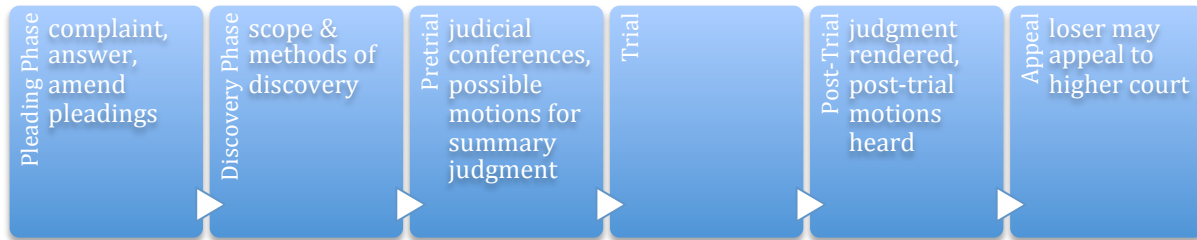


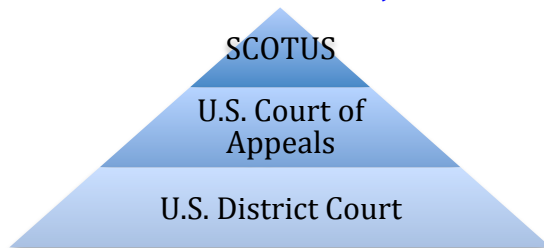
Civil Procedure Outline

“The Secret Handshake of the Law” – rules for engaging in court

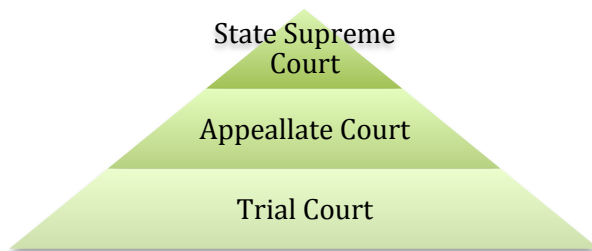


I. Intro to American Courts

- a. Federal Courts – **limited jurisdiction**



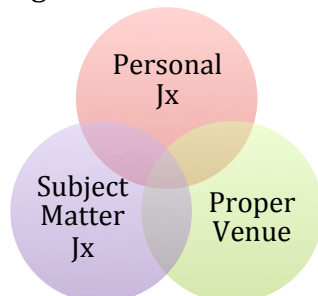
- b. State Courts – **general jurisdiction**



- c. Institutional Values of Civil Procedural System

- i. Fairness
- ii. Accuracy
- iii. Equality
- iv. Efficiency (“Costco Whole sale Justice”)
- v. Finality
- vi. Participation/dignity

- d. How you get someone to court (must have all 3):



II. Federal Subject Matter Jurisdiction (FSMJx)

- a. Two requirements for subject matter jurisdiction:
 1. POWER – Constitution must tell federal courts which subject matter jurisdiction (Article III Sec. 2), AND
 2. AUTHORIZATION – Congress must grant the theoretic power through statutes for the courts to hear cases (28 USC §1332, §1331, maritime law, etc.)

Diversity Jurisdiction 28 USC §1332

“Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, and is between citizens of different States”



- b. State Citizenship of Individuals: The Domicile Test
 - i. *Gordon v. Steele* (42): Mormon Student can't wait to get married
 1. Domicile = presence + intent to stay indefinitely
 - ii. Test for state citizenship (determined at date of filing)
 1. Presence & Intent to Stay Indefinitely
 2. You don't lose your old domicile until you get a new domicile
- c. State Citizenship of Corporations & Other Entities
 - i. How to determine corporation citizenship is: the state of incorporation and the Principal Place of Business (nerve center test)
 - ii. *Hertz Corp v. Friend* (60) – SCOTUS heard the case and used it as an opportunity to set precedent to the lower courts = “resolve the split in the district courts”. Hertz corp using the state of incorporation and PPB test was found to be citizens of: Oklahoma and New Jersey
- d. The Complete Diversity Rule
 - i. Complete Diversity means that no plaintiff may be a citizen of the same state as any defendant. (No similarities across the “v.” line, within the line okay)
 1. Ex. D: Paula MA v. Bank NY
Frank MA v. Bank 2 NY
 - ii. *Mas v. Perry* (51) – creeper Perry 2 way mirror, Mr. Mas French citizen, Mrs. Mas determined as Mississippi and Perry as Louisiana citizen
 1. Exceptions: Domestic relations – congress & the courts want to see these cases handled in family court, historically and socially.
 2. Exception: Probate proceedings.

e. Amount-in-controversy requirement

- i. Today's standard set by Congress is >\$75,000 (As Professor Hsieh says "\$75K and a penny")
- ii. There must be a legal and factual basis for a recovery of the required amount. There must be evidentiary basis to support the award.
 1. *Diefenthal v. C.A.B. (74)* – rich people smoking on airplane first class claim embarrassment IIED, they claim \$50,000 (above the requirements at the time) court says in no way do we see your claim being worth \$10,000 in damages. Court gave Ds time to amend their case but their response was not sufficient to justify the amount in controversy requirement
- iii. Aggregating Claims to Meet the Amount Requirements
 1. A single π can aggregate separate claims against a single Δ to meet the amount-in-controversy requirement (even if unrelated)
 2. Exception: 28 USC §1367 – a second π may "tag along" since first π 's \$ amount fits the requirement

Federal Question Jurisdiction 28 USC §1331

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

f. *Mottley* Well-Pleaded Complaint Rule

Practical rule that serves administrative convenience rather than intellectual elegance.

- i. SCOTUS interpreted and narrowed the scope of the Constitution
- ii. *Louisville Railroad Co. v. Mottley (92)* – **the face of the complaint must include the federal question**, an anticipated or actual defense to the complaint that contains a federal question is not enough

g. Holmes Creation Test

- i. A suit arises under the law that creates the cause of action. So...the claim of the suit must arise under federal law. Think about what has "created" the cause of action.

h. Embedded Federal Issue (Exemption to Holmes Test) (*Grable* - RARE)

There is Federal Jx over a state law claim if the federal issue is:

1. Necessarily raised,
2. Actually disputed,
3. Substantial, and
4. Capable of resolution in deferral court without disrupting the deferral-state balance approved by Congress

