Setting up an exam answer – 15 to 20 mins for 1 hour (200-500 word) fact pattern.

1. Set external time allocation (how much for each question / set of questions).
2. Internal time allocation (how much time for each part of response).
    a. Read the "call" of the question (last 2 sentences).
    b. Read the question.
    c. Re-read the question.
        i. Question each fact's relevance.
    d. Organize the answer.
        i. Organize legal issues (focus on facts and rules).
        ii. Chart Side 1: Fact Pattern; Side 2: Major Legal Issues
            1. Add sub-issues.
            2. State issue components, even non-debatable issues.
            3. IRAC each debatable issue (Issue, Basic Rule, Application to Facts, Legal Conclusion)
3. Write the answer.

- Stick to time allocations.
- Give more time to significant and more-discussed (in class) issues.
- Give more time to debatable issues.
- Outline answers to remaining questions if a full answer is not possible.
- Answer in the order presented and do not read full exam at start.
- Some issues may be non-debatable, "but if it was, the next sub-issue would be…" - get points for as many issues as possible. State issue if it is related even if "it does not seem entirely applicable here."

A. The Rules

Rule 1

a. Help with efficiency, accuracy, justice. Many have judge's discretion at core

B. The Adversary System

a. Judge is more passive facilitator than inquisitorial model; jury is fact finder.
b. Mechanism for applying substantive law rules to concrete disputes.
c. Role of a procedural system:
    i. Certainty; expectations and outcomes.
    ii. Fairness; "day in court" - due process procedural right.
    iii. Truth; objective presentation of facts.
    iv. Accessibility; option for justice open to all.
    v. Resolution; procedure makes objective justice attainable.
    vi. Efficiency
    vii. Legitimacy

C. Due Process

a. Constitutional right to be heard (Fourteenth Amendment)
    i. Must involve state action.
b. Protection of individual rights over concern for efficiency.
c. Flexible in administrative arena.

14th Amend.

    i. *Matthews v. Elridge* three factors for due process decision related to govt. administration:
        1. Private interest that will be affected by official action.
        2. Risk of erroneous deprivation of interest through procedures used.
        3. Probable value of additional or substitute procedural safeguards.
        4. Govt's interest and burdens.
d. Appropriate/situational process: Amount of process you get depends on facts (normal/exceptional) and risk of error.

D. Remedies

a. Prejudgment Seizure

Rule 64

    i. Interim relief before trial.
    ii. Replevin, garnishment, attachment, sequestration.
    iii. Must meet due process requirements.
        1. Protection of use and possession of property from arbitrary encroachment.
        2. Right to be heard.
        3. Notice given.
    iv. Exceptions to DP re PS:
        1. Unusual circumstances
        2. Need for prompt govt. action (bank failure, contaminated food)

3. Protection of public interest (seizure of unpaid taxes during natural disaster)

b. Temporary pretrial relief: restraining orders and preliminary injunctions preserve status quo.

c. Post Judgment Remedies

i. Damages

1. Monetary

a. Nominal (usually no proof of injury); compensatory.

2. Punitive

a. Punishment and deterrent for future wrongful conduct.

ii. Equitable Remedies

1. Exs: Injunction, specific performance.

a. Usually pls don't also ask for damages b/c that would concede that money is adequate compensation.

2. Injunctive relief unavailable unless irreparable harm is otherwise likely to result, and pl. has no adequate remedy at law.

a. *Permanent* injunction criteria:

i. Success on the merits

ii. No adequate remedy at law

iii. Risk of imminent irreparable harm

1. Claim usually not "ripe" unless harm is imminent.

iv. Balance of hardships does not weigh against issuance of injunction

v. Injunction serves public interest

vi. Court can, as a practical matter, issue injunction.

3. Requests for equitable relief often involve justiciability doctrines (ripeness, standing, etc.)

iii. Declaratory relief (declaring respective rights of parties).

E. Cost of Litigation

Rule 1

a. Added procedures may lead to added costs, but may be justified (e.g., due process v. efficiency).

Rule 23(h)

b. Atty fees: "American rule" – at common law, each party pays own atty's fees.

i. Some exceptions, such as prevailing civil rights plaintiffs – statutes often provide for atty payment as part of D's costs (fee shifting; usually higher risk, smaller reward).

ii. "Lodestar" is common approach, multiplying hours worked by lawyer times lawyer's hourly rate.

c. Filing fees: common, but can violate DP if re "fundamental right."

F. Describing and Defining the Dispute

a. Procedural devices seek to achieve early definition, weed out groundless claims, maintain flexibility, fairness.

b. History and Evolution of Pleading

i. Forms of Action (standardization of writs). Included:

1. Trespass, trespass on the case, covenant, debt, assumpsit, detinue, replevin, trover.

Rule 1

ii. Common Law Pleading (law cts, not equity cts).

1. Attempted to reduce dispute to single issue.
2. Strictness frustrated the "merits."
3. Defenses: plea in bar (justification or denial), dilatory plea (challenging jurisdiction), demurrer (failure to state a claim).

iii. American Reform

1. Fact pleading (Field Code; code pleading)

Rule 2

a. Required only statement of facts constituting cause of action (one form of action).

i. "Ultimate facts" should show legal duty and violation resulting in injury.

ii. Complaint must be "fatally defective" to be rejected as insufficient.

iii. What, when, where, who: circumstances of alleged wrongful conduct.

iv. Requires more than legal conclusions (e.g. "assault" or "trespass").

1. Conclusory allegations alone would = costly discovery; burden on defs. too great.

b. If facts not sufficient, pl. allowed leave to amend

i. Note: Defs in *Goodyear* filed demurrers, which were sustained. Demurrers based on pl's story; if D. wants to add new facts, must file MSJ.

iv. Notice Pleading **(see current application *Twombly* and *Iqbal*, p. 7)**

1. Federal revision of field code in FRCPs; reliance on generalized pleading.

Rule 8(a)(2)

a. Creation of FRCPs: **Trans-substantive** principle: same procedural rules should apply regardless of substance of case.

b. Lesser burden of proof up front.

c. Getting away from charged terms "facts" and "cause of action" in favor of "short and plain

statement of the claim showing that the pleader is entitled to relief." **Rule 8(a)(2)**

i. See **Form 9** example.

Rule 8(a)(2)

d. Note that 8(a) does not actually use "notice," but cases like *Taylor* and *Conley* interpret it to only require that opposing party be fairly notified of nature of claim (plain statement adds up to notice).

e. My plain language interpretation: *this is what I'm claiming, and if proved by the facts, I am entitled to relief; I will prove the facts later* (vs. fact pleading – these are all of the facts that created the wrongful conduct). Variability re how many facts necessary to state claim.

