1. The Nature of Complex Litigation
   1. What makes it complex?
      1. Number of parties
         1. Have different facts and different issues the judge must review
      2. Number of jurisdictions
         1. What to do with different cases before they are joined/find resolution
      3. Multiple/difficult issues
         1. First time with a new issue
         2. Legal and regulatory issues
   2. Class Definition – Cases that include multiple parties
2. Permissive Party Joinder
   1. FRCP 20 allows for permissive joinder
      1. The court always has discretion to deny joinder and sever the cases, even if both requirements for FRCP 20 are met

(a) Persons Who May Join or Be Joined.

(1) Plaintiffs. Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) Defendants. Persons—as well as a vessel, cargo, or other property subject to admiralty process in rem—may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) Extent of Relief. Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) Protective Measures. The court may issue orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

* 1. FRCP 21 allows for claim of misjoinder and nonjoinder
     1. Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.
  2. *Mosley v. General Motors*
     1. The main issue in the case is whether all of the π’s are allowed to join under FRCP 20
     2. Who cares about this issue?
        1. We know that the ∆’s are interested in the issue because they moved to sever
        2. We know the π’s are interested because they appealed (and because they brought the case to begin with
        3. The appellate court cares because they took the interlocutory appeal (these are discretionary)
           1. Interlocutory appeals do not stop the proceedings unless the appellate court issues a stay
        4. The district court cares because they certified the question for interlocutory appeal
     3. What is the test for the permissive joinder?
        1. a right to relief must be asserted by each plaintiff relating to or arising out of the same transaction or occurrence, or series of transactions or occurrences, and
        2. any question of law or fact common to all the parties must arise in the action
     4. The district court said that the first requirement was not met because the causes of action did not arise out of the same transaction
        1. Same ∆ ≠ same transaction
  3. *Baughman v. Lee County, MS*
     1. 27 strip searches, all under the same policy at the same jail
     2. Issue: Can the 27 π’s be properly joined under FRCP 20(a)?
     3. According to the court, each strip search was a separate occurrence/transaction
  4. *In re Stand ‘N Seal*
     1. 7 π’s bought the same product and developed respiratory problems
     2. The alleged product defect is the common occurrence that ties the π’s together
  5. *Stanford v. Tennessee Valley Authority*
     1. The main issue here is TN law - does not allow for joint and several liability
     2. Joined only for trial under FRCP 42, but not joined completely, which means separate pre-trial
     3. Rule 42. Consolidation; Separate Trials

(a)Consolidation. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

* 1. *Poster v. Steamship (?)*
     1. Seaman works on two different ships who dock in Suez Canal and allow natives to use the ship
     2. He develops an infection on the first ship and it is made worse on the second ship
     3. Can he join both ships?
        1. No, separate transactions

