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## 1. Introduction

### 1.1. Introduction to American Courts

#### 1.1.1. Structure of state court systems
- generally: trial court, state court of appeals, state supreme court

#### 1.1.2. Structure of the federal court system
- district court, circuit court of appeals, SCOTUS

#### 1.1.3. Unique role of the US Supreme Court in reviewing both state and federal cases
- SCOTUS may review state cases that raise issues of federal law
- allows SCOTUS to provide definitive issues on issues of federal law, which bind all American courts, state and federal

#### 1.1.4. Types of cases state courts here, and the concept of specialized courts with limited subject matter jurisdiction
- state courts may hear any issue
- some states have specialized courts to handle particular issues (e.g., divorce, tax)

#### 1.1.5. Concurrent jurisdiction
- generally, any case that may be brought in federal court may also be brought in state court; opposite is not true, U.S. Const. art. III, § 2.
- exception: some federal §s provide for exclusive federal jurisdiction

#### 1.1.6. Tactical considerations and choosing to file in State versus federal court
- initially determined by Plaintiff
- **convenience**- federal court may be far from lawyer or client
- **familiarity**- lawyer may litigate in one forum more frequently
- **jury pools**- state juries are drawn by county; federal juries from larger area (think Monroe County vs. S.D. Indiana for a civil rights case)
- **speed**- federal courts generally resolve cases more quickly than state
- **case assignment to one judge**- on federal side, only one judge will handle the case from start to finish; particularly important in a case with complex issues
- **attorney control**- federal system generally more strict with deadlines; state courts more free-wheeling
- **out-of-state litigants**- federal judges’ life tenure insulates them from political pressure; state court judges are more accountable to local citizens; diversity jurisdiction takes this into account
• expertise- judges in one system may have more experience dealing with particular cases—especially complicated federal law issues
• other factors- rules of evidence, rules of discovery, allowance of non-unanimous verdicts

1.2. Description of the Litigation Process and Sources of Procedural Law
1.2.1. Description of the litigation process

<table>
<thead>
<tr>
<th>Pleading Phase</th>
<th>Discovery Phase</th>
<th>Pretrial</th>
<th>Trial</th>
<th>Post-trial</th>
<th>Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>P files complaint, D answers or moves to dismiss</td>
<td>Parties investigate facts, take discovery, file and argue motions</td>
<td>Pretrial conference, possible motions for SJ or on evidentiary issues</td>
<td>Opening statements, P’s evidence, D’s evidence, closing statements, instructions to jury, jury deliberates and renders verdict</td>
<td>Judgment entered for winning party, post-trial motions heard</td>
<td>Losing party may appeals errors of law to a higher court</td>
</tr>
</tbody>
</table>

1.2.2. Description of the various types of procedural regulation: constitutional provisions, statutes, rules, and local rules

1.3. Dueling Policy Rationales & Dueling Rule Interpretations
1.3.1. Framework for thinking about rules to demystify and understand civil procedure
1.3.2. Recurring dueling policy arguments in civil procedure (point and counterpoint arguments)
• FRCP 1: “construed ... to secure the just, speedy, and inexpensive determination of every action and proceeding”
  • efficiency vs. fairness
  • resolving cases too quickly results in inaccuracy
  • P need not state all the facts when filing suit (greater access for P); allows further evidence via discovery
  • D may need to spend time and money in discovery on unfounded claim
  • mandatory disclosure, FRCP 26(a): routine stuff that will inevitably come out
  • transsubstantivity- one size fits all rules, applied broadly across civil procedure, are better than a patchwork of specific rules for specific types of cases
• Path of the Law: defining a law’s purpose, the idea of stripping it down to “get to the bottom of the subject itself,” is essential to creating procedure and thus, creating deterrence through predictability (making duties and rights real so that a “bad man” can predict the procedure or the outcome)
• “bad man’s perspective”: if the procedure/structure does not deter, then the bad man will commit wrongs
• one purpose cannot be obtained without being at the expense of another; inevitable tradeoffs
• no rule is truly neutral; tends to help one side more than the other (even if not prima facie)
• forks in the law
  • precedential, interpretive ambiguity
  • classic dueling patterns
  • traditional rule vs. modern rule
  • majority approach vs. minority approach
  • follow the statute v. abide by CL
  • ambiguity drawing meaning from statutes and rules
  • formalist approach vs. purposive/pragmatic approach
  • plain meaning approach vs. purposive approach
  • statutory canons: thrust vs. parry
  • competing purpose: EDE v. VONT DR
• ambiguity regarding the meaning of precedent
  • broad vs. narrow holdings from prior cases
  • broad vs. narrow articulation of rules from prior cases
  • state’s rule vs. how rule was applied and operationalized
  • state’s rule vs. court’s rationale
• non-precedential
  • arguments about judicial administration and formal reliability
  • bright line vs. flexible standard
  • arguments about social utility and deterrence
• flexibility vs. stability
• formal deterrence vs. substantive deterrence
• moral arguments
• morality as form vs. morality as substance
• morality as freedom vs. morality as security
• justice for P vs. justice for D
• economic arguments
• paternalism vs. self determination
• regulation vs. facilitation
• rugged individualism vs. collective altruism vs. collective altruism
• category characterization and recharacterization (fork in the facts)
• different standpoints on what counts
• different way to view the facts
• different time frames

1.3.3. Leeway for different interpretations that allow flexibility to achieve aims of civil justice system
• greater certainty (bright line rule) vs. greater fairness (judge’s discretion)

1.3.4. Liberal ethos and restrictive ethos that operate within rules
• liberal
  • designed to promote open access to the courts and to facilitate resolution of disputes on their merits
  • e.g., full disclosure through discovery and decision by jury trial based on merits after full disclosure
  • FRCPs originally designed to promote access
  • notion that uniformity was an innovation designed to make the system more accessible to litigants
  • preference for merits-based judgments over those obtained through procedural technicalities
  • timeliness
• restrictive
  • prevalent today
  • frustrates P’s ability to bring claims and receive a decision based on the merits
  • “counterrevolution” to the underlying ideology of liberality; sought to make reforms to keep out the worthless, frivolous suits
  • solution to the litigation explosion and discovery abuse epidemic
  • excluding or discouraging claims rather than supporting them
• class-actions: bring access to low-value suits affecting many people
• merits-based resolution: SJ