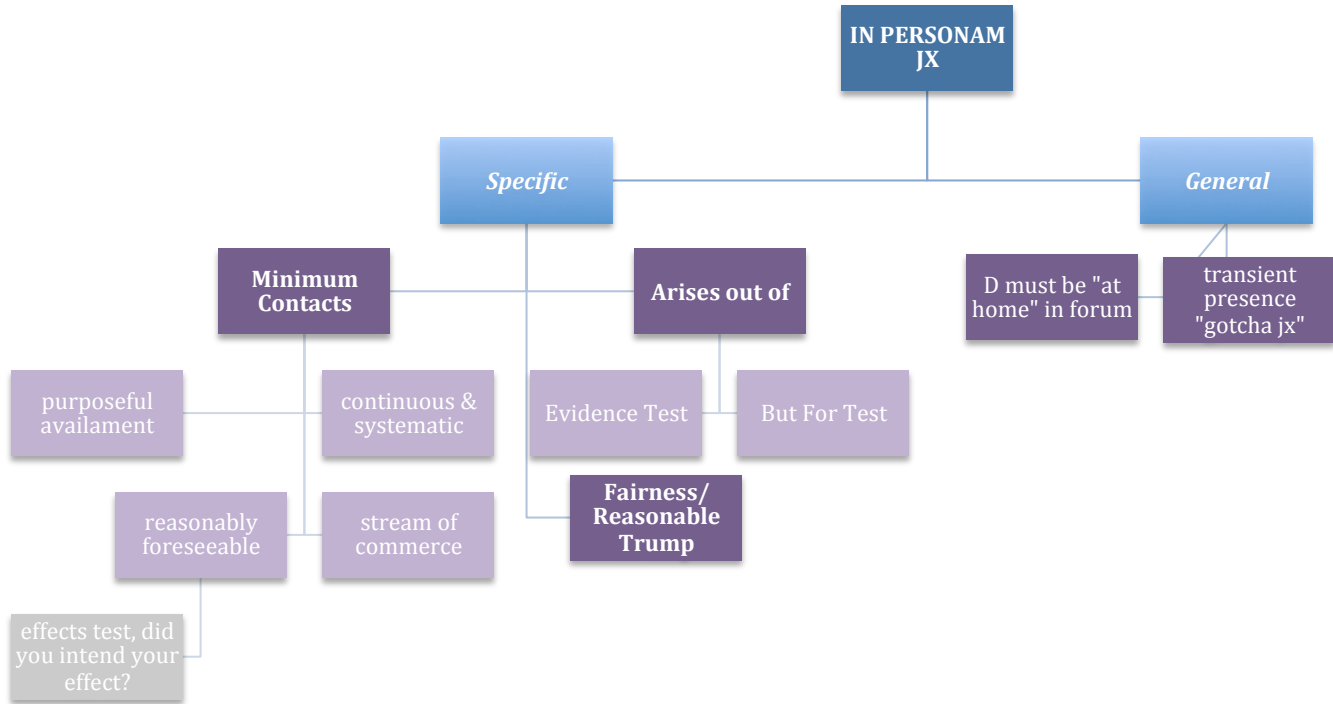
Removal & Remand Procedures

- i. Basic Removal Provisions 28 USC §1441 (a)
 - i. D can remove a case from state court & send it to federal court if the federal court would have had original jx anyways
 - ii. Avitts v. Amoco Production Co. (127)
- j. Removal & “Forum Shopping”
 - i. Careful pleading
 - ii. Joining an in-state D
 - iii. Joining a non-diverse D
 - iv. Limiting amount requested in diversity case
 - v. Fraudulent joinder
- k. Procedure for **Removal**: Who, When, Where & How
 - i. Who: all D’s must agree to remove 28 USC §1446 (b) (2) (A)
 - ii. When: 30 days after receiving initial pleading or being served with process in the action 28 USC §1446 (b) (1). (but no more than one year after action commenced in court for 1332 IF something has changed. Think of this as a special rule)
 - iii. Where: remove to district court of federal system for the district & division embracing the place where such action is pending 28 USC § 1441 (a)
 - iv. How: take removal request to federal court you want to be in, wait to see if P will challenge with a remand
 - v. Exceptions
 - vi. Forum Defendant Rule – §1441 (b)(2) – bars removal of a diversity case if ANY Δ is a resident in the state in which the suit is brought
 1. If the non-diverse party is dismissed from the action, then removal will be permitted
 - vii. You can remand anytime before final judgment IF there is no valid subject matter jurisdiction - 28 USC §1447 (c)
- l. **Remand**
 - i. A P can file a motion to have the case remanded (sent back) to state court.
 - ii. Motion must be brought within 30 days of the removal.
 - iii. Court must remand if no federal subject matter.
 - iv. A P can remand anytime until final judgment if subject matter jx is lacking.

III. Personal Jurisdiction (PJx)

The court must have the authority to require the Δ to appear in the forum & defend the action there.

- a. POWER: 14th & 5th Amen. Cost. +
AUTHORIZATION: FRCP 4(k)(1)(A) & Long Arm Statutes
- b. 2 *Shoe* Sizes: Specific & General in personam jx
 - i. If claim arises out of D's deliberate contact with state (specific)
 - ii. If D has ongoing contacts with the state (general)



SPECIFIC PJx

1. Minimum Contacts
2. Relatedness/Arises out of
3. Fairness/Reasonableness Trump

c. Refining **Minimum Contacts Test**

Evolution of the Role of Contacts in Analysis:



- i. *International Shoe Co. v. Washington* (193) – can International Shoe be forced to appear in Washington?
 1. Crt established that Shoe had “systematic & continuous” business operations in Washington because of their 13 salesmen.
 2. Rule: minimum contacts with the forum state can enable a court in that state to exert personal jx over a party consistent with due process clause.
- ii. *Hanson v. Deckla* – Crt moved away from McGee’s vague multi-factor analysis
 1. emphasized need for “deliberate and purposeful” contacts, must have purposeful contact within the state
- iii. *World-Wide Volkswagen v. Woodson* (1983) – Audi burns NY family in OK on their way to AZ.
 1. Reasonableness of contacts.
 2. The D’s contact with the forum state must be such that maintenance of the suit does not offend traditional notions of fair play and justice.
 3. The relationship between the party and the state must be such that it is reasonable to require the party to defend the suit where it is brought.
- d. Refining Minimum Contacts test: Contract Contacts
 - i. *Burger King v. Rudzewicz* (202) – Is a contract with a choice of law provision enough to establish minimum contacts necessary for personal jx? One needs to purposefully avail themselves of the law of the forum state, you should reasonably aware.
 1. (look at circumstances of the commercial relationship): negotiation of K, the provisions in K itself, ensuing experience under the K (Burger King) <Choice of law v. forum selection clause>
- e. **Stream of Commerce** (*Asahi* Pluralities)
 - i. Brennan, “Pure” S.O.C. = mere foreseeability is purposeful availment. D’s burden is counterbalanced by benefits of biz.
 - ii. O’Connor, “Stream of Commerce Plus” = mere foreseeability is not purposeful availment. “Plus” is act directed at forum, i.e. specially designing a product for that area, or advertising there.

GENERAL PJx

- Sufficient contacts to be “at home”
 - Domicile
 - Service on D while voluntarily in forum state (transient presence okay)
 - Consent or waiver by D
- f. **NOTICE**
 - i. Think of it like “Simon says.” Constructive or “actual” notice is not enough, has to be exact per statutes.
 - ii. Notice = Complaint + Summons
 - iii. FRCP (4)(c)(1) – plaintiff burden to serve D
 - iv. **FRCP (4)(e):** methods of serving individuals
 1. In hand
 2. Leave with capable person of age at dwelling

3. Copy with authorized agent
 4. Follow state rules
- v. **FRCP 4(h):** methods of serving corporations
1. Officer/agent
 2. Authorized agent
 3. Follow state rules
- vi. **Notice, For notice to be proper, it must satisfy:**
1. **CONSTITUTIONAL Due Process Requirements**
 - a. Rule elaboration: *Mullane*: “Notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”
 2. **AND Relevant Statutory Requirements FRCP 4 OR state provisions of service**

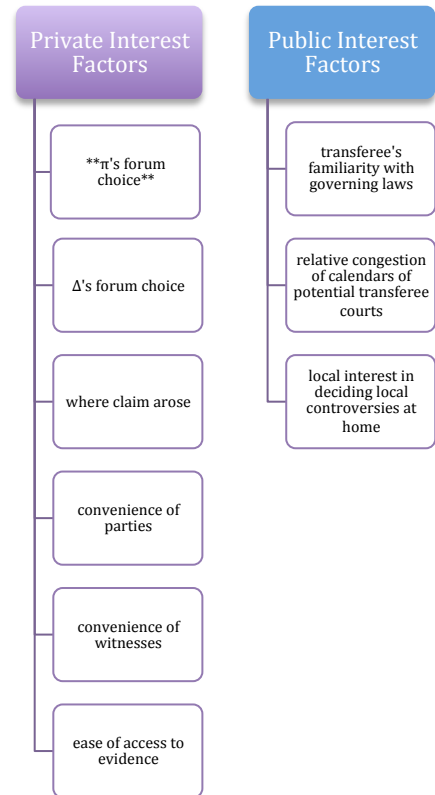
IV. Proper Venue

- a. **Venue** = particular court within court system where a P can file suit
- i. The US Constitution does not restrict P’s choice of venues (only statute does that- there are fed & state statutes)
 - ii. Restriction of P’s choice of venue are designed to ensure that the location of the suit is reasonable & convenient given the location of the evidence, witnesses & D
- b. **28 USC §1391 (b)** (work horse venue statute)
- i. **where any D resides, if all Ds are residents of the state, OR**
 1. [“reside” here is equivalent to domicile standard from PJx, presence + intent to remain indefinitely]
 2. knowing citizenship is more than knowing where someone resides, reside does not equal citizenship. So use the right vocabulary
 - ii. **where substantial part of the events/omissions occurred, (property part of that action) OR**
 - iii. **if no i. or ii. then anywhere that the court has personal jx. (fall back - don’t use this until you have EXHAUSTED options in 1 or 2)** (pretty much just for foreign Ds)
- c. there may be more than one proper venue, or none at all
- d. **Change of Venue**