1. The Nature of Class Action Practice
   1. *Hansberry v. Lee*
      1. How does the rule against applying a preclusive effect to those not involved in litigation apply to class action lawsuits?
      2. 1st holding – Some absent class members can be bound by the holding in the class action case
      3. 2nd holding – Due process requirements apply
         1. Adequacy of representation must be met
            1. Here it was not met because there was only one class representative and the class was made up of members who were diametrically opposed
         2. Does not answer to what extent interests must be aligned, but does show that some degree of conflicting interests should be allowed
   2. *In Re Rhone-Poulenc*
      1. Posner made his decision about how strong the claim was on the merits based on trial verdict data
         1. Unreliable because of differing juries and differing jurisdictions
         2. Juries may hear about what happened in previous cases (can be told to disregard, but can’t unring the bell)
         3. ∆’s don’t want to be precluded by liability/breach of duty issues decided in early cases
         4. Litigation incentives are higher in the beginning for the ∆
         5. ∆ likely to try and settle the strongest cases first so that the ones going to trial are weaker
2. Class Definition
   1. 7th Circuit says you must have an adequately defined class based on objective standards
   2. Denial of class certification can only be reviewed if there is an abuse of discretion
   3. Pre-Requisites under FRCP 23(a)
      1. Numerosity - so numerous that joinder of all members is impracticable
      2. Commonality - there are questions of law or fact common to the class (absolute commonality not required)
      3. Typicality - the claims or defenses of the representative parties are typical of the claims or defenses of the class
      4. Adequacy of representation - the representative parties will fairly and adequately protect the interests of the class
      5. Must fit into one of the three types of cases in FRCP 23(b)
   4. *Simer v. Ross*
      1. Π’s attempted to define the class as “those individuals eligible for CIP assistance but who were denied assistance or who were discouraged from applying because of the existence of the invalid regulation promulgated by CSA.”
         1. Would first have to identify everyone who qualified for CIP
         2. Then would have to prove they knew of the regulation
         3. Then would have to prove the regulation discouraged them from applying b/c of the shut off requirement
         4. This would be burdensome and a large expenditure of court time
         5. The class definition forces us to look at the reasons why certain class members did not seek assistance
         6. Relying on reasons behind not seeking assistance causes us to evaluate individual state of mind
         7. State of mind makes manageability difficult to satisfy the requirement of an adequately defined and clearly ascertainable class
      2. Two reasons to identify the class
         1. Ensure that class action is the most efficient way to handle the claims
         2. Ensure that those who were actually harmed are the recipients of the relief awarded
      3. Rule 23(b)(3) requires that class questions predominate over individual questions and the majority says that is not met here.
   5. *Oplchenski v. Parfums Givenchy, Inc.*
      1. Test for Adequacy of Representation:
         1. Representative does not have conflicting or antagonistic interests compared with the class as a whole
         2. Representative is sufficiently interested in the case outcome to ensure vigorous advocacy
         3. Class counsel is experienced, competent, and qualified
      2. Test for common question:
         1. Does the answer to an individual plaintiff’s question do something to move the class along, or just the individual case?
      3. 23(b)(3) class actions have a predominance and superiority requirement as well for the common questions, which is not met here
   6. *Byrd v. Aaron’s*
      1. 3rd circuit requirements for class definition:
         1. Class needs to be "defined with reference to objective criteria"
         2. There must be "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition"
      2. Policy reasons behind the 3rd circuit stricter class definition rule
         1. Absent class members are bound by the decision
            1. Due process only requires “the court must direct to class members the best notice that is practicable under the circumstances”
         2. Unfair to bona fide class members
            1. They will dilute the funds available to class members who were actually harmed
            2. Most people won’t perjure themselves just to get a small win
            3. Very small claim rates
            4. Often this is the only way that bona fide class members will recover anything
         3. Efficiency
            1. The court can always decertify if it does end up as a nightmare
            2. Manageability still comes in under 23b3 - this is better because it looks at all the other mechanisms available
3. Commonality and Typicality
   1. *Wiener v. Dannon*
      1. 2 different yogurt products with 2 different health benefits advertised
      2. Should have severed under Rule 20(a)
         1. Same transaction or occurrence requires commonality of law or fact
         2. Same ∆ ≠ same transaction (Mosley v. General Motors)
