I. Personal jurisdiction
   a. Jurisdiction is the power to render authoritative judgment
   b. Jurisdiction over the parties—whether the court has jurisdiction to decide a case between particular parties or concerning the property.
   c. Two inquiries:
      i. Substantive due process—the court must have power to act
      ii. Procedural due process—the defendant must have both (1) adequate notice and (2) an opportunity to be heard
   d. Origins
      i. Pennoyer v. Neff
         1. In rem jurisdiction—relates to property; constructive notice is okay as well as attachment of property
         2. In personum jurisdiction—relates to the person—requires personal service of process
         3. Quasi in rem jurisdiction—attachment of the property in the forum state to gain personal jurisdiction on a personal (non-property) claim.
         4. Service of process must be accomplished while the party is in the state. Exceptions:
            a. When the suit involves the status of a resident towards a non-resident. Example: marriage, not child support
            b. Business partnerships where one person is located out of state
            c. Creating corporations
      ii. Collateral attack—defendant after default judgment may attack that judgment within defendant’s own jurisdiction on the grounds that the default judgment jurisdiction did not have personal jurisdiction
      iii. Special appearance—Hess v. Pawloski—allows defendant to appear to challenge jurisdiction without consenting to personal jurisdiction.
   e. The Modern Formulation
      i. International Shoe Co. v. Washington—personal jurisdiction test
         1. Minimum contacts—what is the quality and nature of the defendant’s activity in the forum state?
            a. Specific jurisdiction—does the case relate to the parties activities within the forum state?
            b. General jurisdiction—party must have substantial contacts within the forum state.
               i. Individuals—state of domicile
               ii. Corporations—primary place of business or place of incorporation
         2. Substantial justice
         3. Fair play—would it be unreasonably burdensome to make the defendant defend suit in the forum state?
         4. a corporation’s “single or isolated items of activities in a state . . . are not enough to subject it to suit on causes of action unconnected with the activities there”—establishes basis for specific and general jurisdiction
         5. That a corporation chooses to conduct activities within a state accepts a reciprocal duty to answer for its in-state activities in the local courts—power should be limited to voluntary actions
         6. Continuous, but limited activity in the forum state, such as an ongoing business relationship will support specific jurisdiction. Burger King v. Rudzewicz
      ii. McGhee v. International Life Insurance Co.—also need to consider the burden and inconvenience to the defendant and the state interest in protecting the interest of its residents.
      iii. Hanson v. Denkla—unilateral activity of one party does not avail related parties to the personal jurisdiction of another forum. (Beneficiaries move to Florida did not mean that the trust/Trustee would be availed to Florida jurisdiction.) Must be some act by defendant to purposefully avail himself upon the privilege of conduction activity within the forum state invoking benefit and protection of that state’s laws.
   f. In Rem Jurisdiction
      i. Shaffer v. Heitner—
         1. expands minimal contacts analysis to quasi in rem jurisdiction and abolishes quasi in rem jurisdiction;
         2. expands minimum contacts analysis from corporations to individuals.
   g. Challenging Jurisdiction
      i. Do nothing—collateral attack after the judgment.
         a. Benefit—cheap; can challenge in your own jurisdiction
         b. Drawback—if you do the collateral attack and it doesn’t go your way, then you have waived your defense
      ii. Special appearance—
         a. Now it may be termed a pre-answer motion (Rule 12b)
         b. Challenge in your answer followed by a motion to dismiss for lack of jurisdiction.
c. If you bring a pre-answer motion that does not include a challenge to personal jurisdiction, you have waived the right to that challenge. It is the same in your answer—threshold issue that needs to be gotten out of the way early. If you don’t then you have consented to the jurisdiction.

d. What do you need to know to establish jurisdiction?
   i. Where are they incorporated
   ii. Do they have agents there
   iii. Do they own property there
   iv. How long have they been there
   v. How much business do they do there
   vi. Where is their principle place of business

e. If you don’t know this info, you get it through discovery.

f. District court judge can have a preliminary hearing regarding underlying facts related to the jurisdiction at its discretion. If the jurisdiction hearing has too much disputed evidentiary material tied up in the facts of the case, the court may need to move to the trial and decide the jurisdiction during the trial.

h. Specific jurisdiction
   i. **World Wide Volkswagen**—pleurality opinion: it may or may not be enough to interject an item into the stream of commerce with the knowledge that it will end up in the forum state. If stream of commerce theory isn’t enough think about whether the plaintiff was reaching out to the forum state; critical to due process analysis . . . is that the defendant’s conduct and connection with the forum State as such that he should reasonably anticipate being haled into court there."
   
   ii. **Burger King**—finding that there were enough Florida contacts related to the controversy to satisfy the test. Defendants at times dealt directly with Burger King’s Miami headquarters; they contracted with Burger King to have Florida law govern the franchise agreement; and they promised to send their franchise payments to Burger King’s Florida address. Under the circumstances, the Court refused to attach importance to the fact that Rudzewicz had not been in the forum state.
   
   iii. **Asahi Metals**—California’s attempt to assert personal jurisdiction over the foreign defendant was unreasonable on balance. The Court found the interests of the plaintiff and the forum state to be “slight,” and Asahi’s burden from defending in California “severe.” CONCURRENCE: putting goods into the stream of commerce, at least in substantial quantities constitutes purposeful availment. Stream of commerce is split.

i. General jurisdiction

<table>
<thead>
<tr>
<th>No contacts</th>
<th>casual or isolated</th>
<th>single act</th>
<th>continuous but limited</th>
<th>substantial or pervasive contact</th>
</tr>
</thead>
<tbody>
<tr>
<td>No PJ</td>
<td>No PJ</td>
<td>SPJ</td>
<td>SPJ</td>
<td>GPJ</td>
</tr>
</tbody>
</table>

j. Transient jurisdiction—based on service within the forum of a nonresident defendant passing through the state, upheld by the Supreme Court in **Burnham v. Superior Court**

k. Notice—
   i. **Mullane**—Alternative means of notice, such as newspaper publication, may satisfy due process where individual notice is impracticable and the party seeking to bypass individual notice can demonstrate that (1) the suit is in the interest of the absentees, (2) they will be adequately represented by one before the court, and (3) the value of their individual interests is not too great. Where the identities and parties can be reasonably ascertained, however, individual notice is required.
   
   ii. **FRCP 4**

l. Long arm statutes—state statute permitting state court to obtain jurisdiction over persons not physically present within the state at the time of service. Three types: (1) blanket, (2) enumerated, and (3) intermediate allowing courts discretion

m. Venue—Venue tells parties where they can or can not bring the suit. Purely statutory doctrine. Closely parallels personal jurisdiction. Asks about the connection between the venue, the litigation and the forum court. It locates a case within a particular district with a state.

   i. State level—statutory doctrine; most often venue is in city or county where defendant resides

   ii. **Federal 28 USC 1391**
      1. If any defendant resides in that district and all defendants reside in the state containing that district
      2. if a substantial part of the events giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated in the district
3. If at least one defendant is reachable in the district and no other district qualifies. Works in a case based solely on diversity to give venue to all defendants where one defendant has personal jurisdiction. In subject matter jurisdiction, it is in a district in which any defendant may be found (probably minimum contacts where they can be found.)

4. Corporations—anywhere where there is sufficient minimum contacts—district where it has substantial operations or any district in which it is incorporated.

n. Forum non conveniens—"[T]he court stated that a plaintiff’s choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would ‘establish oppressiveness and vexation to a defendant…out of all proportion to plaintiff’s convenience’ or when the ‘chosen forum is inappropolate because of consideration affecting the court’s own administrative legal problems,’ the court may, in the exercise of its sound discretion, dismiss the case."
1. Is there an alternative forum where the case may be tried?
2. Given the existence of that forum is this forum so inconvenient that it makes sense to try the case somewhere else?
3. Does it make sense for this court to be deciding this case?