2. Discovery will frame issues.
   a. Trend toward disposition of cases on the merits, by jury trial, after full disclosure through discovery.
   b. Shift from common law approach to pleadings included shift toward increased pre-trial disclosure of **relevant** evidence (see Disco section).
3. *Hickman v. Taylor* (first case to cite "notice pleading"). See more under Discovery section.
4. *Conley v. Gibson* (union case, 1957):
   a. No MTD unless beyond doubt that pl. can prove no set of facts to support claim.
      i. i.e. no relief could be granted under any set of alleged facts that could be proved; "the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings." (Souter in *Twombly*)
   b. Litigation focused on merits of the claim (not facts at outset).
   c. "Forgiving attitude" toward pleading.
   d. But, see Posner: **Notice won't suffice in modern cost-heavy litigation (such as antitrust).**

c. Describing and Testing the Plaintiff's Claim

i. Specificity

Rule 12(e)

1. Parties may bring motion for more definite statement, claiming inability to frame responsive pleading if complaint or other pleading is too vague/ambiguous. **FRCP 12(e).**
   a. Usually restricted to "unintelligible" pleadings, rather than want of detail.
   b. Attempt to "flesh out" opponent's case is misuse of rule **12(e).**

2. "Competing risks" of burdens on pl. and def. (no way to obtain addt'l facts w/o discovery *v.* discovery burdens).

ii. Inconsistent Allegations

Rule 18
Rule 8(d)(2)

1. Pleading alternative sets of facts is ok, regardless of consistency, if discovery is required to get at truth.
    a. Allegations made "on information and belief" (believed to be true but no personal knowledge).
    b. No double recovery
    c. Defs could prove Pl's case by arguing against each other.
2. Policy weighs in favor of alternative pleading so controversy can be settled and justice accomplished in single action.
    a. Filing two lawsuits instead could result in inconsistent judgments; reflects poorly on system.
    b. Counter-policy: imposing litigation on innocent Ds.

iii. **Rule 11**

Rule 11

1. Certification by signing that pleadings were "formed after an inquiry reasonable under the circumstances."
    a. Helps cts avoid speculative/sham pleading ("fishing expedition") – pl. must have some basis in fact for the action when pled.
        i. Factual contentions should have, or will likely have after discovery, evidentiary support.
    b. Atty who signs pleadings certifies their truth re law and fact, based on appropriate investigation ("reasonable inquiry").
        i. Must also rely on objectively reasonable representations of the client.
    c. Attys can be sanctioned for signing w/o researching (wasting court's and parties' time).
        i. Ct. must find bad faith / willful conduct for sanctions, and consider ability to pay. Non-monetary sanctions include discovery restrictions, time extensions favorable to other side, etc.
2. Rule 11 history – periods of heavy reliance, but got to point where it "seemed to destroy civility."
    a. Sometimes deliberate; often more benign reasons such as time pressure from SOL.
3. "Safe harbor" provision allows time for offender to desist and withdraw/amend mistakes.

d. Heightened Pleading Requirements

i. Contained in Rules or case law for particular kinds of claims.
1. Ex: 9(b) requires allegations stating "with particularity the circumstances constituting fraud or mistake."
a. Usually applies re securities fraud.
b. Late 20th c. feeling that 9(b) should be expanded to cover other issues w/ heightened pleading.

Rule 9(b)

e. Current Application of 8(a)(2)
i. Ex: *Bell Atlantic Corp. v. Twombly* (2007)
1. Legal conclusions couched as factual allegations are not appropriate statements of claim. Conscious parallelism does not raise suggestion of agreement needed for conspiracy.
a. Claims must be "plausible," not merely "conceivable."
i. Ct. seems to require "plus factor," more factual proof of conspiracy claim.
ii. "Plausibility" test is ambiguous holding.
iii. "Retirement" of *Conley*.
1. Though cited for support, changes standard; "factual allegations must be enough to raise a right of relief **above the speculative** level," not just labels, conclusions, and "a formulaic recitation of the elements of a cause of action."
2. *Conley* w/out "no set of facts" is accepted pleading standard: Once a claim has been stated adequately, it may be supported by any set of facts consistent w/ the allegations, which must be taken as true.
2. Opinion changes notice pleading standards without saying so. Essentially heightened pleading requirement requiring grounds of entitlement to relief.
3. Policy reasons: avoiding enormous costs of antitrust discovery; preventing over-litigation.
4. Dissent: allegations based on circumstantial evidence are sufficient if they state claim upon which relief can be granted. Allegation describing unlawful conduct requires response from petitioners before dismissal.
a. Pls. alleged agreement; don't have to prove yet.
b. Evidentiary framework re Sherman Act developed by *Matsushita*; evidence that tends to exclude possibility that alleged conspirators acted

Rule 8(a)(2)

independently would be required at Summary Judgment (Rule 56) stage, but not Complaint stage.

5. ***Practical application:*** not all courts buy it. Technically "the law," but at odds with FRCPs; either will be overturned or FRCPs will need to be revised – currently in tension, so judges may apply or not.

ii. Ex: *Ashcroft v. Iqbal* (2009)
1. Affirmed *Twombly* standard:
a. Pl. obliged to "amplify claim" with some factual allegation needed to render claim plausible.
i. Must plead factual matter to show that policies were implemented for discrimination rather than neutral investigative reason.
ii. Conclusory nature, rather than "extravagantly fanciful nature" disentitles allegations to presumption of truth.
b. Burdens of discovery would be high in this case.

f. Defendant's Response
i. 12(b) motions – dismissals for inadequate pleading.

Rule 12(b)

ii. **12(b)(6)** – Failure to state a claim upon which relief can be granted; challenge to substantive merits.
1. Based on pleadings; no new facts brought in by D.
a. Except affirmative defenses.
2. Pl. can be more vague in pleading, but usually is unavailing, b/c facts come out in course of litigation anyway; also could be subject to Rule 11 sanctions for inaccuracy of facts and allegations.
3. Pl. usually given opportunity to amend before dismissal.

iii. Rule 12 Pre-Answer Motions
1. Procedural objections; filed as optional alternative to answering complaint.
a. Tactical advantage before D must admit/deny allegations.
b. Some defects require dismissal, some can be remedied before case proceeds.
c. Four of the 12(b) defenses will be waived if not raised in D's first response to the complaint (pre-answer motion or answer itself if no motions made).

Rule 55

iv. Default (Failure to Answer)
1. Once D. fails to file responsive answer, he is in default.

a. Once default judgment entered, if not set aside, pl. automatically wins case (Ds liable for each well-plead alleged cause of action).
b. Allegations taken as true, though usually separate hearing on damages.

