Crump-Civil Procedure- Fall 2011

1. Overview (of the course)
   1. Pre-Suit Stage
   2. Where and How to File Suit
      * 1. Subject Matter Jurisdiction
           1. State-Federal
           2. Type of Court – Probate, Etc.
        2. In Personam Jurisdiction; also, Service of Process
        3. Venue
        4. Parties
   3. The Pleadings (Complaint, Answer, Etc.)
   4. Preliminary Disputes (Jurisdiction, Etc.; Motions to dismiss)
   5. Discovery and Pretrial
   6. Disposition without Trial (Summary J., default, settlement, dismissal, etc)
   7. Trial – scheduling and trying
      1. Judge and Jury
      2. Selecting the Jury
      3. The Trial: Evidence, Arguments
      4. Court’s Charge and Verdict; Judgment
      5. Taking Case from the Jury: Directed V.; Judgment notwithstanding the verdict; new trial
   8. Enforcement (by execution or otherwise); Remedies
   9. Appeal
   10. Alternate Dispute Resolution
2. Basic Jurisdictional Concepts
   1. **Jurisdiction** is what gives a court power to act.
   2. Courts must have **both personal and subject-matter jurisdiction**.
   3. If there is **no Jurisdiction** there is **no power** over the dispute.
   4. **Venue** on the other hand is a personal right of the defendant.
      1. Must be insisted on- *a court without proper venue can still proceed to give binding judgment* – most rights can be waived, lack of jurisdiction, in some instances, cannot be because it has to do with the court’s power. Subject matter jurisdiction is that way.
3. Subject Matter Jurisdiction:
4. **Subject Matter Jurisdiction** is power over the generic type of dispute, as contrasted to **Personal Jurisdiction** which means power over the court has power over this individual.
5. **Subject Matter Jurisdiction** has to do with whether the case can be in state or federal court, personal has to do with what states might have power over the dispute, or what federal court has power over that state.
6. Subject Matter Jurisdiction in Federal Courts
   1. Some cases can be heard in either state or federal court.
      1. If it is a federal issue, state court has to apply federal law.
         1. **Diversity Jurisdiction** (Congress Passed **§1332** under authority of Constitution)
            1. **Requirements**:

Diversity

Citizens of different states or of State & Foreign Nation, etc

Permanent resident aliens treated as citizens of state in which they reside.

Over $75,000 amount in controversy.

* + - * 1. Diversity must be complete: every plaintiff on one side has to be competent to sue every defendant. If there are two parties on opposite sides that have the same citizenship, there is no diversity.
        2. Corporation: There are two possible places: the place of incorporation, plus the principle place of business. Which is determined by the nerve center test.
      1. Arising Under Jurisdiction §1331 (Also misleadingly called “Federal Question Jurisdiction”) 🡪 The mere presence of a federal question in a case does not bring about federal jurisdiction.
         1. Requirement: a claim “arising under” the U.S. Constitution, statutes, or treaties.
         2. Anticipation of a Federal Defense is not enough; even use of a federal law in avoidance of defense is not enough. Plaintiff’s own claim must arise out of federal law.

“Ingredient” Test: Asks whether a substantial ingredient of the claim is federal in nature. 🡪 More liberal and generous, it is easier to have an ingredient in the claim than it is to have the actual claim created by federal law.

“Creation” Test: Asks whether federal law creates the claim.

* + - 1. Special Jurisdictional Statutes that create federal jurisdiction (e.g., United States as Party; Foreign Sov Immunities Act; Bankruptcy; Etc.; “Exclusive” Statutes) 🡪 For the most part either diversity or federal question or arising under federal questions.
      2. **Supplemental Jurisdiction** **(§1367)**
         1. **Purpose**: To allow a closely related claim that does not have a jurisdictional handle to be litigated in the same case as a federal case because it is more efficient to do it that way and fairer.
         2. **Test**: If you have a jurisdictional claim, that is either a federal question jurisdiction claim or a diversity claim, and then a third party claim with no diversity or federal question jurisdiction, or the P has parallel state and federal claims, then the District Court has supplemental jurisdiction if it is “so related… that they form part of the same case or controversy under Art. III of the U.S. Constitution.” This is a broad test, Congress wrote it intending to bring in any related claim that could possibly be reached. The idea is, if you have a fed and state claim, you can bring it into the same case.
         3. **Discretionary in Certain Instances**: Supplemental Jurisdiction, in some instances, gives the court power to dismiss the supplemental claim, most of the time it has to hear the claim but there are 4 exceptions. (i.e., Novel State Question then the state courts get the first crack at it, non-jurisdictional claim predominates in that case the state claim will be wagging the federal dog, jurisdictional claim dismissed early in the case in that instance there is not a federal handle, other “exceptional” cases which is kind of the catch all )
         4. Includes multiple claims by a plaintiff state and federal, as well as counterclaims ex p files federal claim and d files a claim for less than $75K and it is about the same claim it should be heard and can be even though there is no jurisdictional handle, cross-claims, etc., that are not jurisdictional.
      3. **Removal Jurisdiction**: Allows Defendant to take case to Federal Court (§1441 (a)-(c)) \* Defendant’s key to the federal courthouse.
         1. Basic Concept: Defendant can remove from state court to federal if the case is within original jurisdiction of the federal court (1441(a)). If it could have been filed there in the first place as a federal claim, it is usually removable. A diversity or federal question case will be removable.
         2. If diversity is the sole basis for jurisdiction, the case cannot be removed by a (local citizen) resident defendant even if diversity exists (1441(b)). (Resident Defendant means citizen of the state.) A New York defendant cannot remove from a New York state court, nor can another defendant remove if that defendant is in the case. If it is a federal question, it is removable regardless of citizenship.
         3. Procedure (§§1446-1447)

Defendant files “notice of removal” stating concisely the grounds for removal (all of the defendants must join) – simple piece of paper saying “defendant removes this case to the District and division where the court is located b/c of diversity of citizenship etc.)

Two Time Limits: Within 30 days after receipt of pleading “or other” notice that gives you to understand that the case is removable.

Notice to Parties & State Court “Effects” removal; state court is supposed to stop immediately

Federal Court may to remand if it finds that any time the case was not removable on its own or on motion of a party. The Remand is not reviewable by an Appellate Court. So if the District Court sends it back to the State Court, you cannot appeal the remand order so the issue can be settled once, final and for all.

1 Year limit on removal of diversity actions. (Note Problems Here) If your case is a diversity case and your D is dismissed who otherwise would have destroyed diversity you may remove but only if it happens within the statute of limitations. Notice the P may strategically settle with one of the Ds and not finalize the settlement until after the one year has run.

Court May order filing a copy of State proceedings.

If the P wants to object to the removal on procedural grounds the P must object within 30 days or else the P has waived the procedural defects in the removal. If, for example, the D moved without all the D’s signing the petition or the like.

1. In Personam Jurisdiction (Personal Jurisdiction)

* What state – if it is a federal or state court is it in Texas or Montana etc., whether the state can get power over the defendant.
  1. **Basic Physical Power Notion:** A Court has Power to Adjudicate as to a Person Validly Served with Process Inside its territorial limits

Exceptions: Persons in the Territorial Limits by Virtue of Fraudulent Enticement, or Subpoena. Cf. Burnham v. Superior Court (D was present in California for reasons other than the lawsuit, the court upheld service b/c he was served within territory).

* 1. **Consent**: A court has Jurisdiction to adjudicate as to a person who has consented to the J of the court, either **expressly or impliedly**, to jurisdiction
     + 1. **Nonresident Motorist Statutes:** Hess v. Pawloski – drove on roads of Massachusetts so it was held that he consented that the Massachusetts commissioner of motor vehicles would be his agent for service of process within the state of Massachusetts – consent was implied.
       2. **Waiver:** 12(h)(1) of FRCP; Texas’ Rules. **Waiver is consent.** If you appear and defend the lawsuit, this rule says you must object early on to the Jurisdiction or you have waived your right.
       3. **Motion to Dismiss:** Can be filed and will not be consent.
          1. Special appearance: 1st Document filed in the case (Some J’s require)

Not waiver and not consent if you file a motion to dismiss and make it a special appearance and if done under applicable rules. 🡪 One way of contesting J – notice that if you file a motion to dismiss in the state in which you have been sued, you are stuck with the ruling of that court system. You cannot attack the judgment

Forecloses “Collateral” Attack in D’s Home State: –To not appear and then contest the J in your own state.

* + - * 1. Federal (12(b) Motion): It is **analogous to Special Appearance** but needn’t be the first paper- there are time limits instead. If you file it after your answer in some state courts, you are in trouble… in Federal court you can file it with answer, after answer, or before but there is a time limit that depends upon amendment rules.
  1. **Long-Arm Statutes & Due Process**
     + 1. Courts ultimately broke away from the strict territoriality which required that the D either be served within the state or consent, and allowed service outside the state.
       2. Requires that you meet 2 requirements:
          1. **Basic due process test** (sometimes expressed as “doing business”, “presence,” or “minimum contacts”):
          2. **Long arm Statute:** Jurisdiction complies with due process if defendant has **sufficient contacts within the forum state so that the suit is consistent with “traditional notions of fair play and substantial justice**” Just saying minimum contacts is not enough.
       3. **Refinements:**
          1. A single point of contact may be sufficient, if it is substantial enough (McGee). **– Specific Jurisdiction:** when the contacts and the claim are related. What if they are unrelated?:
          2. **Substantial Contacts** within the forum may be enough even though the events causing the suit do not have any relation to the contacts. (Perkins v. Benguet) (But: Due Process doesn’t mean the state Long-Arm statute has to go that far). This is called:
          3. “**General” Jurisdiction**: (Requires systematic & continuous contacts) as vs. “Specific” which requires less contact where the contact and the claims are related.
          4. Unilateral acts by the plaintiff are not enough – the P by their acts cannot bind the D to the jurisdiction of the state (Hanson v. Denckla) ->Must have some “**purposeful act**” or acts by which the defendant avails themselves of the facilities of the forum state. (of the privilege of being there)🡪 there must be in the contacts some purposeful availment in the state by the D.
          5. “**Reasonable anticipation**”: (Worldwide Volkswagen): d must be able to reasonably anticipate being sued in the forum state. Usually tied to purposeful availment – the defendant must have done enough to purposefully avail themselves of the privilege of conducting activities in the state so that a reasonable person would reasonably anticipate being hailed into court there.

