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Civil Procedure Outline
Genty – Fall 2015
Subrin – 4th Edition

Federal
State

- 1. **Due Process -**
  - **Rule 65** – **Injunctions and Restraining Orders**: **(a)** Preliminary Injunctions (must give notice first); **(b)** Temporary Restraining Orders (can be issued ex parte; without notice, if immediate action necessary given circumstances).
  - **United States v. Hall (1972)** – does District Court have power to punish for criminal contempt a person who was not a party for violating a court order designed to protect the court's judgment in a school desegregation case? Ex parte injunction; named D specifically, though he was not officially served. Did have notice of the injunction, though. **Yes, court can issue an order to preserve the status quo that is binding on all persons regardless of notice.** Limited to disputes between parties; not applicable to general public.
    - Joint Anti-Fascist Refugee Committee (1951) – AG lists several organizations as subversive; sued for lack of notice or an opportunity to present a defense. SC **rule**s that organizations must be given opportunity to present evidence before pejorative labeling.
  - **Goldberg v. Kelly (1970)** – state terminated P's welfare payments without opportunity for hearing beforehand. Does Due Process clause require evidentiary hearing **before** termination of benefits? **Yes**. Extent of due process depends on **1)** extent to which party may be "condemned to suffer grievous loss", and **2)** whether the recipient's interest in avoiding that loss outweighs the government interest in summary adjudication. **Written presentation of case not enough.**
    - **Pre-Termination hearing not required in every situation**, but where welfare benefits, often party's sole means by which to live, are at stake, there must be one.
    - Recipient must have timely notice of reasons for termination, and an effective opportunity to present arguments orally and evidence, and confront adverse witnesses. Must be allowed to retain an attorney.
- **2. Costs of Process –** what role should costs play in determining how much process is required?
  - ***Mathews v. Eldridge (1976) –** does 5th Amendment DP Clause require pre-termination hearing for SS disability benefits? No. **Due process is flexible and calls for procedural protections as the particular situation demands**. Procedures used in this case are sufficient safeguards; requires determination of medical expert, so need for evidentiary hearing is not as great as in Goldberg. Need for disability recipients not as great as that of welfare recipients (Goldberg). **Three factors** for determining due process needs:
    - **1.** The **private interest** affected by the action.
    - **2.** The **risk of erroneous deprivation** through the procedures used, and the probable value of additional safeguards, if any.
    - **3.** The **government's interest** including the function involved and the fiscal and administrative burdens that additional or substitute safeguards would entail.
- **3. Enemy Combatants and Due Process –**
  - **Hamdi v. Rumsfeld (2004) –** Due process demands that a citizen-detainee held in the US as an enemy combatant, and seeking to challenge that classification, be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker. Presumption in government's favor, and a lowering of the standard of evidence, but must be contestable.
  - **Connecticut v. Doehr (1991)** – can a state statute authorize the prejudgment attachment of real estate without prior notice or hearing, without a showing of extraordinary circumstances, and without a requirement that the person seeking attachment post bond? **No, violates 14th Amendment.** Even temporary or partial impairments to property rights require due process protections. Risk of erroneous deprivation high; standard for getting attachment is too low. **Must be a pre-attachment notice or hearing, unless there are some exigent circumstances.**

- **4. Access to Lawyers and the Legal System –**
  - **Boddie v. Connecticut (1971) – Access to Courts**: state procedure requires payment of court fees and costs in order to commence litigation. **Welfare recipients unable to bring divorce actions because they can't afford these fees.** Excludes these parties from only forum empowered to settle their disputes. "A statute or **rule** may be held constitutionally invalid when it operates to deprive an individual of a protected right" even if **rule** is in itself proper. **Equivalent of denying parties right to dissolve their marriages**; denial of due process (14th Amd).
  - **Lassiter v. Durham County Dept. of Social Services (1981)** – **Access to a Lawyer**: court terminates P's parental rights after failing to take care of her child. P could not afford counsel, and was not appointed any. State court held that action was not serious or unreasonable enough to require them to appoint counsel. **SC: evidence against P sufficiently substantial that absence of counsel's guidance did not render the proceedings fundamentally unfair.** Affirms state court; no need for appointed counsel here.

II. Remedies and Stakes –

- **Rule 1 – Scope and Purpose (p1):** govern all civil actions and proceeding in US District Courts.
- **Rule 2 – One Form of Action:** the civil action.
- **Rule 64 – Seizing a Person or Property (p101): (a)** every remedy available under state law is available here; **(b)** specific kinds of remedies available (arrest, attachment, garnishment, replevin, etc.).
- **Rule 65 – Injunctions and Restraining Orders: see p102**

- **B. Provisional Relief:** ability of P to obtain relief before proving elements of claim through devices for **securing the judgment** and **maintaining the status quo**. Equitable relief of **injunctions**.
  - **Securing the Judgment - Attachments, Garnishment, and Sequestration:** P will often try to tie-up D's property pending outcome of litigation in order to ensure their ability to pay should the judgment be in P's favor. File notice of **lis pendens** to encumber title of property. **Sequestration** allows sheriff to seize and auction off D's property in order to cover judgment against D. Tying up D's assets puts pressure on D to settle. **P must post bond** to cover damages to D from such injunctions should D be victorious.
  - **Preserving the Status Quo –** prevents D from acting in ways that may be harmful to P, or make the final remedy P is seeking inadequate (stop D from releasing copyrighted materials). P must establish that they are likely to succeed on the merits, and likely to suffer irreparable harm without grant of preliminary relief.
  - **American Hospital Supply Corp. v. Hospital Products, Ltd. (1986) (Posner)** – D terminates contract after P agreed to renew, and outside the agreed-upon termination window. P granted **preliminary injunction** to compel D to continue performing under the contract; posted $5 million bond to cover risk. Dissent applies **four-prong test**, which is widely used by courts:
    - **1**. Is there irreparable harm to P and no other remedy as equitable? **(YES)**
    - **2.** Does the irreparable harm outweigh the harm to other party? **(YES, posted bond)**
    - **3.** Likelihood of success? **(Very high)**
    - **4.** Danger to public interest? **(Some, D declared bankruptcy)**

- **C. Final Relief –**
- **1. Equitable Relief** – court may issue a **permanent injunction** (direct D stop halt offending conduct or perform acts under a legal duty) rather than monetary damages. Traditionally disfavored in all but irreparable harm cases, but has been expanded.
  - **28 USC $2201 – Creation of Remedy (p353):** Courts have right to declare judgment/other remedies in cases within their jurisdictions.
  - **28 USC $2202 – Further Relief (p354):** further necessary or proper relief based on a declaratory judgment may be granted after reasonable notice and hearing against any adverse party whose rights have been determined by such a judgment.

- **Walgreen Co. v. Sara Creek Property Co. (1992) (Posner)** – P operates pharmacy in D's mall. D promised not to lease any other space to a competing pharmacy, but tries to anyway. Lower court grants permanent injunction on grounds that **monetary damages would be too difficult to calculate**. Posner affirms. **Burden on P** to show that **damages are inadequate**. Burden on court to enforce injunction, but calculation of damages is also costly, and probably inaccurate here. P has to project losses over 10 years; **not feasible**.
- Do **NOT** have to show **irreparable harm** to obtain a **permanent injunction.** That is only the standard for **preliminary injunctions.** Burden is simply to show that **damages are inadequate**.
- **Consent Decrees –** settlements of lawsuits that seek injunctive relief. Parties agree to conduct themselves in a certain way. Court must approve terms, and retains jurisdiction over the dispute for duration of settlement. Terminate with motion by one or both parties, typically after compliance or a change in circumstances.

- **2. Enforcement of Equitable Relief** – courts lack police or other direct resources to ensure enforcement. After winning final judgment, claimant needs a document called a **judgment**. If D does not voluntarily comply with that judgment, the court can appoint a person to enforce **equitable decree** and engage in required behavior (ex. conveying title to property). If D still fails to comply, court may hold **contempt proceedings**. Can result in either an order to pay P additional damages, or a penalty for failure to comply (fine, jail). **Civil contempt** proceedings are all about enforcing the order. **Criminal contempt** proceedings are about ensuring respect for the court.
- **3**. **Declaratory Relief –** a party may request **clarification of the law**. An issue because courts are not supposed to act without an active, live controversy under Article III.
- **4. Damages –** on most civil cases, courts rely on tort or contract law to provide direction for issuing damages, but how should damages work for constitutional violations? The constitution doesn't address this.
  - **Carey v. Piphus (1978) – 42 USC $1983** case. What should damages be, and how should they be calculated? **Court** – **In absence of proof of actual injury, students are entitled only to recover nominal damages.** Lower courts found that students had been suspended in **violation of their 14th Amd. Right to due process**. Court finds that because failure to accord due process was **not the cause** of the suspensions. Party **not entitled** to **compensation simply because due process rights were violated**. Mental or emotional distress **would be** compensable under $1983, but that is not present in this case. **D liable only for nominal damages only**.
- **5. Punitive Damages –** further monetary relief beyond nominal or compensatory damages; designed to deter future wrongdoing and to express public disapproval. Amount is subject to judicial review; excessive punitive damage awards violate due process. **Three "Guideposts"** for determining whether or not a punitive damages award is unconstitutionally excessive: **(1)** how **reprehensible** D's conduct was, **(2)** the **ratio** of the award to the actual or potential **harm** inflicted, **(3)** a **comparison** of the award to **civil or criminal penalties** that could be imposed for **comparable misconduct**. Does **not** allow punitive damages for harm to **nonparties**.
- **6. Enforcement of Damages –** original judgment only identifies D's obligation to P, it does not order payment. Need **writ of execution**; state law applies to enforcement. P must initiate another legal proceeding if D still refuses to pay. Can get **lien** on D's property, **writ of execution for D"s property** (allows P to have it sold and collect the proceeds), get a **garnishment** against D's wages. P may have difficulty obtaining any of these **due to lack of assets**, however.