Rule 55

2. Three factors determine outcome re Rule 55(c) motion to set aside a default or default judgment:
   a. Whether plaintiff will be prejudiced
   b. Whether the defendant has a meritorious defense
   c. Whether culpable conduct of the defendant led to the default.
      i. Intent to thwart judicial proceedings or reckless disregard for effect of conduct on proceedings.
      ii. Inclination towards leniency where no wanton disrespect for court and credible explanation for delay (despite "not excusable" procedural conduct).
3. Rule allows courts discretion, but modified "good cause" standard of review has arisen b/c of strong preference for trials on merits in federal court.
   a. Default judgment deprives client of day in court.
   b. Premise of adversary system: if one side does not want to contest the other side's case, court is not obliged to inquire further.

v. Answering
1. Admitting or Denying the Averments (Allegations)
   a. Ds must address each paragraph or each part of each paragraph of the complaint re each allegation. Some states still allow <u>general denial</u> of complaint.

Rule 8(b)

      i. When D. admits allegation in complaint, that allegation is taken as true for purposes of the litigation <u>whether or not it is accurate in fact.</u>
   b. If D "lacks knowledge or information sufficient to form a belief as to the truth of an allegation," this usually has effect of a denial.
2. Affirmative Defenses
   a. General: mounting an offense with new facts when admitting or denying is inadequate.

Rule 8(c)(1)

      i. "Justification" for some admitted actions. At common law called "pleading in confession and avoidance."
      ii. Presents new issues to the litigation.

Rule 8(c)(1)

b. Burden allocation: law allocates proof burden to Ds for certain defenses (D. must always plead AD, but Pl. will sometimes have more proof related to AD).
    i. Considerations re pleading burden allocation in different types of litigation:
        1. Policy
        2. Fairness
            a. Evidence relating to an element may lie more within the control of one party.
        3. Probability
c. Procedure for pleading affirmative defenses
    i. D. may bring up in answer or pre-answer 12(b)(6) motion to dismiss for failure to state a claim.
    ii. D. must plead AD up front; if not, the issue is not in the case and evidence relating to it is not admissible at trial.
    iii. If D. admits essential allegations and does not plead AD (thereby admitting prima facie case), plaintiff can file 12(c) motion for judgment on the pleadings, testing legal sufficiency of all the pleadings.

g. Joinder of Claims
    i. Rule 18(a) joinder:

Rule 18

        1. Party asserting a claim may join as independent or alternative claims as many as it has against opposing party (even if unrelated).
    ii. Counterclaims
        1. Complaint filed by Defendant which Plaintiff has to answer.
            a. Two kinds:
                i. Compulsory, **13(a)**

Rule 13
See p. 25

                    1. Re facts of complaint (arising out of same transaction or occurrence).
                    2. Same evidence would substantially dispose of issues raised by the opposing claims.
                    3. Must assert in original action or lose claim (forces adverse parties to litigate all claims arising from same set of facts in singe action).
                ii. Permissive (non-compulsory), **13(b)**

1. The issues of law and fact raised by the opposing claims are significantly dissimilar.
2. No connection b/w the events giving rise to the counterclaims and those giving rise to original claim.

iii. Crossclaims

Rule 13(g)
See p. 25

1. Asserted against a co-party ("same side of v.)
2. Must arise out of same transaction or occurrence.
    a. *But* once a proper crossclaim is asserted, can add totally unrelated claims.
3. Promotes efficiency, but joinder is optional b/c separate suit may be more beneficial to party suing as new Pl.

iv. Court can sever claims if joinder gets unruly or prejudicial to parties.

h. Voluntary Dismissal

i. **Rule 41** – early request to withdraw is usually without prejudice; however, D. can cut off Pl's right to end case (by notice) answering or filing MSJ, in which case Pl. can only dismiss upon stipulation of all parties or order of the court.

Rule 41(a)

1. Once filed, Pl. cannot withdraw, but can move to vacate for mistake or other good cause.
2. Ct. may impose conditions if D. has suffered prejudice (such as P paying D's costs).

ii. If "with prejudice," has res judicata effect (can't bring case again on same issues).

iii. VD Brings up "forum shopping" concerns.

i. Amendments to Pleadings

i. Permission to Amend

Rule 15(a),(b)

1. Pleading is a vehicle to get to truth (deciding on the merits), so Ct. usually takes liberal view re amendments. **Rule 15**.
2. However, liberal rule must still contain limitations b/c other side relies on pleadings and may forgo investigation into matters not pleaded.
    a. Permission to amend sometimes denied if amendment will result in undue prejudice to other party.

ii. Relation Back of Amendments

Rule 15(c)

1. Amendments relate back to the date of the original pleading under certain circumstances; see **Rule 15(c)**.
    a. Issue of notice: Defs added later, and "Doe" defendants don't get proper notice at start of suit.
2. Some mistakes don't justify relation back under the rule.

a. Careless vs. willful conduct.

3. Important b/c of SOL; predictability of repose and keeping evidence fresh.
4. Rule may be liberally construed if no party suffered prejudice.
    a. Counterargument: More lawsuits will be filed against incorrect Ds; Pls should bear costs of improperly identifying Ds.

iii. Supplemental Pleadings

Rule 15(d)

1. "Update" complaint re after-occurring transactions, occurrences, or events (such as injuries manifest after filing of complaint).
    a. Aid to claim already made, not to allege new claim.

iv. Amendments at Trial

1. In the form of evidence admitted w/o objection – treated as part of original complaint.

G. Obtaining Information for Trial

a. History of Broad Discovery

i. Purpose to reach accurate/truthful result in court; information needed to process cases and determine proper outcome.

Rule 26(a) and (b)

ii. Shift from common law approach to pleadings included shift toward increased pre-trial disclosure of **relevant** evidence.
    1. Evidence related to facts consequent to determination of the action. Relevancy is broad under Rule 26.

iii. 26(a) mandates some disclosures; 26(b)(1) provides for broad scope.

iv. U.S. system has much larger scale of discovery than other countries.
    1. Alt. example: German system leaves fact investigation to the judge. Prevents "adversarial excess."

v. S.Ct. comments on what discovery is - from *Hickman v. Taylor*:
    1. A device, along with pretrial hearing, to narrow and clarify the basic issues between the parties.
    2. A device for ascertaining facts, or information as to the existence of whereabouts of facts, relative to those issues.
    3. Meant to illuminate civil trials consistent with recognized privileges for the parties to obtain the fullest possible knowledge of the issues and facts before the trial.
    4. Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation.
    5. Reduces the possibility of surprise.
        a. Adversary system: More transparency and each side learns more, but also still motivated to conceal as much as possible for strategy.

b. Potential losses greater if going into trial w/out all facts.

vi. Ability to obtain more knowledge has led to increase in cases and has had effect on some substantive areas of law, such as "knew or should have known" pleading in products liability.

vii. Judge has responsibility to manage disco, though parties enact it, partly to reign in costs. However, mostly "extra-judicial" – process designed to work out of court.
1. Cost/benefit determinations.
2. Court resolves disputes.
3. System depends on good faith, common sense, and cooperation from counsel; courts should not have to, and do not like to, interfere in the process.
4. Inconsistency in narrow/liberal rulings; often cost/policy-based.

