Civil Procedure Outline

Rubenstein – Fall 2012

SUBJECT MATTER JURISDICTION

subject matter jurisdiction – the court's power to hear a case because of the nature of the dispute, as distinct from its power to enter a judgment against a particular defendant

- In state courts: determined by the state constitution, state statutes, and judicial decisions
  - courts of general jurisdiction
  - just because case removed to federal court does not mean state court did not have jurisdiction
- In federal courts: governed by Article III, federal statutes, treaties and judicial decisions (28 U.S.C. § 1331)
  - if not federal question, need to satisfy both the amount-in-controversy and diversity (28 U.S.C. § 1332)
  - few statutory instances of exclusive federal jurisdiction – bankruptcy, copyright, patent, IP law

Parties **cannot waive or create** subject matter jurisdiction (*see* Capron v. Van Noorden (1804))

- appellate courts review lower courts decisions but do not take evidence
- do not want to infringe upon state sovereignty

DIVERSITY

Diversity exists in civil actions between (28 U.S.C. § 1332(a)) –

- citizens of different States
- citizens of a State and citizens or subjects of a foreign state (unless alien domiciled in same state)
- citizens of different States and in which aliens are additional parties
- a foreign state as plaintiff and citizens of a State or different States

Diversity interpreted to mean "complete diversity"

- there is no diversity jurisdiction if any plaintiff is a citizen of the same state as any defendant (*see* Strawbridge v. Curtis)
  - EXCEPTION class action suits only require minimal diversity
- burden of proof – party asserting diversity jurisdiction must demonstrate it exists
- determination of citizenship for diversity purposes is controlled by federal law, not any state law

CITIZENSHIP OF INDIVIDUALS

Citizenship means "domicile" (*see* Mas v. Perry)

- mere residence is not sufficient for diversity purposes
- a person's domicile is the place of "his true, fixed, and permanent home and principle establishment, and to which he has the intention of returning whenever he is absent"
- change of domicile can only occur by (1) taking up resident in a different domicile and (2) intending to remain there
- In Mas v. Perry, moving to a location for graduate school was not viewed as a change of domicile – you are domicile at the last place that meets the definition

CITIZENSHIP OF CORPORATIONS

A corporation has two locations of citizenship (28 U.S.C. § 1332(c)) [must have diversity for BOTH locations]
(1) the state(s) in which it is incorporated; and
(2) the state in which it has its principal place of business

Test for Principal Place of Business
- **Standard** – the principal place of business is the nerve center (*see* Hertz Corp v. Friend)
  - "Nerve Center" test – locus of corporate decision-making and overall control
  - typically headquarters, although it cannot be just a HQ in name but must maintain essential functions
  - Justifications for Using Nerve Center
    - administrative simplicity is a major virtue in jurisdictional statute – vested economic interest in using a predictable standard
- Other Possible Tests
  - "Corporate Activities" or "Operating Assets" test – greatest location of a corporation's production or service activities
  - "Total Activity" test – hybrid of previous two; considers all the circumstances surrounding business

AMOUNT-IN-CONTROVERSY

The district courts shall have original jurisdiction of all civil actions where the matter in controversy *exceeds* the sum or value of $75,000 (28 U.S.C. § 1332(a))

Standard for Evaluating Value of Claim (*see* A.F.A. Tours Inc. Whitchurch)
- "The sum claimed by the plaintiff controls if the claim is apparently made in *good faith*. It must appear to a *legal certainty* that the claim is really for less than the jurisdictional amount"
- if punitive damages are permitted under the controlling law, then may included
- court must afford plaintiff "appropriate and reasonable opportunity to show good faith" that meets requirement
- injunctive relief can still qualify based on estimate of value of relief

Aggregating Claim Amounts
- each plaintiff must satisfy this requirement individually
  - EXCEPTION multiple plaintiffs that join in a single suit may aggregate the amount of their claims if they seek "to enforce a single title or right, in which they have a common and undivided interest" (e.g. two partners/owners of a business or property; not class action)
- one plaintiff can aggregate all of their claims into one suit to meet requirement "even when those claims share nothing in common besides the identity of the parties"

Indemnification Joinder and Diversity
- a defendant suing another party under Rule 14 for indemnification does not destroy diversity unless the plaintiff amends the complaint to add a claim against the new defendant
- for the purposes of SMJ it is treated as a separate suit or claim
  - impleader claims must arise from the same set of facts as the main claim to satisfy Rule 14 so will necessarily meet the requirements in Gibbs and § 1367(a)
- *reference* Owen Equipment v. Kroger

FEDERAL QUESTION

The district courts shall have original jurisdiction of all civil actions *arising under* the Constitution, laws, or treaties of the United States (28 U.S.C. § 1331)
- Article III, § 2 also includes cases affecting ambassadors, admiralty/maritime jurisdiction, and controversies to which the US is a party

Determining Federal Question ("Well-Pleaded Complaint")
- **Rule** – Court look *only at the complaint* (not anticipated defenses or later counterclaims or cross-claims) to see if the issue involves a federal question (*see* Louisville &Nashville R. Co. v. Mottley)
  - case involving a breach of contract by a railroad company to provide free transportation after Congress based an act forbidding such agreements (court held that at its core merely a breach of contract dispute with state law claims)
  - "A suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws."

What to Look for on the Face of the Complaint

Express violation of federal law
- most common and simple case

Implied cause of action *created* by federal law (**Holmes "Creation Test")** [no longer used]
- the proper forum to hear a case is the one having control over the laws which created the cause of action (*see* T.B. Harms Co. v. Eliscu)
  - where state law creates the cause of action, federal jurisdiction typically not appropriate
  - e.g. in Harms, the dispute was over ownership of a copyright which is simply a state law issue *instead of* the copyright itself which would be a federal question

Suing under state law, but necessarily turns on federal law (apply **Grable Test**)
- **Three-Part Test** for "Arising Under" Federal Law (*see* Grable &Sons v. Darue Engineering)
  1) Does the state law claim necessarily raise a stated federal issue
  2) Is that issue in dispute and of substantial nature

- "arising under" jurisdiction allows federal court to hear claims that turn on substantial questions of federal law and thus justify resorting to the experience, solicitude, and uniformity of the federal forum
- e.g. in Grable, court determined strong national interests in interpreting IRS tax provision despite lack of federal cause of action

3) May a federal forum entertain the issue without disturbing any balance of power between federal and state context?
- NOTE: category of cases extremely rare

Federal government is a party (*see* Osborn v. Bank of the United States)
- court interpreted Congressional authorization of the bank to sue and be sued as conferring federal subject matter jurisdiction
- the act of Congress is the "foundation" – without it no contract could have been formed

Federal right interpreted through state law (*see* Merrell Dow Pharmaceuticals v. Thompson)
- **Rule** – Incorporation of a federal standard into a state law action does NOT confer federal jurisdiction where that standard creates no federal right of action
- "arising under" federal exemplified by actions in which the cause of action is federal in nature
- court held it would undermine congressional intent to conclude that the matter arises under federal law when Congress explicitly holds that no private right of action exists under the federal law
  - e.g. in Merrell Dow, Congress provided a standard for branding drugs in the Federal Food, Drug, and Cosmetic Act but no cause of action; Ohio adopted that standard into its laws
- *consistent* with Grable Test emphasis on protecting state sovereignty – did not have to answer a federal question to resolve state law claims
- *see also* Shoshone Mining Co v. Rutter where court held that federal court is not the proper forum even if arising under federal statute if the federal cause of action applies "local rules and customs"

REMOVAL

Removal of Civil Actions – 28 U.S.C. § 1441
- any case that could have been brought in federal court can be removed from state court
- at-home defendants cannot remove – defendant may not remove to federal court if a citizen of the state in which the action is brought
- all defendants must consent to removal
- where an action involves both federal and state claims, the district court may sever the claims which it would not have had independent jurisdiction over and send back to state court
- EXCEPTION class action suits where any defendant can remove without consent of others even in-state defendants

SUPPLEMENTAL

Supplemental jurisdiction – used to get claims lacking independent federal jurisdiction into federal court

Three Step Approach to Analyzing Supplemental Jurisdiction

- Does the court have the **constitutional power** to hear the supplemental claim? (Gibbs standard)
- Has **Congress authorized** the jurisdiction over the related claim? (§ 1367 joinder exclusions)
- Does it fall within the **discretionary factors** allowing a court to deny supplemental jurisdiction?

28 U.S.C. § 1367 – Supplemental Jurisdiction

(a) **Common nucleus of facts**: jurisdiction over all other claims that are so related to claims in the action within original jurisdiction that they form *part of the same case or controversy*

(b) **Exceptions**: Supplemental jurisdiction does NOT exists over the following claims/parties –
   - claims against defendants joined under Rule 14 (third-party), 19 (required joinder), 20 (permissive joinder), or 24 (intervention)
   - claims by plaintiffs joined under Rule 19 or 24

(c) **Discretion to decline**: A district court may decline to exercise supplemental jurisdiction if –
   - state claim raises a novel or complex issue of state law (state sovereignty basis),
   - state claim substantially predominates over the actual federal claim,
   - all claims over which court originally had jurisdiction have been dismissed, or
   - any other exceptional circumstances, such as jury confusion of federal-state law

Why restrict supplemental for Rule 19 (required joinder) but not Rule 20 (permissive joinder)

- in abstract, a case is conceived of as 1 plaintiff/1 defendant/1 case (Brennan view)
- in practice, Rule 19 parties are essential to a case so multiple plaintiffs or defendants may be the case
- Kennedy views permissive parties as not essential to the case; therefore, hooking them in under supplemental jurisdiction does not violate notions of diversity

Pendent Claim Jurisdiction

- federal courts may decide state issues which are closely related to the federal issues being litigated – "common nucleus of operative facts" (*see* United Mine Workers v. Gibbs)
   - Gibbs dismissed the Hurn notion that single cause of action essential – correct assessment is whether in a broad sense there is a "common nucleus of operative facts" to satisfy *res judicata*
   - Article III, Section 2 extends power to all "cases" (not "claims") – Brennan views this as all one case that in part arises from federal law
- court has discretion for pendant jurisdiction – must evaluate based on judicial economy, convenience and fairness to the litigants