	Case filed in wrong venue	Case filed in correct venue
Motion to Transfer	28 USC §1406	28 USC §1404 (must balance the private v. public factors)
Motion to Dismiss	28 USC §1406	Forum non conveniens

e. **Transfer Factors** for 28 USC §1404 (P can use this too)

- i. Private v. **Public** Interest Factors:
- ii. Exception to considering the factors – if the parties have agreed to a forum selection clause in a contract, then courts ignore the *private* interest factors (essentially waiving private interest factor considerations)
- iii. In practice note: If you are in federal court and don't want to be there you can't remand or remove – you 'play the venue game' and try to transfer or dismiss venue



V. Pleading

a. Vocabulary

- i. Pleading = paper containing factual assertions, “allegations,” that support jurisdiction and legal claims in a civil lawsuit FRCP 8(a)
- ii. Complaint = P's first pleading, states grounds for Federal Subject Matter Jurisdiction, a short & plain statement of claim showing that P is entitled to relief, and a demand for relief. FRCP 8(a)
- iii. Answer = D's first pleading
 1. Sets out defenses (FRCP 12 (b))
 2. Counterclaim = D includes claim against P in answer
 3. Cross claim = D includes claim against a co-defendant
- iv. Judgment-proof = a person who has no assets from which judgment can be collected

b. Initial Pleading

- i. Historical Context, Purposes
 1. Give notice to D
 2. State facts
 3. Narrow issues for litigation
 4. Help courts weed out bogus claims
- ii. **Modern Notice Pleading** – 3 requirements **FRCP 8 (a)**
 1. Subject Matter Jx, AND
 2. A short and plain statement of the claim showing that the pleader is entitled to relief (“notice pleading), AND
 3. Demand for judgment
- iii. **Heightened Pleading:** Pleading with Particularity – **FRCP 9**
 1. For fraud & mistake a d P must plead w/particularity (rationale: it's a serious claim that impacts a persons reputation):
 - a. Fair Notice
 - b. Protecting Reputation

- c. Protecting Public \$
- d. Suspect Plaintiffs
- 2. For special damages, aka damages that are not normally anticipated from an event. (i.e. you caused someone to drop a vase, you don't expect that the vase is a billion dollar vase)

iv. Still Evolving Standard of Plausible Pleading, ***TwiqBall***

- 1. *Bell Atlantic v. Twombly & Ashcroft v. Iqbal*, 2 prong test & set up the inquiry:
 - a. Set up inquiry: what is the substantial law claim? What are the elements?
Overall: the claim must be plausible.
 - b. A court must take the factual allegations of the complaint as true
 - i. ONLY if complaint is well-pleaded and not conclusory
 - c. Determine whether the allegations plausibly give rise to an entitlement of relief.



v. **Default – FRCP 55**

- 1. Entry of default v. default judgment
- 2. FRCP 55 (a): fail to plead or otherwise defend
- 3. FRCP 55 (b) (1) Clerk shall enter default only if fault and failure shown by affidavit otherwise
- 4. FRCP 55 (b) (2) By Court.
- 5. FRCP 55(c) – setting aside default of default judgment. The court may set aside any entry of default for good cause, and it may set aside a default judgment under Rule 60(b)
 - a. Good cause is broadly allowed in (c) because we want courts to hear cases on the merits, not technicalities

vi. **FRCP 12 Motion to Dismiss**

- 1. Purpose: promote judicial efficiency by consolidating 12 (b)(2)-(5) defenses
- 2. Allows a D to assert several diff defenses and objections to the compl. But may not assert them one at a time, must be joined in 1 omnibus pre-answer motion and imposes waiver as the penalty for leaving certain defenses out.
- 3. “Grocery List” FRCP 12 (b)(1)-(7):
 - i. lack of smjx
 - ii. **lack of pjx**
 - iii. **improper venue**
 - iv. **insufficient process**
 - v. **insufficient service of process**
 - vi. failure to state a claim upon which relief can be granted; and
 - vii. failure to join a party under Rule 19....
- b. 12 (h) is the rule that says 2-5 of the grocery list is waived if you don't bring them up all at once
- 4. **Timing FRCP 12**
 - a. 12 (a) (1) (A) (i) – 21days from served with summons and complaint

- b. 12 (a) (4) – if court denies 12b motion you have 14 days after denial

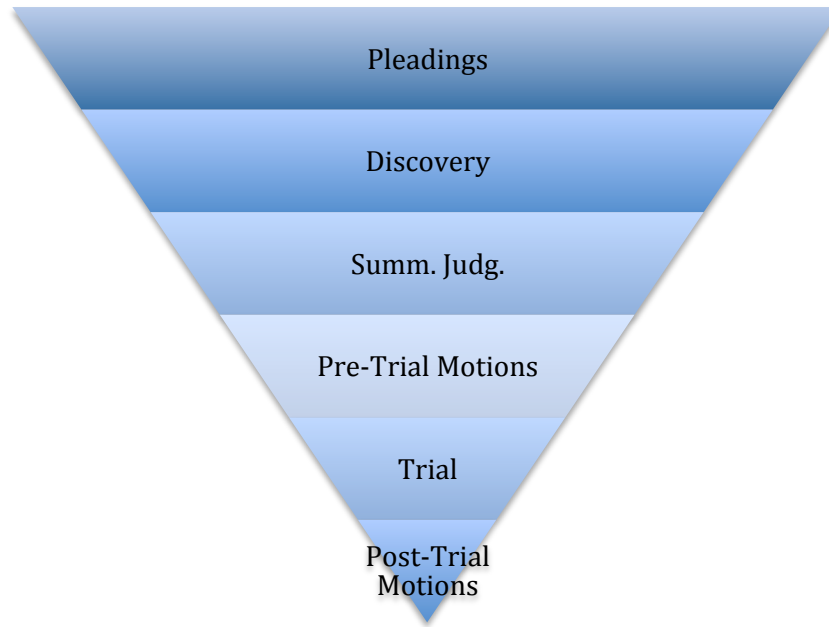
vii. **Amended Pleadings FRCP 15**

- 1. FRCP 15(a)
 - a. (1) amendment allowed as a matter of course (don't need courts permission) – “you only have 1 free bite out of the apple”
 - i. 21 days after service
 - ii. 21 days after service of responsive pleading
 - b. (2) amend by leave of court (need courts permission) – “The court should freely give leave when justice so requires.”
 - i. Pg. 562 of casebook:
 - 1. Reason for the amendment
 - 2. Amending parties diligence
 - 3. Prejudice to opposing party
 - 4. Amendments would be futile as a matter of law
 - 5. Amending parties prior amendments
- 2. Rule 15 (b) – less generous standard for amend. During or after trial because pleading changes after trial starts may likely unfairly prejudice opposing parties (less prep time)
- 3. 15(c) addresses amendment after the statute of limitations (SOL) has run and whether they can *relate back* (be back dated)

viii. **Care & Candor in Pleading - FRCP 11**

- 1. (a) Signature – make clear who is held responsible
- 2. (b) Representation to the Court
 - a. not improper purpose such as harass, unnecessary delay, or to increase to litigation
 - b. non-frivolous argument
 - c. factual contentions have evidentiary support
 - d. denials of factual contentions are warranted on the evidence, or if specific and reasonably based on belief or a lack of information