Rule 26 amendments

viii. **1983 amendments to Rule 26:** Threshold of disco "reasonably calculated" to lead to admissible evidence should then be subject to common sense burden/benefit determinations.
1. What information am I really likely to need;
2. What is the most cost effective way to get it.

ix. System abuses: fighting over everything; deluging opposition with too much material to digest, etc.

b. Discovery Devices

i. Pre-suit discovery
1. Available to preserve evidence if party can show that it is currently unable to commence litigation. But, not available merely to satisfy Rule 11 obligations / determine if pl. has a valid claim.
2. Some disco allowed for facts to be used in amended pleadings already on file.

ii. Initial Disclosure
1. "Core materials" willingly turned over before formal disco.
a. Old rule seemed to mandate disclosure of info that could be harmful to disclosing client; new rule has no directive unless formally requested.

Rule 26(a)(1)

2. Four main categories:
a. People who have discoverable info.
b. All documents supporting your claims or defenses.
c. Computation of damages.
d. Insurance agreements, disclosure of assets.
3. Evidence that *should have been* disclosed but was not can not later be presented in support of claims (if wanting to use at trial or in support or opposition of MSJ). See **Rule 37(c)(1)**.

iii. Document Inspection (Requests for Production)

1. **Rule 34**, includes documents as well as access to computers, machinery, other relevant items for inspection.
    a. The Rule authorizes entry onto property for purposes of testing or measuring.

Rule 34

2. Other party must have 'possession, custody, or control' over documents to be discoverable.
    a. Includes efforts to obtain docs from others w/in sphere of influence.
3. Request should describe documents with "reasonable particularity" (specific docs or categorical descriptions).
    a. Def replies objecting or specifying docs they will produce.
    b. If numerous, docs made available in location where they are kept (though now often supplanted by e-discovery).

iv. Interrogatories

1. Written requests that must be answered under oath; opponent has duty to respond.
    a. Often burdensome to answer; susceptible to abuse.
    b. Written by lawyers who indulge in generalities to avoid disclosing harmful info through specifics.

Rule 33

2. Seek to elicit who, where, when; helpful for obtaining:
    a. Precise logistical info.
    b. Additional info needed to complete other discovery (such as witness identification)
3. Contention interrogatories: seek to elicit opinions about application of law to fact.
    a. Court may defer until after completion of discovery.
4. Only Oregon does not have rogs!

v. Depositions

1. Compels witness to answer spontaneously; requires intense prep on both sides. Answers under oath, but not in court.
    a. Traditionally recorded by court reporter; sometimes videotaped.

Rules 30-32

2. Restrictions: time for each dep, number of deps permitted per side, etc. (meant to prevent abuse; waste of other side's time and money).
3. Preparation of witness to answer predictably is called "woodshedding" – not permitted in a lot of other countries (deponents must go in cold).

4. **Rule 31(a)**, written deposition questions. May be necessary if in-person is not possible; however, limited scope: can't pose follow-up questions, and deponents can think out answers. Not as useful as on-the-spot.

vi. Physical or Mental Examination

Rule 35

1. Only discovery tools for which stipulation or advance court approval is necessary.
2. Can be taken by other side if "good cause" – when metal or physical condition of party or person under legal control of party is "in controversy."

Rule 36

vii. Requests for Admission

1. An "art form."
2. Permits parties to send requests asking for admission of truth of any matter w/in scope of 26(b). Responding party deemed to have admitted unless he affirmatively denies.

c. Discovery Sequence and Tactics

i. Establish facts through pleadings.

ii. Meet and confer to form discovery plan.

Rule 26(d)(2)

1. Formal disco only allowed after conference.

iii. Submit scheduling order to court for approval.

iv. No particular order for rogs, deps, etc. – ordered according to particular strategy, how to lay groundwork.

v. Rules place no limitations on what party may do with materials obtained in disco.

1. Ct. can order protective orders for certain info; means discovery must be produced, but kept protected from general public. Some restrictions on POs re public health hazards.

d. E-Discovery

Rule 26(b)(2)

i. Clients (personal and corporate) post all kinds of info online, and preserve info in emails; this is discoverable, but there are rules re benefit/burden (see Cost Shifting; 26(b)(2))

e. Discovery of Non-Parties (**Rule 45**)

i. More limited than disco from parties, but still allowed; avoid unfairly burdening and may have to compensate for costs.

Rule 45

1. Ex: Retailers of products, marketing firms, etc.
2. Non-party "expert" reports may be used w/out formal affiliation, but must pay them (which creates affiliation; can be subpoenaed to testify, etc.)

f. Admissibility at Trial

i. Admissibility of discovery materials depends on rules of evidence. Docs obtained through disco may not be admissible unless "authenticated."

Rule 26(b)(1)

ii. Depositions sometimes used to impeach witnesses, when they say something different at trial than they did in dep.

g. Preservation of Evidence
   i. Failure to preserve can lead to sanctions.

h. Cost Shifting, 26(b)(2)
   i. Forcing the requesting party, rather than the answering party, to bear the cost of discovery. Esp. pertinent re electronic data. Should be considered only when electronic discovery imposes an undue burden or expense on responding party.

Rule 26(b)(2)

   ii. *Zubulake 7-factor test:*
      1. Extent to which request is specifically tailored to discover relevant info.
      2. Availability of such info from other sources.
      3. Total cost of production, compared to amount in controversy.
      4. Total cost of production, compared to resources available to each party.
      5. Relative ability of parties to control costs and incentive to do so.
      6. Importance of issues at stake in litigation.
      7. Relative benefits to parties of obtaining the info.

i. Privacy Burdens
   i. Privacy protection concerns trump tenuous relevance.
   ii. If party raises issue, can't later debate privacy concern.
   iii. Other confidentiality concerns may apply, such as <u>trade secrets</u> (Ex: *Coca-Cola Bottling Co. v. Coca-Cola Co.)*; need for info to make case may outweigh need for protection.

j. Expert Discovery
   i. Pls not entitled to discovery of experts not expected to testify at trial. **Rule 26(b)(4)(B)**

Rules 26(a)(2) and (b)(4)

      1. If retained or specially employed but not testifying, discovery of experts is unavailable unless exceptional circumstances exist (inability to obtain info from other sources).
      2. "Expert shopping" ok.
   ii. In-house experts who are not <u>retained or specially employed</u> are treated as ordinary witnesses. If work is in anticipation of litigation and prep for trial, disco analyzed under work-product doctrine.
      1. Requires determination of employee status (specially employed = insulation, vs. regular employee as witness).
   iii. Presumption against allowing discovery when opponent seeks info merely to avoid expense of conducting own tests (defeats rule of protecting trial strategy and "free riding").

iv. Experts can express opinions at trial, where normal witnesses cannot.
v. "Daubert motion" – attack on unfounded "scientific" theories in litigation. Must use scientific method to satisfy Daubert test. Has led to increase in grants of SJ.
vi. Testifying experts provide reports including all data or other info considered by the expert in forming her opinions. **Rule 26(b)(4)(A)**

26(b)(4)

a. Report must contain all facts and opinions expert will express at trial.
b. Atty efforts to prevent disclosure include limiting written communications with experts.
c. Other side can take expert's dep.