Pendent Party Jurisdiction

- **Past/Historical Approach**
  - supplemental jurisdiction may not be used to join a defendant that a federal statute specifically doesn't have a cause of action against (*see* Aldinger v. Howard)
  - cannot bypass complete diversity by using supplemental jurisdiction if federal jurisdiction was originally conferred due to diversity (*see* Owen Equipment v. Kroger where defendant joined a third-party indemnifier who was non-diverse then stepped away)
    - EXCEPTION non-diverse parties joined under Rule 14 indemnification do not unless complaint amended to add them as a co-defendant because would violate § 1367(b)
    - NOTE must have independent jurisdiction over the indemnification suit [Rule 14 joinder by the defendant not prohibited by § 1367(b)]
  - Congress must explicitly authorize pendant party jurisdiction for the federal cause of action in that case for supplemental jurisdiction to be applied (*see* Finley v. United States)
- **Modern Approach**
  - if a court has jurisdiction over a single claim in the complaint, then it has jurisdiction over the entire civil action (*see* Exxon Mobil v. Allapattah Services)
  - diversity: § 1367 overturned Finley but retained the limits suggested in Kroger against using supplemental jurisdiction to circumvent diversity requirements
    - Rule 20 exception in § 1367(b) prevents joining non-diverse defendants but not plaintiffs
    - however, cannot use supplemental jurisdiction to join non-diverse plaintiffs under § 1367(b) because inconsistent with jurisdictional requirements of § 1332
  - A-I-C: supplemental jurisdiction may be used if *at least one named plaintiff* satisfies the amount-in-controversy requirement for diversity
    - different because court views amount-in-controversy as statutory but complete diversity is a constitutional requirement from Art III, § 2

PERSONAL JURISDICTION

CONSENT

A defendant who **fails to raise an objection to personal jurisdiction** in the answer or in an initial motion waives his right to raise the issue later (FRCP 12(h))

- form of objection
  - **special appearance**: by appearing in a court to challenge jurisdiction, a defendant agrees to abide by the court's ruling on the issue and the manner in which the court determines it
  - *see* Insurance Corp of Ireland v. Bauxite (failure to follow the court's discovery rule viewed as waiver of personal jurisdiction claim)
  - if objection correctly raised, burden is on plaintiff to demonstrate appropriate forum
  - NOTE: defendant can also not show up then challenge jurisdiction through "collateral attack" (*see* Pennoyer v. Neff where enforcing court may inquire into jurisdictional validity of judgment)

Forum Selection Clause

- clauses in contract stipulating a forum for any legal disputes confers personal jurisdiction over parties in that forum (*see* Carnival Cruise Lines v. Shute)
- enforcement based on policy consideration because a clear forum benefits all parties (e.g. lower litigation costs for business means lower ticket prices for customers)
- subject to judicial scrutiny for fundamental fairness
  - forum selection clause must be reasonable given the nature of the parties involved
  - e.g. beneficial for international corporations in different countries to stipulate a forum (Bremen v. Zapata Off-Shore)

PRESENCE (TAG JURISDICTION)

Burnham v. Superior Court

- service of process of someone physically in state sufficient to establish *in personam* jurisdiction
- "minimum contacts" standard doesn't apply – not a violation of Due Process
  - physically present defendants from absent ones (Shaffer doesn't apply)
  - International Shoe standard is just a substitute for physical presence
  - tradition and uninterrupted practice of recognizing tag jurisdiction satisfies FPSJ
- Brennan's Concurrence: conducts analysis under Shaffer and purposeful availment instead of treating longstanding tradition as sufficient

To Whom Does Tag Jurisdiction Apply

- service of process is invalid if deceitful action was used to bring defendant into the jurisdiction of the court (Tickle v. Barton)
- *see* FRCP 4 for who can be served process in person

IN REM AND QUASI-IN-REM

Historical Treatment of Jurisdiction

- under Pennoyer v. Neff, difference between jurisdiction *in personam* and *in rem/quasi-in-rem*
  - no way to obtain *in personam* jurisdiction over a defendant out-of-the state
    - state retains absolute authority over persons and property within its jurisdiction
  - citizenship in a state satisfactory for establishing personal jurisdiction
- quasi in rem proceedings based on attachment or seizure of property present in the jurisdiction
  - extended regardless of relationship of property to suit
  - seizure of property thought to serve as substitute for adequate notice or service
  - attachment had to occur at the outset of the trial if done for jurisdictional purposes
  - effect of judgment limited to property attached
- old practice of appointing in-state service of process for jurisdictional purposes (Hess v. Pawloski)

Contemporary Treatment of Jurisdiction

- under Shaffer v. Heitner, must establish minimum contact and FPSJ regardless of tool used to obtain personal jurisdiction
  - cost of simplifying litigation too greatly sacrifices "fair play and substantial justice"
  - conceptually, a proceeding against property equivalent to proceeding against interests of the person holding the property – "an indirect assertion of that jurisdiction should be equally impermissible"
  - *Dissent* – if corporate fiduciary must submit to state laws for incorporation, then should have to submit for corporate misconduct; derivative action should have jurisdiction in Delaware
- property alone unlikely to be sufficient to establish minimum contact
- **continuing purpose of quasi in rem jurisdiction**
  - if you think that the defendant might get rid of the property during the trial, or
  - if the language in the state's long arm statute doesn't allow you to pull a defendant into court
- without an express statute, situs of stock ownership in a forum does not convey minimum contacts or purposeful availment over the directors of the corporation (*see* Shaffer)
- as a form of property, a person's debt follows them wherever they go (Harris v. Balk)

LONG ARM STATUTES (MINIMUM CONTACTS)

International Shoe Co. v. Washington

- Rule – to exercise *in personam* jurisdiction over a defendant, must have certain **minimum contact** within the forum state such that maintenance of the suit does not offend "traditional notions of **fair play and substantial justice**"
  - maximum extent to which a state can exercise jurisdiction consistent with the Constitution
- in this case, contact was deemed to be "**systematic and continuous**" due to the company employing salespersons working within the state
  - irregular and casual activity alone not sufficient

Service of process establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court in the state or when authorized by federal statute (FRCP 4(k))

Evolution of Minimum Contact Analysis

- Former Doctrine prior to International Shoe
  - "consent" theory – presupposed that a corporation could transact business in a state only with that state's consent which requires service of process in state
  - "presence" theory – corporation is amenable to process if it is doing business within a state in such a manner and to such an extent to warrant the inference that it is present there
- Application of International Shoe
  - Gray v. America Radiator: relevant test is whether the defendant engaged in some conduct by which he may be said to have invoked the benefits and provisions of the law of the forum
    - **Holding** – Titan Valve contact with state sufficient to establish jurisdiction
    - sufficient if act or transaction in question has "substantial connection" with the state of the forum (specific jurisdiction)
    - not only about quantity but chiefly about "quality and nature of activity"
    - **state must adopt a long-arm statute to expand their jurisdictional reach**

Purposeful Availment

- Two Purposes of Minimum Contacts
  - protects defendant against the burdens of unfairly litigating in a distant and inconvenient forum
  - prevents states from reaching beyond the limits of state sovereignty
- World-Wide Volkswagen Corp v. Woodson: defendant itself must establish contact with the forum such that it would reasonably anticipate being hauled into court there
  - foreseeability of unilateral activity by another related party is not sufficient
- Asahi Metal Industry v. Superior Court: court split over whether mere awareness that a product placed in the **stream of commerce** could end up in a state constitutes "purposeful availment"
  - Asahi (Japan) manufactures parts for Cheng Shin (Taiwan) who ships 20% of business to Cali
  - **O'Connor** – due process requires *more than just being aware* that a product would enter a state through the stream of commerce (**commerce plus**)
    - examples include designing the product for the market in that state, advertising there, or establishing channels for providing regular advice to customers in that state

        - difficult to adopt in some cases because parts manufacturers by their nature rarely advertise or do things that would satisfy the O'Connor Test
    - **Brennan** – awareness is sufficient as long as doesn't violate FPSJ; manufacturers, unlike retailers, can not only foresee that product might enter forum state but HOPE that it will (distinction between Asahi and World-Wide)
- J. McIntyre Machinery v. Nicastro: court still split on purposeful availment
    - Nicastro (New Jersey) injured his hand at work in machine manufactured by McIntyre (England) who used an independent company as a distributor
    - slightly different from Asahi because person injured is not the person who bought product
    - majority rejects Brennan's view based on foreseeability because it would be unfair to allow so many forums
        - **actions, not expectations, should be what determines jurisdiction**
    - dissent claims that purposefully availed itself to sell product everywhere in the US and not just locations where attended conventions
- Goodyear Dunlop Tires v. Brown: stream of commerce argument too broad to convey general jurisdiction
    - accident did not happen in North Carolina so no specific jurisdiction
    - real world implications would create too much liability for big manufacturers

Internet and Personal Jurisdiction
- a district court in Zippo, adopted a "sliding scale" test for minimum contacts
    - YES: "active" websites that businesses use to carry out transactions with residents of a forum state (similar to O'Connor's example in Asahi of channels of advice)
    - NO: "passive" websites which do little more than make information available

Measures to Consider for Fair Play and Substantial Justice (*see* Burger King Corp v. Rudzewicz)
- **defendant burden**
- **plaintiff interests** in obtaining convenient and effective relief
- **forum state interests** in adjudicating the dispute
    - converges with plaintiff's interest when forum state is plaintiff's home state
    - in Burger King, Rudzewicz had purposefully established contact with Florida to enjoy the advantages of being associated with a corporation governed by Florida laws
- interstate judicial system's interest in **efficient resolution of dispute**
    - is there another forum that obviously would be better – similar to FNC
- **shared interest of states** in furthering substantive social policy (sovereignty and fairness)
    - e.g. custody dispute in which couple in different states – state gov't formed a compact on issue which is unconstitutional without approval of the federal gov't –and rule was that best forum where children reside

PROCEDURAL DUE PROCESS

NOTICE

Notice is valuable in that it is often instrumental in interested parties having an opportunity to be heard – therefore notice only necessary if the interests of a party is not represented

