* Cases: celotex, adickes v cress, iqbal, twombly, hickman v taylor, conley v gibson

Practice hypos: 275

Stopped at 10-20, LOOK AT ESSENTIALS OF SUMMARY JUDGMENT

**BEFORE TRIAL**

* **Justiciability**: whether a court can hear a case
  + **Ripeness**: controversy must have already happened
  + **Standing**: plaintiff must demonstrate injury to legally protected interest
  + **Mootness**: can’t sue if later development means plaintiff no longer has personal stake in case
* **Prejudgment seizures:** action taken by court to change/prevent change of the status quo
  + Prelim injunction
  + Seizure of prop – assure plaintiff remedial relief can be found
    - -Sometimes this is ruled unconstit/unfair – need proper due notce
      * Exceptions: for import gov interest, if prompt action is nec
    - -This addresses abuse by gov, not private actors – ie, contract to allow seizure of prop
    - -most important factor today: risk of error
      * -need for due trial before seizure of prop mitigated by private interest of debtor, risk of erroneous dep, prop value of add safety guards, cost of hearing

**Preliminary injuctions**

Need to show strong liklihood of success, plus other criteria of injun

Must show no adequate remedy at law

**PLEADING!:** describing and defining the complaint (rule 8)

* Frcp: you can’t plead law, you plead facts
  + Ie, saying a person acted negligently is not good enough – describe what was done
* Why are there pleading requirements?
  + -fair notice to def
  + -fair notice to court
  + -decide the merits
  + *rule 9b: heightened specificity requirements: for certain types of complaints (fraud)*
* **plaintiff’s claim**: frcp says must provide a short, plain statement of claim showing they are entitled to relief
  + -must balance risk of unduly burdening plaintiffs who need discovery with risk of burdening defendant
  + *must state a valid legal theory in claim*
  + **amendment**: liberally offered, given to correct a complaint
  + **contradictory claims 8(e)2**: some juris allow pleading in the alternative, regardless of consistency – good strategy, allows you to have defs point fingers at each other
    - eg, you aren’t exactly sure of the facts of the case (not sure who’s at fault)
* rule 11: designed to enhance honesty in pleading
  + rule 11a: signature (signifies it’s true and you’ve checked it)

