On the other hand, it’s a timesaver: it makes the decision up-front and it’s a bright-line rule
         c. Without the rule II’s can easily manipulate their cases into federal court (as long as they can come up with some possible federal defense)
b. T.B. Harms Co. v. Eliscu
1. An action “arises under” a federal law ONLY if the complaint is for a remedy expressly granted by the federal law
2. JUSTICE MARSHALL (“ingredient test”): if a federal issue is in any way involved in the claim, that satisfies “arising under”
3. JUSTICE HOLMES (“creation test”): a suit arises under the law that creates the cause of action (“creation test”)
   a. When federal law is involved, but nothing the parties are fighting about requires an interpretation of that federal law, the case does NOT arise under federal law
   b. This narrower view only applies to lower federal courts, the SCOTUS is free to broadly construe FQ jurisdiction

c. “Arising under” issue and the FRCP
1. Rule 8: requires that a Π include in the complaint an allegation telling the court why it has jurisdiction over a particular case
2. Rule 12(b)(6): Π alleges a claim, but the cause of action filed with the court is inadequate to prove his legal theory
3. Rule 12(b)(1): telling the court they have no jurisdiction over this issue
d. The court can raise SMJ of its own accord, at any time. WHY?
   1. SMJ is a constitutionally required jurisdictional issue
   2. It’s about the separation between state and federal power, which the courts are charged with policing
   3. The parties themselves may not have an incentive to raise SMJ

C. DIVERSITY JURISDICTION
   1. A person is a “citizen” of the state in which he/she is “domiciled”
   2. For adults, domicile is established by physical presence in a place AND the intent to remain there
   3. A person can only be domiciled in one state
   4. As the party seeking to invoke diversity jurisdiction, the Π bears the burden of proving jurisdiction is proper
   5. 28 U.S.C. §1332(c)(2): the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same States as the decedent

b. Redner v. Sanders: a person is a citizen of a state within the meaning of §1332 if he is a citizen of the U.S. and is domiciled in the state in question

c. Saadeh v. Farouki
   1. Alien residents of the same state cannot invoke diversity jurisdiction
   2. §1332(a) - an alien admitted to the U.S. for permanent residence shall be deemed a citizen of the State in which such alien is domiciled (congress intended this section to LIMIT caseload)
   3. Citizenship at the time the suit is filed is the relevant test
   4. Art. III, §2 – does not provide for two non-citizens to sue one another in federal court (the SCOTUS avoids this issue)

D. SUPPLEMENTAL JURISDICTION
a. §1367 – Supplemental Jurisdiction
   1. The federal claim must be real and legitimate
   2. The state issues cannot substantially predominate
   3. The state and federal claims must derive from a common nucleus of operative fact
b. Policy reasons to allow supplemental jurisdiction
   1. Inefficient to make PI litigate two suits over the same incident
   2. Consistency – if the suits aren’t brought together they could have inconsistent rulings

c. Policy reasons to NOT allow supplemental jurisdiction
   1. Takes up valuable federal court time and resources
   2. Allows for manipulation of the system (forum shopping, etc.)
   3. Creates a more complicated trial, where the jury has to sift through two different sets of laws
   4. Federal courts may not be adequately informed to adjudicate state law claims

d. United Mine Workers of America v. Gibbs
   1. Supplemental jurisdiction is appropriate when:
      a. The state law claim forms a separate but parallel grounds for relief
      b. PI’s claims are such that they would ordinarily be tried together
      c. The federal claims are not dismissed before trial
      d. The state issues do not substantially predominate
   2. The power to exercise supplemental jurisdiction is discretionary
   3. The issue of supplemental jurisdiction remains open throughout litigation

e. Aldinger v. Howard – pendent party jurisdiction
   1. Pendent party jurisdiction – PI seeks to join a state law claim, with a common nucleus of operative facts to the federal law claim, but involving an additional party
   2. SCOTUS says pendent party jurisdiction does not exist (although §1367(a) allows for joinder of additional parties, overturning Finley)

f. Owen Equipment & Erection Co. v. Kroger – SCOTUS says if the suit is brought in diversity, federal jurisdiction is destroyed at the moment complete diversity no longer exists. All federal and supplemental claims must be dismissed for lack of SMJ

g. Finley v. United States – Scalia claims supplemental jurisdiction has been over-expanded and declares that jurisdictional statutes must be narrowly construed to allow jurisdiction over ONLY those expressly mentioned in the legislation. This decision is overturned by §1367

E. REMOVAL
a. **Requirements of a suit**
   1. Personal jurisdiction
   2. Venue
   3. Subject matter jurisdiction
      a. Federal question jurisdiction
      b. Diversity jurisdiction
      c. Supplemental jurisdiction
   4. If it is a federal question, it will be removable (this question requires courts to look at all the other requirements to make a decision – it is NOT a separate basis for federal question jurisdiction)

b. §1441 – standards for removal
   1. Federal courts must have original jurisdiction over the suit
   2. Federal question actions are removable without regard to citizenship of the parties
   3. Diversity actions are removable only if none of the parties at interest are citizens of the state in which the action is brought
c. Metropolitan Life Ins. Co. v. Taylor
   1. Any civil action brought in State court over which the federal courts would
      have original jurisdiction may be removed by the defendant to the district and
      division embracing the place where the action is pending (can’t just remove to
      any federal court!)
   2. Generally the court will look to the Mottley rule: the face of well-pleaded
      complaint, to determine original jurisdiction
   3. EXCEPTION: when Congress has explicitly pre-empted state causes of action
      with federal legislation, such that a defense will inevitably bring the case into
      federal jurisdiction, then the court may look to the pre-emption defense to
      determine original jurisdiction
      a. Example: ERISA pre-empts all state employee health and benefits
         claims
      b. The court must look to the INTENT OF CONGRESS, not the
         “obviousness” of a pre-emption defense
      c. There is absolute certainty that federal law will be applied and
         interpreted in such a case
      d. We aren’t worried that Π will try to manipulate the system by
         anticipating/predicting a federal defense
      e. This exception applies only in limited circumstances

   d. Caterpillar, Inc. v. Lewis
      1. §1446(b) – a case where federal jurisdiction arises from diversity cannot be
         removed more than one year after commencement
         a. Federal question jurisdiction is more lenient because there is a stronger
            interest in having federal questions removed to federal court
         b. The rule exists in part for efficiency reasons – at some point the
            legislation just needs to go forward
      2. So long as the jurisdictional requirements were met at the time of removal, a
         district court’s error in failing to remand a case which is no longer
         appropriately within federal jurisdiction is NOT fatal
      3. Considerations of finality, efficiency, and economy support the notion that
         district court error in not remanding should NOT grounds for overturning a
         decision
      4. The statute does say that courts shall dismiss actions for lack of jurisdiction –
         it’s not optional!

III. THE ERIE DOCTRINE
   A. §1652 – state laws are the rules of decision, except where the Constitution, treaties, or
      Congressional Acts otherwise require or provide
      a. Only applies to supplemental jurisdiction and diversity cases
      b. Federal question cases will always apply federal law (no question)
   B. Swift v. Tyson: federal courts exercising jurisdiction on the ground of diversity need ONLY
      apply state statutory law, not state common law
   C. Erie Railroad v. Tompkins – NEW RULE
      a. Except in matters governed by the Constitution or Acts of Congress (federal question
         cases), the law to be applied in any case is the law of the State, whether it be common
         law or statutory law
      b. There is no federal general common law
   D. Legal theory behind the Erie Doctrine
      a. Swift represents a natural law tradition (the law is out there, it exists, and it can be
         discovered through legal reasoning)
b. *Erie* represents a new approach – the law doesn’t exist out there in some metaphysical sense to be discovered. It is just what the sovereign says it is. As such, diversity cases should respect the *State sovereignty* to decide what their own laws mean.