Reasonably Calculated Standard

- **Rule** – notice must be given to a party by means *reasonably calculated*, under the circumstances, to apprise interested parties of the pending action and afford them an opportunity to present their objections (*see* Mullane v. Central Hanover Bank & Trust)
  - in cases with a large number of small, but identical, interests – notice only needs to be reasonably calculated to reach most of those interested
- Two Components –
  1) notice of such a nature as reasonably to convey the required information
  2) affords a reasonable time for those interested to make their appearance
- notice by publication
  - insufficient where the names and addresses of the parties are known (Mullane)
- **disputes involving property**
  - may assume that attachment of property will provide reasonable notice to interested parties (either property is abandoned therefore not depriving anyone of use or absent party has left some caretaker to let him know about any dispute)
    - however, in Mullane the caretaker is precisely the person that is misusing property
- where notice is known to have failed, another method must be attempted (*see* Jones v. Flowers)
  - certified mail typically satisfies except in Flowers where subsequent regular mail is sufficient

OPPORTUNITY TO BE HEARD

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

Factors Considered in Due Process Challenges (Mathews v. Eldridge) [*for individual versus government*]

1) private interests that will be affected by the official action
2) risk of an erroneous deprivation of such interests and the probable value of additional procedural safeguards
3) government's interests in avoiding the burden of further requirements

Application of Factors – Timing of Hearing

- **government benefits**
  - Mathews views government benefits as statutorily created "property" interests
  - avoiding grievous loss resulting from **welfare termination** outweighs the government's fiscal interest in summary adjudication (Goldberg v. Kelly)
    - fair distribution of welfare benefits in line with government interests
    - viewed as essential the right to state position in person orally and confront adverse witnesses
  - not the same for **social security benefits** because (1) other government benefits available for disability recipients and (2) less risk of erroneous deprivation because SS eligibility requirements more clearly defined and easily documented (*see* Mathews)
- **replevin statutes**
  - "a **temporary, non-final deprivation** of property is nonetheless a 'deprivation' in the terms of the 14th amendment" – ability to reclaim by doubling **bond not sufficient** (*see* Fuentes v. Shevin)
  - for the interests of the 14th amendment, property goes beyond undisputed ownership to extend protection to "any significant property interest"
  - must be provided a hearing before deprived of property interests
    - courts made EXCEPTION in Mitchell v. W.T. Grant for case where both parties have an interest in the property and the replevin statute is narrowly constructed so as to minimize the risk of erroneous deprivation by having a judge, NOT clerk determine validity

Modified Balancing Test for Due Process Challenges (Connecticut v. Doehr) [*for disputes between private parties*]

1) private interests that will be affected by action
2) risk of an erroneous deprivation of such interests and probable value of additional procedure
   - bond is necessary but not sufficient to eliminate risk
3) interests of the party seeking to prejudgment remedy and any interests the government may have in foregoing additional procedural protections
   - in Doehr, plaintiff failed to demonstrate presence of any of the circumstances where pre-hearing seizure is justified
   - no existing interest in the property being seized

- notable difference in this case from precedent is that seizure of property does not prevent use of it as in the case of bank accounts or goods; Doehr can still use his house but just loses certain rights

Instances Where Pre-Hearing Seizure is Justified

- purposes of jurisdiction (in *in rem* proceedings)
- to secure the availability of judgment damages
- special need for prompt action ("exigent circumstances")
- cases where notice of hearing undermines the procedure itself (e.g. warning cocaine possessor of search warrant hearing)
- the state has strict control over its monopoly on legitimate force
  - e.g. property seizure for internal revenue, to meet the needs of a war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs or contaminated food

VENUE/FORUM NON CONVENIENS

VENUE AND TRANSFER

Venue is appropriate where (28 U.S.C. § 1391) –

- any **defendant resides**;
  - for natural persons (including aliens lawfully admitted) = domicile
  - for corporations = anywhere the court has personal jurisdiction
    - if there is more than one district within a state, then an appropriate venue is any district within the state that satisfies minimum contacts test
- a **substantial part of the events** giving rise to the claim occurred, or a substantial part of the property subject to the action; or
  - multiple venues can be correct – does not imply that a singular place is correct because it would essentially require trying the entire case just to determine venue
  - *see* Bates v. C&S Adjusters where court found venue appropriate in the district where plaintiff received a collection letter that violated statute giving rise to claim
- **fall back** venue is any location where the court exercises *personal jurisdiction* over the defendant
  - rarely applies because must be no other venue in which the case could be brought

Additional venue specifications where defendant is an officer/employee of the United States (§ 1391(e)) or a foreign state (§ 1391(f))

Change of Venue/Transfer (28 U.S.C. § 1404/6)

- may change to any venue that (1) it could have originally been brought in or (2) to which all parties have consented (§ 1404)
  - must satisfy BOTH "could have been brought" and the interests of justice and convenience of parties/witnesses condition
    - could have been brought applies to *at the time the case was filed* – just because defendant later waives personal jurisdiction objection does not mean case "could have been brought" (*see* Hoffman v. Blaski)
    - convenience/justice alone insufficient
  - court retains discretion to reject a jurisdiction to which both parties have consented
- court may either dismiss or move cases that are filed in improper venue (§ 1406)
  - no obligation of the court to address venue complaints not made in a timely manner
  - jurisdictional dismissal are *without prejudice*

Rule 12(g) – If you don't raise a motion to dismiss due to lack of venue, then right is waived

CHOICE OF LAW

Rule – Absent federal or constitutional questions, the law to be applied is the law of the state in which the court sits (Erie R. Co. v. Tompkins)

- *rejects* the "federal common law" approach adopted in Swift v. Tyson
  - no transcending body of law to provide a basis or consistency of application for this standard
- procedurally, apply federal (not) state rules of civil procedure post-Erie (*forum shopping benefit*)

Conflict of Law Rules

- Federal courts must apply the conflicts-of-law rules of the state in which they sit
  - *See* Klaxon Co. v. Stentor Electric Manufacturing Co.
- A state could apply its substantive law in a case, so long as the state had significant contacts or a significant aggregation of contacts with the parties and the transaction
  - *See* Allstate Insurance Co. v. Hague
  - encourages forum shopping because state will likely end up applying its own laws if it has personal jurisdiction over the parties
- change of venue cases – court applies the substantive laws of the state in which the action was filed, not the court to which it transfers (*see* Van Dusen v. Barrack)
  - partially maintains the advantages of the plaintiff to choose its own forum

FORUM NON CONVENIENS

Threshold Question – Is there another forum in which the case could have been brought?

- If the answer is no, the FNC motion fails on face

Piper Aircraft Co. v. Reyno

- **Rule** – plaintiff may not defeat a motion to dismiss for FNC merely by showing that the substantive law in the alternative forum is less favorable to him
  - EXCEPTION – cases where the remedy provided by the alternative forum is "so clearly inadequate or unsatisfactory that it is no remedy at all"
- Balancing Test of Gilbert factors for determining FNC
  - private interests
    - strong presumption in favor of plaintiff's choice of forum (except with foreign parties)
    - connection of action with alternative forum(s) – availability of witnesses/evidence
  - public interests – consistency of judgments, confusion of jury in applying different substantive laws, "local interest in having localized controversies decided at home"
  - deference to the deciding court except where there is a "clear abuse of discretion"
- finding a plaintiff's chosen forum "burdensome" but not "unfair" still sufficient for FNC

Primary Application of FNC

- necessary to move a case from one state court to another state court by way of dismissal
- due to change of venue option, only reason to use in federal court is to leave the United States

Neuborne – "The Myth of Parity" (1976)

Background
- Powell declared that state and federal courts are fundamentally interchangeable forums likely to provide equivalent protection for federal constitutional rights.
- Neuborne disagrees. The parity does not exist; federal question cases are much better off in federal rather than state courts, and federal courts are institutionally preferable with respect to FQs

Benefits of Federal Forum
- Institutional Comparisons
  - federal district courts often unfairly compared to state appellate courts – more accurate analogy must be with state trial level courts because of fact finding
- Competence
  - federal judge pool is smaller and therefore higher quality
    - better paid, higher caliber clerks, lower case loads
- Psychological Differences
  - federal judges more responsive to Supreme Court decisions and feel more responsible to uphold constitutional rights
  - state judges tend to exercise constitutional avoidance
    - less competent judges will be more hesitant to rule that a constitutional violation occurred
    - therefore both parties don't come in on equal grounds
- Insulation from Majoritarian Pressures
  - allowed to make the choice rooted in the constitution and not politics

Challenges to Neuborne's Thesis
- perception of superiority might just mean that lowers funneling more constitutional questions to federal court
  - this is turn allows federal judges to develop expertise on such questions
  - no inherent or institutional differences
- emphasizing superior could undermine the advantages of a lighter caseload

Rubenstein – "The Myth of Superiority" (1999)

Overall
- Rubenstein argues against Neuborne's conclusion in the context of gay rights and other civil rights litigation

Advantages of state courts
- familiarity with family issues – better understand real world impact of constitutional decisions
- political pressure makes states courts more responsive – local elections often turn on minority interest groups
- life tenure of federal judges hinders responsiveness to modern civil rights issues

PLEADINGS AND DISMISSALS

Pleadings include the following documents (FRCP 7(a))
- complaint (and answer to a complaint)
- an answer to a counterclaim designated as a counterclaim
- an answer to a crossclaim
- a third-party complaint (and answer to a third-party complaint)
- a reply to an answer (if the court orders one)

All pleadings must be simple, concise, and direct (FRCP 8(d))

Parties are allowed to amend the pleadings (FRCP 15) –
- once before trial; and
- after the conclusion of a trial to conform to evidence and add any unpleaded issues that are raised

COMPLAINT AND ANSWER

COMPLAINT

A civil action is commenced by filing a complaint with the court (FRCP 3)

Requirements for a pleading stating a claim for relief (FRCP 8(a))
(1) short and plain statement of the grounds for jurisdiction;
(2) short and plain statement of the claim showing the pleader is entitled to relief; and
(3) a demand for relief sought

