I. Due Process in an Adversary System

Lawyers are active and judges are passive

- Judges react to the facts of the law as presented to them by the lawyers
- The active D of the lawyers is to their clients, not to the truth
  - Want to win, while being truthful along the way
- Arguments come from the lawyers and what is the role of the judge in giving weight to new legal arguments

II. Pleadings

FRCP 8-General Rules of Pleading
FRCP 12-Defenses and objections-When and how presented-by pleading or motion-motion for judgment on the pleadings

Pleadings—main 7 types of pleadings and motions

- Written statements of claims or defenses
- Complaint and answer in federal ct
- Counterclaim (Δ against π), crossclaim (Δ complain against co-Δ), third-party complaint (Δ against person not already a party)
- “reply” to a counterclaim and an “answer” to cross-claim or third party complaint

pleading in civil suits-federal

- notice-federal district ct and most state trial-1938
  - short and plain statement showing that the pleader is entitled to relief
  - may be easier to disguise non-meritorious claims

Determining the substantive sufficiency of the complaint

12b6-dismissal for failure to state a claim upon which relief can be granted

- dismissal of a claim is appropriate when it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations
- Accept π’s allegations in the complaint as true and view them in light most favorable to the π
- Common law-usually, there are cases that recite the elements for a particular claim
- When statutory, begin with the statutory language for the elements
• $\pi$ routinely given leave to amend at least once
  o otherwise, probably abuse of discretion
• dismissal is a final order so can appeal if $\pi$ has no other theory

Why give extra facts in the pleading?
• Public record
• Usually given leave to amend
• Get to the appeals ct, assumes the facts in the complaint as true

**Notes on the elements of a complaint**

Required components of a pleading in federal ct-FRCP 8
• Grounds for J, why entitled to relief, Demand for judgment for relief
• Relief is only limited to the prayer or demand if the $\Delta$ fails to answer
• Signing and verification

**Allocating and Adjusting the Burden of Pleading**

Prima Facie Case and Defense
• elements regarded as sufficient to entitle $\pi$ to recover if he proves them and unless $\Delta$ establishes elements that could offset them

Allocating the elements-burden of proof usually follow burden of pleading
• Allocate elements (part of the prima facie case) of the claim to $\pi$
(If...then...)
• Allocated affirmative defenses to $\Delta$ (unless...)
• Generally, must show all elements, and the exceptions are on the $\Delta$, unless the statute or K explicitly provide for exceptions
• Factors
  o Policy-Whoever has to prove it has the dice loaded against him.-look at history and intent of the statute
  o Fairness-It may be more fair to allocate the burden of proof on the party with more knowledge regarding the element
    ▪ Access to evidence
  o Probability-Burden on the party benefited by a departure from the supposed norm.

The role of pleading
• Determining the relevant elements and allocating the burden of proof prior to trial
• Does not do much in terms of narrowing issues (except 12b6)
42 USC § 1983 provides a cause of action for the deprivation of any rights, privileges, or immunities secured by the constitution and laws by any person acting under color law.

(Fed. Rule Civ. Proc. 8 (c)-Δ must plead any matter constituting an avoidance or an affirmative defense.

- Lack of Good faith in a §1983 claim is an affirmative defense (Gomez)

**Note- Burden of pleading, burden of persuasion, and burden of proof**

The burden of pleading determines who must allege the element

Burdens of production and persuasion go to the adequacy of the proof of the claim before the finder of fact-together, burden of proof

- Burden of production- burden of placing sufficient evidence in the record supporting all essential elements of the claim to allow the finder of fact to find in her favor
  - Judge decides if there is enough evidence to get to jury
    - Burden of production
  - Then jury decides
    - Burden of persuasion (standard factfinder applies)
      - If balanced, party with the burden loses

**Adjusting the Burden of Pleading:**

Pleading fraud and mistake-9(b)-must be sufficiently detailed

- Otherwise, same as not having plead at all, and can file MTD

Other claims and issues requiring more specific pleading

- 9(g)-claims for special damages must be specifically stated
- 23.1-π in a shareholder suit

**Pleading inconsistent theories**

A π is permitted to plead inconsistent counts in the alternative, where he is genuinely in doubt as to what the facts are and what the evidence will show-

FRCP 8(e)(2)

- Not an admission against interest
- Lawyer may be professionally obliged to plead a doubtful case
  - Must reasonably inquire into underlying facts and lw and adequately prepare
    - If injured by incompetence, client can sue for malpractice
- Pleading rules allow for inconsistent claims
They are allowed to the extent the party does not know the truth, but inconsistency tends to be not believable. The pleading must satisfy the basic ethical requirements of Federal rule 11.


If the truth is known by the pleader, it still is possible that judicial treatment is debatable, so it may still be permitted to plead in the alternative.

Ways to answer—answer must respond to $\pi$’s allegations
- Deny—must be proven in ct, proof follows pleading
  - Creates an issue of fact as to the allegation
  - Permits $\Delta$ to introduce evidence to disprove allegation
  - Can’t mislead $\pi$ by denying issues don’t intend to contest, or being intentionally vague about denials, making $\pi$ think you aren’t going to contest
  - 11 b 4, 8b
- Admitting—no evidence admitted (established as true)
- Fail to deny—same as admitting (8d)
- Don’t know—same as denial (8b)
  - May deny based on lack of information whether it is true
- File a motion
- Affirmative defenses
  - Introduce new matter-8c, not exhaustive
  - Must be put forth affirmatively
- Counterclaim, other parties, cross claim
  - Advace affirmative claim, usually filed same time as answer
- Nothing

If guilt is admitted as to one or more issues the ct should only allow evidence material to the issues in controversy.

- Otherwise, could be grounds for new trial (prejudicial procedural error)
- One of the functions of pleading is to limit the issues and narrow the proofs.
- Evidence may be important to more than one issue
- Exceptions (rare)
want info presented publicly b/c other people benefit

R 15-amendment to an answer to admit L-Read r 15

- Why wait till day of trial to amend?
  - Pursue settlement
  - Surprise, make them change strategy
  - Cts are hostile to amendments that involve major shifts in theory as trial dates near closer and discovery is ending
- Why allowed? (usually if drastically change trial, will delay the trial)
  - R 15- easy to amend, allow leave to amend as justice requires
  - Amendments to pleadings allowed liberally to allow pleaders to correct mistakes or reflect facts revealed through discovery
- Amendment to the pleadings be allowed to conform with the evidence presented-15b
  - If issues not raised in the pleadings are treated as though they were
- 16d, pretrial conference, time to put case in final form for trial
  - Should include amendments to pleadings
- Amended pleadings displaces prior pleadings for most purposes

**Frivolous Claims and Contentions**

- Verification of pleadings
  - Affidavit stating allegations are true or believed to be true
  - If π verifies, Δ must verify the answer
  - Difficult to challenge on the ground that the party had no basis for knowing truth or falsehood of the allegations
- Common law remedies for meritless or abusive litigation
  - Cts have inherent power to prevent abusive litigation tactics

**Rule 11 and other devices to deter frivolous or abusive litigation**

(Read R 11, and know the basis deal)

- A.) signature
- B.) representation “after reasonable inquiry under circumstances
  - 1. Improper purpose-difficult, would be lots of appeals
  - 2.) warranted by existing law or nonfrivolous argument for an extension modifying, or reversal of existing law
    - Nonfrivolous is not difficult
3.) factual contentions/evidentiary support
   ▪ or likely to after discovery
4.) denials; evidence or lack of info

- c. sanctions
  - process
  - limits
- d. does not apply to discovery

Pretty difficult to prove a violation of r 11

Reasonable investigation and evidentiary support

- Factual claims must have evidentiary support or be likely to have evidentiary support after reasonable opportunity to further investigation or discovery—must be reasonable likelihood the info would emerge in discovery.
- Zuk Case showed insufficiency of research.
- May be enough to ask the client
  - Can still get in trouble later if know to be false and argue orally
- May be difficult to tell after the fact
- Because the SOL is an affirmative defense, may be able to argue you could not be certain they would raise it.
- Prohibited presentations to the ct include oral advocacy based on written material that violates the rule-11b

Warranted by existing law or a non-frivolous argument for the extension, modification, or reversal of existing law, or the creation of a new law

- Rarely will there be conclusively established lack of merit
- Judges “know it when they see it”—But they can disagree

The main purpose of rule 11 is to deter, not to compensate.

- Fines and reprimands, as opposed to private interest remedies. Monetary penalties should be paid to the ct. District cts choice of deterrent is appropriate when it is the minimum that will serve to adequately deter the undesirable behavior.

1993 Changes to R 11

- safe harbor—litigant can escape sanctions by withdrawing an offending pleading w/in 21 days of being served with a motion-11(c) (1) (A)
  - 11c1b-ct can impose own sanctions w/o safe harbor
standards for the award of sanctions
  o sanctions limited to what is sufficient to deter repetition of the conduct or comparable conduct to similarly situated-11(c)(2)

persons L for sanctions
  o attorneys, firms, or parties that violated (b) or are responsible for the violation
  o 11c2a-monetary sanctions cannot be awarded against a represented party for violation of legal merit requirement

28 U.S.C. §1927-attorney who multiplies the proceedings in any case unreasonably and vexatiously
  • costs and/or attorney’s fees
  • some require subjective bad faith, others only objective
  • all require the party have notice and opportunity to defend

Courts have inherent power to sanction bad-faith litigation tactics

III. Remedies

Civil Action-encompasses all civil suits
Intro to Judicial Remedies

8(a)(3)-pleading of demand for relief
26(a)(1)(c)-mandatory disclosure of infor relating to claimed damages

Distinction btw plenary and provisional remedies

- Plenary-awarded at the end of the lawsuit after $\Delta$ has had full opportunity to be heard on L and remedies
- Provisional-upon proper showing while the lawsuit is pending
  - Attachment (seizure of assets, property registered as attached so cannot be sold), garnishment (seizure of property in the hands of a third party-wages, bank account), temporary restraining orders, preliminary injunctions
    - TRO and PI under FRCP 65
      - Need to look at likelihood on the merits, for PI, there must be notice to the other party
      - Difference is timing
        - TRO can be issues immediately
          - some assessment of the likelihood of success on the merits

Compensatory damages

Are compensatory damages fully compensable?

