1. **Personal Jurisdiction**
   1. There are two branches of jurisdiction: subject matter jurisdiction and personal jurisdiction. ***Subject Matter Jurisdiction*** involves the court’s power over a particular ***type of case. Personal jurisdiction*** involves the ability of a court having SMJ to exercise power over a ***particular defendant or item of property***.
   2. **Limitations on Personal Jurisdiction**
      1. The exercise of personal jurisdiction must be authorized by statute ***and*** constitutional.
      2. **Statutory Limitations**
         1. First place to look to determine whether the court has properly exercised personal jurisdiction is usually state law. If no state statute grants the court power over the parties, court lacks PJ
      3. **Constitutional Limitations**
         1. The Due Process Clause of the Constitution places two restrictions on the exercise of PJ.
            1. Defendant must have such contacts with the forum state that the exercise of jurisdiction would be fair and reasonable
            2. Defendant must be given appropriate notice of the action and an opportunity to be heard
      4. **PJ in Federal Courts**
         1. FRCP 4 provides that, absent some special federal statute, each federal court must analyze PJ ***as if it were a court of the state in which it is located***. In most cases therefore, the assessment will be the same as in state court.
   3. **Three Types of PJ** 
      1. **In Personam Jurisdiction**
         1. In personam jurisdiction exists when the forum has power over the person of a particular defendant. (Jurisdiction over a plaintiff is generally not an issue because the plaintiff accedes to the court’s jurisdiction by bringing suit in that court.)
      2. **In Rem Jurisdiction**
         1. Exists when the court has power to adjudicate the rights of all persons in the world with respect to a ***particular item*** of property. This jurisdiction is limited to situations where the property is located within the physical borders of the state and where it is necessary for the state to be able to bind all persons regarding the property’s ownership and use.
      3. **Quasi In Rem Jurisdiction** 
         1. Exists when the court has power to determine whether particular individuals own specific property within the court’s control. Unlike in rem jurisdiction, however, it does not permit the court to determine the rights of all persons in the world with respect to the property
         2. A second type permits the court to adjudicate disputes other than ownership based on the presence of the defendant’s property in the forum
         3. **Defendant is not bound personally**
            1. The basis of a court’s power to exercise quasi in rem jurisdiction is the property within the state. The judgment does not bind the defendant ***personally*** and cannot be enforced against any other property belonging to the defendant
   4. **When do courts exercise In Personam Jurisdiction? (Statute)**
      1. **Physical Presence at Time of Personal Service** 
         1. Most states grant their courts in personam jurisdiction over any defendant who can be served with process within the borders of the state, no matter how long he was present (i.e., even if merely passing through).
         2. **Burnham v. Superior Court (**PJ, General Jurisdiction**)**
            1. The SCOTUS upheld this type of action, allowing a transient defendant to be served with process for a cause of action unrelated to his brief presence in state.
            2. Physical presence

Anytime a person is in state, can serve them

Burnham is served while visiting kids in CA

Brennan applies minimum contacts test, when in state one is availing themselves of road, fire dept., economy, and police

* + - * 1. Presence and Service= GJ
    1. **Domicile**
       1. Most states grant their courts in personam jurisdiction over persons who are domiciliaries of the state, even when the defendant is not physically within the state when served the process
       2. **Defined**
          1. Domicile refers to the place where a person maintains her permanent home. Domicile is the place a person has chosen through presence, coupled with the intention to make that place their home
       3. **Citizenship**
          1. A US citizen, even though domiciled abroad, is subject to PJ in the US.
    2. **Consent** 
       1. Express Consent
          1. A party’s express consent to the jurisdiction of local courts, whether given before or after suit is commenced, serves as a sufficient basis for in personam jurisdiction
          2. Failing to contest in a timely manner (FRCP 12 (b) (2) + 12(g) +12(h)
          3. By Contact
       2. Implied Consent
          1. When the state has substantial reason to regulate the in-state activity of a nonresident of the state, it may provide that by engaging in such activity, the nonresident thereby appoints a designated state official as his agent for service of process
          2. Statute names the Secretary of State as the agent for service of process for any corporation doing business in the state
    3. **Long-Arm Statutes**
       1. Defendant has committed acts bringing him within the forum state’s long arm statutes
  1. **Constitutional Limitations on In Personam Jurisdiction**
     1. Once it is determined that a state has a statute that allows the court to exercise in personam jurisdiction over the parties before it, the constitutionality of the exercise must next be determined. There are two components of the constitutional aspect: contacts with the forum state and notice.
  2. **Sufficient Contacts with the Forum State**
     1. **Traditional Rule: Physical Power**
        1. Traditionally, jurisdiction over a person (or res) was a consequence of the state’s physical power to carry out its judgment; i.e. it was based on the power to arrest the person to force compliance with a judgment. Accordingly, the SCOTUS upheld exercises of jurisdiction whenever the defendant was served with process within the forum state (*Pennoyer*). The court later expanded the states’ physical power to extend not only to those defendants who were served within the state, but also those who consented to the state’s power or who were domiciled in the state, regardless of where they were served
     2. **Pennoyer v. Neff**
        1. Presence
           1. Personal service of notice
           2. Consent

Explicitly

By waiving right to contest PJ

Failure to contest it in a timely manner

By contact

Implicitly

Statute names the Secretary of State as the agent for service of process for any corporation doing business in the state

* + - 1. Property in state
         1. Attachment at the outset of suit
      2. Pennoyer Rule: Presence, consent, property
  1. **Modern Due Process Standard: Contact, Relatedness, and Fairness**
     1. **Personal Jurisdiction Inquiry Today**
        1. Easy Cases: Is the defendant’s
           1. Domicile or
           2. State of incorporation or principle place of business in the forum state?
        2. Or has Δ consented to PJ?
        3. If not, is there Specific Jurisdiction through the minimum contacts test? (*Int’l Shoe*)
           1. Purposeful Availment Prong

Are there minimum contacts between the Δ and the forum state?

Did Δ purposefully avail itself of the benefits and protections of the forum’s laws?

Δ’s activities create a “substantial connection” with forum state. Purposeful in-state contacts

Stream of commerce

What limits PJ?

Must be foreseeable that product will contact state

Unilateral activity of another does not make a contact

Targeting, marketing, commercial benefit, etc. (*Nicastro*)

* + - * 1. Reasonableness Prong:

Is it reasonable to hale the Δ into court in the forum state?

Balancing of Interests:

Burden on Δ

Interest of forum state in providing a forum for redress for its residents

Plaintiffs interest in obtaining relief

Interest in efficient dispute resolution

Interest in fundamental substantive social policies

* + - * 1. Does the cause of action arise out of the Δ’s contacts with the forum state?

If strong relationship and strong contacts-> PJ

If weak relationship and contacts-> no PJ

*The going gets tough when there are strong contacts and weak or no relationship, or weak contacts and strong relationship*

If No relationship between the cause of action and Δ’s contacts, is there **General jurisdiction**?

Are there sufficient “continuous and systematic contacts” between the Δ and forum state?

Domiciled in forum state (individual)

Principle Place of Business

State of Incorporation

Presence? *Goodyear/Daimler/Burnham*

Corporations: When there are such sufficient “continuous and systematic contacts” between Δ and the forum state as to render a corporation “at home.”

Is Physical presence enough?

*Burnham/Pennoyer*

Has Δ consented to PJ?

Explicitly or implicitly?

When does a Π consent to a forum selection Clause? (*Carnival Cruise*)

What if it’s a contract of adhesion?

What if the forum were North Dakota?

What if the plaintiffs were reasonably unaware of the clause?

* + - * 1. *Test measures when it is fair to assert personal jurisdiction over an* ***absent, unwilling* Δ**
    1. **International Shoe Co. v. Washington (Minimum Contacts Test)**
       1. No longer was power controlled solely by whether one of the traditional bases of presence, residence, or consent was present
       2. Focus on whether sufficient minimum contacts exist between the defendant and the forum so that maintenance of the suit against the defendant does not offend “traditional notions of fair play and substantial justice.”
          1. Nature of Δ’s contact with forum state

Relationship Δ has created with the forum state through activities in or affecting the forum state

Continuous and systematic versus isolated and sporadic

Extent to which the Cause of Action relates to/arose out of that relationship

* + - 1. Nature of Shoe’s contacts with forum state
         1. The relationship that the Δ has created with the forum state through activities in or affecting the forum state
         2. Continuous and systematic versus isolated activities AND
         3. Extent to which the cause of action relates to/arose out of that relationship
      2. **Absorbing *In Rem* Jurisdiction**
         1. *International Shoe* provided a new framework for thinking about *in personam* jurisdiction over corporations.
         2. *In Rem*: Describe cases in which ownership of the property itself is at stake
         3. *Quasi In Rem*: Describe cases in which the property is used only as a “jurisdictional hook” to allow litigation of a claim not related to the property
      3. **Test:** Assesses the Δ’s contacts with forum state, ***and*** whether the cause of action arose out of those contacts (Specific PJ)
    1. **Contact**
       1. *International Shoe* requires that the defendant have “such minimum contacts” with the forum that the exercise of jurisdiction would be fair and reasonable. In considering whether there are such contacts, a court will look at two factors: purposeful availment and foreseeability
       2. **McGee (**Minimum Contacts/States Interests**)**
          1. Conducting one business activity in a forum may be enough
          2. Provides the idea that the state’s interests in providing a forum for redress is a relative factor
          3. Π was a resident of CA receiving Life Insurance from Δ, Δ had no office or agents in CA, Π died and Δ refused to pay claiming he committed suicide
          4. Modernization and nationalization of our economy has made it appropriate for the Π to bring suit in CA even though Δ had no connection to the state
       3. **Purposeful Availment**
          1. Δ’s contact with the forum must result from her purposeful availment with that forum. The contracts cannot be accidental. Δ must have reached out to the forum in some way, such as to make money there or use roads. The court must find that through these contacts the defendant ***purposefully availed*** themselves “of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws” (*Hanson v. Denckla*)
          2. **Hanson v. Denckla (Purposeful Availment)**

Defendant may not be called upon without minimum contacts with the state

Trust created in PA by Mrs. Donner, established in Delaware, with Delaware Bank as Trustee. Mrs. Donner moved to Florida, dies. Court in Florida cannot acquire jurisdiction over Delaware Trustee

Mrs. Donner moving to FL does not mean the Δ has availed itself to FL

* + - * 1. **McGee & Hanson:** Δ’s contacts

Purposeful availment of benefits & protections of the state’s laws/purposeful activity in the state

Unilateral activity by Third party doesn’t constitute purposeful availment

The state’s interest in providing a forum for redress for its citizens (McGee &CA)

* + - * 1. **Shafer v. Heitner (Expansion of Minimum Contacts/”kills” *quasi in rem*)**

Expands minimum contacts test to In Rem

Narrow Holding: Attachment of instate property does not automatically confer personal jurisdiction over a non-resident. Have to use the minimum contacts test. Quasi In Rem is no longer an automatic way to get PJ

For things like stock, you can’t get PJ just because of the property

Deeper analysis of the level of contacts

Can property provide basis of PJ over a non-resident?