2. **26(b)(4)(C)**, parties seeking recovery pay fee of expert for responding to discovery.
3. Selection of experts – popular w/ trier of fact (grapevine research, academic publications, etc.)

k. Investigation / Fact Gathering w/o Judicial Assistance
i. No need to give notice/disclose to other side.
ii. Early investigation might make you sympathetic to key players; can later involve them in discovery.
1. No restriction in Rules on counsel's private inquiry into the facts underlying his client's claim.
a. Rules may be concerned with discoverability of statements and whether they can be used at trial.
b. Depositions used to perpetuate testimony, have it available for use at trial, and have witnesses committed to specific representations – different purpose than simple investigation.
iii. Note: Must get approval from opposing side if wishing to investigate/speak with that side's employees.

l. Exemptions from Discovery
i. Relevant, but privileged info is not discoverable.
1. Unless privilege holder has taken a litigation stance that puts them at issue.
ii. Attorney-Client Privilege
1. Falls under 26(b) rules but also at common law.
2. Protects confidential communications b/w lawyer and client in which client seeks legal advice.
3. Promotes full disclosure by client to lawyer.
4. Ex: *Upjohn v. U.S.*
a. Previously, majority rule was "control group" rule – upper division atty-client privilege, but not lower employees.
i. Stymied atty from getting accurate info.

ii. *Upjohn* liberalism rejected by some states.

b. Determined that lower level employees can have atty-client privilege when communicating relevant information to corporate counsel in order for counsel to render legal advice to client corporation.
   i. Broad determination of client as "anyone in the corporation" b/c potentially broad distribution of fault.
   ii. Consistent with underlying purposes of doctrine.
   iii. Does not place adversary in worse position, b/c only protects communications, not facts underlying those communications.

iii. Work Product Privilege

1. Ex: *Hickman v. Taylor*
   a. Case that established work product immunity to discovery.

Rule 26(b)(3)

   b. Protection of privileged matter obtained in preparation for / anticipation of litigation.
      i. Meant to preserve litigation strategy and lawyer's "mental impressions" about case.
   c. Ct. will weigh in favor of protection esp. if info can be obtained in some other manner by opposing counsel.
      i. Concern w/ opposing side "borrowing from adversary" (leaching off other side's efforts and expenses) w/out showing of necessity or hardship.
   d. Not absolute, as atty-client priv is supposed to be.
      i. Discovery permitted when mental impressions are pivotal issue in litigation and need for material is compelling.
   e. Material generated in ordinary course of business not considered to be developed in anticipation of litigation.
2. **Note: attys must still provide relevant and nonprivileged facts (just not communications, mental processes, etc.)**
3. Judge may redact docs *in camera* to separate fact from opinion.

m. Enforcing the Discovery Rules – Sanctions

Rule 26(g)

   i. Meant to deter non-compliance and make disco more efficient.
   ii. Failure to disclose or cooperate (such as ignoring order to compel discovery), esp. willful/deliberate, could lead to sanctions.

Rule 37

iii. Grossly negligent failure to obey order compelling disco may justify severe sanctions under **Rule 37**; frustrating efficiency of the system.
    1. Could include reimbursement of costs to opposing party, orders striking portions of pleadings, prohibition on introduction of some evidence, finding disputed issues in favor of other side.
    2. Sanctions serve threefold purpose:
        a. Preclusionary orders ensure party will not be able to profit from own failure to comply.
        b. Rule 37 strictures are specific deterrents seeking to secure compliance w/ particular order at hand.
        c. Courts free to consider general deterrent effect orders may have on instant case and other litigation if party is at fault.
    3. Need to base judgments on merits of case has constitutional stature; preferable to impose fines, etc. than to dispose of case based on technicalities.

H. Adjudication Before Trial: Summary Judgment

a. SJ overview, **Rule 56**

Rule 56

i. Opportunity for either party to win case before trial by showing there is **no genuine dispute as to any material fact** and that moving party is **entitled to judgment as a matter of law**.
    1. Transsubstantive – cuts across all kinds of cases.
    2. Premised on right of jury to decide fact issues; if no issues to decide, shouldn't go to jury (would prob suffer directed v. anyway).
        a. However, more or less discretionary; judge can almost always find a disputed issue of fact (despite "shall grant" text).
    3. Combat frivolous cases; preserve resources.
    4. Parties must show what evidence they have that would convince trier of fact to accept their version of events ("Put up or shut up").
        a. It is Pl's burden of persuasion to show breach by prima facie case. Once allocated to P, this burden doesn't shift.
            i. Must convince trier of fact at trial of the accuracy of factual assertions by preponderance of evidence.
        b. D's burden of persuasion for affirmative defenses.
        c. **Ct. must weigh inferences in favor of non-moving party**.

Rule 11

i. Means ct is evaluating evidence, though usually reserved for trier of fact.

5. Note of caution: MSJ can be tool for harassment, driving up non-moving party's costs. However, **Rule 11** should deter unsupported SJ motions.

ii. D. may bring in new facts to attack Pl's case (vs. MTD based on Pl's pleading alone). "Smoke out facts."

1. Burden of <u>production</u> can shift re producing evidence to show there are no issues.
   a. Does party have enough evidence in favor to go to trial in the first place?
   b. One side introduces evidence of issues.
   c. Other side responds attempting to negate issues.
   d. If not enough preponderance of evidence, there is issue of fact (meets burden).
   e. If preponderance of evidence presented that other side cannot respond to, summary judgment appropriate (shifts burden).
   f. See Affirmative Defenses section re proof burden.
   g. The fruits of discovery → more info → SJ
   h. Ex: Lawsuit filed after 7 years; D. can file MSJ by presenting 6 yr SOL.

b. Burden Shifting Summary

i. Point is to show that nonmoving party lack sufficient evidence to make out case > SJ burden starts w/ moving party.

ii. Old law: Strong burden on moving party to show no factual issues.