**Targeted Effects Test: (**American Radiator – targeting state for sales etc.) Where intentional actions are aimed at the forum states (advertisements etc.)

* + - * 1. With a **commercial defendant:** Justice Brennan “if there is a commercial defendant, there is J unless the D can make a compelling showing of convenience issues” (Burger King) You can cite it but is it usually used, no. The USSC has not used this principle since that time. Dicta by Brennan - ?
        2. **In Rem Jurisdiction**: The court can adjudicate rights of the thing even if none of the people who claim it are particularly connected to the state; property cannot be seized and tied to the state if the owner has no other ties to the state- and the claim has nothing to do with the thing inside of the state. There must be **Nexus among the defendant, state, and litigation – so that it satisfies the fair play test**. (Ideal illustration is a piece of land within a state and claimants that have no other connection with the state, if the state adjudicates power over the land then the required nexus is present so that it is fair – the d claims the land, the litigation is about the land and the land is within the state)
        3. **The Texas Statutes**

**Nonresidential motorists** – Any nonresidential motorist who has motor vehicle accident on Texas roads is covered by this state’s long-arm statute.

**General Long Arm**—covers anyone “doing business” within the state, meaning having the requisite minimum contacts – meaning it reaching to the limits of due process. ( including torts or contract)

* 1. **“Tag” Jurisdiction**: Burnham v. Superior Court: In-State Service Apparently Suffices even without contacts fairness analysis (but are there limits?) Distinguished from long arm- if you serve the defendant when the d is within the state- you almost always will have J in that event – contacts analysis is not necessary b/c court has physical power over a person within its borders.
  2. **Forum Selection Clauses**: Jurisdiction by contract. Federal courts have been very free about enforcing these Federal Enforceability as to Jurisdiction, Venue; State Differences
  3. **Nationwide Service: Federal Statutes**– In some places/situations there are federal statutes that in effect erase state borders with respect to service of process and create nation-wide service thereby in effect creating a nation-wide long-arm jurisdiction without going through the contacts analysis. Usually these are situations where you would expect the person would think they would be subject to nation-wide J. (If you do a securities offering under federal securities law – there is nationwide service.)

1. Service of Process – need to create personal jurisdiction over defendant- must meet due process requirements and the rule of the court.
   1. **Due Process “Notice” Requirement**
      1. A notice “**Reasonably calculated**” to give defendant actual notice of the action and to allow the defendant’s response. (If you know the person’s name and address, the court has held that at minimum, mailed service ought to be required. If you don’t know their address publication, advertising, etc. may be enough)
      2. The notice **may be sufficient even if not received** (it depends) Due process requires it to be reasonably calculated. Many states & federal government have provided a means to avoid default judgment when notice was not received but due process does not create that right, it is the applicable rule that does.
   2. **Service Methods:** What does the rule say? It usually is not enough to comply with due process, you have to follow the rule that the court uses – you cannot just make up a method and argue it complies with due process- you must follow the rule. There is a traditional significance to this “ceremony” (Etiquette”?) of Service – you must follow the rule.
   3. **Texas Service**
      1. Within State there are 2 principle methods:
         1. **In-hand** by sheriff or constable-
         2. OR **Restricted registered mail** (restricted to the addressee D is the only person who can sign for it) -> Leave with service is not present in Texas.
         3. **Substituted:** a “reasonably calculated” method, upon motion sworn showing of inability to in-hand serve defendant (Butler v. Butler- what if you can’t serve the person?) There is a fall-back method; every state has one for ds who are hard to serve. In Texas, any method “reasonably calculated” to give notice if you make a motion with the court with a sworn notice of inability to use the other methods (in-hand service or mail service) draft up an affidavit saying how you plan to do it- court can then order that method- you have to have the court’s order however so you can prove you’ve already tried those things.
         4. Publication – last resort- just cannot find the D.
         5. Corporations: registered agent; president; v.p; or substituted service on secretary.
      2. Consent: Texas law is that any appearance other that after, and subject to, special appearance is a consent to the J of the court and is a general **appearance** and waives any defects in service.
      3. **Outside State**: Several Ways
         1. Most Frequent, now—serve on Secretary of State; Secretary forwards by registered mail (may mean that you go to the courthouse you have the clerk file stamp a copy and issue a summons you then send it to a process server or to a sheriff or constable who serves it to the SOS in Austin and they forward the papers by registered mail, the person who served on Secretary makes a return and the secretary will give you a certificate containing the green card showing the certified mail has been received by the defendant)
         2. Other means also exist
   4. **Federal Rule 4:**
      1. **(Rule 4 (a)-(c))** The “summons” and “complaint” are to be served by a person 18 years or over and who is not a party to a lawsuit, usually not served by a government official unless court orders.
      2. Part 2 of the rule has to do with notice and waiver; the rule says D has a duty to save costs; so you send them a “notice” and “waiver” **(Rule 4(d))**
         1. See Forms 1A and 1B for format Notice and Waiver
         2. Notice gives D information like what would be in the summons and it is accompanied by the complaint. The waiver is a paper that says they waive actual service on themselves. And the executed request by the D when filed by the P if the D sends it back and the P files it is equivalent to the D having been served.
         3. Incentives to execute the waiver: A “duty” is imposed by Rule; important b/c most lawyers will have to advise their clients that they have a duty to save costs by executing the waiver. Rule expressly doesn’t waive venue or personal jurisdiction; you can still argue there are no minimum contacts or that venue is improper or ought to be transferred and you get 60 days rather than 20 days to answer; costs (including attorney fees for motion) “shall” be imposed if no waiver executed.
         4. But: if no waiver, and sometimes d’s tactically refuse to waive, then you must serve. If you are close to statute of limitations time don’t use the waiver, usually unless you believe the D was going to execute it, usually you can talk to the attorney for the other side who will agree to that. The service has to be done within a limit of 120 days or it is subject to dismissal.
      3. Individuals (Rule 4e))- service upon individuals
         1. Can be served pursuant to state law; in Texas you can use restrictive registered mail or if there are no easy ways provided by law, use the substituted method and get a court order to try another way.
         2. Or, alternatively, one of 3 additional ways
            1. In hand (Personal service): supplied by the state law already
            2. “Leave with” service (at “dwelling” or “**usual” abode**, on person of **suitable age and discretion** then **residing there**)
            3. Agent – appointed by appointment or by law – secretary of state for a foreign person works
      4. Corporations, Assistants (Rule 4(h)):
         1. State Law (as for Individuals) – may use any of the state laws, restricted registered mail etc.
         2. Or, alternatively, by serving
            1. An “officer” or “managing” (in charge of or having managerial duties etc) or “general agent,” (a person who has authority to bind the corporation in contracts) or
            2. Agent authorized by appointment or law (must also mail to defendant if governing law so requires) – example you serve the secretary of state to serve an out of state corp., since that is provided for in Texas.
      5. Other Provisions for Infants; Incompetents (usually serve parent or guardian); the United States or Its Agencies (complicated, more than one method of service required); Local, State or Foreign Governments, Etc. (Rule 4 (g), (i), (j))
      6. **Territorial Limits** (Rule 4(k)) for effective service that bind federal and state courts
         1. Federal Courts generally have no greater out-of-state jurisdiction than state courts – at least for state claims.
         2. The State Long-Arm Statute provides the limit of effective service, even in federal court (and it is one permissible method) – even in fed court if it is a state law claim, it must comply with the long-arm statute
         3. If it is a federal claim 4(k) then the long-arm extends jurisdiction to due process limits. So you don’t have to comply with the state long arm statute if it is a federal question claim but you must show sufficient contacts with the state to satisfy due process.
      7. International Service (Rule 4(f))\*don’t worry about
      8. Time Limit:120 Days (Rule 4(m)) after which the court can dismiss the case
      9. The **Return**, or proof of service, is made by person effecting service (by affidavit). (Rule 4(1)) – note important default cases- return is an affidavit proving that service was done. Validity of the judgment depends on validity of return.

VI Venue separate from jurisdiction but related b/c they both have to do with where the lawsuit is going to be.

1. Purpose: there are almost always many courts in either system (state or federal) that could acquire jurisdiction over both person & subject. Many such forums may be distant or otherwise inappropriate. Venue is a way (sometimes) of creating a convenient place for trial by limiting and narrowing the number of places a trial can be.
2. Nature of Venue: unlike lack of jurisdiction, which disempowers a court from acting even though not raised by the parties, **venue is a matter of privilege of the defendant.** It has to be asserted, if you default to change venues and the court can still render a decree, this is not the case if the court lacks J.
3. **Federal Venue** (§1391) – The case must be in the district & division where one of the following occurs:
   1. Where any **defendant resides** (if all in the same state); or where all defendant’s reside; or
   2. Where “**a substantial part of**” the acts or omissions underlying the claim, or property that is the subject of the action is located, or
   3. Applies if the first two don’t apply: In diversity cases, where personal jurisdictions over the defendants, if no other district. In federal question cases, where any defendant “found” if no other district. (if claim arose in France and the D is located and resides in France but the D has sufficient contacts to bring case here it can be any place where there is personal service over D).
   4. Corporations: “Reside” wherever they’re subject to personal jurisdiction. So a corporation has multiple residences possible. Wherever the minimum contacts test and long-arm are satisfied, there is venue. For a crop venue kind of collapses into personal J.
   5. Waiver unless timely motion by a defendant
   6. **Discretionary transfer:** a district court may transfer to a district or division where the case “might have been brought” (§1404) Many places of proper venue and P has filed lawsuit in a place that was inconvenient. 4 requirements for court to consider:
      1. Convenience of parties or witnesses
      2. Interest of justice (could mean anything- where the controversy arose is the biggest thing courts look at with that)
      3. May transfer (court has discretion)
      4. “might have been brought” means district must be one fixed by law, not merely by defendant’s consent
      5. Law of transferor district still controls- what does this mean?
4. “**Forum NonConveniens**” – Common law doctrine that preceded the transfer provision, a court that had J might dismiss in preference of the case being brought elsewhere. When diff procedural systems are involved (for ex. A case is filed in federal court and it turns out all the Ps are from India, the claim arose in India and they try to file in US, the court in that case applied forum nonconveniens. Court cannot transfer to an Indian court b/c it is not part of the same procedural system, but Texas can apply this to dismiss or abate the suit.) This is not the same as venue – within the federal system you use the transfer provision in venue.
5. Analyzing Legal Problems – how to write a law school exam
   1. Where not to start: with a conclusion (E.g., “yes, there is jurisdiction, because) why? b/c you are likely to do incomplete reasoning.
      1. Reasoning first: gives better conclusions
      2. Reasoning first: shows how adversary & neutrals will analyze
   2. IRAC Method (as terminology, I think “principles” & “facts” makes you understand it better) **PFC is better**
   3. Identify issues (All)
   4. Principles: set out all possibly applicable (Neutrally, generally, exhaustively, declarative sentences, each refinement, exception, ambiguity, etc)
      1. Examples of non-principles DON’T DO IT: “court should use the minimum contacts” test. “court should as, are the contacts sufficient?”
      2. Proper Statement uses declarative sentence that identifies:
         1. What is being considered or evaluated;
         2. How it is to be considered or evaluated
         3. What the meaning of the evaluation is, Example:

“Due Process Requires…”

((c): Meaning of the evaluation) “…that the defendant have contacts with the forum…”

((a)” What is being evaluated) “… that are sufficient so that jurisdiction is consistent with fair play and substantial justice.”