1.3.5. Three-level schema
• Level One: Rule 1 + concern for access vs. expense + plain meaning vs. purpose + Facts
• Level Two: interpreting the rule
• Level Three: stepping outside the law

1.4. Procedural Justice and Karl Llewellyn’s Bramble Bush
1.4.1. Social psychology of procedural justice: VONT DR
• What processes seem most fair and will lead to increase in acceptance of the judicial decision?
• Distinguishes between fair treatment by decision-making authority from the effect that fair treatment has on fair/good outcomes
• Idea of social justice socially created concept that has no physical reality
• Factors that contribute to social construction of fairness:
  • Voice
  • Opportunity to be heard
  • Neutrality of forum
  • Trustworthiness of the decision maker
  • Degree of treatment with dignity and respect

1.4.2. Normative reasons to invoke fair procedure
• Idea that fair process will yield fair outcomes
• No unified perception of what fair process looks like
• instrumental: just process is the only means to a just outcome
• **dignity**: importance is an intrinsic value, value in enforcing norms about human dignity and interaction in society, value of process related to the role of the individual in society rather than to type of outcome achieved
• **legitimizing functions**: participation is a core value of PJ for its legitimizing nature—a process that does not allow for participation is illegitimate

1.4.3. Karl Llewellyn’s practical (and professional) definition of a real right
• one must consider the degree to which procedure clouds and limits the probability of recovery: (POTENTIAL VERDICT × CHANCE OF SUCCESS) – COST TO LITIGATE
• changing a rule regime to make it more liberal/restrictive will affect settlement values and probabilities
• “rights” are statements of likelihood that in a given situation, a certain type of court action would succeed
• **procedural limitations on what can be done about the situation (ought vs. is)**

2. Before Filing Suit: Practical Considerations
2.1. Whether to sue at all: litigation and its alternatives
2.1.1. Why parties choose to settle
• Real Right formula from P and D perspectives at different points in litigation lifecycle
• eliminates uncertainty: part will actually pay; takes it out of the jury’s hands
• expediency (e.g., P out of work as result of illegal discharge)
• settlement is more private: NDAs, concerning for some scholars
• reach an amicable agreement between parties (e.g., divorce)
• avoiding embarrassment at trial and in discovery
• avoid disclosing further negative evidence in discovery
• create solution through settlement that the law would not allow

2.1.2. Courts’ roles and limitations in mandating settlement
• FRCP 16(c)(1): Court may require that parties meet to consider settlement.
• FRCP 16(f): Court may sanction parties who don’t put forth good faith effort to settle
• **Kothe (trial judge attempted to coerce settlement; imposed sanction on D)**
• A judge may not penalize a party for failing to settle a case within a pre-determined period.
• law favors voluntary settlement of civil suits, but judge may not coerce parties to settle
• why was only the D sanctioned?

2.1.3. Attorneys’ fees regimes and how these costs affect the recovery of real rights
• taking advantage of client by billing more hours irrationally (i.e., avoiding settlement) is malpractice
• if there’s a big chance of losing, bad publicity
• contingency fee structure: settlement guarantees some payment for attorney

2.1.4. Pros and cons of alternative dispute regimes
• judges’ interest in making system run efficiently
• if all cases went to trial, no way to fit them all on calendar

2.2. Maintaining the status quo: preliminary injunctions and temporary restraining orders
2.2.1. Injunctions
• FRCP 65
• **Function of preliminary injunctions**: to preserve status quo pending determination. Must demonstrate either:
• probable success & possibility of irreparable injury, or
• serious questions are raised & the balance of hardships tips sharply in its favor
• **Temporary restraining order**: party hasn’t yet suffered harm, but it will if the act continues
• **Chalk (teacher with AIDS discriminated against)**
• A possibility of harm without any evidentiary reasoning does not create grounds to deny preliminary injunction.
• Preliminary injunctions issued at court’s discretion.
• Chalk deals with emotional damages that would be incurred without injunction.
• District Court abused discretion in denying preliminary injunction.
2.2.2. Difference between permanent, preliminary, and temporary injunctions

<table>
<thead>
<tr>
<th></th>
<th>emergency?</th>
<th>hearing &amp; notice?</th>
<th>pending thru full suit</th>
<th>final remedy?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Temp. Restraining Order</td>
<td>✔</td>
<td></td>
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<tr>
<td>Preliminary Injunction</td>
<td></td>
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<tr>
<td>Permanent Injunction</td>
<td></td>
<td></td>
<td></td>
<td>✔</td>
</tr>
</tbody>
</table>

2.3. Where to sue: a primer on jurisdiction and related concepts (basics)

2.3.1. Subject matter jurisdiction
2.3.2. Personal jurisdiction
2.3.3. Service of process
2.3.4. Venue

3. Commencing a Lawsuit: Plaintiff Files the Complaint and Defendant Responds

3.1. Pleading

3.1.1. Original Federal Baseline

- FRCP 3: “a civil action is commenced by filing a complaint with the court”
- FRCP 7(a): kinds of pleadings
- FRCP 8(a): contents of a pleading, generally
- FRCP 8(e): “[p]leadings must be construed so as to do justice”
- FRCP 10: captions & other particulars of pleadings

Dioguardi (handwritten complaint submitted; sufficient for case?)

- A complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief.
- complaint was drafted by the P himself, unclear

Doe (secret recording of sexual intimacy; didn’t plead every element)

- Under the FRCP, P’s complaint is sufficient if it states a claim for relief; it need not plead each and every element of the legal theory asserted.
- P didn’t specifically plead that D’s recording was an “interception” covered by the federal wiretapping statute.
- Not requiring each element to be pleaded makes it much more difficult for Ds to move to dismiss—almost a waste of time

Two ways to dismiss:
- P claiming legal theory not supported by American jurisprudence.
- P pleads herself out of court (i.e., P says something to indicate what they’re suing for didn’t happen)

Terminology

- pleading- paper containing allegations that support jurisdiction and legal claims in civil suit
- complaint- P’s first pleading; states grounds for federal SMJ, short statement of P’s claim showing he is entitled to relief, and a demand for relief. FRCP 8(a).
- answer- D’s first pleading; responds to P’s allegations and asserts defenses and claims by D
- counterclaim- if D’s answer contains claim against P
- crossclaim- if D’s answer contains claim against co-D.