- Attorney’s fees/costs
  - Usually not recoverable-exceptions exist
- Interest
  - Should be included for full compensation
  - Post-interest judgment is almost always allowed

Punitive damages

Specific relief: injunctions

- Matter of ct’s discretion
- Failure to obey an injunction may be contempt (not for damages)
- Traditionally only available when legal remedies, such as damages, are inadequate
- Structural injunctions are common in public law litigation to restructure some governmental entity or operation

Restitutionary remedies: constructive trusts, rescission, and cancellation of K

Other equitable remedies

- Reorganization of financial affairs
- Suits to determine title of land
• Constructive trust
• Structural injunctions

Declaratory relief
• Simply declares the legal rights of the parties
• Available if $\pi$ can show he confront real risk if he proceeds with the course of conduct which he seeks to follow
• Cts remain wary of permitting declaratory judgment suits when issues are not ripe for adjudication or moot.

Provisional remedies: attachment
• Provide security for the $\pi$
• normally required to post a bond for losses to $\Delta$

Provisional remedies: TROs and PIs
• May be issues ex parte- if $\Delta$ cannot be secured in time for a hearing
• Bond to indemnify $\Delta$ against loss is normally required
• TRO is usually returnable as soon as possible
• $\Delta$ has unqualified right to appear at hearing on the return date to seek dissolution of the injunction and oppose injunctive relief
  o $\pi$ tries to transform TRO into preliminary injunction
  o must show need to maintain the status quo pending the outcome of the litigation
  o likelihood she will ultimately prevail in the litigation
  o difference in harships btw $\pi$ and $\Delta$-FRCP 65

Injunctions:
• The basis must be irreparable injury and the inadequacy of legal remedies. Also:
  o intervention is essential to protect property rights against injuries otherwise irremediable.
    ▪ Not if the threat of harm has ended
  o Balance conveniences of the parties and possible injuries to them according as they may be affected
  o public consequences
• May be easy to define inadequacy so it is never adequate
  o Damages only adequate where they can be used to replace the thing $\pi$ lost
• generally and extraordinary remedy
The district ct retains discretion to order an injunction or other relief unless Congress clearly manifests a contrary intent (Weinberger)
  o Reviewed for abuse of discretion

Preliminary injunctions
  • Need to look at likelihood of success
  • Interlocutory injunctions has never been regarded as strictly a matter of right, even if postponement is harmful to the π.

How to obtain and pay a lawyer: How to get paid

**The Costs of litigation and the costs of lawyers**

3 categories
  • costs, litigation expenses (3x costs on avg), attorney fees (3x LE)
  • costs are ct required fees only
    o paid by the loser
  • LE/Attorney fees
    o American rule: pay your own-almost always
    o British rule: loser pay winner

Public costs
  • Salaries of ct personnel, expenses of running ct, and fees for jurors.
  • Relatively low public costs and relatively high private
  • Plaintiffs pay a low filing fee, Δs pay no fee

Private costs of litigation, with special focus to attorney’s fees
  • Contingent fees-most cases in civil cases
    o 25-40%
  • Hourly fees
  • Limitations on lawyer fees-must be reasonable

Allocating the private costs of litigation and the American rule
  • The ct taxes the losing party for these costs. -54d
    o Incidental expenses of ct proceedings-not attorney fees
  • Allocating attorney’s fees, the American rule (opposite of English)
    o Each party Generally responsible for its own fees
    o Exceptions to American rule
      ▪ losing party’s claim fails so outrageously that it is later to be determined to have been brought in bad faith
      ▪ litigants prevailing in claim involving the public interest
- Fees ACT (similar acts)-color of state title and violation of civil rights-reasonable attorney fees
  - Class action/common fund-relate exceptions
    - Given out of the fund by the judge
    - when a lawyer’s efforts on a client’s behalf generate a common fund benefiting a class of similarly situated persons or provides substantial benefit to shareholders
  - Contingent fee
  - Legal services corporation
  - Equal access to justice act
  - Pro bono
  - Ct appointed lawyer
- Rule 23 (e) requires ct approval of the terms of any settlement of a class action.-r 23, allows attorney to sue on behalf of group of people
- Δ may condition settlement on waiving attorney fees, exploiting the attorneys obligation to his client
  - may reduce incentive for lawyers to take civil rights cases
  - ct retains discretion under the fees act-promotes settlement
  - decision to settle is π’s, not lawyers

How to deal with problem of getting paid, fees and conflicts of interest
- May be able to sign document saying lawyer owns fees and π owns relief. Hmm, doesn’t really do anything
- K-attorney owes share of damages, client owns share of lawyer fees
- May be able to separate the attorney fees from the π’s claim in a prior agreement, so the fee cannot be waived (Jeff D)
- π agreed not waive fees- Unenforceable as against pub. Policy
  - lawyer/client Ks are regulated by K law, not civ pro
- Pick clients carefully
- Litigation migrates toward where fees are going to be recovered
  - Claims can fall under more than one action

British rule v American rule
- British rule-loser pay winner’s attorney fees
  - More cases where stakes are lower
  - Afraid to bring cases difficult to win
The Right to Counsel in Civil Cases

an ingent’s right to appointed counsel

- where the litigant may lose his physical liberty, Due process guarantees the right to counsel
  - some parental rights might also
- Balance these elements against each other and set against a presumed right to counsel only where indigent and may lose personal freedom
  - Difficult points of law
  - Private and government interests
  - Costs and probability of error-risk of an erroneous decision
- For parental rights-trial ct decides and subject to review (Lassiter)

Pattern of litigation in the U.S. is largely due to

- insurance
- fee system

The market provides affordable counsel in many cases

- Where there are significant damages and a decent prospects, can usually find counsel no matter what using contingent fee.

Not provide by the mkt

- Smaller tort, K, and government benefits

Ct may request a member of the bar to serve on a pro bono basis. Cannot be requirird to perform pro bono under the federa in forma pauperis statute.

Other strategies

- Pro se- self representation
  - Take more judicial resources, and pose questions of neutrality
- Less expensive forms of legal advice
  - Allow lawyers to provide limited advisory role
  - Allow non-lawyer practitioners to provide routine assistance in a selected class of cases
- Reduce procedural complexity of litigation
- Alternative dispute resolution

IV. Jurisdiction

4 requirements must be satisfied before suit can be brought in a particular ct

- territorial jurisdiction-over a person or thing
• subject matter J
• venue
• ability to withstand a MTD for forum non conveniens

**Territorial J-FRCP 4**

• Over her person-*in personam* J.
• Over property-*in rem* or *quasi in rem* J.

*In personam*

• Consent (if he brings suit, there is J)
  o Consents to J over matters arising out of what you sued for
  o General appearance-a defect in territorial J is waivable, deliberately or inadvertently
    ▪ Failure to timely object
  o Special appearance
    ▪ Appearance for the sole purpose of contesting J
    ▪ Must be careful to not make a general appearance
    ▪ dismissal under 12b2 for lack of J over person
      ▪ May be joined with other motions under 12b or with a responsive pleading
      ▪ Objection is waived if not asserted in a responsive pleading or motion under 12b2-FRCP12(h)
        • May be forefeited if not timely pursued-12h
  o Ex ante-agreements provide consent to J before dispute

• Actual notice and failure to object (consent), or actual consent
  o Mail gives notice
  o Notice-1950
    ▪ Violates due process to enter judgment against absent ∆ w/o adequate notice- reasonably calculated under all circumstances to reprise a ∆ there is a suit against him

• Presence-always enough-physical presence in the J
  o Serve them w/ the complaint while in J (N &P)
    ▪ Not if fraudulently induced
    ▪ Flyover-*mcarthur*
  o Easy for natural person, usually
  o For absent ∆, Minimum contacts (see below)

• Legal status in state
• Businesses (corporations, partnerships), marriage (divorce)
  ▪ State may determine the status of one of its citizens towards a non-resident, even without personal notice to non-resident
• The relvance of service of process in an in personam suit
  o The presence of a person within a state justifies in personam if provided person is served with process at the beginning of the suit.
  o Generally, all process other than a subpoena may be served anywhere w/in territorial limits of the state in which the district ct is held 4(f)

In rem - against a thing
• True in rem actions Bind property-adjudicate the rights of all who claim interest in the property
• Property in J and the the property is the subject of the suit

Quasi in rem - settles property rights only of specific persons
• Type one-resolves a dispute about the property itself
  o i.e. foreclose on mortgage where claimant is outside J
• Type 2 (attachment J)-establishes rights to property, but the underlying dispute is unrelated to the property, only parties are affected
  o Absent Δ who owns property w/in state.
  o Property is brought w/in J by attachment, and absent Δ is put to the choice of either coming into the state to litigate or stay outside the state and losing the litigation through a default judgment.
    ▪ Must be attached before the suit (Pennoyer)
  o Law assumes property in the possession of its owner.
    ▪ If the judgment was void, it will not become valid by subsequent discovery of Δ's property
      ▪ Judgment void even in J where rendered
  o A diligent owner would be alerted of a suit against him

Full faith and credit clause gives full faith and credit to rulings on other J
• Still more difficult to collect in another state

Minimum Contacts Formulations
International Shoe(1945)

- Activities in the forum state
- For out of state Δs, Δ must have minimum contacts w/ J such that suit does not offend traditional notions of fair play and substantial justice
- Continuous and systematic (nature of contacts with forum)
- Give rise to the liabilities sued upon-( did dispute arise out of the contacts)
- Fairness

Contacts btw Δ and forum state

- There must also be proper venue, and the forum cannot be too inconvenient. The problem of insufficient contacts btw π and the forum state has usually been handled under the doctrinal heading of forum non conveniens, but the question has appeared in discussions of in personam J as well.