(b)): How it is to be evaluated)

* 1. Analyze the facts
     1. State the relevant facts (exhaustively)- why? b/c the court might have forgotten which facts you must recount them so the court can see them
     2. Analyze how they compare to legal principles
  2. Conclusion
  3. Go to next issue
  4. This is syllogistic Reasoning: principles form major premise; facts form minor premise; conclusion follows

Federal-State Choice of Law

# Erie v. Tompkins

Erie was injured by the RR track in Pennsylvania and **the issue was whether or not federal or state law would govern his negligence claim**. Court said: State law of the forum state governs in that sort of situation. The court cited a number of policies: including

1. **Policies**: (1)**Avoidance of encouraging Forum-Shopping:** always going to have but the forum shopping that would result if you had an entirely different definition of negligence would be a whole order of magnitude larger. (2) **Discrimination:** Absence of discrimination or irrational discrimination or irrational difference in result based only on whether or not there is diversity– in other words if Tompkins had been injured by a RR that was a citizen of Pennsylvania he would have been bound by PA law, since he was a citizen of Penn and sued a NY RR he was able, he thought, to use so called general law as federal law and therefore avoid PA law, this was discriminatory according to court.
2. **Apparent Basis:** Constitutional **Court held the basis of the law was constitutional b/c of Federal Interference**: That is the federal courts have no power to make up state rules of decision.
3. **History:** **Rules of Decisions Act:** the first congress passed an act that said the rules of decision in federal court shall be state rules unless there is a federal statute on point. You’d think this would solve the problem **–** however under Swift v. Tyson the SC had **confined the Rules of decision Act to statutes or so-called local laws** (meaning property and the like) so if that *Swift* rule had continued in effect, Tomkins would have been able to appeal to general law as federal law, (law applicable in federal court) – problem was, no one knew what general law would be is that the majority rule, the better rule, the rule most states trend twd, or the rule that this particular judge preferred? **Swift v. Tyson** created the problems that were the policies underlying or driving the Erie Doctrine, so the court came up with the new rule
4. **Basic Rule:** In diversity or other State-Claim cases, the substantive law is to be determined not by relevance to “general” law of the State where the District Court sits.. : **Erie Rule**: In a diversity or other state claim cases, the **substantive law** is to be determined- not by relevance to general law- but rather by the substantive law of the state where the district court sits.

# Frequent Problems

1. **The Substance- Procedure Issue:** For Erie purposes, labels as to what is usually “substantive” or “procedural” may have some limited utility, but don’t really apply. **What is substantive law**? Court follows substantive law of the forum state but it follows **federal procedure law** so you have to be able to tell the difference.
   1. **First step:** “Controlling” Rule Test (Hanna v. Plumer). 1- Hanna v. Plumber approach to federal rules of civil procedure (court says this is first step) Look to see if there is a controlling federal rule - A federal rule that governs the question – if there is a federal rule of civil procedure or a similar rule embodied in a statute or rule, you follow that rule b/c it is automatically procedural
      * Court did this by reconciling the **Rules Enabling Act** – which says the court has the authority to pass rules to create rules- with the Rules of Decision Act that says the substantive law is the law of the forum state.
        + The court has authority to adopt rules, if court adopts rule that says something it makes sense to assume that the court has already ruled that it is procedural, that is what they are supposed to do within the REA - it is not within the scope of the rules of decision act.
        + Hanna reconciles the Rules of Decision Act with the Rules Enabling Act.

This Hanna rule is then that you follow the controlling Federal Rule if there is one. And you do that unless the rule is so clearly substantive that the rule in effect is unconstitutional. That is, if the court has authority to promulgate such a rule- if it can arguably be called procedural then you follow the Federal Rule if it is a controlling rule. It has to be something of a gray area at least btwn substance and procedure. 🡪 If there is a rule (procedural) and it would affect the outcome of the case, you follow the federal rule 99.9% of the time.

1. **Second:** What if there is **no controlling federal rule** – there is no way there can be one that speaks to the details of every procedural or substantive problem.
2. **Outcome Determinative Test:** (Guaranty Trust v. New York) you look to see whether the rule determines the outcome of the case, if it does, it is substantive.
3. **“Absolute” or “Definitive” Outcome Determination Test:** (Byrd v. Blue Ridge) modification of the outcome determination test- it is not just anything that might change the outcome of the case –if it simply changes the process of decision, it is not substantive, it has to have **decisional** quality to it, it has to specify the outcome- absolute in the sense that some cases could be governed by it, in the sense that it could go either way in that the P or the D would win depending on how you applied the rule.
4. **Federal –** **State Interest Balancing (Byrd)** if there is a strong federal policy behind doing it a certain way, that policy may control, and we will call it **procedural**. On the other hand, strong state policy in doing it a certain way, that policy will control, and we will call it **substantive**. May sound like an odd way to decide what it is but the court has used it in several cases… (Who has the most interest to having their rule be followed)
5. **Basic Test: Policies of Erie:** will the rule in this case create a lot of forum shopping. Does the choice of the rule give a big advantage to one side or the other; will it cause irrational difference in result?
6. **Second Issue: The “Ventriloquist’s Dummy” Analogy:** once you decide that the court is to follow state law, the Q comes, how does the court go about doing that? Ventriloquist dummy: Court is supposed to do what the state court judge would do, if the matter is **substantive**.
7. **Multi-State Choice of Law Issue:** Something happened in another state and it is being tried in a federal a court in this state, which state law do they follow?
   1. The Federal court follows the Forum states choice of law rule to determine what law to apply.

***Example:*** Erie case was tried in NY, SC said NY court must follow NY State law but NY state law specifies use of PA law.

Imagine an assault takes place in Nevada but a trial about that assault is held in a federal court in Texas, federal court would follow substantive law of forum state, which includes the choice of law rules of the forum state. Does what a state judge in that state would do- the fact being that case is within Texas, court would follow **choice of law rules in Texas**, that might or might not mean the choice of law rules would cause the federal judge to apply Nevada law.

* + - * Complete answer, could not say court would use Nevada law, that is not the principle that governs and it may not be an accurate answer.

1. **State Choice-of-Law rules:** Different states have different rules including: **Lex-Loci** the law of the place of injury; or **Most Significant Relationship,** the state that has the most interest in the issue (**Texas**) A lot of times, these end up being the same state. (The federal court does not have a choice about which rule to apply, it is whatever the State choice of law rule uses)
2. **Difficulty in determining State Law – Fed Ct. infers what highest State Court would do:** The court is supposed to follow the rule of law of the highest state court. What if there is no decision by that court? Then the court makes the “**Erie educated guess”** inferring what they think they would do using other decisions by that court or lower court decisions.

Pleading

# Basic types of Approaches

**Claim** (**federal**- the new version of notice pleading moves this closer to the cause of action pleading but doesn’t tote up all the elements) versus **cause** **of** **action** (**states**- statement about each element of the claim)

**1. Historical:** Historically we studied the forms of action: at the same time that the common law was inventing forms of action, **equity** filled in the gaps – there was a system of **common law pleadings**: P filed a declaration, P filed a replication (one of three narrow minded kinds of things, demurrer, traverse, plea at bar) P filed doc in response and D filed another doc. You were supposed to stick to a single issue but if you departed or had multiple claims, you lost. Doctrines were very narrow and highly specific and if you strayed, you lost. **(Field) Plea Coding:** 18th century invention that was still narrow minded but was maybe an improvement to the historical forms of action.

**2 Restrictive Practice – Facts, not conclusions.** Codes told you that you had to state the facts that constituted the cause of action, so you had to plead the facts, not conclusions but the number of pleadings was reduced. Law and equity were merged so you didn’t have to guess which system to go to, but you still could not have multiple claims.