Factors for the court to consider:
1. relative ease of access to sources of proof
2. availability of compulsory process for attendance of unwilling witnesses
3. cost of obtaining attendance of willing witnesses
4. possibility to view the premise, if view would be appropriate to the action
5. all other practical problems that make trial of a case easy, expeditious, and inexpensive
6. administrative difficulties flowing from court congestion
7. local interest in having localized controversies decided at home
8. 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
9. the avoidance of unnecessary problems in conflict of laws or in the application of foreign law
10. the unfairness of burdening citizens in an unrelated forum with jury duty

II. Subject matter jurisdiction
a. In general
i. Subject matter jurisdiction refers to a court’s authority to decide a particular kind of controversy. Subject matter jurisdiction can be concurrent — shared between several different kinds of courts — or exclusive, restricted to a particular kind of court.
ii. The United States Constitution sets out the permissible scope of the judicial power of federal courts in Article III, § 2. It lists the following types of federal subject matter jurisdiction:
1. cases “arising under” this Constitution, laws of the United States, and treaties (federal question jurisdiction);
2. cases affecting ambassadors and other official representatives of foreign sovereigns;
3. admiralty and maritime cases;
4. controversies to which the United States is a party;
5. controversies between states and between a state and citizens of another state;
6. cases between citizens of different states (diversity jurisdiction);
7. cases between citizens of the same state claiming lands under grants of different states;
8. cases between a state or its citizens and foreign states and their citizens or subjects (alienage jurisdiction)

b. Federal question jurisdiction
i. The well pleaded rule—only if the federal issue appears on the face of a well pleaded complaint does it satisfy the requirements to be heard in federal court. Louisville and Nashville RR v. Mottley; TB Harms—does the remedy arise out of the act or the claim require interpretation of the act?
ii. 28 USC 1331—The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treatises of the United States

c. Diversity jurisdiction
i. 28 USC 1332—
ii. Hawinks v. Masters Farms—Plaintiffs bear the burden of proof in establishing jurisdiction
1. facial attacks on sufficiency of the complaints allegations as to SMJ
2. challenge to the actual facts upon which SMJ is based
3. Estate of a person is considered to have the same domicile as the deceased
a. Domicile established where you live and where you intend to remain
iii. Redner v. Sanders—plaintiff who is resident of France, rather than a citizen, does not meet criteria for diversity jurisdiction
iv. Saadeh v. Farouki—alienage amendment intended only to eliminate SMJ of cases between a citizen and an alien living in the same state. Amendment not intended to create diversity jurisdiction where it did not previously exist.
d. Challenging jurisdiction
   i. Rule 12 b
   ii. Rule 12 g
   iii. Rule 12 h

Personal vs. Subject Matter jurisdiction

<table>
<thead>
<tr>
<th></th>
<th>Direct challenge</th>
<th>Waiver</th>
<th>If D defaults on collateral attack?</th>
<th>If no jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Personal jurisdiction</strong></td>
<td>By motion</td>
<td>Yes12(h)(1)</td>
<td>Yes (attack jurisdiction only, not merits) Pennoyer</td>
<td>Plaintiff must find another forum with sufficient contacts</td>
</tr>
<tr>
<td></td>
<td>12(b)(6)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Subject matter jurisdiction</strong></td>
<td>By motion</td>
<td>Never 12(h)(3)</td>
<td>Probably not (rarely arises)</td>
<td>Plaintiff may refile in state court</td>
</tr>
<tr>
<td></td>
<td>12(b)(1)</td>
<td></td>
<td></td>
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</tbody>
</table>

iv. How jurisdiction challenged:
   1. Raised sua sponte—by the court (e.g. Mottley and Saadeh)
   2. Raised in Defendant’s motion—rule 12(b)(1) or 12(b)(6)
   3. Raised in Plaintiffs filing—Rule 8 provides that the plaintiff must allege in the complaint why the jurisdiction is inappropriate.

e. Supplemental jurisdiction
   i. *United Mine Workers v. Gibbs*—pendent jurisdiction when there is (1) a real federal claim, (2) issues are so closely related as to be part of the same case they fall under article III “arising under” and (3) the claims arise from the same common nucleus of operative facts.
   ii. *28 USC 1367*—“same case or controversy”; may include claims that involve joinder or intervention of additional parties; can’t add a plaintiff who will destroy complete diversity if you are in federal court for diversity of citizenship

f. Removal
   i. *28 USC 1441*—any civil action in a state court where there is jurisdiction may be removed to a federal court in the same district; any claim arising out of a federal question shall be removable regardless of the citizenship or residency of the parties
   ii. *Metropolitan Life v. Taylor*—a claim may be removed to federal court even if there is no federal question on the face of a well pleaded complaint so long as a relevant federal statutory provision preempts the state law.
   iii. *28 USC 1446*—Procedure for removal
   iv. *28 USC 1447*
   v. *Caterpillar v. Lewis*—court allows removal with incomplete diversity when the non-diverse party drops out of the case after the removal. This is because removal is not appealable until the final order and the court wants to avoid the duality of retrying a case that has already been decided.

III. Choice of Law
   a. *Swift v. Tyson*—used federal general common law sitting in diversity
   b. *Erie RR v. Tomkins*—federal courts sitting in diversity must follow the substantive law of the state in which they are sitting; “there is no federal common law” in areas of state law; there is federal common law interpreting the constitution and federal statutes; substance v. procedure
   c. *28 USC 1652*
   d. *Guarantee Trust v. York*—substance-versus-procedure test would not be adequate to resolve all issues arising under the Rules of Decision Act where a state law is both substantive and procedural in purpose, such as statutes of limitations. In Guaranty Trust the defendant argued that *Erie* required application of the state statute of limitations, which would have barred the action, while the plaintiff argued that federal law, under which the action was timely filed, governed. Agreeing with the defendant, the Supreme Court found the intent of the *Erie* doctrine to be that in diversity cases “the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.” Under this “outcome-determination” test, state law controls if the choice between state or federal law could be outcome-determinative in the case.
   e. *Byrd v. Blue Ridge Rural Electric Cooperative*—federal court should follow state law when the state rule is “bound up with the rights and obligations of the parties.” Balancing test of the governmental interst behind the rules contending for application.
   f. Balance the source of the conflict (general equity practice, common law, statute, constitution) to determine which law governs

{Page 4 of 21}
g. **Hanna v. Plumer**—*federal procedural rules* (unless found constitutional and invalid under the Rules Enabling Act) *are not overridden by state law* or policy. Thus, *Erie does not control* when there exists an *applicable federal rule* that *conflicts* with the state law or policy.

IV. Incentives to Litigate
a. Damages
   i. **Honda Motor Co. v. Oberg**—to the extent that the state law prohibits judicial review of damage awards, the law violates due process.
   ii. **State Farm v. Campbell**—
      1. Reprehensibility
         a. Was the harm physical or economic?
         b. Did the tortious conduct evince an indifference to or a reckless disregard of the health and safety of others?
         c. Did the target of the conduct have financial vulnerability?
         d. Was the conduct involved repeated actions or was an isolated incident?
         e. Was the harm the result of intentional malice, trickery, or deceit, or a mere accident?
      2. The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award
         f. Single digit multipliers of compensatory damages are more likely to be in the constitutional range.
         g. Some cases may warrant going beyond a single digit multiplier.
         h. Is the wealth of the defendant relevant? Can’t justify an otherwise unconstitutional punitive damage award.
      3. The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.
   iii. **US Const. Amend. XIV Sec. 1**
   b. Injunctive and Declaratory Relief
      i. **Sigma Chemical**—in order to qualify for injunctive relief, you must show:
         1. There is a balance of hardships
         2. There is no adequate legal remedies
         3. Decisions regarding injunctive relief better made by judge than jury
         4. Damages favored over injunctions—courts don’t like enforcement problems
      ii. 28 USC 2201—allows declaratory judgments as final judgments
      iii. 28 USC 2202—allows for further relief based on declaratory judgment
      iv. **FRCP 57**—the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where appropriate
   c. Provisional Relief—occurs when if the claim will be nullified without immediate relief.
      i. Balancing harms—how likely is the plaintiff to win on the merits and granting the injunction is in the public interest.
      ii. **Inglis & Sons Baking**—criteria for judgement
         1. Will the plaintiff suffer irreparable injury if injunctive relief is not granted
         2. Will the plaintiff probably prevail on the merits
         3. In balancing equities, will the defendant not be harmed more than the plaintiff is helped?
         4. Is granting the injunction in the public interest?
         5. Decision can not be final because:
            a. May be insufficient evidentiary record
            b. Due process right to a jury trial
            c. Fast tracking the trial may prejudice one party
            d. There is a risk that the preliminary injunction may end up being a final order (i.e. if group gets preliminary injunction barring city from preventing it from having a rally, the city has no recourse after the rally is held)
            e. In order to avoid duplication, findings in the preliminary hearing may become part of the record for trial.
      6. Standard of review
         a.Erroneous legal standard
         b. Abuse of discretion
   iii. Temporary Restraining Order
      1. Can be issued without notice to the other party if the requesting attorney certifies that either s/he tried to give notice and could not or there is some reason why notice should not be given
      2. There must be a risk of immediate and irreparable harm
      3. Restraining order will issue and hold everything in place until the preliminary hearing
iv. **Fuentes v. Shevin**—declares unconstitutional sheriff seizure of property ex parte making the owner file suit for its return → violation of due process; potential for mistake, abuse, inefficiency, unequal bargaining power; infringement on fairness, dignity, and respect for people as individuals