* + - **rule 11b2: all claims must be warranted by existing law, or by nonfrivolous argument to extend existing law** (warn)**,** 
      * **can’t use law to harass,, etc**
      * **denial of/factual contentions must be supported by evidence (or will with discovery)**
  + **supplemental pleading**: making the complaint current
* **fact pleading v frcp**:
  + frcp allows some law, only requires ‘notice’,
  + fact pleading means only the facts! No law
* 41a1: Voluntary dismissal
  + must do w/out prejudice
    - usually after def files answer/motion for SJ – too late
  + can’t reverse except according to rule 60 (mistake etc)
* **RESPONDING TO PLEADING: the answer!**
  + You can:
    - 12a4: file a pre-answer motion w/in 20 days, extend filing deadline
    - Fail to show
    - Deny all, deny some
    - Allegations not responded to become firmly established
      * Anything admitted need not be proven at trial
  + 12e: need more definite statement
  + 12f: motion to strike redundant, immaterial, scandalous matter/insufficient def
  + 12h3: lack of juris on subj matter (made at any time)
  + 12h1: lack of juris over peson, improper venue, insuff proce, insuff service of process
    - waived if not brought up by preanswer motion/answer
  + 12h2: failure to state claim, join indispenable party, failure to state legal def
    - can be made in any opleading, motion for judgment, or at trial on merits
  + **default judgment**: obtained by plaintiff ex parte
    - can ask for ‘prove-up’
    - can set aside depending on:
      * whether plaintiff will be prejudiced
      * whether def has meritous def
      * whether culpable conduct of the def led to the default
  + **affirmative defenses**: you prove em you win!
    - E.g., res judicata, SoL
    - Burden is on def to bring em, otherwise waived
  + **COUNTERCLAIMS:** best def is a good off
    - **Compulsory 13a**: CC raising out of same ‘transaction’
      * Only in fed cases
      * Matters b/c if you don’t have juris in fed court but your CC is compulsory, wouldn’t be fair not to bring it
        + Would have to respond to a suit in fed court without raising a relevant CC
  + **Other action pending**: granted according to rules of claim preclusion
    - If other party was trying to judge/forum shop, etc
* **Burden of pleading**: on which party?
  + Policy: when one side has ‘dice loaded against them’
    - What’s the intent of the law?
  + Fairness: when info is on one side (if you have all the info, you should prove it)
  + Probability: burden is on party departing from norm
    - E.g., suing for unpaid bill. Burden of nonpayment is on plaintiff because you assume most bills are paid. Payment is an affirmative defense.
* **AMENDING**
  + ***Liberal in allowing***
  + when do **deny** permission?
    - Unreasonable delay – should have known about this
    - Prejudicial to plaintiff – can’t sue right party now (SoL)
  + Relation-back 15c: borrowing original date of filing pleading when you’re too late
    - Dicey with new defs – needs to have been notified
    - Needs to be a mistake
* **DISCOVERY! Rule 26**
* (**26f3** First – meet and confer with opposing counsel)
  + **Rule 26b1:** extraordinarily broad discovery
    - Anything nonprivileged that is relevant
    - 26b3: covers pre-trial materials, docs, tangible things
      * needs to be relevant, not privileged, not work product
  + ***Hickman v taylor***: landmark discovery case
    - Coins term ‘notice pleading’ – task of pleading is to give notice
      * *Purpose for broad discovery: device to narrow, clarify issue, obtain facts relative to issues*
      * Cry of ‘fishing expedition’ shouldn’t stop litigation
    - ‘mutual knowledge’ key to proper litigation (reduce surprise, increase settlement)
    - *you can’t ask for ‘work product’ of an attorney even in liberal disc*
      * attorneys needs degree of privacy
  + **privilege**: potentially as broad as all members of a corporation (broad rule)
    - when legal advice sought, by prof lawyer acting in capacity, the communications relating to that purpose, made in confidence, by client, at instance protected, from disclosure by either, except it be waived
  + **initial disclosure**: give up ‘core materials’ (not always the rule)
    - rule 37: forbids use of materials that should have been disclosed but weren’t
  + **26:** prevents ‘**undue burden** or expense’
  + rule 34: allows parties to demand an opp to **inspect**, copy test or sample documents
    - must ask with reasonable particularity
  + 33: **interrogatories** – send questions to be answered under oath (>25)
  + **depositions**: 30
    - must be served with subpoena if not party
    - limited to ten on each side, may sched whenever with notice, time limit – one day of seven hours
    - ‘woodshed’ your witness
    - often used to impeach
    - 31a: poor man’s deposition (send written questionnaire to witnesses)
  + **35:** physical/mental **examination**
    - can only be used when there is genuine controversy
  + email discovery: follow the email trail!
  + **36:** request for **admissions**: must either admit truth of relevant matter or deny it
    - seldom used
  + **37:** can **refuse to give info** during discovery, but might be forced to later
  + **admissibility at trial rule 32:** things found by discovery can generally come in
  + 45: discovery against ‘**non-parties’**: usually gotta pay em
  + **sham affadavit**: affadavit that contradicts what you previously said in dep
    - unclear question, done frequently
    - sc says you can disregard them!
* **sanctions re: disc**
  + usually have to be willful or at least gross negligence
* **Make sure your witnesses are prepared**

1. **INVESTIGATION**: fact gathering without judicial assistance
   1. Don’t have to follow rules of discovery
   2. Poor man’s discovery
2. rule 26: **EXPERTS!**
   1. Can take dep (no surprise)
   2. 26a2B: Must provide written report of their opinions, data, etc
   3. 26b4B: protected from discovery except in limited circumstances
      1. inability to obtain info otherwise
   4. must be real experts (can try to ‘hide’ witnesses this way), must use scientific method
   5. *they can use their opinions!* – but needs to be backed up
   6. can’t normally use ‘legal’ experts