- **E. Financing Litigation** – financing has a strong incentive/disincentive on decision to bring a lawsuit.

- **Rule 54(d)** – **Judgment Costs (Attorney's Fees) (p92): (1)** unless a statute says otherwise, prevailing party must pay court fees; **(2)** prevailing party must make a **motion** to recover attorney's fees within **14 days** of entry of judgment.
- **Rule 68** – **Offer of Judgment (p104):** At least 14 days before trial, defending party may serve opposing party an offer to allow judgment on specified terms; opposing party must accept via written notice within 14 days, or withdrawn. If ultimate judgment less favorable than offer, opposing party must pay costs incurred after offer made
- **28 USC $1920** – **Taxation of Costs (p350)**: judge or clerk may tax: fees of clerk and marshal; fees for printing; fees for copies; docket fees; fees for court-appointed experts.

- **42 USC $1988(b)(c)** – **Proceedings in Vindication of Civil Rights (p360):** prevailing party (other than US) may recover reasonable attorney's fees from losing party; may include expert fees.
- **The American Rule –** losing party does not generally have to pay prevailing party's attorneys' fees. Permits the poor to sue, but may incentivize frivolous litigation in efforts to grab quick settlements. American civil suits are generally decided by juries, unlike England. Many lawsuits are taken on a **contingency fee** basis (attorney gets percentage of ultimate award). Some are financed by **third-parties** (pay costs, take percentage of pay-out).
- **Fee-Shifting Statutes** – exception to American **Rule** where party brining lawsuit does so in **bad faith**. Can also work the other way, **$1988** passed by Congress allows **prevailing plaintiffs** to recover attorney's fees from defendants for certain types of lawsuits (civil rights, environmental protection, etc.). **$1988** only works one way; **defendants in such cases can't recover fees from losing plaintiffs**, provided they did not sue in bad faith.
- **Frivolous Claims** – defendants may recover fees for bad faith claims under **$1988**, but only those costs that would not have been incurred except for the frivolous lawsuit. Most lawsuits, even where plaintiff loses, have a reasonable basis; difficult for courts to apply.
- **Assessing the Value of Legal Services** – how should attorney's fees be calculated when courts award them?
    - **City of Riverside v. Rivera (1986) –** is an award of attorney's fees **per se unreasonable under $1988** if it **exceeds amount of damages recovered by P** in a civil rights action? **No**. P's attorney's hours and rates were reasonable (**"lodestar"**); shouldn't be punished simply because award to P was small. P's award should be a consideration in determining whether fee award was proper, but it is not dispositive. **Vindication of civil and constitutional rights serves greater purpose than simple damages for individual Ps.**

- **F. Contempt** – a party or lawyer who disobeys a court order or court **rule** risks being found in contempt of court. Blurred distinction between civil and criminal contempt. **Civil Contempt** is meant to induce some sort of outcome or remedy during an ongoing litigation; **alleviated when individual in contempt acquiesces to the court's will.** Criminal Contempt is expressly punitive; meant to punish violations of court **rule**s or orders. **Should a party be able to defend noncompliance with court order on the grounds that the order is unlawful?**
    - **Walker v. City of Birmingham (1967) –** circuit judge grants **temporary injunction** in order to prevent Ps from marching. After receiving notice, several named parties declared intention to disobey the order on grounds that is was an injustice. P's allege that injunction was unconstitutional on the grounds of being vague and overbroad, and restricting free speech; also that city's parade ordinance was administered in discriminatory manner. Court – P should have applied to state courts for their issues with the ordinance. **Doesn't matter that injunction may have been unconstitutional, Ps knowingly violated it without appealing to courts first.** Legitimate public safety issues existed; **"no man can be the judge in his own case"**.
        - **Dissent –** ordinance was per se unconstitutional. Ps appealed to courts over injunction immediately following march; to do so beforehand would have disrupted the long planned march. **"The right to defy an unconstitutional statute is basic in our scheme."** Ordinance violated free speech rights.
        - **Collateral Bar Rule –** citizens of states with such **rule**s are forbidden from disobeying a law, then challenging it in court, even if that law is later found to be unconstitutional.

III. Pleadings and Joinder –

- **Rule 3 – Commencing an Action (p1):** action commenced by filing a complaint with the court.
- **Rule 4 – Summons (p1-6): (a)** required contents; **(b)** Issuance; **(c)** Service – 30 days to answer; **(d)** Waiving Service – 60 days to answer if service waived; **(e)** service in judicial district of US; **(f)** service in foreign country; **(h)** service on corporation – on managing agent, or one authorized by law to receive service; **(i)** serving US gov't/agencies/etc. **(k)** territorial limits on effective service; **(m)** time limit for service – within 120 days of complaint being filed.
- **Rule 5 – Serving and Filing Pleadings and Other Papers (p10-11): (a)** what papers must be served; **(b)** how service may be made; **(c)** serving numerous defendants; **(d)** filing.
- **Rule 6 – Computing and Extending Time (p14-16): (a)** computing time – exclude day of event that triggers period; count weekends and holidays, unless last day; **(b)** extending time – court may with or without motion for good cause; **(c)** written motion and notice of hearing must be served at least 14 days before time specified for hearing.
- **Rule 7 – Pleadings Allowed; Forms of Motion and Other Papers (p16): (a)** list of allowed pleadings; **(b) rule**s for motions.
- **Rule 8 – General Rules of Pleading (p17-19): (a)** claim for relief must contain; **(b)** what response to pleading must include; **(c)** affirmative defenses; **(d)** pleadings must be concise and direct; **(e)** pleadings must be construed as to do justice.
- **Rule 9 – Pleading Special Matters (p19-20):**
- **Rule 10 – Form of Pleadings (p20):** caption, names of parties, paragraphs, exhibits, etc.
- **Rule 11 – Signing Pleadings, Motions, and Other Papers; Representations to Court; Sanctions (p21-22): (a)** signature requirement for all papers; **(b)** what representations to court entail; duties; **(c)** sanctions.
- **Rule 12 – Defenses and Objections (p22-25): (a)** time to serve responsive pleadings – within 21 days of service unless service was waived (60 days); **(b)** how to present defenses – party may assert 12(b)(1-7) via motion; **(c)** judgment on pleadings – may move for after pleadings, but before trial; **(e)** motion for more definitive statement; **(f)** motion to strike – from pleading, any insufficient defense or redundant or scandalous matter; on motion with 21 days of service, or by court on its own; **(g)** joining motions; **(h)** waiving and preserving certain defenses – (b)(2-5) are waived if not asserted in first response; (b)(6-7) can always be raised; (b)(1) court must dismiss for lack of SMJ if it discovers at any point in proceeding.
- **Rule 15 – Amended or Supplemental Pleadings (p27-29): (a)** party may amend its pleadings once within 21 days of serving it; court should freely give leave when justice so requires; **(b)** amendments during and after trial; **(c)** relation back of amendments.
- **1. Pleadings and Amendments – Rule**s 7-10 lay out the requirements for a federal complaint; **Rule** 12(b)(6) describes motion D may bring to challenge whether P's complaint correctly describes a claim for which relief can be granted. Trend towards more rigorous pleading requirements.
  - **Purpose and Doctrine of Complaints –** balancing act in amount of detail required; deter frivolous claims, but not meritorious ones.
  - **Conley v. Gibson (1957) –** Court – **complaint should not be dismissed** for failure to state a claim **unless** it appears "**beyond a doubt that P can prove no set of facts in support of his claim which would entitle him to relief**." FRCP do not require claimant to set out in detail the facts upon which he bases his claim." **Short and plain statement of facts all that is required**, to give D **fair notice** of what P's claims are and on what ground they rest.
    - **"Notice Pleading" –** very low standard; many lower courts adopted tougher standards anyway.
    - **Plausibility Standard –** notice pleading recently rejected in favor of plausibility standard at pleading stage of federal anti-trust cases (Twombly (2007)). Complaint "requires more than labels and conclusions, and a formulaic recitation of the elements." "Factual allegations must raise a right to relief above the speculative level." **Rule 8(a)(2)** requires a **"showing"** rather than a blanket assertion of entitlement to relief.