Not automatic, property becomes (transformed into) the level of interest that the Δ has in the property

Broad Holding: Quasi in Rem is dead, from now on minimum contact test is used for ALL assertions of PJ

What kind of suits does the minimum contacts test apply?

All of them

Or at least to *quasi in rem* cases, in which seizure of in-state property creates personal jurisdiction over the owner, even if the suit is unrelated to the property

Instead, the property becomes merely a contact with the forum state

* + - * 1. **Burger King v. Rudzewicz (Sliding scale between P/A & Reasonableness)**

SCOTUS says entering a long term agreement with an organization based in Florida and doing training in Florida means the Δ has availed himself to be haled in Florida

i.e. Flordia Law governs even though the specific franchise owned by the Δ’s is in Michigan

If it is substantially fair to assert JD over Δ, need fewer contacts than otherwise would

* + - * 1. **International Shoe’s Analysis applies to almost every case**

Broadens PJ with a minimum contacts test, assessing:

Defendant’s contacts with forum state, and

Whether the cause of action arose out of those contacts

If you have land in a state and are sued for a car crash in another state, you cannot be sued in the state you own land in because CoA has not arose out of contact of owning land

If the contact is weak but the CoA is strong, there is still PJ

Depends on the sliding scale of strength of contact and CoA

* + - 1. **“Stream of Commerce” Cases**
         1. Great difficulty in assessing purposeful availment in “stream of commerce” cases. Typically arise when Δ manufacturers its product in State A (or even Country A) and sells them to a second party in State B, thereby placing the product in the stream of commerce. The product winds up in another state (State C) and causes injury therein.
         2. Question of whether Δ ***purposefully availed itself*** of State C
         3. ***Merely placing an item in the stream of commerce,*** by itself, ***is not a sufficient basis*** for personal jurisdiction
         4. ***It is unresolved*** whether (probably unlikely that) placing an item in the stream of commerce ***with the knowledge or hope*** that it will wind up in a particular state would be a sufficient basis for PJ.

Look for intentional targeting!

Connection between Δ and forum state, fairness to Δ, states interest in providing a forum for its citizens

* + - * 1. Foreseeability, knowingly availing one selves to jurisdiction of the state if it is clear a corporations products will end up in a certain area’
        2. Intent to sell/make profit
        3. **World-Wide Volkswagen (Purposeful Availment & Stream of Commerce)**

Addresses how easy or hard it is for a person to establish minimum contacts and personal availment

Audi makes car in Germany, Nat Distributor in CA receives car, sends it to WW who sells it to Seaway, at which time Π buys it

Π gets in car crash in OK and tries to sue in OK invoking PJ

WW and Seaway challenge PJ in OK

Expands PJ all the way to the manufacturer, however there are limits

Must be foreseeable that product will end up in the state

Cannot be unilateral activity of consumer which takes it into the state

* + - * 1. **Importance of *World Wide***

Case tightens the test for jurisdiction

Seaway and WW could “foresee” their cars might end up in Oklahoma. Not enough however. The dealer and regional distributor did not purposefully avail themselves- did not seek out, by advertising and in other ways,- The Oklahoma Market, jurisdiction does not lie.

* + - * 1. **McIntyre Machinery v. Nicastro (Stream of Commerce/ P/A)**

Requires targeting of a certain area to establish PJ

Generally targeting of the US as a whole is not intent to target the state

* + - 1. **Foreseeability** 
         1. In addition to purposeful availment, the contact requirement of *International Shoe* requires that it be foreseeable that the defendant’s activities make her amenable to the suit in the forum. The defendant must know or reasonably anticipate that her activities in the forum render it foreseeable that she may be “haled into court” there.
         2. Ex. A national magazine is probably subject to in personam jurisdiction for libel cases in every state in which the magazine is marketed. Its publishers may reasonably anticipate causing injury in every state in which the magazine is sold, and thus should reasonably anticipate being haled into court in each state.
         3. **Relatedness of Claim to Contact**

Important factor: whether the claim asserted against the defendant arises in some way from defendant’s contacts with the forum. If it does, the court is more likely to find that jurisdiction is fair and reasonable. This assesement requires the court to determine the nature and quality of the defendant’s contacts with the state

**Claim arising from Activity in the State (Specific Jurisdiction)**

If the Δ’s instate activity is less than systematic or continuous (e.g. isolated acts), in personam jurisdiction over the defendant will be proper only for causes of action arising from ***that in-state activity***. i.e. the court will have specific jurisdiction

**“Essentially At Home” in State (General Jurisdiction)**

GJ- in personam jurisdiction for ***any*** CoA against the Δ , whether the CoA arose from the in-state activity or from activity outside the state- requires that a Δ engage in systematic and continuous activity such that the Δ is ***essentially at home* in the state** (*Daimler v. Bauman*)

* + - * 1. **MacIntyre Machinery, LTD. V. Nicastro (Stream of Commerce/P/A)**

Stream of commerce refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that description its meaning is far from exact

Principle inquiry into cases of this sort is whether the defendant’s activities manifest an intention to submit to the power of a sovereign

MacIntyre is from England, Nicastro’s injury occurred in NJ

Three concepts of availment:

Kennedy: Must target NJ specifically through marketing and activity (aim/target)

Breyer: Minimum Contacts (*International Shoe*)

Ginsburg: Broad, if you’re targeting nationally and your product goes into a state and injures someone, you should expect to be hailed there. Notions of fairplay and substantial justice

* + - * 1. **Abdouch v. Lopez (Website/Interactivity Test)**

Sliding Scale Test

“Interactivity Test”

Between website and customer v. passive website (provides info, cannot interact)

Transmission of personal info

Activity between website and consumer=commerce

Commercial v. noncommercial

More commercial, more likely to find PJ

Abdouch Test: How do you intend to affect a forum state, must aim at state knowing you will have effect

Interactivity and aiming

Gives us a test to evaluate website using interactivity and evaluating the relationship between defendant and forum state

\*Connection with CoA\*

* 1. **Waiving PJ**
     1. Can waive it
        1. Fairness of the individual
        2. State’s interests and territorial boundaries, however a person may waive this and allow a state to extend its power over oneself

1. **General Jurisdiction** 
   1. General Jurisdiction deals with circumstances when the state has PJ over a Δ even though there’s no connection to the CoA
   2. Corporation can be sued in PPB (home office) and Place of Incorporation
   3. Instead of suing a corporation, a person can be sued where they are domiciled
   4. No need for connection between CoA occurring and where corporation is incorporated
      1. Regardless absence of connection between forum state and Δ
   5. **Specific v. General**
      1. Specific requires a link between continuous and systemic contacts and the CoA
         1. Connection between forum state and CoA
      2. General does not need the CoA
      3. Matter of degree, general needs far higher level
         1. Absence of connection between CoA and forum state, need some type of pervasive contact such as PPB or conducting substantial amount of business within forum state
   6. **Goodyear v. Brown (**GJ**)**
      1. Bus accident outside Paris kills two 13 year old boys from NC, parents attribute accident to defective tire manufactured in Turkey at a plant or foreign subsidiary of Goodyear tire and Rubber Co.
      2. Commenced action in NC naming Goodyear USA and 3 of its subsidiaries (operating in Turkey, France, and Luxembourg
         1. Goodyear USA does not contest jurisdiction, however the others do
      3. Court may assert GJ over foreign corporations when their affiliations with the State are so “continuous and systematic as to render them essentially at home in the forum state”
         1. The fact tires made their way to NC does not establish GJ in NC
      4. Foreign subsidiaries attenuated connection to state fall far short of continuous and systematic general business contacts
   7. **Daimler AG v. Bauman (**GJ**)**
      1. Inquiry is not whether the defendant engaged in systematic and continuous activity in the state, but rather whether the activity renders the defendant ***essentially at home*** in the state
      2. Employee of Daimler Arg. V. Daimler Germany
      3. Forum State: CA
      4. MB USA, subsidiary of Daimler is in CA with regional sales office, largest supplier of luxery vehicles in CA
         1. PPB for MB USA is NJ
      5. MB USA is only 2.4% of Daimler’s sales however
         1. Therefore Daimler is not connected to CA

Gives us a test to evaluate website using interactivity and evaluating the relationship between defendant and forum state

\*Connection with CoA\*

* 1. **Carnival Cruise Line (**Forum Selection Clause**)**
     1. Forum Selection Clause: Clause in ticket contract that states if there is a lawsuit it must be settled in Florida
        1. Court upholds as constitutional
        2. Dissent: Can’t have a forum selection clause without bargaining
     2. Law in Economics Argument: BY upholding a Forum Selection Clause, provides Carnival Cruise with predictability, means they can lower ticket prices for customers