E. **Guaranty Trust Co. v. York**

a. In all cases where a federal court is exercising jurisdiction *solely* because of diversity of citizenship, the *outcome* of the litigation should be the same as it would be if tried in State court.

b. Procedural rules → federal law governs

c. Substantive/outcome determinative rules → State law governs

F. **Byrd v. Blue Ridge Rural Electric Cooperative**

a. The federal system of allocating functions between the judge and jury is a procedural issue, and federal law should prevail in federal courts

b. NEW TEST: Is the rule “bound up with rights and obligations of the parties?”

1. If yes, the court should follow the State rule

2. If no, the court should engage in a *balancing test*: the federal interest in having their rules followed vs. the state interest in having their rules followed (look to the rights at issue, and the source of federal and state law – what was the purpose of the rule?)

G. **Hanna v. Plumer** – restores a bright-line test

a. TEST:

1. Does the rule actually regulate procedure?

2. Is the rule constitutional? (The FRCP *are* constitutional)

b. *Procedure*: the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them

c. The “outcome determinative” test was never meant to be a talisman and must be considered in light of the twin aims of the *Erie* rule:

1. Discouragement of forum shopping

2. Avoidance of inequitable administration of the laws

d. When a situation is covered by one of the Federal Rules, the FRCP must govern, UNLESS it is found that the Rule transgresses the bounds of the Rules Enabling Act

IV. **INCENTIVES TO LITIGATE**

A. **PUNITIVE DAMAGES**

a. **Honda Motor Co. v. Oberg**

1. The Constitution imposes a substantive limit on the size of punitive damage awards, because such damages pose a danger of arbitrary deprivation of property, without adequate due process

2. Common law: judicial review of the size of punitive damage awards has been a *safeguard* against excessive jury verdicts

3. Civil cases require judicial review of punitive damages because they don’t have as many safeguards as criminal cases (proof beyond a reasonable doubt, for example)

b. **State Farm Mutual Automobile Insurance Co. v. Campbell**

1. Courts reviewing punitive damage awards should consider these guideposts:

   a. The degree of reprehensibility of the Δ’s misconduct

   b. The disparity between the actual or potential harm suffered and the damage award

   c. The difference between the damages awarded by the jury and the penalties given in similar cases
2. Reprehensibility should be measured by considering whether:
   a. The harm caused was *physical* as opposed to economic
   b. The conduct evinced indifference to or a reckless disregard for the health and safety of others
   c. The victim had financial vulnerability
   d. The conduct involved *repeated* actions
   e. The harm was the result of *intentional* malice, trickery, or deceit, or mere accident

3. Defendants should be punished for their conduct which caused injury, not for being unsavory people

4. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award

5. **There is no bright-line ratio, but generally punitive damages that are $\leq 9 \times$ the compensatory damages award are constitutional (ratio should be in the single digits)**
   
   c. “Severity shift” – the award given by juries is usually higher than the median award of each individual award predicted by the jurors.
   d. Punitive damages caps can create perverse effects – juries use caps as an anchor and award higher PD than they would have
   e. SCOTUS view of punitive damages
      1. Punitive damages are about punishment and deterrence
      2. PD are a constitutional issue – so every case in which PD are awarded is potentially a SCOTUS case. The court is unlikely to grant cert to those kind of cases, though
      3. GINSBURG objects to the ratio cap because sometimes the little person deserves a huge award from the big corporation
      4. SCALIA & THOMAS object to the ratio cap because it violates federalism – PD are a state issue!

B. INJUNCTIVE RELIEF
   a. *Substitutionary remedy:* replacement for the harm a defendant has caused (money)
   b. *Specific remedy:* some type of performance, requirement to act or not act

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<thead>
<tr>
<th>SUBSTITUTIONARY REMEDIES</th>
<th>SPECIFIC REMEDIES</th>
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<tr>
<td>Compensatory damages</td>
<td>Injunction</td>
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<td>Liquidated damages</td>
<td>Constructive trust</td>
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<td>(Punitive damages)</td>
<td>Rescission of K</td>
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<td>(common law courts)</td>
<td>(Court of Chancery or equity)</td>
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*Exceptions:*
- Damages (ordered by Chancery)

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<th>Exceptions:</th>
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<tr>
<td>Replevin (law)</td>
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<td>Ejectment (law)</td>
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<td>Writ of mandamus (law)</td>
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<td>Habeas corpus (law)</td>
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C. Sigma Chemical Co. v. Harris
   1. The benchmark of evaluating an injunction is *reasonableness*
      a. The injunction must be *reasonably necessary* to protect the plaintiff’s legitimate interest
b. The injunction must be reasonable in terms of *temporal scope* (cannot last an unreasonably long amount of time)
c. The injunction must be reasonable in terms of *geographic scope*

2. Two step test for granting injunctive relief:
   a. The court must “balance the hardships” (how granting the injunction will harm the ∆ vs. how not granting the injunction will harm the Π)
b. There must be *no other adequate legal remedy*

3. The two inquiries are separate, but in practice they are often combined
4. Even in cases of inadequate legal remedy, the harm of granting the injunction may be so great as to outweigh the Π’s right to relief
d. Injunctive relief is granted by judges

C. **DECLARATORY RELIEF**
   a. A party asks the court for a declaration of their rights
   b. May be combined with other types of relief
   c. Tricky issues:
      1. There has to be an actual controversy (no advisory opinions)
      2. Sometimes this complicates other issues, like jurisdiction

D. **PROVISIONAL RELIEF**
   a. *Preliminary injunction*
      1. A valid exercise of due process if the ∆ has a meaningful option to be heard before the deprivation occurs
      2. No time for a full blown trial (the relief must be immediate or the issue will be moot), but there must still be notice and an opportunity to be heard
      3. The judge must sort out two “irreparable harms”
         a. Balancing of the harms – must weigh potential risks in a zero-sum vacuum
         b. Must assess the *likely outcome* of a full-blown trial
      4. **Rule 65(c)** – if a Π seeks a preliminary injunction, they must put forth a bond
         (The efficacy of the bond depends on the kind of harm the ∆ is facing, as well as how much the bond is ordered at.)
b. *Ex parte* procedure – the other side is never heard
   1. Procedure:
      a. Go to court, sign something that says you’re legally entitled to the property
      b. Post a bond equal to the price of the item
      c. Sheriff goes out and repossesses the property
   2. SCOTUS has deemed this inadequate due process!
   3. Rationale for disallowing this type of procedure:
      a. Hearing from the other side is necessary before balancing of the equities can occur
      b. The harm cannot be undone, once the item is taken
      c. Efficiency – the sheriff shouldn’t go to the effort to repossess until a judge has decided it’s appropriate
      d. Huge potential for abuse and harassment by the Π!
c. **William Inglis & Sons Baking Co. v. ITT Continental Baking Co.**
   1. Π is entitled to preliminary injunction *only if*:
      a. Π will suffer irreparable injury if injunctive relief is not granted
      b. Π will probably prevail on the merits
      c. In balancing the equities, the ∆s will not be harmed more than Π is helped by the injunction
d. Granting the injunction is in the public interest
2. ALTERNATIVE TEST: it is not necessary that the moving party be reasonably certain to succeed on the merits. If the harm that may occur to the Plaintiff is sufficiently serious, it is only necessary that there be a “fair chance of success” on the merits
3. The grant or denial of a preliminary injunction is reviewable only for error or abuse of discretion
d. **Fuentes v. Shevin**
   1. Procedural due process requires that the parties whose rights are to be affected must have NOTICE and an OPPORTUNITY TO BE HEARD, so that the validity of the claim of the person seeking relief can be properly evaluated
   2. These rights must be granted at a meaningful time and in a meaningful manner – when the deprivation can still be prevented!
   3. Allowable seizure is limited to 3 situations:
      a. The seizure is directly necessary to secure an important governmental or public interest
      b. There must be a special need for extremely prompt action
      c. The person initiating the seizure must be a governmental official, responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance
e. **Temporary restraining order (TRO)**
   1. Emergency action, might wake up a judge in the middle of the night to get one
   2. Not to last more than 10 days (holds everything in place temporarily)
   3. **Rule 65(b)** – TROs are permissible even without written or oral notice to the other side, so long as certain conditions are met
      a. Must show immediate and irreparable damage, AND
      b. Must make an effort to notify, OR
      c. Must show good reason for not notifying the party