**Disadvantages: Difficulty; Expense; Injustice through non-compliance or variance (Restrictive State Approaches):**

1. **Federal Notice Pleading –**The Reaction in Federal Courts was **FEDERAL NOTICE PLEADING**
   1. **RULE 8:** The pleader must make “short and plain statement” with the federal rules and forms as guides- interpreted to mean that you engaged in “notice pleading” the notice has to state a claim- showing that the pleader is entitled to relief. “**A short & concise statement,” – Crump’s outline**
2. **Modern Liberalized State** At the same time, states have kept **“Cause of Action” which just means you have to make a statement about each element of the claim** - and the modern liberalized method is to require you just to say something about each of the elements and not to require it necessary to do what the field codes required, namely to give only facts or the like.
3. **Which is Better: (1) “Notice” Pleading of Claim or (2) Liberalized “Cause of Action” Pleading? \*\*\***

# Plaintiff’s Complaint

1. **Must: \*state a claim \*show jurisdiction \* & claim relief, but**
2. **Sufficiency as to Specificity – (“Notice” Pleading) –** Forms; Facts must show claim is “plausible;” “mere conclusions” are insufficient. Standard is notice pleading: you must give **notice of the factual context and notice of the claim**. [Form 9 is a negligence complaint “D was negligent in driving his car” Type of legal claim- negligence Factual context- driving his car. Notice that would reasonably apprise the D of the legal claim and facts but does not have to plead the elements – does not have to show duty, precise type of breach, approximate causation and harm in the same way pleading a cause of action would have to do.]
3. **Substantive Sufficiency – Basic test in response to m/dismissal for failure to state a claim:** “construe complaint in light most favorable to the Plaintiff; assume that all of the facts are true, then only if it cannot be said that Plaintiff could recover on any proof under complaint will motion be granted.” Or: Assume all allegations are true; dismiss only if, as a matter of law, P still couldn’t recover.
4. **Defensive attacks on pleadings:** 1-Motion for dismissal for failure to state a claim: see standard above 2-motion for a more definite statement: test is does it give reasonable notice? 3-motion to strike: test is that it must not contain irrelevant, immaterial, or scandalous material.
5. **Alternative & Inconsistent** - OK to put in alternative claims like: Claim 1 negligence-Claim 2 breach of warranty etc.-Claim 3 product liability. They can even be inconsistent- sometimes since you don’t know what the jury will find you plead: “if we were contributorily negligent we can recover under this theory, if not we can recover under this theory”
6. **Particularity:** Rule 9: Certain things must be alleged with particularity (– E.g., Fraud, Mistake, Special Damages.) **Fraud** is most common. **Special Damages** are those that cannot be inferred from the fact of injury alone – they are not defined in the rule but you have to have a Paragraph or in the prayer indicate at least by category, the category of damages that you want – cannot simply say we pray for $100,000 in damages.

# Answer

**1. Rule 12(b) Motion – Certain Defensive Theories can be raised by motion:** Motions can be put in the complaint that attack **(1) Subject jurisdiction (2) In personam jurisdiction (3) Venue (4) Process, (5) Service (6) Failure to State a Claim, (7) Necessary Person.**  It can also include a motion to strike or motion for more definite answer. Some Defenses are waived (personal j, venue etc.) if you don’t raise them promptly. (Or you can put these items in a motion which is filed before you file an answer.)

**2.Denials:**

1. **General denial (state)** In State court you can file a general denial, this is not a factual denial of every fact, it says I am denying claim, P prove each element. Can say, I admit I was driving my car but deny I was negligent. You can say I do not have information sufficient to admit or deny this claim operates as a denial. Or you can put it in a motion which is filed before answer.
2. **Federal: must admit & deny in good faith, fairly meeting the substance of each allegation** you must read & answer each allegation by admitting or denying it, in good faith, fairly meeting substance of each element.If you do not know enough information you can say “no information sufficient to admit or deny each fact” which operates as a denial

**3.Affirmative Defenses must be pled- notice pleading**

**4.Summarizing Defendant’s Pleadings – 3 Basic Types: Dilatory (Abatement) Matters** subject matter J, personal J, service, venue, and parties by a 12(b) motion in federal court. Texas has analogous types of pleading doctrines: all you need to know is we have them.

**Challenges to P’s Pleading: Federal** 12(b) motion to dismiss for failure to state a claim (assume it’s true…) 12(e) motion for more definite statement – does it give fair notice of the legal nature of the claim and factual context. 12(f) motion to strike – does it contain inappropriate, scandalous or immaterial material. Texas does all 3 by **special exception**- just know that there are analogues, there is a Texas pleading type that accomplishes the same purposes.

**Answer on the merits (called pleas in bar)** – Rule 8(b) requires denials and admissions – general denial can only be used if you are denying the entire thing - including names of all the parties - impossible in Federal Court to use a general denial, you have to admit at least some things. – Texas allows general denial… Affirmative defenses are pled by notice pleading in the federal system…

# D. Amendment

**1. Of Right—**before responsive pleading it can be done once. If opponent files for failure to state a claim you may amend one time before the answer is filed.

**2. Permissive (With Leave) –** “freely given, when justice so requires” …can be done w/ permission of your opponent (first step is to ask opponent for approval) or by leave of court which court should give fairly liberally (when justice so requires) – court has broad discretion to deny your amendment based on circumstances (how many other amendments you’ve had, how late it is in the case, and the nature of the amendment).

# E. Texas Pleading Differences

Texas pleading differences –petition, not a complaint… D’s pleadings are different, not in federal court.

# F. Current Rule 11

What the complaint says, what happens if a party files a complaint that has no basis whatsoever without any investigation whatsoever? That is what Rule 11 is aimed at

1. **Implied Certifications:** Rule 11 implies a number of certifications by your act of filing the complaint.

By signing it you certify that to the **best of your knowledge** and **based on a reasonable investigation**, there is

* 1. **no improper purpose** behind the compliant (such as harassment or delay),
  2. it is **warranted by existing law**, or by **a non- frivolous argument** for extension, and also that it has evidentiary support OR if you don’t have evidentiary support, you can make the contention that if you identify the allegation and say that although it does not have support now you reasonably believe it will have support after discovery.

\* This is an **objective standard** “cannot say, I was ignorant I never read Rule 11 and never investigated facts but I thought it might be true”-that’s not enough. Objective means – a reasonable lawyer doing a reasonable investigation… and you violate it if you are negligent in failing to do so.

2. **Sanctions:** **Discretionary; Deterrence Purpose; on Attorneys, Law Firms, Parties “Responsible”**

If you violate the rule, sanctions may be possible, certain steps:

\*Now sanctions are discretionary by the judge. (Does not have to impose if he doesn’t want to)

\*Purpose and limit of the sanction has to be that which is sufficient to deter this violation.

\*It can be imposed upon attorneys, law firms, or parties’ responsible (not just on filing attorney)

\*The sanction is supposed to be an “appropriate” sanction.

* + - * Judges sometimes make people go to an ethics course or make you write an essay etc.

**3. Safe Harbor Procedure: •**The current rule says: “there is a safe harbor” if you want to file a motion for sanctions against your opponent you must draft the motion and before filing it, serve it on the opponent, and you may only file it if the offending pleading is not withdrawn within **21 days**. \*Judge can also initiate the procedure… different procedure for notice and the like if this happens.

\* This is controversial because the rule was put in b/c people were worried if attorneys would be discouraged from filing controversial lawsuits or rather they would charge more for them for fear of being blind-sided in some way. \*It shifts the burden of investigation to the party who receives the pleading; people can be reckless making wild allegations causing damage to the other party making them make investigations into the allegations. (Racing case) – one of the defects in the rule, can’t have it both ways.

4. **Recall methods of avoiding violation**:

* + - * Send a **demand letter**
      * **Cross examine your client** (Rule says you don’t have to do a reasonable belief in the evidence, you can believe your client but you do need to carefully understand what your client is telling you and worry about them contradicting you later)
      * **Document the investigation** “Reasonable investigation under Rule 11”
      * Hire an **expert witness** in a complex case
        + Expert can provide evidence that will support or will avoid your making allegations.
      * Hire a **legal expert** (lawyer who has done this kind of thing before), someone who has done this kind of thing before
      * Do **legal research** – if there is a big bomb major case that says your claim is frivolous & you didn’t find it, you are screwed
      * Do **Prompt discovery** – doesn’t avoid but allows you to withdraw offending pleading.
      * **Identify allegations that you don’t have current evidence of** and specifically put in there that this depends on discovery.

# G. Other Sanction Powers of Court:

\* Rule 11 is only the beginning, there are other sanction powers of court, there is a statute that allows sanctions for multiplying litigation (requires willfulness proof). Court has discovery sanctions applied by rule 26 & 37 and court has general equity inherent powers to impose sanctions for bad behavior.

\* Rule 11 only applies to pleadings and documents that you file, if you offer purgered testimony that is very bad and court should be able to sanction you but they can’t do it under Rule 11.

Parties & Claims: Joinder

1. **Counterclaim:** is a claim by the D against the P or is generically a claim by someone who has been sued by another party and is claiming back against that party.
   * + 1. **Permissive & Compulsory**: those that do not arise out of the same occurrence or transaction can be asserted now or anytime but, if it arises out of the same occurrence or transaction then the counter-claim must be asserted during this case.
       2. **Distinguished from cross**-**claim:** Cross Claim – one D suing another
2. **Third Party Claims (Impleader)** – to engage in third party practice, make a third party claim by a third party P against a third party D. If you are a D in a case, you may implead or bring in a 3rd party any person that **you claim is liable to you for part of the P’s claim**. (usually contribution claims where there are 2 tort-feasors, P has sued only one and D u want to bring in the other person responsible) **Indemnity** claims the distributor wants manufacturer to pay.
3. **Joinder of P’s & D’s:**
4. **Permissive-** allowed whenever a right to relief is claimed 1-**jointly**, **severely,** or in the alternative out 2-**of the same transaction or series of transactions** or occurrences and 3-**common questions of law or fact are involved…** all 3 tests have to be met but the middle one is the most important b/c it brings the other two about normally. In this situation, the P is in the driver’s seat- P can decide to add other Ps or can sue multiple Ds
5. **Persons needed for just adjudication (Compulsory):** all you need to know- besides permissive joinder where the P has a choice, there are few and rare situations where the court will force the P to add someone, a so-called person needed for just adjudication. Usually they are situations when someone is left out of the lawsuit and they will experience consequences if they are not joined to the suit or to somebody who is in the suit who may be faced with multiple liabilities. **Rule 19** governs the necessary joinder – we just need to know that there is such a thing… doesn’t get used a lot.

# Complex and Multi-Party Actions:

1. **Class Actions – Rule 23:**
2. 4 prerequisites that all have to be met:

**Numerosity**: number so large that it’s impractical to bring them before the court.

**Commonality**: there has to be at least one common question.

**Typicality**: the claims of the representative parties have to be typical of those of the other class members.

**Adequate Representation**: the named claimant must be such that he can say “I am going to adequately represent the people who are absent.”

