Civ Pro Outline: Fall 2015

Overview (Come back to this later)

1. Overview
2. **Basic Jurisdictional Concepts**
   1. Jurisdiction is what gives the court the power to act
   2. In Personam and Subject-matter Jurisd.
   3. Consequence of lack of juris.d: No power over dispute
   4. CONTRAST: Venue, other rights
      1. Venue: proper forum state for filing
      2. Personal right of D;
      3. Can still give judgement without venue
         1. Venue can often be waived
         2. Jurisdiction can’t be, mostly, esp. subject matter jurisdiction
3. **Subject Matter Jurisdiction**
   1. Definition: Subject-Matter jurisdiction is power of the type of dispute; “state court or federal court”
      1. Contrast: In personam jurisdiction is power over parties in dispute. “what state/fed court has power over the PEOPLE in dispute”
   2. 3 Main Types: Diversity, Federal Question, Supplemental
   3. Types of Courts & Court Systems:
      1. US Supreme Court- can hear federal issues from both systems
         1. Fed courts: US Courts of Appeals (13); District Courts (trial courts)
            1. We are 5th Circuit Appeals, Southern Dist. Tex.
         2. State Courts: Tex Supreme Ct (14); two in Houston
            1. State District cts, County and Justice Cts, Special cts
      2. Federal courts can hear state claims and vice versa.
      3. Jurisdictional limits in court cases:
         1. If the ruling is over jurisdictional limit…
            1. Acceptable if original petition properly brought, and the increased damages are a result of time passage.
   4. Subject Matter Jurisdiction in Federal Courts:
      1. Diversity Jurisdiction (§1332, passed by Congress)
         1. Purpose: Protect against local prejudice.
         2. Requirements:
            1. Diversity: Citizens of different states, or state & foreign, etc.

Permanent resident aliens are now treated as citizens of state of residence.

*Mas v. Perry:* Mrs. Mas Mississippi citizen, husband foreign and then considered not a resident; Perry in LA. (residing LA while other citizenship)- so diversity proper.

* + - * 1. Over $75,000 in controversy
      1. Completeness: Strawbridge v. Curtiss- Diversity must be complete.
         1. Every person on 1 side of suit can sue every other person under diversity. (every P can sue every D in federal court)
         2. Adding in a local defendant can “destroy” diversity
      2. Policy disagreements on diversity:
         1. Local prejudice not common today

Completeness requirement interferes with this anyway

* + - * 1. Leads to congestion w/removal, etc.
        2. Race to bottom/pick worst judge if bad case
        3. Harassing little guy to keep big guy in state court
        4. Passive-aggressive D (impose cost if you can)
        5. Tilted playing field- benefitting from cost in delay, using the law against P.
        6. Pros: people satisfied with disposition, honing law, local prejudice not yet dead
    1. Corporation: Citizen of where incorporated and PPB (principal place of business); THIS IS FOR SUBJECT MATTER NOT PERSONAL!!
       1. PPB is the “Nerve Center” or HQ/place where officers make decisions for the business.
    2. “Arising Under” §1331 (officially “Fed Question”, but that’s misleading.)
       1. A Claim Arising Under Fed Law: US Const, Statutes, or Treaties.
       2. Anticipation of Fed. Defense by P, put in complaint, not enough!
          1. Use of Fed law in avoidance of defense not enough.
          2. Defense is not enough either.
       3. P’s Claim MUST arise from Fed Law: Two tests
          1. Substantial Ingredient test: whether a substantial ingredient of claim is federal in nature [easier test! More liberal/more suits]
          2. Creation Test: whether fed law creates claim
    3. Special Jurisdictional Statutes: Federal jurisdiction when:
       1. US as party,
       2. Foreign Sov. Immunity,
       3. Bankruptcy
       4. “Exclusive statutes”- NO state jurisdiction; very few statutes.
          1. Most of the cases you see in fed court will be diversity or federal question
    4. Supplemental Jurisdiction: § 1367
       1. Purpose: allow closely related, nonjurisdictional claim to be litigated w/ jurisdictional claim in federal court
          1. *Efficiency*- combine into 1 suit!
          2. Also *fairer* to litigate it all in one suit
       2. Test: “So related… that they form part of the same case or controversy under Art. III of US Const.”
          1. (Intentionally broad test, to include as many claims as possible)
       3. Claims that count under this:
          1. Counterclaims under 75k
          2. Claims from the same matter w/ no diversity

DOES NOT COVER if claim is SOLELY in fed court based on diversity and P amends to include nondiverse D.

* + - * 1. Third party defendants also covered
      1. Discretionary in certain instances (judge has discretion):
         1. Novel State Claim- let state figure out own new law.
         2. Non-jurisdictional claim predominates (no state tail wagging a federal dog)
         3. Jurisdictional claim dismissed- generally applies for early dismissal; if both claims are heard and tried yet the fed does not proceed, generally state claim result will stand.
         4. “Other exceptional cases”- the catchall.
         5. Otherwise court needs to hear the supplemental claim
      2. Includes multiple claims by P, Counterclaims, cross-claims that are not jurisdictional.
      3. Example: United Mine Workers v. Gibbs: Federal suit under federal act plus state tortious inference claim; although the fed claim was eventually dismissed, it was partially tried, as was the state claim. Thus it was proper under supplemental jurisdiction.
         1. Pendent and Ancillary J= old terms from supplemental
         2. Pendent= other claim “hangs” on fed claim.
    1. **Removal jurisdiction**: Allows D to take case from state to federal court. § 1441(a)-(c).
       1. Basic concept: can “remove” to Fed court if w/in original jurisdiction of Fed. Ct. (1441a), or “Where it could have been brought”
          1. Diversity May be removable
          2. Federal question cases are removable.
       2. Limitation: (1441b)If diversity is sole basis for jurisdiction, resident defendant cannot remove, even if diversity exists
          1. D cannot expect local bias in this case.
          2. If there IS a resident defendant, it cannot be removed (other defendants can’t remove in that situation either)
          3. But federal question claims can be removed even without diversity.
       3. Procedure §1446-7
          1. D files “notice of removal” concisely stating grounds.

All D must join in

Contents:

D removes this to district in division where state court is located

And here’s why there is removability (explain facts of diversity/other reason)

Time Limit: w/in 1 year for diversity cases (aside from 30 days from notice requirement.)

Prevents removal when things don’t go D’s way, late into trial, wasting resources.

P can be clever here- keep a local D in for a year so that it can’t be removed, then settle.

*Caterpillar v. Lewis:* Filed 1 day before deadline, and diversity then became complete after filing but before trial. Permitted on policy reasons.

* + - * 1. w/in 30 days of pleading or “otherwise” notice that removable.
        2. Notice to parties and state court “effects” removal

State court proceeds no further

* + - * 1. Court may remand (send back) any time before judgement, on motion of party or own motion.

Remands NOT reviewable by appellate court.

Motion to remand (used for procedural irregularities) to be filed by 30 days after removal

* + - * 1. Court can order filing of copy of state proceedings
        2. P can object- Procedural defects in removal waived unless raised by defendant’s motion w/in 30 days.

Ex: not all D signed removal = procedural defect

1. **In Personam Jurisdiction:**
   1. Basic physical power notion: Court has power to adjudicate as to a person validly served with process w/in its territorial limits.
      1. Narrow Exceptions: Fraudulent enticement or subpoena
         1. *Wyman v. Newhouse:* Judgement on action did not succeed, as the original court lacked jurisdiction due to fraudulent enticement.
      2. Burnham v. Superior Court- doesn’t matter if served when there on unrelated purpose
   2. **Consent**: Consent to jurisdiction, implied or express, gives court power.
      1. Nonresident Motorist Statutes
         1. *Hess v. Palowski*: Hess sues Palowski in Mass. for injuries sustained in Mass. auto accident; there is jurisdiction b/c Mass. stat. that appoints an agent by law for all nonresident motorists.
         2. Consent is implied by driving on the roads
      2. Waiver: 12(h) of FCRP; TX Rules
         1. Fed Rule 12h: Waived jurisdictional arguments if omitted from 12g motion.
            1. Basically, must object EARLY. Unlike TX, can be before or after answer, as long as it is within time limit
         2. Motion to dismiss and special appearance is not consent/waiver.
         3. Texas rules: special appearance to preserve jurisdictional arguments, else waived.
            1. Improper order/doing of special app waives; must file before answer.
         4. “Waiver is Consent!”
      3. Motion to Dismiss:
         1. Special appearance: FIRST document
            1. Not waiver if done under applicable rules.
            2. Forecloses “collateral” attack in D’s home state.

To fight area with no J, can specially appear (and then can answer on merits)

Collateral attack: can take default and then fight it when they come to enforce in home state. RISKY, no answer on merits

* + - 1. Federal 12(b) motion: Analogous to special appearance, but not first; does have time limit of “before responsive pleading” but can be in same document.
  1. Long-Arm Statutes and Due Process:
     1. Courts ultimately broke away from Strict Territoriality (D served in state or consents) and allowed service outside state.
     2. Two Tests: Basic Due Process & State Long Arm Stat.
     3. **Basic Due Process Test: Aka “Min Contacts**,” “Presence,” or “doing business”:  
        Long-arm Jurisd. Complies with Due Process if D has sufficient contacts w/ the Forum State so that Suit is consistent with “traditional notions of fair play and substantial justice.”
        1. MINIMUM CONTACTS IS NOT A TEST! Give the WHOLE STATEMENT.
        2. *International Shoe*: Landmark case: presence of salespeople in Washington over several years met minimum contacts for jurisdiction when state sued to recover unemployment from company.
     4. Refinements:
        1. A single point of contact may be sufficient, if substantial enough (McGee, specific jurisdiction case)
        2. Substantial Contacts w/ Forum may be enough even though events occurred elsewhere (Perkins v. Benguet, general jurisdiction)
           1. Due Process doesn’t mean the state long-arm goes this far!
        3. “**General Jursidiction**”: Requires systematic and continuous contacts, so D is “essentially at home” VS “**Specific Jurisdiction**”: requiring less, as above.
           1. Difference: Specific- contacts related to claim; General- contacts related to claim.
        4. **Unilateral Acts by Plf are not enough** (Hanson v. Denckla): P can’t, by own acts, bind D to jurisdiction (say, by bringing car D made to state)
           1. MUST HAVE **purposeful availment** where D avails itself by laws/protections/facilities of forum state.
           2. *McIntryre Machinery v. Nicastro:*

4 machines ever in NJ; one injures Nicastro

Stream of commerce can’t be sufficient; no purposeful availment in this case

Would not be consistent with fair play notions.

* + - * 1. D must have contacts in forum state; P cannot create contacts for personal jurisdiction. (*Walden v. Fiore*, 2015)
      1. **Reasonable anticipation**: D must be able to reasonably anticipate being haled into court/sued in forum state
         1. Often tied to Purposeful Availment
         2. *Burger King v. Rudzewicz*: Buying equipment, contract, making payments, ongoing purchases of marketing research and training created reasonable anticipation and minimum contacts w/FL even if R never set foot in FL.

Note also: agreed to jurisdiction in contract, and no “magic formula” of what makes sufficient contacts.

* + - 1. **Brennan’s test:** Jurisdiction in commercial cases unless D makes compelling showing of convenience issues (Burger King)
         1. This is not a “Real” test, just something Brennan put in opinion. Not well established; more of an “Extra”
         2. S.C. has never used it again, so may be dictum
      2. **Stream of Commerce** is not itself sufficient. **Targeting Test** (targeted particular state to do business) can create jurisdiction—but notice how similar to P.A. that is.
         1. *McIntyre v. Nicastro*
         2. *Goodyear Dunlop v. Brown:* Manufacturer of specialty tires putting out into stream of commerce in USA doesn’t create jurisdiction over branch that makes general tires which caused accident in France.
      3. **Essentially At Home:** newest and not well-defined; a corporation can only be sued if it is “essentially at home” in the forum state.
         1. From Daimler AG v. Bauman 2014.
      4. **In Rem. Jurisdiction**: If a “thing” is w/in power of the court, court may adjudicate rights in that thing
         1. Need claim and thing to be related to state (claim about thing in state ok; claim separate and state and thing linked not ok)

This is Shaffer v. Heitner: **Nexus among Defendant, State, and Litigation: Fair Play Test**

No “hostage” property

Shaffer v. Heitner: events outside DE, and the stock attempted to be seized was in state; no nexus, no claim.