V. **PLEADING**

A. **COMPLAINTS**

a. **Rule 8(a)** only 3 requirements for a pleading
   1. Short and plain statement of jurisdiction
   2. Short and plain statement of the claim, showing pleader is entitled to relief
   3. A demand for judgment
b. **Rule 8(b)(2)** any party can set forth more than one claim or defense, regardless of consistency
c. **Rule 12(b)(6)** – if pleadings are lacking one of the above, respondent can demur. If court gives leave to amend, Plaintiff can bring an amended claim
   1. Purpose of this rule is to test the sufficiency of the complaint
   2. Court assumes that factual allegations are true when deciding
   3. Legal sufficiency (Rule 12(b)(6)) vs. factual sufficiency (trial)
   4. When respondent argues that some fact, OUTSIDE of the pleadings (e.g. an affirmative defense) is grounds for dismissal, the court can turn a 12(b)(6) into a motion for summary judgment
d. **Rule 11** – became used frequently after the 1983 Amendments
   1. Usually a form of “satellite litigation”
   2. 1993 amendment made sanctions discretionary (trying to reduce the amount of satellite litigation)
   3. **Rule 11(b)(4)** – applies to responses only (denials of factual contentions must be warranted or reasonable)
4. **Business Guides v. Chromatic Communications Enterprises**
   a. The standard of conduct under Rule 11 is one of *objective reasonableness*. Sanctions are appropriate if no reasonable person would be satisfied with the party’s explanations.
   b. Claimants must conduct an investigation reasonable to the circumstances *before* filing a complaint.
   c. **Rule 11(b)(3)** requires evidentiary support OR a likelihood that evidentiary support will become available after discovery.

5. **Religious Technology Center v. Gerbode**
   a. A motion for sanctions under Rule 11 should not be filed until 21 days after it is served on opposing counsel and the challenged paper is not withdrawn or corrected.
   b. Attorney’s fees should **NOT** be automatically imposed for a Rule 11 violation.
   c. **Rule 11(b)(2)(A)** now prohibits the imposition of monetary sanctions on the *represented party* for violations of Rule 11(b)(2). However, sanctions on *law firms* as well as the particular attorney who signs the pleading are now allowed (lawyers are responsible for frivolous arguments).
   d. Rule 11 requires both subjective good faith AND an objective basis for the claim.

6. **NOTE:** Rule 11 cannot save you from having to answer a complaint. Still need to respond to a claim within 20 days.

B. **RESPONDING TO THE COMPLAINT**
   a. Π drafts a complaint, ∆ responds:
      1. Do nothing - default judg., possible collateral attack, very risky!
      2. Pre-answer motion – **Rule 12**
         a. Same deadlines as answer (20 or 60 days)
         b. Preliminary hearing
         c. If granted – case dismissed
         d. If denied – go back and file an answer (**Rule 12(a)(4)(A)** gives 10 days), generally can’t appeal, not a final judgment.
         e. If deciding whether file 12(b) defenses – these are things that can be decided *without* extensive discovery (either on the law or on preliminary look at the facts)
         f. Generally not invoked, rarely granted:
            i. **12(e)** – motion for more definition statement
            ii. **12(f)** – motion to strike
   3. Answer
      a. 20 days if personally served, 60 days if service is waived.
      b. Choices for your answer:
         i. Admit
         ii. Deny
         iii. You are without knowledge or information (= denial)
         iv. Affirmative defenses
         v. Counterclaim
      c. **12(h)** After filing an answer, respondent waives the right to PJ defenses.
      d. If respondent has just filed an answer and forgot to include PJ, they have 20 days to add that defense.
4. **12(c)** – can move for judgment on the pleadings. The standard is the same as for **12(b)(6)**, but it’s not a pre-answer motion

5. SMJ is never waived, can come up at any time

b. **Zielinski v. Philadelphia Piers, Inc.**

   1. *General denial*: denial of all the facts/allegations included in a complaint
   2. When a pleader intends to deny only part of a claim, he must *specify* which parts are true and which parts are denied
   3. Equitable estoppel will be applied to prevent a party from taking advantage of the S.O.L. where a II has been misled by that party
   4. Δs do not have to advise IIs attorney of errors in the claim, BUT Δs do not have a right, knowing of a mistake, to *foster* it by acts of omission
   5. **Rule 8**: the II should admit as much as is true and deny the rest
   6. The pleadings should avoid any UNFAIR SURPRISE at trial

c. **Rule 8(c)**: lists 19 specific affirmative defenses, as well as “any other matter constituting an *avoidance* or *affirmative defense*. Must be raised in answer or waived

1. **Layman v. Southwestern Bell Telephone Co.**

   a. **TEST**: if Δ intends to rest his defense upon some fact not included in the allegations, then he is raising an *affirmative defense*
   b. Trying to avoid UNFAIR SURPRISE at trial

2. **Ingraham v. United States**

   a. Factors to consider in deciding whether a defense is an affirmative def.
      i. Are the facts involved in the defense new facts?
      ii. Which party has better access to evidence?
      iii. Unfair surprise
   b. When an aff. defense is raised at trial in a manner that does NOT result in unfair surprise, *technical failure* to comply with 8(c) is NOT fatal
   c. Think about what a *reasonable* II would anticipate

d. Denial vs. Affirmative Defense

1. *Denial*: allegations in the complaint simply aren’t true
2. *Affirmative defense*: maybe what II said was true, but it’s not as bad as it sounds because there are other facts that *legally justify* what I did

e. **12(b)(6)** failure to state a claim vs. Affirmative Defense

1. *Failure to state a claim*: assuming everything in the complaint is true, there are still no grounds for legal relief
2. *Affirmative defense*: assuming everything in the complaint is true, there are new facts that prove we’re not liable

f. **Rule 11** governs submissions of affirmative defenses – can’t just throw out 30 and hope 1 sticks (although Rule 11 is rarely used against affirmative defenses)

C. **AMENDMENTS**

a. **Beeck v. Aquaslide ‘N’ Dive Corp.**

1. Once the claim and answer have been filed, amendments may be made ONLY be leave of court or by written consent of the adverse party. Leave *shall* be given freely when justice so requires
2. In order for a judge to deny a reasonable amendment request, prejudice must be shown
3. **Rule 15(a)** – IIs can amend their complaint one time, *before* the Δ has answered, and Δs have a similar right within a time frame
   a. Leave shall be given freely when justice so requires
   b. Looking for evidence of bad faith
c. In the end, if the prejudice on the Π is not great enough to warrant disallowing amendment by the Δ, if will be granted (and vice versa)

b. Rule 15(c) - amendments that “relate back”
1. In order to amend the complaint and be within the S.O.L., the amendment must “relate back” to the original pleading. This is allowed when:
   a. It is permitted by the law that created the S.O.L.
   b. The claim or defense asserted in the amendment arose out of the same conduct, transaction, or occurrence set out in the original pleading
   c. The amendment changes the party or the naming of the party against whom the claim is asserted
2. Moore v. Baker: the critical issue is whether the original complaint gave notice to the Δ of the claim now being asserted
   a. An amendment which changes the legal theory of the case is appropriate only if the factual situation upon which the action depends remains the same AND has been brought to Δ’s attention by the original pleading
   b. When such an amendment is brought during discovery, it is fair
4. 15(c)(3) – allows amendment to change a party or name ONLY when:
   a. The new Δs had notice within the time period for S.O.L., OR
   b. When claim arises out of the same conduct, transaction, or occur AND
   c. The new Δ had notice of the lawsuit within the time period in which they should have been served, AND that they knew or should have known that they would have been charged had it not been for a mistake concerning the identity of the proper party

   c. Considerations in deciding whether to allow amendment:
      1. Fairness to the other party (during discovery = OK)
      2. Why didn’t the Π bring the claim in the first place? (honest mistake = OK, bad faith ≠ OK)