1. *Adickes v. Kress* – SJ hard to get granted.
   a. Where evidentiary matter in support of mtn does not establish absence of genuine issue, SJ must be denied even if no opposing evidentiary matter is presented.
   b. Moving party must discharge rigorous proof burden whether or not he would bear the burden of proof at trial. (D filing MSJ is heavy proof burden vs. D filing for judgment as a matter of law based solely on Pl's presentation of case).
      i. Otherwise, would conflict with liberal notice pleading standard.
2. Academic attack: Summary judgment and directed verdict should be analyzed the same way but with different timing.

iii. New law: Light burden on movant to <u>point to</u> lack of nonmovant's evidence (lack of genuine issue/fact), assuming nonmovant has burden of proof at trial.

1. *Celotex* – creates burden shifting paradigm, effectively overruling *Adickes*.
    a. After pointing out, if other side has b. of persuasion at trial, must put forth genuine issue to survive SJ.

    b. S.Ct. granted SJ and created new approach: burden of production transferred to party who has burden of persuasion at trial (normally on plaintiff).
        i. Pointing out deficiency in non-moving party's evidence in and of itself; advancing new evidence not required.
            1. Still opportunity for party to respond – trial principle. If non-moving party can come up w/ evidence, they will survive.
            2. Could have been decided other way; did 3 evidentiary items present question of fact?
2. Practical meaning of Celotex (and Matsushita – repudiation of slightest doubt; and Anderson – 1986 trilogy): SJ reinvigorated; much easier for Defs to file MSJs.
3. Implicit meaning: SJ available for all types of cases
    a. Question old song that SJ should be denied in negligence cases and in complex cases.
4. Plaintiff nonmovant needs to advance evidence showing issue of fact to get to trial.

c. SJ Evidence Rules
    i. Evidence must be admissible.
        1. Exception: nonmovant can advance hearsay, provided material is capable of conversion to admissible evidence by time of trial.
    ii. Rule 56(c)(4)
        1. Affidavits must be based on "personal knowledge."
        2. Affidavits must be premised upon "(specific) facts."
    iii. Affidavits of expert witnesses
        1. Admitted if pass muster under evidence rules.
        2. Must also pass tests of Rule 56(e).
        3. *Daubert* tests applicable at SJ stage.
        4. Fight fire with fire; if movant has expert affidavit, some decisions require nonmovant to respond with expert affidavit.

d. SJ Ethics
    i. Rule 56(g)

1. Court required to sanction where affidavit in bad faith or solely to delay (better view; text of rule).
2. Some courts read discretion into Rule to avoid sanctions.

ii. Rule 11

Rule 11

1. Not mentioned in Rule 56
2. Rule 11 "swallows" 56(g) – if violate bad faith rule, automatically violate Rule 11.
3. Common for def. to seek and obtain Rule 56 grant and follow it by seeking R. 11 sanctions on grounds that pl's case lacked any factual or legal support.
4. Common to draft letter warning of R. 11 to pls and permit pl. to withdraw under threat of sanctions.

e. Timing of the Rule 56 Motion

i. Timing permissive, hands off, w/in discretion of counsel.

1. Mtn made at any time until 30 days after the close of all disco.
2. Most common to move early and save on discovery and trial costs.
3. In theory could move late in case, even during trial.
    a. Local rules may mandate deadline.
4. Common to move after some or all discovery.
5. 56(d) is valuable time-out for nonmovant who lacks facts and is faced with defending motion.
    a. Mandates filing of affidavit by Pl. who seeks addt'l time for disco to oppose motion.
    b. Should set forth how add'tl disco will force mtn to be denied (vs. mere request for addt'l time).

f. Other MSJ cases – see chart.

g. Review concepts:

i. De novo: re-review of *all* facts and issues on appeal (as if considering question for first time; substitute new court's judgment for that of lower court).

ii. Sua sponte: issue considered of the court's own accord; not presented by parties.

iii. Res ipsa loquitur: the thing speaks for itself; less burden re proof of causation.

h. SJ vs. Judgment as a Matter of Law

Rule 50

i. Two kinds: "directed verdict" or "judgment n.o.v." (notwithstanding verdict)

ii. Occurs <u>after</u> trial, where SJ occurs before.

iii. Directed verdict decided by judge if judge finds no question of fact for a reasonable jury to decide, once all evidence is presented (either one or both sides).

1. Same for J.n.o.v., but after verdict is returned, if judge thinks they came to wrong decision.

iv. Standard of proof applied is identical for these motions.
v. Party w/o burden of production may move for judgment as a matter of law at close of opponent's case, w/o presenting any evidence of his own.

i. Partial Summary Judgment
i. Throws out specific claims but not entire case.

I. Judicial Supervision of Pretrial and Promotion of Settlement – Rule 16

a. Pretrial Conference
i. Allows judge to act in more activist/controlling role.
ii. Helps avoid surprise.
iii. Effects efficiency, accuracy, truthfulness, fairness.
iv. Some say Rule 16 unecessary b/c court already has inherent powers.
v. Can order parties to appear; discretion re case management; can sanction for lack of compliance.
vi. May be abuse of power to try and coerce settlement.
vii. May require that person appearing at conference has settlement authority; otherwise, wastes ct's time.

Rule 16

J. Settlement

a. Why do Defs settle?
i. More certainty, predictability.
ii. Avoid excess costs.
iii. Preserve image.

K. Establishing the Structure and Size of the Dispute

a. Proper Parties
i. Real Party in Interest
1. Insurance co's are often RPI b/c of claim subrogation by contract.
2. Can sue in own name or be joined to action.
3. RPI need not have beneficial interest so long as sufficient interest in outcome (such as trustee, guardian, etc.)

ii. Fictitious Names
1. *SMU v. Wynne and Jaffe* (pls cannot sue w/ ficticious names when issues are not of highly private and sensitive nature).
a. Bilateral analysis: If Defs have to be named and "embarrassed," shouldn't pls?
b. Compelling need to protect privacy = sometimes allowed.

iii. Joinder of Parties
1. Permissive Joinder of Parties, **Rule 20**

Rule 20

a. Joinder of multiple parties if they assert right to relief jointly, severally, or in alternative re same transaction or occurrence (or series) *and* if at least one question of law or fact is in common.
    i. Res Judicata compels mandatory joinder of claims (otherwise waived).
    ii. One usual common question of law or fact is **damages**.
    iii. Leads to efficiency and consistency of judgments.
    iv. creates convenient and efficient "trial package" b/c same evidence can be used.
    v. Series requires related issues.
        1. Logical relationship of T/Os.
b. "Plaintiffs Rule"
    i. Pls decide to join other Pls and to join various Defs when filing initial complaint.
        1. Reasons for adding multiple Ds: might not know who caused harm, conspiracy, Ds will engage in finger pointing.
c. Systematic pattern of occurrences satisfies joinder.
d. Possibility of prejudice to Ds could be remedied after discovery (Rule 20(b)).
e. Facts must be sufficiently similar so joinder is efficient.
f. Severing
    i. Mtns to strike attack joinder.
    ii. Judge can rule that joinder is not appropriate; may leave in all parties but sever for separate trials.