- **Aschroft v. Iqbal (2009) – (failure to plead sufficient facts);** P a non-citizen, "high-interest" detainee in connection with terrorism; alleges constitutional violations; that he was subjected to harsh conditions of confinement on account of his race, religion, or national origin. **P's pleadings ruled insufficient**. Names Ashcroft and Mueller as the "principal architect" and chief implementer of unconstitutional policies. Actionable in itself via Bivens. Vicarious liability does not apply, so P must plead that each D has violated constitution on their own. **Must plead sufficient factual matter that Ds acted "for the purpose of discriminating on account of race, religion, or national origin."** Need to establish more than a possibility. Do not have to accept conclusory statements as true for SJ. Twombly requires **plausibility**; more likely explanations here. **Need to show D's acted with discriminatory state of mind; doesn't.** Twombly **applies to ALL** civil suits.
    - **Interpretation of Rule 8(a)(2) –** diverges from literal text of **rule**; heightened standard.
    - **Runnion (2015) –** heightening of pleading standards in Twombly/Iqbal creates need for a more liberal amendment standard. Complaints only need factual allegations that give fair notice to D, and show that claim has substantive plausibility.
    - **Littlejohn (2015) –** Title VII complaint relaxes pleading standards if P can show four factors apply; creates rebuttable presumption of discriminatory motive on part of D. Iqbal applies, but the McDonnell Douglas factors reduce facts that need to be plead if met. Still must give fair notice.

- **2. Answers, Motions, and Affirmative Defenses** –
    - **A. Preliminary Motions – Rule** 12(a) determines applicable time to respond. **Rule** 6(b) deals with extensions of that time. D loses by default if they fail to respond.
        - **Motion for a More Definite Statement – Rule** 12(e), available when complaint is too vague or ambiguous for client to formulate a proper response. Must be filed prior to answering, or lost.
        - **Motion to Strike – Rule** 12(f), asks court to delete from pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous material. Time limit for motion, but court may strike material at any time. Can remove causes of action for failure to state a claim (typically use 12(b)(6)).
    - **B. Motions to Dismiss – Rule** 12(b), can be raised as part of answer, or by preliminary motions.
        - **Lack of Subject Matter Jurisdiction –** 12(b)(1)
        - **(NF) Lack of Personal Jurisdiction –** 12(b)(2)
        - **(NF) Improper Venue –** 12(b)(3)
        - **(NF) Insufficiency of Process –** 12(b)(4), failure to conform summons to **Rule**s 4(a) and 4(b).
        - **(NF) Insufficiency of Service of Process –** 12(b)(5), failure to properly serve opponent.
        - **Motion to Dismiss for Failure to State a Claim –** 12(b)(6)
        - **Failure to Join a Party Under Rule 19 –** 12(b)(7), failed to join indispensable party
    - **C. Answers –**
        - Typically contain: **Admissions** and **Denials** to the averments in P's complaint. **Rule** 8(b); **12(b) Defenses; Affirmative Defenses; Counterclaims** and **Crossclaims. Rule** 13.
        - Other**:** assert their theories of the case, additional "defenses" (such as: lack of negligence, lack of causation, etc.). **Impleader of Third Party** (**Rule** 14) or otherwise seek to add parties; **Motion to Consolidate** (**Rule** 42(a)); **encouraging someone else to intervene** (**Rule** 24); reduce number of parties through **Misjoinder** (**Rule** 21); **claim a jury trial**.
    - **D. Admissions and Denials – Rule** 8(b) requires admission or denial of every allegation, except where party "lacks knowledge or information sufficient to form a belief about the truth of the allegation" (must be genuine lack of information; if party should in fact be able to form opinion, court may deem as an admission) Subject to **Rule** 11. Under 8(b)(6), when responsive pleadings required, all allegations not denied will be deemed to have been admitted. When no responsive pleading is required (ex. amount of damages), an allegation is considered denied or avoided. If any room to disagree whatsoever, parties will deny allegations; generally can't take back later on.

- **E. Affirmative Defenses** – **Rule** 8(c), D has obligation to plead any avoidance or affirmative defenses. Ex. comparative negligence, privilege, rescission, etc. Burden of proof generally on D to establish elements of each such defense. Some courts require these to be raised in answer or waived, but some will allow them to be added later, so long as this does not show prejudice to P.

- **3. Sanctions – Rule** 11, targeted at deterring frivolous litigation; lawyers must comply with all requirements of **rule** in good faith. At judicial discretion whether or not to impose sanctions; "may impose". Can be monetary or non-monetary. Lawyer's signature on a pleading or motion constitutes agreement to comply with **rule**. **Safe Harbor** provision allows violating party notice and opportunity to amend, or dismiss before sanctions imposed.
  - **Chaplin v. Dupont Advance Fiber Systems (2005) –** Title VII action, alleges discrimination on grounds of national origin, race, and religion. D files **Rule** 11 motion for sanction. **Civil Complaints must be**: **(1)** Filed for **proper purpose** (does not mean likely to win, but case must have some merit); **(2)** Each count must have **sufficient basis in law**; **(3)** Each count must have **sufficient basis in fact**. P met proper purpose requirement ("creative litigation", even though unlikely to succeed), but the **religion and race charges have no factual support**. Court sanctions P's counsel $10,000.

- **4. Amending the Complaint** – **Rule 15**, pleadings set boundaries for trial; cannot introduce evidence of causes of action and defenses not included in pleadings, so parties frequently desire to amend their pleadings once discovery begins. **Rule 15(a)(2)** states that courts should "freely give leave [to amend] when justice so requires". Exceptions through "justice" requirement include: unreasonable delay in raising; prejudice created through delay; raised in bad faith; new issue is "futile". **Rule 15(c)** described when amendment can "relate back" to date of original pleading (crucial for statute of limitations issues). More difficult to add an additional party than an additional claim. **Rule 15(b)** allows issues outside of pleadings that are raised and not objected to, to become part of pleadings through "implied consent" of parties. **Rule 15(d)** deals with supplemental pleadings.
  - **Singletary v. Pennsylvania Department of Corrections (2001) –** P sought to add additional defendant. If she was unable to add this party, and have her amended complaint relate back, her entire claim was going to be dismissed. **Three criteria (all must be met)** for additions of defendants under **Rule** 15(c)(1)(C):
    - **1.** Claim against newly named D must arise out of **original transaction or occurrence addressed in original pleading**.
    - **2.** Must file notice within 120 days of initial filing under **Rule** 4(m), and newly named party must receive notice within 120, so as not to prejudice them in making a defense on the merits ("**Notice and Absence of Prejudice**"). Does not require actual service.
    - **3.** Newly identified party would have been named if not for a mistaken identity on the part of P, and said party knew or should have known that they would be named as a party
    - Party can receive **"constructive notice"** via **shared attorney** (if they became party's attorney within the time period in which notice was required), or via an **identity of interest** (parties so closely related in their business operations or other activities); but neither applies here.
    - Not knowing identity not the same as mistaken identity, with some exceptions. Court suggests "mistake or lack of information" standard, but this is not the norm.
  - **Krupski v. Costa Crociere S.P.A (2010) – Court – 15(c)(1)(C)** depends on what party to be added knew or should have known, not what party seeking to amend knew or should have known that it would have been named if not for an error. **Only defendant's knowledge is relevant**. Knowledge of a party's existence is not the same as having knowledge of that party's identity. P was not sure which entity to sue, and chose the wrong one; they had similar names**. Deliberate, but mistaken choice does not prevent 15(c)(1)(C) from being satisfied**. Fact that P may have delayed is irrelevant under (c). Broader reading of "mistake" than in Singletary, but does not adopt that courts recommendation completely.

5. Simple Joinder –

- Rule 13 – Crossclaim and Counterclaim (p25-26): (a) compulsory counterclaim; **(b)** permissive counterclaim; **(c)** relief sought in counterclaim; **(g)** crossclaim against co-party.

- Rule 14 – Third-Party Practice (p26-27): (a) when defending party may bring in a third party; **(b)** when plaintiff may bring in third party.

- Rule 18 – Joinder of Claims (p34): very lenient; party asserting claim may join any and all claims it has against opposing party, even if unrelated.

- Rule 19 – Required Joinder of Parties (p34-35): necessary and indispensable parties.

- Rule 20 – Permissive Joinder of Parties (p35-36): (a) persons who may join or be joined

- Rule 21 – Misjoinder and Nonjoinder of Parties (p36): not grounds for dismissing action; on motion or on its own, court may add or drop a party; court may also sever any claims against a party.

- Rule 42 – Consolidation; Separate Trials (p77): (a) consolidation – if involving common question of law or fact, court may join or consolidate actions; **(b)** separate trials – for convenience, efficiency, avoidance of prejudice, court may separate any claims, crossclaims, counterclaims, etc.