General and Specific J

- General-number and quality of Δ’s contacts with forum state are sufficiently substantial that one may litigate any dispute in cts of the forum, whether or not this dispute grows out of those contacts.
- Specific-exists when the contacts with the forum are related to the dispute sought to be adjudicated.

Diversity of citizenship-different states

- Not diversity as long as there is one π and Δ with same citizenship

Burger King

- Min contacts
  - Δ’s conduct is such that he should reasonably anticipate being held into ct there
    - purposefully directing
    - Purposeful availment
    - Includes business negotiations, terms of the K, course of dealing
  - other factors after finding min contacts (from WWVW)
    - Burden on Δ,
    - Forum state’s interest in adjudicating the dispute
    - π’s interest in obtaining convenient and effective relief
- interest of the interstate judicial system in efficient resolution of controversies
- shared interest of the states in furthering fundamental substantive social policies
- These considerations sometimes serve to establish the reasonableness of J upon a lesser showing of minimum contacts
  - as opposed to VW incorporating them into min contacts

- governs internet J

**Purposeful availment**—emphasis is benefit Δ receives
- It is essential that there be some act by which Δ purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

**Purposeful direction**—emphasizes Δ activities directed at the state
- a commercial actor’s efforts are purposefully directed toward residents of another state if:
  - 1.) committed intentional act
  - 2.) aimed at the forum state,
  - and 3.) caused harm, the brunt of which is suffered and which Δ knows is likely to be suffered in the forum state.
- Supports J where a Δ’s acts outside the forum have foreseeable consequences inside the forum

**Asahi Metal Industry Co. v. Superior Ct**
- Is Stream of commerce purposeful availment
  - Mere awareness is not enough, but more could be
  - Delivers products into stream of commerce with the expectation that they will be purchased in the forum state

- Other factors take into account foreign J

- The doctrine of forum non conveniens
  - allows a court to dismiss a suit in which it has valid in personam J but when the forum is nonetheless extremely inconvenient.

**Note on service of process—FRCP 3, 4**

- Special rules that toll SOL in certain cases
- Sewer Service—private process servers are occasionally tempted to pretend falsely that proper service has been accomplished
  - Default judgment can be set aside

- Long-arm statutes—J statutes that reach across state lines
• Some authorize max under the 14th amendment
• Fed district cts usually rely on the long-arm statute of the state in which they sit, but there are a few federal long-arm statutes that assert nationwide in personam J, or just more broadly
  o “nationwide J”- ct may assert territorial J over Δ anywhere in US irrespective of whether Δ has contacts with the state
Δ’s choices and their consequences
• Full faith and credit clause enforces judgment
• Can resist enforcement on ground that judgment was rendered without territorial J
  o Cannot assert judgment on the merits after default judgment
  o Cannot assert no territorial J after judgment on the merits except as through that appellate system.
• Pretty risky not to appear
Forum-selection clauses
• Arguable that passengers are “choosing” lower prices by waiving their choice of forum. Can be substantial
• May have some weight in 1404(a) motion to transfer
Contractual assent to J
• Not a forum selection clause, but rather consent to in personam J
  o Such as by agreeing to appoint an agent in a certain state to receive service of process
When Choosing:
• Money, likelihood of success
• Cost, knowledge of system, bias of different areas for πs, locals, against non-residents, etc...
Will the ct exercise authority over the Δ?
• Long-arm statutes
• Allowing a state to exercise J does not mean they will assert J

Subject matter J
• State (10th amendment)-general J
• Federal- limited J
Limited by the nature of the law involved, or particular types of parties that can bring suit in federal ct
Art. III, §2-9 parts, read carefully-congress does not have to implement all -nothing prevents state cts from exercising J
Can bring state and federal claim in state ct
  - The federal question must arise in the complaint for federal ct to have subject matter J.
Statutes-congress can limit, not extend past whats granted in Article III, section II
  - 1251-controversies btw states
  - 1330-foreign states
  - 1331-federal question (federal law)
  - 1332-diversity
    - exceeds sum over 75,000
    - requires complete diversity
  - 1333-admiralty and maritime
  - 1345-U.S. is π
  - 1346- U.S. is Δ

Person is citizen of where he or she is domiciled (and a U.S. citizen)
  - Domicile = residence + intent to remain
  - Usually domicile of wife is that of her husband, but not changed if married to an alien (Mas v. Perry)
  - Citizen domiciled aborad may not use 1332 as the basis for J bc requires citizenship of a state
  - Alien can use 1332 in 2 ways; citizens of a state and citizens of foreign state, alien admitted for permanent residence in the U.S. is deemed citizen of state in which she is domiciled.
  - Artificial persons-citizen of both its state of incorporation and its principal place of business.

Must be diverse at the time of filing
  - Possible to move to create J
  - Burden of pleading is on party invoking federal J
  - If there is a dispute, burden is on party to establish residence and intent to remain; other party can present contrary evidence
• 1132(a)(2): federal judicial power extends to a foreign citizen against a domestic citizen (Mas)
Must also reasonably plead over 75,000
• Must appear to a legal certainty that the claim is for less to justify dismissal
• Injunctions - Generally amt in controversy is satisfied whe viewed from either π’s or Δ’s perspective.
• π can aggregate all claims brought in a single complaint. Multiple πs cannot, unless individual or class πs have undivided interest in claim.
• Counterclaims - amounts sought in permissive counterclaims under 13(b) are not considered part of the amt in controversy.

Assignment or joinder of parties
• may not be done “improperly or coluusively” in order to invoke J.
Can have state laws at issue and federal procedures

V. Pretrial Procedure
Functions of discovery: compelling the disclosure of information relevant to disputed factual issues in litigation
• Enable more accurate outcomes
  o Reduce the risk of surprise
  o More complete view of the circumstances
• Promotion of settlement
• Summary judgment

Much of discovery takes place informally before suit is filed
• Must do so to comply w/ rule 11

Meeting to draw up proposed discovery plan-FRCP 26
Initial disclosures
• 4 classes required-FRCP 26, only favorable to the case
Depositions-formal questioning of a witness under oath
• Advantages-direct answer rather than through a lawyer, deponent does not know the questions, follow-up questions
• Disadvantage-cost, discovery of unfavorable info, tipping ones hand
• Rules of thumb
  o Don’t depose own client, and generally not friendly witnesses
  o Depose important unfriendly witnesses
- FRCP 30—may depose any person possessing relevant info within the meaning of R 26, whether or not a party.

Interrogatories—written questions sent to a party that must be answered in writing under oath—FRCP 33
- Can only be sent to parties
- Inexpensive
- Often accompanied by request for documents
- Useful in seeking hard information

Production of documents and things—FRCP 34
- Party asks what relevant documents/objects exist
- Requesting party asks they be produced

Physical and mental examinations—FRCP 35
- Available only against parties, and only when the physical or mental state of a party is at issue
- Ct usually requires showing of good cause

Requests for admission—may request for the purposes of the case that certain facts are true and documents are genuine to simplify the trial—FRCP 36

Motions for protective orders and motions to compel
- Protective order—R 26
- Motion to compel production—FRCP 37.
- Must first attempt to confer with the other party in good faith.

Sanctions
- Expected to conduct discovery and comply with requests, without being ordered to do so by the ct.
- Other party may wish to move for sanctions
- Most commonly is costs and fees caused by the discovery abuse
- Extreme cases, resolved a fact against, dismiss a cause of action, or enter judgment.

If information falls outside the protection of any privilege or trial preparation immunity, the remedy for the producing party is normally to seek a formal protective order from the ct barring discovery of the material or restricting its use and dissemination by the party to whom the info is produced.

Zubulake v. UBS Warburg LLC
2003
Discovery used to narrow and clarify the basic issues btw the parties and as a device for ascertaining the facts or info as to the existence or wherabout of facts relative to those issues. Proportionality test in R 26-limited by the ct if 1) unreasonably cumulative or duplicative, obtainable from more convenient, less burdensome/expensive source 2.) party has already had ample opportunity through discovery to obtain the info sought, 3.) burden outweighs the benefit. May invoke district ct’s discretion under 26 c to grant orders protecting it from undue burden or expense, including orders conditioning discovery on the requesting party’s payment of the costs of discovery. Seven factor test: Order from most to least important

- Marginal Utility test
  - 1.) the extent to which the request is specifically tailored to discover relevant information
  - 2.) the availability of such information from other sources

- Costs issues
  - 3.) Total cost of production, compared to amount in controversy
  - 4.) Total cost of production, compared to the resources available to each party
  - 5.) The relative ability of each party to control costs and its incentive to do so

- Third group
  - 6.) importance of the issues at stake in the litigation

- Final group
  - 7.) the relative benefits of the parties obtaining the information

A test run would inform the cost-shifting analysis laid out above so the entire cost-shifting analysis can be grounded in fact rather than guesswork

**Note on Scope and Costs of discovery**

**Scope**

- FRCP 26-any matter not privileged which is relevant to the claim or defense of any party
- Enough if it appears reasonable calculated to lead to discovery of admissible evidence.