Proper ex: Land rights- dispute about land, land in state and suit in state about item in state

* + - * 1. *Pennoyer v. Neff*: Court did not permit personal jurisdiction based on property in the state alone; however, suggested that you could quasi-in-rem sue on property (property as hostage).

*Shaffner v. Heitner*: No, can’t use property as hostage. See above.

Note that, if you have a judgement specifically to collect from an account, that is different from trying to use the account to create personal jurisdiction.

* + - 1. **Quasi In Rem**: Action against property interest of person outside state, with property in state (could be about an interest in the property, which is still ok, or an attempt to satisfy other judgement out of property, which is now severely limited).
      2. **Texas Statues:**
         1. Nonres motorist—Jurisdiction where nonres motorist has accident on Tex. roads.
         2. General long arm covers anyone “doing business” (req. min contacts), including tort or contract; **reaches limits of Due Process**.
      3. Long-Arm Statute Models:
         1. **Due Process**: limits of due process met, then there is jurisdiction in state
         2. **Laundry List:** specific cases where there is jurisdiction

*Grey v. American Radiator*: Court struggles to get jurisdiction over mfg. when statute requires “tortious ACT” and the malfunctioning radiator is a “tort without an act in the state.”

If too narrow, laundry lists cause problems of legislative interpretation.

*Hall v. Helicopteros*: Texas case that leads to change to due-process long arm; court technically ignores long-arm and twists “doing business” in order to get jurisdiction over foreign company in death case.

* + - * 1. Hybrid: something in between the two
  1. **Tag Jurisdiction**: In-state suffices even w/out Contacts Fairness Analysis
     1. Cf *Burnham v. Superior Court*: divorce case, jurisdiction created when husband visited state for unrelated reasons and was served there.
     2. Limits? In an airplane counts; fraudulent deceit vitiates
  2. **Contract Jurisdiction/Forum Selection Clauses**: Jurisdiction by Contract- Federal courts have been very free in enforcing them for jurisdiction.
     1. Parties can essentially consent to jurisdiction in contract, and agree to venue at same time
     2. State differences?
     3. **What goes here**? (find info on: Venue; State differences. )
     4. *Carnival Cruise Lines v. Shrute:* Clause of contract to litigate all claims in FL was indeed valid. Seminal contract jurisdiction case.
  3. **Nationwide Service**: Fed Statutes (where you’d expect to have it, basically)
     1. Securities, etc.
        1. Means no need to meet long arm

1. **Service of Process**
   1. Due Process “Notice” Requirement
      1. “reasonably calculated” to give D actual notice of action and allow response
         1. If you know name and address, at minimum, ought to mail service
            1. If not, publication may be enough.
      2. Notice may be sufficient even if not received- it depends
         1. State law may allow relief for such default judgement entered if you did not get notice. Due process does not in itself.
   2. Traditional significance of the Service: representative of when service = arrest until the trial; hence the physical roots.
      1. “got to follow the rule”- mind local rules on this
   3. Texas Service:
      1. Within State: NOTE NO LEAVE-WITH SERVICE!
         1. **In-hand** by Sheriff/Constable; also **restricted registered mail**(primary two methods)
            1. In-hand MUST BE in the proper place!

*Harkness v. Hyde*: In-hand service done on Shoshonee reservation was not “in the state”, was equivalent to attempting on foreign territory, thus invalid.

* + - 1. Substituted “rsn calculated” method, upon motion and sworn showing of inability to in-hand or mail serve defendant
         1. Tedious and expensive
         2. Example: *Butler v. Butler*, where man runs off w/kids, wife wants divorce. Got permission to serve his atty.

You can’t simply do this kind of service w/out court.

* + - 1. Publication – last resort method.
      2. Corporations:
         1. Serve Registered Agent;
         2. Pres; VP or
         3. Substitute service on Corporate Secretary.
    1. Consent: any appearance other than Special appearance (& any after)
    2. Outside State
       1. Most frequent: serve secretary of state; secretary forwards by registered mail
          1. Process: Clerk file stamps this and issues summons, then you send it to process server to serve in Austin on Sec of State, and then Secretary forwards it and sends you the “green card” for the mail being received by D.
       2. Other means also exist
  1. Federal: Rule 4
     1. Summons and Complaint; service of these by any non-party person over age of 18; Can be marshal, if ordered by court. [rules 4a-c]
     2. Waiver; duty to save costs; “Notice” and “waiver” (rule 4d)
        1. Notice is the info that would be on complaint; waiver is the waiving paper for the D to return
        2. Federal forms 1A and 1B for notice and waiver
        3. Executed request by D, when filed by P, is = to service.
        4. Incentives to D to return waiver:
           1. Duty imposed by Rule (may have to tell client about duty)
           2. Rule expressly doesn’t waive Jurisd or Venue objections
           3. 60 days to answer (more than 20 usual)
           4. Costs (inc atty fees) imposed if no waiver

Some refuse to waive b/c stat of lim will run. If there is any chance of the time to answer going outside of Stat of lim, DO NOT USE.

Don’t use in general unless you think D will sign waiver. Usually you can contact D atty to see.

* + - 1. IF no waiver, must serve. Note 120 day time limit for service from filing, stat of lim problems as above.
  1. Individuals (Rule 4e)
     1. State Law Methods-TX restricted registered mail, in hand, fallback methods, etc.
        1. Morton v. F.H. Paschen: Service on foreign corp by certified mail upheld under Rule 4h, even though state law demands service in-hand. Federally permissible methods are ok even if state normally disallows.
           1. State law methods permitted but don’t control
     2. 3 additional ways
        1. In-hand (Personal service)
        2. Leave-with service:
           1. At “dwelling” or usual abode

*Leigh v. Lynton*: serving Englishman by leave-with at the hotel his wife stayed at was improper, as it was not his dwelling nor his usual abode.

* + - * 1. With a person of suitable age & discretion
        2. Then residing therein
      1. Serve an agent (by appointment or law)
  1. Corporations: Rule 4h
     1. State Law Methods
     2. Alternate Methods:
        1. “Officer” or “managing” or general agent
           1. Gen agent- Someone with authority to bind org to contracts
        2. Agent authorized by appt or law (also need to mail to D if req by law)
  2. Other provisions: know that there exist provisions for
     1. infants, incompetents (serve parent or guardian)
     2. suing the US or agencies (complicated)
     3. foreign govts- rule 4 g, i, j
  3. Territorial Limits for effective service (4k):
     1. Fed courts generally have no greater out-of-state jurisdiction than State courts, at least for state claims
     2. State Long Arm Stat provides limits of Effective service even if Fed court (& is one permissible method) [if state law claim, must comply w/ long arm]
     3. 4k extends to due process limits for federal question claims
        1. So no need to comply with different state long arm
        2. BUT must show minimum contacts with forum state
  4. Int’l Service: Rule 4f (know it exists, don’t study)
  5. Time limit: 120 days from filing, as in rule 4m
  6. Return or proof of service is made by person effecting service (by affidavit, see rule 4l).
     1. This is especially important in default cases- must have served to get judgement.
     2. Return- affidavit proving service was done, important for default cases

1. **Venue:**
   1. The “what and where” for trial, whereas Jurisdiction is the “what and where” for Venue.
   2. Purpose: almost always many courts in either state or fed that could acquire jurisdiction over person and subject.
      1. Some are distant or otherwise inappropriate
      2. Venue creates convenient place for trial; limits and narrows appropriate places
         1. Jurisdiction determines what places make the possible venue list- no jurisdiction means inappropriate venue!
   3. Nature of Venue: Jurisidiction disempowers court to act even though not raised by parties; in contrast, Venue is a matter of D’s privilege.
      1. “weaker” as an idea
      2. Binding decree on default even if improper venue (not so for improper jurisd)
   4. **Federal Venue**: §1391. In any district and division….
      1. Where any D resides (if all in same state)/ state where ALL D reside or
      2. Where “substantial part of acts/omissions” underlying claim took place, or property located or
      3. In diversity cases, where Personal Juris is and no other district. (where D can be found)
         1. 99.9% of cases under 1st two; this is default provision
      4. Corporations “reside” wherever subject to personal J!
         1. possible multiple residences
         2. wherever long-arm and due process are satisfied
      5. Waiver unless timely motion by D
      6. **Discretionary Transfer**: §1404 A district court may transfer to district or division where “might have been brought” (also consented one, but that doesn’t usually come up) §1404(a). Factors:
         1. Convenience of parties/witnesses
         2. Interest of justice
            1. Usually, where did events happen b/c of state interest in residents and events in that state
         3. “MAY” transfer- discretionary
         4. Transferee must be one fixed by law, not MERELY by D’s consent (can only do consent + where could be brought) (Hoffman)
         5. Law of Transferor district still controls.
            1. Example: Robertson v. Cartinhour: Transfer proper when a DC suit on same issue is filed, and transfer of a NY countersuit is sought.

More convenient to parties since all info is there

Only just to do both suits in same place

* + 1. **Forum non Conveniens**: common law precursor of transfer; involves dismissal
       1. Today, exists, used when different procedural systems involved
          1. Ex. Transfer outside Fed.; to Scotland or India, say.
          2. Inside Fed., use transfer and venue.

1. **Analyzing Legal Problems**
   1. Do not start with conclusion
   2. Reason first.
   3. Use IRAC or (I)PFC- Issue (mental step), principles, facts, conclusion
   4. Identify all issues
      1. Principles- neutral, general, exhaustive, declarative-sentence listing with all refinements, ambiguities, exceptions.
         1. Use What to be considered, what the meaning of evaluation is, and what is being evaluated, and how.
      2. Then do facts: state and analyze how they compare to legal principles
      3. CONCLUDE
         1. NEXT ISSUE
   5. Syllogistic: Principles form major premise; facts form minor premise; conclusion follows.
2. **Fed-State Choice of Law [NOTE: OBJECTIVE QUESTIONS ONLY]**
   1. Erie v. Tompkins:
      1. Case: Tompkins injured by track, wants fed general law to avoid PA rule, suing NY railroad, brings as diversity.
      2. Policies: Avoidance of forum-shopping, discrimination by diversity/not, Fed. Interference
      3. Apparent basis: Constitutional
      4. History:
         1. Rules of Decision Act- 1st Congress- state laws are rules of decision for state cases
         2. Swift v. Tyson: Fed common law exists-- later confined to local (laws about property and the like) and state laws
      5. Basic Rule: In diversity or other state-claim cases, Substantive law is determined not by “general law” but by substantive law of state where district court sits.
   2. Frequent problems:
      1. Substance-procedure problem: usual labels don’t really apply, have limited utility
         1. First step: Gray areas and FCRP:
            1. Controlling Fed Rule Test: Hanna v. Plumer: if you have a fed rule, use it! Reconciles rules enabling act (court can make own rules) w/ Rules of decision act (state law rules of dec)

If procedural, court has authority to promulgate, follow federal rule

If CLEARLY not procedural, rule unconstitutional, follow state (99.999% of time this will not happen)

* + - 1. Second Step: No controlling fed rule:
         1. Outcome Determinative Test (Guaranty Trust v. York)

Everything determinative is substantive

Problem: even stat of lim?

* + - * 1. Absolute or definitive outcome det test (Byrd v Blue Ridge)

Slightly better than regular outcome det

Must specify outcome, not just change the process of making decision

Example: what other side asks for =/= abs det

* + - * 1. Fed-state interest balancing (Byrd)- strong policy can control

Side that has most compelling interest governs

Constitution > admin convenience

* + - * 1. Basic Test: Policies of Erie

If it leads to discrimination or overturning fed rules, no.

* + 1. Ventriloquist’s Dummy: As if state judge was controlling fed judge for choice of law: do what the state court would do!
    2. Multi-state choice of law: Fed ct uses forum state’s rules of choice of law to determine what law to apply
       1. Ex: Erie tried in NY about PA events; to use NY choice of law rules.
    3. State choice-of-law rules: States have rules about what laws to use in case of a conflict.
       1. Lex Loci: Place of the wrong
       2. Most significant relationship: aka states’ interest test; what state has most interest in this matter.
          1. *Pennington v. Dye*: Married couple sues in FL for suit not allowed in OH, despite being OH citizens; most sig rel test applied, suit barred.
       3. *Klaxon Co. v. Stentor Electric*: DE case about NY breach; for “uniformity of state” reasons, applies DE law where suit brought and not NY law.
          1. Extension of Erie
    4. Difficulty in Determining State Law
    5. : have to make educated guess about what state court would do
       1. Supposed to follow the highest state’s court’s decision, but when one does not exist, have to look to lower court cases and make Erie Educated Guess.