* **FRCP 16: pretrial conferences and prep – don’t worry too much about em!**
  + Often used by judges to faciliate settlement, gives them a more inquisitorial role
    - Can they compel people to attend? Some courts say yeah
    - *If you want to settle a case the authority must be clear*
  + 26f: Directs parties to meet, confer
  + The more truthful we are earlier, the more likely we are to settle
  + Reasons:
    - Expedite deposition
    - Establish early control so case won’t be protracted
    - Discourage waste
    - Improve quality of trial
    - SETTLEMENT
  + 2nd pretrial order: actually get ready for trial (parties hate it)

**ADJUDICATION BEFORE TRIAL**

* **FRCP 12B6: motion to dismiss for failure to state a claim!!**
  + - Court said 12b6 should not be granted unless it could be shown beyond a doubt that the plaintiff has no case
    - Notice pleading needs to be detailed enough to generally inform def, however don’t throw away case without serious factual checking (beyond doubt etc), altered by twombly et al
    - Assume facts as plaintiff pled them, but not legal conclusions
    - May be brought at any time
  + Used to be **conley v Gibson**: don’t grant 12b6 unless it can be shown beyond a doubt that plaintiff has no case (‘notice pleading’) now its:
* ***Bell atlantic corporation v twombly***: pled on ‘info and belief’ – don’t!
  + Says pleading must be ‘plausible’
    - Plausible > possible
    - Cross the line from conceivable to plausible
  + Bare accusation of cause (eg conspiracy) is not enough!
  + *You need additional proof (‘plus-proof’)*
    - ‘mere parallel action would not suffice a trial’
  + now can’t plead legal conclusions
  + this overrule *conley*, which stated pleading need only state a claim that if true require relief
* ***Iqbal*!: a**gainst DOJ, accused them of detaining arab/muslim men, subjecting them to harsh treatment because of this
  + Did not push case from conceivable to plausible
  + Plead elements, but not to the point of legal conclusions
    - ‘plus-factor’
* reasons for iqbal/twombly?
  + No expensive discovery, fear of over-discovery
* **SUMMARY JUDGMENT rule 56:** no issue of material fact, decide as matter of law **check out ‘essentials of SJ for redrafting outline’**
  + Sits on the shadow of unconstitutionality (amend 7: right to jury)
  + Need some **evidence** for claim
  + Most common time: after discovery
  + **BURDEN SHIFTING**: persuasion or evidence production
    - Persuasion: the burden of proving (allocated, then doesn’t shift)
      * Plaintiff has burden of proving primae facie case
    - Production: movant has original burden, but it’s light – point to lack of evidence
      * Then burden shifts to introduce evidence against motion
  + **Determining the appropriate standard!**
    - Some courts still say, if there’s any doubt, we deny SJ
    - **Others: use DV standard (if case would go against plaintiff)** only diff is matter of timing
      * Predominate test today!!
      * *No way jury would find for plaintiff*
      * Weigh evidence in favor of plaintiff
  + **Adickes v cress** (look up spelling)
    - Facts: white schoolteacher went into store with black students. Soon after arrested for vagrancy. Alleged conspiracy between store and cop
    - Def moved for SJ: evidence was witness, cop affadavit
      * Plaintiff: unsworn statement from witness
    - **Burden of production on moving party**
      * Must ELIMINATE possibility plaintiffs could win
      * Makes it look like entire burden is on moving party
    - **Probably no longer good law!**
  + **Celotex**: and you thought adickes was the landmark SJ case?
    - Facts: woman suing three companies for (dead) husband’s asbestos exposure – not sure who did it
    - So celotex moves for SJ – **f***ailed to produce suff evidence that celotex product were proximate cause of husbands death* (her counterproof is hearsay – *although rehnquist says evidence need not be in admissible form if it could/can be by trial*)
      * Changes adickes heavy burden to mere need to **point at lack of evidence –** a light burden for SJ
        + **Connects dots between SJ motion and burden of persuasion at trial**
  + SJ in **defamation** trials (where subjective mindset is key)
    - Sc says it’s ok, but over a lot of dissent (paper trial)
  + Review facts **de novo** in SJ trial
  + **SJ SAFEGUARDS**
    - Disputed issue of fact (judge can always find one if wants to)
    - Cautionary canons
      * Negligence, antitrust, civil rights, environmental, complex
      * But SJ is transsubstantive
    - Mystery of admissibility of NM evidence
      * Ie, cut NM some slack on SJ, but not at trial
    - Weigh inferences in favor of NM
      * Easy to say, hard to do – can be discretionary way to deny SJ
    - Credibility is for juror!
      * 7th amend violated when judge decides credibility
    - de novo
      * lots of detailed use of factual record – curbs trial judge enthusiasm for SJ
  + **when is SJ appropriate?**
    - Take facts one by one
      * Evidence presented needs to make admissibility standards
      * Experts need foundation for opinion
      * Remember **burden-shifting**
* **MOTION FOR JUDGEMENT ON THE PLEADINGS**
  + Def admits essential aspect of plaintiffs case and has not made an affirm def
  + In rules but useless