Judicial regulation of the discovery process
• Rules oblige the arties to attempt to negotiate a consensual resolution of their difference before burdening the ct-FRPC 37
Regulating the scope and costs of the discovery
• Strong presumption if relevant and therefore discoverable, the responding party bears the cost of production

Special Issues of E-discovery
• Amendment to 26 B would relive a party from producing info not reasonable accessible. If moved to compel discovery, burden would be on the responding party to show it was not reasonably accessible. Then ct could still order discovery upon showing of good cause, wit the power to impose conditions and limits
• R 34 amended to permit the requesting party to specify the form in which electronically stored info is produced.
• May withhold info not reasonably accessible. If contested, the party from whom discovery is sought must make in initial demonstration that the discovery sought will involve an undue burden or cost. The burden is then on the requesting party to show the burdens and costs of discovery are justified in the circumstances of the case
• Among the considerationa are:
  o Specificity of the request
  o Quantity of info available from more easily accessed sources
  o Failure to produce relevant info likely to have existed but is not longer available on more reasonably accesses sources
  o Likelihood of finding relevant, responsive, information that cannot be obtaind from other more easily accessed cources
  o Predictions of importance and usefulness of the further information
  o The importance of issues at stake in the litigation
  o The parties’ resources
• May include a sampling of the sources
• Ct may condition discovery on the requesting party covering all or part of the reasonable costs.

Appellate review of discovery orders
• Ordinarily not final judgments and not immediately appealable

Discovery-bulk of FRCP-need to know the general structure
• 26 general provisions
• 27-29, 32-procedural rules for deposition
• 5 tools of a lawyer in pretrial discovery
  o 30-oral depositions
  o 31-written depositions
  o 33-interoogatories
  o 34-production of documents, tangible things
  o 35-physical, mental exam (always need ct’s permission)
  o 36-request for admission
• 37-m/compel/sanctions

Rule 26
• A-required disclosures
  o Initial, experts, pretrial, methods
• B-scope of limits
  o Any matter not privileged relevant to the claim of defense of any party
  o Trial prep materials, experts, privileges
• C-protective orders- file this to protect the documents
• D-timing and sequence
• E-supplementation
• F-conference
• G-signature

Practice problems-hmmm, look at worksheet
• notice pleading is vague
• responsive pleading…I don’t know, or deny
• first thing…google, lexis, not FRCP

A/C Privilege
The privilege does not protect disclosure of the underlying facts by those who communicated with the attorney.

The ethical D of confidentiality is broader than the privilege to protect the confidence of the client even if not related to obtaining legal advice
• Is discoverable, but not able to divulge for no reason

Scope A/C Privilege
• 1.) asserted holder of the privilege is or sought to become a client
• 2.) the person to whom the communication is made
is a member of the bar or ct or his subordinate and
in connection with this communication is acting as a lawyer

3.) communication relates to a fact of which attorney was informed
   by his client
   w/o the presence of strangers (in confidence)
   for the purpose of obtaining legal advice
   and not for the purpose of committing a crime, fraud, or tort

4.) and the privilege has been claimed and not waived by the client
Cannot be overcome by showing the info is unavailable from another source

Claiming and waiving the privilege

- If withholding otherwise discoverable information bc of a claimed privilege, the claim must be made expressly, and describe in a manner to enable parties to assess the applicability of the privilege
- Can be waived by voluntary disclosing the communication or failing to claim the privilege.

Info may be divulged for Laywer-client disputes and lawyer self-protections
- Most Js require attorneys to reveal if the client committed perjury.

In the corporate setting

- The scope of the A/C privilege in the corporate context extends beyond the control group of upper-level management. (Upjohn)
- Corporation may wish to waive privilege when not in the best interest of the employee (who is also a client)
  - The corporation will ultimately decide
- If lawyer is aware of potential conflict of interest, he has an obligation to inform employee and possibly recommend he retain counsel

Who can waive the attorney/client privilege

- Client can wave it
  - Such as stating it publicly
    - Includes throwing things away into the trash
    - Overheard in public, usually
      - Expected to take reasonable precautions
- Where the corporation is the client
  - Generally closer to a control group test for waiver
    - Usually must return things accidentally given
  - After client dies-depends on the state
**W/P Immunity**

W/P-documents and tangible things made in preparation for trial or in anticipation of potential litigation (probably if prepared in anticipation of an earlier case)

- protect game plan-not absolute
- Covers info from other sources than the client, notably witness statements and document compilations.

A/C-protects communications made in connection with legal advice of any kind. Absolute

**W/P Doctrine-26b3**
- If
  - Document or tangible thing
    - Includes IRS summonses (Upjohn)
  - Prepared in anticipation of litigation or for trial
  - By or for party or representative
- Then
  - Substantial need/undue hardship
    - Where relevant and non-privileged facts remain hidden, and production is essential, discovery may be had.
    - permits disclosure of documents and tangible things constituteing attorney W/P upon a showing of substantial need in the preparation of the party’s case and inability to obtain equivalent w/o undue hardship.
  - Just need to request witness statements
    - An actual statement (written or oral), not interrogatories and such
  - not the mental impressions of the attorney-if combined then omit the mental impressions
    - i.e. memorandum and notes reveal attorney’s mental processes
    - impressions, conclusions, opinions, or legal theories

Witness lists and contention inquiries
- FR 33c-party may direct an interrogatory t the opposing party which involves a contention that relates to fact or the application of law to fact-been upheld over W/P objections
Expert testimony
Discovery from testifying experts
- Identity of an expert witness who will present evidence at trial must be revealed without a specific request from the other side.

26b4-4 categories
- a. expected to be used at trial-always discoverable
  - To the extent an attorney has supplied W/P materials to an expert, those materials are discoverable
- b. retained in anticipation of litigation or preparation for trial, but not expected to be used at trial.
  - Only upon a showing of exceptional circumstances under which it is impracticable to obtain the facts or opinions on the same subject by other means, except where provided by R 35b
    - R 35 concerns physical and mental exams
  - precludes info and opinions developed in anticipation of litigation as well as the identity and other collateral info
  - similar to WP doctrine
- c. informally consulted in prep for trial, but not retained
  - no discovery as to identity or opinions
- d. not acquired in prep for trial, including employees not specially employed and viewers or actors in the occurrence giving rise to the suit-freely discoverable as any other witness

The status of each expert should be based on;
- Manner in which consultation was initiated
- Nature, type, and extent of info or material provided
- Duration and intensity of relationship
- Terms of the consultation
- Any relevant additional factors

Confidentiality, Privacy, and Prevention of Harassment
Discovery can also involve invasion of personal privacy
- The most intrusive is the physical or mental examination

Appropriateness of the mental examination (R 35)
- R 35 requires a physical or mental condition be in controversy before an exam is appropriate
The pleadings may be sufficient to put mental or physical condition in controversy, as when a $\pi$ alleges mental or physical injury
  - i.e. by alleging mental and emotional distress
Mental or physical exam requires the discovering party to obtain a ct order. The ct may grant the motion only for good cause shown
  - that the party produce specific facts justifying discovery and that the inquiry be relevant to the subject matter or reasonably calculated to lead to discovery of admissible evidence.

Privacy limitation on the scope of a mental examination
- There mere initiation of a sexual harassment suit, even with extreme mental and emotional damages claimed, does not function to waive all privacy interests.
- Implicit waiver of a party’s rights encompasses only discovery directly relevant to the claim and essential to the fair resolution of the lawsuit
- On occasion, $\pi$’s privacy interests may have to give way to her opponent’s right to a fair trial
  - Balance right to discover relevant facts against privacy interests of person subject to discovery
- Too extensive of discovery of sexual aspects of $\pi$’s lives may discourage complaints and annoy and harass litigants
  - Absent extraordinary circumstances (stronger showing of good cause), inquiry into those areas should not be permitted

Presence of counsel
- In the federal cts a mental examinee has no absolute right to the presence of an attorney; but when the circumstances warrant it, the cts may fashion some means of protecting an examinee from intrusive or offensive probing- up to the trial ct to allow the presence of counsel or take other measures

is able to pick the examiner

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**Disposition without trial**
Dismisal for failure to state a claim-12b6
• Either party may move for judgment on the pleadings under 12 (c) after the pleadings are complete
  o If Δ makes it, same as 12b6, but 12b6 may be made before the pleadings are complete.
  o Same standards for granting or denying 12 c and 12b6
  o If any materials are presented in addition, it is a motion for SJ
Voluntary dismissal
• By π or by stipulation
  o Is w/o prejudice—may file suit again without being met by defense of res judicata— a 2nd one is w/ prejudice
  o May also dismiss by stipulation of the parties-41a1(ii)—no limit
• By order of the ct-41a2
  o w/o prejudice on such terms and conditions as the ct deems proper—most commonly with attorney fees
  o reversed only for abuse of discretion
involuntary dismissal for failure to prosecute-41(b)
  • unless ct specifies otherwise, operates as an adjudication on the merits with a res judicata effect
default and default judgment
• entry of default under 55a is an entry by the ct clerk indicating that a Δ has failed to plead or otherwise defend
  o does not terminate the case
  o may be set aside for good cause shown
• entry of judgment by default under 55b is actual entry of judgment granting relief against a Δ.
  o Is on the merits with res judicata consequences
  o relief granted cannot exceed that demanded in complaint-54c
  o judgment may be set aside only in accordance w/ 60b
  • cts are more lenient in setting aside entry of default than in setting aside a default judgment
  • Δ seeking to set aside a default does not always have to present proof that she has a meritorious defense to π’s claim