v. **FRCP 65**

V. Pleadings

a. Complaints

i. **FRCP 3**—a civil action is commenced by filing a complaint with the court

ii. **FRCP 8**

1. (a) claims for relief—(1) short and plain statement of jurisdiction; (2) short and plaint statement of the claim showing entitlement to relief; (3) a demand for judgment for the relief the pleader seeks
2. (b) Defenses – denials: general denials allowed subject to Rule 11
3. (c) Affirmative defenses: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.
4. (d) Effect of failure to deny – averments are admitted if not denied
5. (e) Pleadings to be concise and direct; parties may plead in the alternative
6. (f) All pleadings shall be construed so as to do substantial justice

iii. **FRCP 9**—Pleadings Special Matters

1. (a) capacity--

iv. **FRCP 12(b)**—pre-answer motions asserting defenses for:

1. lack of SMJ
2. lack of personal jurisdiction
3. improper venue
4. insufficiency of process
5. insufficiency of service of process
6. failure to state a claim upon which relief can be granted
7. failure to join a party under rule 19

v. **Haddle**—disputes regarding factual allegations are not part of a 12(b)(6) motion; the court can convert a motion to dismiss into a motion for summary judgment sua sponte

vi. **FRCP 11**—standard of conduct is objective reasonableness

b. Responding to the Complaint

i. Defendant may

1. Do nothing
2. File Pre-Answer motion according to rule 12
   a. Preliminary hearing
   b. If denied has 10 days to file answer (Rule 12(a)(4)(A))
3. Answer (in 20 days if service, or 60 days with waiver of service)

ii. **FRCP 8**—Defendant may

1. Admit the allegation
2. Deny the allegation
3. Neither admit or deny the allegation for lack of information (acts as denial)
4. Defendant MUST include affirmative defenses in the answer
5. Pre-answer motions waived if not filed before the answer—SMJ is NEVER waived (Rule 12(h)(3)). Pre-answer motions should be filed concurrently

iii. **FRCP 11(b)(4)**

iv. **FRCP 12**

v. **Zielinski v. Philadelphia Piers**—defendant issued blanket denial; rule 8 says you should specify exactly what you are admitting and denying; this is to prevent unfair surprises at trial; there should be no unfair surprises at trial.

vi. **Layman v. Southwestern Bell**—affirmative defenses are those facts not included in the allegations necessary to support the plaintiff’s case; easement is an affirmative defense and must be included in the answer rather than a general denial.

vii. **Ingram v. United States**—Central policy is unfair surprise; Things to consider when determining whether something is an affirmative defense:

1. Whether the matter at issue can fairly be said to constitute a necessary or extrinsic element of the plaintiff’s cause of action
2. Which party, if either, has better access to the relevant information
3. Policy considerations: should the matter be indulged or disfavored
4. Certain allegations in Rule 8 and fraud, statute of frauds, statute of limitations, truth in slander and libel
c. Amendments
   i. **FRCP 15(a)**—a party may make amendments:
      1. before a responsive pleading is served
      2. if no responsive pleading is permitted and the action has not been placed on the trial calendar: within 20 days of service
      3. by leave of the court – leave shall be freely given when justice so requires
      4. by written consent of the adverse party
      5. Response to amendment shall be made within the time left for the pleading or 10 days, whichever is longer
   ii. **Beeck v. Aquaslide**—rule 15 places the burden on the non-moving party to show that the amendment will cause undue hardship
   iii. **FRCP 15(c)**—amendments to pleadings relate back to the original pleading when
      1. relation back is permitted by the law that provides the statute of limitations applicable to the action, or
      2. the claim or defense asserted in the amended pleading arose out the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading
      3. the amendment changes the name of the party or the naming of the party against whom a claim is asserted
   iv. **Moore v. Baker**—the critical issue under rule 15(c) is whether the original complaint gave notice to the defendant of the claim now being asserted; the amendment must rely on the same facts as the original complaint to arise out of the same conduct, transaction or occurrence and therefore relate back to the original claim
   v. **Bonerb v. Richard J. Carbon Foundation**—if the litigant has been advised at the outset of the general facts from which the belatedly asserted claim arises, the amendment will relate back even though the statute of limitations may have run in the interim. TEST: an amendment which changes the legal theory of the case is appropriate if the factual situation upon which the action depends remains the same and has been brought to the defendant’s attention by the original pleading…provided no showing of undue hardship on the non-moving party or undue delay or bad faith on the part of the moving party. Timing is key—non-moving party should still have time for discovery.

VI. Discovery
   a. Scope and limits
      i. **FRCP 26(b)** describes what may be discovered under the federal rules. Unless discovery has been otherwise limited by a protective order of the court, a party may discover any matter that is: (1) relevant to a claim or defense; (2) reasonably calculated to lead to discovery of admissible evidence; (3) not privileged; (4) not constituting work product (A special showing is required for discovery of work product prepared or acquired in anticipation of litigation or for trial.)
      ii. **Davis v. Precoat Metals**—information regarding other employees complaints was discoverable so long as the requests were narrowly tailored to the specific claims of the case; INTERLOCUTORY APPEAL IS RARE IN DISCOVERY CASES
      iii. **Steffan**—employee fired because of statements he made admitting homosexuality was not required to answer questions regarding whether he had engaged in homosexual conduct since the firing was based on the comments and not the conduct
      iv. **FRCP 26(b)(1) and (2)**—anything that is relevant to a claim or defense and is not unreasonably cumulative or duplicative or obtainable from some other source that is more convenient, less burdensome, or less expensive is discoverable. The burden or the expense of the proposed discovery must not outweigh its likely benefit taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.
      v. **FCCRee v. American Academy of Orthopedic Surgeons**—two ways disputes regarding discovery come about: (1) protective order request, or (2) motion to compel. TEST: (1) compare the hardship to the party against whom the discovery is sought, if discovery is allowed, with the hardship to the party seeking discovery if the discovery is denied; (2) consider the nature of the hardship as well as the magnitude and thus give more weight to public interest than private interests; (3) consider the possibility of reconciling the competing interest through a carefully protected restraining order
      vi. **FCReese (c)**—provides for protective orders on information requested in discovery.
   b. Further limits
      i. **Upjohn v. United States**—lower court uses control group test for corporate privilege—if the employee is a high enough level manager that they would be involved in deciding the actions the company takes based on legal advice, they are considered part of the control group and thus subject to attorney client privilege. SCOTUS disagrees. Guidelines from Upjohn:
         1. Communication must be confidential
         2. It must be clear that the communication is with an attorney
3. Communication must be for the purpose of seeking legal advice
4. Communication must be regarding actions within the scope of the employment

ii. *Hickman v. Taylor*—establishes protection of attorney work product. The current version of FRCP 26(b)(3) essentially codifies the case of Hickman v. Taylor, 329 U.S. 495 (1947), in which the Supreme Court recognized a common law qualified immunity of work product from discovery. In Hickman, the Court stated that when the discoverer of work product shows that production is “essential to preparation” of his case and that denial of discovery would cause hardship because “witnesses are no longer available or can be reached only with difficulty,” production of “relevant and non-privileged facts . . . in an attorney’s file” should be allowed.