1. **Pleading**
   1. Basic types of approaches
      1. Historical:
         1. Forms of action: rigid, formalistic
         2. Rise of Equity: for things common law won’t solve
         3. Common-law pleadings: think cause of action
            1. Very narrow minded and high bound
            2. One issue only
         4. Field Codes: reform of old system
            1. Less restrictive but still narrow
            2. Plead facts, not conclusions
            3. Reduced pleading numbers
            4. Merged Law and Equity
            5. Single claim still
         5. Federal notice pleading arises in response to field code, States have kept cause of action pleading
      2. Restrictive Practice:
         1. Facts and not conclusions
         2. Disadvantages: difficulty, expense, injustice through noncompliance and variance
            1. Variance: when you plead one thing and prove a slightly different thing, and no recovery (plaster and bathroom case)

*Messick v. Turnage:* Plaster bathroom case; plead flood and proved clogged bathroom, so no recovery.

* + 1. Federal Notice pleading: Short & Concise Statement w/ Fed forms as guides, designed to give rsn notice.
       1. “Short and Plain Statement showing the pleader is entitled to relief” AND NOW also “Facts plausible to state a claim” (think under entitled to relief)
       2. Functions of pleading:
          1. Separate Qs of law from Qs of Fact
          2. Reduce Qs of fact to clear-cut basis
          3. Notify parties
          4. Serve as formal basis of judgement
          5. Place Qs raised on record/ future Res Judicata
          6. Serves as index of points to be proven.
    2. Modern liberalized state cause of action pleading: NY, Cal, TX
       1. Cause of action: make a statement about each element of claim
    3. Which is “better”? Notice or modern Cause of Action?
       1. Cause of action is a bit more prone to variance issues if you particularize the facts; otherwise it’s generally better. What even is a notice anyway?
       2. *Dioguardi v. Durning:* Case before “facts plausible” standard- inartfully pleaded claim allowed b/c did give basis for action.
          1. This type of claim is easier to plead; allows claims when you’re not sure of the type of evidence you’ll find
  1. P’s Complaint:
     1. Must:
        1. State a claim
        2. Show Jurisdiction
        3. Claim Relief, but also
     2. Sufficiency as to specificity: “Facts” (factual context) and not conclusions so that existence of claims is plausible.
        1. Notice pleading still applies
           1. *Conley v. Gibson:* Union did give enough facts, even if not in detail, to pass the test (union refuses to help black people).
        2. Forms are on their way out due to this
        3. Rule 9: Fraud, special damages require “specificity” in pleading
        4. Facts must be “facts” and not “conclusions- the categories do blend
           1. *Bell Atlantic v. Twombley:* Cannot give a list of legal labels/conclusions like “contract combination” and “conspiracy” to meet the facts-plausible standard.
           2. *Ashcroft v. Iqbal*: 9-11 civil rights case; cannot merely give the “effect” (policy seems to discriminate by race, religion, national origin) as fact in a civil rights claim without also giving actual facts- like how D was involved, what observations/awareness D had, etc.
     3. **Substantive sufficiency**: basic test in response to motion to dismiss: Construe in light most favorable to P; then only if there is no way for P to recover, dismiss.
        1. “As a matter of law, P cannot recover” 🡪 dismissal
        2. Example: Bell v. HCR Manor Care: § 1983 civil rights requires “color of state law”; nursing home funded by state does not qualify, so a complaint attempting this gets dismissed for failure to state a claim upon which relief can be granted.
        3. Example: *Wytinger v. Two Unknown Police Officers:* To avoid dismissal, complaint about son’s treatment in jail must meet the official-requirements policy of statute (or it does not meet the substantive test).
           1. Pleading a lot of facts does not create sufficiency.
     4. Defensive attacks on pleadings:
        1. Motion to dismiss: substantive standard.
           1. Motion to dismiss on failure to state claim
        2. Motion for more definite statement: specificity standard
        3. Motion to strike: remove inappropriate material
           1. Test: must not contain irrelevant, immaterial, or scandalous material
        4. Example of all: *Fox v. Lummus Company:*
           1. Dismissal: Contract claims for quasi-contract and implied intent could not lead to recovery when, on face, complaint admitted that contract existed and that express intent was included.
           2. More Definite Statement: “Harassment” claim needed details-who, what, where, when?
           3. Strike: P&S Claim, as it is immaterial when NY does not allow these damages for an economic loss.
     5. Alternative and inconsistent theories ok; help to avoid variance
        1. *Lambert v. Southern Counties Gas Co:* Cannot use the law that says negligence of renter (count 1) is on owner to avoid liability for count 2 of neg of gas company.
     6. Particularity: Must allege these w/ particularity:
        1. Fraud
           1. *Sweeny v. Engineers-Construction Co.:* “secret device” does not meet the particularity standard for fraud- need some sort of who/what/when/where/who got taken in.

Most courts would only require method, unlike this one. Still need a method and not just “secret device”, though.

* + - 1. Mistake
      2. Special damages- PARTICULARIZE!!!
         1. Things that cannot be inferred from fact of injury alone
         2. Most damages
         3. ATTY FEES
    1. There are no magic words in pleading!! Comes now v now comes—no difference.
       1. But do use words that mean the right thing, a citizen is not just a resident.
  1. The D’s Answer
     1. 12(b) motion: Can raise a lot of defensive theories:
        1. Subject Jurisd
        2. In Person Jursid
        3. Venue
        4. Process
        5. Service
        6. Fail to state a claim
        7. Necessary person not joined
        8. NOTE that there can be a waiver problem depending on order/ special appearance rules.
           1. Also can move for more def statement or to strike.
           2. Some things like jurisdiction will be waived if not made early
           3. Can file these things in a motion before you file answer, as well
     2. Denials [and admissions] (answers on merits)
        1. General (state; allowed in TX)
           1. “prove it” to all statements
           2. NOT a factual denial for each fact, but of the claim
        2. Federal: must admit/deny in good faith for each allegation
           1. Must meet substance of allegation
           2. Can go insufficient info to admit/deny too.
           3. Must divide into parts if you admit part
           4. *White v. Smith:* Form letter denial of all allegations striken and D told to replead b/c the attachments to complaint (including Ds’ signatures) could not be denied in good faith.
        3. Affirmative defenses must be pled, and other side gets notice pleading thereof
           1. *Gomez v. Toledo:* Good faith immunity is affirmative defense.
           2. Novation
           3. Unavoidable Accident is NOT an affirmative defense!

Affirmative defenses- new facts that are a “so what”

This- a negation of an element

* + - 1. 3 basic types of D pleadings: abatement/dilatory, challenges to P’s pleadings, answer on merits.
         1. DILATORY: “delay causing”, often found in 12(b) motion. Jurisdiction, service, venue, parties defect.

Fed: all 12b mot.

State: Plea to jurisd, mot/dismiss, quash service, transfer, abatement

* + - * 1. CHALLENGE P’S PLEADINGS: substantive insufficiency 12(b), vagueness 12(e), inappropriate matter 12(f)

Fed 12(b), (e), or (f)

State all “special exception”

* + - * 1. MERITS: Denial or aff. D.

Fed: Rule 8(b) denials; notice pleading like P’s complaint.

You can’t deny everything down to the party names, hence no general denial

State: Gen or special denial; plead like petition.

* 1. Amendment
     1. **Of right**: only once, w/in 21 days or before responsive pleading if required
        1. Only before the responsive pleading is filed.
        2. Can amend after motion to dismiss and before answer, for example
     2. **Permissive**: with the leave of the court
        1. “Freely given when Justice so Requires”
           1. BUT court has broad discretion to deny- nature, timing, and number of previous amendments as factors.
           2. Should not unduly prejudice opposing party
           3. *Aquaslide Case:* D realizes after answer that they did not make the slide in question; amendment allowed b/c no bad reason like delay, and justice requires it.
        2. Practical tip: inadvisable to do too close to trial, else may be denied/may anger judge
     3. **Relation Back**: when date of amendment is taken to be in the past/before statute of limitations Ran
        1. Avoids statute of limitation problems
           1. What if you sue wrong D and amend too late?
           2. Two requirements, not often met:

Added defendant received notice of suit in some manner

D Knew/should have known they would have been sued originally if not for mistake.

* 1. Tex. Pleading Differences
     1. P’s cause of action called a “petition”; summons is called a “citation”
        1. Cause of action, liberalized
        2. Defendant: pleas in abatement, challenges to P’s pleading, Merits
           1. Plea to Jurisdiction = Subject Matter J
           2. Motion to Dismiss/ Special appearance for in personam juris.
           3. Motion to Quash Service
           4. Motion to Transfer
           5. Motion in Abatement (parties defect)
           6. Special exception for fail state claim, more def statement, strike
           7. Gen Denial and Special Denial
           8. Aff D is pled like P’s petition
  2. Current Rule 11
     1. Older rules:
        1. Oldest rule 11: Bad faith, almost impossible to sanction
        2. Old rule 11: mandatory sanctions and certification; too strict/draconian
           1. Eastway v. NY: Judge forced to give sanctions, does a 1k sanction, they make him do more.
     2. Implied Certification:
        1. When you file a pleading, by fact you signed, you certify:
        2. Based on “Reasonable Investigation” shows claim is
           1. Not for improper purpose (harassment, etc.)
           2. Warranted by existing law

Or has nonfrivolous argument

* + - * 1. Has evidentiary support, or

Will likely so have, after discovery. Must specifically identify this!

How to spec ID: “Claims #, #, and # are specifically IDed as likely to have evidentiary support after discovery under Rule 11.” Or similar.

* + - 1. Based on a reasonable standard is an OBJECTIVE standard- might be true is not enough. Reasonable lawyer doing reasonable investigation
    1. Sanctions:
       1. Discretionary, not mandatory.
       2. Purpose is deterrence of improper conduct
          1. Severity enough to so deter/minimal for this purpose
       3. Who may be sanctioned:
          1. Law Firms
          2. Attorneys
          3. Parties “responsible” for problem
       4. Types: Can vary greatly, including essays and ethics classes
    2. Safe Harbor Procedure:
       1. Motion is served to opponent before being filed
       2. Filed only if not withdrawn w/in 21 days.
          1. Different procedure if judge initiates.
          2. If they fix problem, you withdraw.
       3. *Hadges v. Yonkers Racing:* Sanctions overturned for P’s lie about employment in pleadings since safe harbor not followed. Also atty not to be sanctioned, since under Rule 11 you can rely on reasonable representations of fact from client.
    3. Problems with Rule 11:
       1. File frivolous things and then change it 20 days after motion is filed to something else bad.
       2. “toothless” against 1 due to Safe Harbor
       3. Can force party to spend $$ on reasonable investigation of wild claims and then withdraw them
    4. Methods of avoiding violation
       1. DOCUMENT: paper with “Rsn Investigation” on top, list EVERYTHING done.
       2. Demand letters to identify right D.
       3. Cross examine client
          1. Rule now allows you to believe your client
          2. But you need to understand them and they might contradict you later on.
       4. Basic legal research – quickest and most severe sanctions occur when there is a case that says that claim is frivolous, and you didn’t find it
       5. Legal expert- associate w/ lawyer who’s done this before
       6. Subject expert/expert witness as needed
       7. Prompt discovery
       8. Be sure to specifically ID allegations depending on discovery.
  1. Other sanction powers of the court: not limited to rule 11!
     1. Statutes
        1. Sanctions for “vexatiously” multiplying litigation
           1. Willfulness requirement!
        2. Discovery sanctions
        3. General equity powers
        4. Types
           1. Include merits sanctions like striking pleadings and dismissal
           2. Not confined to pleadings
     2. Court also has inherent power to sanction
        1. For things like perjured testimony and things not under rule 11.