- Rule 18 allows P to include as many claims as they wish against a D, even if they are completely unrelated (no "same T/O" requirement). Rule 42(b) however, allows a judge to separate claims for reasons of convenience, avoiding prejudice, and economy. If P fails to bring potential causes of action that arise from the same transaction at the same time, those additional claims may be barred from being brought in the future due to *res judicata*. **Rule** 20 requires that persons joining or joined in an action have rights "**arising out of the same transaction, occurrence, or series of transactions or occurrences**", and that there be a "**common question of law or fact**". **Rule** 20(b) permits the court to separate parties for the purpose of trial or otherwise.

- **Rule** 13(a) deals with **compulsory counterclaims**, claims that must be brought with an answer or else waived. 13(g) defines permissible **cross-claims** (claims between co-defendants). The **same transaction or occurrence** test is key in issues of joinder. **Rule** 14 deals with **impleader** of third-parties.

- **Same Transaction or Occurrence –** courts tend to look at whether or not there is a sufficient overlap of facts and evidence, and whether claims are logically related to each other. Questions of convenience, efficiency, and fairness are crucial considerations for judges when making this determination. **Rule** 21 permits the court to drop or add any dispensable party on its own initiative at any stage in the action on any terms "that are just". **"Transaction" has a very flexible meaning.**

- **Lopez v. City of Irvington (2008)** – D moves to have trials of Ps separated under **Rule** 21 on grounds that Ps claims do not arise out of the same T/O, and that keeping claims together would be prejudicial towards Ds. District Courts have broad discretion over **Rule** 21 motions; to permit joinder: **(1)** must be **same T/O**, and **(2) at least one question of law or fact in common**. Court **denies Rule** 21 motion. Additional questions for making determination:
  - **1.** Are issues in cases significantly different?
  - **2.** Do separate issues require different witnesses and documentary proof?
  - **3.** Will party opposing severance be prejudiced if granted?
  - **4.** Will party supporting be prejudiced if not granted?
- **Additional Considerations –** jurisdictional, venue, and notice requirements must still be met, along with issues of *res judicata* or preclusion.

- **Counterclaims and Cross-Claims** - **counterclaims** are claims asserted against an opposing party, usually by D against P. Relief may or may not be related to P's claim; may be greater than P's claim. Can be either **compulsory** or **permissive**. **Cross-claims** are claims between co-parties, usually Ds**. Less broad than the counterclaim rules**, may not assert every claim that possibly exists between co-parties. Must be closely related to the transaction of the original claim asserted by P. **Cross-claims are always permissive**; never barred by *res judicata*, or waiver, or estoppel from later asserting that claim.

- **Podhorn v. Paragon Group, Inc. (1985) –** D trying to dismiss P's claim on grounds that it should have been raised as a compulsory counterclaim to a previous action. P argues that they didn't raise it because in previous action, the court did not have SMJ over that issue. Court – **P still had to file it**; would have been assigned to a court with SMJ. Grants dismissal.
- **Four Test for Applying "Transaction or Occurrence" Under Rule 13(a) –**
  - **1.** Are the issues of fact and law raised by the claim and counterclaim largely the same?
  - **2.** Would *res judicata* bar a subsequent suit on D's claim absent the compulsory counterclaim **rule**?
  - **3.** Will substantially the same evidence support or refute P's claim as well as D's counterclaim?
  - **4.** Is there any logical relation between the claim and the counterclaim?

- **Third-Party Practice – Rule** 14 governs procedure through which D can bring a third party into the action. **Rule** permits court to allow D to **implead** a person not already part of the action who is purportedly liable to D for all or part of D's liability to P. D becomes **third-party plaintiff**, and impleaded party becomes **third-party defendant**.

- **Gross v. Hanover Ins. Co. (1991)** – D seeking to bring in third-party defendants (the shop-owners), alleging that they were complicit in the robbery that created P's insurance claim, and would be liable to D should P prevail**. Court allows impleader**. Three conditions for who may be brought in as 3PD:
  - **1.** Can only be used to bring in one who is not already a party.
  - **2.** Must have actual claim, a theory of liability, against impleaded party. Can't add to try to redirect fault.
  - **3.** Theory of liability against third-party must be "for all or part of" P's claim against D.
- **United States v. Olavarrieta (1987)** – **Improper Impleader,** court denies D trying to implead University of Florida; D amends complaint, tries to add university's Board of Regents. UF cannot be sued under state law (**Rule** 17(b) allows state law to apply). Claim against BOR dismissed as well for failure to state any legal or factual grounds for indemnification. **Can only bring claim under 14(a) if that third-party's liability is dependent upon the outcome of the main claim**. D's claim is asserting a **separate and independent claim** from P's claim against D against parties he's attempting to implead.
- **14(a)(2)(C)** – third party D may assert against the P any defense the third-party P has to the P's claim.
- **Necessary and Indispensable Parties – Rule** 19: identifies persons who have not been named as parties but are necessary for a just adjudication of the underlying dispute. 19(a) identifies three situations in which an absentee should be joined: where P cannot get relief from the named party (19(a)(1)(A)); where the absentee may be prejudiced by the failure to join (19(a)(1)(B)(i)); where D may be prejudiced by failure to join absentee (19(a)(1)(B)(ii)). Any party whose absence results in one of the above problems is a party whose joinder is compulsory, if feasible. When joinder not feasible court must decide whether to proceed without that party, or dismiss the case (four factors in 19(b)).

IV. Discovery –

- **Rule 26 – Duty to Disclose; General Provisions Governing Discovery:**
- **Rule 27 – Depositions to Perpetuate Testimony**:
- **Rule 28 – Persons Before Whom Depositions May Be Taken**:
- **Rule 29 – Stipulations About Discovery Procedure**:
- **Rule 30 – Depositions by Oral Examination:**
- **Rule 31 – Depositions by Written Questions:**
- **Rule 32 – Using Depositions in Court Proceedings:**
- **Rule 33 – Interrogatories to Parties**:
- **Rule 34 – Producing Documents, Electronic Information, Tangible Things; Entering onto Land:**
- **Rule 35 – Physical and Mental Examinations:**
- **Rule 36 – Requests for Admission:**
- **Rule 37 – Failure to Make Disclosures or to Cooperate in Discovery; Sanctions:**

1. Introduction – expansive discovery allowed under FRCP. Primary function is to provide litigants with an opportunity to review all of the pertinent evidence prior to trial.

- **Rule 26** lays out type of discovery that a party is **entitled** to; any matter that:
  - **1. Is relevant to the claim or defense of any party**. Entitled to all information that "appears reasonably calculated to lead to the discovery of admissible evidence" (26(b)(1)). "Relevant" has an expansive meaning.
  - **(2) Is not unreasonably cumulative, burdensome, or disproportionate.** Court may limit discovery when the information sought is unreasonably cumulative, or can be obtained from another source, and also when the benefit to the requesting party is disproportionate to the burden of producing it.
  - **(3) Is not privileged.** Even if it is relevant (ex. attorney-client privilege).

2. The Mechanics of Discovery – **Rule** 26(b) govern the permissible scope of all formal discovery under FRCP. The scope of discovery is intentionally broad, much broader than for evidence to be admitted at trial.

- **Moss v. Blue Cross and Blue Shield of Kansas, Inc. (2007)** – Generally, the party resisting discovery motion has the burden to show that it is not relevant. Must argue either: **(1)** information sought is **outside the scope of 26(b)(1)**; or **(2)** is of such marginal relevance that **the potential harm occasioned by discovery would outweigh ordinary presumption** in favor of broad discovery. **Mere fact that discovery would create hardship is not enough**, must show sufficient detail and explanation about the nature of this burden.
  - **"Overly Broad or Unduly Burdensome on Its Face" -** When relevancy of requested information not readily apparent, moving party has burden of showing the relevancy of the discovery request. Even if objecting party fails to me evidentiary burden, court may determine that request is plainly **OB/UB** on its face, or would require answering party to "**engage in mental gymnastics**" to determine what information is responsive. Lack of specificity (ie. "relating to", or where no time frame given) generally facially overly broad.
  - **Rule 26(c) –** parties who do not want to comply with a discovery request can either object to the request, or file a protective order (bring to court's attention). Requesting party can then either abandon/reframe request, or bring dispute to attention of the court by filing a **motion to compel**.

- **A. Mandatory Initial Disclosures** – parties required to disclose some information upon commencement of litigation (26(a)(1)), such as: contact information of individuals "likely to have" discoverable information that party may use to support their side; a copy or description of all documents and tangible things that disclosing party has in its possession and may use to support its side; etc. Must be made within two weeks of conference required under 26(f). That conference must occur at least 21 days prior to **Rule** 16(b) conference. **Party must make these disclosures based upon the information then reasonably available**. **Rule** 26(e) requires **supplementation** of any information that would have been subject to mandatory disclosure. **Rule** 37(c) provides an almost automatic sanction for failure to disclose under 26(a).