Policies and purposes of pleadings

- notice pleading (the Conley standard) must provide short and plain statement of the claim showing that pleader is entitled to relief

- may permit greater number of claims by Ps (some perhaps frivolous)
- greater access to justice—especially in complex situations requiring discovery to gather more evidence
- more cost on Ps
- court could dismiss if “no set of facts” could possibly prove their allegations

- antecedents of modern pleading

- code pleading required P to state and specifically plead each and every element of the legal theory asserted

- different perspectives: plaintiff, defense, judge, attorneys, the public

3.1.2. Heightened Pleading and Evolving Pleading Standards

Leatherman (civil rights violation during execution of search warrant; dogs shot)

- FRCP requires only that the complaint contain short and plain statement of P’s claim; court may not arbitrarily impose heightened standard for pleading in certain causes of action.
- It is not the court’s place to extend 9(b) to civil rights; that’s for the legislature.
• heightened-pleading requirement
• FRCP 9(b): “party must state with particularity the circumstances constituting fraud or mistake”
  • more than a naked claim
  • when, where, and how the fraud was committed
  • originated from common allegations of fraud in securities cases

Protecting reputation

• differences between the notice-pleading system and plausibility-pleading
  • *Bell Atlantic Corp. v. Twombly*: SCOTUS rejects notice-pleading for plausibility-pleading
    • Under *Conley*: so long as complaint leaves open the possibility that P would find some fact to support recovery, complaint cannot be dismissed.
    • *Twombly standard*: conclusory statements of claims no longer survive motion to dismiss; complaint must contain enough facts to raise a reasonable expectation that the discovery process will reveal relevant evidence to support the claim; “[f]actual allegations must be enough to raise a right to relief above the speculative level,” thus moving a claim across “the line between possibility and plausibility.”
  • Why? To protect Ds from meritless claims in which Ps hope to find evidence through discovery; discovery is expensive and time-consuming; district courts shall act as gatekeepers to keep out factless claims.

• *Ashcroft v. Iqbal*: SCOTUS clarifies the *Twombly* rule
  • Under *Twombly*, the plausibility standard is not satisfied where P only shows the mere possibility that D is liable.
  • *First prong*: strike legally conclusory statements; presume all factual statements true
  • *Second prong*: do the remaining facts support a plausible claim for relief? (relying on judges’ “judicial experience and common sense”)

• analyze the new decision-making that courts are tasked with performing in a plausibility-pleading regime
• assess the pros and cons of plausibility pleading systems
  • nearly moves the job of fact-finder from jury to judge; just because something isn’t plausible doesn’t mean it didn’t happen
  • requires Ps to do a lot of work to file a claim; may be difficult without any evidence, which P would need discovery to gain access to
  • reliance on “judicial experience and common sense” may cause judges to put undue influence on what is/is not plausible due to their personal biases
  • immense discretion afforded to district court judges to dismiss claims outright without having to go through discovery

3.1.3. Care and Candor in Pleading
• function of Rule 11 as a malpractice/negligence standard
  • FRCP Rule 11: attorney certifies contents of any filing to the court is, to the best of the person’s knowledge and after a reasonable inquiry under the circumstances not presented for improper purpose, warranted by existing law or nonfrivolous argument, facts have evidentiary support, denials of factual contentions are warranted.
  • *Sanctions* in (c); 21 day safe-harbor.

• *Hays v. Sony Corp.* (word processor manuals, CL © claim)\(^{513}\)
  • An attorney who fails to make a reasonable inquiry into whether the claims asserted have a basis in law and fact may be sanctioned under FRCP 11.
  • No pre-complaint inquiry at all.
  • No due diligence to find that CL © was no longer valid per federal law.
  • P clearly didn’t attempt to determine the actual damages.

• reasonable pre-filing inquiry under Rule 11; considerations include...\(^{519}\)
  • amount of time available for an investigation (i.e., proximity of §6Las); but not applicable if the lawyer dicked around for 3 months and *would have* had ample time but for that
  • complexity of the factual and legal issues in question
  • extent to which pertinent facts were under the control of opponents and 3rd parties (e.g., in *Hayes*, attorney only need have called Sony for information—not necessarily gotten a response)
  • extent to which the lawyer relief on the client for the facts
• whether the case was accepted from another lawyer and the extent to which the receiving lawyer relief on the referring lawyer (BUT the duty of inquiry is non-delegable)
• resources reasonably available to the lawyer to conduct an inquiry (less may be required of a individual practice vs. huge firm)
• extent to which lawyer was on notice that further inquiry might be appropriate

• **Hunter v. Earthgrains** *(att'y files class action in empl. discrim. case; sanctioned *sua sponte*)
  • Under FRCP 11, attorney may not be sanctioned for asserting a claim that contradicts precedent unless there is no basis for extending, modifying, or reversing the existing law.
  • Losing legal argument ≠ sanctions *sua sponte*
  • At the time, there was a circuit split regarding arbitration agreements; a SCOTUS decision arguably supported Hunter’s position.
  • **But for allowance of arguments contrary to precedent, Brown v. Board of Ed. wouldn’t have happened.**
  • *Sua sponte sanctions require “extra care.”*

• non-frivolous argument for a change in the law (See Hunter)
• mechanics of Rule 11 practice
• **twenty-one day safe harbor**
  • *sua sponte sanctions have no such safe harbor; incredibly rare!*