1. **Parties and Claims: Joinder [NOTE: OBJECTIVE QUESTIONS ONLY]**
   1. Counterclaim
      1. Definition: claim filed by D “back against” P.
      2. Permissive: allowed as parties please; do not arise out of same transaction or occurrence.
      3. Compulsory: MUST assert if arising from same transaction or occurrence
         1. *Cavanaugh v. Western Maryland Railroad*: even if it seems chilling.
         2. This is rule 13: same transaction/occurrence/series thereof = comp.
      4. **Counterclaim is not crossclaim**!
         1. Crossclaim is one D against other D.
         2. Usually not compulsory- but if D1 sues D2 w/ crossclaim, and D2 wants to do what would be a crossclaim if D1 was the P, then D2’s crossclaim is compulsory.
   2. Impleader (=”Third party claim”)
      1. Definition: when a D brings another party into action, saying they are liable to D
         1. Only when may be liable to THAT D. Cannot bring in someone liable to P only.
      2. Contribution: Seeking part payment from joint tortfeasor
      3. Indemnity: seeking to have whole cost paid by other defendant
         1. Ex. Distributor seeking from mfg.
   3. Joinder: adding someone as party
      1. Permissive: can be done at will. Sue one, both, or other.
         1. Test for when this is allowed:
            1. Right to relief claimed Jointly, severally, or alternatively out of
            2. Same transaction or series thereof with
            3. Common questions of law and fact
         2. *Grogan v. Babson Bros Co:* Who shocked the cows case? Can join all the potential defendants into one suit
      2. Compulsory: court can force joinder of party who it would be harmful to leave out/unfair if not joined [see iv.]
         1. Few and rare situations where court will force P to add someone
      3. Joint, Serv., or Alt. Relief:
         1. Joint: both pay until satisfaction, liable for full
         2. Alternative: either one or other responsible
         3. Severally: responsible for parts.
      4. Persons Needed for Just Adjudication (Rule 19)
         1. Basic notion, sometimes people will be so affected that they ought to be joined as parties
         2. Simple statement of test:
            1. If absent person could assert an interest in the subject of the action, so that the absent person (or any existing party) could be harmed by the proceedings, than the absent person or entity is “needed.”

Examples:

Contestants in suit to cancel deed

All heirs in will contest

* + - 1. If not feasible to join:
         1. Reasons why not feasible:

Destruction of jurisdiction

Case underway or Judgement already rendered

* + - * 1. Test for proceeding:

Harm to absent person or parties

Shaping of relief

Adequacy of J. to defs

P’s adequacy of remedy

Equity?

Good conscience?

* 1. Severance and consolidation:
     1. Severance: Rule 21: Misjoinder not cause for dismissal. Court can add/drop parties or sever a claim against party.
        1. Severance generally used for things like the aquaslide case, where two claims or issues are severed into separate trials.
     2. Rule 42: Court can consolidate suits in addition to ordering separate trials.
  2. Complex and Multi-party Actions:
     1. Class Actions
        1. Governed by Rule 23
        2. Four prerequisites under 23(a)
           1. Numerosity: of people. So many that regular joinder is impracticable. (and under 50 has counted)
           2. Commonality: Common claim/very similar claim
           3. Typicality: Do you have classes where there’s a “typical” situation, even if not identical claims?
           4. Adequate representation: people who will rep class, not chosen by D, etc.

Named claimant must represent absent ones

* + - 1. Three 23(b) models:
         1. b(1): Inconsistent Results (if suits brought separately)
         2. b(2): Uniform injunctive or Declaratory relief (sought in civil rights class action)
         3. b(3): most common! Common questions “predominate” and C.a. is “superior” to manage case

Large number of consumers/stockholders/ etc. suing

Damage can be individual as long as common claim

4 factors for whether this is superior:

Interest in individual control over claims

Pending litigation

Appropriateness of form

Likely difficulties in managing class action

* + - 1. 23(c) Certification and Notice
         1. Certification: early hearing to determine whether or not can be maintained as class action
         2. Notice: also provides for notice to class members, allows them to exclude themselves

Notice is P burden

* + - 1. Example: TX Asbestos cases all went to one judge for a single massive class action, resulted in settlement.
      2. **Diversity in Class Actions: Minimal diversity is acceptable; (named parties only?)**
      3. Note that court manages atty fees for class actions
    1. Interpleader
       1. Faced with multiple conflicting/inconsistent claims, stakeholder requires interpled parties to litigate out entitlement against each other in single action, enjoined from suit elsewhere.
          1. Essential requirement: existence of conflict/inconsistency
          2. Prevents double liability
          3. Example: D dies, insurance co has $100k policy, two parties, A and B, both claim.

Trying to get interpleader does not equal admitting you are the stakeholder; can still deny and have litigated “if I were x” in case they find you are.

* + - * 1. Parties enjoined from suit: *State Farm v. Tashire:* only enjoined on suits related to the matter/property in interpleader, and only for that defendant- not for all defendants!
    1. Intervention: joining existing lawsuit b/c you have an interest; can exist a right or can be at discretion of court
       1. Of Right: When Statutory right or Interest in subject of action would be impeded as a practical matter, and not represented by parties
          1. More common
          2. Example: done to get to “first dollars of insurance payout”
       2. Permissive: When statutory right, or common Q of law or fact.
    2. Judicial Panel on Multidistrict Litigation: federal panel of judges from various circuits that can transfer multiple jurisdiction’s cases on one event to single court for consolidated pretrial
       1. Consolidated Pretrial proceedings
          1. Must be remanded for actual trial
          2. Judge cannot remand and then transfer to self.
       2. Multidistrict rules: complicated
       3. Doesn’t apply to State cases!! FED CASES ONLY
       4. Manual for Complex and Multidistrict Litigation
       5. Good for P (less onerous discovery and helps figure out where getting sued over what)
          1. D does not like b/c “case taken off to remote place” and may need to send hundreds of copies of mailings b/c of all the attys.

1. **Discovery**
   1. Purposes and Techniques: practicalities
      1. Purposes:
         1. Find out information
         2. Freeze harmful testimony
         3. Preserve info in USABLE FORM
         4. Improper purpose: harassment
      2. Purpose of broadness of discovery:
         1. Prevent ambush trials
         2. Fairer Trials
         3. Higher settlement %
      3. T-funnel method: encourage narration and then narrow
         1. Squeeze the witness
         2. Remember to prep own witnesses with dos and don’ts prior to depo!
      4. Ways to draft interrogatories
         1. Broad to narrow
      5. Waves of discovery: According to a discovery plan; so
         1. 1-2 might be depos of parties and interrogatories
         2. 3rd wave: document productions
         3. 4th wave: depo witnesses
         4. 5th wave, etc: more interrogatories…etc.
      6. Overall strategy: EXCRUTATING DETAIL
         1. Squeeze out all the info possible while retaining as much of your own as possible.
      7. “KNOW THYSELF” before beginning: find out as much about your own case
         1. Disclosures
         2. Anticipating discovery
         3. Cross examine your client and mine available medical records
      8. Why attorneys request privileged docs:
         1. Other atty asleep at switch and they’re valuable
         2. Can make other side waste time and $$ to plead privilege
            1. Or if you have the request made, pleading priv makes other side waste time and $ to show cause.
   2. Scope: The following is discoverable:
      1. Relevant info need not be admissible…
         1. Old standard: but rsn calculated to lead to admissible information
         2. New standard: Proportional to needs of case & not privileged, 6 factors:
            1. Importance of issues
            2. Amount in controversy
            3. Parties’ access to info
            4. Parties’ resources
            5. Importance of discovery
            6. Burden/Benefit
      2. Not privileged: can’t discover even though relevant if it is
         1. Attorney-client privilege
            1. NOTE: FACTS ARE DISCOVERABLE
            2. Communication is privileged

But if they admit that they are guilty… that they ran red light, etc., must disclose.

* + - 1. Note that if claiming, must specify which docs are and aren’t withheld for this reason
    1. Limits:
       1. Not cumulative (duplicative)
          1. If you had them produce 25 documents and then ask them to describe those same documents, that may be cumulative
       2. unduly inconvenient
       3. Ample opportunity for party to discover on own
       4. Benefit/burden analysis
    2. Work Product:
       1. Trial prep/litigation prep material is usually not discoverable, except for (1)undue hardship and (2)substantial need
          1. Does not cover unrelated investigations
          2. A document which is not the product of attorney or agents or employees is not work product and cannot be retroactively converted into such.
       2. Experts:
          1. testifying experts fully discoverable
          2. “retained” experts only on extraordinary circumstances

Three experts in the world

Product destroyed in their testing

* + - * 1. One court: informally consulted, not at all (Ager v. Jane Stormont Hospital)
        2. If not consulted for trial, no restriction
        3. Expenses to be paid by discoverer
        4. Difference in treatments of reports of physical or mental exam.
    1. Not under Protective Order:
       1. Discretionary standard as opposed to mechanical privilege
       2. Not under protective order: ct has powers to specify conditions and limits to protect against:
          1. Harassment
          2. Undue expense
          3. Embarrassment
          4. Trade secret exposure, etc.

Test here for these is balancing test: showing significant harm v. need of other side.

Trade secrets are not automatically excluded from discovery (Centurion v. Warren Steurer and Assoc)

* + - 1. Example: *Kerr v. US*: Although prison staff information found to be not privileged, court granted “in camera” review under protective order (as discovery was relevant and had benefit, but the information was sensitive). Notice also that this huge volume of files was not overly burdensome.
      2. Example*: Bank of Orient v. Superior Court*: Report on measures taken after embezzlement not discoverable b/c CA evidence code.
         1. This is common- often evidence of corrective measures is not discoverable b/c it would discourage correction.
      3. Court may also grant:
         1. Forbidding discovery
         2. Limiting discovery
         3. Forcing different delivery/ sealed envelopes
         4. Designating who may be present, etc.
    1. Electronic Discovery:
       1. “Reasonably accessible” is discoverable.
          1. Party info is sought from must show that it is not rsn accessible b/c burden or cost
       2. Other docs upon “good cause”
       3. Data preservation:
          1. Duty to take Reasonable steps for preservation

Legal Hold- duty to hold materials related

* + - * 1. Sanctions: no greater than to cure prejudice, unless intentional
      1. Note usefulness of emails- raw expression
  1. Disclosures:
     1. Initial: now restricted to own claim/defenses; 10 days after meeting
        1. Witnesses- persons who may have relevant info: name, address, phone, subject of info
        2. Documents- description
        3. Damages “calculation” (but vagueness as to formula/figure)
        4. Insurance
     2. Experts
        1. Testifying discoverable; may have to disclose
        2. Must disclose the facts that experts work with
     3. Pretrial
        1. Required in some jurisdictions
     4. Discovery meeting between counsel
        1. Required under Rule
        2. Sets out limits/types/waves of discovery
           1. Discovery Plan form created

Supposed to make discovery less offensive

* + 1. Sanctions for disclosures:
       1. May preclude testimony of undisclosed witnesses
          1. *Harrimon v. Hancock*: not disclosing witnesses until 2 days before SJ response motion due. Sanctioned.
       2. Note rule 26(g) sets out implied cert
       3. 37 is the sanction rule and disclosure and cooperation fail rule
          1. *Lew v. Kona Hospital*: Doc sanctioned under Rule 37 for not showing up to depo, no notice.

Need not be willful to be sanctioned, but failing to notify is willful anyway.

* + 1. TX: allowed to “pick from list” for disclosures- 11 total options
       1. Don’t ask for too many or other side will ask too.
  1. Methods:
     1. Depositions: court reporter records, questions under oath.
        + 1. TX court reporters certified by State SC; feds allow anyone certified under state or fed law to do it.
        1. Use under rule 32(a): impeachment, for agent/party on other side, unavailable witness, completeness
           1. Completeness: if a part is presented, others can refer to parts of that whole deposition
           2. Subpoena may be required for nonparty, not needed for party
           3. Notice to party- contact other side!
           4. Presumptive limit of 10, 7 hours per.

Can ask permission for more from court

7 hour limit so you can finish in one day

* + - * 1. Stipulations: can agree to change rules, most commonly reserving objections
        2. Must be taken at reasonable location (100 miles from where suit filed is limit) – P pays cost, cannot compel D to travel

*Salter v. Upjohn Co*: cannot require MI D to travel to Alabama.

* + - * 1. Apex Deposition: deposing high officer of company “to get company policy”

Can be legit, often abused- as harassment to get a settlement.