- **B. Depositions** – **Rule**s 27-32 apply to depositions. May be scheduled on "reasonable notice" in writing. If deponent is a nonparty, the noticing party must also provide for the attendance of a witness, usually by serving him with a subpoena (**Rule** 45). **Rule** 30 requires that oral depositions be completed in the equivalent of a 7-hour day, though these can be waived if parties agree under **Rule** 29. Expensive, but generally more edifying than written interrogatories.
- **C. Written Interrogatories** – **Rule** 33, written questions may be submitted to an opposing party and must be answered in writing, under oath, and returned within specified time period. Questions may seek any information discoverable under 26(b)(1). Most useful mechanism for obtaining detailed and/or noncontroversial information from an adversary. Typically drafted by lawyers, however, and unlikely to include damaging evidence.
- **D. Production of Documents and Things** – **Rule** 34, any party may request another party to produce documents and things and may then inspect and copy those documents and things before returning them to the producing party. "**Document Request"**. **Rule** 34 (c) permits a party to subpoena documents even from a non-party in conformity with the requirements for a subpoena in **Rule** 45.
- **E. Physical and Mental Examination** – **Rule** 35, may be requested when person's condition is in controversy.
- **F. Requests for Admission** – **Rule** 36, party may serve upon the other party a request for admission of any matter within the scope of discovery. Typically question/answer statements which the answering party is requested to admit or deny. Provide an opportunity to "lock-in" particular admissions or denials of fact.
- **G. Informal Discovery** – nonparty interviews, site visits, exchange of information, requests to government agencies, publicly available records, internet research, etc.

3. Electronic Discovery – 26(a)(1)(A)(ii) requires extensive disclosure of electronically stored information. 26(b)(2)(B) limits this somewhat when burden or costs are excessive, but may still be required to disclose with "good cause." 37(e) provides safe harbor for electronically stored information that is lost as a result of ordinary maintenance and good faith operation of an electronic information system.
- **Teague v. Target Corp. (2007)** – D wants claim dismissed due to spoliation of evidence when P discarded her computer. Parties have affirmative duty to preserve evidence. Generally not granted without **bad faith** conduct. Court may issue "adverse inference instruction" to jurors based on spoliation of evidence if:

- **1.** Party in control of evidence had **obligation to preserve** it when it was destroyed.
- **2.** Destruction or loss was accompanied by a "**culpable state of mind**".
- **3.** Evidence destroyed was relevant to claims or defenses of the party that sought discovery of the spoliated evidence, and a reasonable factfinder could conclude that the **lost evidence would have supported** claims/defenses of party who sought it.

V. Judges and Juries – Right to jury trial guaranteed by 7th Amendment, but has the right outlived its utility?

- A. Summary Judgement – applies to both jury and non-jury cases; typically made after discovery and before trial. Unlike on 12(b) motions, judge is able to consider evidence (pleadings, affidavits, and discovery). Moving party entitled to summary judgment if:

- **1.** No **genuine dispute** as to any **material fact**, and
- **2.** Movant is entitled to a **judgment as a matter of law** (ie. reasonable jury would have to **rule** for moving party).
- Mere disputes of fact not enough; if P cannot satisfy one or more elements of their claim, SJ will be granted. Burden on D to show that P cannot meet their production burden on at least one element at trial.
- **Rule 56** – **Summary Judgment**:
- **Celotex Corp. v. Catrett (1986) – Rehnquist: Does moving party in SJ have a burden to produce evidence?** SC – reverses Appeals; P has failed to make sufficient evidentiary showing on an essential element to which she bore the burden of proof. Can't prove element → Other facts irrelevant. **Burden on moving party may be discharged by showing that there is absence of supporting evidence.** A party moving for SJ need only show that opposing party lacks sufficient evidence to support their case.
- **Anderson v. Liberty Lobby (1986) –** does a claim with a **heightened standard at trial** (malice - "clear and convincing evidence") **also** have to meet that standard **during the SJ phase**? **Yes**. SJ granted.
- **Matsushita v. Zenith Radio (1986) –** Court **rule**s that **"where the record taken as a whole"** could not lead a rational trier of fact to find for nonmoving party, there is no genuine issue for trial. **Court found that P's theory "did not make economic sense"**, and that an **expert's opinion was "implausible".** P needs **unambiguous evidence** that tends to exclude an innocent interpretation.
- **Rule 50 – Judgment as a Matter of Law**:
- **Scott v. Harris (2007)** – 4th amendment (excessive force) case. No dispute over materiality of fact in question, but court decides that the **facts are so one-sided** that there can be **no genuine dispute**. **Facts must be viewed in light most favorable to non-moving party on SJ motion ONLY if there is a "genuine" dispute as to those facts**. Mere existence of an alleged factual dispute is insufficient. **Plausibility Standard.**

- B. Dismissals, Directed Verdicts, JMOL, JNOV, New Trial Motions, and Motions to Vacate Judgment –

- **Rule 59 – New Trial**:
- **Voluntary Dismissal** – **Rule 41(a),** unless otherwise stated is **without prejudice**.
- **Involuntary Dismissal** – Under **41(b)**, unless court otherwise orders these operate as "**an adjudication on the merits**", unless dismissal is for venue, jurisdiction, or failure to join a necessary party.
- **Directed Verdict (JMOL)** – **Rule 50(a)** (for jury cases), judge deciding must look at evidence in light most favorable to non-moving party. However, if P is unable to prove all elements of case to point where reasonable factfinder could find for them, JMOL will be granted. A party may move for JMOL at any time prior to submission to jury. **Rule 52(c)** covers JMOL for bench-trials.
- **JNOV (Renewed JMOL)** – **Rule 50(b)**, after jury has rendered verdict, judge can direct verdict for other party notwithstanding jury decision; even if judge previously denied JMOL motion. Same test as in 50(a).
- **Motions for New Trial** – **Rule 59**, on motion by losing party, or on initiative of court (under 59(d)). May be granted "for any reason for which a new trial has been granted in an action at law in federal court". **Generally granted on grounds that verdict is "against the weight of the evidence".** Appellate courts will rarely over**rule** a grant of new trial by a trial judge.
- **Motions to Vacate Judgment – Rule 60**, similar to new trial, except they are usually filed much later. Requires lawyer to do additional research before making such a motion because the categories listed in 60(b)(1-3) have been interpreted much more narrowly than the language of the **rule** would suggest. 1-3 must be made **within one year** after entry of judgment. 60(b)(6) is a catch-all, but only applies when issue does not fit into any other category.

- **Brandon v. Chicago Board of Education (1998)** – P seeking **Rule** 60 relief due to courthouse clerical error. 1 year, 3 days after case terminated for failure to prosecute, P's attorney discovers error. P argues it falls under 60(b)(6), D argues it falls under 60(b)(1). (6) has a longer time limit, but court **rule**s that errors by judicial officers fall under (1); case dismissed.

- **Special Verdicts – Rule 49**, allows judge to structure jury's reasoning process. Judge can submit a written list of questions that outline how jury must approach the issue.
- **Jury Instructions – Rule 51**, judge can require both sides to submit proposed jury instructions prior to trial. Judge must inform attorneys prior to closing arguments what instructions will be given. Attorneys may object.
- **Remittitur and Additur –** Additur is not permitted in federal courts. Remittitur is, provided P is given the option between a new trial and a reduced award of damages.

- **C. Appeals –** attorneys preset alleged errors of trial judge for appellate court to review. Errors must have **materially affected** outcome of case, and be necessary to the decree to be reviewable. Generally must be a **final judgment** before appellate division can take on case (exceptions: interlocutory appeals, collateral orders). Right to appeal final judgment once in state and federal courts.
  - **Questions of Fact –** must be **clearly erroneous** for appellate court to set aside (52(a)).
  - **Questions of Law –** reviewed **de novo**, more likely than not trial court erred.
  - **Discretionary Rulings –** standard is **abuse of discretion**, only overturned if **clearly wrong**.
  - **Summary Judgment –** tends to be **de novo** standard, based on reviewable documentary evidence.

VII. Choice of Appropriate Court: Personal Jurisdiction, Notice, and Venue

– in order to entertain an action and issue a valid and enforceable judgment, court must have **(1) PJ** (geographic)**, (2) SMJ** (state or federal)**,** and **(3)** have sent **adequate notice** to defendant.

- **A. Jurisdiction Over the Person or Property of the Defendant** –
  - **In personam – power over the person**; allows court to enter a money judgement against the D.
  - **In rem – power of the court over property within its borders for actions involving that property**. In rem judgments affect the interest of persons in the property. Doesn't create obligation on D's part to pay money to P.
  - **Quasi in rem –** hybrid; based on presence of D's property in forum state, but **for claims unrelated to property** itself (**property merely provides basis for jurisdiction**). Court may enter judgment not to exceed value of property, and force its sale if need be.