**SIZE AND STRUCTURE OF DISPUTE**

* **Real party in interest 17a**
  + Real party in interest needs to bring suit, not just be out pulling strings – to protect def from future lawsuit
  + **Subrogration**: substitutes one person/entity in place of another, succeeding legal rights as well
    - Often happens when insurance holder is plaintiff even though insurance party is actual interested party
    - Can happen pursuant to party, case
* **Fictitious names**: should law permit anonymous pleading?
  + Usually no, but exceptions for privacy matters (abortion, etc)
  + 10a: you must reveal yourself
  + but john doe defs are tacitly accepted

1. **JOINDERS!!!**
   1. **Why?**
      1. Flood of litigation
      2. Truth is advanced by handling similar cases together
      3. consistency
   2. **Joinder of claims 18**
      1. Very permissive, why have multiple lawsuits?
      2. Fits in with RJ
      3. **Rule 20**: plaintiff’s rule (do we go at it alone? How many defs?)
         1. Plaintiff v driver + owner of car
            1. Must prove claims arose out same (series of) transaction(s)

E.g., car accident

* + - * 1. Must have common issue of fact/law

E.g., damages

* + - 1. Why sue mult defs?
         1. Might not know who exactly to sue, get them to work against one another
  1. **Mandatory joinder 19** Difficult: don’t want to drag in if not necessary
     1. Usually occurs post-complaint: a v b, c gets dragged in
     2. Used to distinguish betwn necessary and essential parties (most don’t now)
     3. **19a**: **persons required** to join “if feasible”
        1. strategy dominates
        2. when to pull someone in?
           1. usually when they will be *harmed* by the case
           2. if otherwise complete relief cannot be granted

means literally relief – damages, injuctions, etc

* + - * 1. if absentee will have sub risk of incurring doublt, mult, inconsistent obligations
        2. *not simply when people are involved factually*
      1. responsibility to do this: defs
    1. **19b**: **when joinder is not feasible** (e.g., destroys diversity), dismiss case if:
       1. *\*when judgment would prejudice absentee*
       2. where prejudice can be lessened by other measures
       3. whether judgment rendered in absence is adequate
       4. *\*is there another forum where can participate?*
  1. **Permissive joinder 20**
     1. Do as early as possible
     2. When to deny:
        1. Prejudice to defendant
        2. **20b**: gives courts discretion to deal with inclusions that might embarrass, put to expense, etc parties
           1. courts have lots of discretion for severance of parties
        3. transactions must be **logically related** to one another (series: related, tied together, similar)
        4. **motion to strike**: strike def from suit (filed against)
           1. remedy for **misjoinder**: don’t dismiss act – drop/add parties or sever claims
  2. **crossclaim 13g:** against coparty - permissive
     1. hypo: P v D + O, driver sues owner for negligence
     2. needs same transaction/occurance
  3. **third party practice (impleader) 14**
     1. if original def sues someone else (e.g., insurance company for refusing to pay up), they become the *third party plaintiff*
     2. permissive, unless it is prejudicial
     3. need “if-then” relationship: needs to be a causal connection between original action and subsequent action
        1. e.g., two people are hunting, both shoot, one hits a person, they only sue one hunter – the hunter can bring in the other hunter through impleader (joing and sev liability)
     4. *distinguish from crossclaim!!*