1. In addition, the class action has to meet one of three 23 (b) models:
   * + - B1-B2-B3: **B3 is most frequent**- a large number of consumers who have been misrepresented to in a common scheme etc.
       - Test under **B3** is that there must be **predominance** & **superiority**
         * Meaning common claims must **predominate** over issues that are individual to each class member. Usually this means the issue of liability is decided or largely decided by a single question. The amount of damages may be individual to class members.
         * **Superiority**- class action is the superior means of resolving this set of disputes, better than having individual cases, better than having test cases, better than having a case where everyone who wants to sue joins in a single suit etc.
2. 23(c) Certification & Notice (he skips this)
3. **Interpleader:** the interpleading party is faced with **multiple conflicting and inconsistent claims**. A stakeholder who faces multiple claimants, usually either a bank with a deposit claim by more than one person or an insurer who has more than one person who claims to be the named insured who should get the money.
   * + - The stakeholder requires the interpleading parties to come and litigate out their entitlement against each other in a single forum and getting them enjoined from suing elsewhere.
       - **Essential requirement:** claims are **inconsistent** (all of the claimants *cannot* properly all have claims ) (ex: life insurance policy where A and B both claim it and the life insurance company interpleads them.)
4. **Intervention**: is where you join an already existing lawsuit in which you have a stake. All you need to know is: sometimes you have a **right to intervene**; sometimes it is within the **discretion of court** to allow you. (Example in subject matter jurisdiction – workers compensation carrier intervened in the lawsuit against people who had allegedly injured him.)
5. **Judicial Panel on Multi-District Litigation**: federal panel that has authority to transfer multiple cases involving the same matter to the same court to decide pre-trial issues but then transfers it back to each perspective court to proceed with the case. Does not apply to state cases unless they can be removed.

**Consolidated Pre-Trial Proceedings. Note Multidistrict Rules and Manual for Complex Multidistrict Litigation.**

Discovery

# Purposes & Techniques: The Practicalities

* + - * CHECK THESE OUT IN BOOK ETC\*\*\*\*\*\*\*\*\*\*\*
      * Deposition funnel techniques
      * Way to draft interrogatories
      * Use of different kinds of discovery methods

# Scope: The Following is Discoverable –

1. **Relevant Info:** What does relevant mean? It means it need not be admissible, if “reasonably calculated to lead to admissible evidence. It doesn’t have to be certain, just reasonably calculated, but it’s not enough if it is merely possible, it has to be reasonably calculated.
2. **Not privileged** (Can’t discover even though it’s relevant, if privileged) If a party were to say in an interrogatory: “describe all conversations your attorney had with you” -- the info may be highly relevant but it would not be discoverable b/c of attorney client privilege.
3. **Limits** : Group of limits imposed by Rule 26 (b)- discovery **cannot be overly cumulative** meaning for example, if the discovery party has already gotten you to produce a number of documents and then asks you in interrogatories to describe documents produced, that would be cumulative. It cannot be **unduly inconvenient** “let’s take all of the depositions in Hawaii b/c I want a vacation there even though the suit is filed in Houston and Hawaii has nothing to do with it. If the party has already had **ample opportunity** to discover the fact or if the **benefit is heavily outweighed by the burden**. Crump thinks these are redundant of the reasonableness standard, if it is way to burdensome it is not discoverable but the rule sets them out separately so analyze them separately.
4. **Work Product**
5. **Trial or Litigation Preparation Materials** are usually not discoverable. The magic words: “was it created in anticipation of litigation or a trial” and prepared by a party or its representative… can be a party knows it may be sued so they do some research in anticipation. Does not cover work unrelated to litigation. For example, client in embezzlement case gets outside accountants to see how embezzlement can be avoided in the future, it is not work product. (Note **escape valve-**not a true privilege if the discovering party can show undue hardship and substantial need -- maybe they interviewed a crucial witness who is now dead…) (More of an **immunity than a privilege**)
6. **Experts** – (1) testifying experts fully discoverable if the opposing party cannot tell you definitively that they will not testify; (2) “retained” consultants, consulting witnesses are discoverable only in extraordinary circumstances (like if there are only three experts in this field and your opponent consulted each one of them) (3) one court says informally consulted experts, are not discoverable at all but it is not in the rule – crump would have said if they weren’t retained they are discoverable but not what this court says; (4) if not consulted for trial, no restriction -so an expert who designed the product that is the reason for the suit. Or accountants consulted for reasons not to do with the lawsuit but for reasons to do with the account are all fully discoverable. (Note the Difference in treatment of reports of physical or mental exam. Expenses usually to be paid by the discoverer.- not mentioned in video)
7. **Not under protective order –** Court has powers to specify conditions & limits of discovery to protect against **harassment**, **undue expense**, **embarrassment**, **trade secret exposure**, etc.

Test here is a **balancing test**, the party wanting protective order shows it would an unduly harmed by exposure and party opposing it would show it needs it and court would balance the two.

1. **ADD in rules about discoverability with Electronics**

# Disclosure: Meeting

1. **Initial:** rules require you to initially disclose **a. Identification of witnesses** those who have knowledge about relevant facts about your claims or defenses  **b. Documents** that may containinfo relevant to claims or defenses **c. Damage calculations; d. Insurance** (You have to do this early in the case and it is self-initiated, it has been argued that this is inconsistent with the adversarial system..)
2. **Experts:** you must disclose certain info. about experts
3. **Pretrial:** Close to trial there are things that must be disclosed
4. **Discovery Meeting between counsel:** (Required under Rule) You must come up with a discovery plan- supposed to make discovery less expensive etc. but does it work, not always. If the court is unreasonable about it, especially not.

# Methods of Discovery

1. **Depositions** – oral questions asked of a witness by a Court reporter;

You can use these depositions only under **Rule 32(a)** to impeach a party, if the witness is unavailable or for completeness.

TX, other states- allows you to use at trial freely (crump prefers)

**Notice**: starts the process with information such as when/where/who and the like

**Subpoena**: for a non-party you compel the witness with a subpoena for party, notice is enough. **Presumptive Limit** is 10 depositions of 7 hours each… 10 may be enough even in a big case but if you want more you go to court and ask for more… 7 hours is so you can finish in one day.

1. **Depositions on written Qs**: weakened form of discovery
2. **Depositions to preserve testimony**: didn’t really cover these
3. **Interrogatories (Presumptive Limit 25):** written Qs to opponent that they must answer under oath and require investigation and not just the person’s memory so for this it may be superior to a deposition… Interrogatories are thought to be a pressing kind of request and that’s why you only get 25 but most lawyers can write 25 that would take years to answer
4. **Requests to Admit:** Like interrogatories in that they are a written form of discovery that has to be answered under oath by a party; they are to be directed only to parties but these are factual propositions used to establish elements of the claim or defense that you don’t think will be contested. (“admit that the document that is attached to the complaint is the genuine K or admit you were driving the car involved in the accident.”)
5. **Requests to Produce or Inspect:** (Note: our course covers electronic documents although the subject isn’t on the video) Way of getting docs or tangible evidence.
6. **Motions for Physical or mental Exam** Way of examining a person whose condition is important. You have to show **good cause**: you must be able to show more than mere relevance that you will discover something important and the condition has to be in controversy. (SC condition has to be part of issue raised by pleadings, idea is that this examination is intrusive compared to the other types)

# Duty to Supplement

If your answer was incorrect when made or if it is incomplete, you must timely supplement it by giving the information unless it has already been made available to opponent.

# Sanctions

If you don’t behave appropriately during discovery, the court can sanction you.

1. **Range:** From **ordering discovery** if it has been a reasonable failure based on an objection, court can also say you asked a question but I won’t order it to be answered. **Establishment order:** which is to say this fact has been taken as established. **Preclusion:** you are precluded from offering evidence about this subject. (or an **Establishing Precluding order** is that this fact is taken as established and you are precluded from challenging it) **Striking of claims** **or defenses**, **dismissal** of a P’s claim, **default judgment** against D who has abused the rules, **contempt** and incarceration and fine for a non-party or party witness, other “just orders.
2. **Payment of fees & Expenses:** only if there is no substantial justification for resistance and if there is fault
3. **Sanctions above ordering discovery:** only upon some showing of fault (case law) merits sanctions usually require gross negligence or higher standard

# Implied Certification, Discovery Conference

There are implied certifications in Rule 26 that parallel certs under Rule 11 and court may order discovery meeting which covers discovery matters.

Pre-Trial Conference

# Concept and Purposes; Sanctions

Sometimes the resolution can be facilitated by an informal meeting before trial and settlement.

Court can do anything to advance settlement/resolution of case including: getting parties to make stipulations, identify witnesses in advance, rule on pre-trial matters, admit or exclude evidence, and it can require you to engage in settlement resolutions or order you to go to alternate dispute resolution methods (mediation etc.) that are non-binding. They can sanction you for failing to participate.

# Requirements Placed on Parties Before

The P is usually given responsibility for coming up with proposed draft to send to D (questions for examination of jury, jury charge etc)

# Pretrial Order

Prepared from the above drafts and it controls the action unless it is modified to prevent injustice.

Use varies – some courts have no pretrial hearings. On the other hand it is common in a federal court to have a whole series.

Court is required to have a docket control order that presumptively results from some sort of meeting.

Some judges have a whole series to plan, police discovery, plan the trial. (TX doesn’t usually have pre-trial hearings)

# Series of Pre-trials: Varies with Juries

# The “New” Management

1. **Civil Justice Reform Act Plans** require judges to come up with plans for their courts to manage disputes. Include:
2. **Tracking:** putting cases in different categories **Differential Case Management** using different management plans for each one; **Staging**- doing some issues before others; **Fast Track** you have to try case before X date; **Enforcement**- court has set up a plan and expects it to be followed, what if it isn’t?; **Adjudication by Deadline** – if you miss a date you have your claim precluded (its unfortunate)

Pre-trial Disposition of Case

# Summary Judgment

(3 ways \*uncontroverted proof of an affirmative defense; \*by disproving one of the P’s theories(elements- doing it so it is beyond dispute) \*

1. **Based on Pleadings, discovery, and affidavits**
2. **If these show no genuine issue of material fact & movant is entitled to judgment as a matter of law** (kinship between this and failure to state a claim but diff is that is done just on allegations and complaint, this is done based on evidence and discovery)
3. Movant shows there’s **no reasonable way the opponent can prevail**
4. **Burden is on the movant** (but note *Celotex* case: a D can carry burden without affidavits or proof, by definitive inference that P can’t produce legally sufficient evidence – you do this with discovery requiring opponent to produce all of their ev. And then you make a motion showing the court that this is all they have been able to produce and there is no way a juror could find for P under this amount of evidence) movant has to demonstrate that the facts that would govern are undisputed.
5. **Affidavits of Inability**: if there is an absent witness but they will be available. Required response by opponent- motion says there is no issue of material fact but the opponent can specify which issues of material fact there are.
6. **Court can’t resolve credibility or make fact inferences**: if there are facts left open judge cannot grant summary judgment.
7. **Partial Summary Judgment:** Court can grant a summary judgment for liability but hold trial for damages only or the like. **Affidavit requirements** – substitute for evidence must show witness has personal knowledge of what is shown in the paper… and would be admissible under rules of evidence.