### 3.2. Responding to the complaint
#### 3.2.1. Default and moving to dismiss

• **Virgin Records** *(initial complaint served to D’s son; ct. enters default judgment)*
  • Under FRCP 55, entry of a default judgment is proper where D has failed to appear or defend a lawsuit after proper service.
  • Initial complaint served to D’s son; court notifies D that default judgment will be issued
  • Three months after proper service and after the default judgment was finalized, D finally responds.
  • D’s ongoing and continuous © violations and repeated lack of response to service indicates D does not appreciate the illegality of her activities.
  • the default option, and the differences between default and default judgment under Rule 55(a)-(b)
  • FRCP 55(a): where properly served D fails to plead or defend, clerk must enter default (lack of response)
  • if there is some legitimate reason for D’s failure to respond, then clerk can somewhat easily set aside the default UNTIL a default *judgment* is entered
  • FRCP 55(b): non-defaulting party may apply to court for default judgment in their favor; defaulting party served with notice of incoming default judgment at least 7 days before
  • **As matter of public policy, court prefers to hear cases on their merits, but if D doesn’t respond, what can they do?**

• **Matos v. Nextran** *(D attempts to strike basically everything via 12(b)(6), (f), and (e))*
  • D’s 12(b)(6) motion to dismiss will only be granted if, when all reasonable inferences are drawn in favor of P, the complaint does not state a claim upon which relief can be granted.
  • 12(b)(6): punitive damages are not an independent cause of action (legit.)
  • 12(f): P said D engaged in “illegal conduct”; D claims this term is prejudicial; Ha!
  • 12(e): cross-referencing within the complaint; this is explicitly allowed by 10(c)
  • **Rule 12(b)(6) dismissal**
  • FRCP 12(b)(6): “failure to state a claim upon which relief can be granted”
  • Court must accept all pleaded facts as true and draw all reasonable inferences in favor of P when determining whether or not a claim is stated.
  • Looks only to the well-pleaded facts; not to outside sources for more facts on an allegation.

• **Rule 12(f) motion to strike**
  • FRCP 12(f): strike “redundant, immaterial, impertinent, or scandalous matter”
  • highly disfavored, rarely used

• **Rule 12(e) motion for definite statement**
  • FRCP 12(e): allowed when pleading “is so vague or ambiguous that the party cannot reasonably prepare a response”
  • complaint “need not be a literary gem,” though; complaint is merely a rough starting point
• **Hunter v. Serv-Tech** (D includes “express reservation” to PJ, but did not object)\(^{483}\)
  - Under 12(h)(1), party must assert any objection to PJ, venue, or service of process in its first pre-answer motion to dismiss or responsive pleading else the objection is waived.
  - D never actually objected to PJ in its motion to dismiss; merely included an “express reservation” of its right to challenge PJ in the future.

• The omnibus motion and waiver traps, Rule 12(g)-(h)
  - FRCP 12(g): any motion that can be made must be made if one motion is made and the facts to prove the motion are available at that time
    - can’t drag things out by making each of these motions separately
  - FRCP 12(h): if objections to PJ, venue, or service of process are not raised in first pre-answer motion, they are effectively waived; SMJ can be determined at any time.
    - 12(b)(6) is *always* available—even at trial

3.2.2. Answering the complaint\(^ {489}\)

• **Reis Robotics** *(D’s answer contained claims of fraud w/o fact. supp.; motion to strike)*\(^ {490}\)
  - 12(f) gives district courts the discretion to strike an insufficient defense or any redundant, immaterial, impertinent or scandalous matter.
  - three-part test for affirmative defenses:
    - (1) issue must be properly raised as an affirmative defense
    - (2) defense must satisfy the pleading requirements of the FRCP
    - (3) defense must survive the test applied to claims subject to a 12(b)(6) motion to dismiss for failure to state a claim

• **Ingraham** *(Texas medical malpractice statutory limits)*\(^ {497}\)
  - Under 8(c), *affirmative defenses must be pleaded in a timely fashion*, or else the defenses are waived.
  - D didn’t raise the Texas Malpractice Cap as an affirmative defense until AFTER damages had been awarded in various cases
    - malpractice caps not explicitly listed as an affirmative defense, but included under “any other matter constituting an avoidance or affirmative defense”; has opened the door for many defenses over the years

• Applicability of pleading rules to answers
  - FRCP 8(b): answering with denial
  - FRCP 8(c): affirmative defenses (timely)
  - FRCP 8(d): “simple, concise, and direct” allegations, inconsistent/alternative claims are allowed
  - FRCP 12(c): judgment on the pleadings (without evidence); requires only questions of law to remain and no factual disputes
    - 12(f) is P’s version of 12(b)(6).

• Denials vs. affirmative defenses vs. counterclaims

3.3. Amending the complaint
  3.3.1. Amending as of right and with leave of court before trial

• **Beeck** *(D admits manufacture; later moves to amend pleading to deny)*\(^ {551}\)
  - A party may amend its pleading only by leave of court or written consent of the adverse part and leave shall be freely given when justice so requires.
  - D had initially admitted (in good faith apparently) that the water slide was of D’s manufacture
  - D President examines and discovers it to be a counterfeit
  - Why go through with deposition when there is ample evidence this waterslide is not D’s?
    - Judicial economy is best served by quickly resolving the narrow issue of whether or not D was the manufacturer.
  - Why did President only on the eve of deposition look at the slide?  BUT all parties misidentified the slide...