      3. Dist. Ct. said that commonality was fine because of the deceptive advertising by Dannon (even though it was two separate marketing campaigns about two different products)
      4. Failed typicality because the named π’s claims did not “arise from the same event or practice or course of conduct that gives rise to the claims of other class members”
   2. *General Telephone Co. v. Falcon*
      1. No evidence of Rule 23(a) commonality - it has not even been alleged so far
         1. Could bridge the commonality gap by showing evidence of a discriminatory policy
         2. Could bridge the gap with the same manager making the decision
         3. Could bridge the gap with discriminatory testing procedure
      2. Just having a group of people with the same injury is not enough to certify the class - too general of a question
      3. When arguing a title VII claim, there are two theories:
         1. you have to show the disparate treatment and then try to prove it with the circumstantial evidence
         2. The other option is to show disparate impact - no discriminatory intent, but the test or procedure leads to a statistically discriminatory impact
         3. Here the representative and the class to be represented were suing under the two different theories - according to J. Burger’s dissent, this means there is no common question of law or fact
   3. *Walmart Stores, Inc. v. Dukes*
      1. Class was supposed to be all women employed currently or previously by WM since 12/26/1998
      2. Did not pursue compensatory damages so that the injunctive claims would predominate the proceedings
         1. 23b3 has 2 additional requirements for certification than 23b2
         2. Because compensatory damages are not pursued on behalf of the class, WM can argue that the class rep is not adequately representing the class and it should not be certified
         3. The courts are split on whether or not the rep must pursue all remedies that are available
      3. The claim is for disparate impact – because the individual managers are making prejudiced selections and the company knows about this and makes no changes, it creates this impact
         1. Scalia - merely proving that the discretionary system has produced a racial or sexual disparity is not enough. “The plaintiff must begin by identifying the specific employment practice that is challenged.”
         2. Ginsburg - the employer's “undisciplined system of subjective decisionmaking” was an “employment practic[e]” that “may be analyzed under the disparate impact approach.”
      4. Common Question definitions:
         1. Scalia: Their claims must depend upon a common contention of such a nature that it is capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke
         2. Ginsburg: Thus, a “question” “common to the class” must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims
         3. Ginsburg says that Scalia’s rule is actually a predominance evaluation at the 23a stage. This adds a rule that would not normally apply to 23b1 or 23b2 claims
4. Adequacy of Representation
   1. *Peil v. Nat’l Semiconductor*
      1. Oplchenski test for adequacy:
         1. Representative does not have conflicting or antagonistic interests compared with the class as a whole
         2. Representative is sufficiently interested in the case outcome to ensure vigorous advocacy
         3. Class counsel is experienced, competent, and qualified
      2. You don’t have to be the best option, but you must have at least seen the complaint and exhibit some control, must pursue with vigor and interest
   2. *Rodriguez v. West Publishing Corp.*
      1. Objectors claim that settlement incentive agreements between named plaintiffs and class counsel create conflicts among the class representatives
      2. Court held that there was conflict, but because there were two named reps with no such agreement, the class was adequately represented
      3. Court found the settlement fair, adequate, and reasonable
      4. Remanded to determine the value of the original representation and the value added by attorney’s for objectors in consideration for payment of attorney’s fees
5. Class Action Due Process Requirements
   1. *Phillips Petroleum Co. v. Shutts*
      1. Personal jurisdiction falls under the due process clause
         1. Int’l Shoe test applies in state and federal court
         2. You can also achieve personal jurisdiction through consent, waiver, and service
      2. Due process clause protects life, liberty, and property
         1. Here they have a property right (chose in action - right to bring a property claim)
         2. They could potentially lose a property right
      3. Phillips has standing because there is concern that there will not be 2-way preclusion
         1. If no personal jurisdiction, there can always be multiple lawsuits
      4. The court says that Int’l Shoe does not apply to π’s because the burden on ∆’s is different from the burden on absent class-members (aka π’s)
      5. Must give absent class members
         1. Adequate notice
         2. Opportunity to appear in person or by counsel in court
         3. Ability to opt out
         4. Adequate representation
      6. FN3 states that this only applies to π classes wholly or predominantly seeking money judgments
      7. Courts now see it as applying due process requirements to all cases seeking monetary judgments
         1. The Shutts court adds the requirement of “at all times” to the Hansberry v. Lee
            1. Many courts now use this as a basis for collateral attacks