1. **In Rem Jurisdiction & Quasi In Rem**
   1. **In Rem Jurisdiction**
      1. In Rem adjudicates rights of all persons with respect to property located in the state. An in rem judgment does not bind the parties personally, but is binding as to the disposition of the property in the state
      2. In in rem actions the basis of jurisdiction is the presence of the property in the state. The state has a great interest in adjudicating the rights of all the world regarding this property. Therefore, the presence of the property in the state is constitutionally sufficient for the exercise of jurisdiction over the property
         1. **No Jurisdiction if Property Not Located in State**
            1. A court has no in rem power over property outside the state e.g. in settling a decedent’s estate, the court has no in rem power over property in other jurisdictions
      3. **Note:** Early view held the attachment of property, when supplemented by publication of notice in a local newspaper or by posting notice on the property, would give all interested parties sufficient notice. Now the requirements of *Mullane* apply (see Below).
   2. **Quasi In Rem**
      1. Permits a court without in personam jurisdiction to determine certain disputes between a plaintiff and defendant regarding property when the property is located in the forum state
      2. Before 1977, a state clearly had power over all persons and property found within its borders. A defendant with no other connections to the state could be sued in the state for ***any*** dispute simply because he owned property there. However, in 1977, the SCOTUS held that the ***minimum contacts standard*** is applicable to ***every*** exercise of jurisdiction. The mere presence of property within a state is not itself sufficient to permit a court to exercise quasi in rem jurisdiction over property in a quasi in rem action (*Shaffer*)
2. **Notice, Service of Process**
   * 1. In addition to the requirement that the defendant have such minimum contacts with the forum to render the exercise of jurisdiction fair and reasonable, due process also requires that a ***reasonable method be used to notify the defendant of a pending lawsuit*** so that she may have an opportunity to be appear and be heard. Due process requires that notice be “reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to prevent their objections”
     2. **Traditional Methods of Personal Service Satisfy Due Process Notice**
        1. Any traditional methods satisfy the notice requirement
           1. Leaving papers with responsible person at defendant’s residence or place of business
           2. Delivery to an agent appointed to accept service; or delivery by registered mail
     3. **Requirement that Agent Notify Defendant**
        1. If an agent is appointed by contract, in a case where Π chose agent for his own benefit, or agent is appointed by operation of law, the failure of the agent to notify the Δ will prohibit jurisdiction
     4. **Requirements for Cases involving Multiple Parties or Unknown Parties**
        1. In *Mullane* an action was brought against a number of trust beneficiaries scattered throughout the world. SCOTUS held that the Constitution did not require personal service on each beneficiary since the cost would have been prohibitive
        2. However, every beneficiary had to be notified by the ***best practical means*** available. Thus, those whose addresses were known or could be reasonably ascertained had to be notified by ordinary mail, others without known addresses to be notified by publication
     5. **Knowledge Notice by Mail was NOT received**
        1. If a party knows that the notice by mail was not received, he may not proceed in the face of such knowledge if practicable alternatives to apprise the Δ of action exist
   1. **PJ v. Notice**
      1. *Due process requires both*
         1. Sufficient notice doesn’t guarantee that the court has PJ over the Δ
         2. Existence of PJ doesn’t guarantee that the Δ has received sufficient notice
   2. **Rule:** Notice must be sensible and reasonable n
      1. Must be fair, comport with traditional notions of fair play and substantial justice
         1. Reasonable notice
      2. Publication meets the box test of notice but is not reasoable
   3. **Mullane v. Central Hanover Bank and Trust (Notice)**
      1. Trust: A pot of money put in a trust for a beneficiary or set of beneficiaries
      2. Trustee, often a bank, is appointed to manage the trust for beneficiaries
         1. Stringent duty to manage the trust well, as if it was his or her own money
      3. Mullane raises the issue of notice
         1. Distinguished from PJ
         2. If you have notice, doesn’t mean you have PJ
      4. Notice provides Due Process, as people must be dually notified that action is being taken on their property
         1. Without this, they lose the right to litigate
         2. Court suggested that due process did not always require personal service of process, only reasonable efforts
            1. Depends on all the circumstances
            2. Shift from bright line rules
            3. Tension between the requirement for individual notice and an emphasis on practicality
      5. **What Sort of Notice Does Mullane Require for:**
         1. Known Beneficiaries: Those who can be identified and located with reasonable effort
            1. Personal Service, mail
         2. Unknown Beneficiaries: those who cannot
            1. Publication
         3. Bonus Points: What difference does it make in evaluating whether notice is adequate if there are lots of unknown beneficiaries rather than just a few
   4. *Mulane* destroyed the distinction between “constructive” notice that sufficed for *in rem* cases and personal service required for *in personam* cases
      1. All cases required a form of notice that was sensible under the circumstances and reasonably likely to actually inform the defendant of the lawsuit
   5. **Long- Arm Statutes**
      1. Limitation on where a lawsuit can be brought, relating to PJ
      2. Provide an additional limitation beyond constitutional boundaries explored through PJ and GJ
      3. All they do is say: “Check whether jurisdiction of a court falls within constitutional limitations as well as statutory limitations”
3. **Subject Matter Jurisdiction**
   1. The federal courts have been given SMJ over controversies between citizens of different states, even though the controversies do not involve questions of federal substantive law, in order to protect an out-of-state party from possible local bias in state courts
   2. **Test**
      1. Venue
         1. Has congress or state legislature further limited the ability of the court to take the case
         2. Is statutory. Congress or state legislature lays this out
      2. Notice
      3. SMJ
         1. Whether federal or state court has power over this type of claim
      4. PJ
         1. Whether court has power over particular Δ
      5. Federal Question?
         1. Is CoA created by federal law
         2. Federal issue as essential ingredient?
      6. Diversity?
         1. Complete diversity of citizenship
         2. 75k+ (Amount in Controversy)
      7. Matter in controversy
   3. **Procedure as Strategy**
      1. If there is con current jurisdiction, plaintiff can make the first move, choosing to file in state or Federal court
      2. However, if there is SMJ and the plaintiff has filed in State Court, the Δ can make a motion to remove the case to Federal Court
   4. **Federal Question (1331)**
      1. A case arises under federal law if the plaintiff is alleging a right or inters that is substantially founded on federal law, which consists of federal common law, federal constitutional law, federal statutory law, treaty law, or federal administrative regulations
      2. Two Tests
         1. Creation
            1. Crated by federal law, statute, or treaty
         2. Essential Federal Ingredient
            1. *Motley*

Well pleaded complaint rule

Federal questions that are raised as part of the Π’s CoA

An anticipated defense does not constitute an “essential federal ingredient”

Defendant’s answer is not relevant; the existence of a defense based on federal law will not give federal question jurisdiction

State law Claim CoA but it has an essential federal ingredient

In order to determine state law claim, must decide a federal issue

* + - * 1. In order to determine state law claim must decide a federal issue
    1. **Motley**
       1. CoA: Breach of Contract
          1. Free railroad passes in return for-
          2. Motley’s give up right to sue the railroad

Waived litigation

* + - 1. Δ railroad: Congress passed a statute that says no more free passes
      2. Π’s: Due Process
         1. Took our property without a hearing
      3. Looking only at CoA (Breach of K) there is no federal question
         1. *Well Pleaded Complaint* rule

If the complaint were reorganized so that all the plaintiff has to prove remains, we are done, no federal question

Ignores defenses and anticipated rebuttals

* + - 1. **Rule:** If a federal question is not part of the CoA, it cannot be considered to have arisen out of a federal question
      2. Procedural Devices
         1. Rule 12 (b) 1: Motion to dismiss for lack of SMJ
         2. Rule 12 (b) 6: Motion to dismiss for failure to state a claim
    1. **Test**
       1. Does a state law claim:
          1. Necessarily raise a federal issue
          2. Actually disputed and substantial
          3. Which a federal forum may entertain w/o disturbing any congressionally approved balance of federal and state judicial responsibilities
  1. **Waiving SMJ**
     1. Cannot do it. Parties cannot mess around with the fundamental allocation of the constitution which allocates the power of the constitution between the state and federal courts
     2. Trumps parties concerns with regards to resolving their own disputes
  2. **Diversity Among the Parties (Diversity Jurisdiction) (1332)**
     1. **\*Complete Diversity When Action is Commenced\***
        1. **Multiple Parties- Complete Diversity**
           1. Diversity jurisdiction requires “complete diversity,” meaning no plaintiff may be a citizen of the same state as any defendant. If one defendant and one plaintiff are co-citizens of the same state as any defendant, complete diversity is lacking= no diversity jurisdiction
     2. **Questions of Citizenship**
        1. **State Citizenship of an Individual- Domicile**
           1. The determination of the state of citizenship of a natural person depends on the permanent home to which he intends to return. The concept is the same, except in name, as domicile.
           2. Established By:

***Physical Presence*** in a new place and

The ***intention to remain there*** i.e. no present intent to go elsewhere

* + - * 1. i.e. Intent to Remain and Present Domicile
      1. **Citizenship of a Corporation- Possible Multiple Citizenships**
         1. Defined by 28 USC §1332
         2. A corporation is deemed a citizen of ***every*** state and foreign country in which it is incorporated and the ***one*** state or foreign country in which it has its Principle Place Of Business
         3. PPB is the state from which the corporation’s high level officers direct, control, and coordinate the corporation’s activities
         4. Hence, two citizenships, PPB and Incorporation
         5. **Note:** For insurers, they can be sued in PPB, State of Incorporation, AND the state or foreign country of which the ***insured*** is a citizen
    1. **Amount In Controversy** 
       1. Does the complaint allege an amount in controversy that exceeds 75k?
    2. **Domicile and Intent to Remain**
       1. Diversity jurisdiction is both constitutional and statutory
       2. **Redner**
          1. Redner lives in France, Defendants in NY
          2. Redner is not a citizen of France, then claims he is a citizen of CA