Spring Semester Outline



VI. Joinder & Supplemental Jurisdiction

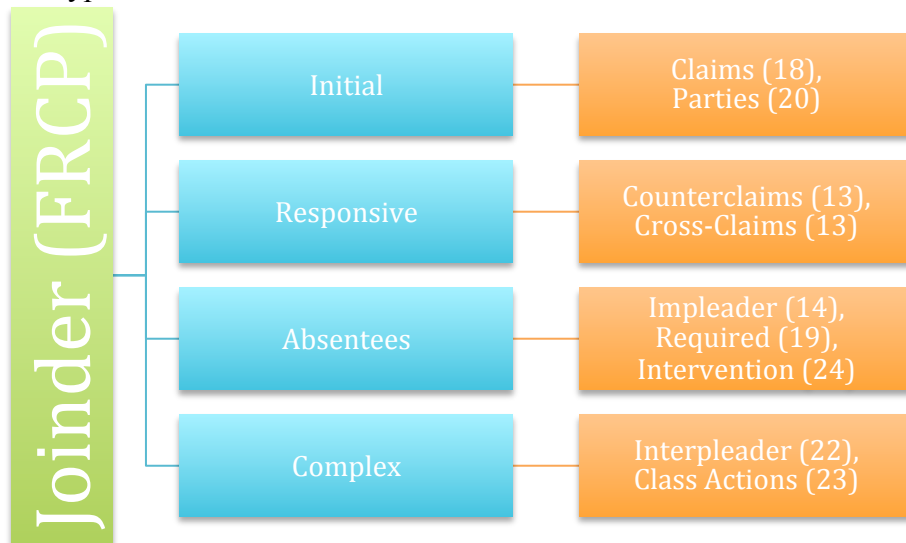
a. FRAMEWORK:

- i. **PERMISSION** – is there permission under the procedural rules?
 1. Is joinder proper under FRCP 14, 19, 20 or 24?
- ii. **POWER** – is there jx power over the joined claim & party?; AND
 1. Fits within “case or controversy” constitutional ART III §2
- iii. **AUTHORIZED** – is joinder authorized by Congress?
 1. 28 USC §§ 1332, 1367, statutory authority

b. **PERMISSION, Joinder** = combining claims & parties into a single federal suit

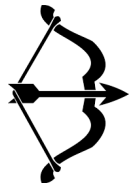
- i. All of the rules are about permission only...you must still check off all other boxes (i.e. personal jx, subject matter jx)

ii. Types of Joinder:



c. Initial Joinder of:

- i. **Claims - Rule 18(a)** = allows a P to assert ANY claim she has against an opponent whether related or not
1. “once you have 1 arrow, shoot away”
 2. Claim preclusion (*res judicata*) = prevents P’s from harassing adversaries by suing again for events they already litigated in a prior action. Barred IF she could not have joined new claim in the first suit



- ii. **Parties – Rule 20** = can add new people or entities to a lawsuit, either new Ps or new Ds. Requires:
1. Same transaction or occurrence; AND
 2. common question of law or fact.



d. Responsive Joinder

- i. **Counterclaims (R13)** (dance moves, counter step)
1. *Compulsory*: defending parties must assert counterclaims that arise out of the same transaction/occurrence as the claim against them or waive it **FRCP 13(a)(1)**
 2. *Permissive*: May also assert counterclaims that are unrelated to the opposing party’s initial claim **FRCP 13(b)**
- ii. **Cross-claims (R13)**
1. Cross-claim may be asserted only if it arises out of the same T/O as the main claim in the action.
 - a. Scope of T/O Test difficult to define, but typically its historically related events:
 - i. Crt considers:
 1. Overlapping evidence
 2. Witnesses
 3. Issues involved in various claims
 4. Logical relation
 2. Cross claims against co-parties FRCP 13(g)
 3. Additional parties to a cross claim or counter FRCP 13(h)

e. Joinder of Absentees

i. **Impleader (R14):**

1. Joinder by defending parties for:
 - a. **Contribution** = partial reimbursement after paying award
 - b. **Indemnification** = full reimbursement for any judgment D incurs to P
2. *Erkins v. Case Power & Equipment Co.* (630)
 - a. 4 factors to determine FRCP 14:
 - i. timeliness of motion
 - ii. potential for complication of issues at trial
 - iii. probability of trial delay
 - iv. whether P may be prejudiced by addition of parties
3. FRCP 14(a)(1) – a party is entitled to implead a 3rd party if 3rd party D may be liable to D for all or part of P’s claim against D

ii. **Required Joinder of Parties (R19)**

1. *Torrington v. Yost* (646)
2. Rule 19 is almost like a defense, plaintiffs add via 20, defendants try to get out of case or force joinder with r19
3. Joint tort-feasors don’t need to be included via 19
4. 3 Steps for R19:
 - a. Is Absentee a Required Party?
 - i. Can a court give relief or will it impair or impede or inconsistent obligations? Or that claims and interests to the subject of that action, may Implead or m=imapri interest or leave another party subject to inconsistent obligations because of the interest.
 - b. Is Joinder Feasible?
 - i. Even if ordered to appear, still need pjx
 - ii. Diversity jx – if joinder destroys valid smjx
 - iii. Is venue still proper?
 - c. Dismiss or Continue?
 - i. Proceed without absentee or dismiss case?
 - ii. 19(b)- 4 factors for court to consider in deciding whether “in equity and good conscience, the action should proceed among the existing parties or be dismissed”

iii. **Intervention (R24)**

1. R24 (a) = interveners of right
2. R24 (b) = permissive intervention
3. *Grutter v. Bollinger* (655)

f. Complex Joinder

i. **Interpleader (R22)**

1. Forces all adverse claimants to litigate ownership issue in a single proceeding

ii. **Class Actions (R23)**

1. Class action litigation is binding on absent class members, even if they are unaware of the lawsuit
2. 4 Elements to Certify (R23(a)):
 - a. NUMEROSITY; potential claimants sufficiently large enough that joinder of each member individually is impractical
 - b. COMMONALITY, there are questions of law or fact common to the class, issues linking class members but be “substantially related” to resolution of case
 - c. TYPICALITY, the claims or defense of the rep parties are typical of the claims of the class
 - d. ADEQUACY OF REPRESENTATION; the rep parties will fairly and adequately protect the interest of the class
3. crt must decide which type of class to certify under 23(b) [3 diff types of classes]
 - a. inconsistent adjudications or impairments of absentees;
 - b. injunctive relief; and/or
 - c. common questions of law or fact predominate and class action is more fair and efficient.