Attack on a previous class action judgment by a person who was an absent member of that class

Usually make the argument that they were not adequately represented

They will refer to this case and show that they were not adequately represented “at all times”

* + 1. The KS law was that the rule of the forum state applies unless it could be expressly shown that a different law governs
       1. For nationwide class-actions, “compelling reasons” must be shown as to why another state’s laws should govern
       2. Because of this rule, there is a “bootstrapping” argument to be made
          1. The very fact that you are bringing a nationwide class action leads to the certification of the class (bootstrapping = self-fulfilling prophecy)
    2. The due process defect according to SCOTUS is the choice of KS law
       1. Applying KS law to non-KS π’s violates their due process because there are not significant contacts
       2. If there is no injury, it is fine to use KS law
    3. The practical application means that you must have smaller class-actions or have subclasses for each group of π’s/∆’s who are from states with different governing laws

1. Certification solely for settlement
   1. *Amchem Products, Inc. v. Windsor*
      1. From Hansberry, we know that certain intra-class conflicts will destroy the class certification (i.e. diametrically opposed interests), but we do not know all of the conflicts that are disabling conflicts
      2. ∆’s offer to pay nothing now for exposure-only claimants, but offer to set up a fund/insurance to cover their possible future injuries
      3. The deal was made enforceable through class action for settlement only
      4. The opinion deals with 23(a)4, 23(b)3 and the rule 23 notice requirement
      5. Some people view this as the most important supreme court decisions for complex litigation
      6. Court held that the class failed to satisfy the predominance requirement because the class members had interests that were diametrically opposed
         1. Those showing injuries now wanted money now
         2. Exposure only clients wanted there to be money in the trust down the road for when they showed signs of injury
         3. Questions were not common to the class as a whole and therefore could not predominate
      7. Court held that because of the diametrically opposed views, there was no adequacy of representation
2. Limited fund class actions
   1. Ortiz v. Fibreboard
      1. The insurance companies only want to settle if they can be guaranteed that they will have no future liability
      2. Rule 23b1 does not allow members to opt out and the court is not required to give notice
         1. These are referred to as mandatory class actions
      3. Part 1 - III B (deals with the pedigree of ltd fund class action litigation)
         1. Someone who was selling boat tickets ran away with the money, but had a bond for $15k, which was more than the money stolen - the bond is the limit
         2. Someone dies and leaves behind an estate, but the estate has more debts that money, so the fund is limited by the funds in the estate
         3. Characteristics of the historical cases:
            1. Insufficient fund
            2. The whole fund is to be distributed to the claims
            3. Equitable treatment

Include everyone

Pro rata distribution

* + 1. Part 2 (deals with the intent of rule 23b1 - is it supposed to replicate the historical model or not)
       1. Rule 23b1 was designed to replicate the historical model
       2. The rules committee had a big discussion about allowing class actions for mass tort scenarios
          1. The vast discussions about 23b3 made it unlikely that the committee would “experiment” with class actions under 23b1 without discussing it
       3. The rules enabling act prohibits the rules from abridging substantive rights
       4. Anytime there is a class action settlement, the parties are going to get far less than if they were to pursue an individual lawsuit
       5. Mandatory class actions can impede 7th amendment right to jury trials
       6. They can also impede the right to service of process (Hansberry v. Lee) that would maintain preclusive effects for absent class members
    2. Part 3 (deals with the details and the application of 23b1 to this case)
       1. The settling parties must present evidence that the fund is inadequate
          1. There is no way to prove the true value of the insurance funds because the settlement value has been tainted by the ∆’s attorneys trying to get the inventory case deal included
       2. There is also a conflict between those exposed before the insurance cut off and those exposed after the insurance cut off
       3. There is also a problem with inclusiveness because certain inventory clients are excluded
       4. Finally, there is a problem about the amount of the fund that is actually available because Fibreboard only puts forward $500k of it’s $235m net worth (what about credit for transactional savings? - SCOTUS kicks this down the road to answer later)
       5. There is a Rule 23a structural problem here because the goals of the currently injured claimants and the exposure only claimants are diametrically opposed.
    3. Most Rule 23b1A class actions can also be certified as a 23b2 class action