1. Prepared in Anticipation of Litigation or for Trial Immunity is limited by FRCP 26(b)(3) to materials “prepared in anticipation of litigation or for trial.” Most courts add that the primary purpose of preparing the documents must have been to assist in such litigation. Thus, documents prepared for ordinary business purposes (e.g., a routine accident report), public regulatory requirements (e.g., statutorily-required report to police of automobile accidents involving injuries), or other nonlitigation purposes (e.g., self-evaluation) fall outside the Rule.

2. Documents and Tangible Things--The Court in Hickman emphasized that although the written witness statements and the attorney’s memoranda were not discoverable on a bare demand, the discoverer was free to obtain the facts gleaned by discovery. The qualified immunity for work product does not protect against discovery of facts – which may be construed as “intangible things” – contained in the work product, including the identity of fact witnesses or the existence of the protected documents and things. However, federal courts have ruled that the discoveree may not be compelled to reveal facts to the extent that he is essentially recreating the protected document for the discoverer. Although witness statements qualify as work product, FRCP 26(b)(3) expressly provides that a party or witness may on demand obtain a copy of his own substantially verbatim statement concerning the subject matter of the action.

3. Party’s “Representative”—As used in FRCP 26(b)(3), “representative” includes a party’s attorney, consultant, surety, indemnitor, insurer, or agent.

4. Undue Hardship-- Hickman demonstrates that the “undue hardship” requirement may be satisfied when important facts are exclusively in the control of the discoveree such that the party seeking discovery has no other reasonable access to the information. For example, undue hardship may exist where: (1) a witnesses died, moved beyond the reach of compulsory process, lost his memory, deviated from his prior testimony or refused to cooperate; or (2) evidence that has physically disappeared or been altered is reflected in work product, such as photographs of skid marks or conditions at the scene of an accident. [6] Opinion Work Product-- FRCP 26(b)(3) provides what appears to be an absolute immunity for opinion work product, defined as “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

iii. FRCP 26(b)(3)

iv. FRCP 26(b)(5)—need to provide a showing of why the document is privileged

VII. Resolution without trial

a. Defaults, Dismissals and Settlements

   i. FRCP 41—voluntary dismissal
   
   a. FRCP 41(a)(1) provides that the plaintiff may dismiss once without leave of court by filing notice of dismissal before an answer or motion for summary judgment is served upon the plaintiff. Thus, a FRCP 12(b) motion to dismiss the complaint does not cut off plaintiff’s right to nonsuit unless the motion is converted into a summary judgment motion by the offer of supporting materials outside the pleadings. Following service of
an answer or motion for summary judgment, plaintiff may voluntarily dismiss only by stipulation of the parties or by order of the court upon such terms and conditions as it deems proper. [FRCP 41(a)(2)] Unless the court specifies otherwise, an initial voluntary dismissal is without prejudice. Federal courts are empowered by FRCP 41(d), however, to require a plaintiff who renews his action to reimburse the parties for the costs of the previously dismissed action. Most jurisdictions follow a two-dismissal rule, by which a second voluntary dismissal is with prejudice. The second thus operates as an adjudication upon the merits with whatever preclusive effect is given judgments by the law of the rendering jurisdiction.

b. Most commonly occurs because of settlement
c. Dismissal without prejudice unless the case has been vol. dismissed before

2. (b) involuntary dismissal—
a. Involuntary dismissal or compulsory nonsuit is an analogous remedy for the defendant when the plaintiff fails to prosecute her claims or to obey court rules or orders. Disobedience that would justify dismissal also often consists of litigation delays, or failures to appear, respond or take other required action. Involuntary dismissals are with prejudice to re-institution of the action in the same court, unless otherwise provided or unless grounded on failure of the plaintiff to meet any precondition set forth in FRCP 41(b): jurisdiction; proper venue; or joinder of a party under FRCP 19. A dismissals based on a plaintiff’s failure to satisfy such preconditions does not operate as an adjudications on the merits.

b. Usually acts as adjudication on the merits even though it is not
ii. FRCP 55—FRCP 55 authorizes the clerk to enter a default when it appears from the docket or is shown by affidavit of the claimant. Entry of default is simply a notation of the fact of default and an interim step towards the entry of a default judgment. FRCP 55(c) authorizes the court in its discretion to set aside an entry of default upon good cause shown.

iii. Kalinauskas v. Wong—sealed settlement agreements may sometimes be opened in the interest of justice; underlying facts rather than the terms of the settlement are available.

b. Voluntary and Court-Ordered Mediation
i. Types
1. Arbitration—neutral person renders a decision—either binding or non-binding
2. Mediation—facilitation of negotiation; helps parties overcome barriers
   a. Therapy model—mediator and parties usually without lawyers; talks out issues; discussion of the underlying relationship
   b. Bargaining model—neutral with parties and lawyers; mediator sets out ground rules; each side tells story then time for questions and clarification; parties separate into separate rooms and mediator goes between rooms.
3. Early neutral evaluation—cases sent out to a neutral who hears both sides and renders a non-binding judgment; basically serves to let you know how good your case is and encourage settlement
4. Summary jury trial—mock jury with mock verdict to give a sense of the strength of the case
ii. FRCP 16—encourages all district courts to refer cases to ADR; all other litigation deadlines run while ADR takes place. Majority of federal cases get referred to ADR
iii. Nick v. Morgan Foods—defendant sanctioned for refusal to participate in mediation in good faith.
c. Summary Judgment
i. FRCP 56—A motion for summary judgment may be supported by the pleadings, discovery documents, affidavits, and any other materials that present facts that would be admissible at trial. Hearsay, speculation, conclusions of law, conclusory ultimate facts, and promises that the necessary evidence will be offered at trial therefore cannot support a motion for summary judgment, even when presented by an otherwise proper affidavit. If movant meets his burden of production that there exists no triable issue of fact, in order to avoid a finding of summary judgment, the opposing party “may not rest upon the mere allegations or denials” of his pleading but must set forth specific facts showing that there is a genuine issue for trial. [FRCP 56(e)] Alternatively, the opposing party may present an affidavit under Rule 56(f) stating why he cannot state specific facts in opposition to summary judgment at the present time, without adequate time for discovery. The reasonableness of plaintiff’s request for time is a crucial factor in the exercise of the court’s discretion. If the movant for summary judgment fails to meet his burden of production, the opposing party need not do anything as entry of summary judgment is not proper in the absence of a prima facie showing that there is no genuine dispute of material fact.
ii. Lundeen v. Cordner—opposition to motion for summary judgment must meet the issues raised and supported by the other party to show that there is a genuine issue of material fact.
iii. Cross v. United States—summary judgment is particularly inapproriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions. A
judge may not on MSJ draw fact inferences. Such inferences must be drawn at trial. Consider the importance of calling an adverse party before a jury and having the witness examined in the presence of the jury.

iv. **Celotex v. Catrett**

1. The moving party can meet the standard for summary judgment by:
   b. Pointing out the absence of evidence establishing an essential element
   c. Plaintiffs have a higher burden b/c they must establish all elements of the case to qualify for summary judgment; defendants merely establish that one element does not fit.

VIII. **Jury trial**

a. The right to a jury trial

i. **FRCP 38**—Jury trial of right
   1. (a) Right Preserved
   2. (b) Demand for jury trial
   3. (c) Specification of issues
   4. (d) Waiver

ii. **U.S. Const. Amend. VII**—In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall otherwise be re-examined in any court

iii. **Chauffeurs, Teamsters, and Helpers, Local 391 v. Terry**

1. To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. “First we compare the statutory action to the 18th century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.”

2. Characterization of damages
   a. Money damages traditional form of relief in courts of law
   b. Damages are equitable where they are restitutionary
   c. A monetary award incidental to or intertwined with injunctive relief may be equitable.