ANSWER

Overview
- After a complaint has been filed against you, you have THREE options
  - Default (Rule 55)
    - court reserves the right to conduct hearings before issuing judgment into amount of damages, establishing the truth of any allegations by evidence, or investigating any other matter
  - Answer (Rule 8)
  - Motion to Dismiss (Rule 12(b))

Requirements for responding to a pleading (FRCP 8(b))
(1) a short and plain statement of its defense to EACH claim asserted against it; and
(2) admittance or denial of the allegations asserted by the opposing party
  - Must fairly respond in good faith to allegations by either –
    - Denying all allegations generally;

- Denying designated allegations specifically;
- Denying part of an allegation, then admitting the part that is true; or
- Claiming a lack of knowledge or information sufficient to form a belief about the truth

(3) a failure to respond to an allegation is viewed as an admittance
- a party must serve an answer within 21 days of being served complaint (FRCP 12(a))
- exception for responding to damages (FRCP 8(b)(6))

MOTIONS TO DISMISS

For motions to dismiss under 12(b)(2)–(5), party must move BEFORE filing an answer
- includes dismissals for:
  - lack of personal jurisdictions
  - improper venue
  - insufficient process or service of process

For motions to dismiss for lack of subject matter jurisdiction (12(b)(1)) and failure to state a claim (12(b)(6)), a party may move at ANY time throughout the proceedings

Old Procedure of Code Pleading
- required plaintiffs to state factual support for all elements of each cause
- not only fleshed out the facts but also determined legitimacy of claims (plead the evidence)
- purpose under this system two fold
  - enable opposing party to respond
  - enable the court to declare the law upon the facts stated

New Procedure of Notice Pleading
- only required to contain enough information to put the other party *on notice* of the complaint (*see* Dioguardi v. Durning)
  - FRCP abandons old code pleading standard of stating "facts sufficient to constitute a cause of action"

Adequacy of Notice Pleading
- Old Standard
  - a complaint should not be dismissed under 12(b)(6) unless it appears *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief (*see* Conley v. Gibson)
    - *Conley* simplicity establishes a minimal barrier to discovery
- Bell Atlantic Corp. v. Twombly
  - court in *Twombly* effectively overturn *Conley*
    - concerned about the ease of entering the discovery process
    - must not only be conceivable but plausible
  - Standard – In order to get into discovery, must show

        - plausible that when plaintiff pleads factual content the court will be able to draw an inference of liability
        - a reasonable expectation that discovery will reveal evidence of allegation
        - Court rejected Twombly's complaint because the factual allegations did nothing more than speculate that the phone companies acted in concert rather than in parallel.
        - Must allege something more than just mere possibility of violation
    - Dissent – The heightened burden that court uses is appropriate for summary judgment but not pleadings. The policy behind the modern FRCP has been to allow for liberal discovery to be policed at the summary judgment stage
    - applied to ALL civil actions (not just antitrust actions)
- Ashcroft v. Iqbal
    - a court must take the facts as pleaded in the complaint as true EXCEPT for facts that only restate legal conclusions
    - Holding – Iqbal's complaint fails because it did nothing more than state the elements of a constitutional violation. He did nothing to show that it was plausible that violation occurred.
- however, not required to plead specific facts establishing a prima facie case in a complaint (*see* Swierkiewicz v. Sorema N.A.)
    - elements of a prima facie case is an *evidentiary standard* not a pleading requirement

Pleading Facts for the Wrong Claim
- in Case v. State Farm, the court granted the motion to dismiss
    - claimed that not court's responsibility to create a claim not spelled out
- however, later in Pruitt v. Cheney, the court rejected the motion to dismiss
    - justified primarily on grounds under Rule 15
        - although not articulated in complaint, facts give adequate notice that pleadings could easily be amended to reflect an equal protection claim
        - issue argued on appeal so therefore can amend
    - "duty to examine the complaint to determine if the allegations provide for relief on any possible theory"
- Distinction
    - *Case* was a private contract dispute with relief sought of damages; whereas *Pruitt* involved an Equal Protection claim as part of a class action

ANALYSIS OF NOTICE PLEADING

Cost of Discovery
- Both Twombly and Iqbal justify their decisions surrounding access to discovery
    - Twombly views as a *money question* ("a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed")
        - concerned that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases"
    - Iqbal views as a *political question*

Benefits of Notice Pleading
- Basis for identifying and separating legal and factual contentions so that legal issues may be disposed of at an early stage
- Establish in advance what a party proposes to prove at trial so the opponent can prepare

Issues and Solutions with Notice Pleading (EDIT MORE)
- Problem – Frivolous lawsuits that are made up
  - Rule 11 sanctions will prevent lawyers from taking these cases
- Problem – plaintiff thinks there has been a violation of law but don't have evidence yet
  - Iqbal and Twombly allow limited discovery with summary judgment to halt unmeritorious claims
- Problem – plaintiff has a cause but don't plead the right cause of action
  - Rule 12 based on all facts alleged being true (*see* Pruitt)
- .

SANCTIONS

Lawyer conduct with respect to pleadings is enforced by **Rule 11**
- Every pleading and written motion must be signed by at least one attorney of record
- **signature certifies** that *to best of that person's knowledge formed after an reasonable inquiry* under the circumstances:
  - it is not submitted for any improper purpose (harassment, delay, increase cost of litigation)
  - legal contentions are warranted by existing law or a non-frivolous argument to alter existing law
  - facts have evidentiary support or will likely have evidentiary support
  - denials of facts are reasonably based on belief or a lack of information
- limited in scope to conduct during pleadings (does not extend into discovery)

Sanctions for Violating Rule 11
- court may impose sanction on any attorney, law firm, or party that violated or is responsible for violation of rule
- motion for violations under FRCP 11(b) must be made separately
  - **safe harbor provision**: if a party is alleging a violation, then must give notice 21 days prior to filing with the court and other party can rectify or withdraw claim in question
- Goal of Sanction (FRCP 11(c)(4))
  - deter repetition of the conduct by others similarly situated
  - not punitive (as demonstrated by allowing safe harbor provision)

Garr v. U.S. Healthcare, Inc. (1994, 3rd Circuit)
- *Facts*: U.S. Healthcare insiders had sold a large portion of their stock before a substantial drop. Malone (lawyer for Greenfield) read about this in the WSJ and determined that a certain class of stockholders had a legitimate claim against the defendants
- *Holding*: Malone violated Rule 11 by failing to verify that Greenfield could adequate represent interests of the class; Levin and Sklar failed to do a reasonable inquiry into the underlying facts

- *Reasoning*:
  - Rule 11 imposes a "non-delegable duty" on the signing attorney to conduct his own independent analysis of the facts and laws for all written motions and pleadings
  - WSJ article was not sufficient inquiry because certain allegations were present in the complaint that were not in the article
  - Irrelevant if the claims ends up having merit if it was not preceded by a reasonable inquiry

JOINDER

Must always ask (1) whether the rules permit joinder and (2) whether the court has jurisdiction over it

CLAIM JOINDER

Claim (FRCP 18)
- A party asserting a claim may join *as many claims as it has* against an opposing party
- claims may be joined even though one is contingent upon the disposition of the other

Counterclaim
- compulsory (FRCP 13(a))
  - party must state a counterclaim arising out of the same transaction or occurrence as the opposing party's claim
  - EXCEPTIONS
    - if counterclaim requires joinder over a party outside of the court's jurisdiction
    - if counterclaim is already subject of other pending litigation
    - if the opposing party is the United States or a United States officer (FRCP 13(d))
- permissive
  - a pleading may state as a counterclaim any claim against opposing party that is not compulsory (FRCP 13(b))
  - counterclaim does not have to be related to the opposing party's claim (FRCP 13(c))

Crossclaim (FRCP 13(g))
- a pleading may state as a crossclaim –
  - any claim against a coparty arising out of the same transaction or occurrence; or
  - any claim relating to property that is the subject of the original action
- crossclaims may include joinder of a third-party defendant or indemnification claims (FRCP 14)
  - in diversity cases, no supplemental jurisdiction for claims asserted by plaintiff against parties joined under Rule 14

You must independently assure you have jurisdiction over EACH additional claim or party

Methods of Determining Same Transaction or Occurrence
- Are the issues of face and law largely the same?
- Would res judicata bar a subsequent suit absent the compulsory counterclaim?
- Will the **same evidence** support the claim and counterclaim?
  - *see* LASA v. Alexander (where court adopted a broad view of same transaction to include different contracts relating to the same construction project)
  - to avoid multiplicity of litigation
  - Rule 42(b) allows court discretion to split claims into separate trials to avoid confusion
- Is there any **logical relation** between the claim and counterclaim?

PARTY JOINDER

Where Joinder of Parties is REQUIRED (FRCP 19)

- if complete relief cannot be granted in that party's absence
- if that party claims an interest relating to the subject of the action and disposing of it in their absence will either –
  - impair or impede their ability to protect their interest; or
  - leave them subject to a substantial risk of incurring multiple or inconsistent obligations (*res judicata*)
- if required party cannot be joined for some reason, court must consider these factors in proceeding or dismissing the case
  - extent to which there will be prejudice to that party or existing parties
  - extent to which relief could be tailored to lessen prejudice
  - whether judgment can be adequate without that party
  - whether plaintiff would have an adequate remedy if action were dismissed

Where Joinder of Parties is PERMISSIVE (FRCP 20)

- if they assert any right to relief arising out of the same transaction or series of transactions
- if any question of law or fact common to all plaintiffs will arise in the action
- persons as well as vessels, cargo, or other property subject to admiralty process in rem may be joined as a defendant
- party does not need to be interested in all claims or relief demanded to join
- court may take protective measures including separate trials to protect against prejudice (20(b))

Misjoinder of a party is not ground for dismissal (FRCP 21)

Intervention (FRCP 24)

- A court MUST permit a party to intervene who –
  - is given an *unconditional* right to intervene by a federal statute; or
  - claims an interest relating to the transaction or property of the action AND disposing of action in their absence would impair their ability to protect its interest UNLESS existing parties adequately represent that interest
- A court MAY permit a party to intervene who –
  - is given a *conditional* right to intervene by a federal statute; or
  - has a claim that shares a common question of law or fact
- court considers whether allowing intervention will cause unduly delay or prejudice the adjudication of the original parties