1. Injunctive/Declaratory relief class actions
   1. The most common example of 23b2 cases are civil rights cases
   2. The rules committee was most focused on school desegregation cases
   3. What role does fairness play in the analysis of 23b3
      1. Very little
      2. The fairness question cannot be the predominate common question
   4. *Parsons v. Ryan*
      1. 8th amendment claim
      2. Distinguished from WalMart because here there are written and common policies
         1. WM did not have common policies b/c everything was left up to individual managers
      3. 23b2 standard
         1. Actions from ∆s (those opposing class certification) generally affect the class as a whole
         2. Injunctive relief is appropriate
         3. Usually for civil rights class actions
      4. Indivisible remedy - applies to the class as a whole
         1. Each prison must have x number of MDs on site
      5. Divisible remedy - applies to one representative or a small set of representatives
         1. Inmate x gets an ophthalmology exam
      6. Everyone in the class does not have to suffer injuries, they just have to be subjected to the same activity
         1. See Wright v. Miller interpretation on 23b2
   5. *Walmart v. Dukes*
      1. Views on 23b2 and monetary relief
         1. Because 23b2 only lists injunctive relief and declaratory relief, monetary relief is not allowed
         2. Because 23b2 is silent on monetary relief, we cannot rule it out
         3. Here neither is addressed by the court.
      2. The Court only worries about whether or not the relief is individualized.
      3. Disgorgement remedies (such as in securities fraud w/o fraud on the market) would be non-individualized monetary relief
      4. In 23b2, the remedy sought will affect everyone in the same way, so there is no worry about notice or the ability to opt-out
      5. In 23b3 class actions the remedy is of the same type, but can differ in amount for everyone involved, people need the right to opt-out so that they don’t get stuck with pennies on the dollar.
      6. HELD - It is the rule itself, not the advisory committee’s description of it that govern
      7. The only holding from this is that individualized relief is not covered under 23b2 class actions
      8. Some circuits allow for monetary relief, but the SCOTUS has not made a ruling on this issue yet
      9. *Simer v. Rios* FN states that the 7th circuit does not allow monetary relief under 23b2 class actions
2. Common Questions and Class Actions
   1. *Amgen Inc. v. CT Retirement Fund*
      1. Amgen made misleading statements in its public filings that made their drugs seem safer and more efficient, which in turn raised the stock price paid by the retirement fund
      2. Material misrepresentation is objective - does the stock price turn on the representation
      3. Reliance is individualized, so generally there is no way to prove reliance on a class-wide basis
      4. Economic loss is class-wide, but the amounts for each member is individualized
         1. HOWEVER, because the formula for finding the individual amounts is easy and there is a common class-wide methodology, it is not a big deal
      5. For quantitative analysis, you look at the elements and count how many are common questions vs how many are individual
      6. For qualitative analysis, you look at which elements will take up the most of the trial time
         1. Posner prefers qualitative analysis
      7. Elements for fraud-on-the market
         1. Efficient market
         2. Materiality of misrepresentation
         3. Publicity of the misrepresentations
      8. This is better for class actions because everything here is a common, objective determination and no individual determinations need to be made
      9. Price of stock is considered material information in the public domain automatically
      10. The main issue here is whether the class needs to prove materiality to get the class certified
      11. J. Thomas says that you have to prove materiality in order to prove fraud-on-the-market, which you have to prove in order to prove reliance, which you have to prove to show predominance, which you have to prove to satisfy Rule 23b3
      12. J. Ginsberg says this is wrong, because materiality is determined by an objective standard and the entire class would live or die based on the materiality. This makes it a common question to the entire class.
      13. If the question here was efficiency of the market, you would have to show evidence at class certification, because you could end up having to prove traditional reliance instead of fraud-on-the-market, which would mean that common questions would not predominate
   2. *Smilow v. Southwestern Bell*
      1. If common questions predominate the questions for liability, the class is usually still certified and you can always have individual trials later to determine damages
         1. 23c4 allows for certification for particular issues such as liability
      2. Many critics state that the use of 23c4 to focus on individual issues destroys the predominance requirement of 23b3
3. Mass Tort Class Actions
   1. *Mertens v. Abbott Labs* 
      1. Global liability does nothing to prove individual liability
      2. These cases could be handled just as easily through individual litigation
   2. *Jenkins v. Raymark Industries*
      1. Small, well-defined class from only TX πs working in the same area
      2. Certification only covers the “state of the art” defense
         1. Means that at the time the product was in place, the state of the art research showed no possible injury, ergo strict liability should not survive