g. **Supplemental Jurisdiction**

i. **POWER, Art. III §2 Constitutional Standing =**

1. ***United Mine Workers v. Gibbs***

- a. SCOTUS held that “case or controversy” from Art III §2 implicitly authorizes jx over claims that share the same “common nucleus of operative fact” (CNOF)

ii. **AUTHORITY, 28 USC §1367**: supplemental jx statute

1. (a) – broad authorization for federal court to hear related state law claims when there is an anchor claim with original jurisdiction
2. (b) “take back” provision for Anchor claims based on diversity (1332) jurisdiction
- a. take back if joined by: FRCP 14, 19, 20, 24
3. (c) – discretionary factors from *United Mine Workers v. Gibbs*, authorizes the court to decline supplementary jurisdiction

iii. **28 USC § 1367 - Supplemental Jurisdiction Steps:**

1. ID the basis of the ORIGINAL JX, the “anchor” claim
- a. i.e. §1331, or §1332
2. For each “orphan” claim
- a. Look for same case/controversy (CNOF via Gibbs) §1367 (a)
- i. Spell out the facts in the case
- b. If anchor is ONLY §1332, apply §1367(b)
- i. Check joinder basis of all πs making claims
- ii. Check joinder of Δs to claims
3. Consider §1367 (c) factors: should court exercise discretion to decline jx here?
- a. 1367 (c) (1)-(4)
- i. claim raises novel or complex issue of state law;
- ii. claim substantially predominates over the claim or claims over which the district court has orig. jx
- iii. dist. Crt has dismissed all claims over which it has orig. jx, or
- iv. in exceptional circumstances, there are other compelling reasons for declining jurisdiction

VII. Discovery

- a. **Discovery** = gathering facts & evidence under FRCP to help flesh out generally pleaded claims & defenses
- b. Information investigation = a lawyer collecting facts on her own, outside FRCP in order to decide whether her client has a claim & to frame the complaint
- c. Scope of Discovery
 - i. **FRCP 26 (b)(1)** – generously broad standard
 1. authorizes discovery of:
 - a. “any non-privileged matter,”
 - b. that is relevant to “any party’s claim or defense”
 - c. (even if it would be inadmissible at trial),
 - d. as long as it “appears reasonably calculated to lead to the discovery of admissible evidence”
 - ii. Discoverable matter = emails, letters, pictures, audio tapes, testimonies

d. **DISCOVERY TOOLS TABLE:**

	Rule(s) ?	Results in?	Against Whom?	When/Conditions ?	Note
Depositions	27, 28, 29, 30 , 31, 32	a written transcript of an oral interview made under oath	experts; other party	must give party reasonable notice,	if you object to a particular question you have to do it then and there, it will be recorded in the transcript & judge can decide later
Document requests; discovery	34	documents and electronic information relevant to any parties claim or defense	other party; non-parties	must describe w particularity what you want, 30 days to respond	may object to part of the requested documents
Interrogatories	33	answers to 25 specific questions	other party in the lawsuit	30 days to respond; subject to federal rules of evidence	typically these responses are written by opposing counsel so they can be very edited and potentially less helpful
Physical & Mental Exams	35	examiner's report: diagnosis, conclusion and results of tests	any party whose mental or physical condition is in controversy	only on good cause	motion must specify the time place, manner, conditions, and scope of exam
Requests for Admissions	36	admissions of truth relating to:(A) facts, application of law to fact, or opinions about either; and (B) genuineness of docs	any other party	30 days to respond	an admission under this rule is conclusively established in court unless special circumstances

e. **STEPS TO APPROACH A DISCOVERY PROBLEM:**

- i. What is requested?
- ii. Is it properly requested?
 1. Is it the right tool used timely and properly?
- iii. Is what is requested within the scope of 26 (b)?
 1. Spell out the relevance with the facts provided
- iv. Does any privilege or exclusion shield the info from discovery?
- v. Are there objections as to the scope?
 1. Be specific

f. **Required Initial Disclosure**

- i. FRCP 26(a)(1)(A) =
 1. Individuals likely to have discoverable info
 2. A copy OR description of all docs/things in a party's control that may be used to support its claims or defenses
 3. Computation of damages
 4. Insurance agreement(s)

g. **Objections to Discovery:**

- i. Irrelevant under 26 (b)(1)
- ii. **Privileged** (e.g. attorney-client priv., and evidentiary rule) **26(b)(5)**
 1. a communication made in confidence during the course AND in furtherance of a relationship society has chosen to protect (i.e. lawyer-client)
- iii. **“work product”** or trial prep materials **26(b)(3)**;
 1. *Hickman*, created in anticipation of litigation (no bright line rule)
- iv. **26(b)(2)(C)** limits:
 1. cumulative or unduly burdensome;
 2. already had opportunity for discovery; OR
 3. burden or expense outweighs the benefit
- v. electronically stored information 26(b)(2)(B)
 1. “a party need not provide discovery of electronically stored info from sources that the party identifies as not reasonably accessible because of undue burden or cost.”
- vi. **Protective Order (Rule 26(c))**
 1. Rule
 - a. Movant must certify that it made good faith effort to resolve the dispute without court action; AND
 - b. Then show that protective order is necessary to protect it from “annoyance, embarrassment, oppression, or undue burden or expense”
- vii. **Deciding motions for protective orders**
 1. Balancing test: hardship of party against whom discovery is sought if allowed v. hardship to party seeking discovery if denied
 2. Nature & magnitude of hardship, consider the social value over purely private interests
- viii. Experts = 26(b)(4) - other party can depose an expert the other side plans to testify
 1. testifying (deposable)
 2. non-testifying, but retained
 3. not retained
 4. fact witness (deposable)

- h. **Discovery Sanctions FRCP 37**
 - i. Process:
 1. Requesting party moves for **order to compel 37a**; then if violate-
 2. Requesting party may seek sanctions
 - ii. Judge DREDD Sanctions:
 1. **Disallow evidence from disobedient party**
 2. **Reject (strike) pleadings of disobedient party**
 3. **Establishment order: establishes facts as true**
 4. **Dismiss P's case; or**
 5. **Default Judgment against D**
 - iii. Spoliation = willful destruction of evidence (*Qualcomm*)
 1. Criminal liability & crt has inherent power to impose sanctions

VIII. *Erie* Doctrine & Choice of Law

- a. **Rules of Decision Act 28 USC §1652**
 - i. “laws of the several states...shall be regarded as the rules of decision in civil actions in cases where they apply”
 - ii. RDA = the statute that is the foundation of Erie
- b. **Two Choice of Law Questions:**
 - i. Vertical Choice of Law (*Erie*)
 1. [Federal; or
 2. State]
 - ii. Horizontal Choice of Law (*Klaxton*)
 1. Which state's substantive law do we apply? [state x – state y]
- c. **Erie Doctrine** - vertical
 - i. federal courts may not apply federal general common law to determine the applicable legal principles in diversity cases
 1. But there IS still federal specific common law (i.e. for patents, or other areas reserved for federal courts)
 2. Only an issue for §1332 diversity cases...obvi! Because if the case were being heard under federal question jurisdiction you are applying federal law never state law
 3. When the meaning of an applicable state law is unclear, a federal court should apply the “**state supreme court predictive approach**” to determine what the law of the state is (would be)
 - a. **Federal court asks what rule the state's highest court would apply today**
- d. ***Klaxton Co. v. Stentor Mfg.*** – horizontal
 - i. a federal diversity crt must apply the choice of law rules of the state in which it sites to determine which state's law to apply to a diversity case
 1. “behave like the state”
- e. Pre-Erie (before 1938) = *Swift v. Tyson*, federal courts did not always apply state law to substantive issues in diversity cases – they applied “federal general common law”
- f. **Steps to Tackling an Erie Problem:**
 - i. **Does the Erie Doctrine apply to this COURT & CASE?**
 1. Are we in a federal court, deciding a state-law claim?