Temple v. Synthes Corp. (1990, SCOTUS by way of Louisiana)

- Facts: Temple filed two separate suits against a company who produced an implant used in his surgery and the doctor for negligence. Defendants claim allowing split suits prejudiced them

- Holding: Joint tortfeasors are merely permissive parties not required. The case fails to satisfy the threshold requirements of Rule 19(a)

CLASS ACTION

FORMING A CLASS

Procedural Prerequisites for Class Certification (FRCP 23(a)) [must satisfy all conditions]

(1) numerosity
   - class must be so large that individual joinder would be impractical
   - typically more than 40 members satisfies conditions and less than 25 fails to satisfy

(2) commonality
   - must demonstrate that the class members have suffered the same injury (not just under the same provision of law) (*see* Wal-Mart v. Dukes)
     - In Wal-Mart, commonality dependent upon plaintiffs claim that Wal-Mart engaged in a pattern or practice of discrimination. Because it seemed unlikely that could prove pattern, the class members did not suffer the same injury and lacked commonality.
     - In discrimination cases, the presence of discretion alone resulting in statistical imbalance in not enough

(3) class representative's claims typical of that of the class
   - underlying idea – even a selfishly acting representative will still be behaving in the interests of all the class members

(4) class representative fairly and adequately protects the interest of the class
   - conflicts of interests
   - typically focuses on adequacy of the representative and not counsel
   - can be reviewed by a later court and deemed inadequate (*see* Gonzales v. Cassidy)

Substantive Requirements for Class Certification (FRCP 23(b)) [must satisfy at least one]

(1) limited funds
   - the total liability faced by the defendant exceeds its net worth so individually resolving claims would lead to only those who file first receiving relief

(2) injunctive relief
   - resolving the claims individually could lead to inconsistency and confusion by party opposing class as to how to conduct itself in the future

(3) predominance and superiority (if seeking monetary damages)
   - predominance – questions of facts/issues of the class predominates any claims of individual class members
   - superiority – class forum is the best way to resolve the claims (judicial economy)

Motion for Class Certification

- in theory, a class certification motion occurs before discovery near the end of the pleadings
- in practice, motion for certification occurs when judge is handed settlement agreement

- even though certification of the class is supposed to happen before trial, the court often peeks at the merits in cases with large implications for class certification

DUE PROCESS AND CLASS ACTION

Jurisdictional Requirements

- Personal Jurisdiction
  - a forum state may exercise jurisdiction over absent plaintiffs in class action even though they would not satisfy minimum contact (*see* Phillips Petroleum v. Shutts)
  - burden placed on absent class-action plaintiff not the same as an absent defendant
    - unlike defendant, absent plaintiff's interests being protected by court and named plaintiffs
    - Rule – due process satisfied as long as class member has notice, opportunity to be heard, opportunity to opt-out, and adequately represented
  - rejection of territorial jurisdiction allows for nationwide class action suits
- Diversity (28 U.S.C. § 1332(d)(3)–(4))
  - minimal diversity (typically only look at class representative's citizenship) – same for venue
  - MUST decline jurisdiction if two-thirds of class from forum state and defendant at home in forum
  - MAY decline jurisdiction if between 1/3 and 2/3 of class from forum state and at-home defendant
- Amount-in-Controversy
  - only one class member required to satisfy the amount-in-controversy requirement (*see* Exxon Mobil v. Allapattah Services)
  - enactment of supplement jurisdiction under 28 § 1367 overturned Zahn v. International Paper
  - alternatively, if in the aggregate the value of action exceeds $5 million (28 § 1332(d)(2))
- Choice of Law
  - Standard – choice of law must be neither arbitrary nor fundamentally unfair (*see* Phillips Petroleum v. Shutts)
    - state must have a significant contact or aggregation of contacts (*see also* Hague)
    - in Shutts, court found it arbitrary to apply Kansas law to all class members when only a small percentage of class connected with the forum
  - in practice, resolved by creating a few sub-classes for different substantive laws
    - each sub-class must be certified
  - where the state laws are not in conflict, no need to do choice of law analysis

Jurisdictional Rules Compared

- class action may be sustained under either set of rules
- Conventional
  - numerosity = impractical to join all members (usually met with more than 40 class members)
  - all class representatives and all defendants must be *completely* diverse
  - at least one named plaintiff must have more than $75,000 in controversy
- Class Action Fairness Act (CAFA) of 2005
  - numerosity = impractical to join all members individually and more than 100 class members
  - any class member must be diverse from any defendant (minimal defendant)
  - $5 million in aggregate must be in controversy

Removal Rules Compares
- Conventional
  - only out-of-state defendant can remove
  - all defendants must consent
  - must file removal pleading within 1 year of commencement of action
- Class Action Fairness Act (CAFA) of 2005 (28 U.S.C. § 1453)
  - any defendant can remove, even at-home defendants
  - consent of all defendants not required
  - no 1 year time limit on removal
- removal rules relaxed because belief at time was that state courts certified classes too easily
- EXCEPTION Delaware carve-out for jurisdiction (28 U.S.C. §1332(d)(9))

Notice
- must be provided to all class members who can reasonably be identified (FRCP 23(c)(2))
- notice much clearly state nature of the action, definition of the class, and binding effect of judgment
- lack of notice frequently occurs but difficult to prove due to notice companies that use means "reasonably calculated" to reach all class members
- within 10 days of settlement, the proposed settlement must be served to the appropriate state official and in each state in which class members reside (28 U.S.C. § 1715(b))

Judgment under Class Action
- unlike normal, settlement is entered and turns into a judgment
- Four Step Approval Process for Settlement
  1) Preliminary Approval
  2) Notice to Members
     - given the option to either accept, object, or opt out (not modify)
  3) Fairness Hearing
     - class members can object at this stage (rarely happens)
     - no adversarial nature at this hearing – lawyers on both sides are pushing for same agreement
  4) Final Approval (preclusive effects after this)

Binding Effect
- judgment is binding (1) for anyone determined to be a class member who (2) received notice and (3) did not request exclusion (FRCP 23(c)(3))
- HOWEVER, if the interests of an absent party were adequately represented in the class action then they can still be bound even without notice (*see* Hansberry v. Lee)
  - The holding in Hansberry stated that she was not bound because her interests were not adequately represented in the first suit. In first suit the class sought to enforce the racial covenant but she is resisting it in the second suit
- class action today employs an opt-out philosophy for preclusive effect
  - HOWEVER members cannot opt-out if certification under 23(b)(1) and 23(b)(2)
  - viewed as "mandatory classes" because basis is that individual suits would undermine relief for the class as a whole

DISCOVERY

DISCOVERY DEVICES

Devices apply to those things that are *relevant* and *not privileged*

Initial Disclosures (FRCP 26(a))
- addressed to parties in order to exchange basics
- must provide certain information without a request from opposing party
  - any person likely to have discoverable information
  - computation of damages sought

Depositions (FRCP 30(a)/31)
- addressed to anyone in order to ask oral or written questions under oath
- allows parties to observe potential witnesses to see how they will appear at trial if called to testify
- allows attorney to pin down a witness with regards to details
- chief drawback is their expense

Interrogatories (FRCP 33)
- addressed to parties in order to ask written questions
- helps parties figure out who to depose or to whom to issue a subpoena
- unlike deposition, parties can consult with counsel before answering questions to craft answers
- must respond not only on the basis of own knowledge but knowledge they could reasonably obtain

Document Requests (FRCP 34/45)
- addressed to parties under Rule 34 or anyone under Rule 45
- electronic documents are discoverable if they are reasonably accessible
- if not reasonably accessible, court can make a determination if expense of retrieving worth it and on whom that burden should fall

Physical Exams (FRCP 35(a))
- addressed to parties by court orders to examine injuries
- only allowed in cases with physical or mental injuries
- limited to parties and those under control or guardianship of parties

Admissions (FRCP 36)
- addressed to parties for the purpose of re-pleading
- reveals what facts are still at dispute for trial

Subpoena (FRCP 45)
- addressed to anyone and anything that a party wants to question or examine

Protective Order/Compel (FRCP 26(c)/37(a))
- addressed to anyone to trigger judicial oversight
- courts granted broad discretion to protect parties from annoyance, embarrassment, oppression, or undue burden or expense
- court may also allow only limited discovery on certain issues to see if it will be necessary to move forward on other matters

Signing/Sanctions (FRCP 26(g)/37)
- addressed to anyone to police behavior
- attorney signature constitutes certification that discovery inquiry is proper
- sanctions only obtainable if failure to adhere to discovery request is willful rather than merely negligent

SCOPE OF DISCOVERY AND PRIVILEGE

Purposes of Modern Discovery
- preservation of relevant information that might not be available at trial
- ascertain the issues that are actually in controversy between the parties
- allows a party to obtain information that will lead to admissible evidence on issues that are in dispute

Effects of Modern Discovery
- encourages settlement

Scope of Discovery
- discovery is proper of any fact so long as it is reasonably calculated to lead to the discovery of admissible evidence
- Courts stance on financial ability of parties
  - in general, discovery of assets not allowed because viewed as invasion of privacy
  - exception allowed for discovery of insurance policy limits in order to obtain reasonable settlements
- certain limitations are placed on ability to discover *privileged matters*
  - person asserting a claim of privilege has burden of establishing its existence
  - privileged relationships include lawyer-client, doctor-patient, priest-penitent, husband-wife
    - believed that encouraging confidence in these relationships more important than allowing full access to this information for litigation purposes
  - testimonial privileges include self-incrimination, spousal protection, and concealing the identity of confidential police informants
  - work-product privilege

Work-Product Privilege

- a party may not discover documents and tangible things that are prepared in anticipation of litigation (FRCP 26(b)(3))
  - exception allowed if party can show a substantial need for the materials and that it cannot be obtained without undue hardship
- certain things are never discoverable – mental impressions, theories, etc.
- necessary because attorney-client privilege only extends to exchanges directly between the attorney and his client
- surveillance tapes NOT viewed as part of the litigation materials in personal injury cases (*see* Tran v. New Rochelle Hospital)
  - statute overturned ruling in DiMichel v. South Buffalo Railway Co. which stated that defendants only obligated to disclose those tapes which they planned to use at trial after deposing plaintiff
  - tapes subject to "full disclosure" and offered no privilege with regards to delayed timing
- Policy Justifications for Privilege (*see* Hickman v. Taylor)
  - attorneys must be free to work with a certain degree of privacy from opposing counsel
  - ultimately interest of clients and justice would be poorly served because lawyers would stop writing down trial strategy and preparation of discoverable
  - "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary"

The German Advantage in Civil Procedure – John Langbein

Two Fundamental Differences

- Court, rather than parties' lawyers, takes the main responsibility for gathering and sifting evidence (although the lawyers keep a watchful eye on the proceedings)
- No distinction between pretrial and trial, between discovering evidence and presenting it.