VI. DISCOVERY
A. SCOPE OF DISCOVERY AND ITS LIMITS
   a. Goals of discovery
      1. The parties’ attempt to discover the underlying facts on which lawsuit is based
      2. Sharpens issues of dispute
      3. Develops full factual information so there are no surprises at trial
   b. Rule 26(b)(1) – general rule governing discovery, what can be discovered?
      1. Anything relevant to the claim or defense of any party
      2. “Does the info. sought make a material fact more or less likely to be true?”
   c. David v. Precoat Metal
      1. Rule 26(b)(1) – discoverable info is not limited to that which would be admissible at trial. Info is relevant if it appears “reasonably calculated to lead to the discovery of admissible evidence”
      2. Rule 26(b)(2) – limits on discovery
         a. Cumulative, duplicative, obtainable from some other source that is more convenient, less burdensome, or less expensive
         b. The party seeking discovery has had ample opportunity by discovery to obtain the information sought
         c. The burden or expense outweighs the likely benefit
   d. The judge gets involved late in the process
      1. Parties are left to work out discovery on their own unless there is a dispute
2. Parties must go to the court and request a motion to compel discovery OR a protective order saying they don’t have to produce the information
3. District courts have enormous discretion on discovery matters
4. As a practical matter, there is very little review of discovery orders on appeal
e. **Steffan v. Cheney**
   1. Judicial review of an administrative action is confined to the grounds upon which the record discloses that the action was based
   2. **The underlying rule determines how broad the scope of discovery will be**
f. **Marrese v. American Academy of Orthopedic Surgeons**
   1. A motion under Rule 26(c) to limit discovery requires the district judge to compare the hardships to the parties – balancing test (think about the public good vs. the private interests)
   2. Judges must consider the possibility of a carefully crafted protective order (in camera review, for example)
   3. Judges must also consider ordering discovery to make the objectionable documents late in the process and perhaps unnecessary by that point
   4. **Rule 26(d)** – an order merely postponing a particular discovery request should be granted more freely than one denying the request altogether

**B. FURTHER LIMITS ON DISCOVERY**
a. *Attorney-client privilege*: communications are protected, not the underlying facts
   1. **Upjohn Company v. United States**
      a. Attorney-client privilege applies when the client is a corporation
      b. Control group test (modified by SCOTUS): if the EE making the communication is in a position to control or take substantial part in a decision about any action which the corporation may take upon the advice of the attorney, then he is the corporation
      c. Modified corporation test:
         i. The communications concerned matters within the scope of the EE’s corporate duties
         ii. The EE himself was sufficiently aware that he was being questioned in order that the corporation could obtain legal advice
      d. Concurring opinion test:
         i. An EE or former EE speaks with the attorney at the direction of management
         ii. Regarding conduct or proposed conduct within the scope of employment
         iii. Must be assisting counsel in his performance of one of the following functions:
            1. Evaluating whether the EE’s conduct has bound or will bind the corporation
            2. Assessing the legal consequences, if any, of that conduct
            3. Formulating the appropriate legal responses to actions that have been or may be taken by other with regard to that conduct
   2. SCOTUS refuses to lay out a bright-line test, requires case-by-case analysis
   3. Attorney-client privilege CAN be waived by attorney’s conduct, if the information is not treated as confidential

1. Discovery provisions are to be applied as broadly and liberally as possible, so the privilege limitation must be restricted to its narrowest bounds
2. Limitations on discovery can arise when the requests are in *bad faith* or are designed to *annoy, embarrass, or oppress* the person subject to the request
3. **Work-product privilege does NOT extend to information which an attorney secures from a *witness* while acting for his client in anticipation of litigation**
4. **Where relevant and non-privileged facts remain hidden in an attorney’s file and where production is essential to the preparation of one’s case, discovery may properly be had**
5. **Production might be justified where the witnesses are no longer available or can be reached only with difficulty**
6. Burden rests on the requesting party to establish *adequate reasons to justify production* through a subpoena or court order
7. TEST:
   a. Trial preparation materials
   b. Prepared by the attorney or his agent in preparation for litigation
   c. Underlying notion is to protect the mental impressions and ideas of the attorney. Also to protect his efforts – needs some degree of privacy

C. **DISCOVERY PROCEDURES AND METHODS**

a. Discovery timeline

1. Complaint
2. Answer
3. 26(f) Conference (planning for discovery)
4. 26(a)(1) Initial disclosures – you only get information related to *their* claim
5. Rule 16 Conference (scheduling)
6. Discovery

b. General discovery notes

1. Entitled to hearsay evidence so long as it is going to lead to admissible ev.
2. If there is one specific person within the corporation that you need to speak with (but you don’t know who holds that position), you would note in the deposition that you wanted to talk to that person. It’s the deposed party’s DUTY under *Rule 36(b)(6)* to identify the correct person
3. If a person being deposed no longer works for an involved party, they must be subpoenaed (but if they are an employee a request for deposition under *Rule 36* is enough)
4. “Overbroad and unduly burdensome” objection may be made to requests for “any and all documents” relating to a certain topic
5. Procedural moves for compelling/objecting to discovery
   a. The parties must TALK to one another, discuss the problem
   b. Requesting party can:
      i. Move to compel
      ii. Revise the request to make it more specific (cure the defect)
      iii. Subpoena a related party with the same information

c. Court Involvement - *Thompson v. Department of Housing & Urban Development*

1. *Rule 26(b)(1)* is the first step in deciding what discovery should take place, necessarily followed by *Rule 26(b)(2)* factors
2. When confronted with a difficult scope of discovery dispute, the parties themselves should confer, and discuss the *26(b)(2)* factors, in an effort to reach an acceptable compromise or narrow the scope of their disagreement
3. If ∆’s claim they cannot produce requested information because of the burden, they must justify this claim with specific details that can be evaluated by the Π’s, and, if necessary, the court.

4. The commentary to the recent rule changes emphasizes the need for the court to be actively involved in applying the 26(b)(2) factors, but only AFTER the parties make a good faith effort to do so themselves.

d. Discovery Sanctions - Poole v. Textron, Inc.
   1. Rule 37: the party making a discovery motion must have already made a good faith effort to obtain the documents WITHOUT court action.
   2. Rule 37: The Court shall require the party whose conduct necessitated the motion to pay the moving party the reasonable expenses incurred in making the motion, including attorney’s fees, UNLESS the good faith effort has not been made by the requesting party OR the nondisclosure was justified.
   3. Rule 26(g)(3): if a discovery response is certified in violation of any discovery rule, the Court, upon motion or upon its own initiative, shall impose upon the person who made the certification an appropriate sanction which MAY include an order to pay reasonable expenses incurred as a result of the violation, including reasonable attorney’s fees.
   4. A party must EITHER lodge an objection OR an answer to a request – it cannot do both!
   5. Rule 36(a) – a matter is admitted unless a written answer or objection is served on the requesting party.
   6. Rule 26(g)(2) – counsel must make a reasonable effort to assure that the client has provided all the info and documents responsive to the discovery demand. Counsel need not conduct an exhaustive investigation, but only one that is reasonable under the circumstances. Relevant circumstances may include:
      a. The number and complexity of the issues
      b. The location, nature, number and availability of potentially relevant witnesses or documents
      c. The extent of past working relationships between the attorney and the client, particularly in related or similar litigation
      d. The time available to conduct an investigation
   7. When the party acted in bad faith, awards beyond those provided in 37(a) and 26(g) are appropriate.
   8. Unlike Rule 11, Rules 37 and 26 do not contain specific authorization to impose sanctions on the law firm.