* + - * 1. Good for: evasive witnesses, freezing testimony.
        2. TX Rule: Potted plant rule: no conference w/ witness except re: privilege

Obj limited: leading, form, nonresponsive

instruction not to answer: only if priv, ct order, abusive Q, misleading, or to secure ruling

* + - * 1. This and subpoena duces tecum (bring w/you to deposition) are the only two forms ok for nonparties.
    1. Depo on Written Q’s- weak form, maybe ok for authenticating documents. Use the regular kind when you can instead.
    2. Deposition to Preserve Testimony: when you expect witness to be unavailable
       1. “where failure of justice might occur otherwise”
       2. NOTE: TX at state level allows free use of depositions.
    3. Interrogatories
       1. Written Qs that are answered under oath, require reasonable investigation and not just immediate memory, limit 25
          1. Limit 25 b/c thought to be oppressive
       2. Can be easy to draft and hard to answer
       3. Answers “implied certified”; rsn inquiry required?
       4. Good for things P would need to look up and write down. (Name all your docs, for example)
       5. Contention interrogatories: attempt to get what other side is contending or objecting to
       6. Can allow other side to search records in response to interrogatory
          1. But only if burden to them is SAME

And usually will be easier for your side.

* + 1. Requests to admit
       1. Only to parties, answered under oath- factual propositions
          1. Things not likely to be contested
       2. Unlike @ state level pleading, must engage with each
       3. Affirm, deny, insufficient inof
       4. Must admit in part if true
       5. Helps to make sure suing right D
       6. Opinions permitted in request
       7. Often a failure to respond taken as admission
          1. But there is discretion
       8. Admission are conclusive and cannot be contradicted later by admitting party.
    2. Requests to produce or inspect
       1. Must set time/place that is rsn to get docs/inspect item
       2. Must specify item(s) w/ RSN particularity
          1. For electronic stuff too
    3. Motions for phys/mental exam: MORE THAN GOOD CAUSE
       1. Good cause, condition in controversy.
          1. In controversy: is part of issue raised in pleading
       2. Relevant NOT ENOUGH.
    4. Abuse of methods:
       1. Pushing: giving opponent overly burdensome discovery
          1. Unreasonable requests
       2. Tripping: avoiding giving the info you’re supposed to in discovery
          1. Unreasonable noncompliance
  1. Sanctions:
     1. Range: broad!
        1. Compelling discovery
        2. Preclusion order- you are precluded from introducing evidence on this issue
        3. Establishment- court declares fact and you are precluded from challenging
        4. Spoliation order: “assume this was bad, they did X”
           1. Appropriate when:

Degree of fault

Degree of prejudice

Whether lesser sanctions would do

* + - 1. Striking of claims/defenses
      2. Dismissal or default
      3. Contempt (and incarceration, or fine for non-party witness or party)
      4. Other just orders- Crump notes that the above cover it well.
    1. Payment of fees and costs only if no substantial justification for resistance
    2. Sanctions above ordering discovery have a “showing of fault” req (case law)
       1. Merits sanctions usually require willfulness or gross negligence or higher.
  1. Duty to supplement: if you find it later, and should have disclosed, do so ASAP.
     1. If incomplete or incorrect, timely supplement with info
        1. Unless info already available to opponent
  2. Implied Certification and Discovery Conf.
     1. Implied cert: under Rule 26- parallels rule 11- when you sign, you imply that it’s all to best of knowledge and reasonable inquiry
     2. Court can call attys to conferences dealing with discovery.
  3. TX Discovery Levels:
     1. Level 1: No more than 6 hrs for all witnesses in oral deposition, not more than 10 hours w/o court order.
     2. Level 2: No more than 50 hours depos for opposing party-controlled witnesses
     3. Level 3: Big cases, sort of custom

1. **Pretrial Conference**
   1. Concept and Purposes
      1. Can sometimes settle at a pretrial conference
      2. Court can do almost anything to settle/resolve; including
         1. Attempt to get stipulations by parties
         2. Rule on pretrial matters
         3. Specify witnesses in advance
         4. Admit or exclude evidence
         5. Can require parties to engage in settlement negotiations and send parties to ADR methods that are nonbinding
      3. Use varies; in TX often common not to have one, but in fed court there is usually a series
   2. Sanctions- for failing to participate in good faith
   3. Requirements placed on parties before
      1. P usually has to draft pretrial order
         1. And then send to D
      2. Can be onerous to draft order (voir dire, charge, etc. way before trial!)
   4. Pretrial order
      1. Sets out issues/plan for trial
      2. To be “liberally construed”
      3. May be amended
      4. Controls actions unless doing so would cause “manifest injustice”
      5. Purposes: disposition of the case!
   5. Series of Pretrials- #/type/etc. varies by jurisdiction
   6. Docket Control Order early on in case; often comes from a pretrial conference
   7. “New” Case management
      1. Civil Justice Reform Act Plans: some state plans included a target system to resolve disputes by a certain date and have reporting, not adopted. What was adopted was, must come up with plans to manage disputes, including:
      2. Tracking: putting cases in different categories
      3. Differential Case Management: plans for each type of case in tracking
         1. NJ: Standard, expedited, complex.
         2. Texas: Level 1-3; lower levels get discovery limits
            1. Level 1: 50k amt in controversy: 6 hours depos total, 25 int.
            2. Level 3: Court ordered schedule including trial date.
            3. Level 2: all others; 50 hrs depo; 25 int.

Depos can be 6 hours max according to Crump slides

* + 1. Staging: Trying certain issues first, separately; if resolved one way, may eliminate need for the second trial
       1. Example: Aquaslide case; trying whether or not D mfg. slide meant no need to try for liability/damages
    2. Fast track: must try the case before X date/ get case resolved in a certain # yrs.
    3. Enforcement: each of these has enforcement problems- what if plans not followed? Sometimes deadlines hard to comply with. See below:
    4. Adjudication by Deadline: downside of this management; resolved finally but not on merits; something to avoid.
       1. Importance of office time management to avoid this
  1. Masters and Magistrate judges: to do pretrial, posttrial, and enforce orders. Note that magistrates can try case if parties consent.

1. **Pretrial Disposition of Case**
   1. Pretrial Orders and conferences, more detail
      1. Rule 20: all need scheduling order UNLESS local rules!
      2. Benefits of management:
         1. Individual responsibility for judge/incentive to get cases gone
      3. Disadvantages:
         1. Nonmerits time wasting bogs down judges.
         2. Too many cases, too confusing
         3. Adjudication by deadline- Karubian case, where court failure to mail doc lands person out of court via dismissal.
   2. Summary Judgement
      1. Based on: Pleadings, Affidavits, and Discovery
      2. Standard: “If there is no genuine issue of material fact and one movant is entitled to judgement as a matter of law” then should be granted.
         1. Entitled to judgement as matter of law = movant shows, definitely, from these paper documents, that there’s no rsn way opponent could prevail
            1. Similar to dismissal but this is done based on evidence of discovery, not just assuming pleading is true

*Warren v. Medley*: Summary judgement granted in “glass table top”/Barbie in the trash can case, as the defendant was not responsible for the injury, could not have prevented it, and had no duty to prevent it (and thus the plaintiff could not prevail).

* + - 1. Opponent must respond if properly done (to show there is a material fact issue)
         1. Affidavit of best of knowledge not enough here.
      2. Burden on Movant
         1. Must show the facts are undisputed!
         2. Three ways to do this:

Complete defense (AD)

Negating element of P’s case (and so no claim)

Showing P cannot produce Legally Sufficient Evidence, done by **definitive inference**

This is most difficult! Celotex case

Can be done w/out affidavits or proof

How to do this: use discovery to make opponent produce all of their evidence, then move to show court that this is all they produced, and there is no rsn way for juror to find for them on this subject.

Not enough to say “I don’t think they have evidence”

In discovery, should ask for affidavit/evidence of all of their proof

This is difficult to do- proving a -. BURDEN ON MOVANT until this is proven!!

* + - 1. Affidavits of inability: required response by opponent
         1. Can use affidavits when there is absent witness, etc. to show inability
         2. Opponent must respond to summary judgement motion to show they can prevail
      2. Court CANNOT resolve credibility or make fact inferences (to eliminate a factual issue)
         1. IF there are fact issues open, the court MUST NOT GRANT.
    1. Partial summary judgement: Affidavit requirements
       1. Can be for one issue and not for whole case.
       2. Example: liability and not damages
    2. Affidavits:
       1. Witness has personal knowledge of matters in it and it would be admissible
          1. Can the person prove what is in the affidavit? (issue)
  1. Dismissal:
     1. Voluntary: “voluntary nonsuit” where P surrenders suit, decides not to proceed
        1. Generally “without prejudice”- can refile later
     2. Involuntary: P is forced into nonsuit by court
        1. Usually w/o prejudice if for jurisdiction, parties defect, or venue (so they can bring it again in the right place)
        2. Usually with prejudice otherwise
           1. No refiling
           2. Acts as judgement on merits
  2. Default
     1. Done on D’s failure to plead, or defend, as required by rules
        1. Example: Wyman v. Newhouse (FL fraud enticement case) – no appearance = default
     2. If liquidated damages, done by Clerk
        1. Court frequently requires hearing anyway
     3. If not liquidated, must be done by court, and may require hearing/proof of default
     4. Setting aside: under certain conditions
        1. Existence of arguable defense on merits
           1. Wyman v. Newhouse: it was fraudulent 🡪 set aside
        2. Excusable neglect
           1. Mistakes, etc. BUT intentional acts are not this.
        3. Time limit: 1 year from entry of default
     5. Removal does not erase default! Butner v. Beudstadter- state suit, answer not filed w/in 10 days despite retaning attys; if removed after default? Nope.
        1. Court could set aside default
           1. But it’s not erased by removal.
  3. Judgement on pleadings- rare- dismissal is a type of this.
     1. Done after pleadings closed

1. **Setting the Case for Trial**
   1. Importance of understanding the docket system (which may vary by juris.):
      1. Need to assure reasonable setting of case
      2. Need to understand continuance problems
         1. How to get a continuance
            1. *Oates v. Oates:* extension denied when atty asked for it over telegram- denied b/c (a) discretionary and (b) not proper form.
         2. How to prevent other side from getting one then they shouldn’t
   2. Systems:
      1. Federal: Southern District of TX courts:
         1. Docket control exercised by courts and magistrates
         2. “Great delay” results?
      2. Harris County:
         1. Previously, “request” setting procedure; then “certification”
            1. Request procedure: seen in Dominguez case, where you request that there be a trial and they set and reset
         2. Now, individual judges’ control
            1. Creates some delay but also responsibility on judge’s part
      3. Immense variation: pay attention to local rules!!
         1. Unified Docket: all judges available, random assignment or rotation
         2. Individual docket: set for one judge.
      4. FCRP rules:
         1. 6(a)(1): time periods include the end day but not the day that triggers the time period, each weekend day counts
         2. 40: every court must have scheduling procedure
         3. 79: clerk must keep docket, calendar
   3. Local Rules Generally:
      1. Typical provisions
2. **Trial By Jury**
   1. **General Order of Trial:**
      1. Motions on eve (limine), Voir Dire, Juror selection/challenges, Opening, sequestration/invoking the rule, P’s ev, D’s Ev, Rebuttal/surrebutal, JMatt Law, Charge conference, objections to charge, jury argument and summation, charge, deliberations, verdict, judgement.
   2. Right to jury trial is NOT for every case. “people who are wrong often prefer a jury.” -C
      1. Preserved by Rules and 7th Amendment
         1. Where existed at common law
         2. Where required by act of congress
         3. NOT for equity cases
         4. If not sure, see whether more similar to law or equity.
      2. Rules:
         1. 39: Court can order a jury trial on issues on motion. Parties can stipulate trial by court on issues.
         2. 81© no need to replead
      3. Right does not exist in equity cases.
         1. Historically, equity for chancellor and not common law court
         2. Subjects of equity- mixed bag w/ no remedy at law originally (covered gaps in common law)
         3. Examples:
            1. Injunction
            2. Accounting

Where Court sorts out finances

See DQ case- cannot disguise contract case as this to avoid jury trial!