1. **INTERVENTION** **24** flip side of 19
   1. Device for interested outsider to voluntarily join it
   2. **Intervention of right**
      1. Unconditional right by statute
      2. Need *interest*, which will be *impaired or impeded* (w/out inervention), and are *not adequately represented*
         1. Economic interest is the best to have (uncertain what interest is)
            1. Sometimes it’s interpreted as a ‘legal’ interest
   3. **Permissive intervention**
      1. Will intervention unduly delay/prejudice?
      2. Need common question of law/fact
   4. **24 c:** need to draft a **pleading**
   5. **when**? – not specific, but some guidelines:
      1. when the intervenor knew or should have known of interest
      2. prejudice to parties from delay
      3. prejudice to intervenor if intervention is denied
      4. unusual circumstances
2. **interpleader** **22** (need complete diversity for FRCP)
   1. stakeholder that owes something to others that
      1. places stake in court
      2. files declaratory action naming people who want that stake
      3. names those people then butts out, lets courts deal with it
   2. **only when there is a maximum (IDENTIFIABLE LIMITED) liability that needs to be shared among many interested parties**
      1. can’t be in a clearly inconvenient forum
   3. e.g., grandmother promises same amt of money to both grandson and granddaughter
      1. insurance co v. brother 🡨🡪 sister
         1. *the two can file a cross claim*
   4. interpleader can plead in the alt they owe nothing
   5. interpleader through **1335a**
      1. need minimal diversity,can drag people into forums (kinda totally unconstitutional)
      2. so people avoid rule interpleader
3. **CLASS ACTION 23**
   1. **requirements**
      1. numerousity
      2. common questions of law/fact
      3. typicality (claims of rep 🡪 class)
      4. adequate rep by attorney and class reps
         1. attorney: background in complex litigation
            1. need to make sure they are legit (won’t screw over client)
   2. Three ways to bring them up:
      1. b1: parties with cose id of interests and compelling reasons to avoid ind lit
         1. b1A: mandatory: unfair to def (incompatible affirm relief)
         2. b1B: man: unfair to individual missing plaintiff (e.g. limited fund)
      2. b2: injuctive/declaratory relief against party who has acted/refused to act against a whole class based on grounds typical of class
         1. paradigms: civil rights
         2. mandatory
         3. damages only if they are focus of case
      3. b3: questions of law/fact common to class **predominate** and class action is **superior** to other forms
         1. predominate: dif in state law may be an issue
         2. damages!
         3. only certification to require notice
            1. notice must say you can opt out or get own rep
   3. ***Hansberry v lee***: crucial understanding of rule 23
      1. class actions have a res judicata effect on class memebers
         1. due to adequate rep
      2. so if you don’t have **adequate rep** (or any at all), you can’t be barred by RJ from an earlier case – you didn’t get due process!
   4. if having difficulty with cert, consider limiting class (state-by-state)
   5. consumer class actions: **agency issue**
      1. asymmetric stakes – attorney becomes principle
   6. **settlement**: judge is outside, counsel is inside
      1. **objectors:** do they free-ride, or extort?
         1. can be good objectors: AG, federal agencies, non-profits guardians
         2. play a useful role in fairness hearings because judges are so far removed