Summary Judgment
The material and inferences must be viewed in the light most favorable to the opposing party.
Always move for SJ on the weakest element essential to the cause of action

R 56

Standard-no genuine issu of material fact AND moving party is entitled to judgment as a matter of law (need the law)

Procedure-
- Know the issue that SJ is sought upon
- Who is it allocated to (burden of proof)
- Whether it is an adequate motion (or no evidence)
  - R56 has ben interpreted as imposing an intitial burden on the moving party to support the motion
  - The burden on the moving party (if doesn’t have burden of proof) may be discharged by showing there is an absence of evidence to support the nonmoving party’s case. (celotex)
  - If party with the Burden of Proof moves for SJ, or if exerting an affirmative defense, must set forth affirmatively evidence which requires a judgment in his favor (Adickes)
    - Have to eliminate all reasonable possibilities for which a jury may find against you
- What non-moving party needs to come back with to defeat the motion
  - Cautious lawyer will almost always provide evidence in response to a SJ
  - R 56 (e)-response to a properly made motion consists of affidavits, depositions and the like made on personal knowledge, setting forth such facts as would be admissible in evidence (no hearsay) and showing affirmatively the competence of the witness to testify. (not pleadings)
    - Not necessarily evidence that would be admissible
  - the question is whether there are any genuine factual issues that properly can be resolved only by a finder of fact bc they may reasonably be resolved in favor of either party

Can take away from the jury if
- No reasonable inference for the nonmoving party and
  - Judge decides if the inference is reasonable
- No direct testimony
Even if there was all the testimony in the world, jury has to decide contradictions
- Jury has to decide genuine issues of material fact
- If $\pi$ does not introduce sufficient evidence on an essential element of its case, the judge need not permit the $\pi$’s case to go to the jury
  - linked to the burden of persuasion
- If it cannot be said that at the close of the trial that the judge could properly direct a verdict, the SJ is inappropriate. Where credibility is crucial, SJ becomes improper and a trial indispensable (Adickes).

56f-extension of time for discovery to respond to the motion
- SJ assumed parties have had adequate time for discovery
56c and partial SJ
- Standard

**Settlement and the pretrial conference**

Settlement-resolution of a dispute through a negotiated K btw parties
- Money damages or injunctive relief in exchange for $\pi$ losing her right to the claim
- decision to settle to the client, unless the client has expressly or impliedly authorized the lawyer to make the decision for the client
- Settlement gap-range where any bargain that is struck will make both parties better off by their own lights than continued litigation
- Usually don’t require approval of the ct-there are exceptions

After filing
- Damages-conditioned on dismissal of $\pi$’s complaint w/ prejudice
- Injunction-becomes pt of ct judgment entered on consent of the parties, called a consent decree

R 16-establishes facilitating the settlement of the case as one of the explicit purposes of the pretrial conference-16(a)5
- the district ct’s imposition of a penalty was an abuse of the sanction given it by FRCP 16f (Kothe). The law favors the voluntary settlement of civil suits, but does not sanction efforts by trial judges to effect settlements through coercion.
- Coercion to force settlement: bad
Probably abuse of discretion to sanction a party for refusal to make an offer
Coercion involves
- effect on the party and
- what's right for the judge to do
- encouragement to seek settlement: good
- 37b2bcd
  - Costs of mistaken but on going to trial
  - Info about judge’s view of merits
  - Trial judges rarely do this
    - He is going to preside over the trial, so it might effect ruling -Does not assist settlement
Judges scheduling of decisions
- Only thing that has been empirically proven to encourage settlement is to speed up the time of trial
- May refuse to hear certain issues if “not in good faith”
Sanctions for failure to participate or for failing to settle on time
- Ct may require that a party be reasonably available to consider possible settlement of the dispute-16c
- There is no federal judicial power to compel settlement
- It has been upheld the ct’s power to set and enforce a deadline for settlement, but the automatic imposition of sanctions for failing to meet the deadline, without a hearing violated due process
ex parte rule
- don’t meet with one side without the other side present
Mediators
- Help parties think about their dispute clearly and imaginatively
R 68-federal offer-of-judgment rule (only ct sanctioned)
- A party defending a claim may serve on the other party an offer to allow judgment to be taken against the defending party. If the judgment finally obtained by the offeree is not more than the offer, the offeree must pay the costs incurred after making the offer.
- Rule does not apply if $$\pi$$ recovers nothing (no judgment)
- Usually, rule shifts only costs in the narrow sense, not attorney’s fees, except in limited cases
o Such as the fees act. Then, if $\pi$ does not better the offer, can recover payment of the other side's costs and the party forfeits attorney's fees she would otherwise have obtained after the offer was made.

o §1983 suit, such fees are subject to the cost-shifting provision of R 68. (Marek)

If $\pi$ wins, recovers verdict plus his own costs

If $\Delta$ wins, $\Delta$ recovers own costs from $\pi$

- Always some judgment

If 68 applies, $\pi$ gets verdict plus own pre-offer costs and usually say must pay $\Delta$'s post offer costs

- So, verdict + $\pi$'s pre-offer costs - $\Delta$’s post offer costs
  - Judgment obtained by offerree (language from 68)
- Can include attorney’s fees if the text of the underlying statute includes attorneys fees

Why not always offer?

- It is public, where normal K situation does not admit L
  - Publicity and having judgment against you

R 68 is procedurally permissive coercion, arguably

R 68 does not apply to injunctions to dollars

- Can apply injunction to injunction

**Need other notes here**

**VI. Trial**

The final pretrial conference and the pretrial order

- where trial is a serious prospect, can set a plan for the trial that may follow
  - R 26 a3-take a look
- Supersedes the underlying pleadings
- May be modified only to prevent manifest injustice-16e

**The Right to Jury Trial**-frcp 48

7th amendment

- suits at common law where value in controversy exceeds 20 dollars
- applies only to lawsuits in federal ct
- What is suit at common law? And what exactly is to be preserved?
R-38, either $\Delta$ or $\pi$ has to ask for it, and either gets it assuming the 7th amendment provides for it. - party waives right if does not timely demand it.

In Stewart, the ct could try a suit in equity when an action at law was later brought, covering the same issues. (Not any more)

In a suit where the determination of a factual issue is relevant to both legal and equitable claims, the determination must be made by a jury. (Beacon Theatres)

- To determine whether legal or equitable (chauffeurs)
  1.) look for an analogous cause of action to 1791
     o whether nature of the claim is legal or equitable
  2.) then look to the remedies sought (more important than 1.)
     o Damages are typically legal, injunction is typically equitable
     o Backpay can be either: look to the action
       ▪ Confer a benefit or breach of K?
     o Declaratory judgment-depends on the underlying issues

When congress passes a statute can...

- Stay silent as to judge or jury (chaufers)
- Specify jury in ct
- Specify judge in ct
- Administrative agency (outside article III), no jury

the 7th amend does not prohibit congress from assigning fact finding function and initial adjudication to an administrative forum (Atlas)

- At least in cases in which public rights are being litigated (in which the gvot sues in its sovereign capacity to enforce a statute) even if the 7th would have required a jury where the adjudication of those rights is assigned to a federal ct of law.
  o 7th did not require jury where no action existed before
  o possibly assign traditionally jury triable private claims to trial in an administrative agency if Congress reenacted the claims as a federal statutory right and assigned it to a federal administrative tribunal as part of an effort to reform or systematize the operation of the law in the field

- Public right
  o Govt as prosecutor (maybe not a reqruirement, rarely not)
  o Arguably almost anything could be
• It is rare to assign a historically legal remedy to an administrative agency and eliminate recourse in the courts.
• Can abolish right to jury consciously or provide quick, cheap, ways to pursue claims through administrative agencies.

Suits against the federal govt and against foreign sovereigns:
• No right of jury trial unless Congress clearly and unequivocally conferred such a right for suits against the fed govt.
• 7th does not require jury trials in suits against foreign sovereigns.