Other differences

- Initiation: like in American system, lawsuit is commenced with a complaint. However, German document proposes means of proof for factual contentions: documents are scheduled and/or appended, witnesses are identified. The answer is similar. But no factual research has been done.
- Judicial preparation: judge examines pleadings, schedules a hearing when he has an idea of the case – judge may summon witnesses as well.
- Hearing: circumstances dictate the course – sometimes can be resolved; otherwise the judge sets a sequence for examination of witnesses.
- Examining and recording: judge examines witnesses, and then either party may pose additional questions. Testimony is seldom verbatim; judge will pause to dictate summaries – these summaries form the building blocks from which the court will fashion findings of fact for judgment. In civil litigation judges sit without juries, and the rules of evidence (if there are any at all) and incredibly liberal.
- Expertise: judge may resolve technical matters by consulting with the parties and selecting an expert.

- Further contributions of counsel: after witness testimony, counsel get to comment orally or in writing, to advance theories or suggest proofs. Many hearings are therefore necessary.

Advantages:

- Economy of time and truthfulness: witnesses are usually interviewed once, as opposed to direct, cross, and re-direct, during which the witness may guess what the party is going after and either hide it or mold his story accordingly.
  - German lawyers suggest witnesses and have no out-of-court contact with them.
- Relaxed sequence rules; concepts of P's case and D's case are unknown
- In American system we have to discover entire case before it goes to trial – and once it does, no more discovery
- Episodic nature of German system lessens theatrics and tension, and encourages settlement.
- Perverse incentives: the more likely an expert witness will be measured and impartial, the less likely he is to be used in American system.
  - German system is expert prone: court-selected and court-instructed, and prepares a written opinion in advance, to which parties may address questions
  - Litigants may produce their own experts but their testimony is sensibly discounted

Adversary nature

- Apart from fact-gathering, German system is still adversarial in terms of identification of legal issues and analysis … question is not whether to have lawyers but how to use them.
- But defect is inequality of counsel
- Disadvantage to nonadversarial fact-gathering is the tendency for prejudgment, and the danger that the German judge will not do the job "well" by not digging deeply enough
  - German answer is straightforward – judges make a career out of being judges; are trained to be – not like American judges, who are ex-lawyers
  - Further, German judges are specialized in certain areas or inquiry

ADJUDICATION

SUMMARY JUDGMENT

Either party may move for summary judgment on all or part of a claim

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law (FRCP 56(a))

- "material fact" is one which will affect the outcome of the case and a material fact raises a "genuine issue" if a reasonable jury could reach difference conclusions about that fact

A court need only consider the cited materials but may consider any of the materials on record (including depositions, documents, affidavits, declarations, admissions, or other materials)

Differences between Summary Judgment and 12(b)(6) motion

- **Timing**: motion for SJ follows discovery, whereas a motion to dismiss follows pleadings
- **Different "hurdles"**: P can get by a **12(b)(6)** as long as he states a ***claim*** upon which relief can be granted. Discovery puts ***facts*** in dispute, or shows facts are not in dispute. Neither party can get by SJ unless it is shown that there is a genuine issue of material fact.
- **Decision maker**: in SJ, the case is taken away from the jury as factfinder: since there are no facts in dispute, the only issues left are matters of law to be decided by the judge. Generally Ps want the case to go to jury trial; Ds want the case to be decided by the judge. The judge, however, at this point decides whether the jury should hear the case

Summary Judgment Arises in Four Situations

- Both parties moves because dispute is a legal issue as a matter of law (e.g. Pruitt discrimination case)
- Plaintiff moves (e.g. Cross and Lundeen)
- Defendant moves
- No one moves – court considers summary judgment on its own under Rule 56(f)

Two Ways to Win a Summary Judgment Motion

- show that other party fails to provide any evidence
  - *see* Adickes v. S.H. Kress & Co (conspiracy and civil rights claims stemming from a refusal to serve Adickes at a Mississippi diner)
    - Court held that Kress failed to meet its procedural burden of showing the absence of any disputed material fact because didn't entirely foreclose possibility that policeman was in store
    - **Rule** – For movant to claim no proof supporting a claim, must actually negate *all possible inferences* jury could draw to reach opposing conclusion
    - **Rule** – Until defendant sufficiently disproves original complaint, plaintiff doesn't have to refute defenses arguments under 56(e) (burden of production must first be satisfied)
  - *see also* Celotex Corp v. Catrett (tort case surrounding asbestos in a product)

        - **Rule** – Conclusory assertion that plaintiff has no evidence is insufficient. Must affirmatively show the absence of evidence by leading the judge through the discovery record
        - if moving party will not bear the burden of proof at trial, come move for judgment using only its pleadings without further affidavits
- present killer evidence that disproves other party's claims
    - *see* Scott v. Harris where police provided a videotape clearly contradicting the story Harris claimed happened (no "genuine" dispute of facts if no reasonable person would side with nonmovant)
    - judge considers substantive evidentiary burden at trial at summary judgment (*see* Anderson v. Liberty Lobby where motion granted on grounds that no reasonable person could convict on clear and convincing evidence standard required to prove actual malice)
    - lack of motive highly relevant to whether genuine issue exists and the range of permissible conclusions that might be drawn from ambiguous evidence (*see* Matsushita v. Zenith)

Purpose of Summary Judgment
- Avoid the risk of irrational decision-making by juries
- Avoid the delay and expense of trying unprovable cases
    - more necessary in the system of simple notice pleading
- Provides way to resolve cases where the parties agree on facts, but disagree as to the law
- Resolve individual claims in a multi-claim lawsuit, or claims against/by one party

Right to Cross Examine
- Lundeen v. Cordner (dispute between two wives over whether or not a change occurred in an insurance policy)
    - Plaintiff objected to use of an affidavit from insurance agent as providing information necessary for summary judgment
    - Factors to consider when determining if cross-examination of witness necessary
        - Whether or not witness is biased
        - Whether the witness was competent mentally and in a position to directly observe the facts
        - Whether his participation was in the regular course of his duties
        - Whether the affidavits are internally consistent and in accord with other documents
    - A party opposed to a summary judgment based upon affidavits must assume some initiative in showing that a factual issue actually exists as opposed to bare allegations
        - must provide some evidence that trial likely to produce different or additional evidence
- Cross v. United States (tax refund suit involving a professor of romance languages)
    - **Rule** - Summary judgment is particular inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions
        - judges may not draw factual inferences
    - right to depose does not supplant the right to call and examine adverse party before the jury
        - because many of the facts remain largely within plaintiff's knowledge and plaintiff is not unbiased then reserve opportunity to test credibility on cross-examination
    - *contrasts* with Lundeen where the court did not protect a right to cross-examine without evidence that will lead to different evidence; court here assumes evident

Circumstantial Evidence (What is enough to get you to trial?)

- Valley National Bank of Arizona v. J.C. Penney
  - skeletal remains found in park with bullet casings but cause of death indeterminable; family claiming accidental death for insurance benefit
  - Holding – Summary judgment denied. While there was no considerable evidence either way as to whether the death was accidental or natural, a jury could reasonably infer that death was not natural
- Houchens v. American Home Assurance Company
  - similarly insurance case; husband legally declared dead but no discovery of a body and only thing known is that he entered Thailand
  - Holding – Summary judgment appropriate because there is no circumstantial evidence of death, let alone of accidental death

TRIAL BY JURY

Order of Trial

- Jury Selection
- Plaintiff's Case
- Defendant's Case
- Verdict
- Final Judgment

Choosing Trial by Judge or Jury

- Trial of all issues so demanded are to be tried by jury unless both parties waive the right (FRCP 38)
- Even in such a case, a judge may still order a jury trial on any or all issues when the right is not exercised (FRCP 39)
- Institutional Factors
  - substantial backlog of cases of the jury-trial docket compared to the judge-trial docket
  - in personal injury cases, passage of time may substantially affect damages
- Psychological Factors
  - statistically plaintiffs win more in front of judges than juries
  - however juries award greater damages

Constitutional Right to Trial by Jury

- Law-Equity Distinction
  - Two-Part Test
    - whether cause of action historically available in court of law or court of equity
      - 7th Amendment does not "create" a right to jury trial but "preserves" the right in *federal trials* as it existed at common law in 1791
      - jury trial only granted in court of law

        - whether the nature of the relief sought is legal or equitable
            - good indicator of whether matter of law (compensatory damages) or equity (injunction, restitution, and rescission/reformation of contracts)
    - *see* Chauffers, Teamsters et al v. Terry where court looked for an analogous cause of action to determine whether or not a duty of fair representation suit is legal or equitable
        - monetary relief does not necessarily create a legal issue (exceptions for money awarded in restitution or incidental to injunctive relief)
        - Brennan's concurrence suggests that we abandon historical part of test all together
- Beacon Theatres v. Westover
    - case mixing claims in both law (declaratory judgment on anti-trust violation) and equity (injunctive relief against harassment and other suits)
    - **Rule** – court should order resolution of issues so that jury issues come first
        - if try equitable claims first, preclusive effects hinder counterclaim
        - if try legal claims first, then preclusive effects hinders Fox's injunction claim
        - cannot structure case such that preclusion violates 7th amendment right (no such right for a judge trial)

Mechanics of Jury Selection

- A jury must have at least six members and no more than 12 to satisfy the 7th amendment (FRCP 48)
- Federal jury lists for the *venire* are based on voting registration records (28 U.S.C. § 1863(b)(2))
- During the *voir dire*, attorneys and the judge are allowed to examine the jurors to determine whether they can decide the case fairly and appropriately (FRCP 47(a))
- Challenges
    - a juror may always be excused for good cause (FRCP 47(c))
        - any juror may be disqualified for bias (inclined to one side of an issue) or prejudice (pre-judgment) extending not only to the parties personally but also the subject matter of litigation
        - *see* Flowers v. Flowers where juror pre-judged social drinking
    - attorneys are also permitted a certain number of peremptory challenges to be used without any statement of reason (FRCP 47(b))
        - EXCEPTION cannot use peremptory challenges to excluded jurors based on race (Edmonson v. Leesville Concrete Co) or gender (J.E.B. v. Alabama)
        - if opposing counsel claims violation, can dismiss by articulating *any* non-discriminatory reason that is not protected such as religion, political affiliation, occupation or marital status
    - Justifications = litigants feel better about outcome if they feel they molded the jury and provides a sense of legitimacy to the jury as it is not entirely random

Weaknesses of Modern Jury Trials

- no longer truly representative after peremptory challenges and strikes for cause
- factual issues in cases too complicated for layman to process
- legal issues complex and take extensive amount of time to explain to jury
- significant burden upon jurors

FINAL JUDGMENT

TYPES OF JURY VERDICTS

General verdict: The court instructs the jury on the law, the law is applied to the facts, the jury returns a verdict and reports to the court which party wins and the relief awarded (if any). Low control of the jury, and reviewing court doesn't know how jury arrived at their decision.