• Amending a pleading as of right under Rule 15(a)(1)
  - FRCP 15(a)(1): *one shot* to amend either (A) w/in 21 days of filing, or (B) 21 days after service of responsive pleading/motion under 12(b), (e), or (f)—whichever is earlier; *done as a matter of course—no motion filed*
  - Why might amendment be necessary?
    - information not available to P until after deposition
    - correcting errors
    - not any prejudice/cost to the other side
other side may not have even read initial filing yet
• What if amendments were not allowed?
• decreased access to justice
• increased efficiency
• Why allow P 21 days to amend following 12(b), (e), or (f) motion?
• leaves it up to P to resolve their complaint’s deficiencies, instead of the court doing it for them
• Considerations when granting leave to amend a pleading under Rule 15(a)(2)
  • FRCP 15(a)(2): court should freely allow amendment when doing so allows case to be tried on its merits
  • Why does justice generally require a party be permitted to amend?
  • Promotes judicial efficiency—why prevent easy resolution in light of some new facts?
  • Why not allow an amendment?
    • Foman standard: allowed if there is no...
      • undue delay
      • bad faith
      • dilatory motive (sandbagging; intentional delay)
      • repeated failure to cure deficiencies
      • undue prejudice to opposing party
      • futility of the amendment
3.3.2. Amending the complaint after the limitations period has expired
• Moore v. Baker (suit filed last day of §oLs; P later moves to add negligence allegation)\(^{567}\)
  • An amendment relates back to the original filing when it asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out in the original pleading.
  • Initial complaint regarded D’s surgery; sought amendment adding negligence allegation
  • Negligence allegation related to back to post-op care, not the surgery
  • New claim would require entirely different facts to be proved
• Krupski (cruise ship; P sued ticket agent, not carrier; att. to switch Ds after §oLs)\(^{576}\)
  • P’s awareness of the existence of proper D does not entitle proper D to believe that P made no mistake for purposes of 15(c).
  • P moves to dismiss against wrong D and refile against carrier D, but after §oLs had expired
  • Clearly this passes the T/O test
  • D had constructive notice of action; the two Ds had the same legal team
  • Trial court erred in asking whether or not P knew or should have known correct D; wrong line of inquiry
• Why have statutes of limitations?
  • efficiency of system
  • preservation of evidence
  • peace of mind one can’t be sued decades later
• FRCP 15(c)(1)(B): amending to include a new claim or defense after §oLs exp’d; must arise out of same conduct, transaction, or occurrence set out—or att’d to be set out—in original pleading
• FRCP 15(c)(1)(C): amending to change the party or name of the party after §oLs exp’d
  • 15(c)(1)(B) must be satisfied (T/O test)
  • within 120 days, new party noticed so as to not be prejudiced in defending on the merits
  • new party “knew or should have known that the action would have been brought against it, but for a mistake concerning identity”

4. Configuring and Reconfiguring the Parties
4.1. Joinder of Claims and Parties
4.1.1. Basic joinder of claims and parties
• Hohlbei (4 Ps accepted jobs based on misrepresentations; proper joinder?)\(^{599}\)
  • Under FRCP 20(a), multiple Ps may join their claims against a single D so long as the claims arise out of the same T/O or series of T/Os and involved a CQ of law or fact even if the claims involve factual dissimilarities.
  • each P was an insurance executive, interviewed by D, and received misrepresentation regarding probation period; this is sufficient for joinder of parties
  • Ps in favor of joinder because it provides more credibility for their side; cost to Ps goes down
  • Ds against joinder because it would be easier to discredit each P separately
• Rule 18(a) and its policy rationale
  • FRCP 18(a): permissive joinder of claims against D, no T/O requirement
  • It’s a good idea to join claims all related to the same story; if not, res judicata may bar further claims.
  • joinder saves costs (similar witnesses, evidence, etc.)
  • increased access to justice for P
  • BUT different Ps may have different motives; joinder wouldn’t make sense
  • BUT both Ds may not have PJ under the court; might want to file in same forum
  • KEY: BUT P is the keeper of their claim; thus, joinder not required
  • FRCP 42: allows court to hold separate trials for joined claims, if needed

• Joinder of parties—plaintiffs and defendants—under Rule 20(a)
  • FRCP 20(a): co-Ds are preferred over separate trials; joinder of parties requires T/O + CQ of law or fact

Standards for transaction and occurrence test

• Are the issues of fact and law raised in the claim and the counterclaim largely the same?
• Would res judicata bar a subsequent suit on the party’s counterclaim, absent the compulsory counterclaim rule?
• Will substantially the same evidence support or refute the claim as well as the counterclaim?
• Is there a logical relationship between the claim and the counterclaim?

4.1.2. Counterclaims, Cross claims

Leindecker (dueling Boards of Directors)

• Unlike FRCP 13(a), under Minnesota Rules of CivPro, only counterclaims arising out of the same transaction as the original lawsuit are compulsory.
  • “Occurrence” not present in the Minnesota rule.
• Compulsory counterclaims vs. permissive counterclaims under Rule 13(a) and (b)
  • FRCP 13(a): must counterclaim if the claim arises from same T/O as original claim AND doesn’t require addition of party over whom court doesn’t have jurisdiction
  • FRCP 13(b): may counterclaim any claim not under 13(a)
• Counterclaims vs. cross claims
  • Counterclaim- D against P
  • Cross claim- D₁ against D₂ OR P₁ against P₂
• Standard for cross claims under Rule 13(g)
  • FRCP 13(g): may cross claim against co-party if dispute arises from same T/O as original claim or counterclaim OR if cross claim relates to the same property that is the subject of the original action
  • FRCP 13(h): authorizes adding third-parties to cross claims and counterclaims

4.1.3. Impleader

Erkins (construction accident, riding in bucket of backhoe)

• Under 14(a), D may implead any third party who may be liable to D for part or all of P’s claim, even if the parties’ liability arises under different legal theories.
  • factors considered:
    • timeliness of the motion
    • potential for complication of issues at trial
    • probability of trial delay
    • whether P may be prejudiced by addition of parties
• Impleader claims under Rule 14(a)
  • FRCP14(a): D may file against nonparty as a third-party P if nonparty is liable to D for all/part of the original claim; requires court’s leave if 14 days after original answer
  • Typically, contribution or indemnification (reimbursement for any judgment D incurs)
  • D may not implead an alternative target for P or to seek damages the D herself may have suffered from the underlying litigation events
• Differences between counterclaims, cross claims, and impleaded claims
  • Standard for impleaded claims under Rule 14(a)
4.2. Class Actions

4.2.1. Due process requirements and certifying a class under Rule 23(a)

- **Hansberry** *(racial covenant)*
  - Unless a party was adequately represented by the litigating party, actually participated in the prior action, had joint interests in the issues of the litigation, or had a legal relationship with a party that was present in the prior action significant enough to be bound, an absent party will not be bound to the findings or a prior judgment.
  - Only 54% of the class members (property owners) signed the covenant; doesn’t make since to bind them all of they didn’t agree