**Selection of the trier of fact**

2 stages of jury selection:
• assemble the venire
• voir dire

**Process for assembling the venire**
• Source list
  o Voters and other sources (drivers licenses)
• Randomly selected to fill out questionnaire
  o Qualifications
    ▪ U.S. citizen, 18, resident of district for at least one year, able to fill out the jury form, speak English, physically and mentally capable of serving, not charged or convicted of felony
  o Exemptions
    ▪ Armed forces, local police, public official
  o Excuses
    ▪ Undue hardship or extreme inconvenience
  o Get the jury wheel, jurors ready to be summoned
• Summon a group of people from the master-master jury wheel
• Array-available each day, remaining people sitting in the courtroom
• Venire-in the back of courtroom

**Voir dire**
• Challenges
  o For cause-usually not many, but for some high profile cases, we made need to summon many
  o Peremptory

**Selection of the factfinder-goals** (can be contradictory)
• Should be a representative fact finder
  o Representative Cross-section of the community
• Eliminate extreme bias
• Party involvement in selection
  o Establish repoire with the jury

requirements to establish prima facie case for systematic exclusion (Currie)
• distinctive group in the community (don’t have to be same race
  o constitutionally suspect (equal protection clause)
• representation is not fair and reasonable in relation to the number
  in the community
  o community of qualified jurors in the judicial district
  o can use either absolute or comparative (relative) disparity
• due to systematic exclusion
  o Usually transparent, but may be benign
  o Statistical underrepresentation resulting from race neutral
    practices does not mount to systematic exclusion

If Δ makes the prima facie case, the burden shifts
• provide either a more precise statistical showing
• or a compelling justification for the procedure
• If prima facie case is established, state may be able to show it has
  a significant state interest is manifestly and primarily advanced by
  those aspects of the selection process

Voir Dire (R. 47)
• Aid Challenges for cause
  o Show bias, underlying bias, extremes
    ▪ If the bias spreads across a large section of the
      community, it cannot be for cause
• Aid peremptory challenges
• Affect decisions of seated jurors

A jury’s impartiality may not be assumed without inquiry.
• A π in an accident case may make reasonable inquiry whether
  propective jurors are connected with the insurance industry
  (Kiernan)
  o Must protect the right to adequate VD and restricts disclosure
    that a Δ is insured.

cannot use peremptory to exclude juror solely on account of race (Batson)
1.) prima facie showing shifts burden (only need to show this case)
   - must show excluded was member of a cognizable group-
     - gender (JEB), probably other protected classes
     - May object to a race-based challenge even if the
       challenged jurors are of a different race (Powers)
     - peremptory challenge process permits those to
discriminate who want to
   - These facts and other relevant circumstances raise an
     inference they were removed on account of their race
     - Pattern of strikes
     - Questions and statements during voir dire
     - consideration of all relevant circumstances
2.) race-neutral explanation
   - Need not rise to the level of challenge for cause
   - May not merely state he assumed they would be impartial bc
     of their shared race
   - Must articulate neutral explanation related to case to be tried
3.) trial ct determines the persuasiveness of the justification
   - deference to the trial judge on appeal
Also applies to private litigants in civil cases (Edmonson)
Basically, it turns out now that lawyer eliminates all but the least offensive
table member of a race
Process
   - Under Oath, questioned by judge who will preside (normally in
     federal ct) or by the lawyers.
     - usually asking questions submitted by the parties
   - Questions may be posed individually or as a group
   - 47a gives broad discretion to the individual district judge.
Challenges for cause and peremptory challenges
   - for cause are a matter of federal common law.
     - Family or business relationship with a party, employee of
       corporate party, or witness with personal knowledge of events
     - Judge also has substantial discretion in deciding whether
       actual prejudgment or bias has been demonstrated
   - No reason need be given for peremptory challenge (3 in fed ct)
   - Unlimited challenges for cause,
Judge Selection

How is the individual judge selected

- From general array of judges (lawyer, fed selected by president)
- 2 ways
  - judge selected and oversees the entire process until it is entirely disposed of-single Calendar system
    - Originally assigned randomly
      - Make sure nothing requires judge to recuse
      - Can move to disqualify under 28 § 455 (no peremptory)
  - Judge who presides over different proceedings
    - i.e., discovery, trial, motions

28 USC 455 provides:

- A.) any justice...shall disqualify himself...in which his impartiality might reasonably be questioned (knowledge not required)
  - Goal is to avoid even the appearance of impropriety
  - if a reasonable person, knowing all the circumstances, would expect the judge would have actual knowledge.
  - Must identify the facts that might cause an objective observer to question the judge’s impartiality.
  - may reasonably be questioned if judge reacts to lawyer in court
- B.) or in the following (knowledge required)
  - 4. He knows he, spouse, or minor child, has financial interest in the matter or in a party in the proceedings or any other interest that could affect the outcome of the proceeding
    - usually disqualified for financial interest, but not if all judges have the same interest
- c. should inform himself about his personal and fiduciary interests and those of his spouse and minor children
- can file a motion to recuse if before judgment

R 60 b 6 provides a procedure whereby in appropriate cases, a party may be relieved of a final judgment. “upon such terms as are just” provided the motion is made within a reasonable time and not premised on one of the grounds for relief enumerated in b1-b5. “any other reason”

- In determining whether a judgement should be vacated for a §455 violation, consider the risk of injustice to the parties in the case, the
risk that denial will produce injustice in other cases, and the risk of undermining the public’s confidence in the judicial process.

- could argue (2); newly discovered evidence which by due diligence could not have discovered in time for a new trial under R 59(b)
- implicit if you wait too long, will read into it that “reasonable questioned” is given less leeway
- only use 455 in extreme circumstances where pretty sure going to win-don’t want the judge pissed

The rules with respect to political leanings or attitudes are inexplicit and judges are rarely disqualified on those grounds.

- As opposed to financial disqualification which are detailed and strict

A judge has an obligation not to recuse herself unless the charge of actual or apparent bias really holds water.

Procedure-28 USC 455-the judge against whom the motion for recusal is made hears and decides any factual issues presented, including the question of his actual bias.

**Taking the case from the jury**

Strongest control of jury functioning by the judge is taking the case away from the jury and entering a judgment that the judge thinks is correct

Controllin the jury

- R50(a)-DV
- 50(b)-judgment NOV
- (a) and (b) are now just referred to as judgment as a matter of law
- 59-new trial motion
- Closing argument
- Instructions
- Verdicts

R 50(a)-DV (JML)-must move for DV if want to move for JNOV

- Reasonable jury/insufficient evidentiary basis
- draw all reasonable inferences in favor of the non moving party, and not make credibility determinations or weigh the evidence, reasonable jury could only find for moving party
- A jury can believe whatever it wants (if direct testimony or reasonable inferences)
  - Can decide credibility
  - can only draw reasonable conclusions
• As long as direct testimony to facts in dispute, there is a reasonable basis
  ▪ Jury may make reasonable inference, but judge determines if these inferences are reasonable
  ▪ Direct testimony will guarantee the jury gets to decide, and reasonable inferences get the jury to decide-up to the judge if those inferences are reasonable
• A jury may be unreasonable within the realm of cases where there is any reasonable basis for the jury to come out the way it did.
  o must be sustained if there was any chain of reasoning the jury can find the way it did-can nullify the law.
• Jury doesn’t actually have to assent
• May be made any time before submission of the case to the jury
• R 50 considers pre verdict and post verdict motions to be the same thing; post-verdict motion is simply a renewed motion-R 50 (b).

Practical considerations in taking the case away from the jury
• If the judge grants the pre-verdict motion, ending the case, and the court of appeals decides she was wrong, the trial will be held again
  o Post-verdict, the verdict can be reinstated.
  o Always the chance the jury will agree the non-moving party’s case lacks merit, obviating the need to decide the motion.

3 things that a factfinder does
• finds objective facts-
• infers from direct testimony about facts what other things took place- simplest (where there is dispute as to the facts)
  o decide credibility
  o and draw inferences
• apply the law- stout (where no dispute as to the facts)

Difference btw judge and jury finding the facts
• Jury does not have to share its reasoning

Special verdicts
• Jury finds the result of specific facts

Jury verdicts are given extraordinary deference on appeal

**JML (50(b)) and New Trial (59)**
50 (b) and 59 are almost always filed simultaneously
50(c)- still must rule conditionally on the new trial
50(a)- DV motion-ensures either appellate ct affirms or a new jury hears it
Entry of judgment-FRCP 58
- Important for a variety of purposes, most importantly to compute the time during which an appeal must be taken and the time which post trial motions can be made-
JML against verdict winner (JNOV) (50b)
- no legally sufficient evidentiary basis for a reasonable jury to have for for the verdict winner
- may not resolve credibility or conflicting inferences
- immediately appealable-de novo
New trial (59)
- Verdict is against the great weight of the evidence or prejudicial procedural errors
  - Cts are not free to reweigh the evidence and set aside the jury verdict merely bc the jury could have drawn different inference or conclusions or bc judges feel that other results are more reasonable
  - Judge makes credibility determinations
- 59(a)-any of the reasons for which new trials have been granted in actions at common law
- newly discovred evidence-must show used due diligence before and during trial to discover evidence
- cannot appeal until after the new trial has gone to judgment.-abuse of discretion standard (usually great deference)
- Ct may grant on its own
50 (b)-JNOV (rule on Motion for new trial and JNOV at same time-50(c)
If granted
- Also grant conditional new trial (if motion made)
  - both can be appealed
  - ct of appeals only reaches new trial motion if JNOV reversed
- deny cond. New trial
  - hard to imagine, but possible based on procedural grounds
  - can appeal both
If denied
- New trial granted
  - No appeal, proceed to new trial bc no judgment to appeal
• New trial denied
  o Can appeal both

Mishaps may occur in the jury room—Federal rule of evidence 606(b)
• Upon inquiry of the validity of the verdict or indictment, juror may not testify as to any matter or statement during deliberation or anything influencing his or another juror’s mind or emotions as influencing him, or concerning his mental processes except on whether extraneous prejudicial info was improperly brought to bear upon any juror.
• Jury testimony on intoxication is not admissible under 606(b) to impeach a jury’s verdict (Tanner)
  o Physical or mental incompetence generally internal
• Ct’s hodigns requiring an evidentiary heafin where extrinsic relationships have tainted the deliberations do not detract from the interest in insulating the jury’s deliberative process.
• the jury is observable during the trial, may report inappropriate juror behavior by each other before they render a verdict, may impeach the verdict after the trial by nonjuror evidence of misconduct.