   3. *Sterling v. Velsicol*
      1. Single dump in a landfill makes the surrounding homes sick
      2. This is basically a single event, so global liability proves individual liability
   4. *In re Agent Orange Liability*
      1. Many common defenses
         1. Global liability
         2. Applied by govt
         3. Misapplication
         4. Manufacturer made the product safe
   5. *Castano v. American Tobacco Co.*
      1. Failed to warn about the addictive qualities of nicotine
      2. Theory of liability is similar to securities fraud
         1. There it is misrepresentation causes financial loss to the investors
         2. Here it is that the misrepresentation caused physical harm
      3. Class definition is not objective originally
      4. Predominance Issues:
         1. Too many different state laws
            1. Causes of action may differ
            2. Elements may differ
            3. Makes the class very hard to manage
            4. This is a novel claim, so they don’t have evidence about what the state courts would decide
         2. Too many different individual claims (specifically with existence, causation, and liability of the addiction)
            1. A proper predominance analysis predicts the evidence that will be presented at trial and looks at which issues will predominate
            2. Certification is improper as a matter of law here because the district court did no analysis
      5. No proof of superiority because this is a novel idea and there have been no individual trials using this concept to determine whether class action is the superior method of handling these cases.
      6. The 5th Circuit views 23c4 as a housekeeping provision to make 23b3 class actions more efficient
      7. A mass tort class action based on a novel theory will never meet the superiority requirement of 23b3
      8. The 5th Circuit adopts a per se rule that when there is a novel idea, a class action will not be certified until there have been individual trials completed so that the superiority rule can be properly analyzed.
   6. *In re Rhone Poulenc*
      1. Negligence elements
         1. Duty
         2. Breach
         3. Causation
         4. Damages
      2. Facts in the 7th amendment can be read as facts of the evidence, or as the elements of the cause of action
      3. 23c4 says that issue class certification is only allowed “where appropriate”
      4. They could simply say that the case is not appropriate for issue certification
4. Issue Only Class Actions under 23c4
   1. *In re Nassau County Strip Search Cases*
      1. Class including 200 individual ∆s is too complicated because you would have to have mini-trials
      2. Class including a definition requiring “particularized reasonable suspicion” is too complicated because you would have to have mini-trials
      3. Once the ∆’s concede that the searches were unconstitutional, there is no common issue predominance
      4. The 2nd circuit disagrees with the 5th Circuit’s analysis that 23b3 predominance standards must be met before separating issues for a 23c4 issue certification
      5. They focus on the language of 23c4 stating an “x then y” argument. They state that this means you must perform the steps in order and separate issues before you do the predominance test
      6. 2nd Circuit says that you should not eliminate conceded issues from the predominance test
         1. The settlement may not have a preclusive effect and future cases would not be efficient because they may have to litigate the issues anew
5. Standards for Motions for Certification
   1. *In Re Hydrogen Peroxide*
      1. The court must review all evidence presented by both sides before making a finding on each element required for class certification.
      2. This is based on a preponderance of the evidence.
      3. Must be more than a threshold showing or a prima facie case
      4. Applies to regular evidence and expert testimony evidence that is in conflict
      5. Courts have to weigh the credibility of expert testimony
   2. Civil Procedure Rules regarding parties in multiple states
      1. Subject matter jurisdiction cannot be waived. It can be attacked at any phase, even after a trial and/or an appeal.
      2. If you don’t like the court and you do not have significant Int’l Shoe contacts, you can file a motion to dismiss under 12b2 for lack of personal jurisdiction
      3. Home defendant rule - defendant who is a resident of the forum state
      4. The purpose behind diversity jurisdiction is to protect non-residents of the forum state when they are involved in a suit with a state resident
      5. All defendants must approve to removal
   3. Class Action Fairness Act
      1. CAFA is designed to make it easier for ∆’s to remove cases to federal court
      2. Designed for nationwide class actions dealing with state law claims
      3. Prior to CAFA only the citizenship of named plaintiffs mattered for diversity jurisdiction
      4. The amount in controversy applied to each plaintiff
      5. In 1990 congress drafted 28 USC § 1367 to say that if there was one π with an amount in controversy over $75k, the other plaintiffs could be joined under supplemental jurisdiction.
      6. CAFA got rid of the individual controversy amounts and set a class amount in controversy of $5mil
      7. It also allowed for minimum diversity (1 π and 1 ∆ from different states)
      8. Class must contain at least 100π’s
      9. Anomalous state courts are those who would certify class actions when other courts would not
      10. CAFA has a local controversy exception in 28 USC § 1332(d)(4) - Mandatory