- The constitutional basis for class actions
  - How can all parties in the class have their claims decided without notice?
    - **PROS** of class actions:
      - SCOTUS: efficiency *(w/ 20 joinder, would req. separate deposition, council, etc.)*
      - Without class actions, each class member’s suit would be negative value.
      - private incentive to invest *(attorneys)*
      - economy of scale
      - increased access to justice against huge corporations
    - **CONS** of class actions:
      - distorts decisions on the merits
      - potentially catastrophic judgments
      - does class action actually decrease illegal behavior?
      - what are their actual advantages?
    - **Possible due process issues with class actions**
      - 1) the interest of those not joined *(absent class members)* must be of the same class as the interest of those who are joined *(class representatives)*
      - 2) absentees’ interests must be adequately represented by parties who are present
      - 3) *(implied)* courts must employ procedures to insure that the common-interest and adequate-representation requirements are satisfied and that litigation is conducted so as to insure the full and fair consideration of the common issue.

- The implicit class certification requirements and explicit requirements set forth in Rule 23(a)
  - **FRCP 23(a):** prerequisites for class certification: numerosity, commonality, typicality, representativeness
    - *(implied)* Class definition is drafted so that court can objectively determine who is in and who is out of the class.
    - *(implied)* All class representatives are actually members of the class.
  - **Numerosity:**
    - too many parties to join under Rule 20
    - increased judicial efficiency
    - especially if each party has small claims individually
  - **Commonality:**
    - CQs of law and fact
    - construed liberally
    - looks at the class... looking for some kind of “glue”
    - does every class member have some common characteristic?
  - **Typicality:**
    - potential class representatives feel same pain as class members
  - **Representativeness:** 2 types of analysis
    - 1) counsel that is educated, experience to handle class action
    - if you’re going to be vicarious represented in court, you want particularly fluent representation
    - 2) related to typicality... any conflict of interest between parties or financially?

4.2.2. Certifying a class action under Rule 23(b)

- **Teflon Products** *(non-stick cookware coatings; misrepresentation by DuPont)*
  - A class action lawsuit in state court must meet 23(a) requirements.
  - 3 sub-classes:
    - those who bought branded Teflon coated products and had documentation
    - those who bought off-brand DuPont coated products
    - those who did not fit into the other classes
products sold over span of 40 years... no typicality
for 23(b)(2), only mention of injunctive relief sought is warning labels; economic damages listed first
for 23(b)(3), appears that each P would have to submit different evidence to prove each case; no superiority claim of class action

FRCP 23(b)(1): if c-a denied, would foster inconsistent application of law to similar facts (i.e., juries will inevitably differ)
FRCP 23(b)(2): injunctive relief is appropriate for entire class
FRCP 23(b)(3): CQ of law or fact predominate over any individual questions

Class action must also be superior to alternatives. Factors to consider:

1) interest of class members in individually controlling the prosecution of separate claims
2) extent and nature of any litigation concerning the controversy already commenced by/against class members
3) (un)desirability of concentrating the litigation of claims in the particular forum
4) difficulties likely to be encountered in the management of a class action

4.2.3. Alternatives to Class Action

“test case”
government complaint by AG
joinder under 20

5. Marshaling Evidence—Disclosure and Discovery

5.1. Informal investigation and the scope of discovery

5.1.1. Evolving discovery rules

5.1.2. Ethical concerns implicated when interviewing adversary parties or possible parties and their employees

1) identify themselves to the prospective D
2) advise the prospective D that they represent the prospective P
3) communicate with the prospective D in writing only, with no oral response being received

5.1.3. Scope of discovery under Rule 26(b)(1)

FRCP 26(b)(1): nonprivileged matter relevant to any party’s claim or defense; court may order discovery of any matter relevant to subject-matter involved; relevant info need not be admissible at trial “if the discovery appears reasonably calculated to lead to the discovery of admissible evidence”; may be limited under 26(b)(2)(C)
courts (not parties) may discovery information related to the relevant subject-matter
hearsay is an example of inadmissible evidence at trial that may be discoverable

5.1.4. Introduction to evidentiary privileges

What is privileged?
communication made in confidence during the course and in furtherance of a relationship—lawyer-client, doctor-patient, priest-penitent
party must actively resist privileged information under 26(b)(5)

5.1.5. Work product doctrine under Hickman and Rule 26(b)(3)

Hickman (D tugboat sinks, D asks for all written statements taken by P)
Opposing counsel must demonstrate necessity, justification, or undue prejudice for access to counsel’s written statements, private memoranda, and personal recollections.
“forcing an attorney to repeat or write out all that witness have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness”
here, P could just ask the witnesses again
FRCP 26(b)(3): definition of work product, exceptions
• What is lawyer’s work product?
  • lawyer’s interview notes, index of documents or deposition, abstract of a document or deposition, photos and diagrams, or research memos—even highlighting on copy of judicial opinion qualifies
  • only applies to work product “prepared in anticipation of litigation or for trial”

5.1.6. Different categories of experts under the discovery rules
  • FRCP 26(b)(4)
  • FRCP 26(a)(2)

5.2. Deploying discovery devices

5.2.1. Mandatory disclosures under Rule 26(a)
  • FRCP 26(a): initial disclosures including witness information, list of evidence in party’s control it plans to use, damage computations, expert testimony; made within 14 days of 26(f) conference unless otherwise stipulated (30 days for parties joined alter); failure to fully investigate the case is not excuse from making disclosures
  • FRCP 26(f): parties must might to schedule discovery, agree to discovery rules, submit written report to court

5.2.2. Discovery sequencing
  • 1) Interrogatories
  • 2) Document requests
  • 3) Deposition
    • can use documents obtained earlier to impeach witnesses at deposition
    • can use deposition transcript to impeach witnesses at trial

5.2.3. Discovery devices: interrogatories and document requests
  • FRCP 33: limit 25 interrogatories; may not ask questions of law; who, what, when, where ?s
  • may simply give opposing party access to business records if the answer to interrogatory lies therein
  • FRCP 34: document requests; also applicable to land; documents may not be scrambled randomly