- ii. **Is the issue SUBSTANTIVE or PROCEDURAL?**
 - 1. Is the issue outcome determinative, as judged from the perspective of a P deciding where to file the lawsuit?
- iii. **Klaxon Choice of Law**

g. Substantive v. Procedure

SUBSTANTIVE	PROCEDURAL
Negligence standard – licensee or trespasser? (<i>Erie v. Tompkins</i>)	i.e. how to file a case, make a motion, discovery rules, or timing rules, etc.
Choice of Law Rules (<i>Klaxon v. Stentor</i>)	Adequacy of method of service of process (<i>Hanna v. Plumer</i>)
Burden of Proof (<i>Cities Service Oil</i>)	
Statute of Limitations (<i>Guaranty Trst v. York</i>)	

- i. If the federal procedural practice is governed by:
 - 1. Constitution or Federal Statute
 - a. Then the Supremacy Clause of the Const. allows court to ignore Erie and apply the fed. statute
 - 2. FRCP
 - a. Rules Enabling Act 28 USC 2072 (a) gives broad deference to allow application of FRCPs
 - 3. Judicial Practice
 - a. *Hanna v. Plummer* requires court to consider the impact that ignoring state law will have on the case

IX. Pretrial Case Management (FRCP 16)

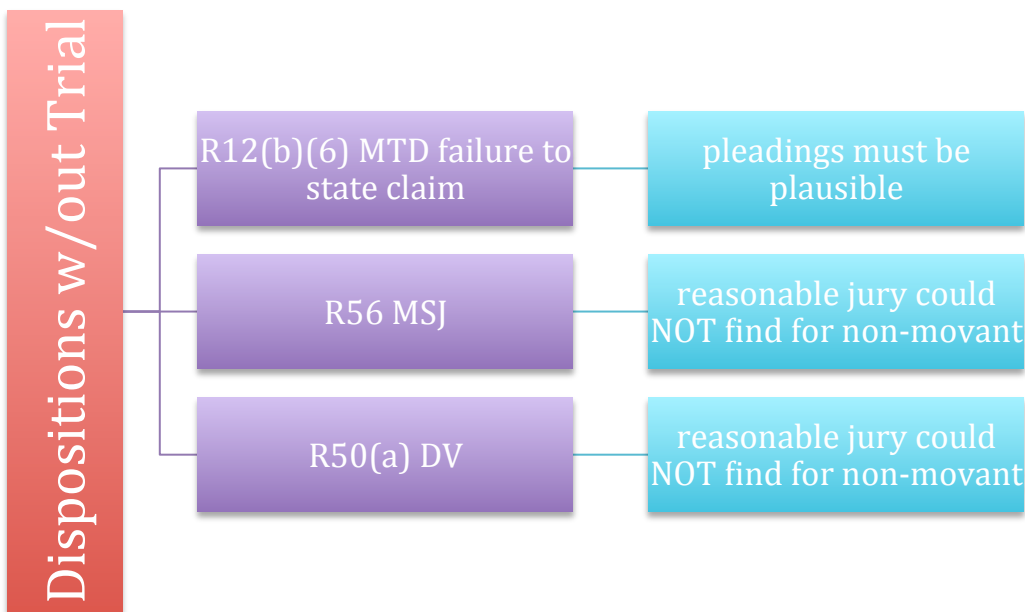
- a. **Pretrial Conference** (FRCP 16 (a))
 - i. ID issues for trial
 - ii. Make pretrial rulings on admissibility of evidence
 - iii. Discuss order of trial
 - iv. (possibly) explore settlement
- b. **Issue Scheduling Orders** (FRCP 16 (b)(1))
 - i. Required early in the process, days after complaint is served
- c. Other Pretrial Orders (FRCP 16 (a-d))
- d. A final pretrial order governing the trial plan can only be modified to prevent manifest injustice (16 (e))
- e. FRCP 16 gives broad authority to district court judges to manage civil cases

X. Trial

a. Right to Jury Trial – 7th Amendment

- i. Jury size – at least 6, no more than 12 jurors
 - ii. Jury instructions – objects must be made before jury retires
 - iii. Jury verdicts
 - iv. Ways to control the jury:
 1. Motion for judgment as a matter of law
 - a. Prevents the jury from making decision without sufficient evidence, or overriding verdicts returned without sufficient evidence
 2. Admissibility of evidence
 - a. Intended to protect jury from misusing evidence
 3. Instructions to jury
 4. Verdict forms
- b. 38(b) - Must demand jury trial no more than 14 days after last pleading served
- c. Involuntary Dismissal – with prejudice
- d. Voluntary dismissal – by plaintiff, with or without leave of court

XI. Dispositions without Trial



Motion:	12(b)(6), 12(c), MTD	12(d), 56 MSJ	50(a), 50(b) JMOL
When:	Compl., answer, & replies	After pleading: collect facts/discovery	Trial, all evidence in the record
Law:	Underlying law	Underlying law	Underlying law
Facts:	Assumes facts alleged in pleadings as true	Undisputed 'document evidence' only	Jury-credibility, judge-sufficiency
Burden:	Pleading	Production of facts	-presumption evidence -persuasion of fact finder

a. **Motion for Summary Judgment FRCP 56(a)**

i. FRCP 56 (a), a movant wins an MSJ when:

1. there is no genuine dispute of material fact; and
2. the movant is entitled to judgment as a matter of law.
 - a. Court resolves doubt in favor of non-moving party

ii. **MSJ Checklist (1007)**

1. What is the substantive law?
2. Which facts are “material”?
3. What evidence may be considered?
4. Has moving party met its burden under FRCP 56(a)?
 - a. If so, has non-movant met its burden to present disputed facts?
5. What is the proper disposition of the motion?

iii. **The MSJ Process**

1. The moving party meets initial burden:
 - a. If moving party has BoP affirmative proof of every element of claim or defense; OR
 - b. Movant doesn't have BoP, so Non-Movant must:
 - i. Disprove an element [prove the negative]; OR
 - ii. “Demonstrate” or “show” absence of proof--SHIFTS B.O.P.--
2. Non-Movant to Create a GDMF
 - a. Using evidence that could be admissible

iv. *Remember*, a “naked assertion” is not enough

1. D saying “show me what you got” on their MSJ is NOT ok

v. **MIKE KIM way of explaining**

1. **If you have BoP at trial**
 - a. **No GNMF & JMOL, no reasonable jury could find for other side**
2. **If you don't have BoP at trial**
 - a. **Disposal of an element**
 - b. **Absence of proof**

vi. MSJ Cases:

1. *Anderson v. Liberty Lobby*
 - a. Judge's inquiry is whether the evidence is such that a reasonable jury could not find by a [preponderance of the evidence] for the non-moving party
 - b. You can “peak” ahead to substantive law's BoP if necessary
2. *Slaven v. City of Salem* (1007)
 - a. Flushing out absence of GDMF
 - b. Due to substantive law, P must show material facts in issue relating to the city's duty & breach
3. *Celotex Corp v. Catrett* (1022)
 - a. Absence of proof
 - b. Negligence cases for asbestos causing death of husband
4. *Flynn v. Goldman*
 - a. Sex discrimination case