(4)  A district court shall decline to exercise jurisdiction under paragraph (2)--

(A)  (i) over a class action in which--

(I)  greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II)  at least 1 defendant is a defendant--

              (aa) from whom significant relief is sought by members of the plaintiff class;

              (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

              (cc) who is a citizen of the State in which the action was originally filed; and

(III)  principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii)  during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B)  two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

* + 1. There is also a discretionary rule (known as the home ∆ rule) in 28 USC § 1332(d)(3)

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

* + 1. Defendants might act collusively with π’s counsel to have a settlement resolved in an anomalous state court if the settlement undervalues the individual claims
    2. CAFA doesn’t fully resolve this problem because the absent class members don’t have the power to remove the case to federal court
  1. *Evans v. Walter Industries*
     1. Plaintiffs almost all live in Alabama, the toxic waste dump was in Alabama
     2. Π’s file for the local controversy exception to try and get the case remanded back to state court.
     3. Π’s show that the number of known class members (4876 of 5200) is 93.8% Alabama residents.
     4. There are 10,118 potential π’s
     5. The burden to show that 2/3 of the class members are residents of the forum state falls on the π’s
     6. Even if you meet the significant relief element of the significant ∆ requirement via joint and several liability, you must also meet the significant conduct element
     7. Cannot bind absent class members to stipulations on damages if the class has not yet been certified.
     8. If π’s try to say that the damages requirement isn’t met, ∆’s can show evidence that the damages would be more than $5mil.