# Dismissal

1. **Voluntary & Involuntary: voluntary:**P non-suits the case… **involuntary** can be done as a sanction or for want of jurisdiction, or for other reasons the judge may dismiss it
2. **With & Without Prejudice:** (i.e., with or without adjudication of merits) with means this case has been determined on the merits and determined adversely to the P or whoever … if it is with it is res judicata…

# Default

1. **On D’s failure to plead or defend as required by rules:** court may enter a judgment by default usually b/c party has failed to answer.
2. **Judgment by clerk – if liquidated:** the amount of claim is mathematically determinable, in theory the clerk can enter judgment but usually the court requires a hearing
3. **By court if not liquidated – (**negligence or car wreck), court may require proof upon the default, the court takes liability as admitted but you have to prove damages- usually by affidavit.
4. **Setting aside – under certain conditions.** Basically, (1) Existence of Arguable Defense on Merits (or Damages) and (2) Excusable Neglect (mistake) you may have the default set aside within one year of injury of default.

# Setting the Case for Trial

1. **Importance of understanding docket system**

Every Jurisdiction has a different docketing system and you need to be able to get your case set within a reasonable time and you want to be able to understand how to get a continuance while being able to avoid having the other side being able to get a continuance if it is not merited, for that reason it is important to understand the local docketing system.

1. Need to assure reasonable setting
2. Need to understand continuance problems
3. **Systems**
4. S. District of Texas (Fed): Docket control exercised by courts and magistrates and there is great delay.
5. Harris County: Former “request” procedure (which is what we saw in the Dominguez book) has been replaced by “certification” procedure and finally by individual Judges’ control – inefficient in some ways but it creates responsibility on the individual judge.
6. Immense variation: Importance to understand the Local system and rules if you don’t understand it you probably will end up travelling long distances in order to be present at a hearing that doesn’t occur. It’s best to get local counsel.
7. Local Rules Generally: Typical Provisions

# Trial by Jury

1. **Right to Trial by Jury** – remember you don’t have the right to trial by jury in every case that might be brought.
2. Preserved by Rules and **7th Amendment**. Where it existed at common law or required by Act of Congress- so the right extends to cases “at common law” if it is a law case you have a right to trial by jury but…
3. Right does not exist in equity cases
   1. Origins of Equity – Historical accident- equity is applicable to those claims or defenses in which there is no adequate remedy at law- equity is essentially a gap filler that deals with covering the gaps in the common law- so the subjects are a mixed bag. it also does not exist in other instances where it did not exist at common law such as
   2. Examples: Injunctions are an example- as are accountings, interpleader is an equitable claim. There is no jury trial right in this type of claim.
   3. Jury Trial right also does not exist in other instances where it did not exist at common law – e.g., habeas corpus cases or admiralty claims-
4. Where claim or part of it is legal in nature, jury trial right preserved even if joined with equitable claims or requests for relief- (if an equitable and legal claim are joined together, the court is supposed to itself decide the equitable claim but preserve the right to trial by jury for the legal claim.)
5. Statutory actions (e.g., civil rights cause of action, any other) issue is whether claim and remedy are historically analogous to common law claim – these typically didn’t exist at common law and a statute may have been passed significantly after the adoption of the constitution, so the claim didn’t exist when the constitution was adopted- so the SC says you look to see whether the new statutory claim is analogous to a common law claim where the right to trial by jury exists.
6. Texas right to trial by jury: broader – extends to equitable claims as well at least to the fact finding part. But still some questions and cases not for jury.
7. **Demand and Waver –** If you have a right to trial by jury and you don’t demand it then you’ve waived the right to trial by jury.
8. Federal – you must make demand within 10 days of last pleading for the part of the claim for which a jury trial is being sought. If it is removed case, demand still effective if you did everything that was necessary to preserve a jury trial in state court before removal otherwise you must make the demand within 10 days after the removal. Even after the time has ran out, the Judge has discretion to grant or deny the right to jury trial after time limit. Demand is simply a written demand; one sentence is enough; to write it on a complaint or answer is OK and all it has to be is plaintiff demands a trial by jury on all issues so triable.
9. Texas – within a reasonable time, not less than 10 days before trial, by written demand and payment of fee. (different but analogous rule that makes the demand much later in the case, the feds tend to make you do it early and state courts don’t require it quite so early)
10. **Summoning of Jurors –**
11. Jury summons have to be issued in a way so that the summoning avoids “systematic exclusion” of identifiable classes (such as race or gender) – this is r**equired by the constitution**.
12. **Federal System:** Each District Court has to evolve plan for summons using voter registration lists or actual voters, supplemented by other means (such as driver’s license lists) if necessary. From this list, names to be drawn at random to compose list from which court summons as needed. Each District Court is to allow certain exemptions (including exempting people who have custody of children under 10- aged or infirmed people and such like) and evolve rules for others in its discretion. Method of summons includes there being an information form sent by the government to the prospective juror for the juror to fill out. The federal statute also provides a method for challenging the array of jurors on a constitutional or statutory basis and it says that if you want to make a challenge you must do it before the jury is selected or after a certain amount of days after you learn of the defect in the jury summons process.
13. The **State** system is different but analogous, we use a computer system with a jury information form and exemption certificate.
14. **Jury Selection –** once the jury has been summoned and sitting in courtroom
15. Voir Dire
    1. Purposes (and Actual uses): Technically the purpose is to conduct **Discovery** on the jury and ask them questions about their qualification and matters of disqualifications, you want info to make preemptory challenges; but you are also trying to conduct **Communications** with them; you want to gain **Commitment** from them to follow the law, you prepare them to accept your proof and define legal terms for them; “**Inoculation**;” which means giving them the bad facts in your case and dealing with them up front. You want to build **Rapport** withthem; some people attempt to get inadmissible evidence through it so note the **problem of abuse**.-
    2. **Methods**
       1. **Federal Court**—Judge may allow attorneys to do it or may do it himself, the judge may also do part of the questioning himself (usual) then allow attorneys to supplement it. If the judge does it alone he must allow attorneys to make written suggestion and the judge has the duty to fairly interrogate the jury to determine possible biases.
       2. **State** – There is a formula for the judge to read (Hitner read it our trial) where they read a formula from the rules, the attorneys are given a reasonable time to ask questions relevant to selection and in Texas the method has to include questions asked by attorneys.
16. Challenges:
    1. Cause: Unlimited number. These are jurors that are disqualified, not citizens, can’t read or write English or : Bias and prejudice, pecuniary interest, etc. Judge decides by making fact finding as to whether juror is disqualified, subject to review.
    2. Peremptory: can be done without assigning a reason- remove a certain number of people b/c you think they will be unfavorable to you. 3 to a side in Federal Civil Case. Done by Striking name on the list.
17. **The Batson-Edmonson Problem**- it is impermissible to have race or gender as a motivation in peremptories. Paradox is that peremptories are always done by stereo types by feel or by gross characteristics, but even so we don’t want people doing them on these particular basis, race and gender.
    1. Racially Motivated peremptories prohibited, even in civil cases
    2. Extension to (e.g.), Gender, Age, Etc.?
    3. Paradox: peremptories always are done by instinct, “feel,” or gross characteristics
    4. Procedure: (1) If you believe adversary has participated in racially or gender motivated selections you need to make a prima facie case by showing statistically that the challenges are biased make a statement “your honor let the record reflect that my opponent has struke three jurors each of which was Asian American or whatever or each of whom is male or female and that if unrebutted is enough to cause the challenge to be valid and sustainable. (2) Opponent is then called upon to rebut the challenge by a (Credible) neutral explanation saying why they challenged each person for a different reason, judge then has to decide whether the netural explanation is real or pretextual.
18. **Opening Statements** – attorneys frame the case and preview the evidence and tell what the witnesses are going to testify to. Usually pairing them up with the major legal issues in the case
19. **The Rule**- Sequestering of Witnesses – either party can invoke the rule- by doing so, you require that the witnesses other than the parties who are going to testify leave the room and not talk to anyone other than the attorneys. You simply do it by saying “your honor, the P or the D, invokes the rule.”
20. **Evidence** –
21. **Opening and Closing** by Party w/ Burden- usually the party with the burden of proof opens the evidence and has a right to close the evidence and the argument for that matter.
22. **Rules of Evidence** – we gave a short general look at this
    1. Basic Rule: If the evidence is logically relevant, it is admissible. If the evidence has any tendency whatsoever to make a fact that is at issue in the case more likely or less likely without the evidence it is logically relevant and therefore admissible unless it is excluded by an exclusionary rule. This is ½ the rules of evidence, the bigger half is the exclusionary principles.
    2. **Exclusionary Principles**
       1. **Relevancy balanced against prejudice**. If the logical relevance of evidence is “substantially outweighed” by prejudice or confusion, the prejudice or confusion is not just there it is big bigger than the importance of the evidence of the case, it is excluded. The judge has simply discretion to make this balancing and weighing. Several rules – settlement and compromise offers are oftentimes excluded b/c they have an ability to show that the person who offered the settlement may be more likely to be held liable. But the likelihood is that the jury will misuse that type of evidence, likewise evidence of subsequent repairs or remedial repairs, or of liability insurance or of bad character or withdrawn guilty pleas are usually excluded.
       2. **Hearsay** – a statement made by someone other than while testifying at the trial offered to prove the truth of something to be proven in the statement. **You can’t repeat someone else’s version of the facts in court.**(He repeated this twice as being the hearsay rule) (a witness at the trial offers to testify- there is this bystander at the accident who said he saw it and this is what he told me he saw- its hearsay b/c it’s another person’s statement who is not now testifying. And it is offered to prove the truth of the statement- how the accident happened.)
          * 1. Out of Court statement offered to prove truth
            2. But there are many hearsay exceptions, sometimes the statements are part of the facts. Sometimes the statement itself is an important fact- one of the examples we considered in class was if a witness is called who overheard a contract being made, witness testifies the P said they offered widgets for X amount and D said I accept, that witness is not offering statements for the truth of the matter asserted, he is offering the statements to prove the statements were made.
            3. Other exceptions exist such as business records, various kinds of spontaneous utterances, public records we saw in a case in the book etc. The **biggest reason** for excluding hearsay is b/c the **declarant cannot be cross examined** so we don’t have usual methods of discovering truth**.**
       3. We exclude most matters that are not **personal knowledge**. We want people to be testifying to their perceptual perceptions of what they have seen or heard. We don’t want them testifying to matters that are their own mental processing. Most matters of “fact” contain some opinion, so this is a question of degree (An exception is **expert** **witnesses** who are qualified as such so that they may give opinion that is not based on personal knowledge but on expertise as applied to the facts of the case therefore, they are not similarly bound by personal knowledge rule)
       4. **Unauthenticated Documents or Objects**- so we have to go through the process of proving up a document or object. Mark it have it identified, lay the predicate for having it be admissible, something as simple as “does this picture truly and accurately portray the scene of the accident, then show to opposing counsel and offer it into evidence)
       5. Privileges –matters which are privileged are excluded from evidence also, actually, privilege is stronger concept than other evidence rules b/c it is a prevention of disclosure.
    3. **Method of examination and enforcement of rules**-
       * 1. **Non-leading questions**: in direct examination don’t ask leading questions. Leading questions suggest the answer. The attorney can’t testify the witness has to testify. “What was the weather outside?” is a leading question- “it was raining cats and dogs outside wasn’t it?” is a non-leading question.
         2. **Responsive answers**- the answer must be responsive, if the witness is asked, “how did the accident happen”, and they answer “well the defendant has liability insurance” it is subject to being struck and it is also likely that you’ll have to peel the judge off the back wall with a spatula.
         3. **Enforcement of the rules is by objection**, admitted evidence that is not objected to becomes part of the evidence whether it complies with the rules or not.
         4. Additional Enforcement: consists of requesting an instruction to jury to disregard which sometimes can be quite effective contrary to what you might think; move for mistrial; contempt- holding a lawyer or party in contempt (never seen it done); appeal (appeal is device limited as an enforcement device because they are difficult to obtain only because of a problem with evidence- by concepts of harmless error, cured error, and preservation)
    4. **Cross Examination and Impeachment** – allows broader scope
       * 1. **Leading questions**- you can ask every question like “and the weather outside was heavily raining wasn’t it?” etc. Conventional wisdom is that during cross examination, every question should be a leading question.
         2. Wider admissibility: Felony convictions are admissible to impeach, bias, psychological condition, prior inconsistent statements are all admissible, etc.
    5. **Jurisdictional variations**: very similar rules between federal and state rules but there are some differences and they are tremendous judgment calls- remember trial judge in Dominguez case at first saying that evidence about other baskets on other days was inadmissible and then reversing himself and letting it in, the judge was probably not going to be reversed for that ruling, he just had to decide if the value of that evidence that is the logical relevance was substantially outweighed by the prejudice that could be created.
23. **Judgment as a matter of Law-** At a certain point the opponent rests and at a certain point all parties rest and close and at that point- either party that wants to can make a motion for judgment as a matter of law, and you’ve got to make it at this point in federal court if you want to be able to raise issues regarding sufficiency of evidence after the trial or on appeal.
24. **Argument of Counsel** – there are certain things you can’t do there are 4 areas.
25. Prohibited subjects: **distortion of law-** you can’t get up and say “who cares if he was negligent?” etc. **facts outside record**- now you can draw inferences from the record and attack credibility- you have a lot of latitude – but it has to be an inference from the record, you cannot introduce a new and different fact that wasn’t presented into the record. “**appeals to passion or prejudice**,” you can’t make the argument for example that the P will be a charge on the public and will be subject to your having to pay for the welfare payments that will have to go to them **ad hominem** – attacking opposing counsel as a vulture or as they said in once case, my opponent represents all the drunks in town.
26. **The organization**: as discussed in class- Typically the P opens and the P typically thanks the jurors, praises the jury system, then as a second step does definitions of the terms that are listed throughout the charge. Then the P goes through each of the special interrogatories one by one. There are 4 steps in the typical use of the special interrogatory. (1) **Read it**: “the judge asks you this question, whose negligence if any blah blah” (2) **Translate it**: “all that means is who participated in this accident…” (3) **marshal the evidence**- “ladies and gentlemen in this case an officer testified that this and this and Mrs. Smith testified to about the same thing and here is all the other evidence…” (4) **tell the jury how to answer it** “there is only one answer you can come up with given this incontrovertible strong evidence and that is …”Usually then you make a short unemotional closing and sit down if you are the P- you don’t make the emotional argument yet because you have another chance after the D. The D then gets up and answers two or three arguments made by the P but tries to do this briefly b/c you don’t’ want your argument to be structured by the other side. The D typically says something like there are too many arguments to try to answer so I am going to pick a few and have to leave it to you to be able to sort out which ones are inaccurate. The D then typically thanks the jurors and praises the jury system just as the P did and then the D goes through the special interrogatories in a manner analogous to what P did but with a spin to the D side. The P then answers two or three args raised by D then says something like “ I will talk to you know about what case is really about” and goes through the interrogatories again in a shorter fashion and then gives the jury the emotional basis for voting with the P. The D has to do this at the conclusion of the D’s argument, and it’s not quite as effective b/c the D’s emotional and rational arguments are subject to being answered by opponent.
27. Purposes: to put together law and evidence to answer the jury questions what you do is essentially the IRAC method- the issue is what the judge has asked you, the principles are here is what it means, the facts are here and this is what the evidence is.
28. **Verdict and Instruction** – the jury is instructed and then goes back to decide the verdict
29. **Form of Verdict**: **General,** one long question, jury is given every principle of law that a person would need to solve the question and then it is simply asked one question, who wins and how much? **Special verdicts** are questions about the ultimate facts in the case, we still don’t ask about each item of evidence but we ask about each of the elements in the case**,** who was negligent was there proximate cause, those types of things, **or a combined General & Special**. Federal Approach: Judge’s discretion which to use (contrast Texas- we use almost exclusively special verdict charges)
30. **Usual contents of charge**: **basic instructions** don’t draw straws or take bribes, elect a foreperson, deliberate and render a verdict based only on the evidence and the law; **principles of law-definitions** etc. that jury will need for answering special interrogatories (negligence, proximate cause, ordinary care, preponderance of the evidence etc. or offer, acceptance etc.); **verdict**- questions themselves
31. **Federal Court**: the Jury is instructed orally before the argument and the judge has discretion to do it either before or after but it sort of puts the cart before the horse to do the argument to the jury before the instructions because the whole idea is to put them together. Judge can comment, but not without limit. In Texas, the instructions must be written and are read to the jury before the argument then the argument is held and the jury takes it with them to deliberate.
32. **Objections to charge-** the parties may make objections and any issue that is not objected to Rule 51 says cannot be assigned as error on appeal- so if you want to complain about it afterward you must object to it.
33. Jury Misconduct: Can’t impeach verdict through mental processes of jurors. \*\*\* we did not study\*\*\* take it out