No intent to remain in France, no present domicile

* 1. **Supplemental Jurisdiction**
     1. Always involves a lawsuit with at least two claims
        1. At least one claim must involve federal question jurisdiction
        2. Second claim must be in some way related to the first
     2. Stretches federal jurisdiction to cover parts of cases that, if brought independently, would not have fit w/in the district courts
     3. Claims sometimes can invoke supplemental jurisdiction when the supplemental claim arises from a common nucleus of operative fact as the original claim, whether the case got into federal court by diversity of citizenship or federal question jurisdiction
     4. **Inquiry**
        1. Are the claims related? (1367(a))
           1. If the claim based on state law derives from a common nucleus of operative fact and are such that a plaintiff would ordinary be expected to try them all in one judicial proceeding
        2. If so, will joining the claim destroy diversity? (1367(b)
        3. If not, should the court exercise its discretion to join the claim? 1367©
        4. Without Supplemental JD, claims that do not originate as under federal question would have to be litigated in State Court
           1. Serious repercussion would be the potential for different decisions on different claims
           2. May win one but lose another, depending on the court
     5. **Even when 1367 (a) & (b) are met, the trial court may choose to decline Supplemental JD over a claim If:**
        1. The claim raises a novel or complex issue of State law
        2. The claim substantially predominates over the claim or claims which the district court has original jurisdiction
        3. The district court has dismissed all claims over which it has original JD, or
        4. In exceptional circumstances, there are other compelling reasons to decline jurisdiction
     6. **Ameriquest**
        1. Resolution of state claims affects federal claims- common nucleus of operative facts (overstated appraisals)
           1. Π consummated mortgage transaction with Ameriquest; alleged true value of home was much less than the amount reflected in report of Trevino who misled her to cancel her mortgage
           2. Court held Supp. J because it was a related claim, common facts connected to prove both claims
     7. **Ramos**
        1. No supplemental jurisdiction because even when 1367 (a) + (b) are met, court may decline to exercise Supplemental Jurisdiction if the claim raises a novel or complex issue of state law, predominates over original claim, court has dismissed original claim, other compelling reasons
  2. **Removal Inquiry (28 USC §1441-1447)**
     1. Is there SMJ under federal question or diversity or supplemental JD?
        1. If Π raises any federal question claim, removal is permitted
           1. Creation test: Federal law created the CoA
           2. Central Ingredient: Federal Ingredient central to CoA
     2. If Diversity only:
        1. Does the home-state Δ rule apply? Under 1441 (b); is any Δ a citizen of the state where Π has filed the case?
        2. If so, no removal
        3. If not…
     3. Time Limits on Removal
        1. Defendant must remove within 30 days of receipt of the complaint or other document showing that the case is removable (1446(b)
        2. For diversity cases, Δ must remove within 1 year of the commencement of the suit
           1. 1446© (1)
     4. Procedure
        1. All Δ’s attorney has to do to remove is provide notice of removal
        2. Π can counter with a motion to remand to state court
           1. Must convince the federal court that they have no jurisdiction to hear the case
           2. Constitutional and statutory reasons

1. **Remedies**
   1. Plaintiffs:
      1. Likelihood they will win
      2. Is it worth going through a lawsuit to get the win?
         1. What will they get out of it?
      3. Remedies play a big part in strategy- Ritual of trial is all about remedial possibly
         1. Looking at the end of the journey before you even begin
   2. **Menu of Remedies**
      1. **Substitutionary:** Seek to provide the Π with reasonable substitute for whatever was lost
         1. Compensatory
            1. Special/hard/economic

Expectation damages

Lost wages

* + - * 1. General/soft/noneconomic

Pain and suffering

Emotional distress

* + - 1. Liquidated damages
      2. Statutory/minimum damages: Minimum damage awards decreed by legislation often where compensatory damages will be small or hard to prove
      3. Punitive damages: Punish for reprehensible behavior
    1. **Specific:** Those that seek to restore directly and specifically that which Δ has taken from Π
       1. Injunctions
       2. Attachment
       3. Replevin
       4. Garnishment
       5. Etc.
  1. **Remedial Hierarchy**
     1. Given the choice, courts will rather compensate than issue an injunction
        1. Substitutionary>specific
  2. **Troupe**
     1. Plaintiff slipped and fell, 13k injury, sought more; Plaintiff motioned to remove to federal court to get punitive damages and cost of litigation
     2. No way to know if plaintiff’s damages will “more likely than not” exceed the minimum of 75k
     3. Defendant provided information that plaintiff’s injury has reaggrivated a previous injury

1. **Choice of Law (FRCP 64, 65)**
   1. **Prejudgment Remedy:** Maintain the status quo by protecting dissipation of assets
      1. Ensure that property is available to satisfy the judgment
      2. How to protect the interests of both the plaintiff and defendant
         1. Why we need them, what kind of trouble they make
      3. Preliminary Injunctions
         1. Factors:
            1. Likelihood of success on the merits
            2. Likelihood of irreparable harm
            3. Balance of equites tips in the Π’s favor
            4. Public interest
         2. Problems with Factors:
            1. How do you weigh each factor?
            2. Are some more important than the others?
   2. **Provisional Remedies and Due Process**
      1. The private interest of the defendant
      2. The risk of erroneous deprivation of defendant’s interest, and the value of additional procedural safeguards
      3. The government’s interest (which may overlap with the Π’s)
   3. **Winter v. NRDC**
      1. NRDC wants a preliminary injunction
         1. Have not decided whether NRDC is right in the first place
      2. Possibility of irreparable harm is not enough to constitute *likelihood*
      3. Majority establishes a checklist for the factors test, all factors of preliminary injunction must be met
   4. **Fuentes**
      1. Suit #1: Firestone sues Fuentes in small claims court for not paying for appliances, wants to repossess (replevin) the appliance
      2. Suit #2: Fuentes sues Florida AG challenging the constitutionality of the Florida Replevin statute
         1. Due process requires notice and meaningful opportunity for a hearing, statute does not provide this
         2. Fuentes is asking for a declaration that the statute allowing Firestone to get the court to issue an order of replevin, is unconstitutional
      3. Due Process
         1. Need state action that deprives Fuentes of property without notice or opportunity for meaningful trial
         2. If someone just steals another’s stuff, they cannot bring a constitutional claim
            1. State action
         3. Clause goes beyond mere ownership but any significant taking of property interest
            1. In *Fuentes*, Fuentes possessed the items but did not own them
         4. *Fuentes* says the timing for a meaningful hearing is important
            1. Existent circumstances allow for seizure before trial to prevent disappearance or damaging of goods
   5. **Legacy of *Fuentes* and *Winters***
      1. Raise the same question: What type of process is due to the defendants before the plaintiff can obtain a remedy before trial (determination of the merits)
      2. Prejudgment remedy
         1. How hard or easy should the system make it for a plaintiff to get a prejudgment remedy
      3. ***Fuentes* Suggests 3 Goals for Due Process**
         1. Accuracy, Efficiency, and Dignity
         2. A reason to increase process is accuracy, increase level of process to be more right
         3. Other hand, if we increase of process and it doesn’t enhance accuracy, we don’t want it
            1. Inefficient, waste of resources
   6. **City of Los Angeles v. David (Mathews Balancing Test)**
      1. Deprivation of life, liberty, or property
         1. Towing of the car, free to get car returned
         2. David contends his car was erroneously towed by city
      2. **Mathews Balancing Test**
         1. Private Interest that will be affected
         2. Risk of Error
         3. Governments Interest
            1. Balance between towing a car without a pre-tow hearing is uneven. Although under *Fuentes* this would constitute deprivation of property without a hearing, it is not unjust
            2. Car was illegally parked in a towaway zone, the balance between keeping the zone free for emergency vehicles, commerce, and such far outweigh the need for a trial in order to decide whether or not the car was properly towed
   7. **Choice of Law**
      1. Relationship between federal and state law
      2. What happens when one forum of law conflicts with another, how to choose, which forum’s law trumps the other?
      3. Arises as a State v. State conflict (WA rule or OR rule)
      4. International v. Domestic
      5. Federal v. State
         1. Federal law has supremacy (Supremacy Clause)
            1. Federal constitution, stattues
            2. As long as congress hasn’t passed the statute in a manner that goes beyond its power to legislate
   8. **Rule of Decision Act (§1652)**
      1. The laws of the several states, except where the Constitution or treaties of the US or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the US, in cases where they apply
   9. **Erie R.R. v. Tompkins** 
      1. *Swift* allowed Federal Courts to ignore state law and create their own federal common law
         1. Common law to govern the entire nation
         2. Federal Courts create a body of common law to be followed by the state courts
            1. State courts didn’t really go along with this
         3. Occurred during the Industrial Revolution, because of *Swift*, state tort common law protecting workers competed with Federal Common law which benefited business
            1. Because of removal, some defendants could get the federal common law which trumped state law
            2. Diverse defendants could take advantage of this while non-diverse defendants could not
      2. Π Tompkins loses an arm to passing train, sues Erie for personal injury based on diversity
         1. 3 ways to prove negligence: NY, PA, and Federal Law
      3. SCOTUS held that federal courts were trespassing on state rights, federal courts must apply state common law
      4. ***Erie* applies only if:**
         1. Diversity is the basis for SMJ or
         2. There are state law claims in the case because of Supplemental JD (either anchored to a federal question or diversity claim) The state law claims are subject to an *Erie* analysis
      5. ***Erie* overrules *Swift***
         1. Brings State common law into the meaning of Laws (1652)
         2. *Swift* failed to respect State Courts as lawmaking institutions by allowing federal common law to apply when there is a conflicting State common law
         3. Federal Judiciary overreaching, making rules where Congress could not
            1. Congress only had the power to make laws where the Constitution says it can, cannot make Tort rules unless there is a provision in the Constitution
         4. *Swift* invited Courts to make judicial common law rules in spaces congress couldn’t, encouraged forum shopping
            1. Diverse parties would choose between federal and state rule in order to get the best outcome, created lack of uniformity within the State
         5. **Erie draws a line between substance and procedure** 
            1. Federal courts can still make Federal Procedural Common Law
   10. **Erie Test**
       1. Step 1: Is there an *Erie* Conflict?
          1. Do the state and federal rules conflict (such that they can’t both govern the issue in the case)?
          2. If conflict, is it a clearly substantive issue? If so, follow state law
          3. If it’s arguably procedural, go to step 2
       2. Step 2: What’s the source of the Rule?
          1. Federal Constitution or federal statute?
          2. *Supremacy Clause*- basically, apply federal law
          3. Federal Rule? (*Hanna*)
             1. Is there a Federal Rule *on point*?
             2. If so, is it “procedural” within the meaning of the Rules Enabling Act?