1. Settling complex cases
   1. *Parker v. Anderson*
      1. Rule 23e governs settlements
      2. The first step is that notice of settlement must be sent by the court
      3. 23e4 gives a second opt-out period because at the settlement stage
      4. In the modern version of Rule 23, the duty to the class as a whole is under 23(g)(4)
   2. In Re Prudential
      1. Krell is allowed to appeal because he objected to the settlement approval
   3. The Girsh Factors
      1. Determine the fairness of settlements
      2. P. 621-628
      3. This summer the advisory committee on the rules of practice and procedure issued a comment on the history of Rule 23(e)(2) and the factors considered by the various courts under the Girsh test
      4. They were worried that the lists under the various circuit courts would “take on a life of their own” and become a central concern of the settlement-review process
   4. *In Re United Health* 
      1. Objector’s counsel is objecting to expenses, but there is no request for expenses, just fees
      2. Objectors add adversarial atmosphere to the fairness hearing
      3. If a truly self-interested objector raises an objection, they can still be paid attorneys’ fees if they present a legitimately adversarial opinion in the fairness hearing
2. Persons bound by judgement
   1. *Taylor v. Sturgell*
      1. The main effect of class certification on the ∆’s is settlement pressure
      2. The main effect of class certification on the π’s is the preclusive effect
      3. Claim preclusion bars all other lawsuits on the same claim or other claims that arise under the same transaction.
      4. For virtual representation to take effect:
         1. Identical interests
            1. Had the same attorney, argued the exact same issues and claims, sought the same documents
         2. Notice of suit
            1. Used same attorney, were friends, same request
         3. Adequate representation
            1. Used the same attorney, obviously thought he did a good job
      5. FOIA allows anyone to make a claim – Public right
      6. Do not have to have a good reason
      7. Most public law/right arguments require standing
         1. I.e. Environmental protection laws
      8. Exceptions to Hansberry v. Lee
         1. Consent
         2. Privity
         3. Previously represented by class action; trustees, guardian, fiduciaries, etc
         4. Non-party assumes control of the suit
         5. Relitigating through a proxy
         6. Precluded by statute
      9. Allowing virtual representation could create a common law class action that requires less than Rule 23 requires
      10. Stare decisis is more of an affirmative defense
          1. Cannot be used in a motion to dismiss like claim/issue preclusion can be
3. Effects of Class action judgments
   1. Matsushita v. Epstein
      1. The SEC law in question allowed for exclusive jurisdiction in federal court
      2. Matsushita could have filed an MSJ because the state claims had little-to-no merit
      3. Matsushita files an MSJ in the federal claim and wins
      4. 28 USC 1738 imposes the full faith and credit obligations onto federal courts as well as on state courts
      5. Courts must respect other state’s judgments to the same extent that the original state’s courts would respect them (specifically in applying preclusive effects).
      6. 9th circuit says that state court judgments cannot release exclusively federal claims
      7. 2 step process under *Marrese*
         1. First look at the law of the rendering state
         2. Look to see if there is a valid exception under 1738
      8. There are 3 different things that happen in state courts dealing with adequacy of representation
         1. It is never mentioned because it is not raised by any party
         2. It is mentioned in a boiler-plate provision because the court just feels the need to address it
         3. There is adequate discussion because one party raises the issue
   2. *Stephenson v. Dow Chemical Co.*
      1. When you have class representatives who are seeking money now and others seeking future payment, you have a structural conflict with the class because of the intraclass conflicts. This structural conflict cannot be waived.
      2. Here those injured after the 1994 cutoff date of the class fund are diametrically opposed to those who show Sx prior to the cutoff date because the class members injured after 1994 will not get paid.
      3. Collateral attack is an attempt to impeach a prior judgment by stating that the court should have never had jurisdiction or violated due process in some other way in a subsequent proceeding
4. Multidistrict Litigation
   1. The JPML
      1. JPML is made up of 7 judges
      2. JPML decisions are usually very short, direct, and somewhat cryptic
      3. This is because the judges on the panel also have to run their court full time
      4. Jobs of the JPML
         1. Consolidate
         2. Rule on CTOs
         3. Transfer tag alongs
         4. Power to remand back to the transferror court
   2. Consolidation via JPML
      1. Motion to xfer for consolidation is filed with the JPML and a copy is filed with the originating district court
      2. During this time, the case does not just stop, the original court may still adjudicate motions until the JPML issue
      3. The JPML can suggest consolidation on it’s own initiative
      4. What do you need for JPML consolidation
         1. Common questions
         2. Pending civil actions
         3. In different district courts
         4. For the convenience of witnesses and parties
      5. The JPML is systemicly biased in favor of consolidation because the judges appointed by the chief justice are typically pro MDL
      6. The main points of consolidation are fairness and efficiency
   3. A motion for remand can be instituted by;
      1. The JPML
      2. The transferee judge
      3. One of the parties
   4. *In Re Aviation Products Liability*
      1. Schedule A claimants all have the same attorney
      2. In many cases you have trials just for punitive damages
      3. JPML issued order to show cause as to why schedule B cases not consolidated
         1. Schedule A plaintiffs were all owners of commercial aircraft using the same faulty engine
         2. Schedule B plaintiffs were pursuing personal injury claims resulting from crashes caused by the same faulty engine
      4. JPML determined that the discovery would involve the design, manufacture, and installation of the engine, the engineers responsible for the design and development of the engine, as well as, company officials who relied on those engineers
      5. Because discovery and other pre-trial functions would be similar, JPML granted motion to consolidate all Schedule A cases and 3 Schedule B cases