<table>
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<tr>
<th>Discovery Devices</th>
<th>Against whom?</th>
<th>How?</th>
<th>What? (26(b)(1)+?)</th>
<th>Response? (26(c) &amp; (g))</th>
<th>Use of response (at SJ &amp; trial)</th>
<th>Utility (pros &amp; cons)</th>
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<tbody>
<tr>
<td>initial disclosure (26(a))</td>
<td>parties</td>
<td>mandatory</td>
<td>info party may use to support claims/defenses</td>
<td>produce or identify</td>
<td>evidence</td>
<td>cheap starting point</td>
</tr>
<tr>
<td>interrogatories (33)</td>
<td>parties</td>
<td>request in writing</td>
<td>info available to party</td>
<td>answer/object in writing</td>
<td>evidence</td>
<td>more thorough than initial disclosure, still relatively inexpensive</td>
</tr>
<tr>
<td>production request (34)</td>
<td>parties</td>
<td>request in writing</td>
<td>documents, items, property available to party</td>
<td>produce or permit entry</td>
<td>“smoking gun” evidence</td>
<td>acquisition of relative documents to prove claim</td>
</tr>
<tr>
<td>deposition (30)</td>
<td>anyone</td>
<td>request in writing; notice</td>
<td>info or documents available to party</td>
<td>answer/object in person, on the record; only privileged info may not be answered</td>
<td>impeachment at trial, evidence</td>
<td>very, very expensive; lengthy process</td>
</tr>
<tr>
<td>exams (35)</td>
<td>parties</td>
<td>court order</td>
<td>person for examination</td>
<td>submission to examination</td>
<td>evidence</td>
<td>invasive for party, high standard to get court order</td>
</tr>
<tr>
<td>admissions (36)</td>
<td>parties</td>
<td>request in writing</td>
<td>truth of any matter—most often document authentication</td>
<td>admission/denial</td>
<td>conclusive</td>
<td>most useful for document auth.; unlikely to admit to other matters</td>
</tr>
</tbody>
</table>

5.3. Electronic discovery
  • **McPeek (sexual harassment claim against BoP; eDiscovery of backup tape?)**
    • Restoring potentially relevant backed-up data is necessary for discovery only when the results and expense justify it.
    • Judge permitted a “test run” of this type of discovery
    • Backup tapes contained randomly stored data; backups were for disaster recovery only
    • Time and expense were uncertain at the time

5.3.2. FRCP implicating eDiscovery
  • FRCP 26(b)(2)(B)-(C), 26(b)(5)(A)-(B), 34(a)(1)(A)&(b)(2)(D)-(E), 37(e)
5.3.3. Policy implications and flux in eDiscovery rules

- **Problem of relevance**
  - backup tapes could contain a bunch of different (non-relevant) data

- **Problem of accessibility**
  - *Active, online data*
  - *Near-line data*
  - *Offline storage/devices*
  - *Backup tapes*
  - *Erased, fragmented or damaged data*

5.3.4. Demystifying deposition mechanics, Rule 30

- **Deponent may be ordered not to answer only if it would breach privilege. If privilege information is revealed, the privilege is lost.**

5.3.5. Physical and mental examinations, Rule 35

- **Sacramona** *(Ds learn P is former drug abuser, inj'd drugs; D want to know if HIV+)*
  - Under Rule 35, court will not order party to submit to an HIV test if the party’s potential HIV status is relevant only to the issue of future damages.
  - this was merely a fishing expedition
  - if physical examination allowed here, then all claims for future damages could require physical examination to determine life expectancy; burdensome, absurd
  - **FRCP 35:** court may order party whose mental or physical condition is in controversy to submit to examination

5.3.6. Requests for admission, Rule 36

5.4. Controlling discovery and sanctioning abuse

- **Chudasama** *(rampant discovery abuse on P's part; court fails to step in)*
  - Rule 26 requires district courts to actively manage the cases before them, including ruling on parties’ pretrial motions and objections to discovery requests.

5.4.2. Rule 26(g) certification requirement

- **FRCP 26(g):** att'y must sign certifying every disclosure was made after reasonable inquiry

5.4.3. Rule 26(c) protective orders

- **FRCP 26(c):** protection from discovery of items or into certain matters that may annoy, embarrass, or impose undue burden or expense

5.4.4. Rule 26(b)(2)(C) narrowing of discovery

- **FRCP 26(b)(2)(C):** court may limit discovery if it would be unreasonably duplicative, party seeking discovery has had ample opportunity to obtain the information, or "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues”

5.4.5. Rule 37(a) motions to compel

- **FRCP 37(a):** if deponent refuses to disclose or permit discovery at request of requesting party, court may compel it to do so

5.4.6. Rule 37(b) and Rule 26(g) sanctions

- **FRCP 37(b):** failure to comply with 37(a) motion compelling discovery = contempt of court
  - **FRCP 26(g):** failure for att'n'y to properly certify disclosures; RARE

6. Challenging the Sufficiency of Opponent’s Case After Discovery—Summary Judgment

6.1. Dismissal

6.1.1. Voluntary dismissal, Rule 41(a)

- **In re Bath and Kitchen Fixtures** *(D files 12(b)(6); P voluntarily dismisses; D objects)*
  - Rule 41 allows P to voluntarily dismiss a lawsuit without prejudice any time before D has filed an answer or a motion for SJ.
  - The dismissal is automatic—requires no court order.
  - D hadn’t filed an answer of motion for SJ—only a 12(b)(6) motion to dismiss.
  - **FRCP 41(a): not a motion, but P's right; must be made before D files A or motion for SJ; only get one shot to dismiss w/out prejudice; may also be made with leave from the court

6.1.2. Involuntary dismissal, Rule 12, Rule 37, and the inherent power of the court

- **FRCP 41(b):** unless stated otherwise, dismissed with prejudice at request of D
6.2. Moving for summary judgment
6.2.1. Summary judgment (aka judgment as a matter of law, JMOL), Rule 56

- **Slaven (decedent hanged himself in jail cell; belt dispute; SJ appropriate?)**
  - Under Rule 56(c), D’s motion for SJ will be granted if P cannot provide evidence of a genuine issue for trial.
  - Whether or not prisoner was wearing a belt is immaterial absent evidence jailors knew or should have known of his suicidal tendency.