Procedural error—jury misconduct or any other procedure we have studied in this course could grant new trial
• Real question is evidence to consider that a procedural error has occurred—obviously, wasted jury is a procedural error, but must have different evidence (606b)
• Mistrial—something happens requiring a new trial immediately

**Excessive Verdicts**
Appellate ct has power to review the order of trial judge refusing a new trial w/ the grounds that the award is against the great weight of the evidence
• If reversed, it must be bc of an abuse of discretion.
• whether the amount is so high that it would be a denial of justice to permit it to stand—a question of law (O’Gee)

No such thing as a motion to set aside verdict as excessive
• It is a motion for a new trial w/ the grounds for a new trial that the award is against the great weight of the evidence
• Trial ct offers $\pi$ to take less than the jury awarded in exchange for no new trial—conditional new trial (Not exactly a free choice)
Appeals-appellate ct can say trial ct should have granted a new trial
  • Ct should have offered $\pi$ to take less than jury awarded in exchange for no new trial
  • $\Delta$ can still appeal the judgment of award remittitur-cond. New trial based on whether $\pi$ will accept lower amount.
  • After $\Delta$ moved for new trial bc damages against great weight of the evidence
  • abuse of discretion is standard of review for remittitur additur-same, but judge raises amount-$\pi$ moved for new trial
  • not constitutionall permited in federal cts

Punitive damages
  • Judges retain the power to reduce PD awarde, using the same discretionary standards as in cases involving compensatory
  • State and federal law also impse substantive limitation
  • PD may not be grossly excessive in proportion to wrong committed
  • Both state and federal cts are required to conduct appellate review of PD awards-de novo
    o If award fails the test of proportionality, ct reduces the award to the constitutionally acceptable maximum, not remittitur.

Look at motions worksheet

VII. Judgment of appeal
FRCP 52(a): “findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial ct to judge the credibility of the witness.”
  • Only overturn if no reasonable judge could have come out that way

main difference btw jury trial and judge trial is that we know why the judge decided the way he did, but assume jury deicded it a reasonable way.

Standards of review on appeal
  • R 52-gives standards of deference for the cts of appeals to use
    o Clearly erroneous-facts by the trial judge
    o De novo-questions of law
    o Abuse of discretion review-btw de novo and clearly erroneous

R 52-governs bench trials
  • Live testimony-given most deference-clealy erroneous review
  • Inferences-clearly erroneous
- Documentary evidence—clearly erroneous
- R 50—look at the fucking rules
  - Live testimony
  - Inferences
  - Documentary evidence
- De novo for conclusions of law
- Ct is empowered to request attorneys to submit proposed forms of judgment for approval—FRCP 58
  - As a lawyer, put it in findings of fact, and ideally live testimony.
- Judgment—defined in 54, 58, 79
  - Decree and any other order from which an appeal lies
  - R58-judgment is effective only upon entry
    - Clerk making a notation in a book known as the civil docket
    - Separate document, except JNOV and other exceptional circumstances
  - R-79—entry is typically brief, stating the judgment is now entered and reciting the relief decreed
  - 54—can only be entered by a trial ct, or where S.C. acts as trial ct
    - 54(b)—discretion to enter judgment on one or more accounts or claims—is appealable, a final judgment

Legal significance of entry
- Triggers the time period for post trial motions—R 50 and 59
- Triggers the time to file an appeal—FR appellate P 4
- Necessary condition for the validity of actions taken on the basis of the judgment, such as an execution and sale of property

Form of the judgment
- Required to be embodied in a separate document
- Shows the basic issues that must be addressed in any judgment involving a claim for relief
  - Amount awarded
  - Amount of prejudgment interest
  - Allocation of costs
- Sufficiently definite and certain so a party can comply with it

Judgment as to less than all claims
- R54(b) allows a district judge in a multi-claim or multi-party suit to enter final judgment as to any claim or party, but only on an express
determination that there is no reason for delay, and an on express discretion for entry of judgment.

- Being final, such partial judgments are appealable

Claims = total number of counts and $\Delta$s

- i.e., $2 \Delta$s, two counts each, = 4 claims
  - 1 count against 1 $\Delta$ is one claim
- count-can have more than one $\Delta$
- judge does not have to enter a final judgment on that claim
  - preference is not to have piecemeal appeals
- cause of action is what states an adequate claim for relief

**Setting aside the judgment**

*Motion in the action in which the judgment was rendered*

60-relief from the judgment-60(b)

- 60b1: motion for relief bc of excusable neglect must be made not more than one year after the judgment was entered.
- 60b6- any other reason justifying relief from judgment
- 60b6; not merely neglect on his part, far more than a failure to defend the charges due to inadvertence, indifference, or careless disregard of consequences; must be extraordinary circumstances.
  - Cannot be relived from judgment merely bc hindsight indicates the decision was wrong (Ackerman)
- 60b- generally the preferred and most effective procedure
  - 6 categories for relief
    - first 3 are subject to a one yr limitation and last three are not
- cases show a strong tendency to grant relief from a default judgment fairly readily, but to give relief from a non-default judgment only extraordinary circumstances

**Separate suit to set aside the judgment**

- Specific provision in R60
- Does not limit the power of the ct to entertain an independent action to relieve a party from a judgment, order, or proceedings or to set aside a judgment for fraud upon the court.
- Available only to prevent a grave miscarriage of justice

**Defending against enforcement of a void judgment**

- A litigant may choose to defend against enforcement of a prior judgment on the ground that the judgment was void.
Most common situation is one in which $\Delta$ is sued in a forum he believes had no in personam J over him-make special appearance and abide by the decision in that forum

Why have appellate cts?
- Trial cts make mistakes
- Balance the concern for error with the cost of the appellate process

Nothing by the filing of appeals stops anything inside or outside the trial ct
- Seek a stay
- PI or TRO from the trial judge
  - Balancing test (earlier in the semester)
  - Post a bond (cannot be prohibitively expensive)

Basis for appeal
- The ct is given the record, the briefs, and the oral arguments
- Cts of appeals usually only decide the issues presented to them

Disposition-how resolved
- Opinions are not the disposition of appeal
- Often a settlement
- Dismissal of the appeal-equivalent of a 12b6
  - Says that Even if true, no basis of appeal
- Mandate
  - What a ct of appeals enters after the judges have ruled
  - legally, there is time for motion for new trial, etc.
  - Send mandate down to the ct that sent the case to you, then to the next, etc. Then when the mandate comes down, enter the judgment, and then it becomes final.
    - Timing is important
      - Prejudgment interest
      - Other things

Timing of appeals
- Often, and usually, cant appeal to the end
- But sometimes, there is a need for interlocutory appeals
  - Something so fundamental that needs resolving before the trial ct can proceed
- Someone always has an incentive to delay, so cant grant appeals for everything
- How to decide when to have interlocutory appeals
Mandamus—there are costs, so must be important

Review types, classes of orders

- By statute and by decision
- Anything on injunction—bc they are particularly intrusive instructions by the cts
  - Vulnerable to high cost error
- Receivers

Appeal bc

- The ct below failed to adhere to proper procedure or
- The decision was based on misapplication of the substantive law or gross misapprehension of the facts

Mootness

- Article III—cases and controversies.

General rules

- A matter can generally not be complained on appeal unless objection was made in the trial ct FRCP 46
- Matter must be properly cited in the appellant’s papers on appeal
- Appellate ct will not receive new evidence, and will reverse findings of fact only when clearly erroneous or unsupported by the evidence
- Appellate ct will not disturb rulings that are within the sound discretion of the trial ct, unless abuse of discretion
- Even if there have been errors in the trial proceeding, reversal will not be granted if those errors were harmless or nonprejudicial
- Scope of review of injunctive relief traditionally is limited to abuse of discretion unless trial ct relied on erroneous view of the law

I law of appeals

- Limited subject matter J, and J over specific subject matter on appeal—must first assert why the ct has J
- Interlocutory appeal—anything not a final judgment

Federal appellate procedure

- Timely filing of a simple notice of appeal is the only step
  - Exception to the general pattern are interlocutory appeals
- Certain post-trial motions suspend the finality of the judgment
  - Motion for judgment under 50b, motion to amend the findings under 52b, motion for a new trial under 59, motion to alter or amend under 59e, motion for relief under 60.
• Ordinarily, the appellant cannot seek reversal upon a ground not raised in the trial ct.
• Appeal to which ct
  o Almost always the ct of appeal of the circuit in which the district ct is located
  o Appeals from federal administrative agencies in many instances may be taken to more than one ct of appeals.