3. Brennan (conc.)—the nature of the remedy is more important than the nature of the right, so there is no point in conducting the first part of the test

iv. Judges, not juries decide significant patent issues

v. **Aamoco Oil v. Torcomian**

1. It has long been settled that neither the joinder of an equitable claim with a legal claim nor the joinder of a prayer for relief for an equitable relief with a claim for legal relief as to the legal claim can defeat an otherwise valid seventh amendment right to a jury trial.

2. It is settled…that even an equitable main claim cannot preclude a jury trial on a legal counterclaim, at least where the counterclaim is compulsory.

3. **Once there is a legal claim there must be a jury trial!** May separate out so that judge hears equitable claim and jury hears legal claim. The judge should hear the legal claim first and to the extent that the facts overlap with the equitable claim, the judge is bound by the jury’s findings.

4. Denial of a jury trial in a case where the court could not have properly granted the opposing party a directed verdict results in reversible error.

b. The role of the jury

i. Judge acts as a filter for the jury trial.

ii. **Dobson v. Masonite Corp.**—Interpretation is always a question of fact. Drawing a legal conclusion about the facts by application of rules to the facts requires that the facts first be found.

iii. Tactical Considerations
1. Institutional concerns
   a. Bench trial faster than jury trial
   b. Defendant who knows plaintiff needs fast trial may demand jury trial to force settlement
   c. May want to wait longer for the trial if the injury is degenerative

2. Psychological concerns
   a. Similarities outweigh differences
   b. Considerations:
      i. Nature of the case
      ii. Characteristics of the parties and witnesses
      iii. The passions that trial may arouse
      iv. The type of jurors likely to be chosen
      v. Background and predilections of the judge
      vi. Counsel’s effectiveness with judge or jury
         1. Less concentration on form with judge trial
         2. Better indication of how case is going with judge trial—attorney can refocus testimony because of this

iv. Reid v. San Pedro, LA & Salt Lake RR—limitations on rational inferences; in order for the plaintiff to prevail it was essential for her to show by the preponderance of the evidence that the cow entered the right of way through the broken fence. The respondent failed to do so. The verdict rendered on the first cause of action is not supported by the evidence, and the trial court should have directed a verdict for the appellant on that cause of action in accordance with appellant’s request.

c. Procedural controls
   i. Burdens
      1. Burden of production—requires the part to produce—to find and present evidence in the first place. Party can lose before trial if they fail to demonstrate that a reasonable trier of fact could find in her favor. Summary judgment based on this burden. For some affirmative defenses the defendant has the burden of production
      2. Burden of persuasion—defines the extent to which a trier of fact must be convinced of some proposition in order to render a verdict for a party who bears it. In civil trials it is “the preponderance of the evidence”, “more probable than not” or “more likely than not”

   ii. Directed verdict—a judge should direct a verdict only if there is no rational basis for a jury to find in favor of the party against whom the verdict is directed.

   iii. JNOV—essentially a late ruling on an earlier motion for judgment as a matter of law. Same standard as directed verdict: there is no legally sufficient evidentiary basis to find for the party against whom the motion is made.

   iv. Why wait to grant JML until after the verdict?
      1. Respect for juries role
      2. Time saving in case of appeal—won’t have to redo the trial.

   v. FRCP 50 (p. 120)
      1. (a) JML
         a. party has been fully heard on an issue
         b. There is no legally sufficient evidentiary basis for a reasonable jury to find for that party
         c. Court may determine the issue and grant a motion for JML against that party with respect to a claim or defense that can not under controlling law be maintained or defeated without a favorable finding on that issue
         d. Motion may be made at any time before submission to the jury
2. (b) Renewing motion after trial—if motion for directed verdict not granted before trial movant may renew motion no later than 10 days after entry of verdict and may alternatively request or join a motion for a new trial under rule 59. The court may
   a. Allow the judgment to stand
   b. Order a new trial
   c. Direct entry of judgment as a matter of law or
   d. If no verdict was returned
      i. Order a new trial or
      ii. Direct entry of JML

3. (c) Conditional Rulings—the trial court shall rule on both motion for JML and motion for new trial in case on appeal JML is reversed; the case shall then proceed to new trial unless the appellate court has otherwise ordered.

4. (d) If JML is denied and appealed, the Appellee may assert grounds for a new trial
   vi. PARR v. Chamberlain—where proven facts give equal support to each of two inconsistent inferences, neither of them being established, judgment as a matter of law must go against the party upon whom the necessity of sustaining one of these inferences as against the other, before he is entitled to recover.

   d. New trial
      i. FRCP 59 (p. 137)
      1. (a) Grounds
         a. Flawed procedures leading to a verdict
            i. Error in admission or exclusion of evidence
            ii. Jury tampering
         b. Flawed verdict—unjustifiable trial result: verdict not supported by weight of evidence.
         c. Judge must be certain he is not substituting his own judgment for that of the jury.
      2. (b) Time—within 10 days of entry of judgment
      3. (d) On courts initiative new trial may be ordered within 10 days
      4. (e) Motion to alter or amend a judgment shall be filed no later than 10 days after entry of judgment

   ii. Lind v. Schenley Ind.—Sales manager for liquor company alleges breached oral contract for increase of pay and sales commissions.
      1. Motion for a new trial usually non-reviewable, but may be reviewable on narrow abuse of discretion grounds
      2. While the trial judge has a responsibility for the result at least equal to that of the jury he should not set aside the verdict as contrary to the weight of the evidence and order a new trial simply because he would have come to a different conclusion if he were the trier of facts. Since the credibility of witnesses is peculiarly for the jury it is an invasion of the jury’s province to grant a new trial merely because the evidence was sharply in conflict. The trial judge, exercising a mature judicial discretion, should:
         a. review the verdict in the overall setting of the trial,
         b. Consider the character of the evidence and the complexity of the legal principles or simplicity of the legal principles the jury was bound to apply
         c. Abstain from interfering with the verdict unless it is clear that the jury has reached a seriously erroneous result.
         d. Judge’s duty is to see that there is no miscarriage of justice.
      3. Where the trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors a verdict should be scrutinized more closely by the trial judge than is necessary where the litigation deals with material which is familiar and simple, the evidence relating to ordinary commercial practices.

IX. Respect for judgments
   a. Repose—seek to end disputes even if the resting condition is less than optimal
   b. Claim preclusion/Res judicata
      i. Forbids a party from litigating a claim that should have been raised in former litigation
      ii. Goals:
         1. Efficiency
         2. Finality
         3. Avoidance of Inconsistence
      iii. Questions to ask:
         1. Could the claim have been brought?
         2. Should the claim have been brought?
      iv. Heaney v. Board of Trustees of Garden Valley School District
1. The former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which (1) **might** and (2) **should** have been litigated in the first suit.

2. Litigation which is repetitious or which is inefficient by virtue of needless fragmentation should not be tolerated because it needlessly burdens both the judicial system and the party who must respond.

3. Efficiency requires that all claims to relief based upon the **same underlying transaction** be pursued in a single action unless evidence bearing upon one aspect of the case may be unduly prejudicial with respect to another. The loss of efficiency in such circumstances may be tolerated to serve the ends of justice.