Is it a “rule of practice and procedure” or does it impermissibly “abridge , enlarge or modify an substantive right?”

* + - * 1. Is it otherwise constitutional (Due Process, Equal Protection clauses, etc.)? If so… *Apply the federal rule even if it is in conflict with a state rule*
      1. Federal Practice (common law)?
         1. Outcome-Determinative Test (*York*)

Is the rule “merely” a “manner or means of enforcing a right to recover” (so procedural)?

Or will use of the federal rather than the state rule significantly affect the outcome of the litigation (so substantive)?

* + - * 1. Was use of federal rule rather than state rule outcome-determinative when complaint filed or removal available?
        2. How to decide this: Would using the Federal Rule promote

Improper forum shopping

Or result in inequitable administration of law (unfair discrimination)

* + - * 1. Depending on whether the case is in state or federal court
  1. **Guaranty Trust v. NY**
     1. York sues Guaranty Trust for misrepresentation and breach of trust in Federal Court
     2. NY State Law barred action because of SoL’s
     3. Federal Law had an equitable rule which took into account fairness in deciding if the complaint was late instead of having a cutoff date
     4. **Test: Outcome-Determinative Test**
        1. Distinguishes substantive from procedural claims
        2. If a state law claim is barred in a state court, it is barred in federal court
           1. This removes forum shopping, if the rule is the same in state and federal court, this is eliminated
        3. *York* is motivated by outcome in state and federal court, must be substantially the same. Takes care of concern of unfair advantage for diverse parties
  2. **Byrd**
     1. Conflict between State and Federal Law over using judge or jury to decide if employee injured was a special employee. Federal Rule Prevails
     2. **Balancing Test**
        1. Under *York* the judge v. jury decision is outcome determinative
        2. If the outcome is certain, it will point to state law
        3. Special relationship between Federal Court and Federal Jury arising from Seventh Amendment
           1. Counter-vailing policy
     3. Consider the certainty of the outcome (or lack there of) when balancing:
        1. State interest in use of state rule, especially the policy in favor of uniform outcomes in diversity cases
        2. Countervailing federal interest in use of federal rule
           1. *Byrd* will allow more use of federal rule
        3. *Byrd* reaffirms that federal courts should apply outcome determinative state law even on procedural issues as to which there is federal constitutional authority to make its own rule
        4. If applying the rule would be inconsistent with Hanna, then apply the state rule unless federal interest trumps state law
  3. **Hanna- Forum Shopping**
     1. Court can refuse to use rules, if the rule alters substantive law, it has overstepped its power
     2. If it is otherwise constitutional, apply the federal rule even if it is in conflict with a state rule
     3. The holding of each such case was not that *Erie* commanded the displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law
     4. If the FRCP neither exceeded the congressional mandate embodied nor transgressed constitutional bounds

1. **Pleadings** 
   1. Pleadings set out the shape of litigation and discovery is what we use to flesh out the facts and test them
   2. It is perfectly ok to assert completely inconsistent complaints within a pleading
      1. Inconsistent allegations is known as pleading in the alternative
      2. Testifying in the alternative is not ok however
   3. Rules: 7,8,9,10,11
   4. **Notice Pleading: FRCP 8(a)**
      1. To put the opposing party on notice (notice pleading): “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests
      2. Represents fundamental decision: opens the doors of discovery to some complaints that may not prevail, recognizing that doing so will impose costs on Δ in such cases
      3. **Short and Plain Statement**
         1. Sufficient Facts + Factual Plausibility
         2. Can’t state a claim= can’t get relief
         3. Can’t just be “merely consistent”
         4. Two Part Test
            1. Elements of CoA supported without conclusions doesn’t suffice
            2. Only a complaint that states a plausible claim for relief survives a motion to dismiss
      4. **Haddle- How Pleadings Establish Law**
         1. Haddle alleges his superiors collaborated with another of his superiors still at Healthmaster to fire him in retaliation for obeying a federal grand jury subpoena and to deter him from testifying at a federal criminal trial
         2. Haddle lays out the 2-step process by which Rule 12 allows us to evaluate the sufficiency of the complaint
            1. 12(b)(6)

Court must assume factual allegations in the complaint are true

Step 1: Assuming every factual allegation is true

Step 2: Assess if the allegations entitle the plaintiff to relief

* + - 1. Allegations must have facts to go forward to a legal conclusion, if the complaint just mirrors the statute, it’s going to sound a lot like a legal conclusion, not going to assume its truth because that just assumes that plaintiff wins
    1. **Dependent on two elements**
       1. “Short and Plain”- suggesting complaints could be brief and that they should avoid technical language that characterized the writs
       2. **“Statement of the Claim”**- Phrase that studiously avoided words that had been source of many disputes in the past
    2. **Twombly- Flexible Plausibility Standard** 
       1. Complaint that turns out to be factually ungrounded will be expensive and time consuming
       2. Conclusory allegations of a conspiracy don’t suffice- Π must allege some facts leading to the inference of an unlawful agreement
       3. Standard obliges a pleader to amplify a claim without factual allegations in those contexts where such amplification is needed to render the claim **plausible**
    3. **Iqbal- “common sense” and “judicial experience”**
       1. Step 1- Sorting legal from factual (Conclusory allegations (**Sorting)**)
          1. Legal Conclusions

Condoned harsh conditions on account of discrimination

Ashcrof- Principle architect and Mueller- instrumental (without this allegation, Iqbal would have no claim, but you need more than this- in order to violate 1983, has to allege that each government defendant through their individual actions discriminated)

* + - * 1. Factual:

Restructure condition until heard by FBI

FBI detained 1000’s of Muslim Men

* + - 1. Step 2: Identify Competing explanations about these facts and then decide whether or not Π’s explanation is plausible **(Plausibility)** 
         1. Determine which one is more likely
         2. Plausible= more likely
      2. *Common sense and judicial experience*
         1. Have to go beyond conclusory allegations to include factual allegations
         2. Have to plead non-conclusory facts that would make the legal conclusion plausible using judicial experience and common sense
      3. *Iqbal* matters in cases where parties will already possess most relevant info, where Π has plausible theory or if ΠΔ possesses info that will create or avoid liability
      4. *Iqbal*’s complaint fails the first requirement because of its conclusory statements, fails the second because at least 5/9 justices believed national security explanation over religious discrimination
  1. **Specificity in Pleading- Rule 9 (*Stradford*)**
     1. **9(b)**
        1. Stradford, a dentist, failed to pay insurance premiums, suffered damage to his building, made a claim for recovery, Δ insurance company didn’t want to award damage because it occurred during a time when he was not paying his policy
        2. Insurance company counterclaimed for fraud, leading to a heightened pleading standard **(Rule 9(b))**
     2. Heightened risk of weeding out meritous claims that you need discovery to determine if there is merit. FRCP 9 constrains pleading that Π must allege more facts based on reasonable inquiry when making certain claims
        1. Fraud affects people’s reputations, can result in punitive damages, therefore creates *in terrorum* effect on defendants, gives them an incentive to settle
        2. FRCP 9 requires more specificity to insure that Π’s cant threaten Δ’s with non-meritous claims and force settlements due to the threat of punitive damages for a fraud claim, etc.
  2. **Ethical Pleading (FRCP 11)**
     1. Rule 11: Scope and Process
        1. Signed document filed with court, discovery, separate motion, safe harbor, strategic considerations
        2. Focuses on sanctions imposed for frivolous lawsuits
        3. Motions and papers *signed* by a lawyer
           1. Signature requirement signifies that the signing attorney has done their due diligence
        4. Need to have undertaken reasonable investigation of fact and law in order to state that in the claim, needs to have enough to allege but also has to be reasonable
        5. FRCP 11 allows court to punish attorneys who file pleadings when they have no more than a hope that favorable facts or law will emerge as the case progresses
        6. Goal is deterrence
     2. **Safe Harbor Provision (FRCP 11)**
        1. Gives the other party the chance to fix things before it goes to court
        2. Service for motions on the party but cannot file in the court for 21 days
           1. Gives the party enough time to amend their pleading
        3. Does not apply if Rule 11 motions have been initiated by the court
        4. Can’t file a motion for summary judgment and motion for sanctions together
     3. **Christian v. Mattel, Inc.**
        1. Rule 11 requires a reasonable investigation of the law and facts
           1. *Mattel* deals with the lack of reasonable investigation of facts
           2. USC student created a doll that she claimed Mattel copied, yet Mattel doll was made years before