# Trial Before Court: Similar to Jury Trial but Simpler Procedurally

No jury selection or Instructions on verdict. (to appeal on factual grounds must get findings and conclusions)

In the evidence presentation but it is simpler procedurally since there is no selection or charge that is prepared. Sometimes the judge is rather informal about how to receive argument which he sometimes does.

To appeal on factual grounds you have to get findings and conclusions on factual grounds. So you have to get the judge to make factual findings and these serve kind of the same functions as the jury does.

# Post-Trial motions and taking Case from Jury

1. **Motion for judgment as a matter of law** (formerly called “directed verdict” or “instructed verdict” if done during trial)
2. **Standard** – if on undisputed evidence movant entitled to judgment as a matter of law; no reasonable way to find for non-movant (**standard** is on the undisputed evidence the movant is entitled to judgment as a matter of law or to put it another way there is no reasonable way to construe the evidence so that you can reasonably find for the non-movant.)
3. Time – when opponent rests or closes or all parties rest or close.
4. A MDV during the trial is a prerequisite for moving for JNOV after the trial or to be able to appeal based on the sufficiency of the evidence. If you don’t make a motion for judgment as a matter of law it doesn’t matter if your opponent did not submit sufficient evidence.
5. **Renewal of motion for judgment as a matter of law after trial** (formerly called judgment notwithstanding the verdict) – standard is the same and the motion is the same during trial, it is simply a renewal but after loss of verdict w/ jury
6. **Motion for New Trial**
7. **Standard**: Discretionary with judge- judge has a lot of discretion- motion for judgment as a matter of law in contrast is mechanical, either you’re entitled to it or not – even if the law takes some deep understanding.
8. **Purpose**: to correct miscarriage of justice for an indefinite range of erros, errors in trial, etc. (while Motion for judgment of matter of law is to give judgment for that person who should win)

Examples:

1. Factual findings against greater weight of evidence, even if DV not proper(not by preponderance standards but deeply strongly greatly against the verdict)
2. Legal or procedural errors – if there were errors no JNOV but still new trial
3. Newly discovered evidence, mistake, etc. – not often granted – must show it is a type of evidence that could not have been found by exercise of diligence and also a major piece of evidence that could probably change the outcome, not just another piece of evidence. Grounds for a motion for a new trial are open-ended these are just some of these.
4. **Review on Appeal**: is judged looking for abuse of discretion- a judge can almost always grant a new trial and be upheld
5. **Correction of Judgment procured by fraud, mistake, etc.** is done 3 different ways depending on when it was made:
6. New Trial- if it is made within 10 days.
7. Rule 60 motion within 1 year; or –
8. Independent action; difficult burden – after a year
9. Rule 60 Motion
10. Rule 60(a): Clerical Mistakes, at any time (if judge made a clerical mistake he can correct it at any time- say his pen slipped and he rendered judgment for 1 mill instead of 10 dollars, that is a clerical error if he did it by accident and it can be corrected at any time.)
11. Rule 60(b): other causes, ranging from excusable neglect (used to set aside a default judgment if you were late filing answer and default was taken it can be set aside if its excusable) or mistake to fraud, “misconduct,” newly discovered evidence, lack of jurisdiction, “other” causes, I year limit on most common grounds- so if there is newly discovered evidence, for example there is a limit that the evidence must not have been discoverable by diligence and a major piece that would have probably changed the outcome. If you miss the one year, you aren’t completely out of luck but you have to show extrinsic fraud to prevail on common law ground.
12. Rule 60 is for the purpose of showing a strict standard for reopening a judgment with reason.
13. Judgment as a matter of law: new name for both DV and JNOV \*\*\*not covered in course)