4. **Dissent:** What factual grouping constitutes a transaction is to be determined pragmatically giving weight to such considerations as whether the facts are related in time, space, origin, or motivation and whether taken together they form a convenient trial unit, an whether their treatment as a unit conforms to the party’s expectations or business understandings or usage.

v. **28 USC 1738** Full faith and credit—the acts of the legislature of any state, territory, or possession of the United States, or copies thereof, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage of such state, territory, or possession from which they are taken.

vi. **Frier v. City of Vandalia**

   1. One suit precludes a second where the parties and the cause of action are identical.
   2. Causes of action are identical where the evidence necessary to sustain a second verdict would sustain the first.
   3. Two suits may entail the same cause of action even though they present different legal theories and the first suit operates as an absolute bar to subsequent action not only as to every matter which was offered and received to defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.
   4. The ground for preclusion is potentially broader under the same transaction theory than the same evidence theory.
   5. Claim preclusion serves to impel parties to consolidate all closely related matters into one suit—when the facts and issues of all theories of liability are closely related, one case is enough.

vii. **FRCP 13(a)**—Compulsory counterclaims (p. 38)

   1. A pleading shall state as a counterclaim any claim which at the time of the serving the pleading the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for adjudication third parties of whom the court can not acquire jurisdiction.

viii. **Martino v. McDonalds**—because Martino filed no pleading, rule 13(a) does not apply; however the doctrine of res judicata may apply;

   1. The principle of res judicata treats judgment on the merits as an absolute bar to relitigation between parties and those in privity with them of every matter offered and received to sustain or defeat the claim or demand and to every matter which might have been received for that purpose.
   2. Consent judgment may have a res judicata effect where it is accompanied by findings of fact and conclusions of law that go to the merits of the controversy.
   3. Res judicata preserves the integrity of judgments and protects those who rely on them.
   4. When facts form the basis of both a defense and a counterclaim, the defendant’s failure to allege these facts as a defense or a counterclaim does not preclude him from relying on those facts in an action subsequently brought by the plaintiff against him.

ix. On the merits

   1. Courts sometimes state that claim preclusive effect should attach to judgment on the merits.

x. **Gargallo v. Merill Lynch**—Does involuntary dismissal serve as “judgment on the merits” for the purpose of res judicata? Yes. Should the involuntary dismissal with prejudice of a federal claim in state court serve as judgment on the merits for purposes of res judicata? No. The state court lacked valid SMJ and therefore could not render a final verdict on the issue.

xi. **FRCP 41(b)**—Effect of involuntary dismissal: For failure of the plaintiff to prosecute or to comply with these rules or any order of the court a defendant may move for dismissal of the action. Unless the dismissal order otherwise specifies, it shall serve as adjudication on the merits, except for dismissal for lack of jurisdiction, improper venue, or failure to join a party under Rule 19.

xii. **Semtek Intl. Inc. v. Lockheed Martin Corp.**—when a federal court sits in diversity, the claim preclusive effect of judgment should be the same as if it was in state court except where that would be incompatible with federal interests.

c. Issue preclusion/Collateral estoppel

   i. Issue involved in a claim has already been litigated and thus may not be re-decided in any subsequent litigation between the same parties.
ii. Issue Preclusion inheres 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. the determination is conclusive in a subsequent action
   6. between the same parties
   7. on the same claim or a different claim
iii. **III. Central Gulf RR v. Parks**—where a judgment may have been based on either or any of two or more distinct facts, a party desiring to plead the judgment as an estoppel by verdict or finding upon the particular fact involved in a subsequent suit must show that it went upon that fact, or else the question will be open to a new contention.
   d. Relation of parties
      i. Privity—a person in privity with another is a person so identified with another that he represents the same legal right.
      ii. **Benson and Ford, Inc. v. Wanda Petroleum Co.**
         1. A litigant has a due process right to a full and fair opportunity to litigate an issue
         2. Conclusive effect of a prior judgment may only be invoked against a party or a privy. A non party will be considered in privity in three situations:
            a. The non party succeeds to a party’s interest in property
            b. A non party who controlled the original suit will be bound by the resulting judgment
            c. Federal courts will bind a non party whose interests were represented adequately by a party in the original suit.
         3. To have control of litigation requires that a person have effective choice as to the legal theories and proofs advanced in behalf of the party to the action. He must also have control over the opportunity to obtain review.
         4. Adequate representation does not pertain to the competence of the previous litigation. It refers to the concept of virtual representation by which a non party may be bound because the party to the first suit is so closely aligned with his interests as to be his virtual representative. See notes RS Judgments Sec. 41:
            a. A trustee of an estate or interest of which the person is a beneficiary
            b. Invested by the person with authority to represent him in an action
            c. The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary.
            d. An official agency invested by law with the authority to represent a person’s interests
            e. The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.
         5. Virtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non parties who file a subsequent suit raising identical issues.
   iii. Mutuality—conditions under which both parties could benefit from or be burdened with preclusion. The last several decades have seen the concept of mutuality erode.
   iv. Defensive collateral estoppel—when the defendant seeks to collaterally estop the plaintiff from relitigating an issue that the plaintiff has litigated against another party and lost.
   v. Offensive collateral estoppel—different plaintiff trying to keep defendant from relitigating an issue.
   vi. Biologically separate individuals possess separate claims, and no rule compels such individuals, even when married to each other, to prosecute their claims together.
   vii. **Parkline Hosiery v. Shore**—offensive collateral estoppel is permissible, however the trial court must consider:
      1. did the defendant have sufficient incentive to litigate the issue the first time?
      2. Is there any new evidence?
      3. Is there any evidence of inconsistent verdicts?
      4. Could the plaintiff have joined in the previous suit?
      5. Procedural concerns—does the second suit afford the defendant procedural opportunities not available in the first suit?
   viii. **State Farm Fire & Casualty Co v. Century Home Components**
      1. We are not free to disregard incongruous results when they are looking us in the eye. If the circumstances are such that our confidence in the integrity of the determination is severely undermined, or that the result would likely be different in a second trial, it would work an injustice to deny the litigant another chance.
      2. Where outstanding determinations are actually inconsistent, it would be patently unfair to estop a party by the judgment lost.
X.  Joinder
   a.  Considerations and analysis
      i.  Is there a rule that permits joinder?
      ii.  Is there jurisdiction: personal, SMJ, supplemental, venue
      iii. Preclusive effect of judgment against future claims.
   b.  Joinder of claims and counterclaims
      i.  FRCP 18 (p. 49)
         1.  (a) Joinder of claims—A party asserting a claim to relief as a original claim, counter claim, cross claim, or third party claim may join, either as independent or alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party
      ii.  28 USC 1367—Supplemental jurisdiction
      iii.  FRCP 13 (p. 38) Counterclaim and Cross Claim
      iv.  Plant v. Blazer Financial Services
         1.  A permissive counterclaim must have an independent jurisdictional basis
         2.  Compulsory counterclaims fall within the ancillary jurisdiction of the federal courts
         3.  A counter claim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the plaintiff’s claim.
         4.  Four tests have been suggested to determine whether a claim and counterclaim arise from the same transaction:
            a.  Are the issues of fact and law raised by the claim and counterclaim largely the same?
            b.  Would res judicata bar a subsequent suit on the defendant’s claim absent the compulsory counterclaim rule?
            c.  Will substantially the same evidence support or refute plaintiff’s claim as well as defendant’s counter claim?
            d.  Is there any logical relation between the claim and the counterclaim?  This is the majority test.  Hallmark is flexibility.
         5.  Logical relationship exists when the counter claim arises out of the same aggregate of operative facts in that the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights, otherwise dormant in the defendant.
      v.  Great Lakes Rubber Corp v. Herbert Cooper—A federal court has ancillary jurisdiction of the subject matter of the counterclaim if it arises out of the transaction or occurrence that is the subject matter of an opposing party’s claim of which the court has jurisdiction.  Similarly, a counterclaim that arises out of the transaction or occurrence that is the subject matter of an opposing party’s claim is a compulsory counterclaim within the meaning of FRCP 13(a).
      vi.  A counterclaim is logically related to the opposing party’s claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by parties and the courts.
   c.  Joinder of parties
      i.  FRCP 20—Permissive Joinder of Parties (p. 54)
         1.  All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.
         2.  All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.
         3.  The court may separate the trials to prevent delay, prejudice, expense of one party, or embarrassment.
      ii.  FRCP 21 Misjoinder of Parties—not a ground for dismissal of an action.  Parties may be dropped or added by order of the court or on the parties own initiative at any stage of the action (encourages settlement).  Any claim against a party may be served and proceeded with separately.
      iii.  FRCP 42—Consolidation; Separate Trials (p. 111)
         1.  Consolidation—When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions.  It may also order the actions consolidated and make necessary orders to avoid unnecessary costs or delays.
         2.  Separate trials—The court may order separation of trials
      iv.  Mosley v. General Motors Corp. —10 plaintiffs alleging race and gender discrimination
         1.  Test:
            a.  Same transaction or occurrence
               i.  Logical relationship
            b.  Common transaction or series of transactions
            b.  Common issues of law and fact
2. Court may order common trial on common issues and separate trials for different issues after the common issues have been decided.