VII. RESOLUTION WITHOUT TRIAL
A. DEFAULTS, DISMISSALS AND SETTLEMENTS
   a. ON THE MERITS: 12(b)(6), 56, Settlement (?)
   b. NOT ON THE MERITS: 12(b)(1)-(5)&(7), 55, 41(b), 41(a), Settlement (?)
   c. Rule 12(b)(6): failure to state a claim upon which relief can be granted **ON THE MERITS**
   d. Rule 12(b)(1)-(5)&(7): lack of SMJ, lack of PJ, improper venue, insufficient process, insufficient service of process, and failure to join a party under Rule 19
   e. Rule 55: default judgment
      1. When ∆ fails to plead or otherwise defend
      2. Π still must prove they are entitled to damages, which may require an additional hearing
      3. The penalty is pretty drastic, so courts are reluctant to invoke it
      4. Decision can be vacated under Rule 60(b) if a mistake has been made
f. **Rule 41(b): involuntary dismissal**
   1. When Π fails to prosecute their case, or when they fail to comply with the rules of the court (can be imposed as a sanction)
   2. There are deadlines after the pleadings that Π could fail to meet
   3. If Π appears to have abandoned the suit, the judge can invoke this rule
   4. Unless otherwise specified, operates as a judgment upon the merits and bars Π from re-filing
   5. Exception: involuntary dismissals for lack of jurisdiction, improper venue, or failure to join a party are NOT to be treated as decisions on the merits

g. **Other ways to keep litigation moving:**
   1. CA fast-track rules – Π and ∆ must take certain actions within certain number of days (initiate and finish discovery, answer/respond, etc.)
   2. Case management procedures in the federal courts – once parties are assigned a judge they will hear from him almost immediately, scheduling conference

h. **Rule 41(a): voluntary dismissal**
   1. *Before* the ∆ has answered, Π can dismiss at any time
   2. *After* ∆ has answered, Π can dismiss with the permission of both parties, OR by order of the judge
   3. Voluntary dismissal is without prejudice UNLESS the case has already been voluntarily dismissed once before

i. **Settlement: ****SOMETHING ON THE MERITS**
   1. Private contract between the parties
      a. No judicial involvement
      b. No public record of the settlement, and all the terms are secret
      c. Once a settlement is reached, Π will file a 41(a) motion, but will want the language to reflect a dismissal with prejudice (to keep the issue from being litigated again)
   2. Consent judgment
      a. Judicial involvement
      b. One of the parties is an incompetent or minor person
      c. The parties want court approval for their agreement AND the ability to go back to court to enforce the agreement
   3. **Kalinauskas v. Wong**
      a. The secrecy of a settlement agreement and the contractual rights of the parties thereunder deserve court protection
      b. In general the scope of discovery is very *broad*
      c. Despite the freedom to contract, the courts must carefully police the circumstances under which litigants seek to protect their interests while concealing *legitimate areas of public concern*. The concern grows more pressing as individuals are harmed by identical or similar action
      d. When the confidentiality agreement in question is part of a case which has concluded *before* the filing of discovery motions in the current case, intervention in the previous case and modification of the confidentiality agreement is NOT required (in other words: the judge is free to disregard the agreement and order discovery of its facts)
B. VOLUNTARY AND COURT-ORDERED MEDIATION
   a. Alternative dispute resolution
      1. *Early Neutral Evaluation*: neutral party hears the parties’ stories, evaluates how good a case each party has
      2. *Summary Jury Trial*: parties “try” their case to a mock jury who render a mock verdict (gives the parties a sense of how good their case really is, so they can get closer to a settlement with realistic expectations
      3. *Mediation*: more likely to see this than arbitration
      4. 1998: Congress passed a law requiring federal judges to encourage ADR in every case – will be discussed at the initial meeting
      1. Referral to ADR does not mandate settlement, it only mandates good faith participation in the ADR process
      2. Good faith participation includes providing the neutral with a mediation memo
      3. Good faith participation requires the presence of a corporate representative with authority to settle
      4. Availability by telephone of a corporate representative with authority to settle is NOT sufficient because the absent decision-maker does not have the full benefit of the ADR proceedings
      5. If someone with authority to settle is NOT present, then one party is taking advantage of the negotiation process by getting information about the other side’s position without giving up any information
   c. If a party does NOT want to participate in ADR, options are:
      1. Challenge the court order (court orders are NOT optional to comply with!)
      2. Indicate ahead of time that you don’t plan to participate fully in the ADR
      3. It’s an issue within the discretion of the judge – the judge is free to not require ADR in cases where it won’t be helpful

C. SUMMARY JUDGMENT
   a. Rule 56: summary judgment **ON THE MERITS**
      1. Π can bring the motion within 20 days from the commencement of the action OR after service of a motion for summary judgment by the other side
      2. ∆ can bring the motion at any time
      3. Standard of review: will be granted if there are no issues of material fact, and the party is entitled to judgment as a matter of law
      4. *Material fact*: one that makes a difference to the outcome of the case
      5. TEST: summary judgment is due when there are no issues of genuine material fact. If there is enough evidence that a *reasonable trier of fact* would find for the moving party, then there are no issues of genuine material fact
      6. 56(c): list of admissible documents to support a motion for summary judgment: pleadings, depositions, answers to interrogatories, admissions on file, affidavits
   b. Summary judgment vs. 12(b)(6) motion
      1. Summary judgment tests the sufficiency of the *evidence* (looks beyond the pleadings)
      2. 12(b)(6) test the sufficiency of the *allegations* (looks at the pleadings)
   c. *Lundeen v. Cordner*
      1. Clear affidavits from the only persons in a position to be aware of a factual situation can well serve as the basis for summary judgment
      2. There being no showing that a witness’s testimony could be impeached or that he might have additional testimony valuable to the Π, summary judgment is
properly granted (the opposing party cannot force a trial merely in order to cross-examine such a witness)

3. Parties have the right to cross-examine in the deposition phase
4. A party opposed to summary judgment based upon affidavits must assume some initiative in showing that a factual issue actually exist
5. Any little bit of fact that could case some doubt on the story would possibly be enough to stop summary judgment (enough to warrant a jury hearing the facts and deciding for themselves)

d. **Rule 56(e)**
   1. Supporting affidavits must be based on personal knowledge, not hearsay
   2. When an affidavit has been filed and is supported, a party must respond with specific facts showing a genuine issue of material fact

e. **Cross v. United States**
   1. Summary judgment is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent, and subjective feelings and reactions
   2. A judge may not, on a motion for summary judgment, draw FACT inferences. Such inference may only be made at trial.
   3. Bare allegations of the pleadings, unsupported by specific evidentiary data, will ordinarily not defeat a motion for summary judgment
   4. The right to use depositions for discovery does NOT mean that they are to supplant the right to call and examine the adverse party before the jury
   5. NOTE: if summary judgment is more liberally granted, it tends to put more pressure on the discovery process, forcing parties to reveal more in pretrial

f. **Celotex Corp. v. Catrett** - SCOTUS
   1. **Rule 56(c)** – only allows summary judgment after time for adequate discovery
   2. A party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record that demonstrate the absence of any genuine issue of material fact
   3. The burden on the moving party may be discharged by showing that there is an absence of evidence to support the nonmoving party’s case
   4. The nonmoving party is NOT required to produce evidence in a form that would be admissible at trial to avoid summary judgment


g. Standards of review for summary judgment
   1. Affirmative evidence negating an essential element, OR
   2. Pointing out an absence of evidence required to establish an essential element
   3. RESULT: Δs more likely to win on summary judgment than IIs (except where Δ has burden of proof)

VIII. **JURY TRIAL**

A. **RIGHT TO A JURY TRIAL**
   a. **Chaffeurs, Teamsters & Helpers, Local No. 391 v. Terry** - SCOTUS
      1. First the court must try to find a construction of the statute which avoids the constitutional question
      2. Second, the court must try and find an analogous 18th century cause of action
      3. Third, the court must look to the remedy sought – is it in law or equity?
      4. The third inquiry is most important in determining the right to a jury trial
   b. In 1791, how did we know if someone had a right to a jury trial?
      1. Law: jury trial
      2. Equity: bench trial
### SUBSTITUTIONARY REMEDIES | SPECIFIC REMEDIES
--- | ---
Compensatory damages | Injunction
Liquidated damages | Constructive trust
(Punitive damages) | Rescission of K
 | Reformation of K
 | Accounting
 | Quiet title

= “legal remedies”
(common law courts) = “equitable remedies”
(Court of Chancery or equity)