# Appeal

1. **Appealable orders**
2. **Basic Rule** – only final judgments (final as to every party, every claim and every requested ground of relief, if there is anything left to be determined it is not final) are appealable. It’s typical to have a Mother Hubbard clause (that covers everything but the cupboard) all relief requested in this case and not granted has been denied. /but a summary judgment granted against one D when there are two Ds is not final, the denial of a summary judgment is not final.
3. **Appealable non-final judgments or escape valves** -
4. **Collateral order doctrine** – we didn’t consider – it is rare
5. **Certain interlocutory orders appealable by statute** (injunctions even if temporary) -
6. **Discretionary appeals** – District Court can make a finding that there is a novel question for which there is substantial ground for difference of opinion and the decision of the matter would advance the termination of the litigation; Appellate court must agree (Appeal by certification- trial judge certifies your final order as being appealable and so does the appellate court)
7. **Making it into a final judgment** (Rule 54(b)): can only be done with an order that disposes of one of the claims ... imagine the judge dismisses one of the claims and the judge decides it’d be a good idea if you appeal it now and the judge then makes it into a final judgment. Rule 54(b) says that if the judge makes an express finding that there is no just cause for delay and the judge expressly makes a judgment on a claim, not done with just any order but one that disposes with a claim.
8. **Mandamus** – an equitable device that allows you to have an appellate court hear the matter if appeal would not be an adequate remedy. Discover orders for example, the trial judge makes a ruling that you think will totally blow open your atty. Client privilege matter- you disagree and you ask trial judge to certify the appeal and they refuse. You may be able to get a writ of mandamus b/c if you wait to appeal you will have to apply the discovery order etc.
9. **Appellate Procedure** (Federal): **Notice of Appeal**- a form that is attached to the rules that contains things like names of the appellants, date of the order appealed from, the court being appealed to… a one sentence doc and has to be filed within 30 days or an extra 30 days can be filed for good cause- a lot of malpractice comes from failing to file a notice of appeal within the 3- days, **cost bond** – a bond for the costs of the appeal, $500 unless court sets different amount. **Supersedeas -** notice that taking of the appeal doesn’t stop judgment from being enforced. To stop the judgment from being enforced you file a supersedeas bond in the amount of judgment plus costs if you are the D. **Record** within a certain period of time the appealing party has to request the record from the court clerk. **Brief requirements** – how long the brief has to be, how many words on each page, what color the cover has to be etc, , **docket fees**, etc.; note time limits for each of these items and they depend on previous time limits – one of the first things you should do is to list a time table by consulting the rules or a reliable source about the rules as the first step.
10. **Jurisdiction**
11. **Courts of appeal**: have jurisdiction over all appealable orders of district courts within their circuits, unless direct appeal to Supreme Court. Also, have jurisdiction over certain administration agency appeals.
12. **Supreme Court**
13. **Original jurisdiction** – if one state sues another state, the Supreme Court has trial state jurisdiction- usually the court appoints a master to hear those cases.
14. Appellate jurisdiction from courts of appeal and state courts of last resort
    * + 1. **Certiorari** – note purpose is to deal with systemic problems of federal issues of national importance, ironically it is not exercised primarily to do justice between the parties but rather to solve problems of federal interest
        2. Other kinds of review (rare)- direct appeal from trial court to Supreme Court, or other instances

# Res Judicata and Collateral Estoppel

1. **Res Judicata Elements-** claim preclusion – claim is barred by previous judgments
2. Previous final judgment
3. Covering same facts (same claim, same facts, or “diligence” (closely related claim) rule) (varies from jurisdiction to jurisdiction)- breadth of preclusion depends upon whether it uses same facts or same claim or diligence rule.
4. Between same parties, their privies, or their predecessors

* - Example: A sues B and Recovers $10K damages for personal injury. After all appeals, judgment becomes final; but A thinks he should have gotten $20K. So A files another suit against B on the very same claim, to get more. What does B do? Answer: Pleads res judicata(previous final judgment covering same claim with same parties).
* -Example: A sues B on a Contract. The court rules there was no contract, and grants J for B. A then sues in quantum meriut (quasi K claim that exists when there is no K designed to prevent unjust enrichment). B pleads res judicata. Result? You have a previous final judgment between the same parties but it depends upon what rule of preclusion the jurisdiction has, does it require that it be precisely the same claim or same facts? If so, it is not precluded. But most Jurisdictions would say it is precluded b/c it is a closely related claim that a person through the exercise of procedural diligence ought to assert.

1. **Collateral Estoppel Requirements** smaller doctrine dealing issue by issue – it is issue preclusion (res judicata as to a particular fact)
2. Previous final judgment -
3. Between same parties, or their privies or predecessors
4. Involving an adjudication of an issue in the prior suit which is an issue in the present suit
5. Which is material to both judgments – example: A sues for B for payment of one installment on a note (only one is due, the only payment that came due was the first payment). B pleads lack of consideration, but in trial, that issue is determined adversely to B A wins and collects judgment. When the second installment becomes due, A again sues; B again pleads lack of consideration for note. A’s reply? A pleads collateral estoppel b/c of a previous final judgment between the same parties involving adjudication in the prior suit which is also an issue in this case and it is material to both judgments- the basis of decision in the previous judgment and it will be the basis of decision in this one also.

# Collections and Enforcement of Judgments

1. **Satisfying judgments with property** –Note: The **Federal Rules simply adopt state collection procedures.**
2. **Execution**: Having a final judgment, Plaintiff has court issue writ of execution. In Texas, the Clerk issues.
3. **Procedure**: it is an order to the sheriff to question the D about his property and seize it and then sell it at an advertised sale.
4. **Limits**: Rules the sheriff has to follow that don’t always do justice but are designed to protect the D. Value of property must bear reasonable relation to judgment if there are multiple pieces of property. If seizure is of land worth $100K when the judgment was for $1K the court is going to ask if there was any other property that could have been seized that was closer in proportion. If it is real property the sheriff is supposed to sub-divide it. If debtor specifies order in which he wants the property sold, the sheriff must honor designation.
5. **Exemptions**: are extensive in Texas E.g., homestead exemption applies to both Home and Business Property; also covers most of what most people own so collecting judgment in Texas is difficult. automobile; furnishings; etc.
6. **Post-judgment garnishment** – is used to get at a debt owed to the debtor by a 3D party. Debtor doesn’t have anything but someone else owes him money. Serve the 3D party w/ a writ of garnishment – technically a lawsuit against the other party, you serve them with a petition in an independent action. D must be given notice and an opportunity to appear. E.g., to collect on bank deposits. Cannot use as to wages in Texas (Exception- constitutional amendment as to child support).
7. **Liens** – by abstracting the judgment (clerk gives form and you file it in every county you believe there is real property and you make it a lien on realty in county) Increases chances of collection, because:
8. Effect of lien: places encumbrance on D’s real estate in the county. Purchasers take subject to judgment debt. Interestingly even though a homestead is exempt for 6 months- title companies won’t insure the title so people can’t sell home without paying the judgment. (Note effect with title Co.’s: Pragmatic Way around homestead exemption) Problem of Priorities (Purchase money D/t will have priority: So will prior judgment creditors; also IRS if filed before).
9. **Turnover**: Allows broad use of court’s equitable powers on property that cannot be reached through normal means of execution- you have to show no adequate remedy at law to use an equitable remedy so you have to show property is not readily executable. Examples: property that D has not gotten yet and you are afraid he will get rid of it – you have court order D to turn it over as soon as he gets it, property that is in a foreign jurisdiction, etc.
10. **Discovering Assets**—records; **Discovery Methods-** always go to records and do an investigation but you can always use every discover method- usually a starting point, take their deposition and request production of financial records etc.
11. **Provisional Remedies**- done at the beginning of the case for fear that the case may be uncollectable at the end.
12. Types of remedies: Attachment, pre-judgment garnishment, lis pendens, temporary restraining orders and the like (Temporary (Preliminary) injunction) (In Texas, “sequestrian”), etc.
13. Fuentes v. Shevin: you can’t use a seizure remedy if there is not a prior adversary hearing. The reasoning in the case seems to say that the creditor has no protectable property interest even if they have a security interest. The court effectively overruled some of the broader reasoning in Fuentes v. Shevin when it decided Mitchell v. WT Grant.
14. Subsequent cases: Mitchell v. WT Grant here a seizure can be constitutional if (1) based on sworn testimony presented before a neutral official and (2) prompt post-seizure hearing opportunity provided. All cases have involved the element of a bond filed by the P and damages that are recoverable for wrongful seizure.
15. Texas Sequestration statute: sworn application you must show entitlement to property and you have to show that you have a need for this pre-judgment writ, if it is a collection case that you wouldn’t be able to get it from normal execution at the end. Statute covers size of type on the notice. You also need to show probably injury (you will be injured in enjoyment of property or won’t be able to collect debt at the end; D can get property back if they file a **replevy** bond and has a right to a hearing within 10-days of the demand; there are severe remedies for wrongful sequestration.

# Remedies Generally

Our coverage included not only provisional remedies but also damages, injunctions, attorney’s fees, other equitable remedies, declaratory judgment, etc. This material also is part of the course although not covered in this review

Damages, injunctions, attorney’s fees, other equitable remedies, declaratory judgment etc. (not covered in review look over book notes – objective questions)

\*\* proof of damages **settlement documents – what you put in \*\*\***

# Alternative Dispute Resolution

Our coverage included the relative advantages of ADR and Traditional Adjudication; Negotiation Techniques and Ethics; Settlement Agreements; Adjudicative Effects of Settlement; Arbitration and Related Procedures; Mediation, Mini-Trial, Summary Jury Trial, Private judging, etc. This material also is part of the course although not covered in this review.

Strategies of discovery/ picking jury/ writing a complaint/ whether or not to appeal(?)