- typically model jury instructions are available in each jurisdiction previously approved by the appellate court
- if judge makes a mistake in his instructions, then the entire judgment can be reversed

Special verdict: **FRCP 49(a)** – The court requests the jury to make specific findings of fact and the judge applies the law to those facts and renders the judgment accordingly. Appellate reversals more seldom, jury control is greater, but deliberations usually take longer.

General verdict with interrogatories: **FRCP 49(b)** – A *middle ground* between the two. The court instructs the jury on the law as in general verdict, but requires the jury to answer specific cross-check questions to enable the judge to verify that the verdict is consistent with the facts.

There are a number of ways a judge can ***take a case away from a jury***

- 12(b)(6) motion to dismiss
- Summary judgment under Rule 56
- Entering judgment as a matter of law (JMOL) under Rule 50
- Ordering a new trial

JUDGMENT AS A MATTER OF LAW (DIRECTED VERDICT)

Unlike summary judgment, JMOL doesn't deny a jury trial but denies the purpose of a jury trial: jury fact-finding

Application

- motion for judgment or partial judgment can be made as soon as an opposing party has been "fully heard on an issue" (FRCP 50(a))
  - similar standard as Rule 56 "no genuine dispute of material fact" except there is a new procedural posture
  - instead of looking at affidavits and *other predictions* of trial, examining the actual evidence admissible from discovery
  - can be made at any time before the case is submitted to the jury
  - plaintiffs rarely move for JMOL after defendant's case because prefer jury damages
  - judges tend to deny motions near end of trial to obtain a less appealable jury verdict
- Post-Trial Motion (FRCP 50(c))

- in order to make a motion *after* trial must have made a JMOL motion *during* the trial
- renewed Rule 50 motion technically not reviewing the jury verdict but the judge's decision to deny Rule 50 motion during the trial
- also known as judgment notwithstanding the verdict (JNOV)
- provides the judgment with possible added security of a jury verdict if it goes the way that judge expects to go
- motions typically granted where the verdict is excessively large given the evidence and the jury decision "shocks the conscience"
- if judge grants motion, can either order a new trial under Rule 59 or enter JMOL for movant

APPEAL

NATURE OF APPEAL

The three basic standards of review are: plenary, abuse of discretion and clearly erroneous.

Plenary Review ("de novo") – applied to issues of law

- court independently examines the issue and need not defer to the decision of the district court
- Examples include: (a) summary judgment orders; (b) dismissals of complaints; (c) interpretation of statutes; and (d) directed verdicts

Clearly erroneous (applied to issues of fact)

- findings of facts must not be set aside unless clearly erroneous and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility (FRCP 52(a)(6))
  - *compare with* Hicks v. United States which held that where the facts are undisputed and interrelated with questions of law then the determinations of the judge may be reviewable (in this case determination of liability under negligence)
- jury verdicts may not be reversed purely because they are speculative and conjecture
  - *see* Lavender v. Kurn where plaintiff died from head injuries under unclear circumstances while working for the railroad
  - the fact that a trial reaches a jury means there is more than one reasonable interpretation and thus speculation and conjecture are implied
- the appellate court may not simply substitute its judgment for that of the district court even if it would have come to a different conclusion
- Examples include: (a) findings of historical fact; (b) intent of the parties, and (c) credibility of witnesses

Abuse of Discretion

- this standard accords the greatest level of deference to the district court
- assess whether district court considered appropriate factors and gave them appropriate weight
- Applications include: (a) admission of evidence; (b) discovery orders; (c) conduct of the trial, and (d) new trial motions

To appeal personal jurisdiction, must request a writ of mandamus against the court or judge
- only granted where no other adequate means to obtain relief which is clear and indisputable

TIMING OF APPEAL

Court of Appeals have jurisdiction of appeals from all final decisions (28 U.S.C. § 1291)
- a final judgment is one that marks the completion of all events that will occur in a trial court
- *see* Liberty Mutual Insurance Co v. Wetzel
  - court ruled that partial summary judgment on liability was not an appealable final decision
  - while liability was established, no relief was yet given – "where assessment of damages or awarding of other relief remains to be resolved" an issue is not considered "final"

Pros of Final Judgment Rule
- Reduces Appeals – because only the party who ultimately loses the trial, it cuts out on half the possible appeals
- Burden of requiring more trial courts is not as severe as burden of having more appellate courts
- Allowing interlocutory appeals does not necessarily lead to more dismissal of trials

Cons of Final Judgment Rule
- Unnecessary Trial – long trial avoided if appeal allowed on critical issues before hearing entire case

Permissible Interlocutory Appeals
- the default rule for appeals is after final judgment but courts allow a number of exceptions to the final judgment rule
- Multiple Claims (FRCP 54(b))
  - when an action presents more than one claim for relief, the court may enter a final judgment as to one or more, but fewer than all, during the trial
  - given liberal claim joinder rules, it seems more efficient to allow cases to be decided piece-wise
- Injunctive Relief (28 U.S.C. § 1292(a))
  - for court to issue preliminary injunction, a party must show that –
    - irreparable damage would occur otherwise; and
    - some merit demonstrating it is reasonable to think that you will ultimately win
- Controversial Rules of Law (28 U.S.C. § 1292(b))
  - appeal may be order where the controlling question of law (1) has substantial ground for difference of opinion and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation
  - judge must file for appeal within 10 days of issuing order on the law

PRECLUSION

Overview
- Terminology
  - claim preclusion = res judicata
  - issue preclusion = collateral estoppel
- Foundational Basis
  - based on common law principles (not statutes)
- Choice of Law and Preclusion
  - general rule – federal courts apply the preclusions rules of the rendering forum
  - however, a court can never determine the preclusive effect of its own judgment
- Due Process
  - you can never run preclusion against a party that had not had its day in court in some fashion
- Benefits of Preclusion
  - judicial economy
  - consistency of courts

CLAIM PRECLUSION

Encompasses two different ideas
- foreclosing any litigation matters that never have been litigated, because they *should have been* part of an earlier suit
- foreclosing litigation matters that *have been litigated* and decided upon

Essential elements
- only judgments that are "final," "valid," and "on the merits" have this preclusive effect
- parties in subsequent action must be identical to those in the first

Rush v. City of Maple Heights (1958, SC of Ohio)
- **Rule** – All claims from the same transaction and occurred that could have been brought are merged into the first judgment and barred from being re-litigated
- Transactional test – In determining preclusive effect, "the critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts*"
- NOTE: plaintiff's choice of forum is considered when determining whether a claim could have been brought in the first suit (e.g. municipal court is limited jurisdiction whereas common pleas is a court of general jurisdiction; if plaintiff could have chosen a court of general jurisdiction for the first suit then preclusion still holds)

Defense Preclusion

- same principles that apply to claims also applies to counterclaims arising out of the same transaction or occurrence
- "cannot use the same defense first as a shield then as a sword"
- Distinction between Mitchell and Linderman
  - reflected in joinder rules
  - Linderman court viewed the sales transaction and fraud claims as not arising out of the same occurrence; whereas Mitchell court viewed second suit against bank as same as first defense
  - preclusion only applies to compulsory counterclaims (FRCP 13(a)) but not to permissive counterclaims (FRCP 13(b))
  - dependent on how broadly or narrowly court defines "same transaction or occurrence that is the subject matter of the opposing party's claim"
- slightly unfair to initial defendant because forces him to litigate his counterclaim in the forum of the plaintiff's choosing

ISSUE PRECLUSION

Traditionally, **rule of mutuality** applied – estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him

Requirements for Issue preclusion

- Actually Litigated and Determined
- First proceeding produced a final judgment
- Issue must have been essential to that judgment
- Issue must be the same in the second proceeding as in the first

Non-Mutual Defensive Issue Preclusion

- preclusion can only be run against a party who was bound by the previous judgment (*see* Berhard v. Bank of America)
- for plaintiff to run the same suit individually against defendants, must show that he did not have "a fair opportunity procedurally, substantively, and evidentially to pursue his claim the first time" (*see* Blonder-Tongue v. University of Illinois where a patent holder tried to repeatedly sue different defendants for the same violation)

Non-Mutual Offensive Issue Preclusion is *acceptable* where (*see* Parklane Hosiery v. Shore) –

- **No Sideline Sitting**
  - the party attempting to use preclusion did not actively engage in sideline sitting in the first case
- **Similar incentives to defend**
  - if defendant had little incentive to defend vigorously in the first case, preclusion would be unfair
- **Similar Procedural Opportunities**
  - different procedural advantages in first case may have not prevented party from having the same full opportunity to litigate an issue