**Exceptions:**
Damages
(ordered by Chancery)

**Exceptions:**
Replevin (law)
Ejectment (law)
Writ of mandamus (law)
Habeas corpus (law)

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c. If you want to assert your right to a jury trial:
   1. Put it in the pleading, complaint, or answer
   2. **Rule 38(b):** must request the jury trial within 10 days of the last pleading
      (typically it’s asserted in the pleading itself, though)
d. **Amoco Oil Co. v. Torcomian**
   1. Joiner of an equitable (bench trial) claim with a legal (jury trial) claim does
      not defeat an otherwise valid Seventh Amendment right to a jury trial
   2. In diversity cases, state law determines the substantive dimension of the claim,
      but federal law determines the right to a jury trial
   3. If there is a compulsory counterclaim in law, it will create the right to a jury
      trial, even if the main claim is equitable
e. **Severability and risk of inconsistent judgments**
   1. Equitable claims are severable and can be decided by the judge w/o the jury
   2. The jury must hear the case and decide first, and *then* the judge can decide the
      equitable claims. The judge must respect the jury’s decision.
   3. Issues that appear on both sides of the complaint (contested issues) will be
      resolved by the jury (and the judge does not have the power to decide them
      differently)

### B. THE ROLE OF THE JURY

a. The right to a jury trial
   1. Judges are randomly assigned
      a. Some states permit preemptory challenge of a judge
      b. All states allow challenges for cause
   2. Juries are drawn from a pool
      a. All state allow challenges for cause
      b. Most states allow a certain number of preemptory strikes
   3. In a bench trial the judge decides all the issues before it
b. **Dobson v. Masonite Corp.**
   1. Contract interpretation is always a matter of fact, and is therefore always a
      matter for the jury
   2. There is no clear rule telling us when something is a question of fact and when
      it is a question of law. It’s a case-by-case inquiry that is informed by respect
      for the jury’s role and the right to be heard by a jury of your peers
c. **Reid v. San Pedro, Los Angeles & Salt Lake Railroad:** when there is not enough
   evidence on either side for the jury to make a reasonable determination of fact, the
judge can take the decision away from the jury and find for the party who does NOT have the burden of proof

C. PROCEDURAL CONTROLS

a. Burdens

1. **Burden of production**: the burden of coming forward with sufficient evidence that a rational/reasonable trier of fact could find in the party’s favor
   a. If the party with the burden of production cannot meet that burden, then we take the case away from the jury and allow a jml
   b. Easier for Δ to move for jml because Π usually has the burden of production – is Δ can get a jml on just one issue, it might destroy the Π’s entire case

2. **Burden of persuasion**: the degree of certainty necessary for a trier of fact to decide in your favor (applied by the judge/jury actually deciding your case)
   a. If it’s a jury trial, the judge instructs the jury on the operation of the burden of persuasion (when Π has burden of proof: 50/50 probability is not enough and Δ wins, vice versa when Δ has the burden)
   b. If it’s a bench trial, the burden of persuasion is in the judge’s mind

b. **Rule 50**: judgment as a matter of law (jml)

1. Common law:
   a. Ruling made before the verdict: *directed verdict*
   b. Ruling made after the verdict: *judgment not withstanding the verdict*

2. Modern law: judgment as a matter of law

3. Timing
   a. Jury selection → opening arguments → Π puts on case → Δ puts on case → closing arguments → case submitted to jury → jury verdict
   b. **50(a)(1)**: a party can move for jml once the non-moving party has presented all their evidence (once they’ve been “fully heard”)
   c. **50(a)(2)**: a party can move for jml before submission of a case to the jury
   d. The Δ can move for a jml as soon as Π has put on its case, up until the case is submitted to the jury
   e. The Π can move for jml as soon as Δ has put on its case, up until the case is submitted to the jury

4. NOTE: movement for jml can be isolated to one issue within the case

c. Judgment not withstanding the verdict (JNOV)

1. Can be raised anytime after the verdict is delivered, but ONLY if the party had moved for jml during the appropriate time period (Really just a renewal of jml)
2. If you let the jury deliver their verdict, at least there will be a jury verdict in place that can be upheld if the JNOV is reversed on appeal

3. **Pennsylvania Railroad v. Chamberlain**
   a. Generally, where there is a direct conflict of testimony upon a matter of fact, the question must left to the jury to determine, without regard to the number of witnesses on either side
   b. If the Π’s right of recovery rests upon an inferred fact which testimony for the Δ directly contradicts, the Π cannot win without additional ev.

D. NEW TRIAL – Lind v. Schenley Industries

a. The trial judge’s discretion must be exercised in accordance with *ascertainable legal standards*. The trial judge cannot substitute his judgment of the facts and credibility of the witnesses for that of the jury just because he would have come out differently!
b. It is not unusual to grant a JNOV and a conditional new trial (if the JNOV is reversed on appeal, the new trial order still stands)
c. Courts can grant a new trial on the following grounds:
   1. The verdict was contrary to the weight of the evidence
   2. The judge made an error in admitting certain evidence to the jury
   3. The judge made an error in the instructions given to the jury
d. If the trial court judge finds that there is no way a rational juror could find for the Π, but the jury finds for the Π, don’t grant a new trial – deliver a JML!

IX. RESPECT FOR JUDGMENTS
A. CLAIM PRECLUSION – Res judicata
   a. Policy concerns
      1. Fairness – have the parties already had their day in court?
      2. Efficiency – consolidation is almost always more efficient
      3. Consistency – always favors claim preclusion
   b. Heaney v. Board of Trustees of Garden Valley School District No. 71
      1. Res judicata: precludes parties and privies from re-litigating any claim actually litigated to a final judgment on the merits in the first suit as well as any claim that should have been litigated in the first suit
      2. All claims for relief which are based upon the same “underlying transaction” should ordinarily be litigated in a single action.
      3. The court may order separate trials when there is reason to do so
   c. Frier v. City of Vandalia
      1. Causes of action are identical (and precluded by res judicata) when the evidence necessary to sustain a second verdict would also sustain the first
         (where the causes of action are based upon a common core of operative facts)
      2. Prevents the oppression of Δs by multiple cases, which may be easy to file but costly to defend
      3. ERIE: In a diversity suit, the claim preclusive effect of a judgment should be determined according to State res judicata laws
   d. Martino v. McDonald’s System, Inc.
      1. Rule 13(a): “compulsory counterclaims” are lost if not raised in the pleadings
      2. The rule does not apply if the case was dismissed prior to the pleadings
      3. When the trial court has entered a consent judgment, it has made a judgment on the merits, and the claim preclusive effect of that judgment will be enforced
      4. Res judicata bars compulsory counterclaims in the same way it bars claims
   e. Gargallo v. Merrill Lynch, Pierce, Fenner & Smith
      1. Full faith and credit: all the courts in the U.S. have to give full faith and credit to prior judgment the same as they would be given by the court originally issuing the decision.
      2. 28 U.S.C. §1738 requires a federal court to give a state court judgment the same preclusive effect such judgment would have in a state court
      3. Rule 41(b): involuntary dismissal operates as a final adjudication upon the merits (and has a claim preclusive effect, unless the court indicates otherwise)
      4. Once the first suit has ended, there is a presumption that finality wins
         a. Particularly if the issue of SMJ was actually raised and litigated
         b. When SMJ is not raised, the presumption exists but it is weaker
         c. Generally speaking, unless the court was so clearly not within its jurisdiction (or if the court’s action threatens the jurisdiction or sovereignty of some other court or tribunal), then a suit actually litigated to conclusion is respected on SMJ grounds
f. **Semtek Intl. Inc. v. Lockheed Martin Corp.**
   1. It is no longer true that “on the merits” necessarily means that a judgment is entitled to claim-preclusive effect. (So dismissal under 41(b) does not automatically mean that the claim is precluded.)
   2. Expiration of the S.O.L. bars the remedy but does not extinguish the substantive right. Therefore a state court dismissal on S.O.L. grounds does NOT have claim preclusive effect in other jurisdictions.
   3. The Supreme Court gets to decide the claim preclusive effect of federal district court decisions
   4. **Federal courts sitting in diversity would follow the same claim preclusion rules as that state’s court would have, and their diversity decisions should have the same claim preclusive effect as a state court decision would have.**
   5. RULE: the claim preclusive effect of a judgment is determined by the laws of the forum where the decision was rendered

g. Tests for claim preclusion
   1. Same transaction or occurrence
   2. Cause of action is identical