* + - * 1. Interpleader
      1. Habeas, Admiralty: no jury trial b/c at common law no juries
    1. Where claim, or part of it, is Legal in nature, Jury Right is preserved even if the claim is joined with equitable claim or request for relief.
       1. Court decides equitable claim but sends legal claim to jury
    2. Statutory actions (eg. Civil rights):
       1. Issue: whether claim and remedy are analogous to common law claim, historically.
    3. Texas right extends to jury for equity as well, at least for fact-finding
  1. Demand and Waiver:
     1. Federal: w/in 10 days of last pleading directed to that issue on which jury trial is sought
        1. Removed case:
           1. If no demand needed, no need to make
           2. If demand made, no need to remake
           3. If demand needed and not made, must make w/in 10 days after removal
        2. After time limit, judge discretion to grant or deny
        3. Demand is written, one sentence is fine
           1. Written on complaint or answer is fine and easiest
     2. Texas Rules: different by analogous rule, allows later demand
        1. w/in reasonable time
        2. Not less than 10 days before trial
        3. Written demand and payment of fee
  2. Summoning of Jurors:
     1. Constitutional requirement: method of summoning must avoid “systematic exclusion” of identifiable classes
        1. Supposed to be a “Fair cross section” of society. In practice, avoid exclusion of identifiable groups.
     2. Fed system: each district develops plan using voter registration or actual voter lists, supplemented by other means if necessary
        1. Names drawn from list at random to compose list from which summons as needed
        2. Each district to allow exemptions and evolve rules for others at discretion
           1. Excuse plans- includes who can opt out, who is disqualified.
        3. Method of summons includes informational form
        4. Method provided for challenge to array (constitutional or statutory)
           1. Must be done before jury is selected or before a certain number of days after you discover defect
     3. State: different by analogous
        1. Use of computer system
        2. Juror info forms and exemption certificate
  3. Jury Selection
     1. Voir Dire
        1. Purposes:
           1. Rapport- use humor, get to know jury
           2. Discovery- of bias, who to strike; qualifications and disqualifications and info for peremptories

Technical purpose

* + - * 1. Communications- get your definitions to jury
        2. Commitmment- get jury to commit to things, like following the law

Rarer now

“If I show X, can you award?”

* + - * 1. Condition to accept proof
        2. Inoculation- seed bad fact so that it’s not a surprise later. Preview your case too.
        3. Abuse: hinting at inadmissible evidence!
      1. Other techniques:
         1. Personalize client
         2. Simple analogies, simple words
      2. Methods
         1. Fed: Judge may allow attys or do it himself

OR ask qs and let parties ask others

If doing it himself, must allow attys to submit written suggestions

* + - * 1. State: formula for judge to read specified by rules

Attys have reasonable time to ask qs relevant to selection

Tex. State court: must include q’s asked by attys

* + - 1. Example: *Fein v. Permanente Medical Group:* Excluding people with ties to medical group in jury allowable under discretion (time and resources would be excessive); error in jury instructions was harmless error.
      2. Note that this is delicate- jury decides case after you’re done with this
         1. BE NICE
         2. Phrase qs carefully to ferret things out- can’t ask “are you in insurance” but can ask if anyone works with claim math for a living.
    1. Challenges
       1. Cause: unlimited in #
          1. Bias and prejudice, pecuniary interest, etc.
          2. Other reasons to be Disqualified: not citizen, can’t speak English, etc.
          3. Judge decides/makes fact finding on disqualification
          4. *Flowers v. Flowers:* no rehabilitation, but HCI v. Cortez says opinions rehabilitatable, but not bias.

Rehab keeps from skewing bias, prevents “run” on the jury

* + - 1. Peremptory: 3 to side in fed case; “striking” on lists
         1. Remember not to strike alternates, that’s a wasted strike
         2. No reason needed
         3. Remove people unlikely to be favorable
      2. Batson-Edmonson Problem
         1. No racially motivated peremptories, even for civil cases
         2. Extension to gender, age, etc.? Gender, yes
         3. Paradox: peremptories always done by hunches/instinct, feel, or gross characteristics

Label chararacteristics, not individual ones

* + - * 1. Procedure

Statistical/prima facie showing on challenge

Opponent rebuts inference by credible (neutral) explanation

Court decides whether it is pretextual or not.

1. **Opening Statements**
   1. P opens first
   2. Thank Jury
   3. Pick themes and preview your story.
      1. Themes tied to evidence, jury questions, and story
      2. Examples:
         1. “This case is about an unavoidable accident”
         2. “We are here today because a young man was careless and hit a child…”
   4. Can give definitions, etc.
   5. Be careful with saying “we WILL show you x” b/c other side will point out if your evidence of x gets objected to and thrown out.
2. **Evidence**
   1. Party with burden opens and closes
   2. “The Rule”- to “invoke the rule”, say so at start of trial
      1. This means witnesses are sequestered while others testify
      2. And they only get to talk to attys
   3. Rules of Evidence
      1. Admissibility of logically relevant evidence that makes fact more or less likely
         1. Admissible “relevant and not precluded by exclusionary rules”
      2. Exclusionary principles
         1. Prejudicial Exclusion: Relevancy not substantially outweighed by prejudice, confusion, etc.
            1. Compromise offers, subsequent repairs, insurance, bad character, withdrawn guilty plea = all usually excluded
         2. Hearsay:
            1. Statement by someone not now testifying offered in court to prove truth of facts

Can admit that it was said, as evidence of something else, just not of truth of facts

Example: “Pudding is green!” cannot be offered to prove pudding is green, but can be offered to show the person who said it was intoxicated

“Can’t admit someone else’s version of the facts.”

WHEN THE STATEMENTS ARE THE FACTS, IT’S NOT HEARSAY (CONTRACTS EXAMPLE ESPECIALLY!!)

* + - * 1. Exceptions to hearsay:

Business Records

Public Records

Record of activities

Matter under legal duty to report

Facts of legally conducted investigation

Excited/Spontaneous utterances

Book: Present Sense Impressions

Records of regularly conducted activity if made by someone with knowledge as regular practice in course of activity.

* + - 1. Personal Knowledge (question of degree since most facts have some bit of opinion in)
         1. Expert witness qualified as such may give opinion, is not bound by this rule
         2. Opinion permitted if rationally based on witness’s perception and is helpful to clear understanding.
         3. Note that opinion in a document doesn’t make the fact part inadmissible. (SC Rainey v. Beech Aircraft)
      2. Unauthenticated documents or objects- must be authenticated to admit
      3. Privilege: stronger than other rules, prevents disclosure
    1. Admitting item into evidence
       1. Mark as exhibit
          1. Fed may let you mark beforehand, local rules may differ
          2. Ask Bailiff to mark it
          3. Now called P/D’s exhibit #
       2. Authentication: what it purports to be and how it relates to case
          1. Ask witness

Recognize it?

What it is?

Truly and accurately depict? If photo or diagram

* + - 1. Tender to opponent for objections
      2. Then to judge, offer it into evidence HAVING TENDERED
         1. Opponent can now object
      3. Judge admits it,
      4. So get bailiff to pass to jury!
         1. IF IT GOES IN THE RECORD IT GETS SHOWN TO THE JURY

Otherwise the effort was wasted

* + 1. Method of examination, enforcement of rules:
       1. Direct Examination- NO LEADING QS
          1. Ok on cross- ALL QS on cross should be leading!
       2. Responsive Answers
       3. Enforcement of rules by objections
       4. Additional enforcement
          1. Request instruction to disregard
          2. Move for mistrial
          3. Contempt (lawyer or party)
          4. Appeal (limited by harmless, cured, error, and preservation)

Harmless error: not substantial enough

Cured error: court “remedied” it (but did they really?)

Preservation: object or lose ability to appeal

* + 1. Cross-examination and impeachment
       1. Leading qs allowed
       2. Wider admissibility: can admit
          1. Felony convictions
          2. Bias
          3. Psychological condition
          4. Prior inconsistent statements
    2. There are variations by jurisdiction and many of these things come down to “judgement calls” by judge
       1. Federal and state rules are generally similar
  1. Argument of Counsel, Jury Argument
     1. Prohibited subjects:
        1. Distortion of law: “the factory was only negligent if a factory owner with the exact knowledge and education of this man would do differently”
           1. No “hold against D b/c D is a business”
           2. No “Golden Rule agreements” (award what you’d want to be paid if you were so injured)
           3. No sympathy appeals on opponent’s corporate status
           4. No appeals to “taxpayer status”
        2. Facts outside Record
           1. Can attack credibility
           2. Can draw inference
           3. But must be inference from the record, not a new and different fact
        3. Appeals to passion and prejudice
           1. Can’t make a “P will be a drain on your taxes” or “you’ll pay this judgement/welfare” type of argument
        4. Ad hominem
           1. Attacking opposing counsel as a vulture
     2. Organization:
        1. Start by thanking jury
        2. Remind of themes
        3. Go over the questions and “translate” the law
        4. Marshal evidence
        5. TELL JURY HOW TO ANSWER EACH QUESTION
        6. Don’t forget to mention damages
        7. Policy argument and emotional argument: P saves for rebuttal; D does at end of his time
           1. P’s first closing is short and unemotional
        8. D should only pick 2-3 points to talk about, not more
           1. D wants this to be brief, b/c don’t want their talk to be structured by the other side.
           2. Thanks jury, just as P did
           3. Goes through special interrogatories w/ defense spin, translating and marshalling, etc.
        9. P’s rebuttal: answer 2-3 arguments by D
           1. Then “I’ll tell you what this case is Really About”
           2. BRIEF summary of the special verdict questions
           3. And then emotional argument
     3. Purposes: to put together law and evidence to answer jury questions
     4. There might also be argument in judgement before the court, arguing to judge.
  2. Motion for J as a Matter of Law: once parties rest/close (goes here in trial)
     1. Part of JMatt Law: Rule 50: If there is no sufficient evidentiary basis for a claim, can grant judgement against that party on a claim or defense that, under law, can only be maintained w/ favorable finding on issue.
  3. Verdict and instruction:
     1. Form of verdict:
        1. General (who won)
           1. Clear winner, but problems mean a new trial needed.
           2. “play in the joints” for justice
        2. Special (fact qs)
           1. Prevents personality/prejudice verdicts as jury doesn’t know how to rig it, but leads to language arguments, difficulty breaking claims into elements, and jurors are not computers.
           2. Gives record of fact findings from jury
        3. Federal: Judge’s discretion
        4. Texas: uses special almost exclusively
     2. Usual contents of charge:
        1. basic instructions (answer each Q unless it says not to)
           1. No bribes, elect foreperson, decide on the law, etc.
        2. Principles of law (negligence is…)
           1. Defining offer, breach, negligence, etc.
        3. Verdict (questions to answer)
     3. Fed court: jury instructed orally before or after comment. Judge may comment but not without limit
        1. Crump prefers instruction BEFORE argument, else “cart before horse”
        2. Charge prepped before either way to attys know what to argue.
        3. CONTRAST TX: written charge, read to jury before argument
     4. Objections to charge: enter to preserve on appeal or get charge corrected
        1. Rule 51: if you don’t object to it, cannot assign it as issue on appeal
     5. Problems with Charge: Rule 49
        1. If answers inconsistent, can
           1. New trial
           2. Send jury to deliberate more
           3. Go with special and ignore general
           4. CANNOT go w/ general or add more qs.
        2. Incompleteness ok if jury did not need to answer a q (go to q 3 means ok not to answer Q2)
     6. Jury misconduct: cannot impeach verdict b/c mental processes of jurors