Reasonable investigation of facts would have revealed as much

* + - 1. Sanctions for “un-lawyerly conduct”
      2. For sanctions under Rule 11 need signed documents for sanctions, just “un-lawyerly conduct” is not enough
  1. **Rules 8, 9, 11 Together**
     1. Tension between the rules for solving cases on the merits and discouraging frivolous litigation
     2. Rule 8 encourages resolution on the merits
        1. Sets a low threshold for settling claims
        2. Twiqbal raises this standard
     3. Rule 9 (Heightened standard)
        1. Constrains pleading by requiring Π to support claims with the facts, affords a litigant accused of fraud “fair notice of the claim and the factual ground upon which it is based.”
     4. Rule 11
        1. Limits frivolous and non-meritous litigation, imposes sanctions to deter and require attorney’s to do their due diligence and reasonable factual investigation before filing suits
  2. **Responding to the Complaint (55, 12, 8)**
     1. Default, Pre-Answer Motion, Answer
     2. **Default; Default Judgment (FRCP 55)**
        1. Entering a Default: When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and the failure is shown by affidavit or otherwise, the clerk must enter the party’s default
        2. Judge determines what you get (default judgment)- establishes damages and ends case
        3. When there is entry of default, Rule 55(C)- liable unless attorney uses this rule to say this should be set aside for “good cause”
        4. Rule 60(b)- Will be harder when default judgment comes into play
        5. As defendant’s attorney, you don’t get independent notice of a entry of default (12(a))
     3. **Pre-Answer Motion (FRCP 12)**
        1. Pre-Answer Motion under FRCP 12 stops the clock on the answer (suspends the need to answer)
        2. Temporarily avoids the need to investigate (Under rule 11)
        3. Defendant gets an additional 14 days after the motion has been denied to answer
        4. **Making one pre-answer motion, these options have been foreclosed**
           1. Complete waiver of all defenses in 12 (b) 2-5 that were not raised in the pre answer motion (12 (h)(1))
           2. Can’t file a new *pre answer motion* for failure to state a claim or defense using 12 (b) (6) or a Rule 10 motion to dismiss for failure to join a necessary party
           3. Can’t file a new *pre-answer* motion under 12 € or 12 (f) because of 12 (g) (2)
           4. Can’t raise 12 © because the pleadings are not in
           5. Can still raise lack of SMJ
     4. **Motion (FRCP 12 © € (f))**
        1. 12 ©
           1. Motion for judgment on the pleadings
           2. When defense stated is legally insufficient, Π wins
        2. 12 €
           1. Motion for more definite statement
        3. 12 (f)
           1. Motion to strike
           2. Strips legally untenable claims out of complaints
           3. If allegations have no relation to the case, complaint is too long and confusing, etc.
     5. **Answer** 
        1. If Δ cannot demur to the complaint or make a 12 (b) (6) motion, he must respond to the factual allegations- either deny or raise additional matter constituting a defense
        2. Serve a copy of the answer to all parties and file the original with the court
        3. **Denials**
           1. Involves claims where the defendant agrees they would be liable if they had done what the plaintiff alleges- but says they didn’t do it
           2. General Denial: An allegation that denies each and every allegation of the complaint
           3. Limited General Denial: Denies each and every allegation of a specific paragraph or group of paragraphs
           4. Anything not denied outside of damages is deemed as acceptance
        4. **Affirmative Defenses (8© List)** 
           1. Defendant has the burden of proving them at trial, therefore has the burden of pleading them
           2. If true, an affirmative defense will defeat the plaintiff’s claim
           3. Burden of pleading attracts the burden of proof
        5. **Reply**
           1. When is the plaintiff obligated to reply to defendant’s answer

No obligation to reply if all that is included in answer is affirmative defenses and denials

* + - * 1. If the answer included counter-claims Rule 7 requires the plaintiff reply
  1. **Amending Pleadings (FRCP 15)**
     1. Can bring in another defendant even after the Π has received an answer after suing
     2. Can amend a pleading once, as a matter of course, 21 days after serving it
     3. If the pleading is one that requires a responsive pleading, the Π has 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12 (b) € or (f), whichever is earlier
     4. Rule 15 ©
        1. Allows an amendment of a pleading outside 21 days if the requirements of 15 © are met, the date of the amended complaint is the same as the original complaint
        2. “Relates Back”
        3. Tension between two goals:
           1. Easy amendment= allows pleadings to reflect parties’ changed view
           2. Notion of prejudice= reflects idea that at some point the other side has to make decisions about how to investigate and present its case
     5. **Beek v. Aquaslide** 
        1. Π sued Δ after he was injured using a slide; Δ initially admitted it had manufactured the slide, moved to amend this denial after learning it had not manufactured the slide. Court held that burden of opposing party to the amendment to show prejudice- Δ had not acted in bad faith, was deceived
        2. Rule 15 sets out a two-part test:
           1. Would-be amender given to amend should have good reason for not getting pleading right the first time
           2. Allowing the change shouldn’t hurt the other side too much
     6. Tension between two goals:
        1. Easy amendment= allows pleadings to reflect parties changed view
        2. Notion of prejudice= reflects idea that at some point the other side has to make decisions about how to investigate and present its case

1. **Discovery**
   1. Functions:
      1. Allows for the facts and for them to be applied to claims
      2. Claims may be dropped or stricken if there is no evidence to sustain them
      3. Set up the case for summary judgment
      4. Information that has come up in discovery is used at trial, becomes the record on appeal
   2. Two Tiers:
      1. Initial Disclosures (Required)
         1. Parties are required without a request or order from the court to provide information to each other
            1. Only information that may support the parties claims or defenses
            2. Not stuff that will undermine claims or defenses
         2. FRCP 26 (a) (1): Matters a party “may use to support” claims or defenses
      2. Disclosures obtainable through basic discovery
         1. Able to obtain discovery that the other side does not want to give up
         2. How do you get answers to your questions?
            1. Interrogatories, depositions, records (documents and things), subpoenas (for third parties), mental or physical examinations, written depositions, request for admissions (Ask a question, yes/no, contentions
   3. When is discovery relevant?
      1. Rule 26 (b) (1): Nonprivileged matter that is relevant to any party’s claim or defense
         1. And proportional to the needs of the case
         2. Information within this scope of discovery need not be admissible in evidence to be discoverable
            1. Information has to tend to prove or disprove something the law says matters
         3. Allows you to get relevant info, but provides limitations on this
      2. Privilege can bar discovery of something even if it is relevant
         1. Something can be highly relevant however the rules limit discovery on it if it is privileged
      3. Privilege trumps relevance
   4. What information is relevant?
      1. Rule 26: Relevant to?
         1. A claim or defense, substantive law of the case?, what’s in the pleadings? (The actual claim), What is the discovery request?
   5. Limitations on Relevant Requested Info
      1. Proportionality (26(b)(1)
         1. Consider:
            1. Importance of issues at stake, amount in controversy, parties relative access to relevant information, resources, importance of discovery in resolving issues, whether the burden or expense of the discovery outweighs its benefit
      2. Burdensomeness (26(b)(2)(C)
      3. Liberty & Privacy (26©)
      4. Privilege
      5. Work Product
   6. **Favale v. Roman Catholic Diocese of Bridgeport (Relevance)**
      1. Π claimed Sister sexually harassed her, wanted to discover psychologic history; court held Π didn’t allege psychological background was part of the injury claim, conduct has to be related to harm
      2. 26(b) (2)(c) and 26(c) allow courts to limit discovery for a multitude of reasons
      3. Π never alleged Sister’s prior emotional and anger management issues resulted in the propensity for sexual harassment, did not tie wrongful conduct to the harm that occurred
      4. Relevance tempered by CT law which requires Π to plead the wrongful conduct was tied to harm that occurred
   7. **Leflore (Burden)**
      1. Complaint goes back 10 years that detention center didn’t provide medical services to inmates
         1. Δ argues it is too burdensome to produce the complaints
      2. Relevance
         1. Wrongful death appeal, information is relevant, Δ just argues that recover is too burdensome
      3. *Importance of Leflore*
         1. Weighing the benefit and burden, consequences to both ΠΔ, equities of burdening plaintiff or defendant with the detention centers inability to take organized records
         2. Proportionality and Burden
   8. **Rengifos (Liberty & Privilege)**
      1. Request for immigration status, SSN, tax records. Rengifos objects on the grounds of privacy, burdensomeness, relevance, intimidation; files protective order (26©)
      2. Court focuses on *other harms* from info that may be relevant but nevertheless harmful to Π if released
         1. In terrorum- deportation (policy)
      3. *Importance of Rengifos*
         1. Burden of producing evidence is weighed against consequences (liberty and privacy)
   9. **Liberty & Privilege (26©)**
      1. Protective Orders
   10. **Privilege**
       1. Five Major Privileges
          1. Self-incrimination, attorney-client, doctor-patient, psychotherapist-patient, spouse
       2. *Source of Privilege*: State or federal, common law, statute, or constitutional
       3. **Waiver**
          1. Privileges can overcome highly robust and relevant claims
          2. Can be waived by simply putting the issue at stake in the litigation
          3. If a person brings in an unprivileged third party and tells them privileged info, they are waiving privilege to protect info
          4. Can waive by putting info at stake, telling a third party
       4. **Attorney-Client Privilege**
          1. Protects communications between attorneys and clients in the course of legal representation
          2. 26(b)(5) Claw back Privilege
             1. Can get info back
             2. If you pull privileged info from a document you need to include it in a private log so the other side can see and challenge the information withheld
   11. **Hickman v. Taylor (Work Product) (26(b)(3))**
       1. Tugboat sinks, 5 crewmembers drown
       2. Π conducts interrogatories towards the events prior to, during, and subsequent to the sinking of the tub
       3. Interrogatory #38 wants the Δ’s copies of statements in writing and quoted oral reports of the Δ’s interviewing of the survivors of the tug
       4. Hold: Don’t need to turn over Δ’s copies of statements taken from witnesses
          1. Attorney’s metal process & strategy are being asked for, can ask for facts but not opposing council’s strategy
   12. **Experts**
       1. Delineation between experts who are “fact witnesses” and those who are specifically retained in anticipation of litigation (26(a)(2))
       2. Fact Witnesses
          1. All that needs to be initially disclosed is the name and location of the experts, as he/she is an ordinary witness, not specifically retained for litigation
       3. *Expert* Fact Witness
          1. 26(a)(2)(C) Requires only that an *expert* fact witness provide a summary of the facts and opinions which the fact witness is expected to testify to
             1. As an expert in their field, an expert fact witness can testify not only to the facts but his own opinions

Different from a normal witness

Expert fact witnesses can render opinions at trial, because of this we must give the other side enough info of what will come up at trial so they can prepare

* + 1. If an expert is not retained in anticipation of litigation, they can still provide opinions and must provide a summary detailing the facts and opinions they intend to testify to
       1. More than fact witness but less than *expert* fact witness
       2. Must provide a report, name, location, id, and be able to depose
       3. Rule 26(b)(4) (C) requires info relied on by expert in formulating opinion. Must identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions expressed
  1. **Abuse of Discovery**
     1. 3 Ways
        1. Too little (stonewalling)
        2. Too much (asking more than is justified), and
        3. Mismatched discovery (unequal litigation resources)
     2. Sanctions: 26 (g)
        1. Requires parties to certify that their discovery request, response, or objection is consistent with rules and warranted by law, not made for an improper purpose, or is unreasonable or burdensome/expensive