B. **ISSUE PRECLUSION**
   a. Restatement - an issue is precluded when:
      1. An issue of fact or law is
      2. Actually litigated and determined by
      3. A valid and final judgment, and
      4. The determination is essential to the judgment
      5. And the litigation was between the same parties

b. **Illinois Central Gulf Railroad v. Parks**
   1. *Issue preclusion (collateral estoppel): allows the judgment in the prior action to operate as an estoppel as to those facts or questions actually litigated and determined in the prior action*
   2. Where a judgment may have been based upon either or any of two or more distinct facts, the party seeking issue preclusion must prove that the decision was based upon that fact. (The issue must have been essential to the judgment.)
   3. Restatement: where there are two findings, each of which would independently justify the verdict, neither one is necessary

c. Tests for issue preclusion
   1. Same transaction or occurrence: the same underlying facts lead to both lawsuits (modern test)
   2. Cause of action: look at the facts of the claims and what the cases turn on

C. **WHICH PARTIES?**
   a. *Mutuality doctrine*: required that the parties must be the same in order to invoke claim or issue preclusion – we are moving away from this in modern law!
   b. **Benson and Ford, Inc. v. Wanda Petroleum Co.**
      1. The preclusive effect of a prior judgment may only be invoked against a party OR privy (where situations are so closely identical or bound up with the prior action that we can say they represent the same legal right)
      2. A nonparty is a privy in three situations:
         a. A nonparty who has succeeded to a party’s interest in property
         b. A nonparty who controlled the original suit
            i. Must have effective choice as to the legal theories and proofs to be advanced on behalf of the party to the action
            ii. Must also have control over opportunity to review
Having the same lawyer or merely participating in the litigation (be being a witness, for example) is not “control”

iv. A sole shareholder would be bound by prior decision
c. A nonparty whose interests were represented adequately by a party in the original suit (virtual representation)
i. Demands the existence of an express OR implied legal relationship

3. A nonparty is NOT obliged to seize an available opportunity to intervene in pending litigation that presents a question affecting the nonparty
c. Parklane Hosiery Co. v. Shore – Offensive Collateral Estoppel

1. Non-mutual collateral estoppel (issue preclusion):
   a. Offensive collateral estoppel: when the Π tries to stop a Δ from litigating an issue the Δ has previously litigated AND LOST against a different party
   b. Defensive collateral estoppel: when the Δ tries to stop Π from litigating an issue the Π has previously litigated AND LOST against a different party
   c. In both situations, the party against whom estoppel is being asserted has litigated AND LOST in an earlier action, against a different party

2. Mutuality doctrine: neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment

3. NEW RULE: in cases where a Π could easily have joined in the action or where the application of offensive collateral estoppel would be unfair to a Δ (see list below), a judge should NOT allow the use of offensive collateral estoppel

d. Efficiency – offensive collateral estoppel may decrease efficiency!
   1. Π’s incentives: encourages the Π who could have joined the first lawsuit to wait and see how the judgment turns out. If the 1st Π wins then the 2nd Π will bring a later suit and try to get an issue preclusion automatic judgment
   2. Δ’s incentives: encourages Δs to litigate much more vigorously (may be on the hook for later suits if they don’t) – a suit that may have settled out of court will take more resources and time

e. Consistency – always favors preclusion

f. Fairness – offensive collateral estoppel can be unfair to the Δ
   1. If Δ didn’t litigate the first suit as vigorously as he should have
   2. If new evidence has come to light
   3. If the law has changed in the time between the first case and later cases
   4. If the first decision was manifestly erroneous
   5. If there are inconsistent judgments and the Π seeks to use only those favorable to their case

g. State Farm Fire & Casualty Co. v. Century Home Components
   1. Where it has been concluded that the Δ had in actuality the incentive and complete opportunity to contest the issue fully in the first action, offensive collateral estoppel is allowed (Parklane rule)
   2. EXCEPTION: where outstanding determinations are actually inconsistent on the matter sought to be precluded, it would be unfair to estop a party by the judgment lost. When we KNOW there is a prior judgment out there we have to take it into account!

X. JOINER
A. JOINER OF CLAIMS AND COUNTERCLAIMS
   a. Rule 18: can join all claims, no restrictions
b. §1367: federal courts can only exercise supplemental jurisdiction over claims (including compulsory counterclaims, cross-claims, and third-party suits) arising from the “same case or controversy” as the original suit
c. Rule 13(a): Counterclaim & Cross-Claim
   1. Compulsory counterclaim: a counterclaim shall be brought (must raise it or lose it) when it arises out of the “same transaction or occurrence” that is the subject matter of the opposing party’s claim
   2. Permissive counterclaim: a counterclaim that does not arise out of the same transaction or occurrence may be brought
d. Rule 13(a) “same transaction or occurrence” vs. §1367 “same case or controversy”
   1. Some think that “same transaction or occurrence” is a broader test
   2. But no one really knows whether one test is actually different from the other
e. Plant v. Blazer Financial Services
   1. The federal courts can exercise supplemental jurisdiction over compulsory counterclaims, but there must be an independent basis for jurisdiction over permissive counterclaims
   2. Tests for compulsory counterclaims:
      a. Are the issue of fact and law raised by the claim and counterclaim largely the same?
      b. Would res judicata bar a subsequent suit on ∆’s claim absent the compulsory counterclaim rule?
      c. Will substantially the same evidence support or refute Π’s claim as well as ∆’s counterclaim?
      d. Is there any logical relation between the claim and the counterclaim?
   3. A “logical relationship” exists when the counterclaim arises from the same “aggregate of operative facts” (the same facts serve as the basis of both claims OR the same facts activate additional legal rights in the ∆)
f. Great Lakes Rubber Corp. v. Herbert Cooper Co.
   1. The same test is used to determine compulsory counterclaim status and supplemental jurisdiction. It is NOT causal, though. **When a counterclaim is so logically related that it would be considered compulsory, it is ALSO so logically related that it would be considered within supplemental jurisdiction**
   2. “Logical relationship test” – if the two claims were tried independently, would they require many of the same witnesses and evidence?

B. JOINDER OF PARTIES
a. Rule 20: can join all parties IF their claims arise out of the “same transaction, occurrence, or series of occurrences,” AND if any question of law or fact common to all the parties will arise in the action. NO COMPULSORY JOINDER OF PARTIES
b. Rule 13(g): a claim by any one party against a co-party is allowed (cross-claim)
c. §1367: allows supplemental jurisdiction over cross-claims so long as they are part of the “same case or controversy”
d. Mosley v. General Motors Corp.
   1. Rule 20(b) and Rule 42(b) vests in the district court the discretion to order separate trials in order to prevent delay or prejudice
   2. Purpose of joinder of parties is to promote trial convenience and expedite the final determination of disputes (preventing multiple lawsuits). Therefore the impulse is towards the broadest possible joinder of parties.
   3. All “reasonably related” claims are allowed to be tried in a single proceeding.
   4. The rule does NOT require that all questions of law and fact raised by the dispute be common, just that there be ONE
5. The fact that individual class members may have suffered different effects from the acts of the ∆ (and therefore may be seeking different remedies) is immaterial for purposes of joinder (the court can sever cases at the damage award phase)

e. Watergate Landmark Condominium Unit Owners’ Association v. Wiss, Janey, Elstner Associates
1. Rule 14: A 3rd party complaint is appropriate ONLY where the 3rd party would be secondarily or derivatively liable to the ∆ in the event the ∆ is held liable to the Π
2. Cannot claim “it was him, not me”
3. Must claim “if I am liable to Π, then my liability is only technical or secondary or partial, and the 3rd party ∆ is derivatively liable and must reimburse me for all or part (one-half, if a joint tortfeasor) of anything I must pay the Π”
4. A 3rd party ∆ may not be impleaded merely because he is liable to the Π (derivative liability must “run through” the 3rd party Π to the original Π)
f. New claims & diversity
1. §1367(b) - Π cannot bring in a new claim that would ruin diversity
2. ∆ CAN bring in a new claim, even if it would destroy diversity