- No Inconsistent Previous Judgments

Real World Implications for Non-Mutual Offensive Issue Preclusion
- class action attorneys can wait for regulatory agency to file a complaint then file the same complaint privately
- government typically wins such suits so preclusive effects would be in favor
- government likes this practice because defendants prefer to settle quickly to limit preclusive effects and cheapens the costs
  - however, preclusive effects not available for settlement where the issues are not "actually litigated"
- undermines one benefit of class action which is private detection of wrongdoing

Preclusion and Right to Jury Trial
- In Parklane, the court said that precluding re-litigation of an issue were the first suit was in equity and the second suit in law did not infringe upon 7th Amendment right
- *contrasts* with Beacon Theatres where the court said that issues at law had to be decided before issues in equity
  - distinct in two ways – Beacon Theatres was all one case and no judgment had already been issued; where Parklane is separate cases and the SEC action had already concluded

PRECLUSION IN COMPLEX LITIGATION

Cooper v. Federal Bank of Richmond
- **Rule** – In class action suits, the rejection of a class claim of a pattern and practice of discrimination does not bar an individual claim of a class member of discrimination.
  - While arising out of same transaction and occurrence, the claims/issues of the individual case were not actually litigated and determined in previous suit and were not essential to that judgment
- if determined each claim of class members, then individual claims would predominate the class and thus lead to failure of class certification
- however, if the EEOC had won its pattern and practice argument in the first suit then Baxter's claims likely would have been merged into the class action judgment
- not applicable to class actions that are just aggregations of the same claim

Martin v. Wilks (consent decree mandating affirmative action)
- **Rule** – No preclusive effect on persons not party to the initial action for a subsequent challenge to those programs
  - joinder as a party under Rule 19 is necessary for preclusion to be used against a party not immediately present in the initial suit
    - Rule 19(a) – mandatory joinder where a judgment rendered in the absence of a party would leave an existing at risk for inconsistent obligations
  - knowledge of a lawsuit and an opportunity to intervene under Rule 24 is not sufficient to run preclusion on a party

- parties to the suit are in the best position to know at whose expense relief might be granted
  - places burden on the parties to join them to prevent these inconsistent decisions

- Dissent:
  - distinguishes persons who are actual parties to litigation and persons who merely have the kind of interests that may be impaired by the outcome
    - first group has a right to participate in trial and the second the right to intervene
  - **collateral attack permissible** on grounds that –
    - ruling court had no jurisdiction
    - judgment produce of corruption, duress, fraud, collusion, or mistake
  - requiring parties to join all affected parties is burdensome/discouraging to civil rights litigation
  - the impact of this would be endless relitigation for the courts and a waste of resources
- statute later passed overturning this decision and binding parties in a similar position as the white firefighters to the consent decree within the employment context

Taylor v. Sturgell (successive FOIA requests by different parties)

- Six Categories of Exceptions to Allow Nonparty Preclusion
  - nonparty agrees to be bound by a judgment
  - a substantive relationship justifies preclusion (traditionally referred to as privity)
  - nonparty's interests are adequately represented by a party to the suit (class action, suits by trustees and guardians)
    - adequate representation means either (1) court used special procedures to protect the nonparties' interests or (2) there was an understanding by the concerned parties that the first suit was brought in a representative capacity
  - nonparty assumed control over a lawsuit
  - nonparty colluded to avoid the preclusive effect by litigating through a proxy
  - special statutory schemes such as bankruptcy brought "only on behalf of the public at large"
- rejects the argument for "virtual representation" as a broad case-by-case decision
  - goes against the fundamental nature of preclusion applying only against parties
  - not prepared to recognize a common law kind of class action – abandons the notice aspect of class action which is critical to binding power

Disadvantages to Opting-Out of Class Action

- Cost-Benefit: Might receive more damages if run own trial but costs will also increase
- Delay: Significant time to wait for class action to conclude before starting individual suit
- Preclusion: (1) class actions typically end in settlement so issues might not be "actually litigated and determined;" (2) sideline sitting might prevent non-mutual preclusion

RESOLUTION

Classifications of Relief

- Adjudicating status
  - simply transforms a legal relationship (i.e. divorce, annulment, and citizenship)
  - also includes judgments that confirm, redefine, or reshape a person's interests in specific property
- Perform specific act
  - judgment creating an obligation to perform a specific act or to refrain from doing so
  - injunction, most common form
  - courts reluctant to adopt this form when others will suffice
- Money judgment

SETTLEMENT

Law of Settlement

- After agreement reached, plaintiff withdraws complaint under FRCP 41
  - must provide notice of dismissal before opposing party serves answer or motion for summary judgment
    - need court approval *only if* counterclaim filed for plaintiff to dismissed over defendant object; counterclaim must remain pending for independent adjudication
  - stipulation of dismissal must be signed by all parties who have appeared
  - Unless stated otherwise, dismissal is without prejudice
    - EXCEPTION – if plaintiff previously dismissed any federal or state court action based on same claim, then it is treated as adjudication on the merits
- settlement typically not filed with the court
- settlement becomes a contract
- when representing multiple clients that do no form a class, **cannot settle any claim unless** –
  - inform ALL clients of total settlement
  - inform EACH client of his individual settlement
  - written consent from EACH client
    - in theory, if ANY client rejects settlement, then attorney cannot accept
    - in practice, lawyers may get approval *up front* that majority approval sufficient

Enforcement Mechanics of Settlements

- Breach of Contract (standard)
  - effectively serves as an anti-suit injunction
- Contempt (consent decrees)
  - failure render agreed terms places party in contempt of court
- Preclusion (class action)
  - settlement actually becomes a judgment
  - judge acts on behalf of the class by rejecting or accepting agreement after fairness hearing

Assessing Settlement

- Ultimately what could I have gotten had I gone to trial and would a trial had been worth it?
- From Plaintiff's Side
  - amount of damages
  - "victory" feeling of defendant getting exposed
    - however, many settlements have confidentiality agreements
  - story out in the public – psychologically very valuable to plaintiffs just to be able to tell story
- From Defendant's Side
  - limited bad publicity – no trial
  - insurance may cover the costs – minimal economic impact
  - no punitive damages or
    - scope must match the harm done to the plaintiff
  - no injunctive relief typically
    - no judicial oversight
  - no precedent or legal ruling

Fiss on Settlements

- Overall: Fiss addresses concerns with the trend towards out-of-court settlement and the public view that settlement is "good," despite interests in judicial efficiency. The problem is that the judicial system is not simply for resolving disputes. Rejects conceptualization of lawsuits as purely private
- ***Imbalance of power***: ADR assumes equality between the contending parties, but this is not realistic. Settlement is a function of available resources, and unequal bargaining power in settlement can influence settlement in different ways:
  - Poorer party is less able to amass and analyze the information needed to predict the outcome of litigation – they don't know, realistically, what their chances would be in court
  - Poorer party may be induced to settle prematurely because of an immediate financial need – even though he may get more at trial (could border on coercion, for indigent parties)
  - Poorer party might be forced to settle because of a lack of resources to finance litigation (again, coercion)
  - On the other hand, the "guiding hand of the judge" can employ measures to lessen the impact of unbalanced resources.
- ***Absence of authority***: ADR assumes the contestants are individuals; reality is that many are organizations or groups, so there is the problem of (not) being able to identify who really speaks for the whole.
  - Procedures of identification are faulty because the "authorized party" is usually the one who makes business decisions, not settlement decisions on behalf of everyone in the organization.
  - With broader groups, like minorities, problem is exacerbated.
  - The problem of consent weakens the idea of settlement – when parties agree, it's not clear who is agreeing to what … does everyone in the organization or group agree? How does the representative communicate and get consent from all group members?
  - In class actions – no clear Rule structure for approving settlements: left to judge – and his idea turns on how he thinks it would come out at court; uses different standards.
  - No definite agreement at the end of the day, so no safeguard for the parties actually involved.

- ***Lack of judicial involvement***: ADR minimizes the remedial aspects of lawsuits, and assumes judicial action stops when one party is declared the winner – when in fact the lawsuit could be one phase of a continuing struggle
  - Social reform cases (like school desegregation) require judicial supervision for years after the judgment – parties to settlement are denied this
  - Idea of efficiency is kind of lost: a judge faced with a request for a consent decree must spend time putting the pieces together to consider the fairness
  - Settlements do not inspire vigorous enforcement by the courts, because they are seen as private bargains
- ***Justice, rather than peace***: settlement appears to achieve peace between the parties without the intervention of courts – but judicial decisions have a broader effect because they involved statutory interpretation that may have wider-reaching consequences. Settlement may therefore preclude justice from being done.
  - The satisfaction that judges (and perhaps society) feels when a case is settled is not a reflection that justice has been done, but rather that another case has been "moved along" or that the work required by making a judgment is avoided.
- ***The real divide*** is not between cases that "should" settle and cases that "should" go to court, but rather that ***adjudication is publicly oriented*** rather than privately oriented: "**civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals**." The American view of law in public terms may be unique, and what is unique about it is that we DO something about the problems. "Adjudication American-style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment."

ALTERNATIVE DISPUTE RESOLUTION

Arbitration

- leading form of ADR
- adversary proceeding in which each party presents its case to a neutral arbitrator
- need not conform to the legal rules of evidence but many comply with most traditional rules of evidence and procedure
- Distinction between Hooters and Circuit City
  - both plaintiffs making an equality argument
  - comparing procedural opportunities between parties in Hooters
    - court primarily concerned with resolutions under a system that has inequality between parties (holding against Hooters for breach of good faith in creating contracted system)
    - their system lacked neutral arbitrators and did not provide both sides with equal access to SJ, appeal, joinder, and discovery
  - comparing opportunities in arbitration with court litigation in Circuit City
    - court not too concerned with differences between ADR and litigation

- chief complaint was that the arbitration proceedings had limited procedural opportunities (shortened discovery, restrictions on punitive damages, no jury trial, shorter statute of limitations)
- however, goal of arbitration is to be an abbreviated version of trial so court rejects claim that arbitration system unconscionable

Mediation

- second most prominent form of ADR
- unlike arbitrator, not empowered to render a decision but instead facilitates discussion between parties
- most appropriate when disputants have equal bargaining power
- also helpful when disputants have a continuing relationship that is important to preserve