v. FRCP 14(a) When Defendant May Bring in Third Party (p. 40) At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff.

vi. Watergate—Derivative Liability exists when the defendant/third party plaintiff says “If I am liable to the plaintiff, then my liability is only technical or secondary or partial, and the third party defendant is derivatively liable and must reimburse me for all or part (at least ½ for a joint tortfeasor) of anything I must pay plaintiff.

d. Compulsory joinder
   i. Some parties must be joined—even if neither they nor those already in the suit desire to see them there—they are deemed “necessary and indispensable parties.”

ii. FRCP 19 Joinder of Persons Needed for Just Adjudication (p. 51)
    1. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if:
       a. In the person’s absence 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 persons ability to protect that interest
          ii. Leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

2. If necessary parties can not be joined the court should consider whether the action in equity or good conscience should proceed or be dismissed considering:
   a. To what extent a judgment rendered in the person’s absence might be prejudicial to the person or to those already parties
   b. The extent to which by protective provisions in the judgment, by the shaping of relief, or by other measures, the prejudice can be lessened or avoided.
   c. Whether a judgment rendered in the person’s absence will be adequate
   d. Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

iii. Temple v. Synthes Corp.—should plaintiff be required to join claim against hospital and doctor with product liability claim against screw manufacturer? No.
    1. It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.
    2. Should try to preserve plaintiff’s choice of who to sue and where.

iv. Helzberg’s Diamond Shops v. Valley West Des Moines Shopping Ctr.
    1. Because Lord’s had the opportunity to waive personal jurisdiction and protect its interest and chose not to the suit will not be lost for failure to join them even if there is a possibility that the shopping center could end up with inconsistent obligations.

XI. Class action
a. Class certification
   i. FRCP 23
      1. (a) Prerequisites to a class action:
         a. Numerosity
         b. Commonality
         c. Typicality
         d. Adequacy of representation

      2. (b) Class actions maintainable if additionally:
         a. B1 class: The prosecution of separate actions by or against individual members of the class would create a risk of
            i. Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class
            ii. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; OR
b. B2 class: The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injuction relief or corresponding declaratory relief with respect to the class as a whole.

c. B3 class: the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting individual members of the class and that class action is superior to the other available methods for the fair and efficient adjudication of the controversy considering:
   i. The interest of the members of the class in individually controlling the prosecution or defense of separate actions
   ii. The extent or nature of any litigation concerning the controversy already commenced by or against members of the class
   iii. The desirability or understandability of concentrating the litigation of the claims in a particular forum
   iv. The difficulties likely to be encountered in the management of the action.

   1. Court can look at evidentiary materials beyond the pleadings in deciding whether to certify a class—hearing appropriate.
   2. Can break the class into subclasses after deciding on the common issues to then hear the non-common issues.

iii. Causey v. Pan American World Airways
   1. Circumstances under which mass accident litigation may be maintained as a class:
      a. The class action is limited to the issue of liability
      b. The class members support the action
      c. The choice of law problems are minimized by the accident occurring and/or substantially all plaintiff’s residing within the same jurisdiction.
      d. The class action meets the requirements of 23(b)(3)

b. Constitutional Considerations
   i. Due Process Questions:
      1. Can a party be bound by litigation to which he is not a party?
      2. Does due process require certain procedures within the class action in order for it to be a valid adjudication of the absentee’s rights?
   ii. Hansberry—adequate class representation a component of due process
   iii. Shutt—
      1. Because states place fewer burdens on absent class plaintiffs than they do on absent defendants in non class suits, the Due Process clause need and odes not afford the absent class plaintiffs as much protection form state court jurisdiction as it does non class defendants. They do not need to appear, hire lawyers, pay damages, are not subject to cross or counter claims, are not liable for fees.
      2. A state court must apply the substantive law of each plaintiff in a class action suit.

c. Notice and Settlement
   i. FRCP 23(c)
   ii. FRCP 23 (d)
   iii. Eisen
   iv. Wetzel
   v. FRCP 23 (e)

d. Mass torts
   i. Castano
   ii. Amchem

§ 8.01 Claim Joinder

FRCP 18 allows a party who has made a claim against another to join further claims with it against the same opponent. It authorizes claim joinder without limitation, regardless of whether the claim to be joined is related to the pre-existing claims or not, as long as the joined claim satisfies subject matter jurisdiction requirements.

§ 8.02 Counterclaims

A party may assert a counterclaim against one who previously asserted a claim against him/her. Counterclaims may be compulsory [FRCP 13(a)] or permissive [FRCP 13(b)].
[1] Compulsory Counterclaims

A claim that arises out of the same transaction or occurrence as the subject matter of the opposing party’s claim must be asserted in the present action or is forever barred, except for the following claims:
claims requiring joinder of parties over whom the court lacks personal jurisdiction.
in rem claims.
quasi in rem claims.

Most federal courts interpret “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim” as being logically related to the underlying claim.

Compulsory counterclaims fall within the court’s supplemental jurisdiction and thus require no showing of independent grounds for subject matter jurisdiction.

[2] Permissive Counterclaims

Any claim against an opponent that does not arise out of the same transaction or occurrence as the opponent’s claim is permissive in nature. Failure to assert it does not bar its assertion in a subsequent litigation. Generally, permissive counterclaims fall outside the court’s supplemental jurisdiction.

§ 8.03 Cross-Claims

A party may assert a claim against a co-party – a cross-claim – arising out of the transaction or occurrence that is the subject matter of:
the original action;
a counterclaim; or
relating to property that is the subject matter of the original action.

Cross-claims are generally within federal courts’ supplemental jurisdiction. One may either plead a cross-claim or reserve it for further litigation; cross-claims are never compulsory under FRCP 13(g).

§ 8.04 Joinder of Parties

[1] Permissive Joinder

FRCP 20 permits joinder of plaintiffs or defendants provided that the claims joined to bring multiple parties into the lawsuit:
(1) arise from the same transaction or occurrence; and
(2) have a common question of law or fact.

Additional defendants to be joined must meet the requirements of personal and subject matter jurisdiction, as supplemental jurisdiction does not apply to such claims. Thus, in a diversity action, joinder of additional defendants must not destroy complete diversity among the parties. The jurisdictional amount must also be met by each defendant individually; such claims cannot be aggregated.


FRCP 19 compels joinder in certain circumstances where the adjudication of pending claims will be compromised without the involvement of the party sought to be joined. FRCP 19(a) provides a framework for determining whether the party is “necessary” to the action. A necessary party must be joined if feasible. If joinder is not feasible, a court must determine, pursuant to FRCP 19(b), whether the person’s non-involvement will be so detrimental that the case cannot proceed without the person. Such parties are deemed “indispensable.”

[a] Necessary Parties

FRCP 19(a) sets forth the circumstances under which a party is deemed “necessary”:
(1) if complete relief cannot be accorded among existing parties in his absence;
(2) the absent party’s ability to protect his interest relating to the subject of the action may be impaired without his involvement in the action;
(3) disposition of the action in his absence may subject existing parties to a “substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.”

So long as joinder is feasible, a necessary party must be joined in order for the lawsuit to continue. If one sought to be joined as a plaintiff does not join voluntarily, under limited circumstances, the court may compel such party to join, making the party an “involuntary plaintiff.”
[b] Feasibility of Joinder

However necessary a person might be to the lawsuit, he will not be joined unless it is feasible to do so. Joinder is feasible only if he is subject to the personal jurisdiction of the court, and his joinder “will not deprive the court of jurisdiction over the subject matter of the action.” FRCP 19(a) furthermore excuses an involuntarily joined party from the case if he “objects to venue and [his] joinder . . . would render the venue of the action improper.”

c] Indispensable Parties

When it is not feasible to join a party, the court may determine the party indispensable to the action, pursuant to FRCP 19(b). If the party is deemed indispensable, the action will be dismissed. The factors that determine whether a party is indispensable are:

(1) the extent to which a judgment rendered in the party’s absence might be prejudicial to the party or existing parties;
(2) the extent to which the prejudice can be lessened or avoided by protective provisions in the judgment, by the shaping of relief, or other measures;
(3) whether a judgment rendered in the party’s absence will be adequate; and
(4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. [FRCP 19(b)]

§ 8.05 Impleader (Third-Party Practice)

[1] Nature of Third-Party Practice

Impleader is a device by which a defendant can join a third party who may either share or be legally responsible for defendant’s liability to plaintiff. In this capacity, defendant becomes a third-party plaintiff, the added party becomes a third-party defendant.