1. **Trial Before Court**
   1. Very similar to jury trial in evidence presentation, but simpler procedurally
   2. No Jury selection, instruction, or verdict.
   3. Usually judge receives argument from parties
   4. Findings and Conclusions- not automatic, and must ask judge for them to appeal on factual grounds (rule 52)
      1. Serve same function as verdict does in a jury trial
   5. Perceived to be “looser” about rules of evidence and procedure because “judge knows to disregard” and presumably decides only on admissible evidence
2. **Post- Trial Motions and Taking Case from Jury**
   1. Judgment on the verdict:
      1. Straightforward on a general verdict
      2. More difficult on special verdict, not clear who “won”
   2. Motion for Judgement as a Matter of Law [during trial] (Previously Directed Verdict or Instructed Verdict)
      1. Standard: If on undisputed evidence movant entitled to J as matter of law; no reasonable way to find for nonmovant.
      2. Time: When opponent rests or closes, or all parties rest or close
      3. MDV (motion for directed verdict) is a prerequisite for JNOV (judgement n/withstanding verdict)
      4. Motion must specify facts and law grounds that entitle movant to judgement as matter of law.
         1. Does not need to be very specific, only enough to allow response.
   3. Renewal of motion for J/Matt Law after trial (previously JNOV)
      1. Same as during trial but after loss in jury verdict
      2. Note for J as Matter of law during and after trial- MECHANICAL standard
      3. Note: purpose of j-m-law is to make the party who should win, win. Unlike new trial purpose below.
   4. Motion for New Trial
      1. Standard: Discretion w/ judge, to correct miscarriage of justice, errors in trial, etc.
         1. Unlike Mlaw, not mechanical (allow great weight of evidence, etc.)
      2. Examples:
         1. Factual findings against great weight of evidence, even if DV not proper (disputed fact issue but finding against other evidence)
            1. Not preponderance, but a stronger standard
         2. Legal or procedural errors
         3. Newly discovered evidence, mistake, etc.
            1. Must be MAJOR evidence that would change outcome
         4. Other grounds as well
      3. Review on appeal: abuse of discretion standard
         1. Judge can almost always grant this and be upheld.
   5. Correction of Judgement for procured by fraud, mistake, etc.
      1. New trial (w/in 10 days of judgement entered- Rule 59 says 28!)
      2. Rule 60 motion within 1 year (outside 10 days, up to 1 year)
         1. Easier for clerical errors, etc.
      3. Independent action (has massive burden, rule 60 much easier)
   6. Rule 60 Motion
      1. 60(A): clerical mistakes correctable at any time
      2. 60(b): other causes, from excusable neglect or mistake to fraud, misconduct, newly discovered evidence, satisfaction of judgement, lack of jurisdiction, other causes
         1. 1 year limit on most of these
         2. Fraud is very specific, misconduct is easier
      3. Grounds from “easiest” to hardest to get:
         1. Clerical errors – relief available anytime
         2. Mistake or excusable neglect – 1 year
         3. New evidence that couldn’t be discovered with diligence and would change result – 1 year
         4. Fraud/other misconduct – 1 year
            1. Note: fraud is strict standard of egregious fraud on the court, but misconduct is much easier to get.
         5. Jgmt satisfied, Jgmt void
   7. Interplay between JNOV and NT: [not covered in the course]
      1. Verdict loser will move for both
      2. JNOV denied 🡪 judge rules on MNT
      3. JNOV, Movant satisfied
         1. But court must rule conditionally on MNT in case appellate court disagrees with JNOV, else there would be 2 appeals
         2. Verdict loser became winner, so now new loser can MNT and court must rule on it
      4. If verdict winner’s J reversed on appeal, may move for NT in appellate court
   8. Remember that’s it’s J-Matt Law not DV/JNOV now!
3. **Appeal [NOTE: OBJECTIVE QUESTIONS ONLY]**
   1. What’s appealable
      1. Basic Rule: Judgements that are final are appealable
         1. Final to every party, claim, and ground of requested relief
         2. Judgement is not final if “anything left over that matters”
         3. Mother Hubbard Clause- everything but cupboard; any relief not mentioned here is hereby denied (to make sure it is final)
            1. Judgement for ½ D is NOT final
            2. Denial of SJ is NOT final
      2. Appealable non-final judgements, or escape valves:
         1. Collateral Order Doctrine
         2. Certain interlocutory orders appealable by statutes
            1. Injunctions, even temporary ones
         3. Discretionary appeals: district court can make a finding that there is:
            1. novel Question, where finding on the q would advance the litigation’s disposition. [certification?]
            2. difference of opinion
            3. advance termination

Appellate court must agree

* + - 1. Making it into a final rule: 54(b)
         1. Ct enters final J on one of multiple claims, by express finding and directions

In other words, judge inserts a phrase and it is now final and appealable

* + - * 1. For orders where there is no cause for delay on appealing
        2. Rule **54 Collateral Order**: order entirely separates from merits of case, situated so that appealing at end of case would defeat prupose of appeal (things like filing bond- very rare)
      1. Mandamus: for things like discovery order; show no adequate remedy at law b/c you’d have to comply with order before appeal is otherwise possible.
  1. Appellate Procedure- Federal Level
     1. Notice of appeal- names of appellants, order/date/court appealed from, court appealed to.
        1. Must be filed w/in 30 days, they can give 30? (now 14 according to Fed app rule 4) days extension
     2. Cost Bond- bond for costs of the appeal
     3. Supersedeas- taking of appeal does not stop judgement. To stop execution, you file superpesedeas bond that covers the amount of judgement+ costs.
        1. Usually need this for a stay of execution on the judgement.
     4. Record: appealing party must request
     5. Brief requirements: how long, and formatting and color of brief
     6. Docket fees: must file at certain points in time
     7. Time limits!! That depend on previous time limits-be sure to chart it out with the rules or reliable source about them. “The first step”
  2. Jurisdiction:
     1. Courts of appeal: over appealable orders of district courts w/in their circuits
        1. Unless there is a “certified” appeal to the SC directly
        2. Admin and agency appeals
     2. Supreme Court
        1. Original Jurisdiction
        2. Appellate jurisdiction from Cts of appeal and state courts of last resort
           1. Certiorari- SC decides what cases it will hear (80ish annually)

Purpose: to keep court from being flooded, ensure it hears cases that matter

Usually no reason given as to rejection

And there is no procedural value in rejection

Not interested in “unique” fact cases, but in cases where there are conflicting results and a divide in the law

Not exercised for justice between parties, but for federal interests

* + - * 1. Other kinds of review (rare)
        2. USC 1651: Courts may issue writs to help with their orders.
        3. Appeal on facts: fact review uses “clearly erroneous” standard

Plausible alternatives don’t count

1. **Res Judicata and Collateral Estoppel [NOTE: OBJECTIVE QUESTIONS ONLY]**
   1. Res Judicata – “claim preclusion”
      1. Elements:
         1. Previous Final Judgement
         2. Covering same facts (same claim, same facts, or “diligence” rule)
            1. Diligence rule: asset your compulsory claims and do due diligence to get them all, or barred later? Check.
         3. Between Same Parties, privies, or predecessors
      2. Example:
         1. A sues B and gets 10k judgement, tries again on same claim for 20k. Res Judicata!
         2. A sues B on contract, court says no K. A sues quantum meruit. Probably- b/c closely related claim that someone who is diligent would have pursued in first suit
            1. But it depends on rule of preclusion in that jurisdiction- not the SAME claim. But most say closely enough to be precluded
      3. Also called **Merger and Bar**
   2. Collateral Estoppel – “issue preclusion”
      1. Elements:
         1. Previous final judgement
         2. Between same parties, privies, predecessors
            1. BUT some cases require only that the party to be bound be the same (mutuality problem)
         3. Involving adjudication of issue in the prior suit which is an issue in the present suits
         4. Which is MATERIAL to both judgements
      2. Example:
         1. A sues B for payment of one installment on note. Court determines lack of consideration issue adverse to B. A sues for next installment, B pleads lack of consideration. A now pleads collateral estoppel.
2. **Collection and Enforcement of Judgements: [NOTE: OBJECTIVE QUESTIONS ONLY]**
   1. NOTE: Feds simply adopt State Collection Procedures (TX debtor-friendly)
   2. Note that enforcement procedures can be modified but not after they are done.
   3. Money judgement must be done by writ of execution!
   4. Some states allow judgment liens against property
   5. Satisfying judgements out of property:
      1. Execution: having a final judgement, P has court issue writ of execution.
         1. In TX, clerk issues (if you have judgement, it’s a ministerial issue)
         2. Procedure:
            1. Sheriff advises
            2. Then seizes property
            3. Then sells at advertised sale
         3. Limits: designed to protect D, sometimes do not do justice to P
            1. Value of property must bear reasonable relation to judgement.

If sheriff can divide to meet this, must do so- “land agent of a sheriff”

EX: Can’t sell 200k home for 2k judgement unless no other asset

If Debtor specifies property, Sheriff must honor designation

Ex. Cannot sell real property first if D says to sell cattle

Exemptions: Extensive in TX

Homestead exception- cannot sell primary residence (or in TX, business property), auto, furnishings, etc.

Clothes, tools of trade, etc.

* + 1. Post-Judgement Garnishment: To get at debt owed to debtor by 3rd party.
       1. Serve 3rd party with petition in independent action, will be a separately #ed case.
          1. Example: bank deposits
          2. TX DOES NOT ALLOW with respect to Wages

Except constitutional amendment as to child support

* + - * 1. Other states- up to 25% of wages.
    1. Liens: Abstracting judgement and filing it of record in country, can make it a lien on realty in county. Increases chances of collection b/c:
       1. Effect: Encumbrance on D’s real property in county
          1. Purchasers take subject to judgement debt- no one wants to buy a lawsuit!

This can be used to get around the Homestead Exemption

Can still be exempt for 6 months but NO title company will deal with it like that anyway

Note: never accept “he’s coming with a check, please release by 4pm today.” Get the $$$ first and THEN release, in case check doesn’t clear

* + - * 1. Problem of priorities: Purchase money Debtor will have priority

So will prior judgement, IRS creditors.

* + 1. Turnover: for evasive debtors. Allows broad use of court’s equitable powers to force D to turn over property to pay.
  1. Discovering Assets:
     1. Use of records
     2. Permitted discovery in aid- interrogatories or deposition to get info.
  2. Provisional Remedies: done at beginning of case b/c fear that may be uncollectable at the end
     1. Types:
        1. Attachment: writ to seize property of debtor before it can be wasted/concealed/lost
        2. Garnishment: seizing assets from other parties holding them for debtor/assets due to debtor from 3rd parties.
           1. Examples: Bank accounts, wages.
        3. Lis Pendens
           1. Notice/prejudgement thing, used for title disputes

Can just file this, and it ties up the property

* + - 1. Temporary Restraining Order and temporary (preliminary) injunction- no longer than 14 days!!!
         1. TX: T(P)I = “sequestration”
         2. Need: Bond, petition/complaint, TRO itself, filing fee
         3. How:

Grease the skids by calling judge, clerk, marshall

Post bond (can be securities)

Petition parts:

Names of parties,

facts and not conclusions,

prayer for TRO and finalizing thereof,

Affidavit

Things to put in TRO

Injury and why irreparable

Why no notice

Posting of bond

Specific desc. Of acts enjoined

“order binding on the parties”

* + 1. Fuentes v. Shevin: State-action seizure of property is unconstitutional, even to protect property right or creditor’s interests, unless there is notice and opportunity for prior adversary hearing.
       1. Bond and prompt post-seizure handling not enough
       2. Private repo is not state action
       3. Ironic effects:
          1. Protects thieves by giving notice
          2. Ignores creditor interests!
          3. Encourages use of worse private repo not state.
       4. Subsequent cases:
          1. Mitchell v. WT Grant: Seizure is const. if

Based on sworn testimony before neutral official

And prompt hearing opportunity provided

* + - * 1. North GA Finishing v. Di-Chem and Conn. V. Doerr

If Mitchell safeguards absent, Fuentes applies.