**DURING TRIAL**

**PRECLUSIVE EFFECTS OF JUDGMENTS**

1. **Res judicata (claim preclusion):** can’t relitigate a claim that went to *judgment* - killer def baby – about **facts**
   1. Why?
      1. Certainty of judgment – *repose*
      2. efficiency
   2. **Default judgments:** still count, need teeth (including 12b6)
   3. judgement: terminates on merits, leaves nothing to be done but enforce
      1. FFnC, fed honor st and most vice versa
      2. Split of judgment about appeal
   4. **Transactional approach;** ie nucleus of facts: based on same facts
      1. Final judgment extinguishes claim including all rights of plaintiff to remedies against def wrt any/part of transactions under which claim arose
      2. Barred if you fail to bring all the claims in terms of the same set of facts
         1. About ‘what could have been’ litigated
      3. A series of notes, due and in default, are considered dif transactions
      4. Even if the second issue is much bigger – barred if same trans
   5. **‘same right’ test**: whether claims involve diff rights/wrongs
      1. if a different legal right is violated, RJ is barred (not current way of doing this)
   6. **42: consolidation**: consolidate cases with similar legal issues
      1. highly discretionary
      2. 42b: can split cases
   7. **splitting cause of action**: can’t do it – must bring all theories arising out of a matter
   8. **change in law**: should this bar RJ? Most say yes, some say no
   9. **fed-state preclusion:** usually state-court judgments do not preclude litigation of an exclusive juris claim
2. **Collateral estoppel (issue preclusion):** forecloses the relitigation issues that were actually litigated and necessarily decided by court (based on same claim of **law**)
   1. Issues < claims
   2. Issue must be *essential and necessary* in first suit
      1. Collateral issues may not have been given proper consideration, even in final judgments
      2. If court thinks one is dispositive, they may not really consider others
   3. Must be unambiguously decided
   4. Change in law can bar issue preclusion ask about this
   5. Works only on **unmixed questions of law**
   6. **Various scenarios wrt CE**
      1. what if **lots of cases, dif results**? Prob not, unless overwhelming maj
      2. **criminal cases**?
         1. Can have it – criminal must be beyond shadow of doubt, civil mere preponderance of evidence (so state v drunk driver, then victim v dd)
         2. But if dd won, no CE because there might still be preponderance of evidence
      3. **Settlement?**
         1. Sometimes: want to give teeth to settlement, but it’s a bit unfair if maybe the settlement was just easier, etc
      4. Against **government**?
         1. Generally no- gov litigates often, often about the same important (constitutional) issues, this could freeze law about certain important issues
   7. **Offensive collateral estoppel:** def has had day in court, so as long as it’s appropriate we can do it
      1. But we don’t like it:
         1. No jud economy, ‘wait and see’ attitude
            1. When Is P ‘wait and see’?

Depends on facts

Not if injury, valid tactical reasons to wait

* + - 1. May be unfair to def (diff stakes, proc difs)
    1. Need a ‘full and fair’ opp to lit in S1
    2. Deny: where plaintiff could have joined, where unfair to def
       1. Note that this can deny 7th amend rights
  1. **Defensive CE:** yeah, def had day in court baby
  2. **As long as party against whom we’re arguing CE had day in court, we’re good!**
  3. **Mutuality of estoppel**: when new parties want argue issue preclusion
     1. Traditional view: can’t benefit from CE unless would be bound by prior judgment, ie exact same parties

1. **Adjudication**: RJ and GE have been teased to apply here
2. **Non-party preclusion**: if parties are in privity, they stand and fall together, but generally you can’t be bound by another’s judgments
   1. **Virtual representation**: so closely aligned to S1 as to be virtually rep
3. **13a: compulsory counterclaim**: must bring all CC def has from original claim
   1. so future suit would be barred by 13a if you lose then try to bring second suit against same party for same transaction

**POST TRIAL**

* **SANCTIONS**: RULE 11c (check out in more detail)
  + -court must find ‘willful bad faith’ on part of attorney
  + about deterrence, not compensation – usually paid to the court
* **REMEDIES**
* **Injunctive relief:** may be issued to prevent the doing of any legal wrong when an adequate remedy cannot be made by damages (*no adequate rem at law*, otherwise irrep harm)
  + Sometimes given for damages not yet occurred, but almost certain to occur
  + **Criteria for perm injunction**
    - -plaintiff succeeded on merits
    - -doesn’ have adequate rem at law
    - -risks imminent irrep harm
    - --whether balance of hardships weighs against issuance of inj
    - whether injunc serves public interest
    - --whether court can practically serve injunction
* **Compensatory damages:** compensate for actual damages suffered
  + Put jury in place of victim (med damages, lost income, etc)
* **Punitive damages**: awarded for egregious wrongdoing
  + Have been limited to ratio related to compensatory damages
* **American rule**: generally, must pay own attorney’s fees (exception to norm)

**ADDITIONAL INFO ON FRCP**

* *Frcp must be construed to secrure the just, speedy, and inexpensive determination of every action and proceeding*
* Also created to take power out of pleading, to get facts as most important aspect of case
* Transsubstantive: meant to apply to any fact pattern
  + Rules should be easy to understand and apply