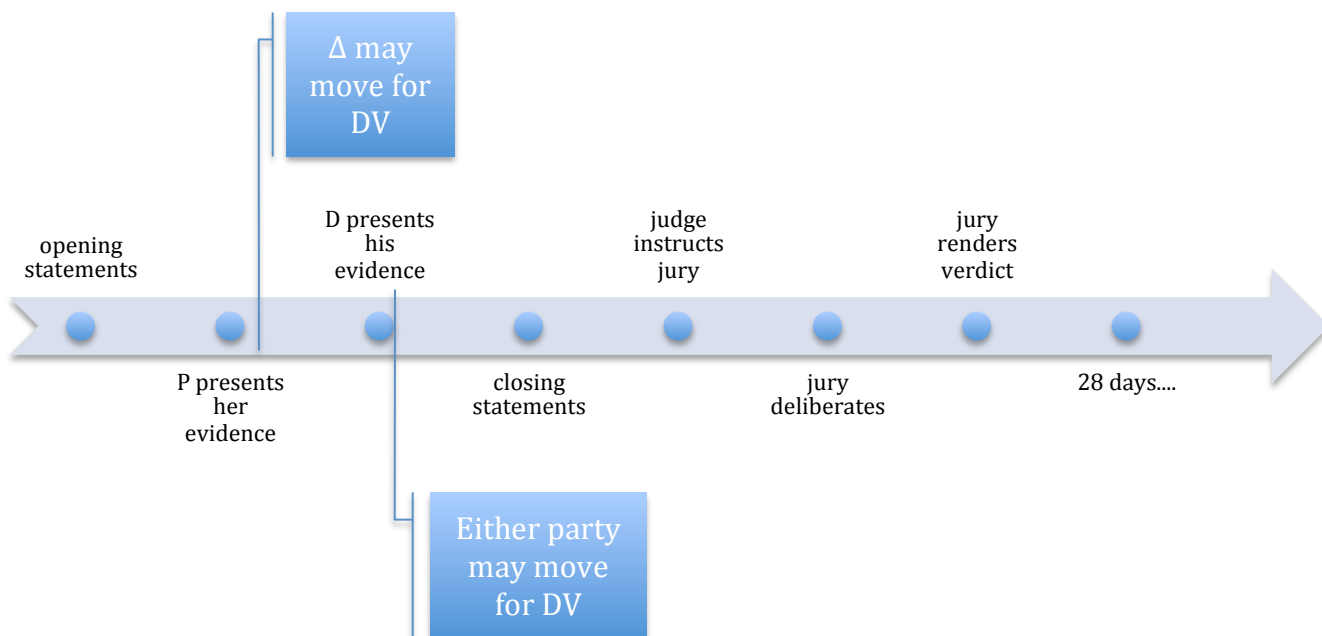
b. **Other Motions, Summary Judgment's Cousins**

- i. **R12(b)(6)** – motion to dismiss for failure to state a claim, decided strictly on factual allegations in the complaint
 1. *In re Bath and Kitchen Fixtures Antitrust Litigation (995)*
- ii. **R12(c)** – motion for judgment on the pleadings
- iii. **R50(A)** motion for judgment as a matter of law

c. **Judgment as a Matter of Law = Directed Verdict, JNOV**

- i. Judgment as a matter of law is a tool to remedy when a P fails to meet their burden of production
 1. (aka, no reasonable jury could find the facts necessary for P to win)
 2. only allowed when a party has failed to offer a “legally sufficient evidentiary basis” to support judgment in their favor

ii. Timeline:

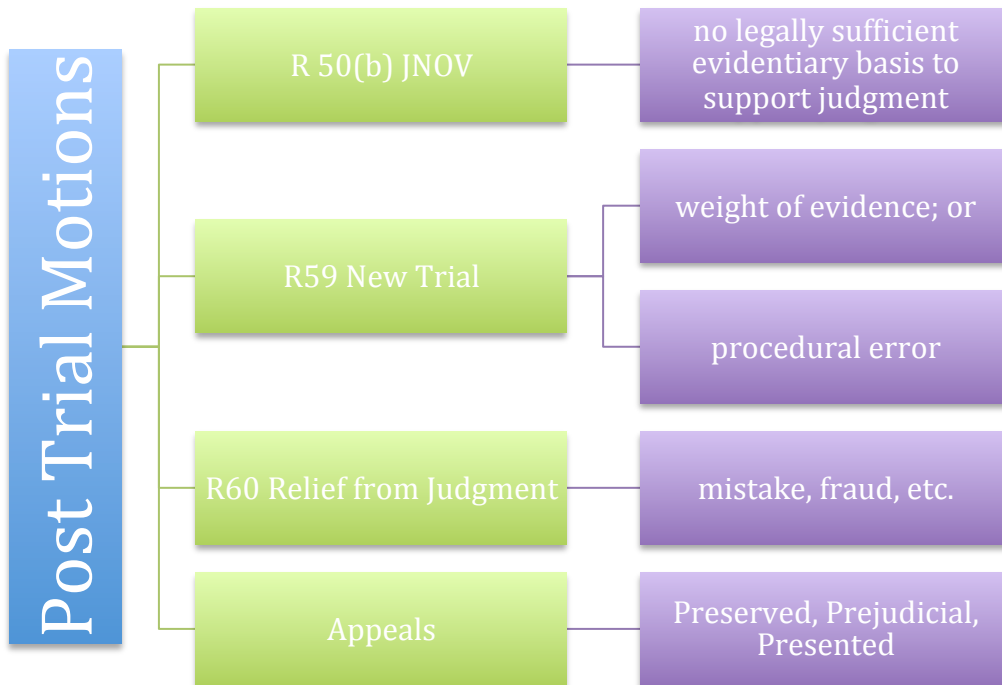


iii. **50 (a) = Directed Verdict**

1. Two functions of a FRCP 50(a) motion:
 - a. Notify the non-moving party that they failed to meet their burden & allow opportunity to correct; and
 - b. Save time & expense of full trial
2. *Pennsylvania Railroad Co. v. Chamberlain* (1075)
 - a. Granting a JMOL
 - i. Negligence, wrongful death claim
 - ii. RR brakeman died when he was operating handbrake for cars on track, and got run over by cars in front and behind
 - iii. Bainbridge = the only witness who testified for P, only heard a crash noise & saw aftermath – he inferred that crash caused death
 1. Hearing loud crash not sufficient evidence to support P’s theory

3. *Lane v. Hardee's* (1086)
 - a. Denying a JMOL
 - i. Lane slipped and fell in bathroom at Hardee's, D moved for JMOL
 - ii. A reasonable jury *could* infer that cleaning policy meant mopping happened and left water behind
- iv. **50 (b) = JNOV**
 1. 50(b) = 'renewed' motion for judgment as a matter of law, judgment notwithstanding the verdict
 - a. does not require a re-trial
 - b. policy rationale to keep 50b = without a 50b the judges would have no opportunity to correct an unsupportable jury verdict
 2. **only allowed when party has failed to offer a "legally sufficient evidentiary basis" to support judgment in their favor**

XII. Post-Trial Motions & Appeals



a. Motion for New Trial FRCP 59

- i. **FRCP 59 appropriate when the verdict is clearly erroneous by:**
 1. **weight of the evidence; or**
 2. **product of flawed trial process**
 - a. must be filed NO later than 28 days after entry of final judgment
- ii. 3 categories to determine if situation is worthy of a new trial
 1. **Weight of the Evidence Errors**
 - a. Verdict is clearly wrong because not supposed by "weight of the evidence"
 - i. Judge actually weighs the evidence
 1. Ex. *Trivdei v. Cooper* (1127)

2. **Process Errors**
 - a. An error occurred in the conduct of trial or the jury's deliberations
 - i. Assuring fair trial
3. Losing party finds new evidence after the trial that would have materially altered the outcome (exceedingly rare)
 - a. Courts insist that the new matter be evidence that could NOT have been discovered by due diligence in time for trial
- iii. *Trivedi v. Cooper* (1127)
 1. Weight of the evidence error
 2. Employment discrimination, D lost motion for JMOL or New Trial
 3. The \$ damages award is not supported by the weight of the evidence
 4. **Remittitur** = ruling by a judge (usually upon motion to reduce or throw out a jury verdict) lowering the amount of damages granted by a jury in a civil case

iv. **Excessive (or Insufficient) Verdicts:**

1. Does the amount of the verdict "shock the judicial conscience?"
2. 3 approaches to finding the right award \$:
 - a. *Minimum Recovery Rule*;
 - i. awarding the lowest amount supported by the record
 - b. *Maximum Recovery Rule*; OR
 - i. Awarding highest legal amount of damages
 - c. Awarding an amount the court deems *reasonable*.