- **B. Traditional Concept of Personal Jurisdiction** –
  - **Traditional Grounds for In Personam Jurisdiction** – still valid today**.**
    - Domicile or Citizenship
    - Incorporation in Forum State
    - Service of Process on D In-State
    - Appearance in Court, and Consent
  - **Pennoyer v. Neff (1877)** – **(overruled).** Linked PJ to due process. Lack of jurisdiction violated 14th Amd.
  - **Harris v. Balk (1905) – (no longer good law)** Third-party attaches debt owed to P by D when D visits state. P also owed money to that third-party; court **rule**d that this attachment gave state quasi in rem jurisdiction (debt = P's property), and the judgment given full faith and credit in P's state. Case against D dismissed.
  - **Hess v. Pawloski (1927)** – **Forum's Interest**: statute for nonresident drivers who drove on MA roadways and were involved in accidents. Created **implied consent** to appointment of state Registrar of Motor Vehicles as driver's agent for service of process. Process was served, and P received notice. Valid because **state is protecting important public interests**; nonresidents being treated **equally** to residents. Still good law.

- C. Modern Conception of Personal Jurisdiction – Pennoyer discarded in 1945 in favor of PJ theory based on actual connections between defendant and forum state.

- **International Shoe Co. v. State of Washington (1945)** – **Specific Jurisdiction**. Court has jurisdiction if D has such **minimum contacts** with the forum so that exercise of jurisdiction **does not offend traditional notions of fair play and substantial justice**. Can serve D outside of forum.
  - **Casual Contacts** – not enough to subject D to a suit, unless cause of action directly related to the contact.
  - **Systematic and Continuous Contacts** – General Jurisdiction. Can subject D to suit, regardless of if it is related to contact.
- **Long Arm Statutes** – personal jurisdiction power is not self-executing; **must be authorized by appropriate legislation**, and only then is minimum-contacts analysis employed.
  - **Nexus Requirement** – jurisdiction authorized by long-arm statutes is limited to claims **"arising from"** the enumerated act. Not enough that D transacts business in forum state, **P's claim must arise out of this activity**. Some states have looser requirements for nexus.
  - **Two-Step Analysis**:
    - **1. Statutory:** Does claim arise from activity of D that fits within enumerated category?
    - **2. Constitutional:** If so, would application of the statute nonetheless reach beyond constitutional constraints of International Shoe's minimum contacts test?
- **Specific vs. General Jurisdiction** – (**Specific**): Long-arm statutes do not replace traditional grounds for in personam jurisdiction, but implement the constitutional authority to reach nonresidents who, though they fall outside the traditional categories, engage in certain activities in state that give rise to P's claim. **General** jurisdiction is power over all claims, whether related to D's activities in the forum state or not. **Specific** jurisdiction requires that P's claim arise out of the particular act performed by D within the forum state.
- **Personal Jurisdiction in Federal Court** – Federal courts are limited by state geography in its jurisdictional reach. **Rule** 4(k)(1)(A) incorporates state long arm statutes as constraints on federal court jurisdiction. Jurisdictional reach of a federal district court in Illinois is determined by, and equivalent to, the reach of the state trial courts there. **Rule** 4(k)(1)(B) is the **bulge rule**, which allows jurisdiction over an otherwise outside court's reach impleaded party **if service was effected within 100 miles of the court**. **Rule** 4(k)(2) created to allow federal courts to exercise jurisdiction over D not subject to general jurisdiction of any state.
  - **Three Elements Required for Exercise of Jurisdiction Under 4(k)(2)** –
    - **1.** Claim must arise under federal law.
    - **2.** Defendant must be beyond the jurisdictional reach of any state court.
    - **3.** Exercise of jurisdiction must not violate D's rights under constitution. If no on state has sufficient contacts, must be **sufficient aggregate contacts** across the US to satisfy the 5th Amd due process clause.

- D. Minimum Contacts Analysis –

- **Hanson v. Denckla (1958)** – DE insurance company had no relationship with FL; one of its policy-holders moved there. **No minimum contacts**; "**unilateral activity**" by P, D never **purposefully availed** themselves of any privilege of conducting activities in the state of FL.
- **World-Wide Volkswagen v. Woodson (1980)** – **Must be foreseeable to D that they would be sued in forum state**. Was foreseeable that party buying car in NY may drive it to OK, but question is whether or not it was foreseeable to D that **they would be sued** in OK. Must be **relevant contact** between D and forum state; no "contacts, ties, or relations" in this case. **Dissents** – too narrow a reading; injected vehicle into "stream of commerce".
  - Prevailing view is that **purposeful action on part of D**, such as distribution of the product in the state, is the **prerequisite to adjudicatory power**.
  - **Fairness Factors – (1)** burden on D; **(2)** the interests of the forum state; **(3)** P's interest in obtaining relief; **(4)** the interstate judicial system's interest in efficient resolution and furthering of social policies**.**

- **Calder v. Jones (1984)** – P brought suit in CA alleging libel by article written in FL. D published in national mag with substantial circulation in CA. Court – article drawn from CA sources, and harm took place in CA. PJ in CA is proper. Article "**calculated to cause harm**" in CA. Differs from WWV in that it was **intentionally aimed at CA.** D's conduct indicated a **"deliberate and continuous exploitation of [CA] market"**, and that is enough for jurisdiction.
- **Asahi Metal Co. v. Superior Court (1987) – Stream of Commerce.** P is a component manufacturer; sold products outside US with knowledge that they would reach CA through "stream of commerce"; enough for PJ? **Majority** – **No. Needs to be purposeful availment**; must be "**substantial connection**" between D and forum state that arises from actions purposefully directed at forum state. **Fairness Factors** from WWV also weigh against jurisdiction. **Dissent** – Yes. Placing into SOC is sufficient for PJ, though fairness factors outweigh in this case.
- **J. Mcintyre Machinery v. Nicastro (2011)** – P injured by machine manufactured by D, an English company. D's representatives appeared in US to advertise (though not in NJ). Enough for purposeful availment? **Majority – No, marketing/advertising were not targeted at NJ, so NJ state courts do not have jurisdiction**. SOC not dispositive. **Concurrence** – majority **rule** too broad, but P did not allege sufficient facts.
- **Burger King Corp. v. Rudzewicz (1985)** – P (FL) suing D (MI), a franchisee. Contract contained forum selection clause for FL. Even though jurisdiction would be quite inconvenient for D, court **rule**s that he must travel to FL anyway. Very high bar for avoiding jurisdiction under fairness prong. International Shoe two-prong test:
  - **1. Contact – MUST** establish **minimum contacts**; threshold issue**.**
  - **2. Fairness –**considered once minimum contacts established; "**fair play and substantive justice" prong**; if jurisdiction would make the litigation "**so gravely difficult and inconvenient**" that a party unfairly is at a "**severe disadvantage**", jurisdiction may not be permitted. Not dispositive in and of itself; cannot create jurisdiction without minimum contacts.
- **Three-Part Test for PJ – (1)** state long-arm statute; **(2)** minimum contacts; **(3)** fairness; don't offend due process.

- **E. Personal Jurisdiction in Cyberspace** –
  - **ALS Scan, Inc. v. Digital Services Consultants, Inc. (2002)** – merely placing information on internet does not establish minimum contacts. Must direct activity toward forum state for the purpose of engaging in business.
    - **Jurisdiction On Internet** – **(1)** D directs electronic activity toward state; **(2)** manifested intent is to engage in business within state; **(3)** the activity created an actionable claim in the state.
    - Must show **more than just transmission of information**. **Passive** sites would **not** qualify. **Active businesses would**. Interactive sites (where user can exchange information with the host computer) are a middle ground.
- **F. Jurisdiction Based on Presence of Defendant's Property** –
  - **Shaeffer v. Heitner (1977)** – a state **cannot** obtain in personam jurisdiction over a party based on that party's ownership of property in that state. **Quasi in rem jurisdiction is subject to constitutional requirements of minimum contacts as well**. Presence of property can go towards establishing MC, but it is not dispositive, unless property is directly related to claims. *Does not invalidate in rem jurisdiction.
- **G. Jurisdiction Based Solely on Personal Service** -
  - **Rule 4** –
  - **Burnham v. Superior Court of CA (1990)** – **Transient Jurisdiction.** NY resident served in CA while visiting children. P has no other connections to CA; doesn't matter, service in-state is enough. **Physical presence alone is enough to satisfy PJ requirements**.

- **H. General Jurisdiction** – very limited; three categories with few exceptions. Almost never an issue with out-of-state residents. State **has jurisdiction over all claims** involving its natural and corporate **citizens**, regardless of where those events occurred. **May enter judgment against a domiciliary even if they are absent from state and cannot be served**. **Corporate citizenship includes** state where corp. is **incorporated**, and where their **headquarters** or principal place of business is.
  - **Goodyear Dunlop Tires v. Brown (2011)** – P tries to sue foreign subsidiary of company based in NC. Can foreign subsidiary be held under **GJ** of a state where it has **no "continuous and systematic" affiliation** with? **No**. No purposeful availment or minimal contacts either, so **no specific jurisdiction either**.
    - Helicopteros – purchases in the US by an out-of-state corporation do not establish minimum contacts.
  - **Daimler v. Bauman (2014)** – Argentina Ps sue German company in CA. Daimler has subsidiary in CA. Can court exercise jurisdiction over a foreign company based on the fact that a subsidiary of the company acts on its behalf in the forum state? No, contacts too slim. Would not accord with "fair play and substantive justice".