2. Compulsory Joinder of Parties, **Rule 19**

Rule 19

a. Timing distinction: Usually occurs post-complaint (3rd party pulled in, v. Pl. joining parties in original complaint).
b. Re "required" parties (used to be necessary and indispensable).
    i. Must be joined "if feasible."
    ii. Must be joined if court cannot otherwise afford complete relief, or
        1. If person would be unable to protect interest if not joined (e.g. issue preclusion effect on future claim), or

2. If not joining would leave existing party subject to multiple or inconsistent obligations.

iii. Ex: Joint and several liability – each party assumes part or whole risk, so court can accord complete relief and joinder is not necessary.

c. Strategy component: some parties if joined will destroy diversity, removing case from fed. ct.

b. Joinder of Claims, Rule 18(a)

i. Party in same suit can join as many claims as it has against opposing party.

ii. Crossclaims

Rule 18

1. New complaint, part of same litigation.
2. Re claims against parties on same side of original dispute (P v. D + O; crossclaim is D or O suing the other).
   a. Must be re same transaction or occurrence as original litigation.
   b. Begins new dispute w/ all same rules of compulsory and permissive counterclaim, etc.

iii. Counterclaims

1. D making claim against P.
2. Compulsory, 13(a).
   a. Rule-mandated res judicata. Must be brought if arising out of same transaction or occurrence, or will be barred in future.

Rule 13

3. Permissive
   a. Does not arise out of same transaction or occurrence; allowed but not required.
   b. May want to sue on this later in separate jurisdiction, etc.
   c. Not necessarily "convenient trial package."
4. Adding parties to counter or cross claims
   a. Permitted if in accordance w/ provisions of Rules 19 and 20 (same t/o).
   b. New party can also make counter/cross claims against original or 3d party plaintiffs.

iv. Impleader, "Third Party Practice," **Rule 14**

Rule 14

1. Right of defendant to bring in new party who is or may be liable for plaintiff's claim against D.
   a. D. becomes "third party plaintiff" seeking indemnity or contribution (joint tortfeasor).
2. 99% of derivative liability involves reluctant insurance companies.

3. If impleader is proper, 3d party will be found liable in same suit.
    a. Outcome of 3d party action must be direct result of determination of the main claim.
4. Ct. should generally allow unless will result in prejudice to other parties.
    a. Such as confusing issues for original Pl.
5. When "if, then" relationship is lacking, derivative liability is lacking – not appropriate for 14(a).
    a. i.e. 3d party defendant would be liable directly to plaintiff, not to 3d party plaintiff. Original P. should have sued 3d party, but did not.
6. **13(h)** permits late counter/cross claims. Not often used.

v. Intervention, **Rule 24**

1. Flip side of Rule 19; helps outsiders enter case of their own volition. Must be "timely."
    a. 24(a), intervention "of right" requires injury or future injury (interest impaired or impeded).
        i. Def. of compelling "interest" can be ambiguous.
            1. Must relate to property or transaction which is subject of the action.
            2. Can't be general/abstract interest.
        ii. *Direct* interest in outcome not required, but interest that could be impaired.
        iii. Parties enter unless already adequately represented by existing parties.
    b. 24(b), permissive intervention – ct has discretion related to original parties' rights (re delay or prejudice).
        i. More liberal if pervasive public interest.
2. Used by public interest groups, govt., or by business w/ substantial interest in outcome.

Rule 24

vi. Interpleader, **Rule 22**

1. Permits person faced w/ conflicting claims to a **limited fund or property** (the "stake") to bring all claimants into single proceeding.
    a. Interpleader wants court to declare who is entitled to fund, or if fund-holder doesn't have to pay.
    b. Limited sum = adversity.
    c. Minimal diversity req'd – b/w two or more claimants.

Rule 22 (complete diversity and amount more than $75,000)

U.S.C. §1335 (statutory interpleader allows stakeholder to have broader federal jurisdiction: minimal diversity, $500 or more)

2. Meant to avoid inconsistent judgments or multiple liability.
3. Two sources: statutory and rule interpleader. Rule 22 interpleader permits general federal court jurisdiction.
4. Efficiency problems:
    a. Interpleading not efficient for pls who are not from state where interpleader claims are being consolidated.
    b. Judge should use discretion.
5. Some states don't permit direct action suits against insurance cos until judgments are obtained against the insured; may take a while.

vii. Class Actions, **Rule 23**

Rule 23

1. Class of Pls against Def. or against Class of Defs.
2. Problem of Representation
    a. Adequate rep important b/c class actions have res judicata effect on class members (even if class members haven't had notice).
        i. Due process implications.
        ii. Protection of interests of absent parties must be preserved.
3. Adequacy of Counsel
    a. Normal lawsuit: client is principle; atty is agent (client calls the shots).
    b. Class action: atty is principle, client is agent.
4. Liberalization
    a. Much more common now, incl. tort / products suits. Recent slowing b/c of number of large suits.
    b. Seen as deterring big companies' wrongful conduct (return to each indiv. Pl. may be small, but important to hold cos. accountable).
    c. "Asymmetrical stakes" – esp. in consumer CAs.
5. Certification
    a. Critical part of case; should happen as soon as possible.
    b. Rule 23(a): constitutional req's. All (b) types must first satisfy (a). Standards for Certification:
        i. Numerosity
        ii. Commonality
        iii. Typicality
            1. Pls diverse b/c of lifestyle differences; conditions are unique. This is why cts sometimes resist class treatment.

Rule 23

iv. Adequacy of Representation

6. Rule 23(b) – Types of class actions
   a. Rule 23(b)(1) class actions
      i. Mandatory – based on necessity to avert unfairness.
      ii. No notice requirement.
      iii. (b)(1)(A)
         1. Infrequent.
         2. Re <u>unfairness to D</u> who may be subjected to inconsistent results and incompatible standards if multiple indiv. suits (dif relief could be sought by dif pls).
      iv. (b)(1)(B)
         1. Limited fund
         2. No right to opt out
         3. Based on <u>unfairness to missing class members</u> if there were indiv. suits.
   b. Rule 23(b)(2) class actions
      i. "Mandatory" – opt out not permitted.
      ii. Focuses on conduct of party opposing the class.
      iii. Money usually not involved; can't "predominate." Damages usually injunctive/equitable/declaratory.
      iv. No notice requirement.
   c. Rule 23(b)(3) class actions
      i. Money involved (damages, torts).
      ii. Most common kind of CA.
      iii. **Class action must be superior to other forms.**
      iv. **Class issues must predominate over individual issues.**
         1. Indiv: damages, causation.
         2. Class: tortious conduct by D., etc.
      v. Notice requirement:
         1. Should let parties know what case is about, atty fees, enough info to object, opt in/out option, etc.
7. State & Federal CA Issues
   a. Multidistrict Litigation (MDL) is way to discuss same issues when can't consolidate state court cases.