1. **Pre-Trial Resolution**
   1. Avoiding Adjudication
   2. **Summary Judgment: Initial Burden**
      1. Question: Is there a question of law that can decide the case? OR has the nonmoving party (victim of summary judgment) met its burden of producing enough evidence to go to trial?
         1. Can a reasonable jury find in this party’s favor?
   3. **Reasons for Motion for Summary Judgment**
      1. Legal question that can decide the case/issue
      2. Essential elements: lack of evidence on at least one element
         1. Need to meet all elements, if one cannot be met there’s no reason to go to trial
         2. One way to win: MP offer evidence that negates an element
         3. Another way: MP shows an absence of Evidence on an element on which the non-MP bears burden of proof a trial
      3. Important: The court can’t decide material facts on summary judgment, cannot determine disputed evidence, if exists, must deny motion
   4. **How to turn a 12(b)(6) motion into a Rule 56 SJ motion**
      1. Rule 12 (d)
         1. Turns 12(b)(6) motion into Rule 56 SJ motion
         2. Evidence is now being evaluated to determine if there is a *conflict of the facts*
      2. If there is a question of fact the jury must decide but if there is just an argument as a matter of law that the judge can decide, SMJ can be granted
         1. Dispute of facts v. Matter of Law
   5. **Summary Judgment: Who’s Responsible (and When)?**
      1. Moving Party’s Responsibility: FRCP 56(a)
         1. A summary judgment motion must be granted when the record “shows that there is no genuine issue as to any material fact and the movant is entitled to JMOL”
         2. Given the essential elements, there is basically no evidence on (at least) one element
            1. Moving party offer evidence that negates an element
            2. Moving party shows absence of evidence on an element on which non-moving party bears burden of proof at trial
         3. Sum Judgment looks *beyond* pleadings to evidence and sees if there is a conflict for trial
            1. No discovery to help find out, no good answer, may be time for judge to decide case
      2. **Celotex- Moving Party’s Burden (56(a)**
         1. Standard
            1. Court can grant summary judgment simply when the moving party points out that non-moving party lacks evidence on an element that is essential to her case
            2. *Celotex* lays out the structure of burden shifting process in a summary judgment motion
            3. Having shown there is no conflict in the law, we can go forward as JMOL (moving party)

Non-moving party rebuts- “actual conflict in the fact and evidence that matters would make a difference between who wins and loses”

* + - * 1. *Celotex* makes summary judgment more accessible to moving party when moving party doesn’t have burden of proof at trial
      1. Grant summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial”
         1. Put together a case that claims that the non-MP has had time to find evidence and if they cannot answer an interrogatory stating what evidence they have than you can use that to grant SJ for the MP
    1. Non-moving party’s responsibility: FRCP 56©
       1. “The party asserting that a fact… is genuinely disputed must support the assertion by:
          1. Citing to particular parts of materials in the record… or
          2. Showing that the materials cited do not establish the absence… of a genuine dispute
    2. **Tolan- Non-MP Burden (56©)**
       1. Responsibility shifts to the non-MP to show there is a genuine issue of material fact
       2. *How heavy is the burden*?
          1. Non-MP “must come forward with specific facts showing that there is a genuine issue for trial”
          2. Can meet burden: Non-MP presents evidence to support the disputed element(s) or counter the moving party’s evidence, in order to show the existence of an issue of fact
       3. **Tolan Standard:** Comes from Anderson v. Liberty Lobby, in a situation where two inferences can be drawn, the inference that is most favorable to the non-moving party must be assumed

1. **Trial**
   1. **Ways a court can dismiss a case before it gets to trial/post trial**
      1. 12(b)(6), ^ SJ, ^ JMOL- Directed Verdict, ^ JMOL-JNOV
   2. **Case in Chief** 
      1. Jury selection
      2. opening statements
      3. Π’s case in chief
      4. *Defendant may move for a judgment as a matter of law* (JMOL)
         1. As a matter of law, Π has not made its case
         2. No reasonable jury would come out in favor of the Π in the status of the case
      5. Defendant’s case in chief
         1. Π *may move for JMOL* (a.k.a. DV)
      6. Π’s rebuttal of defendant’s case
      7. ΠΔ move for JMOL
   3. **The Verdict and Beyond**
      1. Judge gives jury instructions
      2. Parties’ objections to jury instructions
      3. Verdict
      4. *Loser can move for* JMOL-JNOV (*28 days from verdict*)
      5. Appeal (or rarely, motion to set aside verdict under rule 60(b)
   4. **JMOL**
      1. JMOL and JNOV are governed by the same rules
      2. Standard is the same for SJ as well
      3. If there is a tie in evidentiary strength, whoever has the burden of proof loses as a matter of law (evidence in equipoise)
         1. Fact finder must be convinced by a preponderance of the evidence, (more likely than not)
      4. Connect evidence to the burden of proof: “more likely than not”
      5. In order to remain within the constitutional right to a civil jury trial, the post verdict JMOL “renewed JMOL” exists
         1. Must move for JMOL prior to verdict in order to retain the right to a renewed JMOL and appeal
   5. **Two Conflicts at Trial**
      1. We want trial to be a rational and not irrational process
         1. Devices to head off irrational jury verdicts
      2. Other goal: pretrial procedures are supposed to have done the job of weeding out weak cases
         1. If the jury is the repository of common sense/reasonable-ism, we want to give juries slack
   6. **Reid (JMOL)**
      1. JMOL motion- judge isn’t supposed to grant or deny based on whether or not the judge agrees with jury- only supposed to evaluate if there is:
         1. Sufficient evidence for jury to find
         2. Burden of proof- verdict doesn’t have to be rational
      2. Standard: “A reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue”
      3. Cow gets loose and is hit by a train, Π tries to recover for dead cow, Utah statute bars recovery if cow escapes through an open gate, allows recovery if cow escaped through fence hole (maintained by RR)
      4. Π has the burden of proof, if there is a tie in evidence, Π loses if they have burden of proof
      5. Lets us explore why we don’t simply give juries the case and let them decide, state of evidence in which we don’t want the jury to decide except in 1 way
   7. **Pennsylvania RR v. Chamberlain**
      1. Two rules to work with:
         1. Judges are not allowed to make credibility decisions OR
         2. Weigh the evidence
      2. Did the court get this case right?
         1. Π’s theory as employees were negligent in how they drove the cars around which caused death of Π- negligence should be attributed to employer
         2. Rule 50 standard- reasonable jury would not have a legally sufficient evidentiary basis to find a different outcome based on the evidence
   8. **Controlling Judges- Motion for New Trial**
      1. FRCP 59: On motion or “sua sponte” (judge’s initiative)
      2. Flawed Procedures: Erroneous evidentiary ruling or jury instruction, juror misbehavior
      3. Flawed Verdicts: Error in verdict, verdict is against the great weight of the evidence
   9. **Lind v. Schenley Industries (DV & JNOV)**
      1. **Rule 50 (DV & JNOV)**
         1. Grant when there is “no evidence in support for at least one element” of the other party’s case
      2. What does “against the great weight of the evidence” mean for deciding when to grant a new trial? (FRCP 59)
      3. Gives us two signposts about when granting a new trial is out of line
         1. 13th juror would’ve voted another way
         2. DV- no reasonable jury could conclude
      4. Only when there is no evidence for the element will the court grant JNOV
         1. With a new trial, there can be evidence in favor of the verdict. However, when most of the evidence is against the verdict, the court can push the rest button with FRCP 59
2. **Respect for Judgments**
   1. **Claim Preclusion v. Issue Preclusion**
      1. Claim Preclusion prevents a party from relitigating a claim that was decided in a prior case
         1. Usually involves claims that were not decided or even raised in the first lawsuit
         2. Prevents relitigating WHOLE CLAIMS based on same operative nucleus of facts
      2. Issue Preclusion (collateral Estoppel) prevents a party from relitigating an issue that was decided in a prior suit
   2. **Claim Preclusion: Same Claim**
      1. Usually involved claims that were not decided or even raised in the first lawsuit
         1. Prevents litigating WHOLE CLAIMS based on same operative nucleus of facts
      2. **Precludes relitigating (3 basic elements)**
         1. The same claim
         2. Between the same parties
         3. After a final judgment on the merits
            1. Was there a full and fair opportunity to litigate in a previous suit?
      3. **Frier v. City of Vandalia** 
         1. Suit 1:
            1. Π sues the city and garages in replevin in state court to get his car (s) back
            2. Case decided in favor of city (Δ)
         2. Suit 2:
            1. Π sues the city claiming the city did not offer him a hearing soon after his car was taken (due process)
            2. Trial court dismisses Π’s complaint, Π appeals
            3. Appeals Court dismisses under claim preclusion
         3. Preclusion: The result in Suit #2 is to eradicate a perfectly good constitutional claim which had not been litigated
         4. USC §1738: The records and judicial proceedings of any court of any state shall have the same full faith and credit in every court within the US as they have by law or usage in courts of such State from which they are taken
            1. Requires the Federal Court in Suit #2 to look to the state preclusion law that decided first suit
      4. **Same Claim Test:**
         1. Same Legal Theory:
            1. In *Frier* the two claims are replevin and due process

Different legal theories were not enough to bar preclusion

* + - 1. Same Proof/Evidence
         1. Focuses on whether the same proof would be required in both actions/claims
         2. In *Frier*

Replevin focuses on the legality of the parking in Suit #1

Due Process in Suit #2

Since these claims focus on different evidence, wouldn’t be precluded

* + - * 1. **Same Evidence Test:** Focuses on whether the same evidence would be used in the two causes of action
      1. Same Common Core of Operative Facts
         1. **Same Transaction Test:** Precludes all transaction or series of connected transactions out of which the action arose

Going to look at whether or not the two claims arise from a common core of operative facts

Towing gives rise to both legal theories in *Frier*

**What is a Transaction?**

Preclude all legal theories and claims arising out of a “common core of operative facts”