- **I. Jurisdiction Based on Consent** – D can voluntarily appear in court and thereby submit to jurisdiction. A D who appears and fails to assert timely objection to PJ thereby waives that objection (involuntary consent, **Rule 12(h)(1)).**
  - **Carnival Cruise Lines v. Shute (1991)** – **Forum Selection Clause.** Federal Courts **will enforce FSCs**, so long as it is not unreasonably burdensome on party trying to escape it. P (WA) signed clause prior to trip, must appear in FL.

- **J. Notice** – separate from personal jurisdiction.
  - **Mullane v. Central Hanover Bank (1950)** – notice is contextual; must be "**reasonably calculated to reach**" party in question. "**Notice by publication**" is acceptable when whereabouts of affected party are not known, or connection to case too conjectural to be known with certainty. Process that is "mere gesture" is not due process.

- **K. Venue and Forum Non Conveniens** – beyond PJ, venue requirements operate as a further geographic limitation on where case may be brought. State venue **rule**s identify counties; Fed **rule**s identify districts. Objection to venue must be raised at first opportunity (12(b)(3)) or be waived (12(h)(1)). Not a constitutional requirement however.
  - **28 USC $1391** – **Venue Generally**: **(1) party-based** (where any D resides if all Ds are residents of same state) or **(2) claim-based** (any district in which a substantial part of the events giving rise to claim took place). Apply only to original parties to the action.
  - **28 USC $1392** – **Defendants or Property in Different Districts in Same State**: may bring claim in any such district.
  - **28 USC $1404 – Change of Venue:** district court may transfer any civil action to any other district where it could have been brought, or to where all parties have consented. **Codifies forum non conveniens**.
  - **28 USC $1406 – Cure or Waiver of Defects**: if case filed in wrong venue, court shall dismiss, or if in the interests of justice, transfer to proper district.
  - **Piper Aircraft v. Reyno (1981) –** claim arising from plane crash in Scotland brought in CA against PA manufacturer. **Difference in substantive law is NOT sufficient reason to deny FNC motion, or even a significant consideration.** Court must weigh public and private interests when ruling on FNC motion. Wreckage of plane and evidence in Scotland; case involved Scottish citizens so **government had "overwhelming" public interest** in hearing case. Less favorable Scottish laws are irrelevant. **P's choice of forum should generally be given deference**, but not enough here.
  - FNC can act as a discretionary failsafe in cases of transient jurisdiction.

VII. Subject Matter Jurisdiction and Removal – parties cannot waive SMJ; Article III issue. State courts have general SMJ, Fed courts have limited SMJ. Fed courts have exclusive jurisdiction in very limited set of cases. Concurrent SMJ when issue can be heard by either court.

- **A. Federal Question Jurisdiction** -

- **28 USC $1331 – Federal Question:** extends to all civil actions arising under federal law. Plaintiff must assert a viable federal claim.
- **Louisville Railroad v. Mottley (1908)** – both parties KY residents; no diversity jurisdiction. P asserts that because he anticipates D raising a constitutional defense, they should be allowed in Fed court. **Court** – **No, anticipating Fed defense not enough; suit must arise under constitution**.
  - **Mottley Rule** – Does not suffice for jurisdiction that the answer raises a federal question. Also applies to counterclaims.
  - **All claims** being made (cross-claims, 3rd-party claims, etc.) must **EACH** meet SMJ requirements to be heard in Fed court.

- **B. Diversity Jurisdiction** – allows for adjudication of some state law claims in federal court. Every plaintiff must be a citizen of a different state than every defendant in the action (**complete diversity**).

- **28 USC $1332 – Diversity Jurisdiction:** two prerequisites – **(1)** complete diversity (Strawbridge); and **(2)** a sufficient amount in controversy (>$75,000). **(a)(1)** does not apply to foreign citizens or corporations, **(a)(2-3)** do.
- **Domicile –** citizenship for purposes of determining complete diversity is based on "domicile". **Determined by last place where party was both present and intending to remain indefinitely.** An individual always has only one domicile; highly fat-specific inquiry.
- **Ochoa v. PV Holding Corp. (2007) –** P (LA) sues D who was domiciled in LA at time of incident, but has since relocated to TX. Does Fed court have SMJ over D who evacuated to TX? **No**. **Complete diversity must be present as time complaint is filed.**
  - **Determining Domicile –** where party claims to be domiciled is irrelevant; court must make determination based on: **where party exercises civil/political rights, pays taxes, owns property, has licenses, maintains bank accounts, belongs to club/churches, is employed long-term, maintains home.**
  - **Corporations –** deemed citizens both of their state of incorporation, and their primary place of business (the "nerve center" or HQ).
- **Amount in Controversy –** single P must satisfy; can aggregate single P's claims against same D (even if unrelated, see **Rule** 18). Cannot aggregate multiple Ps, or against multiple Ds. Final judgment does not have to be >$75K, but under $1332(b) court may impose court costs on P if it isn't.
  - Exxon Mobil v. Allapattah (2005) – if at least one P has claim >$75K, other Ps may join even if claims are under $75K, provided they do not upset complete diversity, and their claims are all part of same controversy or case.

- **C. Supplemental Jurisdiction** - for claims that do not satisfy federal question or diversity requirements, but are closely connected to such claims already being entertained by the court.

- **United Mine Workers v. Gibbs (1966) – Pendent Jurisdiction** (stretches fed court's authority over federal law claims to encompass a state law claim arising from same facts)**.** P has state and federal claims arising from same incident. **Court** – as long as such claims arise from **common nucleus of operative fact**, and court has jurisdiction over the federal issue, **federal courts may hear both claims**.
- **Owen Equipment v. Kroger (1978) – Ancillary Jurisdiction** (expands authority of a fed court hearing a diversity action). Can fed court hear diversity case where an **impleaded 3rd-party** is from same state as P, AND case against D has been dismissed? **No. Diversity jurisdiction requires complete diversity; common nucleus of operative facts is not enough**. Ancillary jurisdiction allows fed court to hear diversity action when impleaded party violates complete diversity, but because case against D was dismissed, could not happen here.

- **28 USC $1367 – Supplemental Jurisdiction:** combines ancillary and pendent J into → SJ.
  - **A. Codifies Gibbs –** Fed court has supplemental jurisdiction over state claims arising from common nucleus of operative fact as fed claims, with some exceptions.
  - **B. Codifies Owen –** Where court would otherwise have SJ under **$1332(a)**, **court shall not have SJ over claims by P against persons made parties under Rule 14, 19, 20, or 24.**
  - **C.** Courts may decline to exercise SJ over a claim in **(a)** if: claim raises novel or complex issues of state law; claim predominates over fed claim; court has dismissed all corresponding fed claims; other exceptional reasons.

- D. Removal – P has initial choice of fed or state court in fed question and diversity cases. Can **remand** back to state court, but **cannot remove to state court if originally brought in fed court**.

- **28 USC $1441 –** If P opts for state court, D can **usually** remove to fed court under **$1441**, unless case fails for diversity. Cannot remove unrelated state law claims to fed court under **$1367**; will be severed and remanded to state court.
- **28 USC $1443 – Civil Rights Cases**: can always be removed to district court by D.
- **28 USC $1446(a) –** D wishing to remove does not need to make motion, but simply file **notice of removal** in the corresponding fed district.
- **28 USC $1446(b) –** D must remove the action within 30 days of service of complaint (or at any time if court lacks SMJ). When more than one D joined, **ALL** must join in notice of removal (**$1446(b)(2)(A)**), or action will not be removed.
- **28 USC $1446(d) –** after filing notice of removal, D must **notify** adverse parties and the state court.
- **28 USC $1447 –** If **removal is improper** (ie. fed court does not have jurisdiction), P should file **motion to remand** back to state court under **$1447(c).**
- **28 USC $1448 – Process After Removal**: if any party has not yet received service of process, can now be completed in same manner required by state court.

IX. Choice of Law – The Erie Doctrine

- **28 USC §1652 – State Laws as Rules of Decision:** except where Congress or the Constitution says otherwise.
- **Erie Railroad v. Tompkins (1938) –** PA resident injured by NY corporation in PA; brings suit in NY. **State law governs on questions of substantive law**. Courts must apply state substantive law, but federal procedural law where it conflicted with state procedural law. **Where there is no state law on an issue, fed courts must predict how state supreme court would rule on that issue**.
- **Guaranty Trust Co. v. York (1945) – Outcome Determination Test.** Court – **because state statute of limitations would bar case from being brought, the state rule must govern**. No clear distinction between substantive/procedural. Outcome test holds that **case should have roughly the same outcome whether it is brought in state or federal court**; far too broad and constricting on fed judges.