- **FRCP 56: appropriate if party demonstrates “there is no genuine dispute as to any material fact”; may file until 30 days after close of discovery; partial SJ is allowed (on only some claims)**
  - infrequently used, disfavored until mid 80s; viewed as 7th amendment violation

- **Checklist for SJ**
  - 1) ID rule of substantive law.
  - 2) ID facts material to applying that rule.
  - 3) ID evidence that the court may consider.
  - 4) Has movant met its burden of showing that there is no genuine dispute of material fact in the record?
  - 5) If so, has non-movant met its burden of creating genuine dispute of facts?

6.2.2. Different uses and kinds of motions for summary judgment

- **Proof-of-the-Elements Motion for SJ-** when movant bears burden, movant may move for SJ in her favor **(very unlikely)**
- **Disproof-of-an-Element Motion for SJ-** when non-movant bears burden, just need to negate one element of the claim
- **Absence-of-Proof Motion for SJ-** when non-movant bears burden, insufficient proof for any reasonable jury to find for non-movant

- **Duplantis (oil platform, fell on greasy board, no evidence board belonged to D)**
  - Under 56(c), if the burden of proof will rest on the non-moving party at trial, a party seeking SJ need only show there is no evidence of an essential element of the non-moving party’s claim.
  - No affiant or deposition testimony indicating D owned the board in question; further, there was testimony that it was employer’s responsibility to keep rig floor clean

<table>
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<tr>
<th>Rule</th>
<th>Motion</th>
<th>Factual Record for Dispute</th>
</tr>
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<tbody>
<tr>
<td>12(b)(6)</td>
<td>failure to state a claim</td>
<td>facts in complaint</td>
</tr>
<tr>
<td>12(c)</td>
<td>judgment on the pleadings</td>
<td>facts in complaint and answer</td>
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<tr>
<td>56</td>
<td>summary judgment</td>
<td>undisputed facts in movant’s and non-movant’s materials</td>
</tr>
<tr>
<td>50(a)(1) after P’s case</td>
<td>judgment as a matter of law</td>
<td>facts in record after P’s case</td>
</tr>
<tr>
<td>50(a)(1) after P&amp;D’s case</td>
<td>judgment as a matter of law (unlikely, might as well just send it to jury at this point)</td>
<td>facts in full trial record</td>
</tr>
</tbody>
</table>

7. Challenging the Sufficiency of Opponent’s Case at Trial and Afterward
7.1. Judgment as a matter of law, Rule 50

- **Pennsylvania R.R. Co. v. Chamberlain (rrempl, falls off railcar, killed, weak testimony)**
  - When evidence tends equally to sustain either of two inconsistent propositions, a verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.
  - but in this case, no conflicting evidence
  - to find for P would rely on mere speculation and conjecture—not based in fact

- **Lane v. Hardee’s (customer slips on wet floor in restroom, JMOL appropriate?)**
  - Rule 50 permits a judge to grant a JMOL when a party, after being fully heard on an issue, has not offered sufficient evidence to sustain a jury verdict in her favor.
  - There was sufficient grounds for a jury to find for P in this case. Here, district court crossed into jury’s role of fact finder.

- **FRCP 50(a): if “court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party,” court may grant motion for JMOL; motion may be made anytime before case is submitted to jury**
• Important functions of Rule 50 motions:
  • 1) notify non-moving party that she was failed to offer evidence concerning a key element of the case, thus giving her an opportunity to correct the omission; i.e., ensures case is determined on its merits rather than a technicality
  • 2) allows movant to call non-movants bluff if they believe non-movant has no evidence to support her claim; won’t risk an irrational jury verdict in non-movant’s favor

• Reluctance to grant 50(a) motion...
  • risk having to retry the case—an expensive process
  • at this point, might as well just let the jury decide it; if they decide in favor of the movant, then all is good
  • if jury decides against movant and the judge was leaning that way... 50(b) safety net!

7.1.2. Legally sufficient evidence under Rule 50
  • sufficiency of evidence determined without weighing the evidence
  • *scintilla standard* allows any amount of evidence—no matter how tiny—to defeat a 50 motion

7.1.3. Prerequisites for making a Rule 50(a) motion, and a Rule 50(b) motion
  • FRCP 50(b): movant may renew 50(a) motion after jury has returned a verdict; allows judge to set rule notwithstanding jury’s verdict

7.1.4. Prerequisites for appealing a district court’s Rule 50 ruling and the standard of review on appeal

8. Claim Preclusion (*Res Judicata*)

8.1. Defining a claim

8.1.1. Claim preclusion and the policies served by *res judicata*
  • **Why do claim preclusion?**
    • Prevents P to unfairly get a second chance to recover on her claim
    • D would have to incur twice the time, expense, and worry after another lawsuit
    • If second case prevails, D may have to pay on a claim that the first jury dismissed

8.1.2. Operationalizing the “same claim” requirement
  • Three requirements
    • **KEY:** 1) the claim must be the same as the claim that was litigated in the previous case
    • 2) the previously litigated claim must have resulted in a valid, final judgment on the merits
    • 3) parties litigating previous claim typically must be same litigating current claim
    • *Same evidence test* - second suit barred only if evidence needed to sustain the second would have sustain the first, or if same facts were essential to maintain both
    • *Transactional test* - if single group of facts gives rise to both claims, then it doesn’t matter that the causes of action differ (used here)

8.1.3. Determining whether a prior judgment was valid, final, and on the merits
  • **River Park (City D delayed approval on zoning change so D could buy property)**
    • Under IL law, *res judicata* prohibits the same parties from asserting a claim arising out of the same transaction or set of operative facts after there has been a final judgment on the merits.
    • *Res judicata* bars not only claims actually litigated, but also those that could have been raised at a previous trial.