* + - 1. Preclusion is only going to operate if the party has a full and fair opportunity to litigate in the first case
  1. **Rule 13: Consistency**
     1. If you are a defendant in a suit and you do not counter-claim with a defense which you later bring as a plaintiff in a subsequent suit, are you allowed to bring the claim as a plaintiff?
     2. A pleading must state as a counterclaim any claim that- at the time of its service- the pleader has against an opposing party if the claim:
        1. Arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim
     3. Compulsory Counter-Claim: Must be brought in suit #1 or else you lose it
        1. Counter-claim that arises out of the same transaction or occurrence as the plaintiffs claim (common core of operative facts)
     4. Permissive Counter-Claim:Claim the defendant can bring but if they do not, they can bring it later
  2. **Claim Preclusion**
     1. **Same Parties- Six exceptions to non-party preclusion** 
        1. Consent: Agreement by the parties to be bound by a prior action
        2. Preexisting “substantive legal reasons” (such as preceding and succeeding owners of property)
        3. Adequate representation by someone with the same interests who was a party (trustee, guardians, fiduciaries)
        4. Procedural Representation: A party “assuming control” over prior litigation
        5. Procedural Representation: A party who loses an individual suit and then sues again, this time as a representative of a class
        6. Special statutory schemes such as bankruptcy and probate proceedings, provided those proceedings comport with due process
     2. Has constitutional obligations, parties that were not in privity may be bound
        1. There are limits on this, virtual representation is where this tension is played out
  3. **Taylor (When preclusion bars a nonparty to suit #1 from a later suit)**
     1. Adequate representation by someone with the same interests who was a party
     2. Whether Π was acting as agent for party to a previous suit
        1. Must have same interests and be acting in a representative capacity
     3. Same FOI Act request by 2 guys in the same aviation club
  4. **Final Judgment on the Merits**
     1. In most courts a judgment is final, even if it is being appealed
     2. **Opportunities to Litigate**
        1. Trial verdict, JMOL, SJ, failure to prosecute a claim
     3. **Not on the Merits (FRCP 41)**
        1. Lack of jurisdiction, Rule 19, Improper venue
     4. **Dismissed with *prejudice* for failure to state a claim**
        1. With prejudice means that it is precluded
        2. Without prejudice means its not precluded
     5. **Preclude without reaching the merits**
        1. Court needs to enforce procedural rules the parties aren’t complying with
  5. TIP: If you are looking at two or more lawsuits, you may be looking at a preclusion issue
  6. **Issue Preclusion- Same Issue, Actually Litigated and Determined**
     1. Prevents party from relitigating an issue that was decided in a prior case
     2. **Elements**
        1. When:
           1. An issue of fact or law is
           2. Actually litigated and determined by
           3. A valid and final judgment, and
           4. The determination is essential to the judgment,
           5. *The determination is conclusive in a subsequent action between the parties, whether on the same or a different claim*
        2. Opportunity alone is not enough for issue preclusion
           1. ISSUE MUST HAVE BEEN ACTUALLY LITIGATED AND DETERMINED
     3. **Issue actually litigated and decided**
        1. Issue preclusion is inappropriate when the prior judgment is ambivalent
        2. **Illinois Central Gulf RR. V. Parks**
           1. Question: Jury’s verdict was ambivalent, could have reached its decision through two different ways
           2. When that verdict is ambivalent, we will not preclude that issue from being relitigated again because we don’t know what issue the jury decided the case on (actually litigated and decided)
           3. **Parks Rule:** Element: Actually litigated and decided. Issue Preclusion is inappropriate when the prior judgment is ambivalent
     4. **Issue Essential to the Judgment**
        1. Restatement #1: Preclude Both
           1. If the judge has decided both issues (In *Parks*: No damages & Contributory Negligence) why do it again?
        2. Restatement #2: Preclude Neither
           1. Incentives to appeal, how much do we trust the judgment
        3. **Mutuality**
           1. *Parklane*
           2. Key to Mutuality- Did the “victim” of preclusion have a full and fair opportunity to litigate the issue in the first suit?

Non-Mutual Collateral Estoppel

Step 1- Was there a full and fair opportunity to litigate? (victim of preclusion a party to suit 1?)

If not, no preclusion

Step 2- If so, is it Π or Δ who is seeking preclusion in suit 2?

**Defensive (**Δ- **Blonder Tounge**)- Δ can use CE against Π who was a party in a prior suit

Defendant precludes plaintiff from bringing an issue they lost in the first suit up again in the second suit

If the plaintiff had a full and fair opportunity to litigate in the first suit, the issue will be precluded

**Offensive (**Π- **Parklane)**- Π can use CE against Δ who was a party in a prior suit *only* if it:

Promotes judicial economy (not a wait and see Π)

It is not unfair to Δ

Sufficient stakes in first suit/later suits foreseeable

No prior inconsistent judgments

Adequate procedural opportunities in first suit

Uses a judgment against Δ in previous case to preclude the issue from being relitigated in the current case

Have to balance with issues of fairness to Δ- efficiency of suing Δ in one suit

1. **Joinder**
   1. **Rules:** 13, 14, 18, 20, 21, 42, §1367
   2. **Joinder Rules as Tools**
      1. **Plaintiff’s Tools**: Join Parties under 20 and claims under 18
      2. **Defendant’s tools:** Join counterclaims under 13, new parties under 14, additional claims under 18
      3. **All Parties** can use Rule 21 to challenge joinder
      4. **Judge’s tools:** (1) Rule on parties’ motions under the Rules, (2) consolidate *or* sever claims under Rule 42 and 20 (b)
   3. **Joinder of Claims: Two Part Inquiry**
      1. Do the Rules permit the joining of claims?
         1. If not, don’t combine claims!
      2. If so, does the federal court have jurisdiction over the joined claim?
         1. Supplemental Jurisdiction- 1367
         2. Original Jurisdiction §1331, 1332
         3. PJ
   4. **Joinder: Jurisdiction (§1367)**
      1. Does the Federal Court have jurisdiction joined claim?
         1. If not all claims have original SMJ, do the claims form part of the same case or controversy? If so…
         2. What is the basis for original jurisdiction?
            1. If federal Q-> Allow Joinder
            2. If Diversity, go to step 3
         3. Is Π or Δ seeking to invoke Supp. J?
            1. If Δ-> Allow Joinder
            2. If Π, go to step 4
         4. Is Π seeking to join a claim against a party whose joinder would destroy diversity?
            1. These rules join claims against other parties: 14, 19, 20, 24
            2. If joining the party will destroy diversity, no jurisdiction or joinder per S1367(b)
   5. **Counterclaims (Rule 13)**
      1. **Compulsory-** Pleading must stte as a counterclaim, any claim, that at the time of its service- the pleader has against an opposing party if the claim:
         1. Arises out of the ***same transaction* or *occurrence*** that is the ***subject matter of the opposing party’s claim***
      2. **Permissive-** A pleading may state as a counterclaim against an opposing party any claim that is not compulsory
      3. **Plant**
         1. Alleged faulty disclosure under TILA- challenged counterclaim by saying there was no Supplemental Jurisdiction- therefore counterclaim not compulsory; court uses logical relations test (same aggregate of operative facts)
            1. 1367 (a) changed law after *Plant* to confirm that there is supplemental J. over all compulsory counterclaims- claims arising from the same transaction or occurrence
            2. If “same case or controversy” in §1367 is broader than “same transaction or occurrence” from 13(a), it may permit SMJ over some permissive counterclaims
   6. **Joinder: Parties**
      1. **Mosley**
         1. African American female workers alleging discrimination; Rule 20 is the relevant rule (permissive joinder of parties); discriminatory character of Δ’s conduct is basic to each Π’s recovery
         2. Same Transaction or occurrence, Common law or fact question = joinder (20(a))
            1. In *Mosley*: Discriminatory character of Δ’s conduct is basic to each Π’s recovery
         3. Note: If “same transaction or occurrence” is broadly interpreted in joinder context, it will similarly broaden the reach of the preclusion doctrine
   7. **Joinder Of Parties by Defendants: 3d Party Claims of Δ’s (Impleader)-** Party’s ability to defend itself by passing on liability
      1. Defendant/3rd party plaintiff’s claim must be “derivative” of the original claim
         1. Impleader requires derivative liability: If (and only if) the Δ is liable to the Π, the third party may be liable to the defendant
         2. Rule 14- Δ may assert a claim against anyone not a party to the original action if that 3rd party’s liability is in some way dependent upon the outcome of the original action
            1. Limits Δ’s ability to bring people in
            2. If new party bears derivative liability to the Δ, then the Δ can bring that party in
         3. **Careful-** Impleader focuses on the third party’s liability to the defendant, not to the plaintiff
      2. **Price**- Claims are derivate, but they are not related to main claim
         1. Π (chicken farmer) hired Latco to build a new chicken house; Π sued concerning quality of workmanship; Latco moved to file 3rd party complaint against ITW, who Latco alleges defectively designed nails used in the construction; ITW says 3rd party complaint is barred by laches doctrine (rule 14)
         2. Argument is if Δ (Latco) is liable to Π, than ITW is liable to Latco
         3. **Gives litmus test for impleader**- impleader will fail if the defendant can win the case against the main plaintiff and still have a case against the third-party defendant
      3. **Derivative Liability** 
         1. Arises because of some relationship between the Δ and impleaded party; relation can be contractual or imposed because of some relation between the parties
            1. Impleader (14) does not create liability; instead it offers a procedural channel through which that liability can be asserted in the main lawsuit rather than in a separate action
            2. Impleader assures that the manufacturer will be bound by a judgment in the original case, versus getting the opportunity to litigate in a second case and there potentially being an opposite finding
         2. 3rd party claim won’t be permitted when it is based upon a separate or independent claim- **must be in some way derivative of the original claim; 3rd party impleaded only when the original** Δ **is trying to pass all or part of the liability onto that 3rd party**
         3. Rule 18 allows impleader claim- if you have a claim against a party, you can piggy back
         4. PJ over an impleaded 3rd party Δ will usually lie because in many circumstances the 3rd party Δ will have been involved in the occurrence or transaction that led to the original claim and thus subject to PJ- if not enough, Rule 4(k)(1)(b) gives 100 mile boost to court’s jurisdiction
   8. ΠΔ
      * 1. PPB for MB USA is NJ
      1. MB USA is only 2.4% of Daimler’s sales however
   9. Therefore Daimler is not connected to CA