C. COMPULSORY JOINDER
a. Rule 19 – joinder of persons needed for just adjudication
1. Threshold question: must prove the lawsuit would be more efficient if the additional ∆ were joined
2. 19(a): The person must be subject to service, must not destroy SMJ, AND one of the following conditions must be met:
   a. Complete relief cannot be accorded among those already parties, OR
   b. The person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may
      i. As a practical matter impair or impede the person’s ability to protect that interest, OR
      ii. Leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations
3. Inquiry 1: Rule 19(a) – is there an absent party out there that it would be desirable to add to this lawsuit?
4. Inquiry 2: Rule 19(b) – what do we do if there is such a person, but we can’t join them? (Either proceed or dismiss the case, 19(b) gives 4 factors)
b. Temple v. Synthes Corp.: It is not necessary for all joint tortfeasors to be named as ∆s in a single lawsuit. A tortfeasor with the usual “joint-and-several” liability is merely a permissive party in an action against another with like liability
c. Helzberg’s Diamond Shops v. Valley West Des Moines Shopping Center
1. Once joinder is deemed not feasible, Rule 19(b) requires the court to look first to the extent to which a judgment rendered in the additional party’s absence might prejudicial to the additional party OR to the ∆
2. In order to prove that a party is “indispensable” under the consistency theory, two requirements must be met:
   a. The non-joined party must have actually filed another suit with risk of an inconsistent judgment resulting from it
b. There must be a showing that another court would be *likely* to interpret the facts/liability of the suit differently from the way in which the current court would

3. A person does NOT become indispensable simply because their rights or obligations under a separate contract will be affected by the result of the action

XI. **CLASS ACTIONS**

A. **CLASS CERTIFICATION**

a. **Rule 23:** Class Action

1. Requires PJ, SMJ, and venue like any other case
2. 2005 Amendments: federal juris. will exist when there is *minimal diversity* and when the total amount of the class members’ claims exceeds $5 million
3. **23(a) factors for certification:**
   a. **NUMEROSITY:** class must be so numerous that joinder of all members is impracticable (usually ~100 is the cut-off)
   b. **COMMONALITY:** questions of law or fact common to the class (the rule requires common question, not the absence of individual ones!)
   c. **TYPICALITY:** the claims or defenses of the representative parties are typical of the claims or defenses of the class
   d. **ADEQUACY OF REPRESENTATION:** the representative parties will fairly and adequately protect the interests of the class, AND the attorney is qualified
4. **23(b) - type of class**
   a. **(b)(2)** does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages (injunctive relief only!)
   b. **(b)(3)** – questions of law or fact *predominate* over other claims AND class action is most *efficient* method of adjudicating the claims
      i. Requires notice to all other members of the class and the ability to “opt-out”
      ii. Four factors to consider in certifying a **(b)(3) class:**
         1. Interest of the members of the class in *individually controlling* the litigation of separate actions
         2. Extent and nature of any litigation *already commenced* by or against any members of the class
         3. The desirability or undesirability of concentrating the litigation of the claims in *the particular forum*
         4. The difficulties likely to be encountered in the *management* of a class action

b. **Why have class action?**

1. **Reasons to have class action:**
   a. Individual damages not big enough for any single Π to bring suit, but there is still a public interest in deterring the harm from continuing
   b. Consistency - lots of small similar claims should be decided the same
   c. Efficiency
2. **Reasons NOT to have class action:**
   a. Must more costly than regular litigation
   b. Πs in the class are risking res judicata w/o control over litigation
   c. Is it really fair for so many Πs to gang up on Δ?
   d. Extremely complex and burdensome cases
e. It changes the incentives of the existing law (what’s at stake becomes much greater financially)

c. **Communities for Equity v. Michigan High School Athletic Assn.**
   1. The class member who wishes to remain a victim of unlawful conduct does NOT have a legally cognizable conflict with the class representative
   2. Class-based discrimination (where the remedy sought is injunction) is usually a 23(b)(2) class

d. **Causey v. Pan American World Airways, Inc.**: A “mass accident” resulting in injuries to numerous persons is usually NOT appropriate for class certification. A class action CAN be maintained when:
   1. The class action is limited to the issue of liability (there is usually ONE cause of such a mass accident and no use in litigating it over and over)
   2. The class members support the action
   3. The choice of law problems are minimized by the accident occurring and/or substantially all IIs residing within the same jurisdiction

B. **CONSTITUTIONAL CONSIDERATIONS**
   a. **Hansberry v. Lee**
      1. Members represented in a class action are bound by the decision (res judicata)
      2. One is NOT bound by a judgment in personam in litigation in which he is not designated as a party or to which he has not been made a party by service of process, or when the representation is NOT ADEQUATE
      3. Absent class members may collaterally attack the adequacy of representation they received in a prior class suit (usually doesn’t succeed, though!)

   b. **Phillips Petroleum v. Shutts**
      1. A class action, once certified, may NOT be dismissed or compromised without the approval of the court
      2. A forum State CAN exercise juris. over the claim of an absent class-action PI, even though that PI may not possess the minimum contacts with the State, IF:
         a. The PI must receive notice and an opportunity to be heard and participate in the litigation, whether it be in person or through counsel
         b. The notice must be the best practicable, reasonably calculated to appraise parties of the pendency of the action and afford them an opportunity to present objections
         c. The notice should describe the action and the PI’s rights in it
         d. At a minimum, an absent PI must be provided with an opportunity to remove himself from the class (“opt-out” or “request for exclusion”)
         e. The named PI at all times must adequately represent the interests of the absent class members

C. **NOTICE & SETTLEMENT**
   a. **Eisen v. Carlisle & Jacquelin**
      1. Rule 23(c)(2): any (b)(3) class action requires notice and the ability to opt-out
      2. Publication notice does NOT satisfy due process where the names and addresses of the beneficiaries are known
      3. Individual notice to identifiable class members is NOT a discretionary consideration that can be waived in a particular case
      4. Notice requirements are inapplicable to (b)(1) and (b)(2) classes
      5. Where the relationship between the parties is truly adversary, the PI must pay for the cost of notice as part of the ordinary burden of financing his own suit
      6. Cannot peek ahead to the merits when deciding class certification, it is prejudicial to ∆
b. **Wetzel v. Liberty Mutual Insurance Co.**
   1. (b)(2) class must be cohesive as to those claims tried in the class action
   2. (b)(3) permits a class action where the questions of law or fact common to the class *predominate* over questions only affecting individual members AND the class action is superior to other available methods for the fair and efficient adjudication of the controversy
   3. Virtually every class action certifiable as a (b)(2) class will also be certifiable as a (b)(3) class, but it should be certified as a (b)(2) class to enjoy its superior res judicata effect (binding on *all* class members, without notice)
   4. Notice is not *required* for (b)(1) and (b)(2) classes, but the rules gives judges discretion about whether to order it

D. **MASS TORTS**
   a. **Castano v. American Tobacco Co.**
      1. A fraud class action cannot be certified when individual reliance will be an issue in determining liability
      2. Certification of an *immature* tort results in a higher than normal risk that the class action may NOT be superior to individual adjudication
      3. An accurate finding on predominance is necessary *before* the court can certify a class
   b. **Anchem Products, Inc. v. Windsor**
      1. Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems. But other specifications of the rule (those designed to protect absentees by blocking unwarranted or overbroad class definitions) demand heightened attention!
      2. Notice of a settlement shall be given to all members of the class in such manner as the court directs
      3. The fact that a settlement is “fair” does not make certification proper. Predominance is still the most important factor!