* + - 1. Texas Sequestration stat:
         1. Sworn application
         2. Notice w/ seizure
         3. Must show probable injury- you own it, and you should have it, and you’ll be injured if you don’t get it
         4. Replevy bond (pay if wrong)
         5. 10-day hearing
         6. Remedies for improper use-severe

1. **Remedies Generally [NOTE: OBJECTIVE QUESTIONS ONLY]**
   1. Damages
   2. Costs: very small, things like filing fees, can be recovered usually
   3. Injunctions
      1. For when no remedy @ law, irreparable injury
      2. Types
         1. Preliminary uner rule 65 (after hearing, while trial pends)
         2. TROS
         3. Permanent- final adjudication
      3. Tests
         1. Four-factor
            1. Remedy @ law? Irreparable harm?
            2. P harm > D harm if granted?
            3. Rsn likelihood to prevail on merits?
            4. Public interest?
         2. Formula: P x HP > (1-P) x HD
   4. Atty fees
      1. Generally if you reject a settlement that was fair and recover less, no fees
      2. Civil rights always get fees
      3. Lodestar measure: rsn number of hours x rsn hourly rate
   5. Other relief
      1. Restitution/disgorgement damages
      2. Recission: setting aside of agreement
      3. Reformation: rewriting inadequately expressed contract
   6. Pre-judgement interest: generally at common law, prohibited.
      1. Courts imposed by judicial imposition
      2. TX has modified and superseded that.
   7. Other equitable remedies (can be used for civil rights)
      1. Specific performance: contract so unique that no damages; things like land.
      2. Constructive trust (holder of prop is now trustee for claimant)
      3. Resulting Trusts
      4. Equitable liens on assets to secure payment
      5. Accounting, accounting for profits
      6. Subrogation: allows one person to step into shoes of another like insurance suing for 3rd party
   8. Declaratory Judgement- rights declared by court
      1. Things like whether a contract is valid, insurance duty to defend
      2. Can be done where controversy doesn’t have damages yet
   9. Provisional remedies:
      1. Replevin (claim and delivery, sequestration, seizure)
      2. Self-help repo w/out breach of the piece
      3. Attachment
      4. Garnishment
      5. Lis Pendens: see above, “tying up” property
      6. Forcible entry and detainer, eviction, writ of possession: remedies to get possession of real property.
         1. Usually require notice and hearing.
      7. Receivers: appointed to carry out court order
         1. Problems: resentment, management displacement, court becomes the running party
   10. Interstate enforcement:
       1. Fed judgements “registered” by courts
       2. Action on the judgement for state level (think wyman v newhouse)
   11. Note that arrest and contempt can happen for failing to do judgement
2. **Alternate Dispute Resolution [NOTE: OBJECTIVE QUESTIONS ONLY]**
   1. Advantages of ADR
      1. Cheaper
      2. Easier
      3. “enlarging pie” with solutions court can’t do
      4. Less rancorous/ preserves relationships
      5. Justice for claims too small to adjudicate
      6. Polycentric solution- multiple centers of interest, encourages compromise
      7. Privacy and confidentiality.
   2. Advantages of Traditional Adjudication
      1. Formal procedures may have less bias (maybe)
      2. “get your day in court”
   3. Negotiation Techniques and Ethics
      1. Boulwareism/ Firm Fair Offer/ refusal to bargain
         1. Can be effective
         2. Unethical labor practice
         3. Need rep to back this up
      2. “THE” negotiation method: Conceal settle point, make unrsn offer, pretend is rsn
         1. Ethical? You HAVE to do it. And both sides know the other is doing it.
      3. Related techniques:
         1. Reverse psychology- b’rer rabbiting: “don’t ask for X please!” and you want X
         2. Get opponent to make offer first: you both have min/max so this can help you see where they are
            1. They come in with 45 and your minimum settle point is 30, you can try to get them up to 50, etc.
         3. Clubbiness: “you’re too good to be representing that guy… look, we’re both lawyers, work with me.”
         4. Blaming client: often true, often a tactic. Lets you seem reasonable
         5. Be unreasonable/emotional- harder to negotiate so they may give in
            1. Be careful not to drive people out of deal
         6. Bargaining chip- slip in something you don’t want so they can get rid of it and you “compromised”
            1. May be unethical!
         7. Arguments on merits- exp atty b/c conviction in case is scary to opponent; inexperienced atty b/c “merits will change their minds” (lolno)
         8. Drafting is good- gives you influence over things that aren’t worth arguing over but are useful
         9. Time: he who can wait wins.
            1. Emotional cooldowns common
         10. Collateral consequences: unethically increasing costs for other side to win
         11. Whipsaw: playing two offers off each other
         12. Focal point solutions: splitting the difference happens often- make sure the limits are where the difference is good for you (7.5 and 10, vs 5 and 10)
         13. Physical factors- bigger team, home court advantage
         14. Mediator cuts through a lot of this
         15. Feigned emotion- irrational people win by being hard to deal with
         16. Test of strength- be ready to go!
         17. Mary carters
   4. Settlement Agreements
      1. Make SURE you have gotten an appropriately broad release! See below at e.
      2. Get appropriate clauses (as below)
      3. Make sure it gets signed and that suit is disposed of
      4. Times when you’ll need the “friendly suit” b/c the court won’t let you simply sign agreements:
         1. Minors
         2. Elderly
   5. Adjudicate Effects of Settlement
      1. Can bar you from being sued, IF PROPER RELEASE
         1. Global (we release everyone ever) often ineffective
         2. Specific- effective but may not name the right or all parties
            1. Example: mfg. gets release but does not name distributor, is then forced to indemnify distributor.
         3. Name parties who you might have to indemnify.
      2. Solution: Indemnity clause- P agrees to indemnify you for any part you are held to be responsible for of any claims arising from that controversy.
         1. They CAN STILL SUE other people. But then you don’t have to pay
      3. No reliance clause- if you want to say that they’re going from their own view of case- keeps you from being sued for fraudulently representing facts to obtain settlement
         1. But in other cases you want:
      4. Keep ‘em honest clause: Party is relying on other party to have honestly disclosed [ ]
         1. Useful for divorces where you represent party with less financial information, etc.
      5. Fraud clauses- invalid if fraid.
      6. Confidentiality agreement
      7. Dismissal with prejudice
   6. Note on releases: sometimes release of 1 is release of all.
   7. Structured settlement: annuity not lump sum
   8. Arbitration and Related Procedures
      1. Neutral 3rd-party, usually expert, makes decision about solution.
         1. Often binding
         2. Can be done by panel of 3- each side picks one, 3rd is neutral
      2. Court-annexed arbitration: court can send people to nonbinding advisory arbitration before court.
   9. Mediation
      1. Third party, who may or may not be expert, facilitates solution
         1. Often nonbinding
      2. Shuttle mediation: split parties up and go from one group to another.
      3. Depends greatly on quality of mediator!
   10. Mini Trial
       1. Panel/single neutral expert hears summary presentations and comes up with advisory decision
       2. Good for cases with complex question of law and fact
          1. Gives parties a good idea of result
   11. Summary Jury Trial
       1. Can use summoned jurors for this
       2. Decision is advisory only
   12. Private Judging
       1. Rent a judge statutes in CA: get a judge of choosing, often retired judge/atty, to do case.
       2. Binding usually (?)
       3. Gives schedule flexibility
   13. Screening panels- workman’s comp, etc.
   14. Industry-wide claims settlement: TX used for asbestos cases
   15. Multiple door courthouse- sending people to most appropriate method, apply to have that furnished.
3. **Story of a Civil Suit:**
   1. No agreement between lawyers is one unless it’s in writing
   2. Interrogatories are for who, what, when and where, not how and why.
   3. Want to hear unfavorable info at deposition!! Better there than at trial.
   4. Note for insurance adjuster claim: They are paid to try to settle. And yes the adjuster report is work product
   5. Note that previous claims, like the last fall Dominguez had in a Scott’s store, are not admissible evidence.
   6. Suing right person should be a concern in every case.
   7. What happened in this suit?
      1. Dominguez slips and falls
         1. Note originally in complaint there was a “wet floor” and “statutes about maintaining the floor” that was amended out b/c deposition did not support it.
            1. Tactical specificity: if not sure of cause, don’t be too specific (and risk variance)

But be specific when you want to force D to admit facts 1 by 1.

* + 1. The demand for a jury trial: a jury might be more swayed by experienced atty than a judge would, D has more experienced lawyer. D makes the demand. Why? B/c more careful about evidence rules in jury trial.
    2. How to Examine a Witness on Direct:
       1. ID witness in context
       2. Clear designation of time and date of event
          1. DO NOT ASK THE DATE. Ask them to confirm the date. A little leading can be ok on the initial qs.
       3. Questions to produce story in chronological order
       4. Simple terms, graphic details
       5. Re-orient jury when subject shifts!
    3. Actual issues in this case: negligence in maintaining carts
       1. Note that neither of D’s two original witnesses were available when trial was finally reset for the last time.
    4. Dominguez wins
       1. Note that TX allows nonunanimous verdict, Fed does not.
    5. “Appeal not well-taken” = overruled.
  1. Should you take a case? Considerations:
     1. Litigation surprisingly expensive- $20,000 spent for under $2k claims
     2. Remember that 90% of cases settle
     3. Take a case if PR > E (prob of recovery x recovery amt > expense)
     4. Pro bono- can do it but won’t be relaxing. And see if it would be a good pro bono case.
     5. Other factors: do you like P? Do you need experience?
        1. Will it bring in other business? And if you do a bad job/it doesn’t pan out, what will result?
        2. Refer friends and relatives elsewhere!
  2. Motion in Limine: threshold motion, usually precluding evidence.
  3. Written client agreements: Best practice- get them and leave no blanks.
  4. If the person takes the 5th but then they or their attorney talk about the matter, it’s a waiver.

1. **The Practicals:**
   1. It’s ok to use dangling participles in court- Directing your attention to June 3,…
   2. Demand Letter- a How-To
      1. Definition: Letter from one party to another, listing the wrong, and demanding relief/restitution.
      2. What it should be: Courteous, direct, factual
   3. Lawyer compentencies:
      1. Writing (rarer than you think!)
      2. Rapport Building
         1. Witnesses, clients, courthouse personnel
      3. Advice and consultation
      4. Negotiation
      5. Document prep- a huge one; “cannibalizing” other documents
      6. Courthouse Activities
      7. CLE
      8. Practice Management
      9. Negotiation- most highly developed competency
   4. Short form discovery algorithm:
      1. Relevant
      2. Proportional: (need not be admissible)
         1. Parties’ access to info
         2. Parties’ resources
         3. Importance of Issue
         4. Importance of Discovery
         5. Benefit/Burden
         6. Amount in controversy
      3. Not priv
      4. Not work product
      5. Not cumulative
      6. N protective order
      7. Electronic rules
   5. Litigator’s Life (is not a happy one): The Litigators’ Life
      1. Many are dissatisfied
      2. Biggest Issue:
         1. Time management
         2. Billable records
         3. Administrative
         4. Personal life
         5. Short time deadlines
         6. Wipeouts
      3. Adversarial system
         1. Opposing attorneys
            1. Rambo lawyer
            2. 90% of the time deal w/ that 10%
         2. Opposing parties
         3. Judges
         4. Rules
            1. Cost= dollar auction prob- suit more $ than sought
            2. Unpredictable
            3. Unintended
      4. People on your side
         1. Clients
            1. Morals
            2. Intellect
            3. Popular knowledge
            4. Attitude toward you- you are omniscient!!
         2. Co-counsel
         3. Employees
            1. Saying NO

Paper tiger ethics (hard to say no to boss)

* + 1. Business Management
       1. Business plan
       2. Financing
       3. Personnel
       4. Equipment/inventory
       5. Style
       6. Accounting
       7. Systems
       8. Government/employer
       9. Changes in technology
    2. Stress-executive monkey problem
    3. Relationships
       1. Dealing with Failure
       2. Anger
       3. Health
       4. Substance Abuse
  1. Style for complaints:

STYLE FOR FEDERAL COMPLAINT:

UNITED STATES DISTRICT COURT  
for the  
 SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

\_\_\_\_\_\_\_\_, Plaintiff  
 v. Civil Action No. \_\_\_\_\_\_  
\_\_\_\_\_\_\_\_, Defendant

Plaintiff \_\_\_\_\_’s Original Complaint

SUBHEADERS: Jurisdiction

1. This case arises…. Bleh blah

2. blah blah

First Claim

3. Lorem Ipsum

4. Et Dolor

5. There should probably be facts somewheeeere

6. You can also set out the facts before so as to NOT particularize them

Second Claim

7. Y’all love claims, huh?

Prayer/Demand for judgement

8. Therefore, the plantiff respectfully asks this Court to grant him such declaratory, injunctive, and other relief as it deems just and proper. / Therefore, the plaintiff demands judgement against the defendant for $\_\_\_\_\_\_\_\_\_\_, plus interests and costs.   
SPECIAL DAMAGES FORMULATION:   
As a result of the defendant’s [negligent conduct/ conduct], the plaintiff was physically injured, has been incapable of any gainful activity, suffered mental and physical pain, and has incurred medical expenses of $\_\_\_\_\_\_.   
Therefore, the plaintiff demands judgement against the defendant for $\_\_\_\_\_\_\_, plus interest, costs, and attorney’s fees.

Cause No. \_\_\_\_\_\_

\_\_\_\_\_\_\_\_, Plaintiff IN THE DISTRICT COURT OF  
 v. HARRIS COUNTY, TEXAS 151ST  
\_\_\_\_\_\_\_\_, Defendant JUDICIAL DISTRICT

Plaintiff \_\_\_\_\_’s Original Complaint

SUBHEADERS: Jurisdiction