v. **Partial New Trials**

1. New trial can be granted for 1 claim or limited to just the damages of the claim
2. Severability of issue for new trial

b. **Relief from Judgment FRCP 60:**

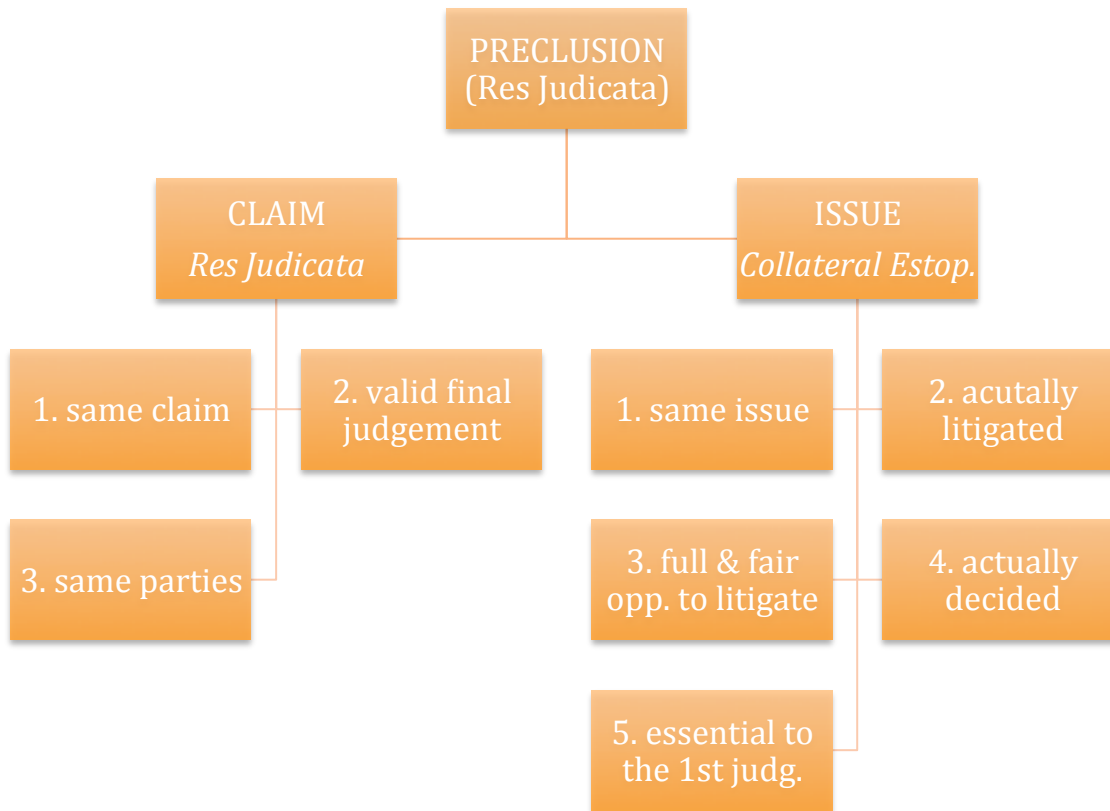
- i. *Mistake, inadvertence..(1 year = italics)*
- ii. *Newly discovered evidence*
- iii. *Fraud or misconduct by party*
- iv. Judgment is void (reasonable time)
- v. Judgment satisfied; application not equitable
- vi. Any other reason that justified relief

c. **Appeals**

- i. Process:
 1. Who: loser
 2. What: file a notice of appeal
 3. When: within 30 days
 4. Where: in district court
 5. How: effect is a stay
 6. Why: maybe you want to make a good law, strategy

- ii. Prerequisites for Appeal: (“PPPlease rule in my favor” – Preserved, Prejudicial, Presented)
 - 1. Preserved
 - a. You needed to give district court opportunity to figure out what they did wrong
 - 2. Prejudicial
 - a. Does it really make a difference?
 - 3. Presented
 - a. The problem must be shown in the appeal.
- iii. The final judgment rule
 - 1. all “final decisions” of the district courts can be appealed by 28 USC 1291
 - 2. exceptions: interlocutory appeals §1292
 - a. **(a)(1) injunctions**
 - b. (a)(2) receivers
 - c. (a)(3) admiralty
 - d. **(d)** D.Ct. certifies debatable question of law that is resolved may materially advance end of litiacal AND crt of Appeal permit review in it discretion
 - i. interlocutory decisions are made in the middle of the case
- d. **writ of mandamus** = court order for extraordinary relief
 - i. irreparable harm
 - ii. clear entitlement to relief, a usurpation of power
- e. **Collateral Order Doctrine R54(b)**
 - i. Cohen Factors:
 - 1. Separability
 - 2. Finality
 - 3. Urgency
 - 4. Importance

XIII. Preclusion



- a. **Res Judicata** = bars a party who has sued a D on a claim from suing that D again on the same claim, if the 1st case was decided after a full opportunity to reach the merits
- b. PP Rationales: (important to address in a preclusion issue because it is based on a common law doctrine, we just PP to justify)
 - i. Public confidence in judicial system
 - ii. Fairness
 - iii. Efficiency; “judicial economy”
- c. **Claim Preclusion** (Res Judicata) – “exclude the whole enchilada”
 - i. Elements:
 1. **Same claim;**
 - a. *Transactional test* =if they arise out of the same “operative fact” or same “transaction or occurrence” (BROAD test)
 2. **Valid final judgment on the “merits;”** AND
 - a. You had an *opportunity* to litigate on the merits
 3. **Same parties**
 - a. Literally the same parties, actually controlled “laboring oar,” or in “privity,” statutory scheme or agreement
 - b. Parties have to be in the same procedural posture
 - ii. *River Park v. City of Highland Park* (1207)
 1. Transactional test v. same evidence test
 - a. Trans =
 - b. Same evidence =
 - iii. Exceptions to Claim Preclusion:

1. Parties have agreed that P may split her claim; or
2. Crt in 1st action expressly reserved P's right to 2nd action;
3. P's 1st claim was restricted by SMJx or court & P wants to use that theory or form of relief npw;
4. 1st judgment was plainly inconsistent with fair & equitable
5. substantive policy reason to give P option to sue;
6. clearly & convincingly shown that policies favoring preclusion of a 2nd action are overcome

d. **Issue Preclusion** (Collateral Estoppel) – “surgical removal of piece of claim”

i. Elements:

1. **Same issue;**
 - a. (be precise!)
2. **Actually litigated;**
3. **Full & fair opportunity to litigate;**
4. **Actually decided;** AND
5. **Essential to the 1st judgment**
6. (against same party)
7. (discretion of court)

ii. *Cambria v. Jeffery* (1258)

1. 1st courts judgment included D's negligence as dicta, it was not ESSENTIAL to the judgment, so not precluded

iii. *Panniel v. Diaz* (1246)

1. Alternative dispute resolutions satisfy the element of “fully and fair opportunity to litigate”

iv. Exceptions to Issue Preclusion (1249ftnote):

1. The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; OR
2. The issue is one of law and:
 - a. The two actions involve claims that are substantially unrelated, or
 - b. A new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws;
3. A new determination of the issue is warranted by differences in the quality of extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
4. The party against

e. **Rule Preclusion** = FRCP 13, if the Federal Rules made claim compulsory (“use it or lose it”) and you failed to do it, then it is precluded via the federal rules

f. **NON-MUTUAL PRECLUSION** = the parties to lawsuit #2 are not EACH able to use the judgment from lawsuit #1 to establish an issue in suit #2

i. **DEFENSIVE**; (*Blonder-Tongue*) or



ii. **OFFENSIVE** (*Parklane Hosiery Co*)



Parklane Factors: (F.I.I.W.)

1. **Full & fair** opportunity for defender to litigate in earlier action?
2. Did defender have **Incentive** to litigate in 1st action?
3. Is earlier judgment **Inconsistent** with other judgments?
4. Did the new claimant “**Wait in the wings**”?

g. **Which Law of Preclusion Applies?**

- i. Enforcing courts (2nd decision) generally use preclusion rules of rendering court (1st decision)
 1. If rendering court is fed. Crt sitting in §1332, enforcing court applies preclusion law of the state in which rendering court sits (*application of Erie*)