   b. If can't certify nationwide class, narrow and file state by state.
   c. Class Action Fairness Act requires minimal diversity (just two claimants) in order to bring case in federal court – Defendants prefer b/c gets rid of local prejudice.
   d. State courts can hear federal cases; defs might argue common issues of law don't predominate.
8. Class action settlement
   a. Fairness hearing is conducted by judge, based on evidence presented by the parties.
   b. Must be approved by court (not true of most non-class cases where joint MTD is granted).
   c. Can have effect of preventing meritorious cases from going to trial.
9. Settlement classes
   a. Settlement before suit is even filed.
   b. Prob if absentees don't have adequate voice.
   c. May apply to both present and future claims (global settlement).
10. Class action objectors
   a. Most common objection is inadequate compensation.
   b. Objectors can introduce new facts.
      i. Play fairness role at settlement hearing; bring judges back down to fact level.
   c. "Free riding" attys can block settlement through extortion; red flags are canned objections and client's lack of knowledge about case.
   d. Pre-*Devlin*, had to intervene to object; now objectors can appeal w/o formal intervention.
   e. Some "white hat" objectors:
      i. Public interest groups, state AGs, guardians
      ii. Guardians may be appointed by judge; ex: separate attys for future claimants, subclasses, absent class members.
      iii. Creates system of monitoring of original attys who purport to represent the class.
      iv. Public interest pls groups heavily funded by pls bar, yet fight pls attys re high fees.

Rule 23(e)

11. Mass tort cases
   a. Not class actions, but similar.

b. Ex: 9/11 workers. Settlement needed approval from 95% of victims (Defs want as many as possible so won't have as many single future cases).
    i. Exceptional non-CA case in which judge held fairness hearing about settlement.

L. Preclusive Effects of Judgments

a. Apply to court decisions, admin decisions, arbitration: all "day in court."
b. Affirmative defenses; must be pled and proved by defense.
c. **Res Judicata – claim preclusion**
    i. Sometimes refers to totality of preclusion doctrines; sometimes refers specifically to claim preclusion.
    ii. Purposes: Certainty of judgment
        1. Repose for Defs.
        2. Final judgment is termination of claim on merits (incl. default judgment); leaves nothing else to be done. RJ preserves integrity of judgment.
            a. If mistake in Case 1, atty should correct on appeal, not w/ new case.
        3. Subsequent defenses, if not alleged in first case, are of no legal consequence.
        4. Applies to same T/O, or series of Ts (same grouping of facts).
            a. If same occurrence created both claims, RJ applies.
            b. What "could have been" litigated in first action, not what <u>was</u> litigated.
        5. *Or*, same primary legal right and duty (not used much in current law; based on technical COAs).
        6. Pls should allege claims in the alternative in first suit; multiple legal theories based on same set of facts.
        7. RJ is re new cases, not appeals of same case.
    iii. RJ enforces prohibition against "splitting a COA"
        1. Not suing on all theories arising out of matter and then attempting to bring second suit.
        2. Should there be exceptions for policy reasons?
            a. Change in law does not affect RJ.
    iv. "Other action pending"
        1. Bringing same case twice in different jurisdictions is forum shopping, not RJ.
    v. "On the merits"
        1. Restatement allows second case on same claim if essential allegation was missing, so first case not heard and decided on the merits. "Gloss" upon accepted rule that failure to state a claim is binding unless dismissed explicitly w/o prejudice.

a. Court could allow amendment before dismissal.
b. Rule 41(b): A judgment under 12(b)(6) shall be treated as judgment on the merits.

vi. Exceptions:
1. Procedural dismissals (lack of jurisdiction, improper venue, nonjoinder or misjoinder of parties).
2. Voluntary dismissal w/o prejudice or directed dismissal w/o prejudice.
3. Specific raising of bar by statute or rule of court.

vii. Cross-jurisdictional application
1. Constitution "Full faith and credit"– states honor laws / judgments of sister states.
2. Final judgment in state courts also binding on federal courts.
a. Except, state-court judgment does not usually preclude litigation of exclusive federal jurisdiction claim.
3. No statute governing whether state court should honor federal court judgment – binding "if they're fair."

d. **Collateral estoppel – issue preclusion**

i. Subset of preclusion doctrines.
1. Bars issues central/necessary to claim already litigated.
2. Issues are elements of larger claims / causes of action.
3. Second action between same parties allowed if different claim or demand; estopped only as to issues already litigated.

ii. Qs of law or fact:
1. CE does not apply to unmixed questions of law, but does apply to mixed questions of law and fact (fact, question, or right distinctly adjuged).
a. Law is a conclusion we give to a set of facts.

iii. Independent grounds for prior judgment:
1. When prior judgment rests on several independent, alternative grounds, judgment is not conclusive as to the facts which were necessarily found in order to establish only one separate ground (not subject to appeal safeguards).
2. If facts are found to prove up one issue, but are not fully examined as to another issue which was not key to the judgment, the latter issue cannot be estopped in a later case based on those facts.
a. "Ultimate facts" v. evidentiary facts.
3. "Trap for the unwary" to use issue preclusion when there are multiple issues where all might not be precluded.

e. **Persons Bound by Judgement**
   i. Nonparty preclusion
      1. Traditional view is that RJ and CE bind only parties and those in privity with them (person so identified that he represents same legal right).
         a. Six factor test for adequate/virtual rep at p. 1173.
         b. Adequate rep must usually be expressly "on behalf of" P2 by P1.
   ii. Mutuality of Estoppel
      1. Common law: same exact parties needed for estoppel to apply.
      2. Did party against whom issue preclusion is asserted already have a day in ct. on this issue? (Bernhard doctrine).
         a. Full and fair trial / use of offensive CE determined by cts on case-by-case basis.
         b. If case wasn't jury trial, or some other procedural anomaly, Ds should be allowed to relitigate issue.
         c. Concerns w/ non-mutual CE: 'wait and see' Pls are unfair to Ds who are found liable (may not have vigorously defended if damages at stake were low in case 1).
      3. Criminal cases – proof must be beyond a reasonable doubt, so CE from crim judgment can be used in civil cases (though defense wining on slightest doubt should not preclude civil cases).
   iii. Collateral Estoppel Against the Government
      1. Exception to usual rule: Nonmutual CE does not apply against govt. to preclude relitigation of issues – too many cases against govt. w/ too many variabilities.
         a. Would thwart development of law by freezing decisions.