The defendant, as a third-party plaintiff, may also join other claims against the third-party defendant. Impleader furthermore makes available to the third-party defendant all the options available to defendants, e.g., counterclaims, cross-claims, and impleader of yet additional parties that could be fully or partially responsible for any liability the third-party defendant is found to have to the original defendant.

[2] Requirements for Impleader

Under FRCP 14, a claim sought to be impleaded must:

(1) have arisen out of the same transaction or occurrence as the original plaintiff’s claim; and
(2) be contingent or derivative.

[3] Common Theories of Contingent or Derivative Liability

(1) Indemnity – A right to indemnification either arises out of an express contractual provision whereby one party agrees to indemnify (“hold harmless”) another for certain liabilities, or by implication when a person without fault is held legally liable for damages caused by the fault of another.

(2) Subrogation – Subrogation is the succession of one person to the rights of another. Often a subrogee is an insurer that has compensated an insured for an injury resulting from the negligence of a third-party.

(3) Contribution – The right of contribution typically arises among joint tortfeasors, two or more persons who are jointly or severally liable in tort for the same injury.

(4) Warranty – A warranty is an express or implied statement or representation typically made by a seller to a buyer or others in the chain of product distribution regarding the character of or title to the product.


Subject matter jurisdiction is satisfied because third-party claims fall within the court’s supplemental jurisdiction. Personal jurisdiction may be had over a third-party defendant if he can be served within the 100-mile bulge of the courthouse. [FRCP 4(K)(1)(B)]

§ 8.06 Interpleader

When there are two or more claimants to a specific property or monetary fund (“stake”), interpleader allows a defendant to avoid multiple actions regarding the same stake by forcing all claimants to proceed against the stakeholder in one lawsuit. Two forms of interpleader exist in federal practice: one under FRCP 22 and one under 28 U.S.C. § 1335.
Whether proceeding by statute or FRCP 22, the defendant deposits with the court the stake which is the target of the competing claims. The stakeholder may seek interlocutory relief, enjoining maintenance of other suits against the stakeholder with respect to the fund during the federal interpleader action. In the interpleader action, the first court determines whether interpleader is appropriate on the facts of the case, and if so, adjudicates the adverse claims and distributes the stake. The stakeholder may be either disinterested (claiming no interest in the stake and getting excused from further involvement in the case) or interested (retaining a claim in the stake and continuing to be involved in the action through its resolution).

Statutory interpleader has some advantages over FRCP 22 interpleader. Under FRCP 22, the interpleaded claims must independently satisfy the requirements of subject matter and personal jurisdiction. Statutory interpleader on the other hand provides for:
- Nationwide service on claimants;
- Minimum diversity (only 2 adverse claimants need be citizens of different states);
- Amount in controversy significantly lower than the diversity jurisdictional amount (more than $500).

§ 8.07 Intervention

Intervention, governed in federal trials by FRCP 24, provides a means for outsiders to join a lawsuit on their own initiative. Intervention may be of right under 24(a) or permissive under 24(b). In either case, there is no supplemental jurisdiction over claims.

[1] Intervention of Right

Intervention of right does not require court permission if three conditions are met:
(1) the intervenor claims an interest relating to the property or transaction which is the subject of the action;
(2) the intervenor demonstrates that the lawsuit carries a possibility of significant detriment to the intervenor;
(3) there is a substantial possibility that none of the present parties will adequately represent the intervenor's interest. However, when the applicant’s stake in the outcome is no greater than that of an existing party with whom the applicant would be aligned, and when that existing party is not in collusion with an opposing party, incompetent, or hostile toward the applicant, representation by the existing party often will be deemed adequate and intervention of right will be denied.

[2] Permissive Intervention

If one does not qualify to intervene as of right, he may petition the court to do so under FRCP 24(b). The claim or defense must have a question of law or fact in common with the pending action.

§ 8.08 Class Actions

[1] Certification

Class actions in federal court are governed by FRCP 23. In order to proceed as a class action, the group of interested parties much be certified as a class. FRCP 23(a) provides for certification of a class if:
(1) the class is so numerous that joinder of all members is impracticable (“numerosity” requirement);
(2) there are questions of law or fact common to the class (“commonality” requirement);
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (“typicality” requirement); and
(4) the representative parties will fairly and adequately protect the interests of the class.

[2] Categories of Class Actions

Class actions are authorized under FRCP 23 in four situations:
(1) where individual actions might result in inconsistent decisions that establish incompatible standards of conduct for the defendant. [FRCP 23(b)(1)(A)]
(2) where the interests of absent class members could be impaired if issues are resolved by individual actions. [FRCP 23(b)(1)(B)]
(2) where the primary relief sought is injunctive or declaratory, not monetary. [FRCP 23(b)(2)]
(3) where “questions of law or fact common to the members of the class predominate over any questions affecting only individual members,” and where “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” [FRCP 23(b)(3)]

Subsection (b)(3) sets forth the factors to be considered in determining whether a class action is superior to other methods:
(1) the interest of class members to individually control separate actions.
(2) whether and to what extent any litigation concerning the controversy has already been undertaken.
(3) the advantages or disadvantages of litigating the claims in the particular forum.
(4) any likely difficulties in managing the class action.
[3] Binding Nature of Class Actions

Class actions brought pursuant to FRCP 23(b)(1) and (2) do not permit class members to “opt out” of the class. Therefore, all class members, whether or not they participate, are bound by settlement or adjudication of the class action and may not bring individual suits on the matter.

In contrast, members of a FRCP 23(b)(3) action may opt out from the class upon timely notice to the court. Members who exclude themselves from a (b)(3) action are not bound by the disposition of the class action and can bring their own action against the defendant.

[4] Notice Requirements

FRCP 23 requires notice only to (b)(3) class members, and such notice must be “the best notice practical under the circumstances.” [FRCP 23(c)(2)] Nevertheless, courts have held that due process requires adequate notice to members of all class actions, including those brought under subsections (b)(1) and (2).

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Supreme Court articulated the standard for notice of a pending class action that would satisfy due process. The Court required individual notice by mail for those persons whose names and addresses were known or could be determined with reasonable effort. However, where notice to other individuals would be impractical – e.g., where the identities of class members are unknowable or where the cost of ascertaining the names and addresses of parties would be considerable – the Court approved of constructive notice by publication.

The class representative is to bear the cost of identifying members of the class [Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978)] and notifying class members [Eisen v. Carlisle & Jacqueli, 417 U.S. 156 (1974)].

[5] Jurisdiction

Class representatives must meet the requirements of diversity and venue in federal class actions but passive class members need not.

There is uncertainty as to whether each class member in a diversity action must satisfy the amount-in-controversy. In Zahn v. International Paper Co., 414 U.S. 291 (1973), the Supreme Court ruled that all class members possessing a separate and distinct claim must satisfy the amount-in-controversy. However, some courts have interpreted the supplemental jurisdiction statute to make Zahn obsolete.

Individual members of a plaintiff-class, aside from named representatives, need not satisfy the “minimum contacts” test in order for the forum state court to exercise personal jurisdiction over them. [Phillips Petroleum Company v. Shutt, 472 U.S. 797 (1985)]

§ 8.09 Consolidation

[1] Cases Pending in a Single District

FRCP 42(a) authorizes a federal court, at its discretion, to consolidate cases pending within the same judicial district involving a common question of law or fact. The claims need not arise out of the same transaction.


Civil actions involving one or more common questions of fact that are pending in different districts may be transferred to any district for coordinated or consolidated pretrial proceedings. [28 U.S.C. § 1407] Transfers are authorized only when they “will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions” and are most frequently invoked in antitrust cases, aviation accident cases, patent and trademark suits, products liability actions and securities law violation actions. Section 1407 applies only to pretrial proceedings and not trials.