- A. Scope of Erie –

- **28 USC §2072 – Rules Enabling Act:**
- **Byrd v. Blue Ridge Rural Electric (1958) –** if issue is not clearly substantive, apply state law unless the federal courts have a strong interest in applying federal law. State laws cannot alter the "essential character or function of a federal court". **Must balance state and federal interests, even if the outcome might possibly be altered**.
- **Hanna v. Plumer (1965) –** issue involving requirements for service of process (4(d)); **if there is a federal rule of civil procedure on point that clashes with state law, the federal rule governs**.
  - **Erie built on two rationales**: **(1)** discouraging **forum shopping**; and **(2)** avoiding **inequitable administration** of the laws. Must weigh these two prongs in determining whether to apply state or federal law.
- **Walker v. Armco Steel Corp. (1980) – should state law or Rule 3 apply** on question of tolling of statute of limitations**? Hanna does not apply because no direct clash of rules**. **Rule** 3 is narrow enough to harmonize with state law (**Rule** 4 in Hanna is extremely broad). York controls here because no direct clash, and issue is substantive. **If rules conflict directly → Hanna. If not → twin aims of Erie.**
- **Stewart v. Ricoh Corp. (1988) – court extends Hanna approach to federal statutory provisions** as well. Court allows D to invoke a forum selection clause in AL, where AL state law refuses to enforce FSCs. **Venue controlled by §1404(a), which court found to be procedural, and thus enforced federal law.**
- **Three Scenarios – Key Question: Are the rules in conflict?**
  - **1. Direct and Unavoidable Conflict with FRCP or Fed. Statute–** Hanna applies (Stewart, Shady Grove); federal **rule** probably trumps.
  - **2. State Practice Conflicts with Judge-Made Fed. Practice Only –** "Unguided" Erie. (Walker, Hanna (twin prongs of Erie analysis), York); outcome test; state law probably applies if substantive.
  - **3. State Practice Conflicts with Non-Codified "Essential Characteristic" of Fed. Litigation –** Byrd balancing test; try to harmonize, weigh factors, equitable balancing test.
- **Gasperini v. Center for Humanities (1996) –** NY allows state appellate courts to order new trials when jury awards are excessive under "deviates materially" standard. In conflict with 7th Amd? **No, so long as fed. review standard is "abuse of discretion".** District courts must apply state "deviates materially" standard, and Circuit Courts must use own "abuse of discretion" standard.
- **Shady Grove Orthopedics v. Allstate Insurance (2010) –** NY law prevents class actions in suits seeking penalties or statutory minimum damages; can district court hear such actions under **Rule** 23? **Yes, state statute does conflict with Rule 23**, so **Rule** 23 applies even though it will undoubtedly encourage forum shopping.

X. Finality and Preclusion –

- **Rule 41(b) – Involuntary Dismissal:** unless dismissal order states otherwise, **a dismissal under 41(b) operates as an adjudication on the merits, UNLESS** it is for lack of jurisdiction, improper venue, or failure to join a party under **Rule** 19.
- **Rule 8(c) – Three Elements for Claim Preclusion: (1)** prior suit has proceeded to a **final valid judgment on the merits**; **(2)** present suit arises out of **same claim** as prior suit; **(3)** the **parties in both suits are the same or in privity**.

- **A. Claim Preclusion (Res Judicata) –** prevents multiple lawsuits arising from the same event; must assert all matters arising out of same incident and against the same party. Even those **related issues that could have been litigated** are **barred** by res judicata once valid and final judgment is entered. If claim against party is **unrelated** to event giving rise to action, **P may join under Rule 18**, but is **not required** to do so (and those claims are not barred by res judicata).

- **Car Carriers, Inc. v. Ford Motors (1989)** – Court had previously dismissed anti-trust case against D; is this 2nd case barred by res judicata? **Yes. All federal claims brought in this action arose from "same basic fact situation" as those dismissed in earlier case.** Court uses "transaction test"; even though new facts were discovered, that is not sufficient to remove res judicata bar.
- **Heacock (1988) – res judicata does not apply when court deciding original claim did not have SMJ over an issue subsequently raised** (ie. tort claim in divorce proceeding).
- **Single Injury/Single Recovery –** even if additional injury results after litigation; party may only recover once.

- **B. What Constitutes "Final Judgment on the Merits"?** – Judgment for D does **NOT** bar another action for same claim when: J is one of **dismissal for lack of jurisdiction, improper venue, nonjoinder or misjoinder**; or when dismissal is **without prejudice.**

- Do not need a full trial for FJM; summary judgment is sufficient. Federal courts must use state court **rule**s for res judicata (Semtek).

- **C. Parties are the Same or in Privity** – non-parties can be precluded from litigating on the basis of a prior decision in certain circumstances.

- **Taylor v. Sturgell (2008)** – P's friend had brought prior case against D, seeking documents from FAA. P then brings this suit, requesting the same documents. Is "**virtual representation**" an exception against general **rule** against precluding nonparties? **No, claim is not barred**.
  - **Six Exceptions to Nonparty Preclusion** – **test cases** (parties agree to be bound by results of action between others); **substantive legal relationships** (bailor/bailee, etc.); **adequately represented by another** (class actions, suits by guardians); **party assumed control over litigation** (presented evidence/arguments even though a nonparty); **re-litigating through proxy** (acting as representative of prior party); **special statutory schemes** (probate proceedings, bankruptcies, etc.).
- **Privity –** a relationship between two parties; close enough that litigation initiated by one party ought to foreclose litigation on that same issue by the other party. Claims must also be derivative; does not apply if each party has an independent cause of action.

- **D. Issue Preclusion (Collateral Estoppel)** – applies to single issues; only issues decided and **necessary** to judgment. **Applies only to issues actually litigated and decided.** Settlements are not preclusive.

- **Hoult v. Hoult (1998)** – P found guilty of sexual abuse; later sues D for spreading claim that he raped her. Is suit barred by CE? **Yes. An issue does not need to be explicitly decided** (court returned general verdict in prior case) **if it was a necessary component of a previous finding**. Still a question of fact; court must determine if claim was decided that way by the jury.
  - Hoult Court Requirements: When an issue of fact or law is **actually litigated and determined**, by a **valid final judgment**, and the determination is **essential to the judgment**, then the determination is conclusive on the **identical issue** in a subsequent action between the parties.

- **Jarosz v. Palmer (2002)** – **"Essential to judgment"** requires that the issue be essential to the merits of the underlying case. Not true here; **prior determination** that there was no attorney-client privilege between P and D **was NOT essential to merits of underlying case**. Could have prevailed in original suit regardless of the outcome on this issue.
    - "**Actually Litigated**" – issue must be "subject to an **adversarial presentation and consequent judgment** that was **not** a product of both parties **consent**".
- **Non-Mutual Issue Preclusion** – a nonparty can invoke issue preclusion against a litigant from an earlier case in some circumstances; **nonmutual estoppel.**
    - **Parklane Hosiery Co. v. Shore (1979)** – can a nonparty be allowed to "**offensively**" collaterally estop party from re-litigating issues resolved in an earlier proceeding? **Yes. Trial courts have broad discretion over allowing OCE.** D already had **full and fair opportunity to litigate** this issue. Should only be allowed when: **(1)** nonparty could not easily have joined prior action; and **(2)** application would not be unfair to D.
        - **Four Factors Against OCE** –
            - ❖ **1.** P could have joined earlier case, and appears to be strategically waiting.
            - ❖ **2.** Stakes in earlier case were much smaller, so less incentive to litigate issue fully.
            - ❖ **3.** Judgment relied on is inconsistent with others where D prevailed.
            - ❖ **4.** 2nd action affords important procedural opportunities not available in first case.
- **Issue Preclusion in Mass Tort Litigation** –
    - **Hardy v. Johns-Manville Sales Corp. (1982)** – Court holds that lower court abused discretion in allowing P to use OCE due to earlier verdict against D that stated they knew or should have known of the dangers of their product and therefore should have warned consumers of dangers. Lower court's definition of privity is too broad. **Court** – **earlier verdict was a general one that did not decide "failure to war" issue directly; was not consistent with prior litigation against D, and was for much lower stakes.** Key questions of fact not answered in prior action; no OCE here.

- E. Counterweights to Finality – what if decision in the prior case is based on what is now acknowledged to be an erroneous reading of the law?

- **Federated Department Stores v. Moitie (1981)** – P's original complaint dismissed for failure to allege injury to business as required. **Instead of appealing, P refiles** what they purport to be state claims, which are then removed to district court and barred by res judicata. Circuit Court reverses on grounds that the basis for dismissal of original claims has been over**rule**d. **SC reverses circuit** – **erroneous conclusions can only be corrected by direct review;** res judicata properly applied by district court**. P chose to forego appeal, don't get to reap benefits of another party achieving reversal.**
- **Allen v. McCurry (1980) –** lower court held that CE was inapplicable to $1983 civil rights suits; SC reverses.