28 USC § 1257- Limited subject mater J to review highest decisions of the state courts involving federal law; only after the highest state ct in which judgment could be had has rendered a final judgment or decree.
• Clearly final if no more proceedings to be had
• Four categories in which the SC has treated the decision on the federal issue as a final judgment for the purposes of 28 USC § 1257 w/o awaiting the additional proceedings. (Cox)
  o First two categories—federal issue would not be affected
    ▪ federal issue is conclusive or the outcome preordained.
    ▪ Federal issue will survive and require decision regardless of the outcome
  o Second two—the federal issue would be mooted if appellant prevailed in proceedings, but there is justification for immediate review of the federal question
    ▪ later review of the federal issues cannot be had
    ▪ party seeking review might prevail on the merits on nonfederal grounds, rendering review of the federal issue unnecessary
      ▪ If a refusal to review the state ct decision might erode federal poicy, the ct may decide the federal issue
• SC is flexible in this regard
  o A lower ct’s decision is final when the ct want to look at it
• 1257 more liberal in the collateral order doctrine

four ways appellate cts have J over district cts

28 USC 1291-J over final decisions of district ct (appeal of right)
• file notice of appeal with the trial judge
• collateral order doctrine-trend is to call most things not collateral orders
To be a collateral order, usually must be
  - 1.) conclusive- (case specific)
  - 2.) resolve important questions completely separate from the merits
    - fact determination
  - 3.) render such important questions effective unreviewable on appeal fom final judgment
    - most important is whether the underlying right reviewable and protectable on appeal
      - if no, then probably better to review now
    - also, if the underlying right is especially important

An order denying effect to a settlement agreement to stay out of ct does not come within collateral orders. (Digital equipment)

Usually not recusal of judge or denial of a motion for lack of personal J

Discovery-not collateral judgment
  - things that are frequent cannot be collateral orders

28 USC 1292(a)- injunctions, receivers
  - defines the final decisions
  - receivers-appointments to take over an organization

28 USC 1292(b)- certifications (discretionary appeals)
  - federal trial judge can certify an appeal that would not otherwise be appealable, and appellate ct has to agree independently
  - controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation
  - May appeal if the trial judge denied certification-deference to trial judge
  - congress carefully confined the availability of interlocutory review
    - the court will be skeptical of interlocutory appeals from federal district courts that do not satisfy any of the federal statutory or rule provisions allowing interlocutory appeals

28 USC1651- mandamus/ prohibition
  - all writs necessary in their respective Js
  - Sue the trial ct judge to get what you want
    - No one defends trial judge, except maybe other party
• various conditions; party seeking the writ have no other adequate means to attain the relief he desires, and he show that his right to the writ is clear and undisputable. (Kerr)
• Must be extraordinary, a judicial usurpation of power, an unlawful exercise of J, a neglect of D.
• Functions as a substitute for appellate review, usually, if not always interlocutory review.
• 3 options for ct of appeals when hearing a writ of mandamus
  o deny
  o deny bc trial judge will do the right thing
  o grant
  o grant and denial with statement saying judge will do the right thing often leads to the same result

28 USC 1292 (a,c,d)
• omitting to take an appeal under 1292 does not prevent the party from challenging the order on appeal after final judgment

23(f)-interlocutory appeal of grant or denial of class action status at the discretion of the court of appeals

VIII. Collateral effects of judgment
Res judicata-umbrella term referring to the finality of judgments
• 2 categories
  o res judicata-claim preclusion
  o collateral estoppel-issue preclusion

Claim preclusion-FRCP 13
• Merger-generally used against someone who won
• Bar-generally used against someone who lost

A final judgment on a claim is conclusive of further litigation btw the same parties on claims that were or should have been raised in the prior litigation
When claim preclusion is asserted, must ask
• Was there a final judgment in the first litigation?
  o First to judgment, not first filed
• Is the second litigation btw the same parties?
• Does the second litigation involve a claim that was or should have been raised in the first litigation?
  o State and federal claim cannot be the same claim, but “should have been”
the transactional test: all or any part of the transaction, or
series of connected transactions out of which the actions
arose; based on same nucleus of operative facts. (Davis)

A 2nd suit is precluded as to all cause of action that were
brought in the first suit and to all causes of action that could
have been brought in that suit, so long as the later causes of
action were part of the same claim as in the first suit.

Transaction in FRCP

- 13(a) (compulsory counterclaim), 13(g)(crossclaim),
  14(a)(impleader), 20(a)(permissive joinder of parties),

πs must take measures to avoid preclusion under res judicata
while they purused the requisite title vii remedies.(davis)

Where less than all of the parties appeal from an adverse judgment, a
reversal as to the parties appealing does not justify a reversal as to the
parties not appealing (Moitie)

SJ is the mechanism to invoke res judicata.

13(a)-compulsory counterclaim

- basically, res judicata for a counterclaim, not claim preclusion
- a pleading shall state as a counterclaim any claim which at the time
  of serving the pleading the pleader has against any opposing party,
  if arises out of the same transaction or occurrence that is the
  subject matter of the opposing party’s claim-not clear what the
  remedy is

Sometimes it is obvious that an appeal is so unlikely to succeed that it is not
worth the time and money to pursue it. But, it is sometimes woth keeping a
case alive by pursuing an appeal to avoid res judicata

Res Judicata sets an incentive structure for people to contest the first
litigation strongly

- Different for different areas of law
- Speeding ticket
  - Generally tickets dont preclude later issues being litigated
    - Can be evidence

**Issue Preclusion**—hundreds of issues in one claim, can have new parties

- Particular issues in prior litigation

A judgment is conclusive against a π or Δ with respect to any issue

- 1.) actually litigated by that π or Δ (or privity);
2.) that was determined; and
3.) whose determination was necessary to the judgment

When issue preclusion is asserted, must ask:
1.) What issue is preclusion sought upon?
2.) was that issue actually litigated (by the π or Δ against whom preclusion is sought), determined and necessary to the judgment in the first litigation?
   - If different standard, then probably not the same issue if it does not follow, but is if it does follow
     ▪ Possible for criminal conditions, but must see if it follows: i.e. found guilty beyond a reasonable doubt, then guilty if preponderance, but not if found not guilty
   - Must be necessary to judgment of jury
3.) is offensive issue preclusion at issue? If so, ask further
   - did Δ have incentive to litigate vigorously in the prior suit?
     ▪ Future suits foreseeable?
   - Is the judgment inconsistent with prior judgments?
   - Are there procedural opportunities in the second suit that were unavailable in the first suit?
     ▪ Parklane says jury is neutral, unlike inconvenient forum
   - Could π have joined other suit?

Defenseive issue preclusion: new Δ asserts against old π
- -favored, want π to join all potential Δs

Offensive issue preclusion: new π asserts against old Δ-disfavored
- Creates a wait and see incentive bc can rely on previous justment by will not be bound
- Trial cts are granted discretion

Both offensive and defensive, party against whom collateral estoppel is sought lost the prior litigation
An equitable determination can have collateral estoppel effect in a subsequent legal action

Mutuality
- Historically, One party should not be bound unless if the judgment had gone the other way, the opposing party would be bound.
- Always subject to exceptions (privity)

Due process-cant be bound by a judgment to which you were not a party
- Privity is a historical exception
  - If you were pulling the strings behind the scenes, bc you were a constructive party
- Problem was, may have to defend multiple times
  - Class action originated when a Δ wanted to sue multiple πs
  - If you combined mutuality and due process, you would only be able to use res judicata when the parties are the same—now changed
  - In a dispute btw the same parties, sometimes the claim preclusion did not apply, but the issue preclusion did

Settlement to avoid preclusion
- Litigants sometimes settle a case to avoid the preclusion that would result from an unfavorable judgment, for example, where a series of additional cases involving the same issues await.
- The first π in line may benefit

**stay, or injunction when another action is pending**

Full faith and credit clause, art IV
- First judgment has enforceable effect in other states and courts
  - Which one gets to judgment first
  - Lawyers don’t know, so have to litigate both
- Use an injunction or a stay to stop one of the proceedings (Csohan)
  - Stay—ask to stop one ct from proceeding
    - Granting a motion to stay suspends prosecution of the second action until the first is terminated.
    - A motion to stay may be granted when the prior action involves closely related issues even though it is not clear that res judicata will result
  - Injunction—ask from the state you want to proceed
    - Must enjoin the parties not to proceed in the suit in the other J
      - TRO or PI (both immediately appealable)
    - Cannot enjoin other states (co-equal sovereigns)
    - State ct cannot enjoin the federal ct proceedings

Interpleader—FRCP 22
- Created by insurance industry for the insurer
- Insurance-risk having to pay twice

Many rules are formed by repeat litigants lobbying for rule changes
• π’s bar, insuance industry, banks
Child custody is always interlocutory
• May relitigate at any time
  o No res judicata
  o Ct proceeds to issue injunctions to the parties

IX. Review
Purposes
• Reading rules
• How litigation works
• How lawyers/ judges/jurors work
Adversary ethics
• Lawyers active D is to their clients, not necessarily to the truth.
• Has increasingly been questioned and is tending towards less adversarial
• Adverse parties promoting their clients interests
  o Truth more likely to emerge by two interested parties arguing for their clients best interests

Jury
• Lay people deciding the facts at the end of the lawsuit influences the decisionmaking of the parties throughout the entire process
• Looks like other countries (ger.) but will come out entirely differently bc of this possibility
• Fact-decided by a jury
• Law-decided by a judge
• Facts and law may be categorized different in american litigation than it might somewhere else in the world
• Jury trial has decreased in civil trials
  o While the right is there, it is expensive

Justice v efficiency
• We generally come out in favor of getting it right over getting it done efficiently
• More likely to get at the truth, even though it costs a lot of money
“technicalities”
• one purpose of a litigator is to read text carefully
• every word of the FRCP, and every punctuation, matters
  o start with the text
• technicalities are the law
Exam logistics
• instructions identical to last year’s exam
office hrs
• Sunday. 2:00-5:00